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

Dr. PAUL KOBERNICK	)	
	)	
Complainant	)	
	)	
v.	)	**Case No. 15-15**
	)	May 4, 2016
FALLSTONE HOMEOWNERS ASSOCIATION, et al.	)	
	)	
	)	
Respondents	)	

DECISION AND ORDER
(Before Ethier, Winegar, Zajic)

The above-captioned case came before a hearing panel (the "Panel") of the Commission on Common Ownership Communities for Montgomery County, Maryland ("CCOC") on November 18, 2015 for an evidentiary hearing pursuant to Montgomery County Code Chapter 10B. Based on the parties' evidence and arguments, the Panel finds, concludes and orders as follows.

I. BACKGROUND

1. On May 8, 2015, Dr. Paul Kobernick ("Dr. Kobernick" or "Complainant") filed a complaint with the CCOC against Respondent Fallstone Homeowners Association (the "Association," "Fallstone" or "Respondent"), Quantum Real Estate Management and several individuals. On May 12, 2015 the staff of the CCOC wrote to Fallstone advising it of the complaint filed by Dr. Kobernick and noted that "the complaint lists several respondents, including the manager and the individual members of the board. The Commission has no authority

over such individuals. Only the Association itself can be a party and therefore only the Association need reply to this complaint." Dr. Kobernick was copied on this letter.

2. Dr. Kobernick alleged that he had been unfairly "targeted...concerning alleged parking violations..." more specially prevented from using visitors parking spaces located on common area; that the fine imposed for this alleged infraction was not in compliance with Fallstone' s own regulations (see page 6, below); that the Association had unreasonably refused to lease him a visitor's parking space at a reasonable rental; that the Association had attempted to prohibit him from parking his automobiles in a "T-bone" fashion but that the Association's attempt to ban parallel parking across driveways was null and void because the Association failed to comply with the governing documents of the Association. The complaint includes several counts: count one: breach of contract; count two abuse of process; count three: invasion of privacy and count four: active and deliberate dishonesty and individual willful misconduct or bad faith. Since the facts underlying counts one, two and four are the same the Panel ruled on the allegations not the form of the pleadings. Finally count three, invasion of privacy, is beyond the scope of the CCOC's jurisdiction. From the voluminous materials comprising the complaint filed by Dr. Kobernick the Panel has extracted the questions of law addressed under **CONCLUSIONS OF LAW**, *infra*.

3. The Association's attorney in his response to the complaint, included a partial motion to dismiss all parties except the Association. Given the CCOC's position on this issue which was conveyed to all parties in May, 2015, namely that the CCOC has no jurisdiction over said parties, the panel considers this issue moot. The Response argues that the Association's Board of Directors (the "Board") has the legal authority to issue a "T-bone" parking ban and sets forth the underlying rationale in the governing documents; that the "HOA has no obligation to resolve Dr. Kobernick's parking issue" and that the Board's initial determination of $300.00 per month for rental of a visitor parking space

is protected from judicial scrutiny by the business judgment rule. The Response includes a refutation of the invasion of privacy claims.

4. In late November Dr. Kobernick filed a request for attorney's fees and costs noting that he had "to bring various actions against Respondents and pursue them, ad nauseam, to comply with their own rules and to respond to Dr. Kobernick's discovery demands." In support of his Request Dr. Kobernick cites Section 10B-13(d) of the Montgomery County Code and argues that the Association failed to follow the governing documents; employed "deceitful tactics to support their erroneous action and forced Dr. Kobernick to file both a Circuit Court action and the present action before the CCOC; that the Respondents failed to provide documents and information; that "all of these actions contributed to Respondents' maintenance of a frivolous defense in this action and delayed and hindered the dispute resolution process without good cause." Dr. Kobernick asks for $12,519.72 for attorney's fees and costs incurred in a Circuit Court action brought by Dr. Kobernick against the Respondents and $4441.14 incurred for attorney's fees in the action brought with the CCOC.

5. The Respondent responded to the claim that, in making an effort to enforce what it believed to be a valid homeowners association rule, the Board acted frivolously or in bad faith as "downright ludicrous" and that Dr. Kobernick has not identified any "deceitful tactics". The Respondent summarizes the allegations and actions in the Circuit Court case at some length. With reference to the failure to provide information and documentation the Respondent's attorney alleges that Dr. Kobernick has sought the wrong remedy in both the Circuit Court and CCOC cases. The Respondent also deals with Dr. Kobernick's allegation that the Respondent "hindered the dispute resolution process without good cause" by claiming that Dr. Kobernick appeared at a mediation hearing in July, 2015 without counsel, and made a settlement offer conditional upon approval by his attorneys. The Respondent accepted the proposal, only to be advised on August 28, 2015 that the proposal was being withdrawn. Finally, the

Respondent argues that awarding "...attorney's fees and costs related to the Circuit Court action...fall outside the scope of Montgomery County Code Section 10B-13(d) as well as the jurisdiction of the CCOC."

6. The Complainant and the Association have cited numerous provisions of the Fallstone governing documents as pertinent to the resolution of the facts in this case. For ease of reference the Panel has set forth below excerpts from said documents which are relevant to the arguments of the parties. Other references cited by the parties are not included because they are either redundant, not directly on point, or not pertinent in the opinion of the Panel. The Panel has also included relevant portion of Chapter 10B of the County Code relating to attorney's fees and costs.

A. Articles of Incorporation of Fallstone Homeowners Association ("Fallstone Articles of Incorporation")

"Article 4. Powers and Purposes

This Association does not contemplate pecuniary gain or profit, direct or indirect, to the Members hereof...

Article 5, No Capital Stock

This Association is not authorized to issue any capital stock and shall not be operated for profit.

