

IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

PATRICK MATTHEWS BOGART :  
and BENJAMIN KURTZ :

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Plaintiffs, :

v. :

Case No. 273518-V

CARDEROCK SPRINGS CITIZENS :  
ASSOCIATION, INC. :

Defendant. :

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT**  
**OF PLAINTIFFS' OPPOSITION TO DEFENDANT'S**  
**MOTION FOR PRELIMINARY INJUNCTION**

COMES NOW, the Plaintiffs, Patrick Matthews Bogart and Benjamin Kurtz, by and through counsel, VanGrack, Axelson, Williamowsky, Bender & Fishman, P.C. and Samuel D. Williamowsky, Esq., Jeffrey M. Axelson, Esq., and Koushik Bhattacharya, Esq. and file this Memorandum of Point and Authorities in Support of Plaintiffs' Opposition to the Defendant's Motion for Preliminary Injunction:

**I. DEFENDANT FAILS TO SATISFY THE FOUR CRITERIA REQUIRED TO OBTAIN A PRELIMINARY INJUNCTION**

In its Motion for Preliminary Injunction the Defendant identifies the four factors the court must examine when considering the appropriateness of granting a preliminary injunction. However, the Defendant fails to note that as the moving party, the Defendant has the burden to satisfy the criteria and have failed to do so. The Defendant must show (1) that there is a real probability that the Defendant will succeed on the merits; (2) that injury that would be suffered if interlocutory injunction is granted is less than harm that would result from its refusal; (3) that the Defendant will suffer irreparable injury if it is not granted; and (4) granting injunction would be in public interest. *Maloof v. State, Dept. of Environment*, 136 Md.App. 682, 767 A.2d 372

VANGRACK, AXELSON  
WILLIAMOWSKY,  
BENDER &  
FISHMAN, P.C.  
ATTORNEYS AT LAW  
401 N. WASHINGTON ST.  
SUITE 550  
ROCKVILLE, MD 20850  
(301) 738-7600

2300 M STREET, N.W.  
SUITE 800  
WASHINGTON, D.C.  
20037

7799 LEESBURG PIKE  
SUITE 900 N  
FALLES CHURCH, VA 22043

(2001). The failure to prove the existence of even one of the four factors that must be found when considering the appropriateness of granting a preliminary injunction precludes the grant of injunctive relief. *Ehrlich v. Perez*, 394 Md. 691, 908 A2d. 1220 (2006)

**A. Likelihood on the Success of the Merits**

In its Motion for Preliminary Injunction, Defendant states that the Plaintiffs are not challenging the reasonableness of the ARC decision and that the Plaintiffs are attacking the underlying validity of the covenants as a whole. In its original Complaint the Plaintiffs were seeking a declaratory judgment regarding the covenants **and** monetary damages concerning breach of contract and constructive taking. In addition, the Plaintiffs have filed an Amended Complaint adding the possibility of a more simple remedy in the form of an approval of its proposed renovations.

Defendant suggests that *Kirkley v. Siepelt* is dispositive in the case at bar and therefore the Plaintiffs will not succeed on the merits. 212 Md.127, 128 A.2d 430 (1957). However, the Defendant's reliance on the *Kirkley* case is overstated. *Kirkley* states that covenants will be upheld where refusal to approve plans are "based upon a reason that bears some relation to the other buildings or the general plan of development and this refusal would have to be a reasonable determination made in good faith and not high handed, whimsical or captious in manner." 212 Md. At 133.

In the instant the case, there has been a complete lack of good faith as the Plaintiffs revised their plans twice to conform to the ARC's suggestions only to have the plans denied. The Defendant has failed to adhere to a general plan of development. Additionally every feature proposed by the Plaintiffs to which the Defendant has an objection is already present in the community in approved or waived construction. Specifically, 1) proposed gables on the

Plaintiffs' house are already present in other houses in the community; 2) a two feet set forward on the garage addition versus a two feet setback is not obvious in the cul de sac and not associated with the preservation of the community as suggested by the Defendant and; 3) the proposed portico on the entrance to the houses is already present in homes in the Carderock Springs community. Community associations such as the Defendant, must make findings that are not in an "arbitrary or capricious manner." *Dolan-King v. Rancho Sante Fe Assoc.*, 81 Cal. App. 4<sup>th</sup> 965 (2000). The Defendant's denial with respect to the above mentioned proposed features is in fact arbitrary and capricious and not consistent with the current status of the community.

In order to succeed on its Motion for Preliminary Injunction the Defendant must show that it is likely to succeed on the merits. However, based on facts in this matter, it is likely that the Plaintiffs' plans will be approved, Plaintiffs will be awarded monetary damages and that the Court will find that the Defendant has abandoned the covenants altogether. Thus the Defendant's Motion for Preliminary Injunction fails and must be denied and the Plaintiffs should be allowed to continue with their proposed renovations.

