

**COMMISSION ON COMMON OWNERSHIP COMMUNITIES  
MONTGOMERY COUNTY, MARYLAND**

**Betty Hess,**  
Complainant

v.

Case #27-07  
April 23, 2008

**The Tiers at Wheaton,**  
Respondent

**DECISION AND ORDER**

The Complainant, Betty Hess, filed a dispute with the Commission on Common Ownership Communities on May 21, 2007, alleging that the Tiers at Wheaton (the “Respondent” or “Association”) was in violation of its obligations under both Section 11-108.1 of the Real Property Article, Maryland Annotated Code (Maryland Condominium Act), and Association Bylaws, Article V, Section 12, to maintain and repair the common elements. The Complainant specifically alleged that the Respondent failed to maintain the sidewalk next to her building in good repair by patching a hole in the concrete with asphalt, which was then tracked into the building and into her unit; and by allowing erosion on the other side of her unit which she believed undermined and could kill a large ornamental tree.

The Commission's staff sent a copy of this complaint to the Respondent on May 22, 2007. However, the Respondent did not reply within the 30 days required under COMCOR [Code of Montgomery County Regulations] § 10B.06.01.03(b). It appears that the Respondent did receive the complaint, however, because on July 13, 2007, the

Respondent, through legal counsel, filed a short opposition to Complainant's motion for entry of an order of default and offered to meet directly with her to review her complaints.

On July 2, 2007, the Commission's staff notified both parties that the answer to the complaint was overdue and that the Complainant was entitled to file a motion for entry of an order of default pursuant to the Commission's *Default Judgment Procedures*. As noted above, the Respondent did reply to this notice. Complainant did file her request and on July 18, 2007, the Commission staff notified both parties that the dispute would be placed on the Commission's agenda for August 1, 2007, with the staff recommendation that the Commission accept jurisdiction and issue an order of default. The Respondent did not reply to this letter, did not appear at the Commission meeting, and did not file any responsive pleading.

On October 16, 2007, the hearing panel assigned to this dispute issued an Order of Default directing the Respondent to study and to report upon the allegations made by the Complainant. This Order was sent with a Notice of Default Order, which informed the Respondent of its right, under the *Default Judgment Procedures*, to move to vacate the Order within 30 days. Respondent did not reply and did not comply with the Order of Default.

On November 28, 2007, the Complainant filed a Request for Entry of Judgment By Default. The Respondent did not file any opposition to the Request.

In the absence of any information from the Respondent, the Hearing Panel asked the Commission's staff to inspect the property and report on the conditions it found. The staff did so and filed a notarized inspection report, with photographs on January 17, 2008.

The staff sent a copy of its report to both parties. Respondent did not oppose the inclusion of this report in the official record.

The Hearing Panel has considered the record of this dispute and the evidence submitted by the Complainant and the Commission staff and makes the following findings of fact and conclusions of law.

### **Findings of Fact**

The Complainant is an owner of a unit in The Tiers at Wheaton, a condominium regime established pursuant to the Maryland Condominium Act, Title 11 of the Real Property Article of the Maryland Annotated Code.

At some date previous to the filing of this Complaint, the Respondent repaired a broken water line that entered the building in which Complainant resides. In order to make the repairs the Respondent broke into the concrete sidewalk next to the building and later repaired the hole by filling it with asphalt instead of concrete. Visitors to the building track tar from the asphalt into the building and into the Complainant's unit. This sidewalk is a common element.

On the other side of the building, also in the common elements, is a large ornamental cherry tree. This tree is located between the building and a wooden retaining wall. The wall is approximately 50 feet long and up to 5 or 6 feet tall. The wall was originally topped with a split rail fence which has deteriorated and collapsed in several places. The level of the ground on which the cherry tree is located is approximately 3 feet higher than the highest portion of the retaining wall. The earth has eroded between the cherry tree and the top of the retaining wall and the roots of the cherry tree have become exposed. The retaining wall itself is coming

apart at its joints and is in serious need of replacement or repair, as is the split rail fence on top of it

### **Conclusions of Law**

Respondent is subject to both Section 11-108.1 of the of the Real Property Article, Annotated Code of Maryland, and Article V, Section 12 of the Association Bylaws. Both state law and the Association Bylaws require the Respondent to maintain the common elements in good condition. The condition of the slope on which the ornamental cherry tree is located reflects poor maintenance. The retaining wall below the tree is several feet high, and at the very least, the lack of a fence is a safety hazard. Moreover, the height of the wall is inadequate to prevent erosion of the slope above it, and the wall itself, which is old, has begun to fail. The Hearing Panel, therefore, find that the Respondent is in violation of its legal obligations to maintain the common elements in the area adjacent to the ornamental cherry tree.

The Hearing Panel also finds the asphalt patch around the water service pipe in the concrete sidewalk to be a violation of the Respondent's duty to maintain the common elements in good condition. The material is not of equivalent durability as the rest of the sidewalk, and it has the additional defect of adhering to shoes and of contaminating the interior of Complainant's unit.

### **Order**

The Hearing Panel hereby ORDERS as follows:

1. Within 45 days from the date of this order the Respondent must remove

the asphalt from the concrete sidewalk and replace it with concrete.

2. Within 90 days from the date of this order the Respondent must repair or replace the wood retaining wall so that it meets all applicable legal standards, and must also increase the height of the wall so that it is within one (1) foot of the level of the sidewalk that is located between the building at 10839 Amherst Avenue and the retaining wall. The Respondent must maintain this height for a distance of at least 20 feet in all directions from the cherry tree and must install a fence on the top of the retaining wall.

3. If for any reason the Respondent is unable to complete the work on time pursuant to this Order and for circumstances beyond its control, the Respondent must so notify the staff and the Complainant of the delay, together with a written proposal stating how, and when, the Respondent intends to complete the work.

4. Within 30 days from the date of this Order the Respondent must refund to the Complainant the sum of \$56.50, representing her costs related to this matter, including but not limited to her filing fee.

Any party aggrieved by this Decision may file an administrative appeal to the Circuit Court for Montgomery County, Maryland within thirty (30) days after the date of this Decision pursuant to the Maryland Rules of Procedure governing administrative appeals.

Commissioners Negro and Leeds concur in this Decision.

COMMISSION ON COMMON OWNERSHIP COMMUNITIES  
FOR MONTGOMERY COUNTY, MARYLAND

By: \_\_\_\_\_  
Greg Friedman, Esq., Panel Chair

Date: \_\_\_\_\_