BEFORE THE
COMMISSION ON COMMON OWNERSHIP COMMUITIES
FOR MONTGOMERY COUNTY, MARYLAND

In the Matter of:

Sylvia Levenson	*	
4720 Chevy Chase Dr., #503		*
Chevy Chase, MD 20815	*	
Complainant,		*
	*	
v.	*	Case No. 61-06
	*	October 30, 2009
4720 Chevy Chase Drive Condominium Association	*	
6935 Wisconsin Ave., #400		*
Chevy Chase, MD 20815	*	
Respondent	*	

DECISION AND ORDER

The above-captioned case having come before the Commission on Common Ownership Communities for Montgomery County, Maryland, for hearing on April 30, 2009, pursuant to Sections 10B-5(i), 10B-9(a), 10B-10, 10B-11(e), 10B-12 and 10B-13 of the Montgomery County Code, 1994, as amended, and the duly appointed Hearing Panel, having considered the testimony and evidence of record, finds, determines and orders as follows:

The Dispute

The Complainant, Ms. Sylvia Levenson, is the owner of a condominium unit located within the building located at 4720 Chevy Chase Drive. The condominium is governed by the Respondent, the 4720 Chevy Chase Drive Condominium Association (hereinafter the "Association"). The Association utilizes the services of a managing agent, Paul Associates to oversee its properties.

This condominium unit in which Ms. Levenson lives is located on the top floor of her building. The unit has an exterior patio, also referred to in the record as a balcony. This patio is accessed from the unit by means of a sliding glass door. In 2005 it became necessary to replace the membrane beneath Ms. Levenson's patio in order to correct a leak in the ceiling of the unit located directly below the patio. This required the removal of a wood deck that then

covered the patio. This deck was damaged during the course of the removal. In replacing the deck, pavers were used rather than wood.

According to a report submitted by complainant's expert, Mr. Joseph Walker, the finished surface of the original wood deck was level and set "at an elevation approximately [two inches] below the existing door threshold." Complainant's Exhibit 2. The finished elevation of the new patio was four inches higher than the previous patio, resulting in a surface two inches higher than the door threshold. To deal with this situation a portion of the patio was reconfigured to create a ramp. This ramp extends approximately two feet from the door threshold. At the hearing, both parties introduced testimony by expert witnesses. Though the precise measurement is in dispute, both experts are in agreement that the resulting slope is less than one inch per foot.

In her initial complaint to the Association, Ms. Levenson objected to the fact that her new patio was no longer level. In correspondence with the Association, Ms. Levenson also asserted that the slope of the patio constituted a tripping hazard. She further asserted in her complaint that the slope to the door threshold allowed water penetration into her unit. Ms. Levenson also seeks the return of plants and patio furniture that was removed from the patio and placed into storage.

An additional issue arose in mid-2007, when a portion of the ceiling in Ms. Levenson's unit collapsed. A subsequent inspection was made of a roof drain situated over the living room of Ms. Levenson's unit. This drain, like all roof drains in the building, is connected to a drain pipe located above the ceiling which then runs through a wall, conducting the water to a downspout located down the exterior of the building. It was determined that when a new drain bowl had previously been installed it had been improperly connected to the piping, resulting in the drain leaking. Ms. Levenson asserts that the leak resulted in damage to her unit.

According to Ms. Levenson, the ceiling in her dining room experienced discoloration due to moisture. This assertion is not disputed by the Association, though there is dispute over the jurisdiction of the Commission to order a remedy, as set forth below. In the bathroom there are cracks in the ceiling that Ms. Levenson also attributes to the drain leak. And the bathroom wall has experienced what is described as a bulge, also attributed by Ms. Levenson to the drain leak.

Also unresolved is a complaint that Ms. Levenson does not receive minutes of Board meetings in a timely fashion.

For reasons set forth below, there is also a claim for legal fees.

Procedural History

On August 8, 2006, Ms. Levenson filed her complaint with the Office of Common Ownership Communities. The complaint was forwarded to the Association on August 30, 2006. After initially failing to reply to the initial complaint, the Association filed its response which was received by the Commission on November 14, 2006.

