

TITLEHOLDERS--HOPETOWN ROAD
BOARD OF APPEALS HEARING
15 APRIL 2014

Outcome of the Appeal

The Titleholders come to the Board of Appeals (“BOA”) to challenge a determination by the Covenants Committee (“the Committee”) that their backyard chickens are not “household pets” as are permitted to be kept under Rule D-102, and that the chicken coop housing the chickens was placed on their Lot without prior approval by the I’On Design Committee (“IDC”) in violation of Section 4-101 of the Declaration of Covenants, Conditions and Restrictions for I’On (“CC&Rs”).

The Board of Appeals unanimously finds that the Covenants Committee acted reasonably and in good faith in interpreting and applying the Rule and the CC&Rs. Therefore, the Board of Appeals confirms the Committee’s determination that the chickens violate Rule D-102, and that the coop was constructed without the mandatory prior IDC approval. (Bob Davis, as a member of the Covenants Committee at the time of its determination in this matter, did not vote on this appeal.)

The Board of Appeals Meeting

The meeting of the Board of Appeals held on April 15 was its first-ever meeting. As a result, certain issues arose which had not been previously considered: whether observers were permitted at the meeting, and whether the Titleholders bringing the appeal could be represented by counsel, particularly in light of the lack of prior notice that an attorney would be present.

The BOA agreed to permit observers to remain for the meeting. After consideration, the BOA agreed to allow the Titleholders to be represented by counsel who spoke on their behalf, but informed them that the BOA members would make no statements and answer no questions, as no counsel was present representing the BOA.

Counsel for the Titleholders made a presentation on behalf of the Titleholders. He asserted the following:

- That there have been procedural irregularities in the proceedings in this matter;
- That the minutes of the Covenants Committee provided to the Titleholders contained errors;

- That issues of fair play and due process arose because of secretive proceedings of the Trustees;
- That a letter from the Founder sent to the BOA and the Trustees indicated that the Covenants Committee had misapplied Rule D-102;
- That the chicken coop, because it is movable, is not subject to IDC approval; and
- That the chickens are in fact household pets.

Following the presentation, the BOA reviewed the matter. Upon due consideration, the BOA concluded that counsel's presentation contained several factual errors, and that no new facts had been presented to provide a basis for the BOA to override or modify the Covenants Committee's earlier decision.

History of this Matter

The Titleholders received a letter from the SCS, the Assembly's management company, sent on 26 August 2013, that their chickens were not household pets. They received a second letter on this point dated 24 October 2013. In both letters, the Titleholders were given ten days to remove the chickens or respond to the letters. No fine was assessed in either letter, although the possibility of imposing a fine was mentioned. In addition, in a separate letter dated 24 October 2013, the Titleholders were notified that their chicken coop had not been properly submitted to the IDC. Again, they were given ten days to correct this situation or to respond to the letter.

During this time, the Titleholders spoke with the community manager, Trisha Elrod, on nine separate occasions. Several of these calls were lengthy and confrontational in nature. In addition, they contacted an individual Trustee directly. On 4 November, one Titleholder notified SCS that she would be asking to appear before the Trustees and would be present at the November 21st Trustees meeting. On 18 November, she notified SCS that she would not be present at that meeting, and requested that she be able to attend the December Board meeting. The next day, having been advised that the Trustees did not meet in December and that she could submit her presentation in writing for the November meeting, the Titleholder refused to submit a written presentation.

The letters issued by SCS as the Assembly's management company were in accordance with the then-current policy for covenants enforcement. No fine was assessed at that time. The Trustees did not vote to issue these letters.

When the issues of the chickens and the coop were raised at the November Trustees meeting, a motion was made to deny the appeal because neither of the Titleholders had availed themselves of the opportunity to appear in person or in writing to present their views. After discussion, which was held in public and reported in the meeting minutes, the motion carried.

No further action was taken on this matter until 3 March 2014.

