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SUPREME COURT OF VIRGINIA
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RICHMOND, VIRGINIA

In The

Supreme Court of Virginia

At Richmond

EDWARD J. RIORDAN and JAMES O. DAY,

Appellants,

vs.

WILLIAM F. HALE and FRANCES L. HALE, his wife, and
WILLIAM H. FINEIN and IRENE L. FINEIN, his wife,

Appellees.

RECORD NO. 740528

APPENDIX

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Note: Numbers in brackets, above, and numbers in upper right corner of pages herein refer to pages in original transcript.

BILL OF COMPLAINT
(Filed June 5, 1973)

Come now the Complainants, Edward J. Riordan and James O. Day, who respectfully file this bill of Complaint and say:

1. The Complainant, Edward J. Riordan, is one of the owners of Lot 137, Section 2, Westwood Park, as the said subdivision is duly dedicated, platted and recorded in Deed Book 1988 at page 246, among the land records of Fairfax County, Virginia, and the Complainant, James O. Day, is one of the owners of Lot 138, Section 2, Westwood Park, which is dedicated, platted, and recorded as aforesaid.

2. The Defendants, William F. Hale and Frences L. Hale, his wife, are the owners of Lot 141 in the aforesaid subdivision of Section 2, Westwood Park, and the said William H. Finein and Irene L. Finein, his wife, are the owners of Lot 145-A, of a resubdivision of Section 2, Westwood Park.

3. The deed of dedication to the subdivision of Section 2, Westwood Park, which is recorded as aforesaid in Deed Book 1988 at Page 246, imposes certain restrictive covenants upon all of the lots in the said subdivision. A copy of the said restrictive covenants is attached hereto and made a part of this bill of complaint and the provisions of the said restrictive covenants is attached hereto and made a part of this bill

of complaint and the provisions of the said restrictive covenants apply to all the lots in the said subdivision.

4. Under the terms of restriction 2 and restriction 4 of the said restrictive covenants recorded in Deed Book 1988 at page 246, no fence or wall shall be erected, placed or altered on any lot nearer to any street than the minimum building setback line, unless the same shall be approved as set forth in restriction 9 of the said restrictive covenants. In restriction 4, the minimum building setback line is located 25 feet from the front lot line and 25 feet from any side street line, and it is a violation of the said restrictive covenants to erect a fence closer than 25 feet to any front lot line or to any side street line.

5. Notwithstanding the provisions of the said restrictive covenants as aforesaid, the Defendants, Hale and Finein, have proceeded to erect fences on their respective lots which are closer to the side street lines than the 25 feet minimum setback lines established in the said restrictive covenants. The Defendants, William F. Hale and Frances L. Hale, his wife, have erected a chain link fence that is much closer than 25 feet to the northerly line of Allan Avenue and the Defendants, William H. Finein and Irene L. Finein, his wife, have erected a wooden fence that is much closer than 25 feet to the westerly line of Remington Street. None of the said Defendants obtained approval to build

the said fences as required by restriction 9 and the said fences have been erected in clear violation of the provisions of the said restrictive covenants.

6. As owners of lots in the said subdivision of Section 2, Westwood Park, the Complainants are interested parties and are authorized to institute this proceeding for the enforcement of the said restrictive covenants.

Whereupon, the Complainants pray that an order may be entered which will require the Defendants to change the location of the fences which they have erected so that the same will be no closer than 25 feet to the northerly line of Allan Avenue and no closer than 25 feet to the respective easterly and westerly lines of Remington Street. The Complainants also pray that they may recover from the Defendants the Court Costs and attorney's fees which they have expended and which they shall be required to expend in this matter.

APPLICABLE RESTRICTIVE COVENANTS
FILED WITH BILL OF COMPLAINT.

1) *****

2) No building shall be erected, placed, or altered on any lot until the construction plans and specifications and a plan showing the location of the structure have been approved by the architectural control committee as to quality of workmanship and materials, harmony of external design with existing structures

and as to location with respect to topography and finish grade elevation. No fence or wall shall be erected, placed or altered on any lot nearer to any street than the minimum building setback line unless similarly approved. Approval shall be as provided in Paragraph 9, hereof.

3) *****

4) No building shall be located on any lot nearer to the front lot line or nearer to the side street line than the minimum building setback lines shown on the recorded plat. In any event no building shall be located on any lot nearer than 25 ft. to the front lot line, or nearer than 25 ft. to any side street line. No building shall be located nearer than 10 ft. to an interior lot line, except that no side yard shall be required for a garage or other permitted accessory building located 30 ft. or more from the minimum building setback line. No dwelling shall be located on any interior lot nearer than 20 ft. to the rear lot line. For the purposes of this covenant, eaves, steps, and open porches shall not be construed to permit any portion of a building on a lot to encroach upon another lot.

5) *****

6) *****

7) *****

8) *****

9) The architectural control committee is composed of: Marshall W. Coffman, Hugh M. McCaffrey, Jr. and James R. Harris. A

majority of the committee may designate a representative to act for it. In the event of death or resignation of any member of the committee, the remaining members shall have full authority to designate a successor. Neither the members of the committee, nor its designated representatives, shall be entitled to any compensation for services performed pursuant to this covenant. At any time, the then record owners of a majority of the lots shall have the power through a duly recorded written instrument to change the membership of the committee or to withdraw from the committee or restore to it any of its powers and duties.

10) The committee's approval or disapproval as required in these covenants shall be in writing. In the event the committee, or its designated representative, fails to approve or disapprove within 30 days after plans and specifications have been submitted to it, or in any event, if no suit to enjoin the construction has been commenced prior to the completion thereof, approval will not be required and the related covenants shall be deemed to have been fully complied with.

11) *****

12) Enforcement shall be by proceedings at law or in equity against any persons or persons violating or attempting to violate any covenants, either to restrain violation or to recover damages.

ANSWER
(filed July 3, 1973)

COMES NOW the Defendants William F. Hale and Frances L. Hale, his wife and files this their answer to the Bill of Complaint and respectfully states unto the Honorable Court as follows:

1. That they neither admit nor deny paragraph 1 and pray for strict proof thereof; and

2. That they admit paragraph 2 of the Bill of Complaint; and

3. That they admit paragraph 3 of the Bill of Complaint; and

4. That they admit paragraph 4 of the Bill of Complaint; and

5. That they admit paragraph 5 of the Bill of Complaint and further states unto the Court that prior to the construction of the fence by Defendant William F. Hale and Frances L. Hale that

a. A number of other fences were so constructed in the subdivision without protest or court action.

b. The fence of William H. Finein and June L. Finein was constructed at least one year before that of Defendants William F. Hale and Frances L. Hale without complaint, objection or court action by the Complainants.

c. Complainants observed the fence being constructed, permitted the fence to be completed and waited in excess of thirty days to make their objections known to Defendants William F. Hale and Frances L. Hale.

d. Complainants failed to file a suit to enjoin the construction of the fence before its completion and did by their failure, in accordance with paragraph 10 of the restrictive covenants, negate the requirement of approval and render the covenants compiled with.

e. Complainants waited almost a full year after the fence was completed before bringing this action.

6. They deny paragraph 6 of the Bill of Complaint and pray for strict proof thereof and further say unto the Court that by virtue of the facts alledged in paragraph 5 of this answer that the Complainants are estopped to now ask for the enforcement of the covenants alledged to be violated.

NOW THEREFORE having fully answered the Bill of Complaint, Defendants William F. Hale and Frances L. Hale pray that the Bill be dismissed with attorney and reasonable cost to them in this behalf expended.

ANSWER OF DEFENDANTS FINEIN
(filed June 27, 1973)

Come now the above named defendants and state as follows:

1. They admit the allegations contained in Paragraph 1,2,3 and 4 of the Bill of Complaint.

2. That they admit of building a fence as alleged in Paragraph 5 and deny the remainder thereof.

3. That they neither admit nore deny the allegations contained in Paragraph 6 thereof.

4. That the terms of the covenants as contained in Paragraph 10 thereof render said covenants void and unenforceable and this suit moot.

5. That the Plaintiffs have not satisfied the requirements imposed upon them by equitable maxims prior to coming into equity.

Wherefore, these Defendants pray that the Bill of Complaint be dismissed in its entirety.

O R D E R
(Entered February 5, 1974)

On the 9th day of January, 1974 came the parties hereto, by counsel and in person, upon the issues joined herein; whereupon the Complainants presented evidence in support of their prayer and Defendants respectively were granted leave to cross-examine each witness. And upon the termination of the case for the Complainants, the Defendants respectfully move of the Court to strike the evidence presented, which Motions were duly considered by the Court, and it being of the opinion that they ought to be granted, it is therefore hereby

ORDERED, DECREED AND ADJUDGED that the evidence presented by the Complainants severally and jointly, be, and it hereby is, stricken, and the Bill of Complaint filed herein be, and it hereby

is, dismissed with prejudice.

NOTICE OF APPEAL
(filed March 5, 1974)

Comes now the Appellants, Edward J. Riordan and James O. Day, by counsel, and respectfully note their appeal from the final order heretofore entered in the above styled suit on February 5, 1974, in the Circuit Court for Fairfax County.

ASSIGNMENTS OF ERROR
(filed March 5, 1974)

Comes now the Appellants, by counsel, and state their assignments of error in the above-styled suit as follows:

1. The trial court erred in granting the motion of the Appellees to strike the evidence at the conclusion of the Appellants' case.

2. The trial court erred in ruling that the Appellants were dilatory in instituting their suit against the Appellees, William H. Finein and Irene L. Finein, and that their equitable remedy would be denied because of the application of the doctrine of laches.

3. The trial court erred in ruling that the Appellants were dilatory in instituting their suit against the Appellees, William F. Hale and Frances L. Hale, and that their equitable remedy would be denied because of the application of the doctrine of laches.

4. The trial court erred in permitting the fences which were erected by the Appellees, Finein and Hale, to remain in place where it was conclusively shown by the evidence that the said Appellees

had knowledge of the restrictive covenants applicable to the erection of fences in their subdivision and that they had knowingly erected the said fences in violation of the said restrictive covenants.

5. The trial court erred in other ways that are apparent in the face of the record.

A transcript of the testimony in this matter is in the process of being prepared by the Court Reporter who was present at the hearing, and the same will be presented to the Court in accordance with the Rules of Court.

APPLICABLE PORTIONS OF TRANSCRIPT

PRELIMINARY DISCUSSION: THE COURT AND COUNSEL:

THE COURT: All right. As to defendant Finein then, completed the fence in May, '71.

MR. GARNIER: Yes, sir.

MR. McGINNIS:: And defendant Hale was May of '72, a year later.

THE COURT: All right. Did you want to accept that, Mr. Conroy?

MR. CONROY: Yes, Your Honor, I think we will stipulate.

1
2
CROSS EXAMINATION OF COL. DAY:
3
4 MR. McGINNIS: Colonel Day, does that fence, in
5 any way, block your light?
6 THE WITNESS: Light?
7 MR. McGINNIS: Yes.
8 THE WITNESS: No, not at all.
9 MR. McGINNIS: Does it block your air?
10 THE WITNESS: That you breathe?
11 MR. McGINNIS: Yes.
12 THE WITNESS: No.
13 MR. McGINNIS: Does it block your view?
14 THE WITNESS: Not per se. It's objectionable to
15 the view from my front window -- as you look out the main
16 picture window -- and as you stand on the front porch, and
17 as you drive up to the house.
18 When you talk about view now, you've got to -- I
19 must mention these points.
20 MR. McGINNIS:: Yes, but it doesn't block your view.
21 THE WITNESS: No, not at the present time it doesn't
22 block any view.
23

CROSS EXAMINATION OF COL. DAY:

MR. GARNIER: As a matter of fact, Colonel, you bought your property knowing full well that this particular property had a fence on it, isn't that correct, sir?

