Before the
Commission on Common Ownership Communities
Montgomery County, Maryland

In the Matter of:	
John Salzman	
Complainant,	
v.	Case No. 21-08
	January 16, 2009
The Whitehall Condominium	
Respondents	

DECISION AND ORDER

The above-entitled case came before the Commission on Common Ownership Communities for Montgomery County, Maryland, for hearing and arguments on November 6, 2008, pursuant to Sections 10B-5(i), 10B-9(a), 10B-10, 10B-11(e), 10B-12, and 10B-13 of the Montgomery County Code. The hearing panel has considered the testimony and evidence presented, and finds, determines, and orders as follows:

Background

John Salzman (Complainant), the owner of the residential unit located at 4985 Battery Lane, Bethesda, Maryland, filed a complaint with the Commission on Common Ownership Communities on April 21, 2008. Complainant alleged:

1. His residential unit is within the Whitehall Condominium (Respondent) community.
2. Respondent's Rules and Regulations have a stated requirement of a one-time move-in fee.
3. This move-in fee does not apply to Complainant.

Findings of Fact

1. The basic facts of this case are not in dispute. Rather, the case centers on an interpretation of Respondent's Rules and Regulations.

2. Respondent is a condominium association established pursuant to the Maryland Condominium Act (Title 11 of the Real Property Article of the Code of Maryland), whose governing documents are recorded in the land records of Montgomery County, Maryland, and which constitute covenants running with the land and affecting all lots within that association.

3. Complainant is the owner of a lot governed by the Respondent's governing documents.

4. Article III, Section 2, paragraph (i) of Respondent's Bylaws states that the Respondent's Board of Directors has the power to enact "uniform Rules and Regulations from time to time for the use of the Property, as well as the conduct and enjoyment of the Unit owners." Further, Article III, Section 9 states that "[s]pecial meetings of the Board of Directors may be called by the President of the Association on three (3) business days' notice to each member of the Board of Directors, given by mail, personally (in writing) or by telegraph, which notice shall state the time, place and purpose of the meeting." Respondent provided minutes from the November 23, 2004, Board of Directors meeting (with a date of November 22, 2004, in the upper right-hand corner of each page). Page 4 of those minutes states in relevant part, "There was discussion regarding changes to move-in fees in light of the elevator problems that have occurred, particularly with respect to Saturday and after-hours weekday moves. … It was the consensus of the Board to increase the move-in fee to $300.00 effective January 1, 2005." Respondent was unable to provide a copy of the minutes of the meeting during which the move-in fee was initially adopted. Complainant did not challenge whether the move-in fee was properly adopted or properly increased at the November 22 or 23, 2004, Board of Directors meeting.

5. The move-in fee is stated on page 7 of the "Guide to Whitehall Condominium Summary of Rules and Regulations" (undated). The relevant portion reads,

> "A one-time, non-refundable move-in fee (at a level set by the Board of Directors) will be charged for any move-in whether by an owner or renter. The fee will be collected by the Site Manager at the time of move-in. The fee must be paid in order to receive the elevator key. Failure to pay the fee may result in a lien being placed against the unit. … All moving must be through the freight elevators and freight entrances. Movers must take care to avoid damage to elevators, walls, floors, etc. Unit owners will be held responsible for damage caused by movers. Moving vans are only permitted at the loading platform in the rear of the West Building, at the freight entrance at the rear of the North Building and at the parking lot behind the townhouses."

6. Respondent did not provide a full copy of the Rules and Regulations.

7. Complainant stated that he was aware of a stated move-in fee in Respondent's Rules and Regulations before purchasing the unit. However, Complainant asserted that the language of the move-in fee indicates that it is intended only for units in the high-rise buildings, not for the townhouse units like the one owned by Complainant. He pointed to the language of the move-in fee stating, "All moving must be through the freight elevators and freight entrances." Complainant asserted that this clearly indicates the move-in fee applies only to high-rise units because the townhouse units do not have freight elevators or freight entrances.