Articles 8, Right of Enjoyment

Every owner shall have a right and easement of enjoyment in and to the Common Area, including an easement for the use and enjoyment of the private streets and parking lots and walkways included therein, which shall be appurtenant to and shall pass with the title to every Lot, for purposes of ingress and egress to and from his Lot.

Article 9, Board of Directors.

The affairs of this Association shall be managed by a Board initially consisting of three (3) directors....

Article 12, Amendments

Amendment of these Articles shall require the assent of seventy-five percent (75%) of the entire membership."

B. The Declaration of Covenants, Conditions and Restrictions ("Fallstone Declaration")

Article 3, Property Rights

Section 3.1 Owner's Easements of Enjoyment. Every Owner shall have a right and easement of enjoyment in and to the Common Area, including an easement for the use and enjoyment of the private streets and parking lots and walkways within the Common Area, which shall be appurtenant to and shall pass with the title to every Lot, subject to the following provisions:

(a) the right of the Association to charge reasonable and uniform admission and other fees for the use of the Common Area or any facility situated upon the Common Area ....

(f) the right of the Association to provide for the exclusive use by Owners of certain designated parking spaces within the Common Area

(k) the right of the Association, acting by and through its Board of Directors to grant easements, licenses or other rights of use of the Common Area and consideration and on such terms and conditions as the Board of Directors may from time to time consider appropriate or in the best interest of the Association or the Property

Section 3.2, Limitations.

(a) Any other provisions of this Declaration to the contrary notwithstanding, the Association shall have no right to suspend the right of any Member of the Association to use any private streets and roadways located upon the Common Area (including without limitation, any private streets and roadways located within the Property) for both vehicular and pedestrian ingress and egress to and from his Lot and for parking.

Section 7.4, Parking. Parking within the Property shall be subject to the following restrictions:

(a) the Association shall be entitled to establish supplemental rules concerning parking on any portion of the Common Area and Lots including, without limitation, providing for the involuntary removal of any vehicle violating the provisions of this Declaration and/or such rules.

Section 12.8. Duration and Amendment. ....

This Declaration may be amended by an instrument signed by, or the affirmative vote of, the owners of not less than sixty-six and two-thirds percent (66-2/3% of the Lots...

Section 12.11. Consents.

Any other provision of this Declaration or the Bylaws or Articles of Incorporation of the Association to the contrary notwithstanding, neither the Members, the Board of Directors nor the Association shall, by act or omission, take any of the following actions:

(d) unless ... the requisite number of Lot Owners as provided in Section 12.8 of this Declaration has been obtained, modify or amend any material provision of this Declaration, which establishes, provides for, governs or regulates any of the following:

(i) voting rights;

(ii) assessments, assessment liens or subordination of such liens:

(iii) reserves for maintenance, repair and replacement of the Common Area;

(iv) insurance or fidelity bonds;

(v) rights to use of the common Area by any Owners, except in accordance with Section 3.1. (b);

(vi) responsibility for maintenance and repairs;

(vii) expansion or contraction of the property subject to this Declaration or the addition, annexation or withdrawal of property to or from this Declaration, except in accordance with Article 2;

(viii) boundaries of any Lot;

(ix) a decision by the Association to establish self-management when professional management had been previously required by an Eligible Mortgage Holder;

(x) leasing of Lots;

(xi) imposition of any restrictions on the rights of an Owner to sell or transfer his or her Lot;

(xii) restoration or repair of the project (after a hazard damage or partial condemnation) in a manner other than that specified in this Declaration;

(xiii) any provisions which expressly benefit mortgage holders, Eligible Mortgage Holders or insurers or guarantors.

C. The Bylaws of Fallstone Homeowners Association ("Fallstone Bylaws")

Section 3.4. Quorum. The presence at the meeting of Members entitled to cast, or of proxies entitled to cast, one-fifth (1/5) of the votes of each class of membership shall constitute a quorum for any action except as otherwise provided in the Articles of Incorporation, the Declaration or these Bylaws.

Section 3.5 Voting. At every meeting of the Members…(T) vote of the Members representing fifty-one percent (51% of the total of the votes of all of the memberships at the meeting…shall be necessary to decide any question brought before such meeting, unless the question is one upon which, by the express provision of law or of the Articles of Incorporation, or of the Declaration or of these Bylaws, a different vote is required, in which case such express provision shall govern and control.

Section 7.1 Powers. The Board of Directors shall have power to:

(a) adopt and publish rules governing the use of the Common Area and facilities situated thereon, and the personal conduct of the Members and their guests thereon, and to establish penalties for the infraction thereof;

(c) exercise for the Association all powers, duties and authority vested in or delegated to this Association and not reserved to the membership by other provisions of these Bylaws, the Articles of Incorporation, or the Declaration;

D. Parking Regulations of Fallstone Homeowners Association Adopted by The Board of Directors in September , 2012 and

Subsequently Filed with the Homeowners Association Depository for Montgomery County

"1. Common area spaces marked as "visitor parking" are provided for and intended solely for use by guests of Fallstone residents. "Guest" or "visitor" is defined as someone who is visiting a resident/owner and does not reside in the Fallstone development ---

2. Owners/residents are required to park in their garage, driveway or assigned space.

3. Owners/residents are not allowed to park in visitor parking spaces---

8. No vehicle shall be parked in such a manner as to impede or prevent ready access to any resident's/owner's driveway or common area parking (such as blocking a driveway or double parking, or to impede the flow of traffic. Vehicles may not parallel park in front of the entrance of a townhouse driveway."

