Before the
Commission on Common Ownership Communities
Montgomery County, Maryland

In the matter of

James and Pandora Kessler, **Complainants**	x x x	
v.	x x x	**Case No. 02-12** February 25, 2013
Leaman Farm Homeowners Association, **Respondent**	x x x	

Before Commissioners Alkon (Panel Chair), Dubin and Farrar

DECISION AND ORDER

The above-captioned case came before the Commission on Common Ownership Communities for Montgomery County ("CCOC"). Pursuant to Chapter 10B of the Montgomery County Code, 1994, as amended, and the duly authorized Hearing Panel ("the Panel") having considered the testimony and evidence of record, finds, determines, and orders as follows:

BACKGROUND

James C. Kessler and his wife, Pandora J. Kessler (the "Complainants"), are the owners of the property improved by 13803 Leaman Farm Road, Boyds, Maryland (the "Property"). The Property is located within, and the Complainants are members of, The Leaman Farm Home Owners Association (the "Association" or the "Respondent").

The Complainant James Kessler filed a Complaint ("the Complaint") with the CCOC against the Respondent on or about January 3, 2012, and his wife voluntarily joined the complaint subsequently. The Complainants alleged that their application for approval of privacy panels they had installed on their deck without permission was improperly disallowed by the Association, and that because the Association did not properly deny it within the time allowed by the governing documents of the Association, it was therefore deemed approved. The Complainants further contended that the CCOC had jurisdiction over this matter because the Complaint involved the authority of the governing body, under any law or association document, to: i) require any person to take any action or not to take any action involving unit or a common element; and ii) require

any person to pay a fee, fine or assessment; and iii) give adequate notice of a meeting or other action.

The Association filed a Response and Counter Request for Relief. In this filing the Association contended that its Board of Directors properly enforced its governing documents and exercised its business judgment in denying the Complainant's application. The Association requested that the Commission order the Complainants to remove the privacy panels, to reimburse the Association for its costs and attorney fees, and to pay all fines accrued at the rate of $25 per day beginning January 1, 2012 until the panels are removed.

The matter was heard by this Panel on November 14, 2012.

Having considered the record herein, and the testimony and exhibits produced at the hearing, the Panel now makes the following Findings of Fact and Conclusions of Law.

Findings of Fact

1. The Complainants are owners of the Property. The Property is located within, and the Complainants are members of, the Leaman Farm Homeowners Association.

2. From November, 2010, through November, 2011, Complainant James Kessler was the President of the Association and a member of it Board of Directors. He was aware of the Association's rules for architectural regulation, and in fact applied those rules to applications coming before the board.

3. The Association is organized and operated under the laws of the State of Maryland. A copy of the Association's Articles of Incorporation, Declaration of Covenants, Conditions and Restrictions ("Declaration") Bylaws and duly promulgated rules and Regulations, including its Architectural Guidelines and Review Procedures (the "Guidelines") were introduced into evidence. The Association's Declaration of Covenants is filed in the land records of the Circuit Court for Montgomery County, Maryland and contains covenants running with the land, including a covenant under which the Association has the right to impose fees on each member lot (Declaration Article V).

4. The Association's Board of Directors ("the Board") also functions as its Covenants Committee, which has the authority to enforce the community's architectural controls.

5. Article VIII, Section 8.1, of the Declaration of Covenants prohibits any changes to the member lots or homes, or the construction of any structures, without the prior approval of the Association.

6. Article VIII, Section 8.3, states that "in the event the [Association] fails to approve or disapprove any plans and specifications which may be submitted to it pursuant to the provisions of this Article within sixty (60) days after such plans and specifications . . . have been submitted to it in writing, then approval will not be required and this Article will be deemed to have been fully complied with."

7. The Complainant filed an application to build a deck on his home at the Property on June 10, 2011, which the Association approved on June 15, 2011. The application shows a railing along the edges of the deck approximately 3 to 4 feet high, constructed of vertical posts supporting parallel horizontal top and bottom rails, with vertical spindles between the rails.

8. Subsequent to this approval the Complainant altered his deck design by adding a fence or privacy panels. These panels are 8 feet tall and almost completely closed, and present a markedly different appearance from the approved design, which was much shorter and much more open. The privacy panels are also a different color from the rest of the deck, being natural wood, whereas the rest of the deck railing is white vinyl. The Complainant did not apply for the Board's approval of this change prior to constructing it. The house to which the deck is attached is sheathed with light-colored vinyl siding, and it has no natural wood trim. The altered deck was completed some time in July, 2011. Prior to making the changes, the deck builder advised the Complainants to investigate whether the new design should be approved by the Association.