Jurisdiction of the dispute was accepted by the Commission on April 2, 2008. A hearing was initially scheduled for May 14, 2008, but had to be rescheduled due to a scheduling conflict that arose for the Panel chair. A new hearing date of June 5, 2008, was set but this also had to be rescheduled, in this instance due to a prior commitment for Complainant's counsel. A hearing date of July 23, 2008, was then set.

On July 22, 2008, the Association sought a continuance of the July 23rd hearing date in order that it might retain the services of counsel. In its motion, the Association asserted that it had only learned the previous day that its insurance carrier would not provide an attorney for the hearing. Noting that the Association had failed to show good cause for the delay, the Panel nevertheless granted the motion for continuance. A new hearing date of September 18, 2008, was set. In granting the request for a continuance, the Panel "invited" Complainant to file a motion pursuant to Section 10B-13(d) to seek reimbursement of any reasonable costs, including legal fees, incurred as a result of the delay. The September 18th hearing was subsequently removed from the Commission's docket at the request of parties so as to allow opposing counsel an opportunity to attempt to resolve the dispute. The attempt to resolve the dispute was unsuccessful and the case was placed back on the docket.

The dispute was heard by a hearing panel on April 30, 2009. Ms. Levenson was represented by counsel, Heather Howard, Esq. Also present as an expert witness on behalf of Complainant was Mr. Joseph Walker of Claxton Walker & Associates, a licensed building inspector.

The Association was represented by counsel, Christopher Hitchens, Esq. Paul Associates was represented at the hearing by Ms. Pat Robertson, the condominium's property manager, who also testified on behalf of the Association. The Association also presented testimony by Dr. Steven Johnson. Dr. Johnson has a PhD in engineering and was called as an expert in the design of replacement roofing, drain design and waterproofing.

Findings of Fact

1. The building located at 4720 Chevy Chase Drive, Chevy Chase, Maryland, is a condominium with individual condominium units. Its governing documents are filed in the land records office of Montgomery County. Ms. Sylvia Levenson is the owner of unit 503 within this building.

2. All individuals who own units within 4720 Chevy Chase Drive are, by virtue of their ownership, members of the 4720 Chevy Chase Drive Condominium Association. As members of the Association, all owners within the 4720 Chevy Chase Drive Condominium are required to maintain their property pursuant to guidelines set forth in the Association's Declaration of Covenants, By-Laws and Articles of Incorporation and to rules set forth by an elected Board of Directors.

3. Ms. Levenson's unit includes an outdoor patio, accessible to her unit by means of a sliding glass door. This patio was previously covered by a wooden deck. The deck was level its entire length and was set two inches below the level of the threshold leading into the unit.

4. In 2005 it became necessary for the Association to repair a leak in the ceiling of the unit located below Ms. Levenson's unit. In order to access the leak, it was necessary to remove the wooden deck and replace the membrane beneath.

5. After the repairs were completed the Association installed a new deck constructed of two-inch thick concrete pavers. The resulting deck was raised two inches above the level of the threshold resulting in a tripping hazard. In order to correct the situation, shims beneath the pavers were fashioned to create a ramp up to the deck. The resulting ramp extends for a distance of two feet from the threshold at a slope of less than one inch per foot. At least one paver on the replacement deck is not set level with the neighboring pavers. The only remedy offered by Complainant to eliminate the slope is to remove and reinstall the deck which would possibly entail reinstalling the membrane beneath. No assurances were offered, however, that such recourse would be ultimately successful.

6. There is no evidence on record to support the contention that the new deck caused water to enter the unit.

7. While the patio work was being performed plants and patio furniture that Ms. Levenson kept on the deck was placed into storage by the Association. These items have not yet been returned.

8. During prior maintenance work performed on the roof drain situated above Ms. Levenson's unit, a new drain bowl was improperly installed. The drain was designed to carry rain water to downspouts installed on the exterior of the building. This work was performed in a negligent manner. In installing the new bowl, the roofers performing the work failed to thread the bowl into the old piping. Instead of using lead or epoxy to seal the bowl to the pipe, the roofers used roof cement. As a result, the drain leaked.

9. The leak from the improperly installed drain bowl resulted in water damage to the dining room ceiling of Ms. Levenson's unit. The Association has expressed their willingness to make the necessary repairs to the ceiling.

