Before the
COMMISSION ON COMMON OWNERSHIP COMMUNITIES
MONTGOMERY COUNTY, MARYLAND

Frank Kalin,
Complainant,

v.

Case No. 24-13
May 27, 2014

Normandy Hills Homeowners Association,
Respondent

DECISION AND ORDER

Before Friedman, Brandes and Zajic

This matter comes before the Commission on Common Ownership Communities ("CCOC") on a complaint filed by Mr. Frank Kalin (the "Complainant") against the Normandy Hills Homeowners Association (the "HOA" or "Respondent"). The Complainant claimed that a covenant amendment adopted by a majority of the members of the HOA to permit the installation of asphalt roofs on the homes in the HOA was not properly adopted and was irrational and inconsistent with the overall architectural harmony of the community. The CCOC accepted jurisdiction of the dispute under Chapter 10B of the Montgomery County Code and referred it to this hearing panel for resolution. This hearing panel held two nights of hearings on the dispute, and having heard all the evidence offered by the parties, now issues the following findings of facts, conclusions of law, and order.

Findings of Fact

1. Mr. and Mrs. Kalin reside at, and are the owners of, the lot known as 8908 Barrowgate Court, Potomac, Maryland. They are members of the Respondent homeowners association ("HOA").

2. The Kalins' lot is subject to a Declaration of Covenants, Conditions and Restrictions (the Declaration) as recorded August 13, 1096, at Liber 7284, Folio 444, in the Land Records of the Circuit Court of Montgomery County, Maryland. The Declaration governs all lots in the community and it was recorded on August 13, 1986.

3. The Declaration creates the Respondent, which is a homeowners association as defined by Section 11B-101 of the Real Property Article of the Code of Maryland.

4. The Respondent consists of 119 homes, of which 27, including the Complainant's home, are townhomes. The townhomes, like all townhomes, are joined to each other in rows, each townhome sharing a common wall with its neighbor. There are two styles of townhomes, called Type II and Type III.

5. The townhomes were originally constructed with natural cedar shake roofs.

6. Prior to April, 2013, Article VI, Section 6.05(e) of the Declaration provided that:

> *...the roof of any dwelling on Type II Lots and Type III Lots shall be repaired or replaced with materials, substantially identical in construction, shingle type, texture and color as the materials utilized by the Declarant in the original construction of the dwelling.*

7. Article XII, Section 12.08 of the Declaration states:

> *Duration and Amendment. Except where permanent easements or other rights or interests are herein created, the covenants and restrictions of the Declaration shall run with and bind the land for a term of thirty (30) years from the date this Declaration is recorded, after which time they shall be automatically extended for successive periods of ten (10) years. This Declaration may be amended during the first thirty (30)-year period by an instrument signed by not less than seventy-five percent (75%) of the Lot Owners, and thereafter by an instrument signed by the Owners of not less than sixty-six and two-thirds percent (66 2/3%) of the Lots. Any amendment must be recorded.*

8. Section 22-98(a) of the Montgomery County Code states:

> **A person must not make or enforce any deed restriction, covenant, rule, or regulation or take any other action, that would require the owner of any building to install any roof material that does not have a class A rating, or an equivalent rating that indicates the highest level of fire protection, issued by a nationally recognized independent testing organization.**

9. In approximately November, 2011, a group of the townhome owners, prompted by concerns over the costs, lack of durability and lack of fire resistance of cedar shake roofs, some of which were now reaching the point at which they needed to be replaced, requested that Respondent's Board of Directors allow the use of asphalt and other types of shingles as an alternative to natural cedar shake shingles. The Board denied such request, notwithstanding the fact that such denial was in violation of Montgomery Code Section 22-98 which requires that every association permit a Class A rated roofing alternative be made available to the homeowners.

10. The concerned homeowners then initiated a petition to amend Article VI, Section 6.05(e) and went door to door with the petition which sought Board action allowing the use of other roofing materials which were rated as Class-A Fire Resistant. The petition was signed by more than 75% of the Respondent's members. The Board of Directors requested an opinion from the Respondent's attorney on the validity of the amendment, and the attorney informed them that the amendment was properly adopted by the general membership of the association. In April, 2013, the Board of Directors voted to authorize its filing in the Land Records, and the Respondent filed the amendment later that month.