E. Parking Regulations of Fallstone Homeowners Association Adopted by the Board of Directors in November, 2014 and Subsequently Filed with the Homeowners Association Depository for Montgomery County

"8. No vehicle shall be parked in a manner as to impede or prevent ready access to any resident's /owner's driveway or common area parking (such as blocking a driveway or double parking), parallel-parked in front of the entrance of a townhouse driveway, or parked to impede the flow of traffic on community streets. Vehicles may not park across a townhouse driveway, i.e. no parking perpendicular to the direction of a driveway anywhere along its length."

F. Montgomery County Code, 10B

(d) The hearing panel may award costs, including a reasonable attorney's fee, to any party if another party:

(1) filed or maintained a frivolous dispute, or filed or maintained a dispute in other good faith;

(2) unreasonably refused to accept mediation of a dispute, or unreasonably withdrew from ongoing mediation; or

(3) substantially delayed or hindered the dispute resolution process without good cause.

The hearing panel may also require the losing party in a dispute to pay all or part of the filing fee.

II. FINDINGS OF FACT

1. The Complainant, Dr. Paul Kobernick, is a resident of Rockville, Maryland. He owns a townhouse at 11310 Morning Gate Drive, Rockville, Maryland, which is located in the Fallstone community.

2. The Respondent, Fallstone Homeowners Association is a townhouse community in North Bethesda consisting of 132 homes. It is governed by restrictive covenants running with the land and recorded in the Land Records of the Montgomery County Circuit Court. These covenants include the right of the Association to charge fees to its members.

3. In 2012 Fallstone adopted parking regulations with reference to parking in the community. The text of the relevant portions of said regulations are set forth above in I.D.

4. In November 2014 Fallstone adopted amendments to parking regulations with reference to parking in the community. The text of the relevant portion of said regulations is set forth above in I.E.

5. In October 2013, the Respondent notified Dr. Kobernick that he could not park his vehicles in the parking spaces on common area designated for visitor parking.

6. Dr. Kobernick was subsequently notified that a fine of $100.00 would be levied against him for parking violations and that he could request a hearing before the Board of Directors with reference to same.

7. Fallstone's Board held a rule violation hearing on January 15, 2014 to consider imposition of the fine. Dr. Kobernick could not attend, but his wife was in attendance. On January 20, 2014 Fallstone's management agent, Quantum Real Estate Management ("Quantum") sent Dr. Kobernick a letter agreeing to lift the fine in exchange for his

commitment to: "(1) only parking on paved surfaces, (2) refraining from parking any vehicles across your driveway, and (3) following the community parking rules...". Dr. Kobernick was asked to sign the letter agreeing to the terms.

8. There was subsequent correspondence between the parties with reference to parking issues; whether said issues should be placed on the agenda of a board meeting: reinstatement of the fine and notification in a letter from Quantum to Dr. Kobernick dated February 24, 2014 that under "various Montgomery County ordinances, your driveway lacks sufficient area to park more than two cars"

9. On March 5, 2014, Dr. Kobernick sent Fallstone's Board of Directors a 30+ page document which addressed various matters. The document did address the issue of whether a charge of three hundred ($300.00) per month was a reasonable fee for use of a visitor parking space. Dr. Kobernick argued that prohibition of his use of the visitor parking space was in violation of Article 8 of the Articles of Incorporation (*see* I. A. above) and that the proposed fee was not reasonable and thus not permissible under Article 3 1. (a) of the Declaration of Covenants, Conditions and Restrictions. (*See* I. B. above.) The Complainant argued that the Association had failed to designate certain parking spaces in Common areas for exclusive use by Owners as mandated under Article 3 1(f) of said Declaration.

10. On March 16, 2014, the Board president, Pamela Cooley wrote Dr. Kobernick on behalf of the Board acknowledging receipt of his letter of March 4 and inviting him to meet to discuss his issues.

11. In a letter dated May 7, 2014, the Association's attorney, Scott Silverman, sent Dr. Kobernick a letter, with the following wording below the letterhead: "WITHOUT PREJUDICE, FOR SETTLEMENT PURPOSES ONLY," in which he informed Dr. Kobernick that the fine of $100.00 had been waived by the Board to "demonstrate its good faith" but which was conditional on the resolution of "the present

dispute between you and the Association." and might be reinstated if "any proceeding (is) initiated by you." Attorney Silverman acknowledged that the "Association's covenants, bylaws and rules and regulations are silent with regard to the subject of parking vehicles sideways in a driveway" but highlighted the Board's authority to adopt parking rules and "may revisit the parking rules for the Association; and, in the exercise of the discretion and authority possessed by the Board, propose, adopt and enforce a new rule prohibiting 'jawbone parking' in the future". Dr. Kobernick was further informed that the Board would not allow him or his family to park vehicles in the visitor parking spaces and would enforce the rules prohibiting same. The Association's attorney further alleged that the community had been polled "to determine whether there is any interest in selling or renting to homeowners any common area parking spaces presently dedicated for visitors' use. The owners' responses, documentation of which is also enclosed per your request, overwhelmingly indicated their opposition to that practice." The Board invited Dr. Kobernick to conduct his own survey of community sentiment and "the Board would be receptive to reconsidering the idea if the results of your poll were markedly different."

12. Dr. Kobernick replied to the Attorney Silverman's letter in a letter dated June 18, 2014. He stated that the imposition of the fine was contrary to the provisions of the governing documents of the Association and that the Board could not waive the fine "conditionally" and he demanded "the Board, in writing, state that the removal of the one hundred dollar $100.00 fine is complete and final and will not be revisited – no conditions attached." Dr. Kobernick questioned the validity of the survey conducted by the Association and demanded certain information with reference to complaints against him by owners of the community and concluded that the Board had ignored the "crux of this whole issue....[How] can the Community help Dr. Kobernick resolve his parking issue while not disturbing quiet enjoyment of each homeowner's use of their space?".

