

Before the
**Commission on Common Ownership Communities
for Montgomery County, Maryland**

In the Matter of

Decoverly I Homeowners Association	x
c/o John McCabe, Esq.	x
Suite 300	x
200A Monroe Street	x
Rockville, Maryland 20850,	x
Complainant,	x
	x
v.	x
	x
Unhee Kim	x
9920 Foxborough Circle	x
Rockville, Maryland 20850,	x
Respondent.	x

Case No. 56-11
September 25, 2012

DECISION AND ORDER

This dispute, having come before the Commission on Common Ownership Communities for Montgomery County, Maryland, pursuant to Chapter 10B of the Montgomery County Code, 1994, as amended, and the duly authorized Hearing Panel having considered the testimony and evidence of record, finds, determines, and orders as follows:

Background

Decoverly I Homeowners Association filed a complaint with the Office of Common Ownership Communities in the Office of Consumer Protection against Unhee Kim, owner of 9920 Foxborough Circle, Rockville, a unit within the Decoverly I Homeowners Association, on December 9, 2011. The complaint sought to enforce the requirement of the Association that Ms Kim remove a so called gazebo installed on the deck of her unit in violation of the Association Architectural and Environmental Review Committee Guidelines. Ms Kim responded that she needs the gazebo to protect herself from mosquito bites to which she has a serious reaction and that the gazebo is not a superstructure as prohibited by the Guidelines.

On July 27, 2011, Steve Leskowitz, Property manager for Decoveley I Homeowners Association, sent Ms Kim a letter advising her that the “semi-permanent screened gazebo” installed on her deck is not permitted under the community Architectural Control Guidelines and thus it was required that it be removed within 15 days of the date of the letter. He advised her that she could request a hearing before the Board of Directors. By letter dated August 15, 2011, Ms Kim requested a hearing. The hearing was scheduled for and held on October 17, 2011. The Board unanimously denied Ms Kim’s appeal and she was notified of this decision by letter dated October 25, 2011 and given 15 days to remove the gazebo. The filing of this case with the Commission followed that action when the gazebo was not removed.

Inasmuch as the matter was not resolved through mediation, this dispute was presented to the Commission on Common Ownership Communities for action pursuant to section 10B-11(f) of the Montgomery County Code on March 7, 2012 and the Commission voted that this is a matter within its jurisdiction. The case was scheduled for a hearing on September 13, 2012, which was held and the record was closed at the conclusion of the hearing.

Facts and Undisputed Testimony

John McCabe represented the Association. On behalf of the Association, Mr. Steve Leskowitz, property manager at Decoveley I since 2004, produced several photographs of the gazebo which were introduced into evidence without objection. He also produced a letter from the community records that required the homeowner of another house in the community to remove a “screen room” as the only community record of a structure on a deck and as evidence that the community had consistently required structures on decks to be removed. Mr. Leskowitz had begun managing the community not long after that transaction and there are no photographs of that structure available. Mr. Leskowitz testified that under Section I.B.1.d. of the Decoveley I Architectural and Environmental Standards and Guidelines as amended in February 2009, “[a]ny superstructure on decks or patios requires approval.” The Guidelines continue with a description of the limit to which awnings may be permitted. The next paragraph sets forth the extent to which a screened patio or sunroom below an above-ground deck may be approved.

Mr. Nick Groshans, a member of the Decoveley I Board of Directors since 2008, and currently Vice President, testified that shortly after being elected to the Board he participated in a community survey and drafting amendments to the Guidelines for clarity and to assure that they reflected the current situation in the community. He testified that the intent of the Guideline related to structures on decks was to prohibit any structure that would obscure the sightlines of any unit owner.

Ms Kim was accompanied by Mr. Michael Ellison who spoke for her for the most part. Ms Kim and Mr. Ellison said that they did not consider the gazebo to be a superstructure and did not want to or think they were violating the rules of the

community with which they have previously complied. They wondered why the Guidelines did not include examples of what would be a superstructure. There was no testimony in response to that question. They erected the gazebo on the deck because they like to use the deck and Ms Kim gets many mosquito bites and suffers extraordinarily from the effect of those bites. Their experience with the space under their deck is that there are many more mosquitoes there. They consider Ms Kim's reaction to mosquito bites to be a medical condition for which they would like special consideration, permitting them to maintain the gazebo on their deck.

The photographs of the gazebo show a large net structure that occupies most of the deck floor space with a top that appears to be canvas of a tan shade. Mr. Ellison testified that it has a metal frame and that it required assembly of its parts. It appears to be at least seven to eight feet tall.

Ms Kim raised a question in an email message to Mr. Leskowitz regarding whether the community would permit accommodations under the Americans with Disabilities Act (ADA) to which Mr. Leskowitz responded that if an issue within the scope of the ADA arose the Association would address it. Ms Kim said at the hearing that she had consulted a lawyer who suggested that she raise the question of accommodation under the ADA. In response to questions from Mr. McCabe regarding the effect on her daily activities of the mosquito bites, Ms Kim indicated that while they caused great discomfort they do not interfere with her major life activities. In his closing statement Mr. McCabe pointed out that the ADA applies to public accommodations and thus does not apply to Decoverly I architectural issues. He also discussed the federal, state and county fair housing statutes pointing out that all of them require that the person seeking protection under those statutes establish a disability as defined therein. The testimony at the hearing did not establish that Ms Kim's reaction to mosquitoes rose to the level of a qualifying disability.

Conclusions of Law

The word "superstructure" is a generic term. It is adequately descriptive to put a reasonably alert reader on notice that anything larger or more complex than ordinary deck furniture on a deck might require approval through the Association Architectural and Environmental process. *The Random House Dictionary of the English Language*, 1966 Edition, includes "any structure built on something else" as one of the definitions of superstructure. The language providing limited use of awnings and for screening in the area below decks supports this interpretation.

Ms Kim's acute discomfort from exposure to mosquitoes does not interfere or substantially limit her major life activities and thus does not rise to the level of compelling the Association to make a special exception to the community wide standards to accommodate her greater comfort.

The legal guideline for the application of covenant standards regulating of the use of property was first set forth in Maryland in Kirkley v. Seipelt, 128 A.2d 430 (Md.

1957). Restrictions on the use of property must be “based upon a reason that bears some relation to the other buildings or the general plan of development;” and would need to be “a reasonable determination made in good faith, and not high-handed, whimsical or captious in manner.” Id. at 434. The Decoverly I Homeowners Association Guidelines and the community interpretation and enforcement thereof are within this legal guidance. While homeowners in the community may apply for approval to put a structure on a deck, which Ms Kim did not do, the policy is to keep deck sightlines clear. The testimony supports that the Association has consistently taken this approach.

ORDER

The requirement by the Decoverly I Homeowners Association that Ms Kim remove the gazebo from her deck is upheld and it must be removed within thirty (30) days of the date of this decision and order and may not be reinstalled without approval from the Association.

The foregoing was concurred in by panel members Caudle and Fonoroff.

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

Dinah Stevens, Panel Chairwoman
Commission on Common Ownership
Communities