11. The amended Article VI, Section 6.05(e), as filed in the Land Records, now states:

> *...the roof of any dwelling on Type II and Type III Lots (the "Barrowgate*

Court Homes") shall be repaired and/or replaced with Class A fire-rated materials, which have been approved by the Barrowgate Court Homes community, and blend in color and texture with the current shingle color and texture on other roofs within the Barrowgate Court Homes Community. The selection of the specific type of shingle to be used will be selected by majority vote of the owners of Barrowgate Court Homes. Before the vote is taken, an ad hoc committee of no less than three (3) Barrowgate Court Homes Member Owners will select not less than two (2) options to be placed to a vote by the Barrowgate Court Homes community. The shingle options selected by the committee shall be put to a vote by the Barrowgate Court Homes community, which shall select the type of shingle to be used until such time as it is no longer commercially available or desirable, at which time the same procedure will be used to select a new shingle.

12. A natural cedar shake shingle, even if treated with a fire-retardant chemical, does not qualify to receive a Class A fire-resistant rating. A natural cedar shake shingled roof cannot be rated Class A unless it has had a qualified fire resistant sub-roof installed between the shingles and the rest of the structure. Such sub-roof will provide a degree of protection to the subject home, but does not inhibit fiery embers from migrating to the roofs of adjoining homes.

13. Nothing in the Respondent's Declaration or Bylaws requires that the members convene in a meeting in order to vote upon or sign an amendment to the Declaration. Nothing in those documents specifies how the "instrument" referred to is to be circulated, discussed, or reviewed prior to being signed by the members.

14. As the Treasurer of the Respondent during the time involved in this dispute, Complainant was present at meetings of the Board at which the proposal was discussed and opposed allowing any roofing material other than natural cedar shakes. He argued that the costs of installing a Class A rated natural cedar shake roof were minor, and that any other material would have a significant and detrimental effect on the appearance of, and value of the homes in, the community. In his Complaint filed before the Commission, Complainant argued that the amendment was not properly adopted because there was no meeting of the members to vote upon or sign the amendment and no opportunity for opponents of the amendment to present their position on it to the community.

15. Complainant also expressed concern regarding the propriety of having the petitioners' attorney file the amendment and the cost incurred by the HOA to do so. We find that the Board's decision to utilize the services of the petitioners' attorney was the most efficient and economic manner of administering this matter and was properly within the discretion of the Board of Directors.

Conclusions of Law

1. Complainant is an owner of a lot within a homeowner association and therefore a proper party under Section 10B-8 of the Montgomery County Code.

2. Respondent is a homeowner association as defined by Section 11B-101 of the Real Property Article of the Code of Maryland and therefore a proper party under Section 10B-8 of the Montgomery County Code.

3. The Commission has jurisdiction of this dispute under Section 10B-8(4)(B)(iii) and (iv) of the Montgomery County Code.

4. The Respondent's Declaration, as it existed prior to April, 2013, allowed the use only of natural cedar shake shingles in the community. Such a material did not have a fire-resistant rating of Class A. It could only be rated as Class A if the existing roof, as originally constructed, was modified by the addition of an approved fire-resistant barrier between the roof structure and the shingles. *See, Fishbein v. Avenel Community Association,* CCOC No. 744 (2006). In *Fishbein v. Avenel,* a panel of the Commission held that the words "roof material" as used in Section 22-98 of the Montgomery County Code referred to shingles only. Consequently, a common ownership community could not require a homeowner to alter the construction of his house by installing a fireproof barrier between the house and the roof materials in order for the homeowner to achieve a Class A rated roof. The roof material itself, meaning the shingles only, had to be rated as Class A. Consequently, the Respondent's Declaration was inconsistent with Section 22-98 and unenforceable to the extent it barred the use of all Class A rated roof materials. If the Declaration were not amended, a homeowner might be allowed to install any Class A rated roof material of his choice. *Fishbein v. Avenel, supra. See also, Inverness Forest Association v. Salamanca,* CCOC#17-08 (2011). It was therefore incumbent upon the Respondent to amend its governing documents in order to bring them into compliance with the County Code or risk losing control over all new roof installations.