THE WITNESS: Mr. Finein's property?

MR. GARNIER: Correct.

THE WITNESS: Yes.

MR. GARNIER: And it had existed on this property at the time that you were renting your own property prior to the time you bought it, isn't that correct?

THE WITNESS: Yes, it was built while I was renting across.

MR. GARNIER: All right. During the time that it was being built and you were renting, were you concerned at that time about the regulations and the rules that are for the welfare of the community, as you have told us, in the breakdown of the covenants?

THE WITNESS: Well, obviously, I didn't --

MR. GARNIER: (Interposing) Well, obviously, you

didn't.

MR. CONROY: I think -- if Your Honor please, I don't think he finished his question.

MR. GARNIER: I thought he had answered it.

THE COURT: Is that your answer? Do you have anything to add to that?

THE WITNESS: What was the question?

MR. GARNIER: Do you want to read the question?

(The question appearing on page 30, lines 17 through 21, inclusive, read back.)

MR. GARNIER: Would you place on the record the fact that he said he would like to change that answer. Go ahead, Colonel.

THE WITNESS: I was concerned about the appearance of the neighborhood that I bought the house in. And, actually, there is no question about it, I will admit Mr. Finein's fence looks better than Mr. Hale's fence.

And it would probably have never come to my mind to bring any difficulty into this unless, concerning Mr. Finein's fence, unless Mr. Hale had built this fence which I think is detracting from the neighborhood.

RE-DIRECT EXAMINATION OF COL. DAY:

BY MR. CONROY:

Q Colonel Day, was it your testimony that you were renting property in this subdivision at the time that Mr. Finein's fence went up?

A Yes, sir. That's right.

Q Did Mr. Finein ever discuss with you the building of this fence before he put it up?

A No, sir.

Q Would you know approximately how long, in time, it took for that fence to go up?

A Not more than two days. Like I say, as I recall -- and I was renting at that time and expecting orders for another station perhaps -- I didn't look and pay a lot of attention to Mr. Hale -- to Mr. Finein's fence.

But, I know I came home one day and it was up. And it was there.

Q Now, with regard to Mr. Hale's fence, which was built in the Spring of 1972, I believe. Did Mr. Hale ever discuss the building of a fence with you?

1 A No, sir.

2 Q And he is directly across the street from your

3 property?

4 A Yes, sir.

5 Q And how long did his fence take to go up?

6 A Well, I don't know how long, but it was not there

7 in the morning when I went to work and it was in the

8 afternoon when I came home.

9 Q In other words --

10 A (Interposing) And I went to work in those days,

11 in the Pentagon, about seven o'clock in the morning, getting

12 back about six.

13 Q And that construction was completed in a day, is

14 that your testimony?

15 A Yes, sir.

16 MR. CONROY: That's all I have of Colonel Day,

17 Your Honor.

18 CROSS EXAMINATION

19 BY MR. McGINNIS:

20 Q Colonel, it has been stipulated that Mr. and Mrs.

21 Hale's fence was finished on May 10, 1972.

22 A (Nodding head)

23 Q Is that correct?

1 A I believe that's correct.

2 THE COURT: It's still May of '72, which was a

3 stipulation. The specific day was May 10, '72, Mr. Conroy?

4 The stipulations I have were that the Finein fence

5 was completed May of '71, and the Hale fence, May of '72.

6 MR. CONROY: I think we would accept May 10th, as

7 being the date.

8 THE COURT: All right. That'll be the stipulation.

9 All right, sir.

10 BY MR. McGINNIS:

11 Q Colonel, why did you wait one year and thirty-two

12 days to file suit?

13 A Well, I'll try to go through that as best I can.

14 I think --

15 MR. GARNIER: (Interposing) Your Honor, I don't

16 think we're interested in what he thinks -- we're asking

17 what he did.

18 MR. CONROY: Your Honor, he asked him why he did it,

19 and I think the man's entitled to answer the question.

20 THE COURT: He can answer. I'll overrule the

21 objection. Proceed, sir.

22 THE WITNESS: Why I waited that long. Well, I

23 began to approach the people in the area to see if they had

1 similar feelings that I did.

2 Because -- and then it became obvious that there

3 were some people who had similar feelings. And I was

4 reluctant to begin, or even approach Mr. Hale.

5 First of all, because I have a tremendous respect

6 for the rights of an individual and what he does with his

7 property.

8 So, I didn't want to hurt his feelings. That was

9 one thing.

10 And then--as trying to find out as best I could

11 concerning was there anything legal you could go on --

12 and then we did go to the association --members of the

13 committee regarding who involved themselves -- the Westwood

14 Civic Association.

15 THE COURT: When you talk about committee, you

16 talking about the Westwood --

17 THE WITNESS: (Interposing) We're talking about

18 the Westwood Civic Association committee.

19 THE COURT: All right.

20 THE WITNESS: And we find out that, yes, there were

21 covenants that existed and could probably be enforced.

22 And they wrote a letter, but it appeared that Mr.

23 Hale was not going to abide by it. And then we talked to

him -- Mr. Riordan and I talked to Mr. Hale privately about it. Approaching him the best way we could in the hope he would see fit to take it down.

And then, we discussed the situation with one law firm and then decided on Mr. Conroy.

And because of the slowness of the proceedings, I guess, it took that long.

BY MR. McGINNIS:

Q Now, when did you have your conversation with Mr. and Mrs. Hale?

A We didn't have it with Mr. and Mrs. Hale; we had it with Mr. Hale, and that was in September.

Q September of 1972?

A Yes.

Q And what contact did you have with Mr. Hale between September of '72, and June 12 of '73?

A I didn't have any contact with him during that period because of the reasons I've already stated.

1
2 CROSS-EXAMINATION OF COL. DAY:

3 BY MR. GARNIER:

4 Q Colonel, how would you describe the make-up of the
5 fence on my client's property? It's not an iron fence, is
6 it?

7 A Mr. Finein's fence?

8 Q Yes.

9 A It's a natural wood fence, I believe. It might
10 have been painted with red.

11 Q All right. And you say that it went up over night?

12 A I don't recall if it went up over night, but I
13 know it went up rapidly.

14 Q Well, you told us that you came home one day and
15 there it was.

16 A That's right.

17 Q Is that correct, if I told you it took two weeks to
18 construct, would you say that was wrong, sir?

19 A I wouldn't be able to say whether it was wrong or
20 not.

21 Q As a matter of fact, the poles to hold the fence
22 went into the property long before the fence, itself, went
23 up, isn't that correct, sir? Or do you know?

1 A I don't recall.

2 Q All right. In fact, the only reason you say it

3 went up overnight is because you paid no attention to what

4 was going on across the street, isn't that correct, sir?

5 A No, I said that because (Witness pauses)

6 Q The answer is yes. Isn't that correct, sir?

7 A No, the answer is not yes.

8 Q What is the answer?

9 A The answer is that I went to work one day and Mr.

10 Finein's fence was up when I got home that afternoon.

11 Q Well, how do you explain, sir, not knowing that this

12 construction was going on for two weeks in advance?

13 A Well, I guess not paying attention to it, but it

14 wasn't as noticeable -- the construction going on wasn't as

15 noticeable as the fence was.

16 Q So, you don't know for how long the construction

17 was taking place, isn't that correct, sir?

18 A No, I don't.

19 Q And you do know, do you not, that the first posts

20 have to go in before the fence of this type goes in, isn't

21 that correct, sir?

22 A That's correct.

23 Q And if you paid attention to what was going on

1 around you to protect these covenants, you could have gone
2 to my client when he put the posts in said, "Hey, hold up a
3 second."
4 You could have done that, couldn't you, Colonel?
5 A Not likely because I was a renter at that time,
6 and had no knowledge and had never owned a house before.
7 Q So, you didn't care then at that time, one way
8 or the other, isn't that correct?
9 A No, that's not right.
10 Q Well, you said it's not likely because you're a
11 renter and you'd never owned a house before. What did you
12 mean by that, sir?
13 A I mean that this house in Virginia is the first
14 one that I ever bought.
15 Q Well, how does that effect you in going to my
16 client and saying, "Look, you've got your posts in a place
17 that I don't like; remove them."
18 You could have done that, could you not?
19 A I could have, but it's not --
20 Q (Interposing) Why didn't you do it?
21 A Go talk to him about the posts?
22 Q Yes. You knew why the posts were going up, did you
23 not?

1 A Because --

2 Q (Interposing) What did you think the posts were

3 going up for, Colonel?

4 A Well, they were probably going up for a fence.

5 Q Ah, very good. And after the posts go up, the

6 fence goes up, right?

7 A Right.

8 Q All right. And so you, as an intelligent man, a

9 leader in our army, knows that it's much more expensive to

10 remove an entire fence than it is to remove a few posts,

11 isn't that correct, sir?

12 A That's right.

13 Q So, had you been as concerned at that time as you

14 claim to be now you could have gone to my client and said,

15 "Look, move the posts a few feet back and we'll save a lot

16 of grief." Isn't that correct, sir?

17 A No, sir.

18 Q You couldn't have done that?

19 A Well, I could have done that.

20 Q Well, why didn't you do it, sir?

21 A Because as I said, I was a renter.

22 Q Which means what to you?

23 A That I rent in this community. I'm going to keep

1 my property that I rent in respectable appearance.

2 Q How did that restrain you from going to my client

3 and asking him to remove the posts?

4 MR. CONROY: Your Honor, I think he answered the

5 question. He said that he was a renter in the community,

6 not a property owner. I think that answered it.

7 MR. GARNIER: You could have gone to your landlord,

8 could you not?

9 THE WITNESS: I didn't know there -- I didn't even

10 know that covenants existed on a thing like this at that

11 time. And I felt that, perhaps, if he wanted to build the

12 fence, he had that right.

13 At that time, I didn't know what the Westwood Park

14 rules were.

15 BY MR. GARNIER:

16 Q In fact, when you came home when the fence had

17 come up by magic in the course of the day, you went over to

18 see my client, did you not? Do you remember that?

19 A I heard you say that. I think Mr. Finein and I

20 talked about that fence. I don't remember going over that

21 day.

22 Q All right. What did you say to him, sir?

23 A I don't recall.

1 Q May I suggest to you that you said to him, it was
2 a very "fine-looking fence".
3 A I don't recall my exact words.
4 Q Well, give me a paraphrase of what you think you
5 said to him.
6 A I probably said, "Well, I see you built a fence."
7 Q All right. That was a shrewd observation. What
8 else did you say to him?
9 A Well, perhaps I said, "Well, it looks pretty good."
10 Q All right. Did you say anything to him about
11 being concerned about the fact that he was obstructing
12 anything or affecting your way of life?
13 A No.
14 Q You didn't object to the fence at that time, isn't
15 that correct, sir? To the fence itself.
16 A Well, that's correct. I did not.
17 Q All right.
18 A But I must --
19 Q (Interposing) What's happened to that fence, or
20 being done to it since May of 1971, that's made it objectionable
21 to you now?
22 A Well, since May --
23 Q (Interposing) The fence itself.