13. A Petition dated May, 2014 shows the signature of 16 individuals, purportedly members of the Fallstone community, stating that "[D]ue to the current situation pertaining to the visitor parking, Dr. Paul Kobernick has been forced to park his cars on his driveway. This has resulted in a car being parked horizontally across the end of the driveway, which does not impede the flow of traffic in any way. The undersigned affirms that they understand Dr. Kobernick's current predicament and accepts the fact that Dr. Kobernick parks the car in this manner. This has no effect on the quiet enjoyment of the Community. It does not bother me."

14. At their August, 2014 meeting, the Board of Directors voted to adopt changes to the parking rules.

15. Due to some concern whether the prior proposed parking rule changes had been distributed to all owners a notice was sent out dated October 22, 2014, entitled "Notice of Proposed Rulemaking and Meeting". Enclosed with the notice were two proposed resolutions addressing Dispute Resolution Procedures and Rules and Regulations Regarding Parking and Parking Enforcement. The notice informed homeowners that the proposed rulemaking would be discussed and voted on at the November 19, 2014, meeting of the Board of Directors. The proposed rules contained the following language:

> "3. Owners/residence [sic] are not allowed to park in visitor parking spaces." Exceptions were allowed for short term use of visitor parking by owners under certain circumstances.
>
> 8. ...Vehicles may not park across a townhouse driveway, i.e. no parking perpendicular to the direction of a driveway anywhere along its length."
>
> 12. Violators of any of the Fallstone parking regulations will receive up to two (2) written notices(s) of warning to come into compliance with regulations. A third violation will result in the vehicle in question being towed. All charges to tow and release the vehicle are the responsibility of the owner/licensed driver of the vehicle. In addition the Fallstone Board of Directors, at its

discretion, may impose a fine of no more than $100 if the violator fails to take appropriate action in response to written notices"

16. Dr. Kobernick garnered more signatures to the petition described in paragraph 11 above. The revised petition shows 43 signatures which according to the Complaint was presented at the Board meeting on November 19, 2014.

17. The Agenda for the 2014 Annual Meeting of the Fallstone Homeowners Association held on November 19, 2014 is set forth below:

. Call to order
. Call for Proxies to be submitted
. Determination of Quorum
. Adopt Minutes of last Annual Meeting
. Proposals
- Landscaping/Snow Removal
- Legal package Options'
- Planting of trees on Woodglen
- Pole Corrections
- Rules and Regulations Regarding Parking and Parking Enforcement
- Dispute Resolution procedures

. Candidates Forum (5 minutes per candidate)
. Voting for Election of Board Members
. 2014 Community Highlights
. Discussion of 2015 Proposed Budget
. Board Adoption of/Opposition of the 2015 Budget
. Member Matters (Submit your name by November 17, 2014 to Sandy Budock)
. We have received two requests to date
. Announcement of Election Results"

18. The minutes of the 2014 annual meeting were approved at the 2015 annual meeting held on December 2, 2015. The meeting followed the order set forth in the Agenda. The minutes include the following:

> Parking rules vote – A discussion among the Board members covered whether or not the Board has to vote for the entire parking package, or could amend certain parts and the vote. Because of the requirement of community notification, the Board could only vote up or down on the rules as a whole. Because it is easier to amend the rules once passed, the Board discussed voting on the rules as is. Sam made a motion to adopt the parking rules. Dennis 2nd the motion. All concurred except for Pamela. Despite Pamela's reservations, the parking rules were adopted as proposed pursuant to the majority vote of the Board. Finally, the Board agreed to look at further amending the parking rules.
>
> Elections – Stan Fagan and Ron Eby assisted Sandy Budock in the count and to make sure the owners were eligible to vote. Pamela announced that Daniel Himelfarb and Susan Kron had the majority of votes and their term will be three years on the Board."

19. After the annual meeting in November, 2014 the Association sent out a copy of the new parking rules to all members and advised owners that "As of January 1, 2015 Fallstone HOA will start enforcing these rules."

20. In a letter dated January 13, 2015, the Association, through its management agent Quantum, sent Dr. Kobernick a letter, certified mail, return receipt requested, stating that "On January 6, 2015, January 8, 2015 and January 13, 2015 a vehicle at your home was parked across your driveway in a manner described as T-Bone style parking that was recently prohibited....You are hereby given official notice that you must immediately cease and desist from parking any vehicles on your parking

pad in the T-Bone style." Similar letters were sent to several other owners in the Community in January through March of 2015.

III. CONCLUSIONS OF LAW

A. Whether infrequency of use by visitors of parking reserved for their use obligates the Board to make said spaces available to homeowners?

Dr. Kobernick argues that the common areas reserved for visitors are not often used by visitors and that therefore spaces left vacant should be made available for homeowners for parking their vehicles and that despite the designation of common area parking spaces as visitor parking these spaces have routinely been used by numerous homeowners for parking their vehicles. Dr. Kobernick has amassed statistics to substantiate his argument. Dr. Kobernick also argues that a reasonable approach to said situation would be to make said spaces available for rent by homeowners.

As discussed elsewhere in this decision it is well settled law that the management of the affairs of an association is the purview of the board of directors. The board decides on appropriate use of common areas, has considerable flexibility with reference to same and the courts have repeatedly ruled that absent bad faith or fraud the courts will not second guess the board's decisions. Petitions and statistics to the contrary may influence a board but do not obligate it to rule accordingly. This is known as the business judgment doctrine. As noted in the STAFF'S GUIDE TO THE PROCEDURES & DECISIONS OF THE MONTGOMERY COUNTY COMMISSION ON COMMON OWNERSHIP COMMUNITIES ("STAFF'S GUIDE"), "...the business judgment rule is derived from the law of corporations and it is applied to common ownership communities because most of them are also corporations, and even when they do not have a corporate charter they are governed like corporations." *Id.* at 84.

