

**Before the
MONTGOMERY COUNTY
COMMISSION ON COMMON OWNERSHIP COMMUNITIES**

Goldie Rosner,
Complainant,

v.

Case No. 14-12

January 18, 2013

Heritage Green Condominium Association,
Respondent

DECISION AND ORDER

This matter was filed with the Commission on Common Ownership Communities (CCOC) on February 9, 2012. Pursuant to Chapter 10B of the Montgomery County Code, the Commission voted to accept jurisdiction of the dispute on June 6, 2012, and appointed a hearing panel. The Commission subsequently voted to refer this dispute to the Office of Zoning and Administrative Hearings (OZAH) on October 3, 2012, pursuant to Section 10B-12(d) to conduct a hearing and to make a recommended decision to the hearing panel.

The OZAH Hearing Examiner for Montgomery County held a hearing on the dispute and closed the record on November 6, 2012, and issued its Report and Recommendation to the Commission on December 14, 2012.

The Commission's hearing panel, having carefully considered the Report and Recommendation, adopts the attached Report and Recommendation as its Decision and Order. Therefore, it is hereby:

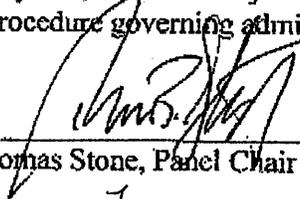
ORDERED, that the Complainant, Goldie Rosner, shall pay the Respondent the sum of \$270.00 to reimburse it for its costs to repair her unit within 30 days after the date of this Order; and it is further:

ORDERED, that if the Complainant fails to reimburse the Respondent within 30 days after the date of this Order, the Respondent may proceed to collect the sum owed pursuant to this Order in any manner authorized by law or its governing documents; and it is further:

ORDERED, that this complaint shall be, and hereby is, **DISMISSED WITH PREJUDICE**.

Commissioners Coyle and Fonoroff concur in this Decision and Order.

Any party aggrieved by the action of the Commission may file an administrative appeal to the Circuit Court of Montgomery County, Maryland, within 30 days after the date of this Order, pursuant to the Maryland Rules of Procedure governing administrative appeals.



Thomas Stone, Panel Chair
January 18, 2013

**BEFORE THE MONTGOMERY COUNTY
COMMISSION ON COMMON OWNERSHIP COMMUNITIES**

**OFFICE OF ZONING AND ADMINISTRATIVE HEARINGS
Stella B. Werner Council Office Building
Rockville, Maryland 20850
(240) 777-6660**

IN THE MATTER OF:

GOLDIE ROSNER

Complainant

Goldie Rosner
Theodore Rosner

For the Complainant

vs.

HERITAGE GREEN CONDOMINIUM ASSN.

Respondent

Bruce Blumberg
Jack Schwartz
Leslie Behne
Susan Ostrander

For the Respondent

CCOC Case No. 14-12
(OZAH Referral No. 13-02)

Before: Lynn A. Robeson, Hearing Examiner

HEARING EXAMINER'S REPORT AND RECOMMENDATION

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I. STATEMENT OF THE CASE

This case arises from a complaint filed by Ms. Goldie Rosner on March 13, 2012 (Complaint), challenging the decision of Heritage Green Condominium Association (Heritage Green or Association) to require Ms. Rosner to pay \$280 representing the cost of a service call performed by a drain repair company in her unit. The service call, mandated by Heritage Green, was the culmination of numerous complaints from the owner of the unit underneath Ms. Rosner's that water was leaking from her unit into the unit below. Ms. Rosner contends that Heritage Green should pay the full amount of the bill because (1) she was not given the opportunity to have the leak repaired herself, (2) she was not given an estimate for the cost of the repair, and (3) she did not receive a statement identifying the work performed for the fees.¹ Exhibit 1 (Complaint, p. 2). She believes that the repair company's fees were excessive for the work performed. *Id.* Ms. Rosner's son, Mr. Theodore or "Ted" Rosner, takes issue with the assessment because Heritage Green incorrectly diagnosed the source of the leak within the Rosner's unit (i.e., the master bathroom toilet instead of the hall toilet). Neither Ms. Rosner nor her son has explicitly challenged the Board's ability to enter the unit and make the repairs; their concerns primarily relate to the \$280 assessment. In addition to the special assessment for repairs, Ms. Rosner objects to late fees which have accrued on her monthly condominium bill, asserting that she has never been late on her monthly condominium fees. T. 42.

On September 26, 2012, the Montgomery County Commission on Common Ownership Communities (CCOC) referred this matter to the Office of Zoning and

¹ Heritage Green did furnish a copy of drain repair company's service ticket prior to the filing of the Complaint. Exhibit 1, pp. 5, 9.

Administrative Hearings (OZAH) for a hearing pursuant to §10B-12(e) of the Montgomery County Code. The record in this case reveals that, prior to the referral to OZAH, Ms. Rosner had requested and received a hearing before the Board of Directors for the Heritage Green Condominium Association (Heritage Green or Association) (Exhibit 1, p. 12) and had rejected mediation pursuant to *Montgomery County Code (Code)*, §10B-113(c). The Commission on Common Ownership Communities (CCOC) noted its jurisdiction on June 6, 2012. Exhibit 5.