At the Trustees meeting of 23 January 2014, the Trustees established a Covenants Committee, a Board of Appeals, and a set of procedures for both bodies, pursuant to Sections 2(102)(b)(2) and (4) of the CC&Rs, and Sections 7-101 and 7-102 of the Bylaws of the Assembly (“the Bylaws”). While the Bylaws provide in Sections 7-101 and 7-102 that the Trustees “may” appoint a Covenants Committee and a Board of Appeals, respectively, in previous years this had not occurred. The new Trustee in charge of Compliance recommended that the community would be well served if these two bodies were established. The Covenants Committee and the Board of Appeals were created specifically to establish a standard procedure for all Titleholders to have matters heard by a forum of fellow residents with respect to Assembly decisions that they feel do not meet the requirements of the Governing Documents, or when they feel they have not been dealt with in accordance with processes established in the Governing Documents.

Following the Trustees’ approval of these entities in January, members of each were appointed at the Trustees meeting on 27 February. (At the meeting of 27 March, the Covenants Committee appointments were revised to remove Mike Parades as a member and appoint Linda Rinaldi in his place.)

To ensure the fairest possible consideration of all enforcement matters, and in accordance with the Covenants Committee procedures, the community manager referred any outstanding enforcement issues and any new enforcement issues to the Covenants Committee for fresh consideration.

At the Covenants Committee’s direction, SCS sent the Titleholders a new letter dated 3 March 2014 informing them that their chickens were not “household pets” under Rule D-102, that their coop had not been properly approved by the IDC, and that because after prior communication they had failed to remedy the violation, they were being assessed a \$50 fine and had ten days to remove the chickens and the coop. They were also informed that they could notify the management company if they wished to be heard before the Covenants Committee as

to why they were not in violation and should not be fined. On 5 March, the Titleholder notified SCS of her request to meet with the Covenants Committee, and the compliance deadline was suspended accordingly.

The Titleholder met with the Covenants Committee on 19 March. At that time, she said that she had researched Town of Mount Pleasant ordinances and learned that chickens were permitted. When she researched I'On's Rules, she found no clear answer, but made no attempt to request clarification from the property management company or the Board. She also asserted that the chicken coop did not require IDC approval before it was placed on her Lot.

On 24 March, the Committee determined that the chickens and unapproved coop constituted a violation, that the fine would be assessed, and that the chickens and coop should be removed within ten days. The Titleholders were notified that they could appeal this determination to the Board of Appeals. They provided notice of their wish to appeal, resulting in a second suspension of the compliance deadline.

Between the decision of the Covenants Committee and the meeting of the BOA on 15 April, Titleholders held a public event at which they gave away 50 baby chicks to neighborhood families. Those families were not informed of the Committee's recent decision.

The BOA met on 15 April. Although the Bylaws do not provide for Titleholders to appear personally before the BOA, Titleholders were invited to speak at the BOA meeting to provide additional or new information about why they were not in violation, or why the Covenants Committee might have misinterpreted the Rules or CC&Rs. The Titleholder indicated mid-day on 15 April that she would attend, but without prior notice, Titleholders appeared represented by an attorney, and declined to speak on their own behalf. Thus, the members of the BOA were unable to ask questions of the Titleholders directly to better inform themselves, as would have been the case had counsel not been present. As stated earlier, no counsel was present to represent the BOA.

To summarize, the Covenants Committee and the Board of Appeals were established to improve the Assembly's ability to enforce compliance efficiently and in an orderly fashion. The Trustees had never taken prior action on the merits of the Titleholders' issues. There had been extensive and frequent communication between the management company and the Titleholders (as well as direct contact with a Trustee) that had failed to result in any resolution of the matter. Finally, the enforcement process with respect to the Titleholders was re-started at the beginning of this March.

The creation of the Covenants Committee and the Board of Appeals has resulted in the Titleholders having been afforded extra time to comply with our rules and more due process than was afforded them under the former system. The BOA believes that the Assembly and its committees have treated the Titleholders fairly and with due respect for the processes and procedures established under our Governing Documents, but that the Titleholders have not demonstrated a similar respect for those procedures.

Issues before the Board of Appeals

The Board of Appeals must address three issues:

- Did the Covenants Committee exercise reasonable judgment in defining “household pets” as not including chickens, and in concluding that the chicken coop required IDC approval before construction? To answer this question, the BOA must also determine:
 - The meaning of “household pets” as used in Rule D-102 and
 - Whether the chicken coop is an “Improvement” under Section 4-101 of the CC&Rs.