The leading Commission case on the rule is *Prue v. Manor Spring Homeowners Association, Inc.* (CCOC Case # 39-09). This case involved the approval of a fence whose location the complainant alleged was contrary to guidelines adopted by the board of directors and violated a provision of the declaration of covenants. The panel in that case ruled for Manor Spring stating that

> the business judgment rule goes further in allowing discretion to the association. It does not ask whether the decision is reasonable, but only whether it was made fraudulently, in bad faith or without authority. Here, the Association has approved the fence and declined to reverse itself and order removal of the fence. The Panel is not in a position to second guess these decisions unless there has been a showing of fraud, bad faith or lack of legal authority and the Complainant has not shown that.

A case often cited by courts applying the business judgment rule is *Black v. Fox Hills North Community Association*, 90 Md. App. 75, 599 A.2d 1228 (1992), in which the court stated, "[t]he decision which the association made to approve the Kupersmiths' fence was a decision which it was authorized to make. Whether that decision was right or wrong, the decision fell within the legitimate range of the association's discretion. As such, the association was under no obligation to proceed against the Kupersmiths to remove the fence" *Id.* at 81, 599 A.2d at 1231. The holding in the Black case has been upheld in a host of cases including *Randall Reiner et ux v. Clifford Ehrlich, et al.*, 212 Md. App. 142, 66 A.3d 1132 (2013)[1] and others which are summarized in the STAFF GUIDE at page 92. The business judgment doctrine is now so ingrained in the law that Chapter 10B of the Montgomery County Code prohibits the CCOC from accepting jurisdiction when a dispute only involves "the exercise of a governing body's judgment or discretion in taking or deciding not to take any legally authorized action."

[1] This case arose out of a homeowners' association's denial of a request to install a new roof on a home using materials not authorized by the architectural rules of the association.

Finally, as pointed out in another CCOC case, *Simons v. Fair Hill Farm Homeowners Association, Inc.* (CCOC Case #77-07),

> a further distinction arises as to burden of proof. The business judgment rule clothes an entity's decision in a presumption of correctness, thus placing the burden on the complainant to plead and prove fraud, dishonesty, arbitrariness or bad faith and, [quoting *Tackney v. U.S. Naval Acad. Alumni Ass'n, Inc.*, 408 Md. 700, 721, 971 A.2d 309, 321 (2009)], "there is a strong presumption that disinterested Board members act in good faith."

There is no question that the Fallstone Board of Directors had the authority to regulate visitor parking. (*See infra* Part III. J.)

The Panel finds that despite the fact that parking spaces reserved for visitors were often vacant this did not obligate the Board to change the designation of same or to offer said spaces to homeowners for rent. To rent or not to rent was in the Board's discretion. The Panel also finds no evidence of bad faith. Having reached the decision set forth above the Panel need not opine on the issue of the reasonableness of the rent initially proposed by the Board.

B. Whether the prohibition in Article 4 of the Articles of Incorporation to "pecuniary gain or profit" restricts the Board of Directors on what it can charge for rental of parking spaces?

The Complainant argues that under Article 4 of the Fallstone Articles the Association is prohibited from "pecuniary gain or profit" and consequently cannot charge him what he deems an excessive charge for the use of a visitor parking space. Given the Board's ultimate decision not to rent any parking space the Panel need not address this issue.

C. Whether the language of Article 8 of the Fallstone Articles of Incorporation prohibits any restriction on Complainant's use of visitor parking?

Dr. Kobernick argues that given Article 8 which states that any owner has "a right and easement of enjoyment in and to the Common Area" that his being precluded from parking his vehicle in a visitor parking space is a violation of said right.

A correct interpretation of this provision would be that no homeowner may be prohibited from using the common areas for the purposes intended or designated. Thus a homeowner may not be refused use of roads to reach his residence or like prohibition. Courts have repeatedly ruled that the board may restrict the use of common areas and may even prohibit use of common area. Boards can refuse access to recreational areas if the homeowner is delinquent in payment of assessments or otherwise in violation of rules and regulations.

Article 3.1 of the Fallstone Declaration repeats the language of Article 8 above word for word but makes it clear that the easement does not mean total unfettered use given the restrictive language which follows "subject to the following provisions" (which includes in 3.1.(e))"...the right of the Association to establish uniform rules and regulations pertaining to the use of the common area and any facilities situated thereon" and 3.1. (k) which gives the Association the right to grant rights of use of common area to persons not members.

The Panel concludes that the easement granted owners in Article 8 of the Fallstone Articles of Incorporation does not give owners the unrestricted right to use the common areas

D. Whether given Article 3.1.(f) of the Fallstone Declaration wherein the Association is given the right to "provide for the exclusive use by Owners of certain designated parking spaces within the Common Area" the Board should have exercised this

right, even on a trial basis, to allow the Complainant to rent a visitor parking space?

Dr. Kobernick owns four vehicles, two spaces in his garage, and two spaces on the parking pad outside the garage. Dr. Kobernick explained that he has a hobby which occupies one garage space thus leaving him one parking space short. He argues that the Board should have exercised the right granted the Association in Article 3.1. (f) to alleviate his difficulties.

As stated above the flexibility afforded the Board under the business judgment rule gives it the discretion to act or not to act. The Board can decide the circumstances under which to exercise the rights granted it under the governing documents. The fact that it is granted the right to do something in no way obligates it to do so. A board might decide to designate certain parking spaces exclusively for handicap residents or for use only for persons employed by an association. The circumstances under which it exercises powers granted it is in its discretion as long as it does not violate the law or other provisions of the governing documents.

