Before the
Commission on Common Ownership Communities
for Montgomery County, Maryland
June 30, 1993

In the Matter of Marna Zanoff, Owner of 2207 and 2213 Washington Avenue Bethesda, MD 20816 Complainant	x x x x x x	Case No. 168-O
Vs.	x x	
Board of Directors Kirk Lugenbeel, President, Rock Creek Commons Condominium Respondent	x x x x	

Decision and Order

The above-entitled case having come before the Commission on Common Ownership Communities for Montgomery County, Maryland, pursuant to Sections 10B-5(i), 10B-9(a), 10B-10, 10B-11(e), 10B-12, and 10B-13 of the Montgomery County Code, 1984, as amended, and the Commission having considered the testimony and evidence of record, it is therefore, this 30th day of June, 1993, found determined and ordered as follows:

On April 24, 1992, Marna Zanoff, owner of condominium dwelling units at 2207 and 2213 Washington Avenue, Bethesda, MD (hereinafter the "Complainant") filed a formal dispute with the Office of Common Ownership Communities. The Complainant alleged that the Rock Creek Commons Condominium, Board of Directors, Governing Body of the Rock Creek Gardens Condominium Three (hereinafter the "Respondent Board") did not act properly when it altered, amended or adopted certain provisions of the by-laws at a meeting of the Council of Unit Owners on February 19, 1992.

Specifically, the Complainant contended that the Respondent Board does not have the authority to amend the Governing documents to require her to use a standard lease addendum provided by the Board which, in Section 4. Associations's Right to Evict, states, "Pursuant to this Agreement, Landlord and Tenant, by their execution hereof, expressly acknowledge that, in the event of any default by Tenant under the terms of the Lease, the Board of Directors of the Association has the power to terminate the Lease and bring summary proceedings to evict Tenant in the name of the Landlord after 15 days' written notice to the Landlord;" and, that the adoption of a change in the Rules and Regulations requiring the unit owner to pay a fee of $100.00 to cover associated expenses of moving, is unfair to absentee landlord/owners, and unenforceable.

Furthermore, the Complainant contended that her April 16, 1992, correspondence to the Respondent Board should be construed as a request for exemption from the new Rules and Regulations pursuant to Section 11-111 (c)(1) and (2) of the Maryland Condominium Act.

The Respondent Board contended that it has the authority to amend the Rules and Regulations and to enforce the newly adopted lease addendum pursuant to Section 11-109 (d)(20) of the Maryland Condominium Act; to enforce the $100.00 moving fee pursuant to Section 11-109 (d)(15) of the Maryland Condominum Act; and, that the Complainant is not exempted from the new Rules as her April 16, 1992 letter does not request exemption, but rather asks only for a legal opinion as to the enforceability of the Rule.

The Complainant sought an order for the Respondent Board to rescind the Rules and Regulations regarding the lease addendum and the moving fee of $100.00 and to establish a dispute resolution process.

Inasmuch as the matter was not resolved through mediation, this dispute was presented to the Commission on Common Ownership Communities for action pursuant to Section 10B-11(e). On January 27, 1993, the Commission conducted a public hearing in this case.

FINDINGS OF FACT

Based on the stipulations of the parties and the testimony and evidence of record, the Commission makes the following findings:

1. The Complainant is the owner of two condominium units located at 2213 Washington Avenue and 2207 Washington Avenue, Bethesda, Maryland, within the Rock Creek Commons Condominium (hereinafter the "Condominium"). The Complainant lives in neither unit and purchased them solely for investment purposes.

2. The Condominium is a 54 unit garden apartment style condominium complex located in Bethesda, Maryland, and is governed by the Declaration and By-Laws dated February 15, 1982 which were introduced as Exhibit 1c in this case.

3. On January 14, 1992, the Board of Directors for the Condominium, (hereinafter the "Board"), acting as the Condominium's duly constituted governing body, notified all unit owners that a public hearing regarding proposed changes to the Rules and Regulations for the Condominium would be held on February 19, 1992. Attached to the notice were copies of the eight (8) proposed rules changes. (Exhibit 6b).