1 A The fence hasn't been changed that I know of.

2 Q All right. So, it is in the same condition today

3 as it was on that beautiful day when you went to see him

4 and said, "Isn't it a fine fence you've got here," right?

5 A I didn't say it was a fine fence . That's not

6 a very good word. That's your word.

7 Q A very good word. All right, whatever word you

8 want to use. What word do you want to use?

9 A If I said it, I don't recall specifically saying

10 it.

11 Q Do you deny saying it?

12 A I do not.

13 Q Was there any other reason?

14 A It would have probably been something like, "Well,

15 it looks pretty good."

16 Q Was there any other reason for going over to see

17 Mr. Finein on that day?

18 A Except that I saw him out in the yard and would try

19 to be neighborly. His son and my son are very good friends,

20 and so are he and I.

21 Q Well, had you gone over his yard in the preceding

22 two weeks?

23 A I don't think so.

1 Q All right, sir. Are you on the architectural
2 committee?
3 A No, sir.
4 Q Are you on the civic committee?
5 A The civic association?
6 Q The civic association.
7 A I believe so.
8 Q You don't know?
9 A I don't know for sure.
10 Q Well, what makes you think you are?
11 A I think my wife paid the dues.
12 Q Are you an officer in the association in any way?
13 A No, sir.
14 Q Have you asked the architectural committee to bring
15 the lawsuit here?
16 A Yes.
17 Q Well, you just finished telling us you didn't even
18 know who they are.
19 A I told --
20 Q (Interposing) Didn't you tell Mr. McGinnis you
21 didn't know who they were a few minutes ago?
22 A I asked the -- we asked the officers of the civic
23 association.

1 Q I'm asking about the architectural committee which
2 is referred to in the covenants that you're relying upon
3 here today, sir. Did you go to them and ask them to file a
4 lawsuit?
5 A I did not.
6 Q Did you ask any of these people on the architectural
7 committee to take any steps on behalf of the association
8 to enforce the covenants?
9 A Not the members of the architectural committee, but
10 that's --
11 Q (Interposing) That's what I'm asking you about,
12 sir.
13 A They're members of the civic committee.
14 Q Well, you --
15 A (Interposing) I did not ask Mr. Member of the
16 architectural committee to do anything.
17 Q In fact, you don't even know who they are, do you,
18 sir?
19 A I can't recall their names right offhand.
20 Q Well, when is the last time you could recall them,
21 Colonel?
22 A It would -- (Witness pauses)
23 Q A pretty long time ago, isn't it, Colonel?

1 A Well, I don't know that I could ever have called
2 their names.
3 Q All right, sir. But, have you ever read the
4 covenants that you're relying on here today, sir?
5 A Yes.
6 Q Is it not a fact that the architectural committee
7 is the body charged with taking action to prevent this type
8 of thing?
9 A I believe that's correct.
10 Q All right. Is there anything in these covenants
11 about the civic association doing anything?
12 A I would have to read it again.
13 Q Do you want to take a look at them, sir? Or would
14 you accept my word for the fact that there is not?
15 MR. CONROY: Your Honor, we'll accept his word
16 that it's the responsibility of the architectural committee.
17 THE COURT: All right, sir.
18 BY MR. GARNIER:
19 Q Now, Colonel, when you filed this lawsuit, you told
20 us you were very concerned about the rights of other people
21 using their property in any way they want, isn't that correct,
22 sir?
23 A That's right.

1 Q When is the last time prior to the filing of the
2 lawsuit, that you had read these covenants?
3 A Well, I don't read the covenants daily or weekly
4 or even monthly. I think probably last fall.
5 Q Well, you told me, Colonel, that you, when you moved
6 in, you did not receive a copy of the covenants, isn't that
7 correct, sir?
8 A That's right.
9 Q Did you ever receive a copy of the covenants?
10 A Yes.
11 Q When did you receive a copy of the covenants?
12 A When I asked the people who handled my house for
13 me when I bought it.
14 Q And when was that, sir?
15 A About May of last year.
16 Q That would be May of 1973?
17 A No, it was probably before that. It was in -- I'm
18 sorry, it would have been in the fall of '71.
19 Q All right. So, from the fall of 1971 to May of
20 last year when you retained counsel, you had a copy of these?
21 A Yes. When we --
22 Q (Interposing) All right. And in the fall of 1971,
23 why did you ask for a copy of the covenants, sir?

1 A Because I wanted to read them.

2 Q For what purpose?

3 A To determine what the covenants were that existed --

4 Q (Interposing) Was there anything in particular

5 that you were looking for?

6 A Yes, fences.

7 Q Fences. At that time, how many fences were there

8 in the subdivision?

9 A Well, Mr. Finein's was there.

10 Q All right. But you weren't concerned about Mr.

11 Finein's fence, were you?

12 A I was not concerned about his fence until --

13 Q (Interposing) So, why were you reading the covenants,

14 to look for whatever there might be in the covenants about

15 fences?

16 A Could I finish the statement I'm trying to make?

17 MR. CONROY: Yes, sir.

18 MR. GARNIER: Well, if he wants to object, he'll

19 object. That's what you paid him for, right?

20 THE WITNESS: I would like to finish my sentence.

21 BY MR. GARNIER: Well, what question are you answering

22 now, or do you know?

23 A Yes. The one you just asked me when you were

1 charging me, sir.

2 Q Which is what, sir? Do you know my question?

3 A I don't recall exactly your question.

4 Q Do you want me to rephrase it for you?

5 A Yes, do so.

6 Q Why is it in the fall of 1971, when you had no

7 objections to the Finein fence, you bothered to get these

8 so you could find something in there about fences?

9 A Because a fence had been built that was very

10 objectionable to the community.

11 Q In the fall of 1971, sir? You sure that's what

12 you want to say? Or do you want to change that answer, too?

13 A Well, wait a minute. No, it would have been the

14 fall of '72.

15 Q Ah, so the fall of '72. Now, the Hale fence has

16 been built and you want to get a copy of these?

17 A That's right.

18 Q O.K. So, there was nothing about the Finein fence

19 that sent you running to get the covenants, isn't that

20 correct, sir?

21 A That's right.

22 Q And when you got a copy of these covenants, because

23 you objected to the other fence and now to my client's fence

1 also, apparently, what did you find in them that aroused
2 you in any way?
3 A Well, that there was certain rules and regulations
4 regarding the building of fences and other buildings or
5 whatever might be built.
6 Q And that's what might be -- that's when you went
7 to the civic association?
8 A No, we had already gone to the civic association
9 shortly after Mr. Hale built his fence.
10 Q You mean that you had got the covenants after you
11 had gone to the civic association?
12 A I believe I got my particular covenant.
13 Q Well, why didn't you leave it up to the civic
14 association to do something in your behalf?
15 A Well, they apparently started to do something, and
16 I didn't feel it was a good cause -- or not a good cause,
17 but that we could get Mr. Hale to remove his fence.
18 Q Well, eventually you and Mr. Riordan ended up getting
19 together, isn't that correct, sir?
20 MR. CONROY: Your Honor, I think that's obvious
21 from the pleadings they got together and filed the lawsuit.
22 MR. GARNIER: That may be obvious, but I may want
23 to question him about it. Would that be all right?

1 THE WITNESS: Well, Mr. Riordan and I discussed
2 this early --.
3 BY MR. GARNIER:
4 Q Well, tell me how this team was formed. How did
5 it come about that the two of you got together?
6 A Well, we're neighbors, we're friends, we both object
7 to the fence.
8 Q Did you try to bring any of the neighbors in on it?
9 A I think --
10 MR. CONROY: (Interposing) Your Honor, I object.
11 I think that's irrelevant whether they bring any other
12 neighbors in or not. They filed the suit themselves.
13 MR. GARNIER: I'll withdraw the question.
14 BY MR. GARNIER:
15 Q At the time you decided to file the lawsuit, were
16 you familiar with paragraph ten of this restrictive covenant?
17 A Yes.
18 Q Do you know what it says?
19 A I can't quote it right now.
20 Q Well, tell me what it says in paraphrasing.
21 A I would have to look at it. I have not memorized
22 the covenant.
23 Q Well, is it not true that it says that if no suit

1 is filed within ten days from the completion, or in any event,
2 prior to the completion of the building of the fence, that
3 this is deemed to be approval by the committee?
4 MR. CONROY: Your Honor, objection. The covenant
5 doesn't say that, Your Honor. It does not say prior to the
6 building of the fence.
7 MR. GARNIER: Well, let me read it to you, Colonel.
8 Are you aware of the fact that it says, "or in any event, if
9 no suit to enjoin the construction has been commenced prior
10 to the completion thereof, approval will not be required
11 and the related covenant shall be deemed to be fully complied
12 with."
13 Are you familiar with that, sir?
14 A I'm familiar with one of the points in there being
15 similar.
16 Q Well, you know that's in there, isn't that correct,
17 sir?
18 A Yes, but --
19 Q (Interposing) And you knew that was in there at
20 the time that you saw Mr. Conroy?
21 MR. CONROY: Your Honor, I think he should let him
22 finish his answer.
23 THE COURT: Sustained. This is just one question

1 at a time. Go ahead and answer.

2 THE WITNESS: But it would seem to me that it would

3 not be reasonable for somebody to built a fence in a very

4 short period of time -- like in a period of one day .

5 MR. GARNIER: Well, you don't know then that he

6 took one day, do you?

7 MR. CONROY: Your Honor, he testified.

8 THE WITNESS? Are you talking about Mr. Finein's

9 fence?

10 MR. GARNIER: Yes. You don't know that he took one

11 day, do you?

12 THE WITNESS: That's true. It might have been the

13 posts and so forth, might have been set up prior to the one

14 day.

15 BY MR. GARNIER:

16 Q That's right. And in any event, had his fence taken

17 six months to build, and had you known about it for six months,

18 you would not have done anything about it, isn't that correct,

19 sir?

20 A In the case that I was a renter at the time, and not

21 having any knowledge of the covenants, I probably would not

22 have.

23 Q And even after you bought, before Mr. Hale put up

his fence, you would not have done anything about it.

Because you felt this was a pretty good-looking fence, isn't that correct, sir?

A That's right.

Q All right. Thank you.

MR. GARNIER: That's all I have, Your Honor.

THE WITNESS: But, sir --

MR. GARNIER: You've answered my question, sir. Your counsel can ask you if he wants to.

1 VICTOR H. BLOMQUIST

2 was called as a witness, and after having been duly sworn,

3 was examined and testified as follows:

4 DIRECT EXAMINATION

5 BY MR. CONROY:

6 Q Would you state your full name, please, sir?

7 A Victor Hugo Blomquist.

8 Q And where do you live, Mr. Blomquist?

9 A 7422 Fairwood Lane in Westwood Park, Falls Church.

10 Q Now, Mr. Blomquist, how long have you lived at that

11 address?

12 A Since the 7th of July, 1970 -- 1962.

13 Q And did you buy it from the developers?

14 A Yes, I did.

15 Q And who were the developers at that time?

16 A Kaufman and McCaffrey, and I believe there was a

17 third party, but they were the principal builders.

18 Q Now, what is your occupation, Mr. Blomquist?

19 A I'm retired.

20 Q Do you have any connection with the administration

21 of the covenants in any way?