On September 28, 2012, OZAH noticed a public hearing for Tuesday, November 6, 2012. Exhibit 11. At the request of Heritage Green, subpoenas were issued to Mr. Joseph Schwartz, a drain repair mechanic employed by Carl B. Seeds, Inc. (Seeds) who performed the work on Ms. Rosner's unit, and Ms. Leslie Behne, co-owner of Seeds. Exhibits 10, 12.

The November 6, 2012, public hearing took place as scheduled. Ms. Rosner and her son testified in support of the Complaint. Three witnesses testified on behalf of the Respondent: Mr. Bruce Blumberg, Heritage Green's property manager, Mr. Schwartz, and Ms. Behne. Ms. Susan Ostrander, a member of Heritage Green's Board of Directors, presented Heritage Green's closing statement.

For the reasons which follow, the Hearing Examiner finds that Heritage Green's decision to assess the cost of Seeds' service against Ms. Rosner was reasonable, made in good faith, and consistent with State law and Heritage Green's governing documents. The Hearing Examiner agrees with Ms. Rosner that all late fees accruing to her account after filing her complaint with the CCOC in March, 2012, should be removed and may not be imposed until after the CCOC's final resolution of this matter.

II. SUMMARY OF TESTIMONY

A. Seeds' Service Call

Contradictory evidence and testimony swirl around the events giving rise to this Complaint, although clarity does illuminate some of the basic facts. The Hearing Examiner finds that most of the facts in controversy are irrelevant to resolution of the case, but will set them forth here should the Commission disagree:

Ms. Goldie Rosner owns the subject property and resides there with her son. In 2010, the property management company, Abaris Realty, Inc. (Abaris), through Mr. Blumberg, notified the Rosners in writing that water was leaking from their unit into the unit directly below. That unit was and still is owned by Mr. Diego Padovan (phonetic spelling). T. 47. According to the Association, the Rosners were notified of the problem in two letters dated April 27, 2010, and September 16, 2010. Exhibit 1, p. 12. Only the September 16th letter is included within the record. Exhibit 1, p. 26. Abaris' September 16th letter stated that Ms. Rosner was aware that there were "two (toilets)leaking [sic] into the unit below." *Id.* The letter also informed Ms. Rosner that she would be fined if "both toilets" were not repaired by September 30, 2010. *Id.*

It is also undisputed that employees of Seeds, a licensed drain repair company, visited Ms. Rosner's unit on September 30, 2010, to investigate the source of the leak. T. 19, 48-49, 111-112. The company snaked the line flowing from Ms. Rosner's hallway bathroom, checked the toilet for blockage, and remounted the toilet bowl. It also snaked the portion of the line in the common elements below Ms. Rosner's unit. T. 111-112. According to Mr. Rosner, Seeds was supposed to have returned to the unit for follow-up repairs; however, the co-owner of Seeds, Ms. Leslie Behne, testified that she was

unaware of any need to return. T. 18-19, 112. Employees of Seeds did not return to the unit until the following May.

After the September 30, 2010, service visit, relative calm reigned among the parties, who agree that Mr. Padovan's complaints had died down. According to Mr. Rosner, he let the issue drop because the toilet was no longer overflowing and Mr. Padovan was not complaining. T. 20. After some time, however, Mr. Padovan renewed his complaints and from this point the parties' accounts increasingly diverge.

Ms. and Mr. Rosner refer to the length of time between the first and second service visits as "about a year", while Mr. Blumberg testified that the complaints started again approximately 6-7 months later, in April or May, 2011. T. 11, 50-51. Mr. Rosner blames Mr. Padovan for the fact that Mr. Rosner could not fix the second leak. This is because, according to Mr. Rosner, Mr. Padovan refused to communicate with him. T. 31. Mr. Blumberg testified that Mr. Padovan spoke with the Rosners numerous times about water leaking from their unit both before and after the September, 2010, service call, but acknowledged that Mr. Padovan had stopped speaking to them recently and instead started complaining to Mr. Blumberg. T. 48-49. According to Mr. Blumberg, there were so many complaints from Mr. Padovan of water leaking from the Rosners' unit, a problem which the Rosners denied, that he felt that he had to have Seeds investigate the problem. T. 50. He stated that he "probably didn't" send separate written notice to Ms. Rosner of the second leak. T. 51-52. Nor did the Association independently enter Mr. Padovan's unit to investigate the source of the leak. T. 56-57. Mr. Blumberg based his conclusion that the leak sprung from Ms. Rosner's unit (rather than the common elements) because Mr. Padovan reported that he would hear the toilet flush in Ms.

Rosner's unit and water would immediately leak into his unit below. T. 59. Mr. Blumberg admitted he lost his patience because the problem had not been resolved. T. 59. He told the Rosners that he was getting a plumber into their unit because it was not acceptable for the resident of the downstairs unit to suffer "urine coming in on his head." T. 59-60.