5. Complainant argues that the amendment was improperly adopted as there was no formal meeting. Although the petition procedure used here was unusual, it was not inconsistent with any provision of the Declaration or of the Bylaws; and no provision in either document requires that amendments be adopted at meetings. In addition, Section 11B-116 of the Real Property Article of the Code of Maryland requires only that amendments be adopted by "the affirmative vote of lot owners having at least two thirds of the votes in the development." It does not require a meeting at which those votes must be collected. Mr. Kalin and those who agreed with him could have conducted their own vote drive to press their viewpoints and to obtain opposing votes. Likewise, he could have requested that the Board of Directors call a special meeting to consider and vote upon an amendment. We therefore conclude that the amendment was properly adopted.

6. Complainant claims that the new rule violates the Declaration because it is inconsistent with the overall design of the community, as created by the community's developer. This appears to be an argument that the association lacks the legal authority to adopt the amendment in dispute. Such an interpretation renders meaningless the right of the membership to change the governing documents. Certainly an association has the right to preserve the appearance of the community as it existed when the developer transferred control to the association. *See, e.g., Decker v. Kingsview Village HOA,* CCOC #19-11 (2013) (if some houses were constructed with shutters and others were not, the HOA had the right to prevent removal of shutters from those houses that were originally constructed with them). However, laws and public policy change with time in order to adapt to changes in public opinion, as well as technological advances such as the development of alternate roofing products which improve the safety of one's home. Such changes may require HOA documents to change with them, as noted by the *Fishbein* and *Salamanca* hearing panels. The appearance of a community is not frozen for all time to come, and the ultimate arbiter of its architectural harmony lies with the membership.

7. Nor is the amendment unreasonable or arbitrary. Some change was needed in order to bring the Declaration into compliance with the law, and protection against the spread of fires in such a closely-constructed community is a legitimate and substantial concern. So also are concerns of the life span and costs of cedar versus asphalt shingles. The community was entitled to weigh those concerns. We also note that the amendment has the effect of broadening the roofing options available to the membership and therefore of enhancing their freedom of property. As the Court noted in *Markey v. Wolf,* 92 Md.App 137 (1991), a lesser standard of review is required of association decisions that permit a homeowner to do something than is necessary for decisions that restrict homeowner choice:

> *As we see it, the disapproval of a building plan might be a restraint on the free use of property and can adversely affect its alienability. The reasons for disapproval, therefore, should be very closely scrutinized. On the other hand, approval of building plans does not interfere with the unrestricted use of property nor with the "freedom of property."*

8. We therefore rule that the amendment was properly adopted and not inconsistent with the governing documents or any applicable law, and is valid.

9. The panel notes that the Court of Special Appeals recently decided *Reiner v. Ehrlich,* 212 Md. App. 142 (2013). In that case, the homeowner unsuccessfully challenged the association's adoption of a rule that allowed installation of natural cedar shake shingles as well as of a Class A rated synthetic cedar shake shingle but restricted the homeowner from replacing his cedar shake roof with a Class A rated asphalt roofs. Although the Court's ruling was largely based upon procedural rather than substantive grounds, the Court did not perceive a cognizable conflict between the HOA rule and Section 22-98 of the Montgomery County Code. Thus, the association was sued for not allowing asphalt shingles, whereas here Respondent was sued for allowing them. The lesson here for all associations is that an association may face a challenge to *any* rule or amendment that it adopts, and therefore should ensure that it follows all relevant procedures and establishes a proper record to support its decision.

ORDER

Based on the foregoing, the decision of the Respondent to authorize the installation of asphalt roofs on homes within the HOA is affirmed and any relief requested by the Complainant is, hereby, denied.

Any party aggrieved by this Decision and Order may, within 30 days, appeal it to the Circuit Court for Montgomery County, Maryland, pursuant to the Rules of Court for Appeals from the Decisions of Administrative Agencies.

The panel's decision is unanimous.

Greg S. Friedman

Greg S. Friedman, Panel Chair