

May 18, 2006

Board Members  
Mills Valley Homeowners' Association  
P.O. Box 515  
Marysville, Ohio 43040

**RE: Opinion regarding the legal effect of variances concerning fences**

Dear Board Members:

You have asked me for an opinion regarding the legal effect of the variances granted concerning the construction of fences. Article VIII, Section R. Fences, of the Special Warranty Deed, provides for specific restrictions regarding the use of fences within the Mills Valley Homeowners' Association.

Pursuant to Article VII, Section C. Variances, of the Special Warranty Deed, the Design Review Board has the authority to grant reasonable variances from the provisions of Article VIII. This authority may be used to avoid any unnecessary hardship or to overcome any difficulties in applying the provisions of the deed restrictions. These variances are to be granted with the Design Review Board using judgment based on the best interest of the community. Therefore, although there are deed restrictions related to the use of fences within the homeowners' association, the Design Review Board does have the authority to grant variances related to those restrictions.

In June, 2004, a newsletter was circulated to members of the homeowners' association. This newsletter contained a specific reference to a variance regarding fences. The newsletter states as follows:

“At a recent meeting, the Design Review Board asked Association Officers to amend the standards for fence and deck materials. Previously, homeowners were required to use wood, stone, or brick. The new standards allow vinyl and decorative wrought iron for fencing and decks. Chain link and other wire fences are still not permitted.”

This newsletter has the legal effect of granting a blanket variance regarding the use of fences, to any homeowner who wishes to install a fence within the association. Any homeowner within the association, would rely on this information to be true

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and accurate. This newsletter also represents an official publication from the homeowners' association, and homeowners within the association rely on this information when making decisions regarding home improvements.

Ohio law addresses the issue of waiver and abandonment regarding deed restrictions. Waiver and abandonment may become relevant if a sufficient number of homes have fences which do not adhere to the deed restrictions, and the association has not strictly enforced those restrictions.

*Romig v. Modest* (1956), 102 Ohio App. 255, 142 N.E.2d 555, discusses the issue of waiver concerning the enforcement of deed restrictions. The court held that the test is "whether in view of what happened there is still a substantial value in the restriction, which is to be protected." In other words, if the nature of a neighborhood has changed so much that the restriction has become valueless to owners of the property, a court will not likely enforce the restrictive covenant.

This concept of waiver is also discussed in *Landen Farms Community Services Association, Inc., v. Schube, et al.*, 78 Ohio App.3d 231, 604 N.E.2d 235. This case specifically addresses the use of basketball poles and backboards within the homeowners' association. The court held that because there were fifty (50) homes within a community of two thousand (2,000) homes, which had installed back boards and basketball poles, the nature of the community had been substantially changed so as to render the restriction valueless to other homeowners. The court decided that the association had lost any right to enforce the restrictive covenant.

Therefore, based on the newsletter published by the association and Ohio law, the association has granted a blanket variance which will permit fences constructed of decorative iron and vinyl.

Please call me if you have any further questions.

Sincerely,

Charles T. Williams

RLS