22 A In 1967, the Kaufman and McCaffrey had completed

23 their work in the construction of this community, and the

president of the association at that time, when they were contacted by Kaufman and McCaffrey --

MR. McGINNIS: (Interposing) I object, Your Honor, on the grounds of hearsay.

THE COURT: All right. Sustained. You can just say what happened.

BY MR. CONROY:

Q Let me ask you this, Mr. Blomquist, did there come a time when you became a member of the architectural control committee?

MR. McGINNIS: Objection, Your Honor, that's irrelevant and immaterial.

MR. GARNIER: Now, he's not suing on that. He is suing on the basis of what is provided about this, as it is incorporated in the pleadings if Your Honor.

And the lawsuit -- this gentleman's name does not appear on it. And the committee' specifically named in the covenants and he's not one of them.

MR. CONROY: Well, Your Honor, I think it's necessary to show what happened in the original committee. If Your Honor will read these restrictions, it names these three gentlemen.

MR. McGINNIS: But it also establishes the procedure

1 for filling vacancies and for creating a new committee.

2 MR. CONROY: Your Honor, it says -- it says, "in

3 the event of the death or resignation of any member of the

4 committee, the remaining members shall have full authority

5 to designate a successor."

6 THE COURT: Well, what do you intend to show with

7 this witness? What's your proffer, Mr. Conroy?

8 MR. CONROY: I intend to show, Your Honor, that by

9 Mr. Kaufman, Mr. McCaffrey and Mr. Harris, who were the

10 original architectural committee, that they resigned by

11 letter to the association.

12 Resigned and that they appointed Mr. Blomquist, Mr .

13 Culpeper and Mr. Freeman as the members of this committee.

14 MR. McGINNIS: Your Honor, if Your Honor please,

15 the restrictive convenants themselves in paragraph nine say,

16 "at any time, the then record owners of the majority of lot

17 holders shall have the power through a newly recorded written

18 instrument, to change the membership of the committee, or to

19 withdraw from the committee, or to restore to it any of its

20 powers and duties."

21 MR. CONROY: That's what it says, Your Honor, but

22 I believe, what we're talking about here -- that's an

23 additional stipulation. There is no requirement here that

1 when the original three members of this committee resigned,
2 that they have to do that by recorded instrument.
3 What we're planning to show, Your Honor, is that
4 Mr. Blomquist is the successor -- a duly authorized successor --
5 to the three original members.
6 And that he and the other two have been working.
7 THE COURT: Let me see the copy, if one of you all
8 has the original restrictive covenants.
9 MR. McGINNIS: The copy in the file is not that
10 clear.
11 MR. CONROY: (Handing)
12 THE COURT: (Examining document) You are saying
13 that all the original three resigned, is that correct?
14 MR. CONROY: That's correct, Your Honor.
15 THE COURT: That's your position.
16 MR. CONROY: That's our position. That's what I'm
17 having Mr. Blomquist testify to.
18 MR. McGINNIS: If Your Honor please, it goes
19 further to say, "that a majority of the lot owners can change
20 the committee.
21 "And it must be changed by duly recorded instrument."
22 THE COURT: All right. Let me just take about a
23 ten-minute recess. This would probably be a good point. I'll

1 take a ten-minute recess.

2 (Thereupon, there was had a ten-minute

3 recess.)

4 THE COURT: Is there any further argument on this?

5 MR. GARNIER: I have one word, if Your Honor please.

6 As I read paragraph number nine, and with reference to the

7 appointment of a successor, the paragraph against binding

8 on the parties provides, "in the event of death or resignation

9 of any member of the committee, the remaining members shall

10 have full authority to designate a successor."

11 I submit to the Court that this is not the case

12 here. When we have the resignation of the entire committee,

13 which means that there is, in fact, nobody left to appoint

14 or designate anybody else to succeed them, that is not what's

15 provided in paragraph number nine.

16 And, of course, we would further object to a letter

17 as just being rank hearsay,as none of the people who drafted

18 the letter would be here to testify.

19 THE COURT: And would you try -- are you going to

20 try to show that the three resigning ones designated him as

21 a successor?

22 MR. CONROY: Yes, Your Honor. That's what I was

23 just going to ask Mr. Blomquist.

1 THE COURT: All right. Do you have anything in
2 writing?
3 MR. CONROY: No, Your Honor. No, Your Honor,
4 nothing in writing, but it's our contention, Your Honor, that
5 it doesn't have to be in writing.
6 It simply says, "a majority of the committee may
7 designate a representative to act for them in the event of
8 death or resignation of any member of the committee. The
9 remaining members shall have full authority to designate a
10 successor."
11 MR. GARNIER: There were no remaining members, Your
12 Honor. Once they resigned, there was nobody remaining.
13 THE COURT: All right. Let me take it on -- let me
14 hear what he's got and let me take it subject--as the easiest
15 way to get into it. Go ahead.
16 Your objection is continuing on both defendants.
17 MR. GARNIER: Thank you, Your Honor.
18 BY MR. CONROY:
19 Q Now, Mr. Blomquist, after the -- well, let me ask
20 you this, Mr. Blomquist. Have you been acting as a member
21 of the architectural control committee?
22 A Yes.
23 Q And for how long a period have you been acting in

that capacity?

A Since its formation in 1967.

Q All right, sir. And who else is acting in the capacity with you?

A Mr. Culpeper and Mr. Freeman.

Q And how did youroccupancy of that particular position come about?

A Kaufman and McCaffrey contacted the president and Mr. John Rimkus, president of the citizen's association, and advised him to send --.

MR. GARNIER: Your Honor, I would object to that. Is that continuing as part of the objection, Your Honor?

THE COURT: Right. It's part of the continuing objection.

MR. GARNIER: All right.

BY MR. CONROY:

DIRECT EXAMINATION OF MR. BLOMQUIST

Q Now, since 1967, have you and Mr. Culpeper and Mr.

1 Freeman, in effect, been the architectural control committee?
2 A Yes.
3 Q And have you, as a member of this committee--has
4 your committee acted on applications for variances that were
5 submitted to it?
6 A Yes.
7 Q Has this committee, of which you and Mr. Freeman
8 and Mr. Culpeper compose, acted on variances for any other
9 fences in the community?
10 A Yes.
11 Q Now, how many other fences have you and these other
12 two gentlemen approved?
13 A Two.
14 Q Now, where are they located?
15 A They are located at the entrance into Fairwood Lane
16 on Shreve Road and Fairwood Lane-- Mr. Musoff and Mr. Burton's
17 homes.
18 Q Now,those are two fences that front on Shreve Road,
19 is that correct?
20 A That's correct.
21 Q And how long ago were those fences approved?
22 A I would say about 1968.
23 Q And that was as a result of application made to the

1 committee?

2 A Yes.

3 Q And did you and the other two gentlemen meet as a

4 committee and consider them and vote in favor of those

5 variances?

6 A Yes.

7 THE COURT: And what date was that, sir, Mr. Blomquist?

8 THE WITNESS: About 1968.

9 THE COURT: C.K.

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VOIR DIRE EXAMINATION OF MR. BLOMQUIST:

VOIR DIRE EXAMINATION

BY MR. McGINNIS:

Q Now, Mr. Blomquist, did you ever get a formal appointment to the committee?

A I got a copy of a letter -- I got the original of the letter form Kaufman and McCaffrey and Harris. And a verbal request by Mr. Rimkus, the president of the association asking if I would serve, and I gave my consent.

Q At that time, were you familiar with restrictive covenants?

A Yes.

Q At that time, did you have an instrument recorded, appointing you and the other gentlemen as the architectural committee?

A I don't think so.

Q To your knowledge, has any one ever been so recorded?

A To my knowledge, I don't know.

Q To your knowledge, has your appointment ever been confirmed by a majority of the lot owners?

A I would say that the present action on behalf of the association, which represents the majority of the lot owners -- and I was designated by this association to handle the architectural affairs.

1 Q Was there ever a vote taken by the qualified lot
2 owners -- not the members of the civic association, but the
3 lot owners?
4 A Not that I'm aware of.
5 Q Has there ever been a meeting of the lot owners as
6 such?
7 A There have been many meetings of the lot owners.
8 Q No, I don't mean the civic association; I mean the
9 lot owners.
10 A Not as such that I know of.
11 Q All right.
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THE COURT: The court will overrule the objection and note the defendants' exception to the court's ruling, but will consider this as merely being -- as showing who the architectural committee is.

And will strike from the record any references as to what Mr. Rimkus told Mr. Blomquist as being hearsay, and any statements or any oral statements of Mr. McCaffrey, of Mr. Kaufman and Mr. Harris regarding this.

So, I'll just consider Mr. Blomquist is a representative of the architectural control committee, and note the exception of the defendants in the court's ruling.

MR. McGINNIS: Thank you, Your Honor.

DIRECT EXAMINATION CONTINUED

BY MR. CONROY:

Q Now, Mr. Blomquist, you testified, on a question by Mr. Garnier, I believe, that from time to time, newsletters were sent out to the community in which the architectural control committee was named. Is that correct, sir?

A Yes.

Q Now, I show you two newsletters. One dated June 23, 1972, and one dated December 7, 1973, and ask if you can tell the Court what they are? (Handing)

1 A The December -- the June 23, 1972, is a newsletter
2 that went out to the residents of Westwood Park.
3 MR. GARNIER: Your Honor please, we fail to see the
4 relevancy of that since both fences had been erected by that
5 time. And we therefore object to it.
6 That it be completely immaterial to the issues here
7 today.
8 MR. CONROY: Your Honor, Mr. Garnier asked a question,
9 "Were any newsletters sent out?"
10 MR. GARNIER: I did not ask the question. The answer
11 was given by your witness. I submit that any newsletter
12 that was sent out after the fact certainly would not serve
13 to enlighten the Court in any way whatsoever.
14 THE COURT: What does the newsletter point to? The
15 architectural committee?
16 MR. CONROY: That's right. That's just that the
17 community knew who they were.
18 THE COURT: I'll overrule the objection.
19 THE WITNESS: The letter in the third underlined
20 paragraph -- I'll read the last sentence.
21 "Current members of the committee are: Victor
22 Blomquist, Warren Culpeper, Wade Freeman. For your own
23 protection and as well as the interests of your neighbors, it

1 is suggested you contact a member of the committee before
2 undertaking construction on your lot to insure that you are
3 not in violation of the covenants.
4 The covenants run with the land and are enforceable
5 by law."
6 MR. CONROY: Your Honor, I'd like to offer that, if
7 I may.
8 THE COURT: All right.
9 MR. GARNIER: I would object on the same basis, if
10 Your Honor please..
11 THE COURT: I think I'll admit it on,certainly, the
12 time differences. It's too late for the instant case, but
13 I want to show what the composition of the architectural
14 committee was.
15 MR. CONROY: Your Honor, there are two of these
16 newsletters. One dated June and one dated December.
17 MR. GARNIER: Same here.
18 THE COURT: I'll make the same ruling and note it
19 for the members of the committee and not for the matters
20 contained therein.
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DIRECT EXAMINATION OF MR. BLOMQUIST:

BY MR. CONROY:

Q Now, Mr. Blomquist, to your knowledge, did the committee ever have any word from Mr. Finein prior to the construction of his fence?

A To my knowledge, no.

Q To your knowledge, did your committee ever have any word from Mr. Hale prior to the construction of his fence?

A To my knowledge, no.