Both parties agree that on May 18, 2011, Mr. Blumberg contacted Mr. Rosner to direct him to set up another appointment with Seeds. T. 8-11, 111. According to Mr. Rosner, Mr. Blumberg "threatened" to force entry into Ms. Rosner's unit if he did not make the appointment. T. 121.

Either Ms. Rosner or Mr. Rosner did make an appointment for Seeds to return to their unit on May 23, 2011, at 10:00 a.m.² T. 111, 118. From this point, each party's rendition of the train of events unfolding during the service visit speeds in opposite directions.

According to Mr. Rosner, he removed the toilet in the hallway bathroom *before* Seeds arrived to assist them in the repair of the hall toilet. T. 13, 20-21. He assumed that the hallway toilet was the source of the problem because correspondence from Mr. Blumberg (dated June 6, 2011) characterized the problem as having "re-occurred". Based on Abaris' assumption, Mr. Rosner pulled the hall toilet before Seeds arrived on May 23rd to determine whether the leak was reoccurring there. T. 13.

According to Mr. Rosner, Seeds later entered Ms. Rosner's unit to investigate the source of the leak. T. 11-13. Mr. Rosner testified that Seeds informed him the hall toilet

² Ms. Behne testified that she made arrangements for the service visit with Ms. Rosner, a fact which Ms. Rosner hotly disputes. Ms. Rosner insists that Ms. Behne instead made the arrangements with her son. As the evidence shows that the time and place of the service visit was arranged with a resident of Ms. Rosner's unit, the Hearing Examiner finds it unnecessary to resolve this dispute, although she does find Ms. Behne's testimony more credible.

was fine, but the toilet in the master bathroom was loose and was likely the source of the water leaking to the unit below. Mr. Rosner directed them to the hall bathroom. T. 14. Seeds, however, asked permission to repair the master bath toilet. Mr. Rosner refused to let Seeds repair the master bathroom toilet because he did not want “to pay \$280 for \$3.00 worth of bolts.” T. 27. According to Mr. Rosner, Seeds’ drain mechanic left the premises while Mr. Rosner prepared to go to a hardware store to obtain the parts to repair the master bathroom toilet. Mr. Rosner spoke with Mr. Blumberg by telephone before he left. During the call, Mr. Rosner informed Mr. Blumberg that Seeds had never finalized the September 30th repair because the technician was not able to “fully augur the drain because of how many 90 degree turns.” T. 18-20. He acknowledged, however, that Seeds then returned to the unit to service the hall bathroom.

There is some controversy surrounding why Seeds used Mr. Rosner’s parts to remount the hall toilet (after being removed by Mr. Rosner) and whether the service ticket was accurate.³ According to Mr. Rosner, he asked Seeds to use Mr. Rosner’s parts to repair the hallway toilet because Mr. Schwartz did not have necessary parts on his truck, a statement with which Seeds disagrees. T. 26. Mr. Rosner also testified that he was unaware that Seeds had inserted a phrase on the service ticket stating that Mr. Rosner insisted that Seeds use his parts to re-mount the toilet. T. 26. He refused to sign the ticket until the phrase “customer pulled bathroom toilet” was included. A copy of the service ticket (Exhibit 1, p. 5) is reproduced for the Commission’s benefit on the following page.

³ The Hearing Examiner finds these issues of minor importance in deciding the case because of her conclusion that the Rosner’s contributed to the need for the service visit, and that the \$280 was a reasonable amount for the work performed.

May 23, 2012, Service Ticket
Exhibit 1, p. 5.

Phrase "@ customer's
insistence"

Date 5/23/12 Day Monday Job No. 10-7297

Carl B. Seeds, Inc.
Serving MD, DC, & VA
410-535-1937 • 800-551-3318

PO# _____ Telephone _____

Name _____
Address 13215 Perry Mill Dr Apt. # 102
City Crofton State Md Zip Code _____

Trunk Sewer Septic Tank Grease Trap
 Contract Cleaning Contract Pumping Grease Interceptor
 Hand Basin Kitchen Sink Down Spout
 Bathtub Laundry Tub Sewer
 Toilet Area Drain Floor Drain
 Other _____

Work Description: Local Stoppage Common Line
toilet bolts that bolts were loose and
leaking toilet base on the floor. Customer
said he will fix himself.

Pulled back _____ Code # _____
 Mechanic Eric/Suzette Helper _____
 BILL TO ACCOUNT CHECK CASH CHARGE CARD
 CREDIT CARD: VISA MASTERCARD DISCOVER
 CREDIT CARD # _____
 EXPIRATION DATE: _____ TOTAL CHARGE \$ _____

Time left last location _____ am pm Job _____ Other _____
 Mileage _____

Arrive Job: 9:55 am pm Signature Customer or Authorized Agent
 Mileage _____
 Depart Job: 10:45 am pm
 Mileage _____
 Arrival Next Location _____ am PM Job _____ Other _____
 Mileage _____

Date 5/23/12 Day Monday Job No. 10-7297

Carl B. Seeds, Inc. Eok.
Serving MD, DC, & VA
410-535-1937 • 800-551-3318 Rosner
Telephone 301-943-4771

