MONTGOMERY COUNTY, STATE OF MARYLAND
Before the
COMMISSION ON COMMON OWNERSHIP COMMUNITIES

In the Matter of	
Edward Shearer and Eylem Sarikaya c/o David Gardner, Esq. 600 Jefferson Plaza, #308 Rockville, Maryland 20852	
Complainants	
	Case No. 15-06
vs.	
	Issued: February 21, 2007
Severn Run Homeowners Association c/o Jeffrey Van Grack, Esq. 3 Bethesda Metro Center, #380 Bethesda, Maryland 20814-5367	
Respondent.	

MEMORANDUM OPINION AND ORDER

Robert S. Thorpe for the Hearing Panel

This case came before a Hearing Panel of the Commission on Common Ownership Communities for Montgomery County, Maryland on August 31, 2006, pursuant to Chapter 10B of the Montgomery County Code, 1994, as amended.

Commissioner and Hearing Panel Member Bryan Cook was unable to attend the Hearing but he has reviewed the entire record including the transcript of the Hearing, and has filed the certification that he has reviewed the record. Thereafter Commissioner Cook participated in the deliberations of the Panel.

There were certain post-hearing matters that occurred, and the last pleading was filed on October 30, 2006.

The Hearing Panel considered the testimony and evidence of record and finds, determines and orders as follows:

THE DISPUTE

Complainants are homeowners in and members of the Severn Run Homeowners Association, which includes approximately 35 homes. On January 27, 2006, Complainants filed a Complaint with the Commission on Common Ownership Communities alleging that the Respondent unreasonably and arbitrarily had found them in violation of community rules and had ordered them to remove a picket fence pool enclosure they had recently constructed behind their home. Respondent answered the Complaint on March 9, 2006, defended its decision, and requested an order upholding its decision.

The parties attempted mediation of their dispute pursuant to COMCOR 10B.06.01.01 but were unable to reach an agreement. The Commission then voted to accept jurisdiction of the dispute and calendared it for a public hearing.

MOTION TO DISMISS

The Panel first deals with a preliminary matter. In its Answer to the Complaint dated March 9, 2006 (before the Commission had asserted jurisdiction) Respondent moved to dismiss the Complaint on the grounds it could not be disputed that Complainants had constructed the subject fence without the necessary approval of Respondent, in direct violation of the Declaration. **Commission Exhibit 1 at pages 77-82.** Respondent renewed this motion during the Panel Hearing. Complainants responded that their application to build a picket fence had been denied, and to file another application would have been an exercise in futility. **Transcript at pages 84-85.** Without deciding whether the Commission's assertion of jurisdiction served to deny the motion to dismiss, the Panel finds as a fact that an application to the Severn Run HOA to construct the fence as it was in fact constructed would have been denied. **See for example the testimony of Donald Little and Steve Chang, and Respondent's Answer to Interrogatory 13.** It would have served no useful purpose to dismiss the Complaint, and indeed the entire case has dealt with whether this fence as constructed should be allowed.

The Panel deals again with this matter, below.

FINDINGS OF FACT

1. The Complainants are owners of a detached single-family home at 18812 Severn Road, Gaithersburg, Maryland, which they bought in May, 2000 from Evergreen Development Partners. (**Respondent Exhibit 1, hereinafter "RE-1"**). The Severn Run development consists of two parts. The first part was made subject to the Severn Run HOA Declaration of Covenants, Conditions and Restrictions (hereinafter the "Declaration") by WHM Land Corporation acting as

Declarant in October, 1992. (**Commission Exhibit 1 at p. 37, hereinafter "Com. Exh. 1"**.) The second part of the Severn Run development, in which the Complainants' home is located, was made subject to the Declaration in June, 1999 by a Supplementary Declaration that brought all the Evergreen Development Partners' parcels under the original Declaration, with the Severn Run Homeowners' Association and Evergreen agreeing that all the Evergreen lots and parcels "are hereby made subject to the effect and operation of the Declaration. (**RE-3**.) The Declaration is therefore binding on all member homeowners and on the governing bodies of the Respondent.

