



## Post-Trial Brief – Garner vs POA

### Description

By Cheryl Dowden, February 3, 2020

On January 10, 2020, the [Garner vs. HSV BOD, POA hearing](#) was held in Saline County Court, Division III under Judge Grisham Phillips.

Plaintiff Gene Garner was represented by Philip Montgomery of [Legacy Law Group](#). The HSVPOA Board of Directors (BOD) was represented by E. B. (Chip) Chiles IV of [Quattlebaum, Grooms, and Tull](#).

### Were the original Protective Covenants revoked or just amended and added to?

This case dealt with the new Protective Covenants imposed on residents of Hot Springs Village. The original Protective Covenants comprised a mere three pages, while the new Protective Covenants is a much larger 120-page document. The new Protective Covenants were adopted by the Hot Springs Village Board of Directors on April 18, 2018.

In this law case, both sides agreed that the HSVPOA BOD has the authority to amend, rescind and add to the original Protective Covenants.

The difference of opinion lies with whether the original Protective Covenants were revoked and if the new Protective Covenants are a creation of a new document that replaces the old Protective Covenants. The Plaintiff (Garner) argued this is what happened. Also, the Plaintiff argued that the new Protective Covenants contain a fair amount of City Code. The Defendant (HSVPOA) argued the BOD merely amended and added to the original Protective Covenants.

### Judge Phillips required more information for a final ruling

Although Judge Phillips usually rules from the bench, in this lawsuit, he did not feel he had enough information to render a final ruling. Instead, Judge Phillips put the burden on the two attorneys to tell him which of the provisions constitute more restrictions and which ones are unreasonable.

### **Attorney Montgomery filed post-hearing brief**

On February 3, 2020, Attorney Montgomery fulfilled the judge's request and filed a post-hearing brief. (Please see post-hearing brief below.) This brief provides a synopsis of the New Protective Covenants "as to what would be considered 'amendments' or 'additions' to the original Protective Covenants. The Plaintiff's position is that the New Protective Covenants are "entirely new covenants and restrictions and so change the character and nature of Hot Springs Village as developed in 1970, that they are invalid for failure to obtain owner approval, failure to file with the real property records of Garland and Saline Counties and failure to have the required acknowledged signatures in order to be valid." (See Ark Code Ann. 14-15-404 and 18-12-103)

### **Plaintiff goes into great detail outlining the new restrictions**

Attorney Montgomery goes into great detail outlining the additions. He said that "never before have owners been required to obtain a permit to perform things such as remove trees or install and/or change landscaping." These actions did not require a permit in the past.

Naturally, Property Owners knew there may be an amendment "here and there." "But, what this amounts to is a 'bait and switch' and complete overhaul of the restrictions under which they originally agreed to be bound." **If the new Protective Covenants are allowed to stand this sets a precedent where the Protective Covenants could be completely "overhauled and replaced on a whim" at any time.**

The original Protective Covenants were comprised of common restrictions often found in subdivisions.

Attorney Montgomery stated the new restrictions and covenants are too numerous to be all-inclusive in a brief without making the brief too cumbersome to read. Attorney Montgomery highlighted the table of contents from the new covenants, which show the newly created covenants. The new covenants contain 104 restriction categories, while the original Protective Covenants contained only 24. "The sheer volume of material reveals that the [new] covenants are not mere 'additions,' but are wholly new covenants and restrictions.

### **Examples of requirements in the new Protective Covenants are:**

- Homeowners must install irrigation systems for their landscaping
- Landscaping plans must now be submitted to the Architectural Control Committee for approval
- There are restrictions on size and materials for homes and outbuildings

### **Permit requirements in new Protective Covenants**

Additionally, a Property Owner is now required to obtain a permit for many reasons. Previously this was not a requirement in the Protective Covenants. Some of these reasons are:

- Hosting an event
- Removal of 'damaged' landscaping requires a permit. In other words, if you have a diseased tree that cannot be saved, you must pay for and obtain a permit in addition to hiring the landscaper to remove the tree (unless you are capable of performing this dangerous work yourself)
- Interior and exterior building alterations which includes roofing, siding, windows, doors, and porches
- Conducting a garage or yard sale
- Electrical
- Plumbing
- Heating

### **The word "permit" cannot be found in original Protective Covenants**

"Not only did the Original Protective Covenants not require a permit for any of the above actions, but permits also were not even mentioned" in the Original Protective Covenants. **The word "permit" cannot be found anywhere in the original document.**

### **Are properties grandfathered in?**

Homes purchased under the previous covenants are grandfathered in as long as ownership does not change or remodeling occurs. But, when Home Owners remodel, the replacements and/or additions must align with the new restrictions.

In addition, when Home Owners sell their homes, the buyers of the homes are not grandfathered into the original Protective Covenants. The property may be required to be brought up to compliance with the new Protective Covenants. This responsibility will typically fall on the seller or they may lose their buyer.

### **Page 10 of the April 18, 2018 (new) Protective Covenants**

### 3.9. "PRE-EXISTING CONDITIONS"

3.9.1. Structures, uses, site development, and landscape approved prior to the adoption of this Code may continue to operate and be maintained in their approved state.

3.9.2. **The ACC may require certain non-conforming conditions to be remedied prior to the sale of a property or modification of structures, uses, site development, or landscape.**

3.9.3. Modification to structures, uses, site development, and landscape is subject to Level 2 review and may be subject to Level 3 review at the discretion of the ACC....."

### **Lot owners are not grandfathered in**

All of the unbuilt lots are subject to the new Protective Covenants. The lots are not grandfathered into the original Protective Covenants. Some people bought these lots many years ago and have been paying assessments all of these years. When they start to build, they will realize the "deal" has changed. In other words, as Attorney Montgomery has stated, this is indeed a "bait and switch."

### **New Covenants akin to a ransom note**

Attorney Montgomery also stated, "These new covenants are something akin to a ransom note containing words and letters cut out from magazines and newspapers. Words and letters were cut out from the original 3-page protective covenants to create this new document. Much like the ransom note, the words and letters can barely be used to determine the source of the original document they came from – that is because the character of those words has completely changed and has taken on new meaning. this case is about more than just a page count, but the jump from 3 pages to 120 pages illustrates the significant change to the existing owners. That is to say, these are not simple additions here and there, but a complete overhaul of the restrictions and in turn the community that has been in place for fifty years."

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### **Post-hearing brief submitted by plaintiff**

By Cheryl Dowden, February 3, 2020

[Post-Trial-Brief-from-Plaintiff-Garner-2.3.20](#)

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