Court decisions and the rulings of the CCOC are replete with application of the business judgment rule in such situations. Under Maryland law decisions by a homeowners' association's board of directors will not be questioned absent a showing of fraud or bad faith. *See generally, Black v. Fox Hills North Community Association*, 90 Md. App. 75, 599 A. 2d 228 (1992). The Court in *Danielewicz v. Arnold*, 137 Md. App. 601, 638, 769 A.2d 274 (2001), went further and asserted that "there is a presumption that directors of corporation acted in good faith and in the best interest of the corporation." *Id.* at 638, 769 A.2d at 296. As stated in Appendix A of the STAFF GUIDE, "The business judgment rule protects the governing body's decisions, whether those decisions are decisions to do something or decisions not to do something...." *Id.* at 86.

Although the Complainant alleges that the Fallstone Board of Directors has acted in bad faith and even alleges dishonesty the Panel finds no such behavior. There may have been mistakes but the Panel does not conclude they rose (or descended) to the level of bad faith.

E. Whether inclusion in the Declaration of Covenants, Conditions and Restrictions of parking regulations means that any other parking restriction can only be instituted by an amendment of the Declaration?

An association can only act through its members or Board of Directors. The decisions reserved for members in the governing documents are few in number, usually require approval by a large number of members and mostly have far reaching consequences for governance of the entity (e.g., Article 12 of the Fallstone Articles of Incorporation which reserves the power to amend the Articles of Incorporation to at least 75% of the entire membership).

The Complainant argues that given that the Declaration deals with parking prohibitions any additional prohibition such as a restriction with reference to "t-bone" parking can only be instituted with an amendment of the Declaration which requires an affirmative vote of 66 2/3 of the owners; that no such vote was taken and that therefore the ruling by the Board with reference to "t-bone" parking is void.

The Panel finds no such intention on the part of the drafters of the Declaration to so limit the exercise of powers to those enumerated thus placing an untenable burden on management of the Association. Had this exclusivity been intended the drafters would not have given the Board the authority to give home owners the right to reserve certain parking spaces for the exclusive use of certain Owners under 3.1(f).

Such an interpretation is also contrary to the recitation of the powers granted to the Board of Directors under Article 7 of the Fallstone Bylaws which endows the Directors with the power under 7.1

(c) to "exercise for the Association all powers, duties and authority vested in or delegated to this Association and not reserved to the membership by other provisions of these bylaws, the Articles of Incorporation, or the Declaration". There is no such restriction or reservation in any of the governing documents.

The Panel finds that the Declaration's recitation of certain parking restrictions is not meant as an exclusive listing of all parking restrictions preventing the Board of Directors from mandating other regulations and thus prohibiting any additional restrictions unless an amendment to the Declaration is instituted.

F. Whether the Association can levy a fine on Dr. Kobernick if he has remedied the violation in a timely fashion as provided in the governing documents?

The Panel finds that this issue is moot given the Association's statement in its Response to the Complaint that "the Board has agreed to waive the $100 fine"

G. Whether under Section 3.2(a) of the Fallstone Declaration the Association is prohibited from promulgating regulations restricting parking in the private driveways?

The Panel finds that Dr. Kobernick has misconstrued the meaning of this provision. It prohibits the suspension of any right of a member to use private streets and roadways in the common area including the right of ingress and egress to and from a lot. There was no attempt in the parallel parking regulation to suspend or prevent access.

H. Whether there was any breach of contract by the Association?

The Complainant alleges a breach of contract although there are no specifics as to the nature of any alleged contractual arrangement. A contract is defined in BLACK'S LAW DICTIONARY as "a promissory

agreement between two or more persons that creates, modifies or destroys a legal relation." The Panel finds no such relationship established between Dr. Kobernick and the Association. The nature of an association has been variously described. Jeffrey A. Goldberg in an article in the Chicago-Kent Law Review entitled "Community Association Use Restrictions: Applying the Business Judgment Doctrine" examines the "municipal attributes of an association that so often give rise to the quasi-government label such a private taxation(assessments) and public services (street maintenance, snow removal and recreational facilities." 64 Chi-Kent L. Rev. 653, 662 (1988). The author sees the relationship as a voluntary association of owners "acting in unison for the sake of convenience and economic efficiency to obtain services they desire" *Id.* Thus a person who decides to purchase a lot, home or condo in an association voluntarily agrees to the arrangement created by the governing documents and agrees to the restrictions (covenants) on their property and to be managed in accordance under a corporate type arrangement. There is no contract between the homeowner and the association. The homeowner is the association. Some writers have made reference to the relationship of the members and the association as a "social contract". This is meant as a social affiliation whereby "unit owners appear to be performing a Lockean exchange of personal (here property) rights for the security and safety of a planned environment...." *Judicial Review of Condominium Rulemaking*, 94 HARV. L. REV., 647, 659 (1981). An association has also been called "a little democratic sub society." *Id.* at 660.

The Panel finds that there is no contract as that term is generally understood in the law and there can therefore be no breach of same.

I. Whether the Complainant has received all documents to which he is entitled?

There was no testimony at the hearing as to what had been requested and no evidence as to what had not been produced. No motion to compel discovery was filed with the Panel.

J. Whether the parking rule promulgated by the Fallstone Board of Directors prohibiting "t-bone" or parallel parking is reasonable?