4. On February 6, 1992, the Complainant forwarded a letter to the Board objecting to the proposed rules changes and requesting that her letter be read at the meeting. (Exhibit 6a).

5. On February 19, 1992, the Board adopted the eight proposed rules changes which require, in pertinent part, that:

a. All residential leases contain an addendum which requires, inter alia, that the tenant agree to abide by all of the governing documents for the Condominium, that the tenant assign its rents to the Condominium if the Landlord becomes delinquent in the payment of his dues, that the number of occupants allowed in the premises be restricted, and that the Condominium may evict a tenant who fails to abide by the terms of the lease addendum (Policy Resolution No. 4); and that

b. All owners notify management at least ten days before any move in or out of their property, pay a $100.00 moving fee, move between 8:00 AM and 8:00 PM, and pay for any damage to the common areas caused by their move (Policy Resolution No. 6).

6. On February 19, 1992, the Board also adopted rules changes pertaining to pets, refuse removal and common element usage, vehicle parking and registration which have not been challenged by the Complainant and are therefore not relevant to this case.

7. On April 16, 1992 the Complainant hand delivered a letter to the Board which challenged the Board's authority to adopt the rules and regulations which it had adopted on February 19, 1992 and requested that she be provided a legal opinion citing the authority on which the Board relied (Exhibit 1a).

8. On April 16, 1992 the Condominium's managing agent, Dubin & Associates, Inc., responded to Complainant's letter of the same date by forwarding her a letter which stated that her request would be an inappropriate expenditure of the Condominium's monies because legal counsel had already recommended the proposed changes to the Board when the rules and regulations were revised (Exhibit 1b). According to the Respondent's witnesses, the Board anticipated the Complainant's response and authorized Dubin & Associates' reply before it even received the Complainant's letter dated April 16, 1992.

9. On April 24, 1992, the Complainant initiated this dispute by filing a Complaint with the Montgomery County Office of Common Ownership Communities (Exhibit 1). In her Complaint, the Complainant challenged all of the rules and regulations adopted by the Board on February 19, 1992. However, in a letter dated August 4, 1992 (Exhibit 5), the Complainant narrowed the issues raised in this case to the validity of the provisions in the lease addendum which require a landlord to assign its rents to the Condominium and grant the Condominium authority to evict a tenant, as well as the validity of certain of the rules pertaining to moving in and out of the Condominium. In her letter dated August 4, 1992, the Complainant further contends that her letter to the Board dated

April 16, 1992, should be construed as a request for exemption from these rules pursuant to Article 11.111(c) of the Real Property Act of the Annotated Code of Maryland.

10. The Complainant has refused to abide by the requirements at issue in the case at bar and the Board has suspended any fines which it might impose as a result of said refusal until after resolution of this case.

CONCLUSIONS OF LAW

Accordingly, the Commission concludes based upon a preponderance of the evidence including, but not limited to, testimony and documents admitted into evidence, and after a full and fair consideration of the evidence of record, that the following provisions of the Maryland Condominium Act apply to this action:

Section 11-109 (d)(15) and (20), and Section 11-111 (c)(1) and (2) of the Maryland Condominium Act, Real Property Article, Annotated Code of Maryland, 1988, as amended, state:

11-109. Council of unit owners.

* * *

(d) May be incorporated as a nonstock corporation or unincorporated; powers of council. -- The council of unit owners may be either incorporated as a nonstock corporation or unincorporated and it is subject to those provisions of Title 5, Subtitle 2 of the Corporations and Associations Article of the Code which are not inconsistent with this title. A council of unit owners has, subject to the provision of this title, the declaration, and bylaws, the following powers:

* * *

(2) To adopt and amend reasonable rules and regulations;

* * *

(15) To impose and receive any payments, fees, or charges for the use, rental, or operation of the common elements other than limited common elements;

(16) To impose charges for late payment of assessments and, after notice and an opportunity to be heard, levy reasonable fines for violations of the declaration, bylaws, and rules and regulations of the council of unit owners, under Section 11-113 of this title;

* * *

(20) To enforce the provisions of this title, the declaration, bylaws and rules and regulations of the council of unit owners against any unit owner or occupant;

* * *

11-111. Rules and regulations.