9. Neighbors of the Complainants complained about the new deck to the Association, and on July 26, 2011, the Association sent a violation notice to the Complainants. When the Complainants failed to respond, the Association sent a second violation notice to the Complainants on August 11, 2011. In response to the second notice, Mr. Kessler, who was the President of the Board of Directors, held an informal meeting at his home later in August to discuss complaints being made to the Board about the privacy panels and to show the visitors the panels. This meeting, which included some members of the Board, did not result in any resolution of the issue, and Mr. Kessler called a formal meeting of the Board on September 1, 2011 at the local library.

10. At the formal Board meeting on September 1, 2011, meeting, Mr. Kessler presided over the meeting and in the course of it he made an oral request for approval of his deck modifications. The Association's governing documents require architectural modifications to be in writing and to contain the signatures of the applicant's neighbors. Mr. Kessler did not present any written application or the signatures of his neighbors. The Board proceeded to discuss the merits of the Complainant's application. In addition to comments on it by Board members, several homeowners were also present and commented on the deck. The comments were generally unfavorable. Mr.

Kessler testified that, at the meeting, some of the Board members expressed their opinions that the proposed improvements "detracted from the neighborhood," that they "just didn't like" the modifications, and at least one other homeowner said that the privacy panels were "ugly." The discussion on the oral request for approval lasted approximately 45 minutes. At the end of the discussions, the matter was put to a vote. Mr. Kessler voted on his own application. The application was rejected by a vote of 5 to 2. Mr. Rai, a member of the Board (and an adjacent neighbor of the Complainants), testified that the application was eventually rejected because the requested privacy fence or panels were not consistent or harmonious with community standards.

11. Minutes were prepared of the Meeting (the "Minutes"), which were introduced into evidence. The Minutes, dated September 9, 2011, state, in pertinent part, that the "Board members did not state why the privacy panels violated the HOA rules." Mr. Rai explained that he understood that language to mean simply that the Association did not have a rule specifically regulating the design of deck railings or privacy panels, but that the Board based its decision on the overall appearance of the deck in relation to the design of the community. Mr. Wilson, the Association's manager, testified that the Complainants' application was not rejected because it was oral but rather on its merits.

12. A Covenants Committee Action, dated the same day as the Minutes, was issued , by the Board, through its management company, which stated, in pertinent part, as follows:

    "The Board has DISAPPROVED your request for a PRIVACY FENCE ON DECK. Since the structure is nearly completed, you are hereby requested to remove the privacy fence and restore your deck to its original condition based on the plans reviewed and approved at the June 14, 2011 Board meeting."

13. The Covenants Committee Action notice stated that the Complainant had the right to appeal the Action to the Board. In October, 2011, the Complainants sent a letter of appeal. The Association denied the appeal on the grounds that its notice was in error and the Complainant had no right of appeal because the decision on his application was made by the Board of Directors sitting as the Covenants Committee (Covenants, Article VIII, Section 8.7). The Action notice did not state the reasons for the Board's denial of the Complainant's application.

14. Section I.C.2.g of the Guidelines and Review Procedures states:

    "If approval/disapproval has not been made within 60 days, and the application is consistent with the guidelines, then the application will be considered approved."

15. Section I.C.3 of the Guidelines states;
"If the proposal is rejected, the reason(s) for the disapproval shall be stated as part of the written decision. The applicant may request reconsideration if new or additional information which might clarify the request or demonstrate its acceptability can be provided."

16. The 60 days allowed by Section I.C.2.g of the Guidelines expired on October 31, 2011.

17. On November 1, 2011, one day after the deadline expired, the Complainants, through counsel, wrote a letter to the Association's management company, pointing out that Guideline section I.C.3 requires an application's disapproval to be in writing and to state the reasons for the disapproval, and that Declaration section 8.3 states that applications that are not rejected within 60 days are deemed approved. The Complainant argued that because a proper written approval was not timely issued then, in accordance with the Guidelines, his oral application was deemed approved.

18. The Declaration of Covenants, Article XIV, Section 14.5, states that the enforcement of the Declaration "shall" be by any proceeding at law or in equity, "all at the cost, including court costs and reasonable attorneys fees, of the Owner in violation."

19. The Declaration of Covenants, Article VIII, Section 8.17, grants the Association the right to impose fines for violation of its governing documents.

Discussion

At the outset, we must determine the standard of review that we will apply to this case.

The Respondent argues that the proper standard of review is the "business judgment" rule as enunciated in *Black v. Fox Hills North Community Association,* 599 A.2d 1228 (Md. App. 1992). Under that standard, we must uphold the decision of the Board of Directors unless the Complainant proves that the Board acted fraudulently or in bad faith.