Performance of the repairs has been delayed due to Ms. Levenson's unwillingness to have the work done until it has been resolved whether the Association will be responsible for any further work to the unit, so that any work might be performed all at one time.

10. The ceiling of the bathroom in Ms. Levenson's unit has experienced hairline cracks and alligator crackling. Ms. Levenson also reported bowing in the bathroom walls.

11. No evidence was presented by the Association to contradict the testimony of Ms. Levenson that minutes of Associations meetings are not being prepared and distributed in a timely manner.

Conclusions of Law

At the hearing. counsel for the Association made an oral motion to dismiss the complaint due to lack of subject matter jurisdiction. The Panel ruled at that time that issues of jurisdiction were always timely, but that it required time for further study of the issue. The Association thereupon suggested that the hearing be delayed in order to allow both parties to brief the issue. Rather than delay the proceedings the Panel decided to go ahead with the hearing, given that both parties were present with their witnesses and noting the delays already experienced in hearing the complaint. Instead the Panel held its ruling in abeyance and held the record open so that both parties could further brief the issue. It is therefore necessary that, prior to resolving the disputes set forth by Complainant, the jurisdictional issues raised by the Association be resolved.

Subject matter jurisdiction of a judicial entity is strictly limited pursuant to the authority under which that entity is established; whether that entity is an Article III court established pursuant to the United States Constitution or a quasi-judicial body established by the Montgomery County Council, such as the Commission on Common Ownership Communities. A judicial entity may not exceed its jurisdiction even if both parties to a dispute desire that it do so. Accordingly, lack of subject matter jurisdiction may be raised by either party at any time. It may even be raised *sua sponte* by the judicial entity itself. *Derry v. State,* 358 Md. 325, 748 A.2d 478 (2000). Therefore, despite the issue not being raised until the day of the hearing, the issue of subject matter jurisdiction is still timely.

The Association first argues that the issues presented in Ms. Levenson's complaint do not constitute a dispute as set forth by Sections 10B-8(3) and (4) of the Montgomery County Code. Specifically, Respondent asserts that the complaint does not fall within the Commission's jurisdiction to determine whether the Association had "the authority . . . under any law or association document, to: (i) require any person to take any action, or not to take any action, involving a unit; (ii) require any person to pay a fee, fine, or assessment; (iii) spend

association funds; or (iv) alter or add to a common area or element." Montgomery County Code, section 10B-8(3)(A)(i)-(iv). The Association argues that in creating the Commission, the County Council did not intend for the Commission to second guess the managerial and operational decisions made by the governing bodies of common ownership communities. We disagree with the Association's interpretation.

First, we do not read the meaning of the term "authority" as contained in section 10B-8(3) as narrowly as does the Association. Respondent would read the word authority as meaning that the Association had the option to act, if it so chose. This is not in keeping with the expressed intention of the Council in creating the Commission. As noted by the Association in its memorandum of law, the Council determined that:

> [T]here is often unequal bargaining power between governing bodies, owners, and residents of homeowners' associations, residential condominiums, and cooperative housing projects. Owners and residents in these common ownership communities are in effect citizens of quasi-governments, which provide services in lieu of government services, levy assessments, and otherwise have a significant impact on the lives and property of owners and residents.

Id. at Section 10B-1.

In order to remedy this inequality of bargaining power, the Council meant for the Commission to address the failure of common ownership communities to meet their obligations as they are authorized to do by their governing documents and as set forth by statute. We find that the complaint, on its face, does set forth jurisdictional claims under Section 10B-8(3)(A) of the Montgomery County Code. Specifically, we find that the Association's alleged refusal to stop the leak into Ms. Levenson's unit—and thereby to place the burden of repairs on her alone—amounts to a dispute over the Association's authority to require Levenson to make repairs (Section 10B-8(3)(A)(i), a dispute over the Association's authority to spend funds (Section 10B-8(3)(A)(iii), and a dispute over the Association's authority to alter the common elements (Section 10B-8(3)(A)(iv).

The Association argues that it is absolved from any damages resulting from the drain leak. Under Article VIII, Section 8 of the Condominium By-laws, "the Association shall not be liable for any . . . injury or damage to person or property caused by the elements or resulting from electricity, water, snow or ice which may leak or flow from any portion of the common elements or from any wire, pipe, drain, conduit, appliance or equipment." Commission Exhibit 1, Vol. 2, p. 151.