2. The Declaration provides for an Architectural and Environmental Review Committee which must approve any proposed construction by a homeowner, after taking into account "safety, harmony of external design, color and location in relation to surrounding structures and topography and conformity with the design concept for the community." **Article VII, Section 1 of the Declaration in Commission Exhibit 1 at pages 49-50.**

3. The Declaration has a specific section on fences:

> "Fences. Any fence constructed upon the Property shall be substantially similar in design, dimension and material to the fences installed by Declarant as a part of original construction and shall not extend beyond the front building line of the dwelling on the lot upon which any such fence is erected or the front building line of the dwellings on all immediately adjacent lots. Height restriction (*sic*) of any fence shall not exceed 6 feet. Chain link and other wire fencing is specifically prohibited. The erection of all fences shall be subject to the provisions of Article VII of this Declaration." **Article VII, Section 9 of the Declaration in Commission Exhibit 1 at page 56.**

4. In April 2004 Complainants sought to install a six-foot-high white vinyl privacy fence around their swimming pool. The saga surrounding the consideration of this proposed white PVC fence need not detain us, because this proposal was eventually abandoned by Complainants. However, in September 2004 as part of the consideration of the proposed white PVC fence, Respondent's expert witness who testified at this hearing, Donald H. Little, opined in writing then that the picket fences installed at 18819 Severn Run and 18821 Severn Run were "Open picket fences between homes [that] allow vistas to rear yards". **Respondent's Exhibit 4 (unpaginated), at its sixth page.** Complainants' home at 11812 Severn Run is located across the cul-de-sac from 18819 Severn Run and 18821 Severn Run. **Complainants' Exhibit 14**.

5. In May 2005, Complainants proposed to install a six-foot high natural wood picket fence in place of the previously proposed white vinyl privacy fence. This request was denied by Respondent's Architectural and Environmental Review Committee by letter dated June 18, 2005. **Complainants' Exhibit 1 at Tab 19.**

Various additional conversations were had but there is no evidence the Severn Run HOA Board formally ruled on any appeal. **But see Transcript at 138: testimony of Steve Chang.**

6. In December 2005, Complainants constructed a fence around their back yard and enclosing their swimming pool. Complainants did not have Severn Run HOA approval to construct this fence. This fence is approximately 5 1/2 feet tall with a scalloped top and has upright boards with open spaces between them.

7. On January 12, 2006, Counsel for the Severn Run HOA sent a letter to the Complainants which said, among other things:

> "Please be advised that if the fence is not removed by February 1, 2006, it is the [Severn Run] Association's intention to proceed with legal action." **Commission Exhibit 1 at pages 35-36.**

8. Complainants then filed a Complaint with the Commission.

9. The evidence shows that at the back of three lots abutting Goshen Road and in the same area as Complainants' home, opaque board-on-board privacy fences were constructed. It appears that two of these fences were constructed by the builder. **Complainants' Exhibit 1 at Tab 20.** Section 9 of Article VII quoted above provides that fences "shall be substantially similar in design, dimension and material to the fences installed by Declarant as a part of original construction". Although these two privacy fences were not constructed by the original Declarant, the Respondent agreed in the Supplementary Declaration that the new parcels and lots would be subject to the "effect and operation" of the original Declaration. The Panel finds as a fact that these two privacy fences demonstrate fences that are "similar in design, dimension and material to the fences" which were installed as a part of original construction.

10. The Panel turns now to the evidence concerning the two picket fences located across the cul-de-sac from Complainants' home. These fences are 42 inches high. **Transcript at 97 (testimony of Donald H. Little)**. The installation of one of these fences was approved in October 2000 by the Severn Run HOA president when there was apparently no AERC existing. Whether any HOA action was taken with respect to the other fence is unknown. (The testimony of Greg Stock, former HOA president was that both these fences were in violation of the Declaration and the HOA Board of Directors granted post-construction waivers. There is no written evidence of such Board action. **Respondent's Exhibit 14**).