We cannot agree. *Black* is inapposite for two reasons. First of all, *Black* involved a challenge to a board's decision to *permit* a homeowner to make changes to his lot, whereas in this case the Board seeks to *restrict* the homeowner from making changes to his lot. As the Court of Special Appeals wrote in *Markey v. Wolfe,* 92. Md. App. 137 (1991), a homeowner association's disapproval of plans is governed by the reasonableness rule of *Kirkley v. Seipelt,* 128 A.2d 430, 212 Md. 127 (1957), whereas the

approval of plans does not interfere with freedom of property and allows a lesser degree of scrutiny. The Commission has dealt carefully and extensively with this issue in *Simons v. Fair Hill Farm HOA*, #66-10 (May 6, 2010) and in *Decker v. Kingsview Village HOA*, #19-11 (September 20, 2012), and we adopt the reasoning of those decisions.

Secondly, *Black* involved the rights of a homeowner who was not a party to the case. In *Black*, the party was disputing a decision of his association to allow *his neighbor* to construct a fence. The neighbor was not a party, and therefore was not given due process to defend his own interests in the matter. As the Commission has noted in *Killea and McNulty v. Cabin John Gardens Inc.*, CCOC ##88-10 and 24-11 (October 3, 2012), a tribunal's ability to make any decision that could affect the property rights of an unrepresented person (such as by overturning a board's decision to allow the unrepresented person the right to install a fence) is strictly limited by the U.S. Constitution.

Therefore, the standard we apply is that of *Kirkley v. Seipelt*, which requires the Association to show that its rejection of the oral application "is based on a reason that bears some relation to the other buildings or the general plan of development, and this refusal would have to be a reasonable determination made in good faith, and not high-handed, whimsical or captious in manner."

The Association argues that the privacy panels do not conform to the overall design scheme of the community. The evidence is substantial that these 8-foot high, solid, natural wood panels are markedly different from adjoining 3-foot, white railings with regularly-spaced spindles. The Complainants do not provide any facts or argument to show that these panels are consistent with any other design or structure in the community.

Instead, the Complainants appear to argue that the Association cannot meet the *Kirkley* test because the Association had no reason for its rejection and therefore acted arbitrarily. Complainants also argue that the Association should be deemed to have approved the privacy panels because, although the Association denied the oral application within 60 days, it failed to state a reason for the denial within 60 days. However, the Guidelines do not actually say this. The relevant section (I.C.2.g of the Guidelines, Commission Exhibit 1 at p. 108) says that if the Association fails to approve or disapprove the application within 60 days, it is deemed approved, and it is undisputed that the Association did disapprove the application well before the 60 day deadline expired.

The facts are clear and undisputed that at the September 1, 2011, Board meeting there was a lengthy discussion of the merits of the Complainants' unapproved privacy panels and that many negative comments were made about them. Mr. Kessler was present throughout this discussion and apparently participated in it, as was his right as the applicant. Mr. Kessler's own testimony shows he was aware of the negative comments.

The Complainants argue that if they had known of the reasons for the Board's rejection of their privacy panels, they would have known how to modify them so as to satisfy the Board. They point to another application heard at the same meeting, which was approved on condition that the applicant make certain changes to his proposed deck; he made the changes and he was allowed to install the deck. However, nothing prevented—nor now prevents—the Complainants from coming back to the Board with another application to modify their privacy panels. Nor would a timely written statement from the Board necessarily have given the Complainants more information than they already had simply by attending the meeting and hearing the negative comments. The board could have simply stated that the privacy panels did not conform to the overall architectural concept of the community. We note that the Court in *Kirkley* upheld a board dealing with a similar situation: the homeowner had installed metal awnings without permission but there was no rule specifically barring metal awnings.

The Complainants also argue that by not stating in writing a reason for denial within 60 days, the Association effectively deemed the application to be approved. We note that the Declaration of Covenants requires the Board to approve or disapprove a proper application within 60 days; however, the Declaration does not require the Board to state in writing its reason for disapproval. That requirement is only found in the Guidelines. While we do not conclude that the board is relieved from a duty to give a reason in writing, we note that a violation of a guideline is not as serious as a violation of a covenant; and we note further that the Complainants violated not only the Guidelines but also the Association's Declaration of Covenants. We further note that the Guidelines appear to contemplate that a written reason can be given *after* the 60-day deadline without the application being automatically deemed approved. Guideline I.C.3 states that if the applicant for some reason believes the written reason is insufficient or unclear, he can request more information. Thus, were the Association to deny an application on the 60th day, and to include a written reason which is not sufficient, the remedy called for in the Guidelines is not that the application is approved but that the applicant may request more information. However, the Complainants did not exercise this right.