PO# _____ Telephone 301-943-4771

Name _____
Address 13215 Perry Mill Dr Apt. # 102
City Crofton State Md Zip Code _____

Trunk Sewer Septic Tank Grease Trap
 Contract Cleaning Contract Pumping Grease Interceptor
 Hand Basin Kitchen Sink Down Spout
 Bathtub Laundry Tub Sewer
 Toilet Area Drain Floor Drain
 Other Went over 4" clean out cap

Work Description: Local Stoppage Common Line
fingered in to let hall way bathroom filled
with water covered floor. Sucked toilet with
plunge, best tool using customer's ring and built
up to screwdriver and a pipe. After
from clean with flushed the good with water
flushed

Pulled back _____ Code # _____
 Mechanic Eric/Suzette Helper _____
 BILL TO ACCOUNT CHECK CASH CHARGE CARD
 CREDIT CARD: VISA MASTERCARD DISCOVER
 CREDIT CARD # _____
 EXPIRATION DATE: _____ TOTAL CHARGE \$ 55.75

Time left last location _____ am pm Job _____ Other _____
 Mileage _____

Arrive Job: _____ am pm Signature Customer or Authorized Agent
 Mileage _____
 Depart Job: 1:05 am pm
 Mileage _____
 Arrival Next Location _____ am PM Job _____ Other _____
 Mileage _____

Phrase "customer pulled bathroom
toilet"

Mr. Rosner also insists that he was not given the opportunity to sign the first page of the ticket.

When asked on cross-examination why he did not attempt to repair the leak before Seeds had to come out, Mr. Rosner stated that he didn't know of the leak until May 18, 2011. When asked why he did not have his own plumber fix the leak between May 18 and 23rd, Mr. Rosner replied that he didn't know the master bathroom toilet was the problem. He assumed that the hall toilet was the problem. He believes that he should

not pay the assessment for the May 30, 2011, assessment because Abaris misdiagnosed the source of the problem. T. 34.

Evidence submitted by Ms. Rosner accords with her son's testimony. She asserts that Seeds' drain mechanic who serviced the unit on May 23, 2012, Mr. Schwartz, did not feel well that day and had to have Mr. Rosner complete the repair. She agrees that the service technician had no parts with him and therefore had to use Mr. Rosner's parts. Exhibit 1, p. 3.

Mr. Joseph Schwartz testified that he was the drain mechanic (accompanied by another employee) who performed the May 23, 2011, service call to Ms. Rosner's unit. He testified that when he first entered the unit, the toilet in the hallway bathroom was affixed to the floor and was working properly. Once he determined the hallway bathroom toilet was "tight" to the floor, he moved to the toilet in the master bathroom. When he shook the toilet in the master bathroom, it came off the floor. T. 90. He informed Mr. Rosner that the master bath toilet had to be repaired, but, according to Mr. Schwartz, Mr. Rosner "insisted" that the necessary repair was to the hall bathroom. T. 92. Mr. Rosner refused the repair for the master bathroom and asked them to leave. When Mr. Schwartz left Ms. Rosner's unit, he contacted Seeds to inform them of what had occurred. Subsequently, he was contacted by Ms. Behne, who instructed him to return to the unit to snake the hallway toilet as a "prevent". Mr. Schwartz returned to his truck to obtain the tools and when he returned to Ms. Rosner's unit, the hallway toilet had been removed and was sitting in the bathtub. T. 92. He testified that he *did* have the necessary parts in his truck (i.e., he "can't do work without them"), but Mr. Rosner insisted on using his own parts and tools. T. 93-94. Mr. Schwartz augured and reverse

augured the toilet to ensure there was no blockage. *Id.* He also checked the common elements portions of the line and determined that these were properly working as well. T. 96. He stated that while his assistant did prepare the ticket, Seeds' management was responsible for costing out the service. T. 104. Nor does he track the amount of time each task takes; they give an overall time for service. T. 105.

Ms. Leslie Behne, co-owner of Seeds, testified that, on September 30, 2010, they received a call from Abaris to investigate a leak possibly coming from the Rosner's unit into the downstairs unit. They investigated the leak and serviced the hallway toilet. They also serviced both portions of the line (i.e., those within the unit and in the common elements). She was unaware of need for any follow-up visit. T. 110-112. The next call she received was approximately May 18th or 19th, 2011, from Abaris asking her to contact the unit owner to allow entry. T. 111. According to Ms. Behne, she arranged the appointment with Ms. Rosner for May 23rd and sent two men out. After approximately 45 minutes, she received a call from her employees informing her that the problem was the master bathroom and that they had been instructed not to fix it or touch anything inside the unit. T. 112. She contacted Abaris to let them know the status. T. 112. Abaris called back to inform her that Seeds was supposed to have returned to Ms. Rosner's unit after the September, 2010, service call to finalize the repair. While she had been unaware of the need for a follow-up service call, she offered to have her men go back in and re-service the line in the hall bathroom to verify whether a problem still existed. Abaris informed her that her employees could return to re-service the hall toilet. Her employees informed her that they re-entered the unit to service the line, but also had to service the toilet because it had already been pulled from the floor. T. 113.