While Maryland case law recognizes such exculpatory clauses as valid, it also requires that they be construed narrowly. *Crockett v. Crothers,* 264 Md. 222, 285 A.2d 612 (1972). Accordingly, disclaimer of liability clauses must be read in a manner consistent both with Association documents as a whole and with the Maryland Condominium Act. Article VIII, Section 1(e) of the Condominium By-laws provides for the use of condominium fees for the cost of roof repairs and maintenance. The Maryland Condominium Act, Section 11-108.1, Real Property, Annotated Code of Maryland, also places responsibility on the Condominium for the maintenance, repair and replacement of all of common elements. Likewise, Section 11-114 makes clear that the Condominium's master insurance must cover repairs to the private units when the damage to the unit is caused from outside the unit.

The Commission has previously interpreted such limitation to casualty losses to be limited to circumstances which can be classified as an "act of God." Otherwise, a common ownership community is liable for those damages resulting from its own negligent failure to properly maintain common elements of the condominium. *See, Prentice v. Sierra Landing Condominium,* CCOC #15-08 (February 6, 2009). In the instant case, agents hired by the Association failed to perform maintenance on the roof drain in a competent manner. And it is Complainant's contention that it is this negligence that resulted in damages to her unit. Accordingly, the Commission does have the authority to award damages under Section 10B-13(e).

The Panel reads Article VIII, Section 8 of the Condominium By-laws to apply only to casualty losses which are in the nature of "acts of God." Thus the Association may not, under some circumstances, be held responsible for injury or damage caused by the elements. The Association can be held responsible, however, for those damages which, while caused by the elements, are found to be the result of its own negligent failure to properly maintain the common elements of the Condominium.

The Deck

It was necessary to remove the wood deck on Ms. Levenson's patio in order to replace the membrane located underneath the deck. Absent the jurisdictional issue addressed above, there appears to be no dispute concerning the obligation of the Association to replace the deck. Thus the only issue remaining is whether, in replacing the deck, the Association acted in a reasonable manner.

According to the October 12, 2006, report by the Association's expert, Dr. Johnson, Commission Exhibit 1, Vol. 2, pp. 13-18, after much negotiation by both sides, Ms. Levenson agreed to the use of a specific natural stone/concrete finish pavers of a buff grey color. The initial plan called for the installation of a heavy gage sheet metal flashing over the curb that runs the perimeter of the deck and

to anchor the pavers to the sheet metal. *Id*. at 8. Once installation of the pavers began, however, Ms. Levenson refused to allow the metal flashing to be installed. According to the report, it was explained to Ms. Levenson that "without installing the flashing, the top of the pavers would be raised and there would likely be a slight step or tripping hazard at the door leading to the deck." *Id*. Ms. Levenson responded that, rather than having the metal flashing, she would prefer raising the pavers slightly. *Id*.

Once the pavers were installed, Ms. Levenson found the top surface of the pavers was too high. As a solution, it was suggested that a piece of wood or synthetic deck board be installed on the concrete curb in front of the door leading into the unit. It was further suggested that the first row of pavers be reinstalled and that shims be used to create a ramp from the rest of the deck down to the threshold of the unit. *Id*. at 9.

According to the report, Ms. Levenson agreed to the proposed changes and signed a "statement" that the ramp could be installed. *Id*. The report notes that a copy of the statement was included with the original report. For reasons unexplained, this signed statement is not included in the record. Its existence has not been contested by the Complainant, however.

The Panel agrees that the need to replace Ms. Levenson's deck would not entitle her to an upgraded balcony at common expense. What Ms. Levenson was entitled to was a deck that was both usable and comparable to the one which it replaced. No evidence was provided on the record as to why pavers were chosen for the new deck rather than recreating the prior wood deck. Neither is there evidence that Ms. Levenson sought to have the replacement deck constructed of pavers rather than wood. And the mere fact that the prior deck was made of a different building material does not, in and of itself, mean that the replacement deck was not comparable to the old one.