Q Now, did there come a time when it was brought to your attention, as a member of the architectural committee, that that objection was being made to these fences?

A Yes.

Q Now, when was that, if you recall?

1 A As I recall, it was sometime in the spring of 1972.
2 Q And do you recall what the committee did in a
3 response to these objections that were made?
4 A The committee suggested that the president call
5 attention to the violations of the covenant, and request --
6 and ask these gentlemen to come and meet with the officers
7 and the architectural committee and discuss the problem.
8 Q Now, did there come a time when either Mr. Finein
9 or Mr. Hale did meet with you and the other members of the
10 architectural committee?
11 A Mr. Finein did come. I was present at that meeting.
12 Mr. Hale, I understood, came at a later date and I was not
13 present at that meeting.
14 Q But you were present at the meeting in which Mr.
15 Finein came, is that correct?
16 A That's correct.
17 Q O.K. And what transpired at the meeting between
18 the architectural committee, of which you are a member,
19 and Mr. Finein?
20 A Mr. Finein was asked, I believe, by Mr. Hineman,
21 the president at that time, to tell the committee or tell
22 the group what he had done to determine that the fence could
23 be placed in this location.

1 Q And what did Mr. Finein say to that?

2 A As I recall, Mr. Finein said that he had discussed

3 the fence with a couple of the neighbors and had gone to the

4 Fairfax County Courthouse and discussed this with a member

5 of some group that had responsibility -- I don't recall who

6 they were.

7 And then he said, well, to paraphrase as I understood

8 it, "if the neighbors have no objections, it's okay with us."

9 Q In other words, this is what Mr. Finein told you

10 the county had told him?

11 A Yes.

12 Q Well, what did the committee then tell Mr. Finein?

13 A The committee--after the meeting at which Mr. Hale

14 was present and discussed his situation -- the committee

15 met and discussed the pros and cons --

16 MR. GARNIER: (Interposing) Your Honor please,

17 that's not responsive to the question. He was asked what

18 the company told Mr. Finein.

19 THE COURT: That's right. He's asking what the

20 final results --.

21 MR. CONROY: What is the final result of these

22 conferences?

23 THE WITNESS: The final result was that the committee

1 did not go on record as taking one position or the other at
2 that meeting.
3 They considered it after the meeting and wrote a
4 letter to each of the members.
5 Q Now, you say to Mr. Finein and Mr. Hale?
6 A Mr. Finein and Mr. Hale.
7 Q All right. Now, let me show you these copies of
8 two letters and ask you if you can identify these? (Handing)
9 A Yes, these are both signed by myself, Mr. Freeman
10 and Mr. Culpeper.
11 Q I see. Now, you say that's your signature and that's
12 the other gentlemen's signature also?
13 A Yes, as far as I can tell.
14 MR. CONROY: Your Honor, I'd like to offer these.
15 THE COURT: Is there any objection, gentlemen?
16 MR. McGINNIS: No objection, sir.
17 THE COURT: All right. These'll be six and seven.
18 Plaintiff's exhibit seven and eight. Plaintiff exhibit seven
19 is a letter July 10, '72. Complainant's exhibit eight is
20 a letter of the same day.
21 (Thereupon, the above-referred to document
22 was marked Complainant's Exhibit No. 7,
23 for Identification.)

1 (Thereupon, the above-referred to document
2 was marked Complainant's Exhibit No. 7,
3 in Evidence.)
4 (Thereupon, the above-referred to document
5 was marked Complainant's Exhibit No. 8,
6 for Identification.)
7 (Thereupon, the above-referred to document
8 was marked Complainant's Exhibit No. 8,
9 in Evidence.)
10 BY MR. CONROY:
11 Q Now, Mr. Blomquist, now, what was the response that
12 you had either from Mr. Hale or from Mr. Finein with regard
13 to those letters?
14 MR. GARNIER: If Your Honor please, I object to that
15 question 'cause the letter being introduced does not call
16 for a response, does not ask that these steps be taken or
17 any response be given to it.
18 MR. CONROY: Well, let me rephrase it, Your Honor.
19 BY MR. CONROY:
20 Q Did you hear anything further after the writing of
21 those letters either from Mr. Hale or from Mr. Finein with
22 regard to their fences?
23 A No. I heard nothing.

1 Q And as far as the committee was concerned, the
2 letters of July 10, '72, were your final action with regard
3 to that, is that correct?
4 A Yes.
5 Q And what did the committee -- what was the holding
6 of the committee?
7 MR. GARNIER: Your Honor, I think the letter will
8 speak for itself.
9 THE COURT: Sustained.
10 MR. CONROY: I'll withdraw it. Your Honor, I think
11 that's all I have of Mr. Blomquist.
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CROSS EXAMINATION OF MR. BLOMQUIST:

Q Now, in your letter of July 10th, you don't tell Mr. Hale or Mr. Finein to take down their fences, do you?

A That's right.

Q You simply say you can't grant approval retroactively.

A That's right.

Q Did you take any action whatsoever after that to have them take the fences down?

A No.

Q And you're not party to this action?

A No.

1 BY MR. GARNIER:

2 Q So, Mr. Blomquist, the committee never went on record as
3 saying to either one of these people that the fences had to
4 be taken down, is that correct, sir?

5 A That's correct.

6 Q All right. Now, who was it that first complained
7 to you about the fences?

8 A It came to me from Mr. Culpeper who lives -- his lot,
9 I believe, backs up to the president -- who was then the
10 president, Mr. Hineman's lot -- and they had talked and Mr.
11 Hineman told Culpeper that there had been complaints from
12 up above.

13 Q Now, why was Mr. Finein called to come to the
14 civic association rather than the architectural committee?

15 A Well, the president called the meeting and asked
16 these people to meet with the officers and the architectural
17 committee. And we felt as many people should be involved
18 as possible who would be responsible in the association.

19 Q Do you recall when the meeting with Mr. Finein was
20 held?

21 A Well, I don't recall the exact date. It was probably
22 in June of 1972, or something like that.

23 Q In June of '72?

1 A Probably something like that.

2 Q Were there any minutes made of that meeting?

3 A Not that I'm aware of.

4 Q Are minutes usually made of the meetings?

5 A No.

6 Q Is there a recording secretary for the association?

7 A Yes.

8 Q What is his or her name?

9 A I don't know who the current one is.

10 Q How about at that time?

11 A I don't think I knew at that time who it was.

12 Q All right. Now, is the architectural committee a

13 part of the civic association itself? Does it hold a role

14 within the association that calls for you to be present at

15 all meetings?

16 A No. It doesn't call for us to be present at all

17 the meetings.

18 Q Was this a special meeting called to discuss this

19 particular problem with Mr. Finein?

20 A Yes, it was.

21 Q And were the two meetings with these two individuals

22 held at the same time or at different times?

23 A At different times.

1 Q Do you recall how long after the Finein meeting the
2 Hale meeting was held?
3 A I think it was a week.
4 Q All right. Now, at the time of the meeting with my
5 client, Mr. Finein, you said that the architectural committee
6 took no position one way or the other, is that correct, sir?
7 A That's right. We wanted to hear what the other
8 party had to say.
9 Q Did anybody on the part of the architectural committee
10 say anything to Mr. Finein, at that time, about how they felt
11 about the fence?
12 A Well, I think, if I recall, we did mention that it
13 was in violation of the code, as he already knew.
14 Q Of the code or the covenants?
15 A Of the restrictions.
16 Q Of the restrictions. Now, do you know whether or
17 not the association subsequently sought legal counsel with
18 reference to this?
19 A No, I don't know.
20 Q Do you know whether or not the association or its
21 president or any of its officers ever told Mr. Finein that
22 they had checked with legal counsel and were told that the
23 covenants could not be enforced under the circumstances?

1 A No, I don't know.

2 Q You don't know. Now, as a matter of fact, when you

3 wrote the letter which has been introduced into evidence,

4 your sole intent in that letter, was it not, was to make it

5 very clear that from henceforth, there would not be any

6 retroactive approval so as to put people on notice that they

7 would have to come to you first?

8 MR. CONROY: Your Honor --.

9 THE WITNESS: No.

10 MR. CONROY: Your Honor, the letter reads for itself,

11 Your Honor, it speaks for itself.

12 THE COURT: Sustained.

13 BY MR. GARNIER:

14 Q You say that after you wrote the letter, you heard

15 nothing, is that correct?

16 A That's correct.

17 Q Did you or any other members of the committee do

18 anything to ascertain what had been done with reference to

19 the fences?

20 A No, we did not.

21 Q Well, what did you expect would be done as a result

22 of the letter?

23 A We expected that in the event that neighbors objected

1 strongly enough to the fences, and wished to take action,
2 that the citizen's association was thereby going on record
3 as supporting such action.
4 Q All right. But you, as part of the architectural
5 committee, were not taking the position as to whether or not
6 the fences are to be moved or removed completely, isn't that
7 correct, sir?
8 A That's correct.
9 Q And this is why you did not bother to check afterwards
10 to see what had been done?
11 A That's correct. That's right.
12 Q In either case.
13 A That's right.
14 Q Now, when were you first told that litigation had
15 been instituted?
16 A I think it was about two weeks ago. I had heard
17 murmurs much before that.
18 Q Is there any reason why the architectural committee
19 did not institute legal action if it was concerned about the
20 fences?
21 A We have no funds to bring such action nor authority
22 to retain counsel, as far as I know.
23 Q Do the members of the association pay any dues?

1 A Yes, they do.

2 Q Is there any reason why the civic association did

3 not bring the action?

4 MR. CONROY: Your Honor, I think that's irrelevant.

5 THE COURT: Sustained.

6 MR. GARNIER: That's all I have, Your Honor.

7 THE COURT: Anything further?

8 MR. CONROY: No, sir.

9 THE COURT: Do you want Mr. Blomquist excused or

10 subject to recall?

11 MR. CONROY: He can be excused.

12 THE COURT: Do you have any objections, Mr. McGinnis

13 or Mr. Garnier?

14 MR. McGINNIS: No, sir.

15 (Thereupon, the witness was excused.)

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DIRECT EXAMINATION OF MR. RIORDAN:

Q Now, Mr. Riordan, were you living in your house when the Hale fence was erected?

A The Hale fence?

Q Yes.

A Yes.

Q Did you have any conversations with Mr. Hale concerning the erection of that fence before it was erected?

A No, sir. Didn't know he had any plans to erect it.

Q How did you first find out that the fence was erected?

A Well, the morning that the truck arrived with some material.

Q Were you home that day?

A I was home in the morning, yes, sir.

Q You say you were home when the truck arrived?

A Yes, sir.

Q And then did you leave at some time during the day?

1 A I had an appointment here in town, or at some other
2 location, but I know I left. I left the house around nine-
3 thirty, ten o'clock.
4 Q And when did you return?
5 A I didn't return until late in the afternoon.
6 Q And what was the situation as far as the fence was
7 concerned?
8 A Well, the fence was up, much to my surprise.
9 Q Was it up in its present location?
10 A In its present location.
11 Q Now, Mr. Riordan, did you do anything subsequent to
12 the erection of Mr. Hale's fence? Did you go over and talk
13 to him about it at any time?
14 A Following the construction?
15 Q Yes, following the time it was put up.
16 A Yes. When Colonel Day indicated his dislike for
17 its appearance, and I knew that I wasn't happy with it, why
18 we made up our minds to have a little discussion with him and
19 see perhaps, he would consider moving it back to meet with
20 the covenants.
21 Q And did you, in fact, have a conversation with Mr.
22 Hale about his fence?
23 A Yes.