Ms. Behne also explained how the fees for the service visit were calculated. Generally, drain companies have fixed charges for specific jobs. She stated that servicing a toilet in an individual unit costs \$145.00, plus an additional \$25.00 if the toilet has to be removed and then remounted. When two employees perform the service, there is an additional charge of \$110.00 per hour if the service exceeds the allowable time. T. 114. The total time spent at the Rosners was approximately three hours, although a portion was servicing the common lines. After Mr. Blumberg spoke with her about the invoice, she agreed to reduce the bill from \$560.00 to \$280.00 because part of the work performed included snaking the lines in the common elements. In her opinion, these fees are reasonable for the service provided within the Ms. Rosner's unit. T. 116-117.

Mr. Blumberg did not know how Seeds discovered the problem came from the master bathroom—when Seeds contacted him, he instructed Seeds to “take care of the problem.” T. 61. In his mind, the conflict did not directly involve the Association because it concerned two owners maintaining their individual units. T. 62. He admits that he assumed the problem in May, 2011, was caused by a re-occurrence of leakage from the hall toilet. T. 69.

B. Late Fees

Ms. Rosner also complains that Heritage Green has incorrectly assessed late fees for non-payment of her monthly assessment. According to Ms. Rosner, she has never been late on her monthly condominium fee and therefore should not owe any late fees.

Mr. Blumberg agrees that Ms. Rosner has never been late on her regular monthly condominium fee. According to him, the billing system accrues late fees for accounting purposes, but they have not actually charged these fees. T. 46. He asserts that the By-

Laws permit special charges to be assessed in the same manner as the monthly assessment, thereby enabling Heritage Green to charge late fees for \$280.00 of the cost of work performed by Seeds. After evidence presented at the hearing, Mr. Blumberg agrees that the most recent statement (at the time of the hearing) was incorrect, and that some credit should be given. The Hearing Examiner agrees with Ms. Rosner that Heritage Green's assessment of late fees against her is incorrect, although not for the reasons stated by Ms. Rosner.

According to Mr. Blumberg, the special assessment for the work performed by Seeds is separated from the monthly assessment on the statement provided to the unit owners. A copy of Ms. Rosner's most recent statement as of the public hearing (Exhibit 17) is reproduced below (the handwriting was added by Mr. Blumberg at the public hearing):

ABARIS REALTY INC.
12009 Nobel Street, Rockville MD 20852
billingdept@abarisrealty.com
Keep This Part For Your Records

Account Number	Includes Payments Received As Of
136-260	10/19/12

ITEM	AMOUNT
AR Condomin	328.10
AR LATE FEE	6.00
CONDOMINIUM	368.60
LATE FEE	6.00

~~328.10~~
Late charges as of 11/4/12

DATE DUE	AMOUNT DUE
11/01/12	708.70

Ex - 17

According to Mr. Blumberg, the “AR Condom” notation is the special assessment for the bathroom repair and the “AR LATE FEE” is the late fee attributable to the assessment. The term “CONDOMINIUM” refers to Ms. Rosner’s regular monthly assessment. Ms. Rosner believes, not without some justification, that she is being charged late fees twice: once for the repair work and once for the regular monthly assessment. T. 70.

According to Mr. Blumberg, the Association’s Rules and Regulations prioritize payment of the two different assessments. Rule 34 requires the Association to apply payments first to legal fees, then to late fees, then to “fines, assessments, and other charges” and finally to the regular Association assessments. Exhibit 16. Mr. Blumberg testified that the late fees for the repair work are compounded monthly (i.e., \$6.00 is added to the base fee of \$280.00 every month the fee remains unpaid). T. 68. He also testified that Ms. Rosner was not being charged two late fees—one applicable to the special assessment and one applicable to the regular assessment because “that’s against the law”. T. 67. Initially, Mr. Blumberg believed that the delinquency in the regular assessment resulted from applying the amount of the regular monthly assessment to the special charge for the repair work. T. 72. He later indicated that he did not have the records with him to verify what payments had been made and agreed to remove all late charges against Ms. Rosner for the special assessment for the repair. Later in the hearing, Mr. Blumberg testified that he verified with his office that Ms. Rosner had never been late on her monthly assessment and that the billing system showed late fees which accrued after Ms. Rosner filed the Complaint with the CCOC. Abaris had already given the account two \$30.00 credits, he stated. Therefore, according to Mr. Blumberg, the

amount due for special assessment should be \$270.00 rather than \$328.10. T. 124. Mr. Blumberg agreed that the Association would adjust Ms. Rosner's bill to remove any late charges from the assessment for the repair work if Ms. Rosner had paid her regular assessment on time. T. 77. After verifying that Ms. Rosner had timely paid her regular assessments, he agreed that all late fees applicable to the condominium assessment would be removed. In addition, all late fees accruing after Ms. Rosner filed the complaint would be removed, leaving Ms. Rosner's balance for the special assessment at \$270.00. T. 125.