11. The conclusion that these two fences do not conform to the Declaration was not shared by Respondent's expert witness, either in 2004 or during his testimony at the Panel Hearing. **Transcript at 97.** However, Respondent's witness Steve Chang who is Vice President of Respondent testified that the HOA

would not approve a new picket fence like the two fences already constructed because “That fence is not substantially similar to the split rail fence.” **Transcript at 150.** The Panel concludes as a fact that the Respondent construed the Declaration in such a fashion the Respondent would only approve a split rail fence with wire mesh. **Respondent’s Answer to Interrogatory 12.** Respondent took this view despite the specific prohibition against wire fence in Section 9 of Article VII. Complainants took the view that a picket fence would provide more security against children being attracted to the pool when Complainants were not home, than would a split rail fence with wire mesh. **Transcript at 77.**

12. Complainants’ fence is 66 inches high at its highest level. **Transcript at 65.** The pool barrier part of the fence must be 60 inches high. **Complainants’ Exhibit Tab 1: Montgomery County Pool Enclosure Requirements (requiring a pool barrier at least five feet high).** As such the pool barrier part of the fence is 18 inches higher than the two picket fences across the cul-de-sac and at its highest Complainants’ fence is 24 inches higher than the two picket fences across the cul-de-sac. The Panel concludes that these two fences across the cul-de-sac are picket fences, and that Complainants’ fence is also a picket fence.

CONCLUSIONS OF LAW

We apply the principle stated by the Court of Appeals in *Kirkley v. Seipelt,* 212 Md. 127, 133 (1956), in which the Court held that any refusal by a common ownership community of a request to make an architectural change "must be 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."

It is hardly surprising that when a builder-developer puts forth a declaration, that declaration is tailored to the builder-developer’s interests and gives the builder-developer a great deal of flexibility. Those interests may be satisfactory to homeowners in the beginning, but as time passes the needs and interests of the homeowners may change. However, in such a situation, homeowners cannot ignore the plain wording of the original declaration but rather they must make use of the avenues available to amend the declaration to make it conform to the current interests and desires of the homeowners. If a declaration specifically prohibits wire fence, the HOA cannot ignore that prohibition. If the HOA wants to allow wire fence, it must amend the declaration in accordance with its amendment procedures.

One of the important roles of the Commission is to inform homeowners of their rights and obligations under a declaration.

In this case the facts clearly show that the builder constructed two opaque "board on board fences" that are much more blocking in their effect than the new fence constructed by Complainants. In addition, there are two other fences, one of which was approved by the Respondent and the other against which Respondent has taken no action. These other two fences are picket fences which are even more similar in appearance to Complainants' fence, being vertical boards separated by open spaces. The only difference is that the Complainants' fence is 18 to 24 inches taller.

However, County law required Complainants to install a higher fence because of pool safety considerations. (See Montgomery County Code Section 51-16 (a) (1) requiring a pool barrier at least five feet high.)

Moreover, Respondent's own expert witness concluded that the two picket fences are consistent with the "safety, harmony of external design, color and location in relation to surrounding structures and topography and conformity with the design concept for the community.

The Panel therefore concludes, as a matter of law, that the Respondent's denial of permission for Complainants' fence is unreasonable, arbitrary, and in violation of its own rules that permit fences similar to those originally constructed in the community.

The Panel returns now to the fact that Complainants constructed their fence without the requisite approval of the Severn Run HOA. The Commission looks with great disfavor when homeowners go ahead and act while there is a pending dispute that should be brought to the Commission for resolution. The Commission exists to prevent such "self-help" measures.

At the same time in this matter there are extenuating circumstances. The situation had been unresolved for more than two years. And the situation involved a fence around a swimming pool, where there are County requirements for prompt installation of a fence.

The Panel concludes that the appropriate resolution is to deny Complainants' request for return of their filing fee.

POST HEARING PROCEEDINGS

At the conclusion of the hearing, the Complainants' attorney asked for permission to file a legal memorandum rebutting that filed by Respondent's attorney during the hearing. The Panel granted the request but failed to set a deadline for the memorandum. Subsequently, Complainants did file the memorandum but Respondent's attorney did not receive a copy in a timely fashion and moved to strike the memorandum and for sanctions. The Panel has reviewed the record

and is satisfied that the failure to provide Respondent with a timely copy of the pleading was the result of a good-faith error, and denies the motion.

ORDER

The Hearing Panel hereby judges and orders as follows:

1. The relief requested in the Complaint is granted to the extent stated. Complainants shall submit an architectural change request to the Severn Run AERC. Respondent shall approve the fence as built within 60 days following receipt of the new change request, and shall take all other necessary actions to implement and record the approval of the fence as built in its books and records.

2. Respondent shall include a copy of this Decision in its files pertaining to the Complainants' property.

3. All other relief requested by the parties is denied.

Panel members Bryan Cook and Eric Smith concur in this Decision.

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

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Robert S. Thorpe, Panel Chair
February 21, 2007