8. Complainant stated that he refused to pay the move-in fee when it was requested from Respondent's representative and that he tried to resolve the matter "informally." Complainant said he spoke to two members of the Respondent's property management agency and then to the Respondent's Board of Directors President. He said one month later he was told by the Board

President that the Board members had been consulted and Complainant was required to pay the move-in fee. Complainant provided a letter from Respondent's property manager, dated April 11, 2008, that stated in relevant part,

> "Per your [Complainant's] e-mail dated March 31, 2008 the Board has considered your request for a reduction and/or waiver of the move-in fee for the townhouses. The Board concluded that the move-in fee applies to all move-ins to any and all of Whitehall [Respondent] buildings (North Building, West Building and townhouses). … Since you have not paid the move-in fee, the Board feels that you are not fully registered and therefore should not receive Condominium privileges such as key fobs, a permanent parking sticker or a storage bin. The Management Office has already extended to you a temporary parking pass. Should you wish to take this matter to the CCOC, upon you're [sic] request, additional temporary parking passes will be provided."

9. Complainant also stated that since he purchased his unit, he has been denied certain rights and privileges of being the owner of a unit in Respondent's community. First, he was given visitor parking permits instead of a permanent parking permit normally provided to unit owners. Complainant had to obtain a new visitor permit every 30 days in Respondent's property management office during business hours and was only allowed to park in visitor spaces, which are farther from Complainant's unit than the owner parking spaces. Complainant stated that his vehicle was towed twice because he had not been able to obtain a new visitor permit and was displaying an expired visitor permit. Second, his "fob" for entering the lobby of the high-rise building does not function. Like all other residents, Complainant must enter the high-rise building lobby to obtain his mail. He must rely on the lobby attendant to "buzz" him into the building. Third, he was denied the opportunity to rent one of the storage spaces, even though one was available at the time he purchased his unit. Finally, while he was initially given a pool pass, Complainant stated that the property manager "implied" that he should not have received a pool pass given his refusal to pay the move-in fee.

10. Complainant stated that he has paid all other fees and is current on payment of his monthly assessment. Complainant also stated that Section 11-113 of the Maryland Condominium Act requires Respondent to notify Complainant of a "violation," but Complainant has never received such a notification. Complainant stated that he felt he had exhausted "all remedies" available through his condominium association.

11. Complainant then called Respondent's property manager to testify. The property manager stated that Complainant's building fob was not activated because Complainant is not a "registered owner" – meaning Complainant's name was not in the database of owners and occupants. He further stated that Complainant's fob was not disabled due to a rule violation. The property manager stated that he was not aware of any other resident refusing to pay the move-in fee. He also said the fee is "regulatory" and is not a "fine." The property manager was asked to explain the difference between a rule and a regulation, but he was unable to do so. The property manager stated a financial management company collects assessments. He also said the move-in fees are used for: (a) processing settlements when properties change owners; (b) paperwork processing; maintenance; (c) a set up fee of the financial management company that

collects assessments; (d) assessment coupons; (e) parking stickers; and (f) programming the building fob. He said the "set up" fee for the financial management company is $25, the coupons cost $5, and the balance of the $300 move-in fee is for the remaining property management activities described. The property manager said Complainant's delinquent move-in fee did not go to a collection agency because of the stay imposed by the Commission after Complainant filed a complaint. The property manager said the move-in fee was required of all new residents. The monthly assessment for Complainant's unit is currently $964 per month.

12. Through interrogatories, Complainant had asked Respondent about the nature of damage to common elements near the townhouse units attributable to move-ins. The Respondent's response was to object to the question, but to provide documents related to general maintenance costs. Upon questioning, the property manager did not clarify how move-in fees are differentiated from, used or accounted for separately from assessments and other condominium fees.

13. Complainant then called Respondent's assistant property manager to testify. He stated that a storage unit was available when Complainant moved into his townhouse. He stated that part of the move-in fee is for use of a storage unit. He said there are insufficient storage units for all units, so units are available on a first-come, first-served basis. He also said there are approximately 57 visitor parking spaces and over 400 resident parking spaces.

14. Respondent then began presenting its case. Respondent's attorney stated that the move-in fee is "no different" than an assessment, and a plain reading of the move-in fee portion of the documents indicates it applies to all owners and residents. He also stated that Complainant's refusal to pay the fee is "not a rule violation."

15. Respondent's Board of Directors Treasurer then testified. She said the move-in fee was modified in November 2004 because of expenses associated with move-ins.

16. Respondent then concluded its case by requesting attorney's fees and submitting an affidavit documenting those fees.

Conclusions of Law

Move-In Fee

The Panel agrees with Respondent that Complainant is required to pay the $300 move-in fee. A simple reading of the rule does not distinguish between high-rise units and townhouse units. The Respondent's meeting minutes noted that the high-rise elevator costs were part of the focus of the justification for increasing the fee in 2004. Also, the fee has been required from and paid by all other new residents since the rule was originally passed and subsequently modified.