III. FINDINGS AND CONCLUSIONS

Decisions and actions of the Board of Directors of a condominium's Council of Unit owners are regulated by State law, by the Association's governing documents when consistent with State law, and by Maryland case law. *Maryland Code Real Property, Annot.*, §11-124. State law controls over anything to the contrary in an association's governing documents. In this case, the governing documents include a condominium deed, Articles of Incorporation, a Declaration of Condominium, By-Laws (attached as Appendix B to the Declaration of Condominium) and Rules and Regulations. Exhibits 15 and 16. If the Board has acted within the confines of State law and its governing documents, Maryland courts apply two legal standards for review of Board actions: These include (1) the "reasonableness standard" and (2) the "business judgment rule". The Maryland appellate courts' decisions regarding when these rules should be applied are less than a model of clarity. Compare *Kirkley v. Seipelt*, 121 Md. 127 (1957), *Black v. Fox Hills North Community Association*, 90 Md. App. 75 (1992), *Markey v. Wolf*, 92 Md. App. 137 (1992). The Hearing Examiner found no Maryland case explicitly

addressing whether the “reasonableness standard” or the “business judgment rule” should be applied to a Board’s decision to assess the cost of unit repairs against the unit owner. The CCOC, however, has extrapolated a general rule from Maryland cases to distinguish which of the two rules should be applied: In *Simon v. Fair Hill Farm HOA*, CCOC Case No. 66-09 (May 6, 2010), the CCOC panel found that the reasonableness test should be applied when the Board’s decision affects an individual unit owner’s financial or property ownership rights. As the Hearing Examiner believes this is not inconsistent with Maryland law, she applies this test to the facts herein.

Because the Board in this action exercised its authority to mandate repair and to assess the financial cost against the unit owner, the Hearing Examiner finds that the more restrictive “reasonableness test” should be applied to the Board’s actions in this case. For this reason, Heritage Green must prove its actions were made in good faith and based upon a reason that bears some relation to the purposes of the Declaration of Condominium. The Board’s actions may not be “high-handed, whimsical or captious in manner”. *Kirkley*, 212 Md. at 133.

A. Assessment for the Cost of Seeds’ Service Call

Ms. Rosner complains that Heritage Green improperly assessed \$280 for a portion of the cost of the service to her unit on May 23, 2011. She disagrees with the Board of Directors’ action because she feels that she should have been afforded the opportunity to complete the repairs herself, because she did not receive an estimate for the repairs in advance and because she never received an itemized statement of the work performed (which has since been furnished to her). At the hearing, Mr. Rosner adds that the fees (he believes) are excessive for the work performed and that his mother should not be

responsible for the fees because the Association incorrectly assumed that the hallway toilet was causing the leak into Mr. Padovan's unit. Neither party appears to question the authority of the Board to enter the unit to make repairs.⁴

Turning first to the Maryland Condominium Act, the State law mandates that the responsibility to maintain and repair individual units (as opposed to limited or general common elements) rests with the unit owner. *Md. Real Property Code Annot.*, §11-108.1. Consistent with State law, Heritage Green's By-Laws likewise place responsibility for maintenance of individual units on their owners. Article VIII, Section 2 articulates the unit owner's duty to maintain his or her individual unit:

...Except for those requirements imposed upon the Corporation, the owner of any condominium unit shall, at his own expense, repair and maintain his condominium unit and any and all equipment, fixtures, appliances and utilities therein situate, and its other appurtenances in good order, condition, and repair and the like which may at any time be necessary to maintain the good appearance of his condominium unit. Exhibit 15, Declaration of Covenants, Appendix B, p. 9.

Should the owner fail in this responsibility, the By-Laws authorize the Board's employees or agents to enter individual units to make repairs. Article XIII, Section 2 of the By-Laws state:

For the purpose solely of performing any of the repairs or maintenance required or authorized by these By-Laws, or in the event of a bona fide emergency involving illness or potential danger to life or property, the Corporation, through its duly authorized agents or employees, *shall have the right, after reasonable notice to the owner, to enter any condominium unit or limited common element appurtenant thereto at any hour considered to be reasonable under the circumstances.* (emphasis supplied).

⁴ While at the time the Board took this action, State law did not explicitly provide authority for the Board to enter a unit to make repairs, it does do so today. *Md. Real Property Code Annot.*, §11-125(e). Moreover, as described below, Heritage Green's governing documents did provide the authority to do so.

If the Board decides to enter a unit and make repairs, the By-Laws permit the Board to pay the expense from the common expense fund and then assess the cost against the unit owner:

The cost of the maintenance or repair of any condominium unit and/or limited common elements in the event such maintenance or repair is reasonably necessary in the discretion of the Board of Directors to protect the general common elements or to preserve the appearance or value of the project or is otherwise in the interest of the general welfare of all owners of the condominium units; provided however, that no such maintenance or repair shall be undertaken without a resolution by the Board and not without reasonable written notice to the owner of the condominium unit or limited common elements proposed to be maintained and provided, further, that, the cost thereof shall be assessed against the condominium unit on which such maintenance or repair is performed and, when so assessed a statement for the amount thereof shall be rendered to the then owner of said condominium unit, at which time the assessment shall become due and payable and a continuing lien and obligation of said owner in all respects as provided in Article IX of these By-Laws. Exhibit 15, Appendix B, p. 8.