* * *

(c) Individual exceptions. -- (1) Each unit owner or tenant may request an individual exception to a rule adopted while the individual was the unit owner or tenant of the condominium.

(2) The request for an individual exception under paragraph (1) of this subsection shall be:

(i) Written
(ii) Filed with the body that voted to adopt the proposed rule; and
(iii) Filed within 30 days after the effective date of the rule.

1. Assignment of Rents and Eviction of Tenants - Resolution No. 4

Although the above-cited provisions of Section 11-109 grant the Condominium authority to impose reasonable rules and regulations on the owners of units within the condominium, the Commission finds that they do not grant the Condominium authority to assign rents or evict a tenant. Accordingly, to the extent that the provisions in Policy Resolution No. 4 grant the Condominium and/or its governing Board authority to evict a tenant and to require that a residential lease include language assigning a tenants rent to the Condominium, the provisions are declared invalid.

The Commission bases its decision invalidating the above referenced provisions in Policy Resolution No. 4 on two grounds. First, Article VIII of the By-Laws for the Condominium contains a comprehensive scheme governing the imposition and collection of assessments from unit owners in the Condominium. In particular, the provisions in Article VIII allow the Condominium to place a lien on the unit, foreclose on the lien if the assessments remain unpaid after the lien is imposed, or obtain a judgment against the unit owner for the unpaid assessments. Maryland Law would permit the Condominium to obtain an assignment of rents by filing for a writ of attachment of property after it had first obtained a judgment against a unit owner for the non-payment of assessment. (Article VIII, Section 5) However, nowhere do the provisions in Article VIII grant the Condominium authority to evict tenants or to require unit owners to assign rents to the Condominium before a judgment is obtained, and nowhere in Section 11-109 of the Real Property Article of the Maryland Annotated Code is this right granted to a condominium. Accordingly, the Commission finds that Article VIII

provides no authority for the board to adopt such regulations through its rulemaking authority and that such rules are not "reasonable" within the meaning of Section 11-109 (d)(2).

In addition to the above, the Commission finds that the imposition of the aforementioned lease provisions would result in an improper invasion of the property rights of a unit owner without legal authority. Although Rock Creek Commons has broad rights to regulate the use of its common areas under the provisions of the Maryland Condominium Act (hereinafter referred to as "the Act") and its governing documents, these rights do not extend to the property owned by the unit owner unless they are specifically set forth in either the Act or the governing documents. Because neither the Act nor the governing documents state that a unit owner may be required to assign his rents or grant the Condominium the right to evict a tenant, the Commission finds that no such authority exists.

2. Moving Schedule, Times for Moving and Moving Fee-Resolution No. 6

With regard to the second resolution being challenged by the Complainant, namely Policy Resolution No. 6, the Commission finds that the provisions of items 1, 2 and 3 relating to the scheduling, timing, and payment of a $100.00 fee for moves are invalid. The remaining provisions were not challenged by the Complainant.

The first item in Resolution No. 6 states that unit owners must arrange with management for a pending move at least 10 days in advance. The Respondent claims that this provision is authorized under Section 11-109 (d)(2) and (d)(16) of the Real Property Article and that the Commission must defer to the Board's discretion under the "business judgment" rule adopted by the Maryland Court of Special Appeals in Black v. Fox Hills North Community Association, Inc., 90 Md.App. 75, 599 A.2d 1228 (1992). While the Commission agrees that these are the appropriate legal authorities by which the Board's actions must be judged, the Commission disagrees with the Respondent's conclusion.