Moreover, the Complainants utterly fail to show how the Association's noncompliance with the Guideline caused them any serious injury, or any injury at all. They had *already* constructed the privacy panels. They did not rely to their detriment on the Association's failure to state a reason in writing.

While the Complainants fail to show any harm resulting from the Board's failure to comply with the Guideline, it is clear that the Association suffered harm from the Complainants' violation of the Covenant prohibiting the making of changes without permission. The Association now has a home with a modification that makes it significantly different from other homes in the community, and the adjacent neighbors of that house are visually affected by the change on a daily basis.

A final factor that we must consider is the Complainant James Kessler's legal relationship to his own community. The Complainants are not ordinary homeowners, who have the right to improve their property and whose obligation to their community

consists of obeying its rules. Mr. Kessler was a member of the Association's Board of directors, as well as the President of the Board, during all the times involved in this dispute.

These facts raise the question of what are the duties of a director to his association when he is engaged in an adversarial relationship with his association. The Commission has never had to deal with this specific question before, and we have not found any Maryland cases on point. Does such a director still have a fiduciary duty to his association? And if he does, what does it mean in this context?

We believe that so long as a person is a director, he is bound to act as a fiduciary. He must act in good faith, with due care, and "in a manner he reasonably believe to be in the best interests of the corporation." Md. Code Ann., Corps & Ass'ns, § 2-405.1(a). He is bound by this duty even if he is in a dispute with the rest of the Board of Directors. If Mr. Kessler had prevailed at the Board meeting of September 1, 2011, there would be no question that his duty would be governed by the standards of Section 2-405 and that the Board's decision could be challenged for a conflict of interest, fraud or bad faith under *Black*. The standard of care and of loyalty expected of Kessler should be the same whether his application was accepted or rejected.

Courts do not expect that directors never act in their own self interest. On the contrary, they recognize that directors may have individual interests and group interests at the same time. "An example of the common interest community director's not having an interest in the outcome of the decision is difficult to imagine." W. HYATT, CONDOMINIUM AND HOMEOWNER ASSOCIATION PRACTICE: COMMUNITY ASSOCIATION LAW 96 (3d Ed. 2000). But if the fiduciary duty of a director is to mean anything at all, it must mean that the director endeavor to act in the best interest of the community, and this means he *must* place the association's best interests above his own private interests. If he cannot do so, he must resign.

It is difficult to see how any of Mr. Kessler's actions throughout this controversy comport with his fiduciary duty as a director. He admitted that he was familiar with the architectural rules and procedures of his association, and therefore, presumably, he was aware of his duty to request in writing and obtain permission for any changes. Yet he constructed a noticeably different railing on his deck than his association had approved, he ignored its first notice of violation, he made an oral request for a change instead of a written request, and in spite of a clear conflict of interest, he voted upon his own oral application. When Mr. Kessler received the Board's rejection, he knew that his application did not comply with the Association's Guidelines. However, instead of insisting that the Board state in writing a reason for its denial of his application, Mr. Kessler waited 60 days, and as soon as the 60 day deadline passed, he notified the Board that it had approved his privacy panels because of its noncompliance with the Guidelines.

We find this last act of Mr. Kessler's particularly noteworthy. That he knew of the 60 day deadline can readily be inferred both from his own admission that he was familiar with the architectural rules and procedures as well as from the fact that a mere 24

hours after the deadline expired he attempted to take advantage of it to declare his alterations were approved. He could have notified the Association of its duty to give a written reason before the deadline expired. He could have exercised his right under Section I.C.3 of the Guidelines to ask for clarification. However, he did not. Instead, he took advantage of the Association's error for his own private benefit.

As a member of the Association's Board, Mr. Kessler had a fiduciary interest to help ensure that the Association properly followed its own rules. He also had a duty to prevent the Association from either taking action or failing to take action when he knew the Association would violate its own rules as a result. He attempted to benefit directly from a mistake that he allowed his own board to make. This was self-dealing on his part. This panel declines to tolerate or excuse such behavior by a director of a common ownership community.

Conclusions of Law

1. The Complainants are members of the Leaman Farm Homeowners Association and bound by its governing documents.

2. The Respondent is a homeowners association within the meaning of Title 11B of the Real Property Article of the Code of Maryland.

3. The Complainants violated the Declaration of the community by installing privacy panels on their deck without seeking the permission of the Association beforehand.

4. The Complainants violated the Architectural Guidelines of the community by failing to apply in writing for permission for the privacy panels.