The parties have not argued that these covenants are contrary to the Maryland Condominium Act nor has the Hearing Examiner discovered any contradiction. Given these provisions, Heritage Green's Board of Directors had the discretion to mandate entry into Ms. Rosner's unit if it found that an emergency existed which potentially could cause danger to life or property and the cost could be assessed against the unit owner if the repairs were necessary to protect the common elements, the appearance or value of the project, or further the general welfare of the condominium unit owners. Procedurally, the Board was required to provide the Rosners with "reasonable written notice" of its intent to require repairs and "reasonable notice" to the owner of the time the repairs would be made.

Ms. Rosner alleges that Heritage Green's assessment is invalid because it did not give her sufficient notice to complete the repairs herself. The notice required is mandated

by the By-Laws, which call for “reasonable written notice” of the Board’s intention to require repair of an individual unit in order to assess the fee against an owner. The Hearing Examiner finds from the evidence that Heritage Green met this notice requirement. The evidence reveals that Heritage Green sent two letters in April and September, 2010, informing Ms. Rosner of the water leak into Mr. Padovan’s unit. While the April 27, 2010, letter referred to in the Board’s decision is not in the record, neither Ms. nor Mr. Rosner dispute that the letter was sent. The September 16, 2010, letter *is* included in the record (Exhibit 1, p. 26) and directed Ms. Rosner to fix *both* toilets in her unit. Therefore, Heritage Green’s written notice covered both the first and second service visit.

Nor does the delay between the September 30, 2010 repair and the May 23, 2011 repair make the Board’s earlier written notice insufficient. The Rosners assert that the length of time between the September 30, 2010, repair and the renewed complaints from Mr. Padovan was “almost a year”. This assertion is clearly an exaggeration, as all agree that the second service visit was scheduled on May 18, 2011, and occurred on May 23, 2011, approximately seven months from the first service visit. Mr. Rosner stated that he did not know of the complaints until May 18, 2011, when he was directed by Mr. Blumberg to arrange the second service call. The Hearing Examiner finds it unnecessary to ascertain when Heritage Green called Mr. Rosner to inform him of Mr. Padovan’s renewed complaints because Mr. Rosner was *never* certain the September, 2010, repair had resolved the problem. Mr. Rosner testified that Seeds was supposed to have returned after its September 30th service because the Seeds employee did not have the tools with them to remount the toilet properly. Based on the evidence in this case, the Hearing

the need to repair *both* toilets, and possibly since April 27, 2010, the date the Board states it first notified Ms. Rosner of the problem in writing. During this time, neither Ms. Rosner nor Mr. Rosner took the initiative independently to ensure the leak was repaired, even though by Mr. Rosner's own account, Seeds should have performed a follow-up service call after the September 30, 2011, service call. The Hearing Examiner finds that the Board's determination that a "bona fide emergency" that was causing property damage to another owner's unit was reasonable under these circumstances. She also finds that, given the Rosners' lack of action to resolve the problem, the Board's decision to require the leak to be repaired was also reasonable.

The Hearing Examiner further finds that the Board's decision to assess the \$280 against Ms. Rosner is reasonable. When an owner fails in the responsibility to maintain his unit, the Declaration conveys to the Board the authority to assess the cost against the unit owner when "reasonably necessary" to protect the general welfare of the residents and the value of the project. The evidence reveals that there was a long-term unresolved problem which caused continuing damage to another tenant's unit. Under these facts, Heritage Green's actions were reasonably necessary to preserve the value of the project and promoted the general welfare of the residents. Certainly, behavior by which one unit owner's failure to maintain his or her unit causes ongoing damage to another unit is not in the general welfare of the residents and may, in fact, devalue the project as a whole.

Mr. Rosner attempts to avoid responsibility for the assessment by blaming Mr. Padovan for refusing to communicate with him about the status of the leak. He also blames Heritage Green for misdiagnosing the source of the May, 2011, leak. As to Mr. Padovan, the evidence in this case reveals that Mr. Schwartz adequately diagnosed the

Examiner finds that the series of events leading to the May 23, 2011, service call were part and parcel of the same problem: Ms. Rosner failed to resolve the drainage problems from both bathrooms, which caused water to leak into the unit below. Notice had been provided to Ms. Rosner, in writing, of the problem.

The Hearing Examiner also finds that Heritage Green provided “reasonable notice” of the time and date of the service visit as required by Article XIII, Section 2 of the Declaration of Condominium. The testimony is consistent that either Mr. or Ms. Rosner, both of whom resided in the unit, made the arrangements for the service visit with Seeds independently of Heritage Green. There is no indication that Heritage Green dictated the day and time of the visit to the Rosners without the Rosner’s knowledge or consent.