It is true that the new deck is elevated approximately two inches above the threshold to the unit. As Respondent's own expert noted, however, the old deck was itself two inches lower than the threshold. Furthermore, according to the evidence in the record, the elevation of the deck is due to Ms. Levenson's decision not to allow installation of the metal flashing. According to the unchallenged Commission record, Ms. Levenson agreed to the proposed solution of fashioning the shims beneath the first row of pavers in order to create a ramp up to the deck.

In installing the deck in its current configuration, the record indicates that the Association acted in reliance upon an agreement entered into with Ms. Levenson. And while there now appears to be considerable acrimony between the parties, there has been no evidence presented to indicate that the Association initially acted in anything other than good faith. Upon seeing the finished result, Ms. Levenson appears to have experienced a form of "buyer's

remorse." Even should there be a proposed remedy that would eliminate the need for a ramp, we cannot direct the expenditure of common funds by the Association in order to address Ms. Levenson's dissatisfaction.

There is, however, one correction to the deck that should be addressed by the Association. There is at least one paver which is not level to its neighboring pavers. According to the Association's expert, this paver is 1¾ inch higher than its neighboring pavers. Dr. Johnson described this paver as a tripping hazard. The only solution offered by Dr. Johnson, however, was to place a planter on top of this paver. No evidence was presented to indicate why the shim beneath this paver could not be either modified or replaced in order to correct this situation. And we are not persuaded that keeping this paver as is and placing a planter on top is consistent with replacing the old level deck with a comparable new deck. Accordingly, we direct that this paver be reset so that it is level with the remainder of the deck or that other appropriate and effective action be taken to remove the tripping hazard. We specifically find that the Association's proposed solution of placing an obstacle, in this case a planter, on top of the raised paver would not constitute "appropriate and effective action."

The Dining Room Ceiling

In presenting Respondent's case, counsel for the Association conceded its obligation to repair the ceiling in the dining room, while still maintaining the Commission's lack of jurisdiction to decide this issue. While we have found that the Commission does have jurisdiction over the issue, we further note that counsel also represented that the Association would repair the ceiling once the Ms. Levenson gives permission for repair crews to enter her unit. Accordingly, this issue is rendered moot.

The Bathroom

Ms. Levenson asserts that cracking in the bathroom ceiling and what she described as "bowing" of the walls are due to the prior roof leaks and thus the responsibility of the Association. Article VIII, Section 1(e) of the Association By-laws, Commission Exhibit 1, Volume 2, p 148, places upon the Association through its Board of Directors responsibility for roof maintenance and repairs as a common element. As a result, the Association is on notice of its responsibility to perform its duties in a responsible manner. As a result, any property damage incurred by a unit owner whose proximate cause is found to be the result of a breach of this duty is the responsibility of the Association. *Prentice v. Sierra Landing Condominium*, CCOC #15-08.

In support of this assertion, Ms. Levenson submitted two written reports by her expert, Mr. Joseph Walker. The first report, dated December 15, 2006, Commission Exhibit 1, Vol. 2, pp 53-58, noted "a series of hairline cracks in the

walls and ceilings of the living room, bedroom and bathroom" as well as "alligator crackling in the ceiling." *Id*. at 53. Two different water meters with deep penetration capabilities failed to detect any abnormal moisture levels. As a result, all of the wall cracks were determined to be "consistent with typical structural creep that exists in all buildings." *Id*.

The alligator crackling in the ceiling was determined to be "the remnant condition of old roof leaks or condensation build up in the space above the ceiling." *Id*. The remedy to this was described as "cosmetic treatment, i.e. sanding, point-up, and painting." *Id*.

In the subsequent July 22, 2008, report, Mr. Walker noted that he had no "first hand knowledge" of anything to change his position. Complainant Exhibit 2, p 1. The report goes on to note, however, that Ms. Levenson had reported that "these walls got wet during one of several roof leak events and they cracked afterwards." *Id*. Mr. Walker concluded that [i]f there is historic documentation that the walls got wet" then he would be "inclined to agree" that the cracking of the plaster was probably the result of "a cycle of being wet and dry." *Id*.

Mr. Walker's attribution of cracking of the bathroom walls to a reported history of the walls getting wet does give us reason to pause, however. There is ample documentation in the record to support a finding of roof leaks that could be the cause of previous wetness in the bathroom. This is further supported by Mr. Walker's finding that the alligator crackling in the ceiling was due old roof leaks or condensation.