5. The Respondent complied with its Declaration on the disapproval of the Complainants' architectural application for the privacy panels, but it violated its Guidelines by failing to state, in writing, the reason for its denial.

6. The Guidelines do not mandate that an architectural application is deemed approved if the Association fails to provide a written explanation within 60 days of why the application has been rejected. An application is not automatically approved if the Association fails to provide a written explanation of the reason for disapproval within 60 days. The proper consequence of an Association's failure to provide a timely written reason must depend on the circumstances of each case.

7. The modifications constructed by Complainants to their deck do not conform to the overall design scheme of the community, and the Respondent therefore had good reason to reject them on their merits.

8. The Complainants failed to show that they relied to their detriment on the Association's failure to state in writing why their application was denied.

9. The Complainant James Kessler, by virtue of his position as a member of the Association's Board of Directors, was a fiduciary to his Association and obligated to act in its best interests. Mr. Kessler violated his fiduciary duties by repeatedly failing to obey the Association's rules, by failing to take reasonable steps to alert his Association that it was not following its own rules, and by attempting to profit personally by his own violations and his own failures to help prevent the Association from making mistakes.

Fines and Attorneys Fees

The Respondent seeks both daily fines of $25 since January 1, 2012, and reasonable attorneys fees for its defense of this action.

Article VIII, Section 8.17 of the Declaration grants the Association the right to impose fines of $25 per day. The fines were to begin January 1, 2012, but with the filing of this action on January 3, 2012, the collection of fines was stayed pursuant to Section 10B-9(e) of the Montgomery County Code.

Under Section 10B-13(e) of the Montgomery County Code, we may order the payment of damages and of any other relief that the facts and the law warrant. We decline to order the award of fines in this case. Fines are not solely punitive in nature. They also serve useful purposes of deterring violations and encouraging voluntary compliance with prior approval requirements. *See, generally,* W. HYATT, CONDOMINIUM AND HOMEOWNER ASSOCIATION PRACTICE, *supra,* at Section 8.04. We deny the request for fines in this action because we believe that our orders will accomplish the same purposes and that therefore any award of fines would be excessive.

Under Section 10B-13(d), we may order attorneys fees "if an association document so requires and the award is reasonable under the circumstances." We interpret Article XIV, Section 14.5, of the Declaration of Covenants to state that if the Association takes legal action to enforce its rules, then the costs and attorneys fees for that action "shall" be at the expense of the member in violation. We therefore conclude that we have authority to grant the motion for reasonable attorney's fees, and the motion is granted.

The fees must be reviewed under the standards set by the Court of Appeals in *Monmouth Meadows HOA v. Hamilton,* 416 Md. 325, 7 A.3d 1 (Md. 2010); applied by the Commission in *Decker v. Kingsview Village HOA*, #19-11 (September 20, 2012). Respondent has submitted an affidavit itemizing its fees and requesting $16,102. Complainants have not responded to that itemization, and we will invite Complainants to do so before we rule.

ORDER

The hearing panel hereby adjudicates and orders as follows:

1. The Complaint is DISMISSED WITH PREJUDICE; and

2. Within 30 days after the date of this Order, the Respondent must deliver to the Complainants a statement, in writing, explaining why the Respondent rejects the Complainants' oral application for privacy panels on their deck; and

3. Within 60 days after the date of this Order, the Complainants must remove the privacy panels from their deck and install the approved railing; and if they fail to do so, the Respondent may enter on the property and remove the privacy panels at the Complainants' cost, and may collect those costs from Complainants in any way authorized by its governing documents or by applicable law; and,

3. The Respondent's motion for attorneys fees is GRANTED and the Complainants may, within 15 days after the date of this Order, file their comments on or objections to the amount requested, stating in detail the reasons for any objections to the amount sought and referencing their comments or objections to the standards required by the Court in *Monmouth Meadows HOA v. Hamilton;* and,

4. The hearing panel retains jurisdiction of this dispute for the purpose of determining attorney's fees.

Commissioner Arthur Dubin concurs.

Allen Farrar, Commissioner

Commissioner and Panel Chair Mitchell Alkon, dissenting:

I concur with the majority in the Findings of Fact, and I further concur that the standard of review in this dispute is not the "business judgment rule" as stated in *Black v. Fox Hills North Community Association, supra.* However, I believe that the Association should be held to the letter of its governing documents, and that those governing documents dictate that the Complaint should be granted. I therefore dissent from the Discussion and from the Conclusions of Law.