Attorney's Fees

Under Section 10B-13(d) of the Montgomery County Code, attorney's fees may be awarded against the losing party if the Panel finds that the party has maintained a frivolous

dispute, unreasonably refused to accept mediation of a dispute, or substantially delayed or hindered the dispute resolution process without good cause. This section also allows the hearing panel to award attorney's fees when "an association document so requires and the award is reasonable under the circumstances.**"**

The Panel disagrees that Complainant should be compelled to bear any of the financial burden incurred in the pursuit of this action. The Panel believes the matter giving rise to this complaint was not appropriately managed by the Respondent. Whereas the move-in fee is contained within the rules and regulations of the condominium regime, as found in Respondent's Summary of Rules and Regulations on page 7, the failure to pay the move-in fee should be considered a violation of the rules and regulations. Therefore, according to the Maryland Condominium Act ("The Act")**,** a dispute procedure consistent with The Act must be used to address such a violation.

It is important to note that Respondent's Summary of Rules and Regulations quotes The Act's procedure on "Enforcement of Condominium Rules," Section 11-113(b). This portion of The Act discusses the procedure for a hearing and the appeal of any decision from a hearing, but Respondent failed to follow those procedures in any way.

The Panel did not find evidence of a process that notified the Complainant about the rule violation or of discussion of a hearing process consistent with The Act. There is evidence in the April 11 letter that, contrary to The Act, the Respondent's Board immediately infringed upon Complainant's rights – *i.e.*, denied a fob, a permanent parking sticker, and a storage bin – for the violation of a rule without following procedures prescribed in The Act. This behavior is unacceptable, and the Panel believes this dispute and many others like it might not reach the point of a hearing such as this if association boards consistently followed these procedures.

The Panel also finds no difference between Respondent's move-in "regulation" and a "rule" as used in The Act. Respondent was repeatedly questioned about the difference between a "rule" and a "regulation" and was unable to explain the difference.

Finally, recordkeeping on the adoption of the move-in was not presented at the hearing, and minutes from the meeting to modify the move-in fee in 2004 were not in proper form, i.e., improperly dated. Complainant did not challenge the move-in fee on the basis that it was improperly adopted or changed, so the Panel considers this to remain an open issue. Much like following proper dispute resolution procedures, it is important for Respondent and all associations to properly maintain all records to avoid ambiguity and other potential disputes.

Order

Based on the evidence of record and the reasons stated above, it is ordered that within thirty (30) days from the date of this decision, Complainant must pay the $300 move-in fee to Respondent. If Complainant fails to pay the move-in fee in full within the 30-day period and on time, Respondent may add the amount of the move-in fee to Complainant's account and may proceed to collect it in the same way as authorized by State law and its governing documents to

collect any other unpaid debts, including but not limited to the imposition of interest charges, liens, and an action at law to collect a debt or to initiate foreclosure.

Respondent must immediately provide Complainant all rights and privileges of being an owner and resident of a unit, including a permanent parking pass, functioning building fob, and pool pass. If Complainant's vehicle is towed from Respondent's property for displaying an expired visitor parking permit after the date of this decision, Respondent shall be responsible for all towing and storage charges and for any damage to Complainant's vehicle. Respondent also must immediately provide Complainant the opportunity to use a storage unit. If a storage unit is not currently available, Respondent must offer the first storage unit that becomes available to Complainant, and Respondent must offer Complainant a comparably-sized storage unit at the nearest commercial storage facility at no cost to Complainant for up to one (1) year, or until a storage unit becomes available in Respondent's facility.

At the next meeting of Respondent's Board of Directors, the Board must: (a) review and discuss their current dispute resolution procedures to ensure they comply with the Maryland Condominium Act; (b) include a summary of those procedures in the minutes of the meeting; and (c) distribute a written copy of the minutes to all unit residents and owners.

Within thirty (30) days from the date of this decision, Respondent also must provide a written copy of this decision to all unit residents and owners.

If Respondent fails to meet the requirements of this order, Complainant may pursue any remedies available to him.

Commissioners Arthur Dubin and Vicki Vergagni concurred 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 thirty (30) days from the date of this Order, under the Maryland Rules of Procedure.

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Douglas Shontz, Panel Chair
Commission on Common Ownership Communities