1 Q Do you remember approximately when that was?

2 A Well, I was under the impression it was a couple

3 of weeks after the fence was originally built.

4 Q Oh, I see. Did that take place over at Mr. Hale's

5 property or over at your property or where?

6 A At Mr. Hale's front porch on his front stoop.

7 Q And who was present there?

8 A Just Mr. Hale and Colonel Day and myself.

9 Q And what was the substance of that conversation,

10 if you recall?

11 A Well, just that there was the covenant going with

12 the land and the lots in the subdivision. And we didn't

13 think that he would -- he would -- well, put a fence out of

14 the front side of his house to the sidewalk.

15 And he said, well, he knew of no covenant.

16 THE COURT: He said what, sir?

17 THE WITNESS: He said he knew of no covenant.

18 BY MR. CONROY:

19 Q Well, he said he didn't know of any covenant concerning

20 it?

21 A That's right. So, when we advised him that there

22 was, he indicated that his lawyer had not provided him with

23 that knowledge. So, at that stage, I said -- well, would he

1 be willing to move the fence back? And if he were, I would
2 be willing personally to go half of the expense.
3 And at that time, he said it wouldn't be necessary
4 because his lawyer had already made the offer that he would
5 if the fence had to be removed -- he would foot the expense.
6 Q Did you say that you offered to bear half the burden
7 of moving Mr. Hale's fence back?
8 A That's right. To within the restrictions.
9 Q Had you made any complaint to him before about the
10 fence? I mean --.
11 A No, this is my first.
12 Q This is your first conversation with him.
13 A This is my first conversation with Mr. Hale.
14 Q So, at that time, he was already aware by some
15 means of feeling in the neighborhood concerning the fence?
16 A Yes. Well, I don't know whether he knew prior to
17 that, but at that time of our discussion, he had to be aware
18 of it.
19 Q But he didn't take you up on your offer to move it
20 back at half the expense?
21 A No, he said he would be glad to give it some thought.
22 And he spoke rather like he would give it some kind consideration
23 that he was -- would let us know in a week or two.

1 Q Did he ever let you know?

2 A Well, in the following Saturday I think, Colonel

3 Day and I talked with him,-- I believe, on a Sunday evening.

4 And the following Saturday I was working in the front yard

5 and he came over and told me that he was sorry but he had

6 decided that the fence would remain exactly where it is today.

7 So, I said, "Well, I'm very sorry to hear that,"

8 because I didn't think that it added anything to the

9 appearance of the neighborhood.

10 And he didn't seem to be in a particular interest

11 in listening to my viewpoints. But I did go back across the

12 street with him and try and reason with him.

13 And he still figured that -- well, then he went on

14 to tell me that even had he known there were covenants when

15 he bought the house, he had intended to fence it in because

16 he had a small dog.

17 And he thought the dog needed all this running space.

18 So, I think that's about the way the conversation terminated.

19 Q And were you living in the neighborhood when Mr.

20 Finein constructed his fence?

21 A Yes, sir.

22 Q And could you state to the Court, in your opinion,

23 how long it took for that fence to go up?

1 MR. GARNIER: If Your Honor pleases, their opinion
2 is not what goes -- if he knows how long it goes.
3 THE COURT: Sustained.
4 MR. CONROY: Yes, Your Honor, I'll rephrase it,
5 Your Honor.
6 BY MR. CONROY:
7 Q Mr. Riordan, do you know if --
8 A (Interposing) Well, I was under the impression --
9 MR. GARNIER: (Interposing) If Your Honor please,
10 I object to what his impression --.
11 THE COURT: Just if you know.
12 THE WITNESS: I know it was there for at least --
13 MR. CONROY: (Interposing) There for a period of
14 several days.
15 THE WITNESS: Right.
16 BY MR. CONROY:
17 Q Did Mr. Finein ever come and discuss the building
18 of a fence with you before he built?
19 A No, sir.
20 MR. CONROY: I think that's all I have, Your Honor,
21 of Mr. Riordan.
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3 **CROSS-EXAMINATION OF MR. RIORDAN:**

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6 BY MR. GARNIER:

7 Q Mr. Riordan, you said that Colonel Day came to seek

8 you out about the fence that Mr. Hale had erected.

9 A No, he didn't come to seek me out.

10 Q Didn't he come to your house?

11 A We met outside the house.

12 Q All right.

13 A He was coming home that particular evening; I

14 happened to be in the front yard.

15 Q Well, you said that he's the one that expressed his

16 dislike for the fence and you agreed that you disliked it

17 also.

18 A That's correct.

19 Q Prior to that, had you had any discussions with him

20 about Mr. Finein's fence?

21 A No, sir. It was our initial discussion.

22 Q So, it's the first time that either you or he

23 together had any complaints about either one of these fences.

1 But then, on that date, they were expressed verbally?

2 A That's right.

3 Q All right. Now, during the course of a few days,

4 as you said, that it took to erect my client's fence, were

5 you retired at that time, sir?

6 A Your client?

7 THE COURT: That's Mr. Finein.

8 THE WITNESS: Mr. Finein's was built when?

9 BY MR. GARNIER:

10 Q In May of '71, sir.

11 A Oh, yes, sir, I was retired then.

12 Q So, that you had occasions to observe that fence

13 going up, did you not?

14 A I did.

15 Q Were you and Mr. Finein on pretty good terms in

16 those days?

17 A Yes, sir. I'd like to think we're still on good

18 terms.

19 Q Well, I hope so, too, sir. During the times that

20 the fence was going up, did you have occasion to discuss

21 the fence with him?

22 A No, sir.

23 Q But you knew that there was a fence being erected,

1 did you not?

2 A Yes, sir.

3 Q And between the time that it was erected --strike

4 that, please. At the time it was being erected, were you

5 aware of the existence of the restrictive covenants?

6 A Yes, sir.

7 Q All right. So, that you knew that you had certain

8 rights under those covenants at that time, did you not, sir?

9 A That's right. I didn't know how good they were, but I

10 knew there were covenants against what he was doing, let me

11 put it that way.

12 Q And you did not see fit to do anything about it,

13 is that correct, sir?

14 A At that particular time, I had little difficulty

15 mustering opposition to the fence from some of the people

16 that were across the street from him.

17 Q As a matter of fact, they told you, did they not,

18 that Mr. Finein had checked with them and they had told him

19 that they had no objections?

20 A No, they did not.

21 Q But in any event, they did not wish to join in with

22 you, isn't that correct,sir?

23 A That's proper.

1 Q Now, even though they did not wish to join in with
2 you, there was no reason to keep you from bringing a lawsuit
3 at that time rather than wait 'till June of 1973, isn't
4 that correct, sir?
5 A There's nothing against it, no.
6 Q All right. And certainly during the period of
7 time it took for the fence to go up, you could have sought
8 legal advice, could you not?
9 A I hestitated on the strength that I didn't want to
10 be --
11 Q (Interposing) You could have, could you not?
12 A Yes.
13 MR. CONROY: He's harrassing the witness.
14 MR. GARNIER: Well, he's not answering my question.
15 I'm talking about -- here's this fence -- he's not answering.
16 Isn't that right?
17 MR. CONROY: Well, he's not given a chance to answer
18 the question.
19 THE COURT: Well, all right. Answer.
20 THE WITNESS: Well, I hestitated on the strength
21 that I hated to seem like the only person in the area that,
22 at that time, seemed to have any interest in preserving the
23 appearance of the community.

1 BY MR. GARNIER:

2 Q And then when Colonel Day came on the picture, you

3 felt more enthusiasm for the task ahead?

4 A I got the enthusiasm after that chain link fence

5 came up right under my nose to my front window.

6 Q So, that really, in your case, as in Colonel Day's

7 case, Mr. Hale's fence is what really aroused you, isn't

8 that correct, sir?

9 A It helped to trip the situation.

10 Q And even though you were willing to condone the

11 fact that you felt that the covenants had been violated in

12 one case, you felt that now you would not condone it for

13 somebody else 'cause you didn't like the fence?

14 A I didn't -- I saw -- it was very plainly, if we

15 permitted Hale's fence to remain, that this is exactly what

16 would happen to the whole community.

17 If we let this thing continue, that the whole

18 community would just go down the drain.

19 Q Well, when did you decide that this risk might

20 exist. Why didn't you decide that when the Finein fence

21 went up?

22 A As I said, I was a lone -- just a lone individual

23

1 because I had spoken to a neighbor of his and I don't like
2 to involve another person.
3 Q Well, let's not then. Did you know, at that time,
4 of the existence of the architectural committee?
5 A I did.
6 Q Did you go to the committee?
7 A No, sir.
8 Q Well, did you know of the existence of the civic
9 association?
10 A I did.
11 Q Did you go to the association?
12 A I -- not officially.
13 Q All right. But these are all steps that you could
14 have taken while the fence was being built, isn't that
15 correct, sir?
16 A Mr. Finein's fence.
17 Q And during this period of time, Colonel Day was
18 living nearby, was he not?
19 A Yes, but I hardly knew Colonel Day except to nod to
20 him.
21 Q All right. Now, nevertheless, he was living nearby
22 at the same time, isn't that correct?
23 A Yes.

1 Q Now, did there come a time, sir, when you and
2 Colonel Day went to the home of my client?
3 A Yes.
4 Q Was this before or after you went to Mr. Hale's
5 home?
6 A After we went to Mr. Hale's home.
7 Q And do you recall the nature of your conversation
8 with Mr. Finein?
9 A Yes.
10 Q Could you tell us what that was, please?
11 A Well, we told him that we were thinking of filing
12 a case against the fences. And that we felt, in all fairness,
13 we should tell him about it before we took the step, as
14 neighbors.
15 Q Did you, in fact, tell him on that night, sir,
16 or didn't Colonel Day tell him in your presence that you
17 really had no objection to the fence, but you found the Hale
18 fence to be offensive?
19 A I never told him such.
20 Q Did you hear Colonel Day say that to him?
21 A He may have.
22 Q In your presence?
23 A He may have said it.

1 Q All right.

2 A I don't remember any such thing.

3 Q Do you recall a conversation with Mr. Finein to

4 the effect that you felt that if his fence came down then

5 Mr. Hale would feel that he should take his down also?

6 A Not that way -- not in that manner.

7 Q In what way, sir?

8 A We told him that if -- I told him, at that time,

9 that I was afraid that it was his fence that had led Mr.

10 Finein to believe that it was satisfactory for him to put

11 up a similar fence on his lot.

12 Q Did you make him an offer to pay for removing his

13 fence, too?

14 A No, I wasn't in that financial status that I could

15 clear the neighborhood.

16 Q In fact, you were more concerned about removing

17 the fence that you found objectionable to your eyesight,

18 isn't that correct, sir?

19 A I objected to -- yes, we all object to things that

20 bother our eyesight.

21 Q That's right. That's why you were willing to pay

22 for removal of the other fence because that one bothered

23 esthetically whereas his did not, isn't that correct, sir?