With respect to improvements sought to be constructed, Section 8.3 of the Declaration provides that if the Association fails to approve or disapprove plans and specification within sixty (60) days after their submission, then approval will not be required and "this Article" will be deemed to have been fully complied with. The majority posits that the Complainants' proposed improvement was rejected at the

September 1. 2011 meeting, and thus the passive acceptance provided by Section 8.3 is not applicable. The problem with this reasoning is the application of Guideline I.C.3, which requires the reasons for any disapproval be stated as part of the written decision. The initial rejection was orally given and the written memorialization of this rejection, in the Board's minutes, acknowledges that the "Board members did not state why the privacy panels violated the HOA rules." A Covenants Committee Action, of even date with those minutes, was sent to the Complainants and this action also failed to state the basis for the Board's decision. Since the reasons for the disapproval had to be part of the written denial of the application, I believe that the disapproval was inadequate and should not constitute a rejection. As a timely disapproval was not given to the Complainants, Declaration Section 8.3 governs and the Complainants' application must be deemed approved.

The majority points out that there was a lengthy discussion of the merits of the application and that many negative comments were made about it. Indeed, the Complainant Mr. Kessler acknowledged, at the hearing before this panel, that he was aware of those negative comments. However, discussion on a topic does not equate with a ruling. The Association has in place a specific requirement that a written and reasoned disapproval be given, and having provided that right and process, neither the Board nor this hearing panel can take it away. The Complainant is not to be put to the task of having to determine the Board's basis" he has the right to have this basis properly enunciated and provided to him. I find it significant that the very sentence following the requirement for a written reasoned decision is that the "applicant may request reconsideration if new or additional information which might clarify the request or demonstrate its acceptability can be provided." Without the proper disapproval, reconsideration is effectively compromised. As argued by the Complainants, the Association's governing documents are to be strictly construed in favor of free use of the Property. *See, Harbor View Improvement Association v. Downey,* 270 Md. 375 (1973).

It can also be argued that the Complainants' ability to appeal has been adversely impacted by the Board's failure to provide a reasoned written disapproval. Although the majority seeks to apply the review standard of *Kirkley, supra,* it is difficult to do so without knowing exactly why the application was rejected. I acknowledge the basis provided at the hearing before this panel, including the testimony of Mr. Rai, but would prefer to work from a written opinion rather than post-decision testimony. The minutes are clear and unambiguous with respect to the statement that the Board members did not state why the privacy panels did not conform to the overall architectural concept of the community. Consequently, Mr. Rai's testimony as to what was meant by the statement is not helpful to me. While it is true that the Board could have stated that the privacy panels did not conform to the overall architectural concept of the community, it did not timely do so. (This does not suggest that such a blanket disapproval statement would comply or not comply with the requirements of Guideline I.C.3, as that issue is not before this panel.)

The majority states that a violation of a Guideline does not reach the same level as the violation of the Declaration. I do not agree: both Declaration and Guidelines are

governing documents to be followed, with the former taking precedence of the latter only if there is a conflict between the two. I see no basis for the majority's conclusion that the Guidelines contemplate that a written reason can be given after the 60-day deadline without the application being automatically deemed approved. If that were the case, could the reason be given within one day, one month, on year or otherwise after the Board's ruling. If such a delay is permitted, then how can a timely and effective reconsideration or appeal be taken from the decision?

The majority states that the Complainants violated the governing documents by proposing that their application be tendered orally. The majority believes this action, as well as the Complainants' action in constructing their panels without previously seeking approval, and Mr. Kessler's failure to advise the Board of its Guideline obligation, constitute breaches of Mr. Kessler's fiduciary duty. While the oral submission was clearly improper, any harm was negated when the Board allowed this oral application. Clearly, the Complainant Mr. Kessler, notwithstanding his presidency, did not control or dominate the Board as the Board voted against his application. Further, the vote on the application came about on a motion to disapprove the application that was submitted by Mr. Rai, and not by a motion to approve the application submitted by the Complainants. Additionally, the Complainants' construction of the privacy panels without Board approval was done at their on peril. Their application and the Board's undertaking of it cured any harm.

I also have difficulty accepting the application of Section 2-405.1(a), Corporations and Associations Article, Annotated Code of Maryland, to the facts at issue. The realities of common ownership life frequently result in Board members having personal issues to be adjudicated. As Mr. Hyatt acknowledged in his treatise above cited, Board members are not required to surrender their personal rights in such disputes in favor of the Association. It is significant that the Board acted independently of Mr. Kessler, and that Mr. Kessler did not act based upon information that he derived from his position as President of the Board but instead upon information available to the general community.