The record does not conclusively establish, however, whether any wetness resulting from previous roof leaks extended to the walls. Neither of Mr. Walker's reports addresses the specific issue of what caused Ms. Levenson's bathroom walls to bow. Nor do his reports indicate whether the cracking can be corrected by any means short of replacing the walls. On the other hand, the Association has not provided us with a plausible alternative explanation for the condition of the bathroom walls.

While we are able to find the Association responsible for correcting the crackling noted by Mr. Walker, we are unable to make a determination of liability regarding the cracking and bowing described by Ms. Levenson. Accordingly, we hereby direct that Complainant may, if she chooses, file a supplemental brief on the issue of liability for the bathroom walls. Such submissions must be filed within 20 days after the issuance of this opinion. Complainant may include with her brief any new or additional documentation she may deem appropriate. If Complainant does choose to re-brief the issue, then the Association must have 15 days in which to file a response, accompanied by any additional documentation it may chose to submit. Each party should also take care to address what measures it believes would be necessary to correct the situation. The Panel further notes that both sides once again have the option, should they

wish, to avail themselves of the mediation services offered by the Commission.

Association Minutes

Ms. Levenson asserted in her testimony that minutes of Association meetings are not prepared in a timely manner and that they are not provided to members. No evidence was presented to contradict this assertion. Article VI, Section 6 of the condominium by-laws provide that "[t]he Secretary shall keep all meetings of the Board of Directors and the minutes of all meetings of the members of the Association." Commission Exhibit 1, p. 147. Though no provision seems to have been made for how quickly they have to be prepared, it would seem that all such minutes should be prepared by the next scheduled meeting so that they may be subject to approval by the entire Board. There also seem to be no provision in the by-laws requiring that minutes be distributed to every homeowner. Accordingly, we are only prepared to instruct the Association that the approved minutes of any meeting of either the Board or the Association's entire body be made available for inspection by the entire membership through any reasonable means prior to the next succeeding meeting.

Legal Fees and Other Costs

As noted above, due to the Association's lack of good cause in seeking a continuance of the July 23, 2008 hearing date, Complainant was invited to make a motion pursuant to Section 10B-13(d) for reimbursement of any costs incurred as a result of the untimely motion for continuance. In the July 23, 2008 Order Granting Continuance, counsel was instructed that such a motion must be accompanied by copies of bills involved and, if any of the bills involved legal fees, that they be accompanied by an itemized statement under oath of the fees, their purpose and how calculated.

Counsel for Complainant offered to present a motion for reimbursement of fees at the April 30, 2009 hearing. It is unclear from the Panel chair's notes whether at the time counsel was offering a written motion or simply tendering an oral motion. Regardless, it was decided that counsel could file a written motion of legal fees, followed by a written response by opposing counsel, based on the same briefing schedule set for Respondent's motion regarding the Commission's jurisdiction to hear the dispute.

Rather than seeking reimbursement for additional expenses incurred as a result of the untimely motion for a continuance of the July 23rd hearing date, counsel for Complainant now comes before the Commission seeking reimbursement of all legal fees incurred by Ms. Levenson.

The filing, combined with the attached submissions, constitutes 75 pages, though some of the pages are blank but for an attached evidence sticker. Included among the submissions are copies of invoices submitted to Ms. Levenson for professional services rendered. In addition, there is a chart summarizing counsel fees and costs incurred by Ms. Levenson on a monthly basis through May 8, 2009.

In her motion, counsel "submits" that all legal fees and costs incurred are reasonable. It is questionable whether this fully complies with the Panel's Order of July 23, 2008, that all bills for legal fees submitted for potential reimbursement had to be submitted "under oath." We would note, however, that this requirement was set forth in Commission practice and is not statutory.

Should we be willing to waive this requirement, however, our task of assessing fees due to the delay of the July 23rd hearing is complicated by the failure of counsel to include actual bills or to fully itemize her claim, as directed by our Order. As a result, we are only prepared to award fees for those entries for work performed after the continued hearing date of June 5, 2008, and prior to the scheduled hearing date of July 23, 2009. In reviewing those entries, we are only able to accept for reimbursement those that we are able to ascertain with a reasonable degree of certainty were for the sole purpose of preparing for the July 23, 2008, hearing and that counsel would be required to repeat for the next scheduled hearing.