It is important to note that these questions do not require addressing the merits, benefits and desirability—or lack thereof—of chickens as animals to be kept in I’On, or the architectural or design merits of the chicken coop currently on the Titleholder’s Lot.

The work of the Board of Appeals is guided by community’s principles established before the first home was constructed in I’On.

Under the Preamble of the CC&Rs, one of the guiding principles of the I’On Community, as endorsed and supported by the Founder and Titleholders, is

[t]o encourage an advancing level of civility which promotes an individual’s right to make personal lifestyle decisions...*while recognizing that in order to promote the health, happiness and peace of mind of the majority, each person must give up a certain degree of freedom of choice for the benefit of the whole.* (emphasis supplied)

CC&Rs, Preamble, On Civility and the Rights of Individuals

And further:

[t]o achieve, through the operation of this Declaration and the other Governing Documents and the good will of the Titleholders and residents of I'On, a neighborhood governing body that ceaselessly strives for harmony between all parties who own Real Property, live or work in I'On.

CC&Rs, Preamble, On Self Government

The Assembly, under the CC&Rs, is the “primary body responsible for administering this Declaration.”

[Its] primary purposes are...to exercise the authority granted to it under the Governing Documents to carry out the duties assigned to it and exercise the authority granted to it under the Governing Documents...

CC&Rs, Section 2-101

The Trustees are elected as representatives of the community, and given the responsibility to exercise

all of the rights and powers of the Assembly...as provided in the Bylaws...without a vote of the membership.

CC&Rs, Section 2-102(b)(1)

In other words, the Assembly is a representative democracy with clearly established powers, responsibilities and processes, including processes for requesting changes in decisions of the Trustees and, ultimately, for electing Trustees whose views are aligned with the views of a majority of Titleholders.

These founding principles and designated responsibilities have included establishing the Covenants Committee and the Board of Appeals to provide all Titleholders with fair and reasonable opportunities to understand and comply with our community rules. These bodies also help balance the ideals described above of assisting Titleholders make personal choices in the context of limiting some choices out of respect for the benefit to the whole community, while endeavoring to maintain civility and harmony in I'On.

Are chickens “household pets” under Rule D-102?

When interpreting and applying rules, it is beneficial to ensure that definitions are clear and easily understandable in ordinary usage. Clear rules allow homeowners the freedom to use their properties within the context of community regulations without fear of repercussions or

enforcement actions, based on a shared community understanding of the rules' meaning and scope. While Rule D-102 does not define "household pets" at length, the term should realistically and practically be interpreted according to normal conversational, non-legalistic usage.

It is clear that many domesticated, and even undomesticated, animals may be considered "pets," based on the care and affection given them by their owners. However, in Rule D-102, "pets" is modified by "household," which clearly indicates that "pets" are restricted to animals kept exclusively or primarily, and customarily, inside a home, in normal conversational understanding. Pygmy goats, miniature horses, or even 4-H calves could be considered pets under some circumstances, but they are not primarily or customarily kept by families in their homes.

By contrast, to define "household pets" as including chickens introduces a significant lack of clarity making it more, rather than less, difficult, for residents to adhere to community rules in the free use of their property. A test or definition that limits pets to those normally kept in homes is very clearly distinct from a definition that includes animals normally found in barnyards, zoos or other menageries. An overly-broad definition of "household pets" raises even more questions about what might be covered. If chickens, why not geese? Ducks? Guinea hens? Peacocks? Or non-fowl animals, such as goats, piglets or burros? The result would be that homeowners would have no clear understanding of which animals qualify as household pets and which do not.¹

To interpret "household pets" overly broadly as including chickens also raises the specter of even more community rule intrusion into homeowners' lives and property use. As stated in the Preamble to the CC&Rs, the Founder and Titleholders of I'On are committed

[t]o encourage an advancing level of civility which promotes an individual's right to make personal lifestyle decisions so long as they do not interfere with or impair the personal or property rights of others.