The "business judgment" rule does not limit the grounds for reversing the actions of a governing body of a condominium to "fraud, dishonesty or self-dealing", as suggested by the Respondent. In addition to these grounds, the Court of Special Appeals stated that a court may review the actions of a governing body to determine whether fraud or bad faith exists, "which would include action unsupported by facts or otherwise arbitrary." Id, 90 Md.App. at 81, citing with approval Martin v. United Slate, etc., Ass'n, 196 Md. 428, 441, 77 A.2d 136 (1950). The Court also stated that all that the "business judgment" rule requires is that members of a governing body "act reasonably and in good faith in carrying out their duties." Id. Applying these standards to the instant case, there was no evidence presented to support the adoption of a ten day notice requirement, as approved by the Board. The Complainant described the facility as a small garden style apartment complex with no elevators, and no on-site manager. Furthermore,

testimony showed that moves are infrequent and have not conflicted with one another. Diane Tschirhart, the property manager assigned to this project by Dubin & Associates, admitted that the possibility for conflict is "highly unlikely" and that her company does not inspect the property after moves occur. The Respondent argued that the managing agent needs to know when moves occur in order to inspect the property following such a move, however, this was not substantiated by the testimony at the hearing. No facts to justify the rule were presented. Accordingly, the Commission finds that item 1 in Policy Resolution No. 6 is unsupported by the facts, unreasonable, arbitrary, and is therefore invalid.

Similarly, item 2 in Policy Resolution No. 6, which restricts moves to between the hours of 8:00 AM and 8:00 PM, was also unsupported by the facts and is therefore invalid. According to the Complainant's testimony, moves frequently last later than 8:00 PM and it would be unduly harsh to restrict a unit owner's move to the proposed hours. Mary Vogt, who testified as the President of the Condominium, was asked whether there has ever been a problem caused by moves earlier than 8:00 AM or after 8:00 PM and admitted that she did not know of any particular problems caused by such moves, and could articulate no reason for the adoption of the rule. She also stated that the Rules adopted on February 19, 1992 had been prepared by the Condominium's attorney following a request by the Board to adopt a comprehensive set of rules and regulations. Although the Rules had been discussed over several meetings, Ms. Vogt could not recall anything specific that was discussed and did not produce the minutes of the meetings, despite the Commission's subpoena requiring her to do so. Based on the fact that the testimony demonstrated no reason for the rule and no documents were offered to display any discussion by the Respondent to develop a reasonable rule, the Commission can only conclude that the move in rules were drafted by the Condominium's attorney and were adopted with no real debate or independent consideration by the Board.[1] Therefore, Resolution No. 6, Item No. 2, is unreasonable and arbitrary, and therefore, invalid.

The last item challenged by the Complainant is Policy Resolution No. 6, item 3, which requires the payment of a $100.00 moving fee. The Respondent claimed that this fee was adopted in order to defray the extra expenses incurred by the Condominium when moves occur. However, Respondent's two witnesses, Mary Vogt and Diane Tschirhart,

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[1]While having the attorney draft a rule does not alone invalidate any rules or regulations which may be adopted by the governing body of a condominium, such a practice should be guarded against and the Board should be involved in developing reasonable rule provisions for its community in order to prevent the adoption of a provision which is unsupported by the facts and circumstances present in the community.

both admitted that the Board had no financial data to back up the imposition of the fee, that they had obtained no estimates of the extra expenses allegedly incurred, and that the same wear and tear on which the fee was based also serves as the basis for the annual assessments which are imposed under Article VIII of the By-Laws.[2]

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[2]In addition to challenging the factual basis for this fee, at the time of the hearing, the Complainant relied on Westbridge Condominium Association, Inc. v. Lawrence, 554 A.2d 1163 (D.C. 1989), in which the District of Columbia Court of Appeals invalidated a move-in charge of $150.00 on the basis that a condominium did not have the inherent rulemaking authority to impose such a fee and that a condominium may only assess general operating expenses on a pro-rata basis. The Respondent argues that Westbridge was impliedly overruled by the D.C. Council when it subsequently adopted Section 45-1848(a)(10) to the D.C. Code. This Section is similar but not identical to Section 11-109 (d)(15) of the Real Property Article of the Annotated Code of Maryland. Section 45-1848(a)(10) of the D.C. Code states that a governing board shall have the:

> (10) Power to impose on and receive from individual unit owners any payment, fee or charge for the use, rental, or operation of the common elements or for any service provided to unit owners.