Maryland courts have generally made a distinction between rulemaking which is subject to the test of reasonableness and a board's enforcement of use restrictions which comes under the business judgment doctrine. However, confusion persists and some decisions imply a requirement of reasonableness in application of the business judgment doctrine as noted by the court in *Ridgely Condominium Association v. Nicholas Smyrnioudis Jr.*, 105 Md. App. 404, 660 A.2d 942 (1995). Quoting the lower court judge, the appellate court stated the following:

> [T]the business judgment rule precludes judicial review of a legitimate business decision of an organization, absent fraud or bad faith. We note that the case at hand is different in that we are not dealing with the enforcement by the Board of an otherwise legitimate rule or bylaw in a specific instance but rather are confronted with the legitimacy of a specific provision as a whole.

Id. at 412, 660 A.2d at 946.

The appellate court was endorsing the distinction between the enforcement of a rule which is generally subject to the business judgment doctrine and the making of same where the test of reasonableness applies. The court went on to reference what it referred to as "the case which is most cited for first enunciating the reasonableness test in the context of reviewing condominium regulations," namely *Hidden Harbor Estates v. Norman*, 309 So.2d 180, (Fla. Dist. 4 Ct. App. 1975). A frequently quoted excerpt from that case is its pronouncement that "if a rule is reasonable the association can adopt it, if not, it cannot." *Id.* at 182. In *Hidden Estates* the court was reviewing the adoption of a rule by the board of directors prohibiting

the use of alcoholic beverages in the clubhouse and adjacent areas. The court ruled in favor of the association. Also, as the court stated in *Ridgely Condominium*, "[W]e begin by noting that this Court has recognized the reasonableness test as the standard of judicial review for evaluating use regulations promulgated by a condominium Board. *Ridgely Condo.*, 105 Md. App. at 413, 660 A.2d at 946 (citing *Dulaney Towers v. O'Brey*, 46 Md App. 464, 418 A.2d 233 (1980)).

Some would argue that a prohibition affecting a unit or home should be contained in a bylaw given the general reluctance of courts to uphold any restriction on property rights. However, the court in the *Dulaney* refused to adopt such a strict approach, stating that "[t]here is nothing now that, in any way, requires that a restriction affecting the use of an individual unit be enacted in a bylaw." *Dulaney*, 46 Md. App. at 469, 418 A.2d at 1237. The court adopted the following language from 15A AM.JUR. 2d *Condominium and Cooperative Apartments* § 16:

> Occasionally the bylaws also contain regulations concerning the use of the condominium by its owners, but usually such regulations are contained in a separate instrument listing a number of rules designed to promote the communal comfort of those living in the condominiums, such as restriction on the parking of automobiles, against the keeping of pets, etc.

Id.

In applying the reasonableness test one must first determine whether the board had the authority to promulgate the rule in question and then to examine the reasonableness of the rule. The applicable standard can be summarized as follows:

> [C]ourts appear to engage in a two-step inquiry: (1) whether an association has acted within the scope of its authority, as defined by the condominium enabling statues and its own declaration and bylaws and (2) whether it has abused its

discretion by promulgating arbitrary or capricious rules bearing no relation to the purposes of the condominium.

Judicial Review of Condominium Rulemaking, 94 HARV. L. REV., 647, 661 (1981).

The Maryland Homeowners Association Act contains no reference to rules and regulations unlike the Maryland Condominium Act which states in Section 11-111 of the Real Property Article, Maryland Code, that "[t]he council of unit owners or the body delegated in the bylaws of a condominium to carry out the responsibilities of the council of unit owners may adopt rules for the condominium...." However, the purpose of that section seems to be to identify the due process procedures under which such rules may be adopted not to convey such authority on boards.

The Fallstone Declaration refers specifically to parking rules as follows:

> 7.4 Parking. Parking within the property shall be subject to the following restrictions:
>
> (a) The Association shall be entitled to establish supplemental rules concerning parking on any portion of the common area and lots ...

Thus the Fallstone Declaration gives the Association the power to regulate the conduct of a homeowner on his/her "lot" and the Fallstone Bylaws identify who on behalf of the Association can regulate same:

> "Section 7.1 Powers. The Board of Directors shall have power to:
>
> (c) exercise for the Association all powers, duties and authority vested in or delegated to this Association and not reserved to the membership, by other provisions of these bylaws, the Articles of Incorporation, or the Declaration."

There is nothing in the governing documents of Fallstone that dictates that parking regulations of any kind are reserved for the membership.

Turning to the issue of reasonableness or whether the adoption of a rule prohibiting t-bone or parallel parking on a homeowner's driveway was arbitrary or capricious the Panel finds that the rule in question was reasonable. The Board could have determined that the design of a driveway did not envision this use and that the limited space makes such parallel parking difficult. Indeed, some of the photos introduced in evidence shows that one numerous occasions an automobile parked in a "t-bone" fashion encroached on the sidewalk. It was noted that Dr. Kobernick was particularly adept at parallel parking but the Board of Directors cannot adopt a rule excepting the Complainant from its enforcement due to his alleged skills. There was testimony that allowing "t-bone" parking would lower the value of the townhouses in the development. The Panel was not persuaded by the witness since he lacked the credentials to so testify. However, the Panel concludes that the Fallstone Board of Directors was not arbitrary or capricious in adopting the restriction on "t-bone" parking and the Panel therefore deems it a reasonable restriction.

K. Whether the Board's rule prohibiting t-bone parking was promulgated in accordance with due process requirements under law and the governing documents?

Having determined that the Board had authority to promulgate a regulation affecting parking in the driveways of lots and that the prohibition of t-bone or parallel parking was reasonable, the next step is to examine the approval process.

The Maryland Homeowners Association Act has no provision controlling the approval of rules and regulations. However, Section 11-111 of the Maryland Condominium Act sets out procedural requisites.

They can be summarized as sufficient notice to unit owners, an opportunity for homeowners to be heard and approval of the proposed rule at a regular or special meeting by a majority vote.