**B. Lack of Injury From Refusal to Grant Preliminary Injunction**

Defendants proffer that at stake for the Plaintiffs is a minimal delay in construction while the ARC reviews their plans. Based on the actions of ARC it does not appear that the ARC will ever finish reviewing the plans or approve the plans. The Plaintiffs are merely attempting to renovate a home that is consistent with other homes in the Carderock Springs community and enhance the value of the property. The fact is that the Defendant will not be harmed in any way should the Plaintiffs continue construction while the issues concerning the covenants and the Defendant's actions are pending before this Court. The Plaintiffs would be taking the risk of

having to revise their plans once again should this Court find in favor of the Defendants at the end of trial. The litigation before the Court will be a lengthy one and to force the Plaintiffs to wait until all issues are resolved would put an undue burden on their ability to renovate their home.

**C. Lack of Defendant's Irreparable Injury**

The Defendant must show that if the preliminary injunction is not granted the Defendant will suffer irreparable injury. However, if the Plaintiffs are allowed to continue construction and the court later decides that the covenants are upheld and enforceable and the method of enforcement is valid and reasonable under the law and the documents and that the Plaintiffs plans are not approved, the Plaintiffs will be the party that will be injured as they would have to incur additional costs to conform the property per the court's order. At no point in time will the Defendant suffer any irreparable injury. If the Plaintiffs continue construction and this matter is resolved in their favor, the issue of injury is moot. If the Plaintiffs continue construction and this matter is resolved in the Defendant's favor, the Plaintiffs may suffer injury and are willing to absorb the costs of that injury. Granting the preliminary injunction would cause the Plaintiffs to have to wait to finish the improvement which could drastically affect the property value of the home or the Plaintiff's ability to sell and purchase another home with the proceeds they could realize from the Carderock Springs property.

**D. Public Interest**

Plaintiffs do not argue that restrictive covenants may be in effect in various Maryland communities. However, the Plaintiffs are arguing that the Defendant has been selectively enforcing the covenants in Carderock Springs and has not acted in good faith when considering the Plaintiffs' proposed renovations. The Defendant's actions are in fact against public interest

for their unequal treatment of the Plaintiffs. Granting an injunction in this matter would not be in the public interest as the Plaintiffs have followed all county regulations concerning permits and have obtained approval from adjacent property owners in the Carderock Springs community regarding its plans. The Plaintiffs have attempted to work and compromise with the Defendant's ARC concerning its plans but the Defendants have continued to selectively and arbitrarily enforce the covenants against the Plaintiffs. The covenants do not specify a prohibition of Plaintiffs' features. The Defendant is not allowing the Plaintiffs to use features already in the community . It is discriminatory, invalid and against public policy.

The Defendant has failed to satisfy the burden necessary to establish the four factors that must be found when considering the appropriateness of granting a preliminary injunction and therefore the Defendant's Motion for Preliminary Injunction should be denied.

## **II. IN THE ALTERNATIVE DEFENDANT SHOULD BE REQUIRED TO FILE A BOND**

Should the Court grant the Defendant's Motion for Preliminary Injunction, pursuant to Rule 15-503(a) the Defendant should be required to file a bond in the amount of \$750,000.00. This amount reflects the amount of lost profits that would be suffered by the Plaintiffs should they be required to cease construction. They would be unable to sell the property, obtain their profits and reinvest their profits. The Plaintiffs have experts who will testify about the lost profits based on delay. The Defendant concedes that this case will "slowly [work] its way through the judicial process." While awaiting a judicial decision on the Plaintiffs' Complaint the Plaintiffs could renovate their current property, place the property on the market and purchase another property. The Plaintiffs will be deprived of the ability to create equity in their house and the ability to use the proceeds from the sale of the property.

Respectfully submitted,

**VANGRACK, AXELSON, WILLIAMOWSKY,  
BENDER & FISHMAN, P.C.**

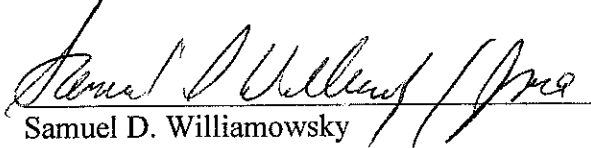
By:

  
Jeffrey M. Axelson

By:

  
Koushik Bhattacharya

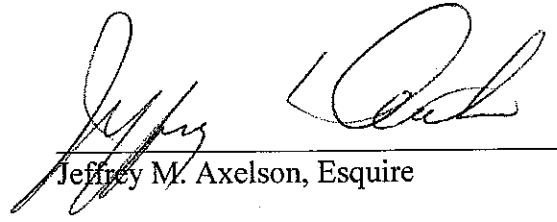
By:

  
Samuel D. Williamowsky  
401 North Washington Street, Suite 550  
Rockville, Maryland 20850  
(301) 738-7680  
Attorney for Plaintiffs

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing was mailed, via first class, postage prepaid,  
this 29<sup>th</sup> day of December 2006 to:

John F. McCabe, Jr.  
200A Monroe Street, Suite 300  
Rockville, MD 20850  
Attorney for Defendant

  
Jeffrey M. Axelson, Esquire