The Commission acknowledges that Westbridge is a District of Columbia case. However, because of the similarities between Westbridge and this case, the Commission provided the Respondent with an opportunity to submit the legislative history to determine whether the D.C. Council, by adopting a provision similar to that contained in Maryland's Condominium Act, intended to overrule Westbridge. The Commission finds that the legislative history cited by the Respondent provides little, if any, guidance and that it must therefore make its own independent determination as to the intent of the D.C. Council in adopting Section 45-1848 (a)(10) of the D.C. Code, and any relevance which it may have to the facts of this case. Furthermore, the D.C. Code provision states that a Condominium may assess fees against a unit owner for "any service providedto unit owners," while the Maryland Code does not. Since a move-in fee may be construed to be a charge for a "service", the language of the D.C. Code may permit such a charge while the Maryland Code may not. Thus the Commission cites the Westbridge case only to show that it used principles therein for guidance, but the Commission does not base its decision on the holding of this case or legislation which may have resulted from it.

Under Article VIII of its By-Laws, the Condominium may only charge a unit owner his or her proportionate share of any common operating expenses incurred by the Condominium. There was no evidence presented by the Respondent to substantiate the fact that any additional wear and tear not covered by the annual assessment occurs as a result of a move and, therefore, the Commission finds that the Respondent has acted beyond the scope of its authority in imposing such a fee. There was no evidence presented at the hearing to indicate that the move-in fee imposed in Policy Resolution No. 6 was for anything other than common operating expenses. For the above reasons, the Commission finds that the fee found in Resolution No. 6, Item 3, is invalid.

The Commission finds the provisions of Resolution Policy No. 4, paragraphs 2 and 4, and items 1, 2, and 3 of Resolution No. 6 discussed above to be invalid.[3] These are the only provisions challenged by the Complainant.

ORDER

In view of the foregoing, and based on the evidence of record, the Commission orders that:

1. The provisions set forth in Resolution No. 4 adopted by the Board of Directors of Rock Creek Commons Gardens Condominium Three on February 19, 1992, which require that a tenant use a standard lease addendum in which the tenant agrees to assign to the condominium rents due to a landlord for the nonpayment of amounts owed by the landlord to the Condominium (paragraph 2), and which grant the Condominium the right to evict the tenant (paragraph 4), are hereby declared invalid and unenforceable; and

2. Items 1, 2, and 3 in Resolution No. 6 adopted by the Board of Directors of Rock Creek Commons Gardens Condominium Three on February 19, 1992, are hereby declared invalid and unenforceable.

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[3] On the issue of whether Complainant's letter dated April 16, 1992, constituted a request for an exemption pursuant to Section 11-111 (c)(1) and (2) of the Maryland Condominium Act, the Complainant's letter did not make a specific request for an exemption from the rule, but was more in the nature of a general challenge to the rule itself, and therefore did not constitute a request for an exemption under Section 11-111 (c)(1) and (2). The decision herein addresses the validity of rules within the Association, rather than whether Complainant should be exempt from those rules.

The foregoing was concurred in by panel members Chester, Gordon, and Gardner.

Any party aggrieved by the action of the Commission may file an administrative appeal to the Circuit Court of Montgomery County, Maryland, within thirty (30) days from the date of this Order, pursuant to Chapter 1100, Subtitle B, Maryland Rules of Procedure.

David Gardner

David Gardner, Panel Chairperson
Commission on Common Ownership
Communities

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