The majority points out that Mr. Kessler asserted, on the first day possible, that his application was approved by the passage of time. I am not troubled by this, as it was Mr. Kessler's right to advocate this position and a delay in doing so would not make his argument any more or less effective. While nothing prevented the Complainants from seeking reconsideration or modification after the sixty day period, the Complainants were not required to do so. The majority also points out that if the Board's written reasoned decision was insufficient, then the applicant's remedy was to seek further information, not to contend that tacit approval had been given. However, in this dispute, no written reasoned decision was provided. The Association was required to provide a specific due process, including the sixty day approval, and it must be held to compliance with that process. If the application of due process results in the Association having a house with privacy panels, then that is the resulting action. I do not believe that a showing of reliance on Guideline I.C.3 is required of the Complainants, because that would

effectively require the panel to re-write the Guidelines an to engage in inappropriate activism.

For the foregoing reasons, I find the litigation was necessitated by the Association's failure to abide by its own governing documents, and thus I cannot agree that an award of attorneys fees is reasonable. I would grant the complaint, order the Complainants' privacy panels approved, and deny the award of attorneys fees.

Mitchell Alkon

Mitchell Alkon, Panel Chair

EXHIBIT B

Before the
Commission on Common Ownership Communities
Montgomery County, Maryland

In the matter of

James and Pandora Kessler, **Complainants**	x x x	
v.	x x x	**Case No. 02-12** April 18, 2013
Leaman Farm Homeowners Association, **Respondent**	x x x	

Before Commissioners Alkon (Panel Chair), Dubin and Farrar

DECISION AND ORDER ON ATTORNEY FEES

The above-captioned case came before the Commission on Common Ownership Communities for Montgomery County ("CCOC"). Pursuant to Chapter 10B of the Montgomery County Code, 1994, as amended, and the duly authorized Hearing Panel ("the Panel") having considered the arguments and evidence of record, finds, determines, and orders as follows:

BACKGROUND

A majority of the panel assigned to this case held that the Complainants had violated their association's governing documents and ordered them to remove the privacy panels that they had installed on their deck without permission. The majority also granted the Respondent's motion for attorney fees but deferred a ruling on the amount of the fees pending briefing by both parties. The panel has since received and considered the briefs from both parties and is now prepared to determine the amount of the fees and to issue a final judgment.

The motion requested fees for 80 hours of time, most at the rate of $200 per hour for the lead attorney and the remainder at $160 per hour for his associate. Complainant made 4 objections: 1. that the fee affidavit was not provided in discovery although requested; 2. that Complainant did not have the opportunity to cross-examine witnesses supporting the fee request; 3. that any award should be limited to fees actually paid by the Respondent (it appears that Respondent's insurance company paid most if not all of the fees); and, finally: 4. the fees are excessive.

Both parties, and the panel, agree that the proper standard for review of an award of attorney fees being sought pursuant to a community association's governing documents is Rule 1.5 of the Maryland Lawyers' Rules of Professional Conduct. *See, Monmouth Meadows Homeowners Association v. Hamilton,* 416 Md. 325, 7 A.3d 1 (Md. 2010), applied by the Commission in *Decker v. Kingsview Village Homeowners Association* #19-11 (September 20, 2012).

DISCUSSION

We first respond to Complainants' objections that the motion should be denied because the affidavit was not supplied in discovery and there was no hearing on the request. We do not agree. First of all, such an affidavit would have been incomplete, since it could not include all of the work necessary to prepare for and to participate in a hearing. Secondly, Complainants were on notice early in the case that Respondent would seek attorney fees and they did not object during the discovery stage to the failure to produce an affidavit. In addition, any harm that might have been caused to the Complainants was obviated when the panel granted time for the Complainants to respond to the complete affidavit. Finally, *Monmouth Meadows* does not require a hearing on attorney fee requests, 7 A.3d 8, n.12, and since the matter has been fully briefed, we do not believe that a hearing will be necessary. We are also reluctant to raise further the costs of this dispute by holding another hearing without a persuasive need for one.

Complainants also point out that the affidavit shows that Respondents' attorneys were hired by its insurance carrier and suggest that Respondents have not incurred any fees, or that most of the fees requested were paid by the insurance company. They argue that any fee request should compensate Respondent only for such attorney fees as it has to pay out of its own funds. However, Article XIV, Section 14.5 of the Declaration of Covenants states that if the Respondent must take action to enforce the Declaration against any member, the costs of that action, including attorney fees, shall be at the cost of the member. It does not state that the member is liable only for the costs actually paid by the Respondent out of its own funds. Moreover, the Respondent might be obligated to pay any funds received from the Complainants to its insurer pursuant to a subrogation agreement.

The main objection to the fee request is that the fees are excessive. Complainants concede that the hourly rate used here ($200 per hour for Mr. Fisher) is reasonable; but they argue that there is considerable duplication of effort and that much of the time expended was used for communication with the insurance company rather than for the actual defense of the Respondent. We agree and we find that reasonable fees are less than those requested.