The final question is whether Heritage Green acted reasonably in assessing Seeds fees for the May, 2011, service call against the Rosners, despite the fact that Seeds serviced a toilet which apparently was not (at the time) causing the leak into Mr. Padovan’s unit. The Hearing Examiner finds that Heritage Green’s actions were reasonable and in good faith. The Declaration of Condominium undeniably vests the responsibility for maintenance of a unit in the individual unit owner. The By-Laws permit the Association to enter a unit when there is an emergency which could potentially result in danger to life or property. The evidence clearly establishes that the water leaking from the Rosner’s unit was causing property damage to the unit underneath.⁵ The problem of water leaking into the unit below had been going on for at least eight months (from mid-September of 2010), when Heritage Green notified Ms. Rosner in writing of

⁵ There was evidence at the hearing that there is still an ongoing problem that water is leaking through the tile in Ms. Rosner’s hall bathroom. According to Mr. Blumberg, that issue is being resolved between Mr. Padovan and Mr. Rosner, without Heritage Green’s involvement. T. 34, 48.

invoice was \$560.00. Ms. Behne explained the structure of the fee system, and the \$280.00 is consistent with that system given that part of the preventative maintenance was done on the common elements. Following the fee structure described by Ms. Behne, the bill would have been a minimum of \$280.00: This includes at least one hour of work (because two men performed the service) at \$110.00, servicing the toilet bowl (\$145.00), and removing and remounting the toilet (\$25.00). Seeds did provide this service to the hall toilet, in part at Mr. Rosner's direction.

For these reasons, the Hearing Examiner finds that the Heritage Green acted reasonably and within the discretion vested in them by the governing documents in assessing \$280.00 of the cost of Seeds' work against Ms. Rosner.

B. Late Fees

All parties acknowledge that Heritage Green incorrectly assessed late fees for Seeds' repair during the time when the stay applicable after filing a complaint with the CCOC was in effect. A question remains as to the exact amount Ms. Rosner still owes for the repair charge. Mr. Blumberg testified that the amount due for the repair work is \$270.00 after crediting Ms. Rosner with the late fees already assessed. If fees are applied as described by Mr. Blumberg, they would be calculated by assessing a \$6.00 fee compounded monthly on the initial \$280.00 charge. The Hearing Examiner independently calculated the late fees which have accrued since March, 2012, when Ms. Rosner filed her complaint. Although she did not know the exact dates of the billing cycle, she estimated that Ms. Rosner should owe \$280.00 for the toilet repair. As a result, she finds Mr. Blumberg's estimate of the amount to be credited reasonable and

source of the leak simply by shaking both toilets to see which was loose without any need for input from Mr. Padovan. As to Heritage Green's misdiagnosis of the problem, the Declaration squarely places the responsibility for repair on the unit owner, not the Association. In addition, the Hearing Examiner finds credible Mr. Schwartz's testimony that Mr. Rosner insisted that the hall toilet was the cause of the leak. Mr. Rosner's reliance solely on Abaris for the mistaken diagnosis is not credible, as he knew that no one from Abaris had inspected the property since the first leak. In any event, regardless of whether Abaris shared the assumption, Mr. Rosner acquiesced to the preventative maintenance performed by Seeds. Had Ms. Rosner or her son taken the initiative to arrange for a licensed contractor to investigate the problem earlier, the May 23, 2011, service call could have been avoided.

Further, Seeds' work did contribute to the correct repair being made. Seeds did diagnose the correct source of the leak (i.e., the master bathroom toilet), which Mr. Rosner later repaired. As to the hall repair, Mr. Rosner was, at least in part, responsible for service performed. Again, the record reveals that Mr. Rosner *acquiesced* in the decision to do the "prevent" maintenance of the hall bathroom, despite the fact that an experienced drain mechanic, Mr. Schwartz, advised to the contrary. Ms. Behne testified that she offered to do the preventative maintenance only after Mr. Blumberg called her to indicate that Mr. Rosner believed there was a continuing problem in the hall bathroom. In addition, the Hearing Examiner finds more credible Mr. Schwartz's testimony that Mr. Rosner removed the hall toilet *after* Mr. Schwartz re-entered the unit.

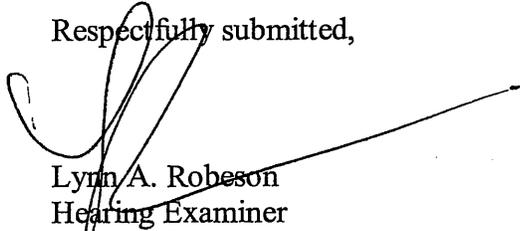
Finally, the Hearing Examiner finds that the amount of Seeds' fees assessed against Ms. Rosner (i.e., \$280.00) are reasonable for the work performed. The initial

recommends that Ms. Rosner's invoice be reduced to that amount until the CCOC finally decides this case.

IV. RECOMMENDATION

For the reasons set forth above, the Hearing Examiner finds that (1) the Board of Director's assessment of \$280.00 for maintenance performed by Seeds to Ms. Rosner's unit be *affirmed*, (2) this assessment should be reduced to \$270.00 to credit Ms. Rosner for late fees accruing since the time of filing this Complaint, and (3) no further late fees should accrued until this case has been finally decided by the CCOC.

Respectfully submitted,



Lynn A. Robeson
Hearing Examiner

DATED: December 14, 2012