This we find we are unable to do. While some of the work claimed we can conclude was spent preparing for the July 23rd hearing and had to be repeated, others entries are not as clear. One example is the relatively straightforward entry for July 15, 2008. On this date counsel traveled to meet with her client in order to prepare for the hearing. We have no doubt this hearing preparation with the client would have to be repeated prior to the subsequent hearing.

Counsel also conferred by telephone with Mr. Walker. The only description of the purpose of this conversation is "re: report." Presumably most of their conversation concerned the preparation of his report dated July 23, 2008, the date of the cancelled hearing. This portion of the conversation had to be held at some point, regardless of when the hearing occurred. And once the report was received, there was no need to telephone Mr. Walker to inquire further about its preparation. But having made that determination, it is not possible to determine which portion of the 4.4 hours was devoted to her witness preparation with Ms. Levenson and which portion was devoted to counsel's conversation with Mr. Walker.

Another example is the entry for July 22, 2008. The conversation with Ms. Levenson and reviewing the evidence prior to the hearing both were repetitive tasks. But it is unlikely counsel had to re-prepare the exhibits.

Accordingly, though we find Complainant made a good-faith effort to comply with our order of July 23, 2008, the Panel concludes that the information provided is insufficiently clear for it to rule on the request for fee and other costs as they relate to that continuance. We are therefore directing that Complainant may, should she choose, re-submit her application insofar as it pertains to fees and other costs resulting from that continuance. The application must be filed within 20 days after the issuance of this order. Opposing counsel will then have 15 days in which to submit a response.

We now turn to that portion of Complainant's motion seeking the awarding of all attorney fees and costs. In reviewing the record, we find we are able to rule on this portion of counsel's claim. In its motion, Complainant cites the numerous delays that occurred between the initial filing of Ms. Levenson's complaint on August 8, 2006, and the hearing of that complaint filed on April 30, 2009

As noted in the text of the Commission bulletin submitted into evidence by Complainant in support of her motion, the Maryland Court of Appeals held in *Black v. Fox Hills North Community Association*, 90 Md. App. 75, 599 A.2d 1228, *cert. denied*, 326 Md. 177, 604 A.2d 444 (1992), as a general matter the awarding of attorney fees is "an extraordinary remedy intended to reach intentional misconduct." Complainant, through the use of bold faced and italicized script, indicates that it she is basing her claim on an assertion that Respondent either unreasonably refused to accept mediation of the dispute, Montgomery County Code, Section 10B-13(d)(2), or, through its actions, substantially delayed or hindered the dispute resolution process without good cause. *Id* at 10B-13(d) (3). To support her assertion, Complainant cites as support *Greencasle Lakes Comm. Ass'n. v. Muller*, CCOC #829-G and *Longmead Crossing v. Venson,* CCOC #04-06.

Neither of the cases cited by Complainant supports her position. In *Muller*, the respondents failed to comply with several requests of the homeowners association that they file an application with the Association's Architectural Committee. Prior to the initial hearing date the respondents requested a continuance due to the unavailability of Mr. Muller to attend the hearing. On the agreed upon date neither respondent appeared for the hearing, nor did they send legal counsel to represent their interests. In *Venson* the respondent did not respond to the complaint and failed to attend the hearing. The Commission refused to award attorney fees, finding that the respondent's inaction did not constitute intentional misconduct resulting in a delay of the dispute resolution process. *See also, Livingstone v. Parkside Community Association, Inc*., CCOC #23-08.

In the instant case, Complainant has failed to establish any egregious behavior on the part of the opposing party designed to frustrate the dispute resolution process. After initially failing to respond to Ms. Levenson's complaint, the Association did file a response. The Association did refuse to participate in

the mediation process, but complaint does not establish in what way this refusal was unreasonable. There are instances where a party to a dispute will come to the conclusion that it has done enough to accommodate the demands of the opposing party and that participation in a mediation process will only serve to delay the resolution of the dispute. That this was the position of the Association has not been proven. But neither has Complainant established that the Association acted with the purpose of unreasonably delaying the process. We further note that both parties consented to removing the September 18, 2008, hearing from the Commission's docket for the purpose of trying to resolve the dispute through negotiation. We believe such an effort is a suitable substitute for mediation which meets the Commission's goal of encouraging informal settlements without need for hearings.