1 A His has never done me any great -- led any great
2 feeling of beauty to me as a person.
3 Q Well, apparently for a period of over two years,
4 even three years --.
5 A I put up with it.
6 Q You put up with it without any great discomfort,
7 didn't you, sir?
8 A I wouldn't say it was any great discomfort.
9 Q And that fence hasn't changed in any way since the
10 day it was erected.
11 A Oh, yes it has.
12 Q It's been painted.
13 A Considered -- no, it's staining with weather and
14 it's turning wood black -- blacker each day.
15 Q Blacker each day.
16 A Blacker each day, as the weather gets into it.
17 Q I do declare. That's all I have, Your Honor.
18 A As the weather gets into it, that's what its doing.
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CROSS EXAMINATION OF MR. RIORDAN

BY MR. McGINNIS:

Q And then you waited a year and thirty-two days before filing suit, is that correct?

A That thirty-two days to file the suit was -- well, I don't know the exact date of filing suit. I don't have that.

Q Well, it's been stipulated that the fence -- Mr. Hale's fence -- was completed on May 10, 1972.

A Right.

Q And your lawsuit was filed on the 12th day of June, 1973.

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5 **CROSS EXAMINATION OF MR. RIORDAN:**
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8 Q Now, did you have contact with Mr. Hale between
9 July 10, 1972, and the time you filed the suit?
10 A Contact with him?
11 Q Yes.
12 A Sure.
13 Q About the fence.
14 A Only on New Year's day of '73. He was out washing
15 his car and I was going up the street and we exchanged
16 greetings. And I thought, well, it was a sad time to bring
17 the subject up, but I brought it up again.
18 I said, "Well, Mr. Hale, could there possibly be
19 any change of heart at this stage of the game? Do you have
20 any idea whether you might just move the fence back."
21 And he said, "Oh, no." So, we let it go at that.
22 Q And you waited another six months before filing
23 suit?

DIRECT EXAMINATION OF MR. HALE

BY MR. CONROY:

Q And how long did it take for your fence to get put up?

A One day, sir.

Q Did you have any conference with Mr. Riordan concerning the building of a fence prior to putting it up?

A No, sir.

Q Did you have any conversations with Colonel Day prior to putting up the fence?

A No, sir.

1 Q Did you make an application with the architectural
2 control board concerning the building of the fence?
3 A I didn't know of its existence, no, sir.
4 Q You say that the fence took you one day to put up?
5 A Not me, sir. It was put up under contract.
6 Q The fence company?
7 A That's right.
8 Q Now, Mr. Hale, when did you first learn that there
9 was objection to your fence?
10 A I received a letter from the Westwood Park Association
11 that said that there were complaints against my fence, in
12 which there was a copy of the covenants.
13 They pointed out in that letter, that I was in
14 violation of certain paragraphs of that covenants.
15 Q Do you remember the date of that letter?
16 A I have a copy of it in my file, sir.
17 Q All right. I wonder, could you get a copy of that
18 for me?
19 A Yes, I think my attorney has it.
20 MR. GARNIER: 10, June, Bob, I believe, I'm not sure.
21 Q Is this a copy of the letter that you received from
22 the citizen's association? (Handing)
23 A Yes, sir.

1 Q And what is the date of that?

2 A 8 June, sir.

3 MR. CONROY: Your Honor, I'd like to offer this

4 into evidence.

5 THE COURT: Any objection?

6 MR. McGINNIS: No, sir.

7 THE COURT: Complainant's number nine is the letter

8 dated June 8, '72, addressed to Mr. Hale from the civic

9 association.

10 (Thereupon, the above-referred to document

11 was marked Complainant's Exhibit No. 9,

12 for Identification.)

13 (Thereupon, the above-referred to document

14 was marked Complainant's Exhibit No. 9,

15 in Evidence.)

16 BY MR. CONROY:

17 Q And how long after the erection of the fence was

18 that?

19 A The best of my knowledge, the fence went up in early

20 May, but the date I don't know. I could substantiate it

21 with my contract with the fence company, though.

22 Q But this letter came approximately a month after the

23 erection of the fence?

1 A A month, yes, sir. Somewhere around there.

2 Q Had you had any conversations either with Mr.

3 Blomquist or Mr. Culpeper concerning the fence prior to the

4 time you received that letter?

5 A No, sir.

6 Q Did you subsequently have a meeting with the

7 architectural control committee?

8 A Yes, sir. That letter asked me to.

9 Q I see. And where was that meeting held?

10 A It was held in the president's of Westwood Park

11 Association home on Tower Street.

12 Q And how soon after you received that letter was it

13 held?

14 A Whatever the date was that was requested on the

15 letter. I don't recall what it was, sir.

16 Q And who was present at that meeting?

17 A A Lieutenant Colonel Hineman, I believe his name is,

18 the president of the Westwood Park Association, and Mr. Warren

19 Culpeper, sir, was representing himself as a member of the

20 Westwood Park Architectural Association or committee.

21 Q And you say you had received a copy of the restrictive

22 covenants prior to the letter?

23 A Yes, sir. I received it at the time I received that

1 letter from the Westwood Park Association.

2 Q Were you advised at that meeting by Mr. Culpeper

3 or by the president of the citizen's association, that the

4 covenants were in violation?

5 A Not in that manner, sir. I submitted at the time

6 of that meeting a letter asking for a waiver and consideration

7 of my fence.

8 And the committee, during the talk of what I had

9 briefed them with on the contents of the letter that I

10 submitted and the talk about the fence, it came out that

11 there were violations of the covenants, yes, sir.

12 But, they did not come out and say, "You are in

13 violation of the covenants."

14 Q Could you tell upon reading the restrictions that

15 your fence did violate the covenants?

16 A Yes, sir.

17 Q And, yet, you elected not the move the fence?

18 A I elected to go before the architectural committee

19 and ask for a waiver to retain the fence as it said in the

20 covenants that I can do.

21 Q And what was the result of your going before

22 the architectural committee with a request for waiver?

23

A They said that they would take it under advisement. And I waited some couple of weeks and I got a letter from them saying that they could not do it -- could not permit it because it would establish a precedent.

Q I see. And what was your reaction to that letter?

A They told me not to do anything with the fence, so I ignored it.

Q You just left the fence were it was?

A Yes, sir.

Q Knowing that it was in violation?

A Well, I'm not sure that it was in violation. It wasn't that clear in my mind that it was a violation, sir.

MR. CONROY: Your Honor, I think that's all I have of Mr. Hale.

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4 DIRECT EXAMINATION OF MR. FINEIN
5 BY MR. CONROY:
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9 Q And were you familiar with the restriction concerning
10 fences?
11 A I knew there was restrictions concerning the fence,
12 yes.
13 Q And when did you decide to build the fence?
14 A In March of 1971.
15 Q This was rather an expensive fence, was it not?
16 A Yes, it was.
17 Q And you said you were aware of restrictions concerning
18 fences.
19 A That's correct.
20 Q Did you read the restrictions prior to putting up
21 the fence?
22 A I had lost my covenants, so I proceeded to the
23 county building -- the new county building -- and went to

1 the office I was referred to for looking up the restrictions.
2 Q Well, I'm not interested in what you did at the
3 county building.
4 MR. GARNIER: Well, if Your Honor please, I think
5 he's entitled to testify as to what he did in trying to
6 find out if there were covenants.
7 MR. CONROY: Well, that's all right.
8 MR. GARNIER: Just a second. Let him finish. That's
9 exactly what he's been asked. That's what he did to find out
10 about the covenants. That's what he's telling, but he doesn't
11 like the answer.
12 MR. CONROY: Well, he went to the county to
13 ascertain. If that's what he said -- if that's what he
14 said he heard.
15 MR. GARNIER: He wasn't finished, unless the Court
16 says he cannot.
17 MR. CONROY: Your Honor, I think that's hearsay.
18 THE COURT: Sustained as hearsay.
19 MR. GARNIER: If Your Honor please, at this juncture
20 I would say to the Court, whatever somebody said to him would
21 not be hearsay in the same sense because we're not trying to
22 get to the truth of the fact as to what was said, but only
23 for the effect upon the person who heard it. And what he

1 did as a result thereof. And that's an exception to hearsay.

2 THE COURT: Well, it is, but I don't think the

3 state of mind is an issue in this case. I'm going to decide

4 this case on the basis of what actually happened, and not

5 on somebody's state of mind.

6 All right. Proceed.

7 MR. GARNIER: All right, sir.

8 BY MR. CONROY:

9 Q Well, in any event, Mr. Finein, you subsequently

10 did build your fence, is that correct?

11 A Yes, I did.

12 Q Did you have any conversation with Mr. Riordan

13 before doing it?

14 A No, I didn't.

15 Q Did you have any conversation with Colonel Day before

16 doing it?

17 A No, I didn't. With Colonel Day's landlord who owned

18 the house that he was in at that time.

19 Q But not with Colonel Day himself?

20 A No, sir. I figured that was the business of the

21 landlord. He was the property owner.

22 Q Now, Mr. Finein, did you make any application with

23 the architectural control committee?

1 A No, sir. Because no one seemed to know who they
2 were at that time. It was a very vague organization.
3 And I've talked with neighbors and no one seemed to
4 know and I didn't even know who the president of the civic
5 association was.
6 Q Were you aware that there were two other fences erected
7 at the corner of Fairwood Avenue and Shreve Road?
8 A Yes, sir, I was.
9 Q Were you aware, also, that those fences were in
10 violation of the restrictions?
11 A I had no idea of what they were in violation of
12 because, as I said, I did not have a copy of the covenants to
13 check. So, I went to the courthouse.
14 Q And were you ever given a copy of the restrictive
15 covenants?
16 A On the closing of our house, I was given a copy, which
17 was six years before I erected the fence.
18 Q And you had lost it?
19 A In six years, you lose-- or misplace, a lot of
20 papers.
21 Q I see. So, this paper had been lost or misplaced
22 during that period?
23 A It apparently has. I couldn't find it.

1 Q So, that your testimony -- so, it is your testimony,
2 Mr. Finein, that you never did seek the approval of the
3 architectural control committee or of the citizen's association?
4 A No, sir. I contacted my neighbors instead -- my
5 immediate neighbors around the property.
6 Q Yes, but you did not contact the architectural
7 control?
8 A No, sir. As I said, I didn't know who they were
9 and nobody else seemed to know.
10 Q But you were aware -- definitely aware at the time
11 of the building of the fence that there were restrictions
12 that applied to it?
13 A Yes, sir. And that's why I proceeded out here to
14 Fairfax County, to find out why and what they were. And I
15 built according to the information I received.
16 MR. CONROY: Your Honor, I think that's all I have
17 of Mr. Finein.
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MOTION TO STRIKE:

MR. McGINNIS: If Your Honor please, the evidence in the case shows that, number one, in the past, there had been the two fences approved on Shrevewood Road which were in violation of the restriction.

The Finein fence had been built one year before the Hale fence. All parties had sat by and done nothing during that period of time.

The evidence shows that the fence went up, that Mr.

1 Riordan waited approximately two weeks before he raised a
2 question. It went to the committee -- the alleged committee --
3 for approval, retroactively.
4 The committee said they would not approve anything
5 retroactively. They did not say we approve or disapprove of
6 the fence."
7 They did not say take it down or not take it down.
8 They simply said, "We will not approve anything retroactively."
9 This was made known to Mr. Riordan and to Colonel
10 Day. They did not take any action for one year and thirty-
11 two days after the fence was completed.
12 The covenants -- section two of the covenants says
13 that, "Fences shall be approved like unto the building."
14 Nine sets up the architectural committee.
15 And then says that, "Or in any event, if no suit
16 to enjoin the construction has been commenced prior to the
17 completion thereof, approval shall not be required and the
18 related covenant shall be deemed to have been fully complied
19 with."
20 If the complainants in this action were to be in
21 court properly, they would have come in within a reasonable
22 time.
23 And no suit was filed for a year and thirty-two

days.

