

IN THE 12TH JUDICIAL DISTRICT OF TENNESSEE
CIRCUIT DIVISION OF RHEA COUNTY

WILLIAM KEENER and TREVA
KEENER; RALPH and RUTH H.
BROWN; HAROLD V. COLLINS;
M.W. THOMAS, JR.; and
EDWARD L. ARMS,

PLAINTIFFS,

VS.

APOLLO SHORES COMMUNITY and
MAINTENANCE, INC.; PHYLLIS N.
ATKINS, President; and
MARJORIE ORICK, Secretary
and Treasurer,

DEFENDANTS.

NO. 15102

FILED

MAY 27 1988 at 2.

JOHN FINE *(signature)*
Circuit Court Clerk

ORDER

This cause came on to be heard on the 6th day of April, 1988, before the Honorable Paul Swafford, Circuit Judge, sitting without intervention of a jury, upon the Complaint, Answer thereto, stipulations of exhibits, testimony of witnesses, exhibits to testimony, arguments of counsel, and the entire record of the cause, from all of which it duly appeared to the Court and the Court finds as follows:

A. Apollo Shores Community and Maintenance, Inc, was a party to an order entered in 1973 by the Chancery Division of this Court. The Chancellor found and determined in that case that all lots in Unit 1 of Apollo Shores Development were exempted from payment of an annual fee of \$18 until such time as a building site was approved by Rhea County Health Department. Further, the 1973 Decree declared that all lots in Units 2, 3, and 4 were building sites and subject to the annual assessment of \$18 per lot. The Court finds by a preponderance of the evidence that the Corporation has been billing the property owners in Unit 2 and Unit 3 based on a "building site" and without regard to the number of lots. The Court finds that the Decree in 1973 omits of no other interpretation except that the annual assessment of \$18 shall be levied against each lot in Units 2 and 3 and Unit 4. The Corporation will, therefore, collect the annual assessment on a per lot basis as previously ordered by the Court in 1973.

B. Lots in Apollo Shores Subdivision were sold and represented by the Defendant Corporation's predecessor in interest to be subjected to 12 restrictions and a general declaration that these conditions and restrictions "shall be binding upon all owners of lots in Apollo Shores, their heirs, and assigns." (Exh. 4) Restriction number 4

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PAGE 105-107
(signature)

prohibits the erection of any building "having a ground floor area of less than 550 square feet including porches. Restriction number 9 prohibits "the placing of house trailers, regardless of size and facilities,... in Apollo Shores." These Restrictions were developed in the late 1950's and early 1960's and well before the advent of modular homes. The Court is, therefore, of the opinion that so long as the structure, regardless of the method by which it is transported, meets the minimum square foot requirement of Restriction number 4 and is permanently affixed to a foundation so as to become a part of the reality, Restriction number 9 does not prohibit such structures. Moveable trailers subject to the title requirement of Tennessee law are, nevertheless, prohibited by Restriction number 9.

The by-laws and constitution of the Corporation provide in Article III that one of the purposes of the Corporation is "(2) To promote and protect the interest of the property owners in said subdivision, enforce property restrictions, collect assessments, maintain roads, right-of-ways, drains, maintain parks and easements." Further Article IV, Sections D and E grant the power to the Board to enforce all rights of the Corporation as to any member and includes the right to suspend membership for non-compliance. The Court, therefore, finds that the Corporation has specific authority to enforce property restrictions and, further, the duty to do so.

C. The Plaintiffs have also challenged the compliance by the present Board of Directors with the requirements of the By-laws and Constitution of the Corporation. Two (2) sets of these documents were exhibited as exhibits 6 and 7 during the trial. Both documents are substantial identical but one, bearing a taxpayer ID number and the other containing the words "effective October 20, 1968", have resulted in some confusion concerning the filling of vacancies occurring on the Board of Directors. Each set of by-laws contains Article VI dealing with resignations, removals and vacancies occurring on the Board of Directors. The only difference in Article VI between the two (2) sets of by-laws is that the word "members" occurs in the third sentence in the first paragraph in one document and the word "member" occurs at the same place in the other document. The Court finds that no member of the Board of Directors has the right to select a successor to a position voluntarily vacated. Vacancies occurring hereafter by resignations to take effect at a future time may be filled by the remaining members of the Board of Directors.

D. Article VI of the By-laws and Constitution further provides that any Board Member or officer of the Corporation may be removed by vote of three-fourths (3/4) of all the members at a special meeting of members called for that purpose. The Plaintiffs urge this Court to adopt the

interpretation of this paragraph to require that 75% of all members of the Corporation must vote for removal of any one Director. The Court rejects this interpretation. While the word "present" does not appear, the undisputed testimony is that there are approximately 195 individual owners of property in the Apollo Shores Development. The Court has drawn the inference from the testimony presented that only a fraction of the total ownership and, therefore, members live in Apollo Shores. To expect 75% of the total membership to vote on removal of a Director is unrealistic. A proper reading of the by-law leads inescapably to the conclusion that the drafters meant "present at the meeting" and the Court so finds.

IT IS, THEREFORE, ORDERED as follows:

1. The Corporation shall assess and collect the \$18 annual fee based on a per lot basis in Units 2, 3, and Unit 4.
2. The Corporation shall enforce the restrictions against non-complying owners; provided, however, any structure containing the minimum 550 square feet, including porches, and permanently affixed to a foundation forming a part of the realty shall be deemed in compliance with the restrictions so long as such structure is not subject to the registration and title laws of the State of Tennessee.
3. Article VI of the By-laws and Constitution shall be read to require that vacancies created by resignations to take effect in the future shall be filled by the remaining members of the Board and that any Director or officer may be removed by vote of three-fourths (3/4) of all members present at a special meeting of members called for that purpose.
4. Costs of the cause are taxed to the Defendant to be paid from assessments collected by it.


ENTER:

ONDS


PAUL A. SWAFFORD, JUDGE

APPROVED FOR ENTRY:

PHILIP A. CONDRA
P.O. Box 307
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BY: 

REBECCA L. HICKS
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CIRCUIT COURT, RHEA COUNTY, TENNESSEE:

FILED
JUN 25 1989
JOHN FINE
Circuit Court Clerk

WILLIAM KEENER and
TREVA KEENER et al

Plaintiff

vs.

APOLLO SHORES COMMUNITY
and MAINTENANCE, INC. et al


Defendant

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Civil Action No. 15102

MOTION FOR NEW TRIAL AND/OR RECONSIDERATION

COMES NOW THE DEFENDANT, by and through their attorney, and moves this Honorable Court for a new trial in this cause or in the alternative a reconsideration of the previous order. In support thereof Defendants would show to the court that the previous order regarding the mobile home restriction is contrary to Tennessee law and policy.


Rebecca L. Illick
McPheeters Law Offices
139 West Third Avenue
Dayton, TN 37321
(615) 772-2722

*This was
withdrawn
due to vote
of property
owners against
it.*

CERTIFICATE OF SERVICE: True and correct copy of all contained hereinabove mailed to Phil Condon, Atty at their last known address by first class mail, this 25th day of June, 1989.
McPheeters Law Offices