CC&Rs, Preamble, On Civility and the Rights of Individuals

Thus, the bias in I'On is against extensive rules. Based on this principle, the Assembly has very few rules, especially compared to many other covenanted communities, and the Trustees have historically intentionally

¹ We are aware that at some point in the past, the Titleholders have also had ducks in a pen on their property. This fact illustrates that the potential problems caused by an over-broad definition of "household pets" are not at all hypothetical.

avoided implementing more and more rules to impinge on residents' lives. Including chickens as "household pets" would require far more rules and definitions. For example, if two chickens are pets, are eight an egg farm? Are two dozen a brooding facility? How high must fences be to prevent chickens flying the coop? What kind of animal husbandry practices must be enforced to avoid attracting vermin and predators? Once again, it is clear that an easily recognizable distinction between "household pets" and other animals simplifies life for residents and keeps rule-making at a minimum, consistent with our community's principles.

In general, although owners may feel affection for, and even name, many animals, those animals that are customarily susceptible of being raised for food, fiber or similar productive purposes are considered livestock. The Titleholders have repeatedly cited the availability of eggs as a primary reason for raising chickens on their property. The availability of fresh eggs to children in I'On was also the ostensible rationale behind the chick giveaway conducted by the Titleholders in recent weeks. In fact, the chick giveaway clearly demonstrates that the Titleholders themselves believe that chickens are livestock and not pets.

In sum, we interpret "household pets" under Rule D-102 as applying to animals normally, primarily and/or customarily kept within homes by their owners, as distinguished from animals normally or customarily kept in barnyards, zoos or menageries when owned or not in the wild. Such an interpretation provides residents with an easily-understood test for whether they should be keeping an animal in I'On. This interpretation has the added benefits of being easily applied, and of avoiding additional and excessive regulation of domestically-owned animals.

Therefore, it is the unanimous opinion of the Board of Appeals that chickens are not "household pets" within the meaning of Rule D-102.

Should the chicken coop have been approved by the IDC before it was placed on the property?

The terms of Section 4-101 of the CC&Rs are abundantly clear:

No Improvements shall be made, placed, constructed or installed on any Lot...without prior approval of the I'On Design Committee in accordance with this Article...

"Improvements" are similarly clearly defined in Exhibit A to the CC&Rs:

Improvements: any grading or other site work on Lots, including...any structure or thing attached to, placed, constructed or installed on any Lot...

The chicken coop is without question a “structure or thing,” and it has equally without question been “made, placed, constructed or installed” on the Titleholders’ Lot.

The Titleholders have admitted they never submitted the coop for IDC approval; they claim instead that they were not obligated to do so, ostensibly because it is portable.

Characteristics of impermanency or transportability have no effect on the homeowners’ obligation to obtain IDC approval before “construct[ion] or install[ation].” The claim that no obligation to submit existed is clearly without merit.

Therefore, it is the unanimous opinion of the Board of Appeals that the Titleholders’ failure to submit the chicken coop for IDC approval is a violation of the CC&Rs.

Did the Covenants Committee exercise reasonable judgment in its decision?

In reaching its conclusion, the Covenants Committee based its reasoning on “the normally understood meaning” of the words “household pets.” In addition, the Committee referred to the explicit language of the CC&Rs with respect to IDC approval requirements in determining that the coop should have been submitted for prior approval.

Deferring to normal conversational understanding with respect to the term “household pets,” as well examining explicit and clear existing rules relating to structure approval by the IDC, is a sound and reasonable method to arrive at a judgment.

Therefore, it is the unanimous opinion of the Board of Appeals that the Covenants Committee exercised reasonable judgment in its decision, and that its reasonable judgment should not be overruled by this Board of Appeals.

Decision of the Board of Appeals

It is the unanimous decision of the Board of Appeals that the Covenants Committee was correct in its determination that chickens are not “household pets” within the meaning of Rule D-102, and that the chicken

coop was not properly submitted for IDC approval prior to construction as required under Section 4-101 of the CC&Rs.

Accordingly, the Titleholders have ten days from receipt of this decision to remove the chickens from I'On and the chicken coop from their yard. They must also pay the assessed fine of \$50 within the same ten-day period.

Further failure to comply with I'On rules on this issue may result in the imposition of a fine of an additional \$100.

The BOA hereby notifies the Titleholders that, on written notice within ten days of this decision, they may appeal this matter to the Board of Trustees for further hearing. The Board of Trustees may exercise its discretion in deciding whether to hear such an appeal, if made.

The Board of Appeals
Deborah Luth Bedell, Chair
Bill Settlemyer
Fred White
Stephen Wood

Bob Davis did not vote on this matter.