Applying the first of the factors listed in *Monmouth Meadows* (the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal services properly), we find the request excessive. The subject of this case—the right of an association to enforce its architectural standards—is a common one,

and so is the determination of the proper standard of review by a court or this commission. The only dispute presented by the Complainants was whether the Respondent failed to comply with one of its own rules in the process of denying the Complainants' application, and if so, what effect that failure should have. There were no facts in dispute. The hearing itself lasted only two-and-a-half hours.

Respondent seeks compensation for 80 hours of attorney time. We note that in our recent decision in *Decker v. Kingsview Village HOA, supra,* a rule enforcement case quite similar to this, we found that 18.2 hours was a reasonable expenditure of time for a dispute in which there was both a mediation session and a formal hearing.

We must also consider whether by accepting this case the attorney was precluded from accepting other employment. We have no information on this. It also appears that the attorneys have an ongoing relationship with the insurance company; and that the attorneys are members of a law firm that specializes in legal services to common ownership communities.

The third factor is the fee customarily charged in this jurisdiction for similar services. In our experience, a fee of $200 per hour for an attorney of Mr. Fisher's caliber is well below the average hourly rate prevailing in this area, and we note that in the *Decker* case we found that his fee of $380 was reasonable, even if at the high end of the prevailing scale. We likewise find that the hourly rate for his associate, Ms. Katz, $160, is below the prevailing rate for an associate, and we find it to be reasonable.

The fourth factor is "the amount involved and the results obtained." Neither party sought a money judgment. The association sought enforcement of its rules and it prevailed fully. The protection of the aesthetics of the community and the enforcement of its architectural standards are a valuable right, on which it is impossible to place a dollar value, but that does not justify the expenditure of unlimited sums of money. The condition involved in this dispute, while offensive visually, was not a threat to the community's health or safety.

We must also consider "time limitations imposed by the client" and the "nature and length of the attorney's professional relationship with the client." We have no information on these matters.

We must consider the attorney's professional qualifications. Mr. Fisher and Mr. Van Grack are leaders in this field with extensive experience. Ms. Katz, although newer to this field, is also well regarded.

Finally, we consider whether the fee is fixed or contingent. According to Respondent's submissions, it is a fixed fee at reduced hourly rates.

We believe it fair and reasonable to take into account the need to coordinate the efforts of different attorneys in a large firm., and that the use of an associate's services at a

lower hourly rate than a partner's can produce a savings to the client. We therefore, unlike the panel in the *Decker* case, will not completely disregard those services.

In this case, the defending party is requesting legal fees. The case was fully litigated. In addition to preparing the answer and motion to join an essential party, there was a Commission-sponsored mediation session, which was followed by settlement discussions. Both parties engaged in prehearing discovery, which was followed by the necessary preparations for the hearing itself. On the other hand, as we have already noted, there was no dispute of facts and the legal issues were, for the most part, straightforward. We have reviewed the affidavit with an eye to eliminating possible duplication of efforts (such as the presence of both Mr. Fisher and Ms. Katz at the mediation session) as well as eliminating fees for tasks which we believe represent administrative functions rather than services devoted to defending the client's legal interests in this matter.

We therefore award one hour for Mr. Van Grack's time (at $200 per hour), as the supervising partner, for reviewing and assigning the case. We award 38 hours of Mr. Fisher's time (at $200 per hour) for preparing the answer, preparing for and participating in mediation and settlement discussions, and for preparing for and participating in the hearing (which was 2.5 hours). We award 4.3 hours for Ms. Katz's services performing file review and document drafting (at $160 per hour). The total number of hours we conclude is reasonable for this fully litigated but essentially simple dispute is 43.3 hours: $7800 for Mssrs. Van Grack and Fisher, and $688 for Ms. Katz, for a total of $8488.00. We also award costs of $54.83. The total award is $8542.83.

It is therefore ORDERED that within 60 days of the date of this Order the Complainants shall pay the Respondent the sum of $8542.83 for its attorneys fees in this matter; and that if they fail to do so, the Respondent may proceed to collect the sum in any way authorized by its governing documents and applicable law.

Commissioner Dubin concurs in this Decision; Commissioner and Panel Chair Alkon dissents for the reasons stated in his dissent to the Decision of February 25, 2013.

This is the panel's final decision in this dispute. Any party aggrieved by the Panel's decisions may appeal to the Circuit Court for Montgomery County, Maryland, within 30 days, as provided by the Rules of Court for Appeals from Decisions of Administrative Agencies.

Allen J. Farrar, Commissioner