It would appear from the filing date that there has been a significant delay in scheduling the initial hearing date in this case. But Complainant has failed to establish how the Association might have contributed to this delay. And once the initial hearing date was established, there were two continuances that the respondent was not the cause of prior to the Association's request for a continuance of the July 23, 2008, hearing date. And while there was a finding of failure to show good cause for the continuance of the July 23rd hearing date, there is no evidence that the Association's action constituted an intentional act of misconduct.

Complainant asserts that the Association further delayed the dispute resolution process by failing to provide any response to her requests for proposals to resolve the issues. Complainant has not cited to any documentation in the record that would support this claim. In its response the Association refers to, and the Panel takes note of, the pages of correspondence between the parties addressing the issues in dispute. The Association has also submitted with its filing an affidavit by Harold Ward of Paul Associates, which the Association asserts would establish that Ms. Levenson has rejected its reasonable efforts to upgrade her balcony. The Panel is unable to consider this submission or to accept it into evidence because of the lack of opportunity provided to Complainant to confront this witness.

As noted by the Association, the Board of Directors has a fiduciary duty to the other homeowners to defend the Association from what it concludes to be unwarranted claims. The Association is entitled to defend its position vigorously. Complainant has failed to provide evidence that would establish that the Association's behavior constituted intentional misconduct. Accordingly, an award of attorney's fees and other costs would not be warranted pursuant to Section 10B-13.

Although we do not award attorneys fees, we do believe that Complainant should be reimbursed for the costs of her expert witness. We note that the Association repeatedly denied the existence of a leak, and that Mr. Walker's

report of December 15, 2006, not only confirmed the existence of a leak but noted the possibility that it was related to the roof drain system, and subsequent events proved him correct. Had the Association responded more effectively to his report, it might have avoided the collapse of the ceiling a few months later and brought this matter to a resolution much earlier. Mr. Walker's reports were instrumental in getting the Association to begin to respond.

ORDER

The Panel therefore ORDERS as follows:

1. That within 20 days after the date of this decision, Complainant may file a motion for attorneys fees and other costs as they relate to the continuance of July 23, 2008. This motion must be under oath and supported by itemized bills, and should explain the relationship between the bills and the continuance. Complainant must serve a copy of the motion upon Respondent after which Respondent will have 15 days in which to file its comments or opposition thereto. The Panel will then rule on the motion.

2. That within 20 days after the date of this decision Complainant may file a supplemental brief regarding the repair to the bathroom walls. Complainant must serve a copy of said motion upon Respondent after which Respondent will have 15 days in which to file its comments or opposition thereto.

3 That within 30 days after the date of this decision, the Respondent must pay to Complainant the sum of $50.00 as the reimbursement of her filing fee, plus the sums she paid to her expert witness, Claxton Walker & Associates. Complainant must provide a copy of her invoices for these fees to the Respondent and to the Commission staff within 15 days after the date of this decision.

4. That within 30 days after the date of this decision, Respondent must:

a) repair the balcony so as to remove the paver that is not level with its neighbors;

b) repair all damage to the living room ceiling and walls caused leaks of the roof drain while ensuring that the original leaks to the roof drain has been fixed;

c) perform the necessary sanding, point-up and painting required in order to correct the alligator crackling reported in the bathroom ceiling. This work, along with all other work directed by this decision, may be delayed at the discretion of Complainant until the issue of liability for repairs to the bathroom walls is determined.

5. That within 60 days after the date of this decision, Respondent must return to the Complainant all personal property of hers that it removed from the balcony.

6. That within 60 days after the date of this decision, the Respondent must adopt a policy of approving the draft minutes of its board and special meetings and make those approved minutes available to the membership for inspection prior to the meeting immediately following the meeting at which the minutes were approved.

The Hearing Panel retains jurisdiction over this matter pending submission of the revised motion for attorney fees as discussed in Paragraphs 1 and 2 of this Order.

Commissioners Farrar and Nettleford concur in this Decision.

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John Sample, Panel Chair