With reference to the standard to be applied in judging the validity of the actions of any governing body the Court of Special Appeals in *A.B. Chisholm v. Hyattstown Volunteer Fire Department, Inc.*, 115 Md. App. 58, 691 A. 2d 776 (1997), that "the Court's role ...is to determine whether or not the actual procedures that were followed were fair and reasonable and whether or not essential fairness was preserved." *Id.* at 63, 691 A. 2d at 778.

No one disputes that a notice with a copy of the Rules and Regulations Regarding Parking & Parking Enforcement was distributed throughout the Fallstone community. The notice specifically indicated that homeowners would have an opportunity to "pose questions or provide comments to the Board at its next meeting on November 19, 2014". Finally, the minutes of the November meeting reflect that homeowners were given a chance to comment and that a majority of the Board voted to approve.

The meeting on November 19, 2014 was in reality two meetings: the annual meeting for 2014, which is a meeting of members, and a meeting of the Board of Directors. Article 3 of the Fallstone Bylaws establishes procedures for the annual meeting and Article 6 does the same for meetings of the Board. The latter has the following language "All meetings of the Board of Directors...shall be held only upon regularly scheduled and established dates or periods...."

When examining the single minutes of both meetings the Panel was troubled by a failure to delineate when one ended and the other started. Both agendas were merged. There is also no evidence as to whether the date chosen for the meeting of the Board of Directors was a "regularly scheduled" date. There is also no evidence as to when the minutes were approved by the Board of Directors. However, looking at

all the facts the Panel does not feel that there is sufficient reason to invalidate the rule prohibiting parallel parking. The Panel finds as a matter of law that there was fundamental fairness in the approval process.

The Panel strongly urges the Association to adopt better procedures; that when they hold a meeting of the Board of Directors immediately follows an annual meeting they formally terminate the annual meeting before proceeding with the meeting of the Board.

L. Whether the Association is guilty of abuse of process?

Under County Code Section 10B-8(4)(B)(viii) the CCOC may adjudicate disputes that involve the "exercise of judgment in good faith concerning the enforcement of the association documents against any person that is subject to those documents". Assuming a very broad interpretation of this provision whereby if the CCOC can examine judgments rendered in good faith the CCOC can undertake a review of factual allegations of bad faith and assuming that the abuse of process allegation falls under the bad faith rubric then the Panel will consider this aspect of Dr. Kobernick's complaint.

The Maryland Court of Special Appeals held in *Century Condominium Association, Inc. et al. v. Plaza Condominium Joint Venture, et al.*, 64 Md. App. 107, 494 A.2d 713 (1985), that bad faith allegations "involve questions of intent and as such, generally, require a factual determination." *Id.* at 115, 494 A.2d at 717. Using this as a guide and having carefully considered the massive record before us the Panel finds no evidence of intent on the part of the Board of Directors to target the Complainant; to rule adversely to his interests with malice or to abuse any process to the detriment of the Complainant. Consequently, as a matter of law the Panel finds no evidence of abuse of process.

M. Whether Dr. Kobernick is entitled to attorneys' fees?

The CCOC held a hearing on Dr. Kobernick's complaint on Wednesday, November 18, 2015. The Panel decided to keep the record open to receive a specific document from the Respondent. On November 27, 2015 the Complainant filed a Request for Attorney's Fees and Costs. Fallstone has filed a response entitled Defendant Fallstone Homeowners Association's Opposition to Complainant's Request for Attorney's Fees and Costs. Although the Panel had kept the record open for a limited purpose it has decided to rule on the Complainant's request.

Preliminarily, this Panel cannot award attorney's fees for costs incurred in conjunction which litigation which is not before us. The Panel will therefore not consider reimbursement for fees incurred in the Circuit Court action. *Potowmack Preserve Inc. v. Ball,* CCOC #73-12.

Any consideration of whether Dr. Kobernick is entitled to attorney's fees should start with a reference to the American Rule, which prohibits the prevailing party in a lawsuit from recovering his attorney's fees and has been adopted in Maryland. There are statutory exceptions to the American Rule as pointed out in *St. Luke Evangelical Lutheran Church Inc. v. Ginny Ann Smith*, 318 Md. 337, 568 A.2d 35 (1990). After reviewing the many instances in which a Maryland court had awarded attorney's fees the Court in *St. Luke* opined that "[i]t is reasonable ...to conclude that ...an award of attorney's fees serves, in general, as a legislative tool for punishing wrongful conduct." *Id.* at 347, 568 A.2d at 39.

The Complainant rightfully points to an exception to the American Rule codified in Montgomery County Code Section 10B-13(d), the text of which is quoted in II.F. above. Looking at the record and pleadings carefully the Panel can find no evidence of bad faith, maintaining a frivolous defense or any attempt to substantially delay or hinder resolution without good cause. The Complainant's classifications of the

acts of the Association as "deceitful", "frivolous" and the like do not make them so. The Panel relies on the *Century Condominium* case quoted in II.J. above in which the court made it clear that there must be intent and a factual determination of wrongdoing. In the Panel's opinion there is no evidence in the record to support an award of attorney's fees and costs.

III. ORDER

For the foregoing reasons, it is by the Commission this fourth day of May, 2016, ORDERED that the complaint and all claims therein are hereby DISMISSED WITH PREJUDICE.

Panel members Aimee Winegar and Ken Zajic concur in this Decision and Order.

This is a final order intended to dispose of all claims in this case. Any party aggrieved by the action of the CCOC may file an administrative appeal to the Circuit Court for Montgomery County, Maryland within thirty days after this Decision and Order, pursuant to the Maryland Rules of Procedure governing administrative appeals.

Marietta M. Ethier, Esq., Panel Chair