I submit to the Court that they have waived their rights and that they are not entitled to an injunction.

I further submit to the Court that there has been no damage that the complainants can complain of. They both readily admit that it has not limited their light. It has not limited their air. It has not limited their vision.

It has been objective to them esthetically, but it has made no other limitations.

I submit to the Court that there is not sufficient damage to the complainants to justify an injunction.

THE COURT: Mr. Garnier.

MR. GARNIER: If Your Honor please, my motion will be basically on the same grounds as that made by Mr. McGinnis and maybe with even more emphasis with the passing of time, as it is even greater in this case.

I do have one additional ground, if Your Honor pleases. And it is the fact that there has been absolutely no evidence presented to the Court with reference to what the building setback lines consist of, which constitute the restriction imposed upon a building of a fence.

Now, I call the Court's attention, if the Court pleases, to paragraph number one of the covenants which

1 provides that, "No fence or wall shall be erected, placed or
2 altered on any lot nearer to any street than the minimum set-
3 back lines unless similarly approved."
4 Now, at this juncture, we don't know what the set-
5 back line refers to.
6 But then we go to paragraph number four. We see
7 what the setback lines are which are referred to.
8 It says that, "No building shall be located on any
9 lot nearer to the front lot line or nearer to the side street
10 line than a minimum building setback line shown on the
11 recorded plat."
12 Now, the recorded plat, if Your Honor pleases, showing
13 what the setback line consists of is not before the Court
14 here today, has not been placed into evidence.
15 And, therefore, I submit to the Court that the figures
16 presented by the gentleman, whether they be ten feet or twelve
17 feet or five feet, in no way tell us or lead the Court to
18 draw a conclusion as to whether or not that distance is
19 shorter than the setback line which is shown in the plat.
20 So on that ground, if Your Honor pleases, we submit
21 to the Court that insufficient evidence has been presented
22 to the Court.
23 We further submit to the Court that, as a matter of

1 common law estopped, the complainants in this case are
2 prohibited from bringint this action at this time because of
3 the time lapse which took place.
4 And we would invoke the doctrine of laches, if
5 Your Honor pleases.
6 Finally, we submit, as did Mr. McGinnis on behalf
7 of his client, the paragraph number ten which says that,
8 "If no suit is filed to enjoin the construction prior to the
9 completion of this construction, then approval is deemed to
10 have been given."
11 It speaks very strongly, very explicitly and bars
12 a cause of action.
13 And, finally, we submit to the Court that paragraph
14 number twelve provides, "An enforcement shall be brought in
15 law or in equity against any person or persons attempting
16 to violate any covenants, either to restrain violation or
17 recover damages."
18 It says norhing about filing a lawsuit to take the
19 kind of steps which are requested here, namely, to remove
20 the fence.
21 THE COURT: Is that what they're asking, to remove
22 the fence? Wouldn't that be an equitable proceeding?
23 MR. GARNIER: Your Honor, what I'm saying, in order --

1 under the law in equity, they're asking for one of the covenants
2 to restrain action, which is an action which is placed in
3 the course of construction -- which is the tenor of the
4 entire covenants -- or to recover damages.
5 The action brought here, if Your Honor pleases, is
6 for neither one of these remedies. For all these reasons,
7 we move to strike.
8 THE COURT: Mr. Conroy.
9 MR. CONROY: If Your Honor please, I take these
10 various points here with regard to an inverse order, with
11 regard to the action that has been taken here by the
12 complainants.
13 Certainly, our bill of complaint is asking for one
14 thing, and one thing alone. We're simply asking these
15 gentlemen to move their fences back.
16 We're not asking Mr. Finein to remove his wooden
17 fence entirely. We're not asking Mr. Hale to remove his
18 chain link fence.
19 We're simply asking them to do as they have been
20 required to do by the restrictions, to move their fences
21 back to the line where they should be.
22 And, Your Honor, I think that's well within the
23 scope of the restrictive covenants.

1 I can't think of us asking for a milder recourse
2 from the Courts, or one that would be less damaging to either
3 of these gentlemen, then simply to ask these gentlemen to
4 move their fences back to where they should have been in the
5 the first place.
6 I think it's well within the range of remedies
7 there.
8 Your Honor, with regard to Mr. Garnier's objection
9 concerning the setback lines, at the very beginning of this
10 trial, all parties stipulated into evidence the deed of
11 dedication to this property together with the recorded plat
12 which is attached thereto.
13 It's about a sixteen-page document, Your Honor, that
14 we have stipulated. And, certainly, Your Honor, at the time
15 it was stipulated, it was my feeling that it was stipulated
16 for the purpose of saving time and so that the Court could
17 read what the restrictions were.
18 And the Court could see which restrictions applied
19 to this particular situation.
20 Your Honor, I think it's quite clear that the clause
21 that pertains here is the one that says, "In any event, no
22 building shall be located on any lot nearer than twenty-five
23 feet to the front lot line or nearer than twenty-five feet

1 to any side street line."

2 When it comes to fences, Your Honor, it says, "No
3 fence or wall shall be erected, placed, or altered on any
4 lot nearer to any street than the minimum building setback
5 lines unless similarly approved.

6 And, Your Honor, I think that clearly the minimum
7 setback line is twenty-five feet. There is no building
8 restriction line as such drawn on the plat, but there is
9 this provision that says the twenty-five feet limitation.

10 Your Honor, I think that the mere fact that out of
11 185 lots in the subdivision, that these are the only two that
12 attempt to violate it attest to the English, to the general
13 interpretation of the English language that, that is the one
14 that applies here.

15 Your Honor, insofar as the restriction that requires
16 the filing of a suit, "Prior to the completions thereof,"--
17 Your Honor, I think, clearly that refers to the construction
18 of a building.

19 If the Court were to hold that view, it would mean
20 that between eight o'clock in the morning or nine o'clock in
21 the morning when the fence truck arrived and four o'clock
22 in the afternoon when the fence was completed, that Mr.
23 Riordan and Mr. Day would have to find themselves a lawyer,

1 present all the facts to him, do the necessary record room
2 work that's necessary to get a suit of this sort filed, go
3 ahead and get the papers into the courthouse and on record
4 before that truck moved out that afternoon.
5 Now, Your Honor, I submit that that clearly is a
6 ridiculous implication to put on those words.
7 I think that Mr. McGinnis is taking a more reasonable
8 approach when he says a reasonable time is necessary here.
9 And I think, Your Honor, certainly in this situation,
10 the actions of these gentlemen have been most reasonable.
11 They didn't just go barreling out to a lawyer and ask him
12 to slap suit on your neighbor. They tried every way they
13 could to do this without the necessity of a lawsuit.
14 They went to the building association, they went to
15 the neighbors, and they were turned down. Ultimately, they
16 have filed this suit as a last resort.
17 I would say, Your Honor, that as far as laches goes,
18 laches is one -- I have an annotation, an ALR -- it's discussed
19 in many cases and it's one of those terms that depends upon
20 the circumstances in every case.
21 There are cases that say twelve years is not laches.
22 There are other cases that say a much shorter time is laches.
23 And I would say that, Your Honor, in considering

1 whether or not laches have attached here, the Court should
2 take -- and, as I said, I really don't think it has because,
3 as far as Mr. Hale is concerned, Mr. Riordan and Mr. Day took
4 action within two weeks. They went over and talked with him.
5 They went to the citizen's association. Within a
6 month, he had a letter from the architectural control board.
7 And within a year, the actual legal machinery was set in
8 motion here.
9 But, I think, Your Honor, in considering laches, there
10 is more than time itself -- time, alone, concerned.
11 And that is that there is another element, too. And
12 that is that the defendants have to be damaged by the delay.
13 And in this situation, Your Honor, there is
14 absolutely no difference insofar as Mr. Finein and Mr. Hale
15 are concerned.
16 No additional damage has accrued to them from the
17 time that these fences were built until the present time.
18 We're asking the same thing today they would have
19 been asked six months ago or earlier, simply to move back
20 to the line. The expense would be the same. The time
21 involved would be the same.
22 And I think, Your Honor, that in the absence of some
23 damage caused by the delay here in filing suit -- in the

1 absence of some damage, laches wouldn't attach.

2 The reason you have the doctrine of laches, as

3 Your Honor knows, is in the event that evidence becomes lost

4 or people's memories become very hazy as to events, or the

5 defendants find themselves in a difficult position after

6 a lapse of time.

7 And they don't do that. There's no difference today

8 than there was, if, by some miracle, these people had been

9 able to get that suit filed the same day the fence was built.

10 I would say, Your Honor, that what we have here,

11 quite frankly, is a situation where two gentlemen put up

12 fences on their property.

13 They had knowledge -- certainly Mr. Finein had

14 actual knowledge of the restrictive covenants. He knew there

15 were restrictions on the property. He knew there was a list

16 of restrictive covenants.

17 Mr. Hale had gone to a settlement. He had a title

18 examination. He had a certificate of title and a set of

19 restrictions.

20 These gentlemen went and took it upon themselves, I

21 think, knowingly, Your Honor, to violate these restrictions.

22 And I just don't think that the community should be

23 penalized in that regard so, I move that the Court overrule

1 the motions.

2 THE COURT: All right, sir. Anything further?

3 MR. McGINNIS: If Your Honor please, in this

4 particular instance, what Mr. Conroy says is to move the

5 fence back.

6 I submit to the Court that to move the fence back

7 would no in any way benefit the complainants. They would

8 be looking at the same fence in front of them.

9 It would simply be twenty-five feet further back

10 from the lot line, so, that all it would do is create a

11 twenty-five foot strip in there.

12 Now, these complainants are on the opposite side of

13 the street. The erection of that fence does not interfere

14 with their view.

15 Had they been a next door neighbor, it might well

16 have been a different thing, but they will be looking at

17 exactly the same thing.

18 They'll have exactly the same amount of light, exactly

19 the same amount of air, and the exactly the same view. I

20 submit to the Court that there is no injury.

21 And, at the same time, they're asking the Court to

22 strictly construe the restrictions as to some parts of it,

23 but as to paragraph ten, they're saying liberally construe it.

1 I submit that the construction of the restrictions
2 should be consistent throughout.
3 THE COURT: All right. The Court has considered
4 the evidence. And the Court finds that, in May of 1971,
5 Mr. Finein completed his fence and that Mr. Hale completed
6 his fence on May 10, 1972.
7 And the record shows that on June 5, 1973, the bill
8 of complaint was filed in this case.
9 The Court feels that both Mr. Hale and Mr. Finein
10 are charged with notice of the restrictive covenants that
11 are contained -- and in interpreting the restrictive covenants
12 and considering covenants two, four, nine and ten, the Court
13 feels that there has been a waiver of any violation on the
14 part of these individuals, by the architectural committee
15 or the people that are now seeking to enforce the covenants,
16 because they've not acted within a reasonable time in
17 accordance with paragraph ten.
18 And, therefore, the Court grants the motion to strike
19 and notes the complainant's exception to the Court's rule.
20 MR. McGINNIS: Thank you, Your Honor.
21 (Thereupon, at 1:15, the hearing was
22 concluded.)
23 - - -