MONTGOMERY COUNTY, MARYLAND
COMMISSION ON COMMON OWNERSHIP COMMUNITIES

In the matter of:

Wayne Amchin
13644 Hayworth Drive
Potomac, MD 20854
Complainant,

v.

Case #95-14 (#29-13)
February 26, 2016

Potomac Glen Community Association
c/o Ruth Katz, Esq.
3 Bethesda Metro Center #460
Bethesda, MD 20814
Respondent

Decision and Order

(Before Winegar, Coyle, Fishbein)

This matter came before the Commission pursuant to Sections 10B of the Code of Montgomery County, Maryland. The hearing panel has considered the testimony and evidence presented at a hearing held XXXXX and finds, determines and orders as follows:

Background

The Complainant, Wayne Amchin (hereafter referred to as "Complainant") filed this complaint with the Commission on December 23, 2014 against Potomac Glen Community Association (hereafter referred to as "Respondent" or "Association"). An earlier complaint, which involved many of the same issues, was filed in 2013 and is referenced in this document as Complaint #29-13.

The Complainant requested the Respondent take the following actions:

1. Provide documentation of the Board's decision not to install the landscaping he requested.
2. Restore landscaping next to his unit that was removed by the Respondent.
3. Cancel costs levied against him to compensate Respondent for removing plantings Complainant installed on community property.
4. Remove tree roots extending from common property onto Complainant's lot.
5. Enforce the Respondent's rule that all trash be properly packaged for removal by the contractor.
6. Require the Respondent to adopt a policy for more frequent trash pickups during pool season, and possibly at other times.
7. Enforce a policy under which the basketball court is closed at night.

8. Permit the Complainant to retain a fence along his property line adjacent to community property to the side of his unit.

The Commission voted NOT to take jurisdiction over Items #1 and #6 of Complaint #95-14. Specifically, Respondent stated that the documents requested in Item #1 did not exist, Complainant could not prove that the documents exist, and the Commission has no power to order the production of a document that does not exist. In the absence of any proof that the requested documents exist, there is no "dispute" as required by Section 10B-8(4) of the County Code. Item #6 involves a request for increased trash removal services. The Commission determined that the question of how often the Respondent should contract for trash removal is clearly a board decision that is shielded by the Business Judgment Rule, and thus again beyond the scope of the Commission to address. The Business Judgment Rule precludes judicial review of a legitimate business decision of an organization's board of directors in the absence of fraud or bad faith. *Black v. Fox Hills N. Cmty. Ass'n, Inc.*, 90 Md. App. 75,82,599.A2d 1228,1231 (1992). During the course of the hearing, Complainant withdrew Item #8.

The requests submitted in the earlier complaint, Complaint #29-13, were referred to mediation and resolved there pursuant to a written agreement. In Complaint #95-14, Complainant asserted that the signed settlement agreement in #29-13 ("Settlement Agreement") was not fulfilled by the Respondent, and Complainant consequently renewed his claims before the Commission. Respondent raised the defense that the issues in #95-14 essentially duplicated those in #29-13 and were therefore resolved and mooted by the Settlement Agreement, and moved to dismiss #95-14 on the grounds that the Respondent had, indeed, complied with the Settlement Agreement.

The Settlement Agreement committed the parties to the following:

1. Complainant agreed to request permission from Respondent to retain plantings in the common area which he planted without prior permission and which were the subject of a Notice of Maintenance dated April 10, 2013.
2. Respondent agreed to consider what types of plantings or other barrier might be installed in that area of Complainant's lot to address Respondent's concerns about littering on his property.
3. Respondent agreed to provide minutes or alternate documentation reflecting a Board decision to rescind a previous Board decision to install barberry bushes in that area of common property. (It was subsequently discovered that no such documentation exists.)
4. Respondent agreed to consider whether to install a permanent trash receptacle across from Complainant's house.
5. Respondent agreed to review its procedures for rule enforcement with regard to trash disposal.
6. Respondent agreed to notify homeowners of its plans to enforce rules as appropriate.
7. Respondent agreed to consider limitations to the swim team's use of the community center sound system.
8. Complainant agreed to report his observations of covenant violations or other safety or security concerns by utilizing the association's designated email address.

The Panel heard testimony on all items, with the understanding that a motion to dismiss had been made with regard to at least those items addressed in the Settlement Agreement, specifically Items #5, #6, #7of the Complaint #95-14. Because of events after the Settlement Agreement was made, the panel felt that there could have been a failure to comply with the Settlement Agreement which needed to be examined through Complaint #95-14.

The panel divided the individual issues of #95-14 into two main groups: (a) Items #2, #3, and #4 which relate to the treatment, removal and restoration of buffer landscaping adjacent to Complainant's residence as well as other landscaping concerns; and (b) Items #5 and #7, which relate to the Respondent's enforcement of rules regarding trash and community amenity use.

As part of the discovery process, Complainant submitted an extensive and wide-ranging request for the production of documents, including contracts, work orders, communications and documents from 1996 to 2015. The panel limited the request to the preceding 5 years. Respondent objected to the scope of the discovery request on the grounds that it was burdensome. Nevertheless, Complainant objected to the more limited scope required by the panel. Respondent provided the documents as requested with the limitations set by the panel, approximately 600 to 700 pages.

As part of the discovery process, Complainant requested an extensive list of witnesses to be subpoenaed. The Commission directed Complainant to provide addresses for each witness and a summary of anticipated testimony. Complainant did not provide this information and subpoenas were not issued.

In discussion of the specifics of Complaint #95-14, Complainant provided numerous photographs of improperly packaged trash within Potomac Glen Community Association, presumably deposited by other residents of the association in violation of association rules. The photographs were undated, although Complainant stated that the digital files for the photographs (which were not provided to the panel as part of Commission Exhibit 1) did have date stamps. The photographs did not always show clear addresses, although Complainant stated that he was prepared to attest to the date and location of each photograph. Respondent stipulated to the fact that residents of Potomac Glen Community Association do not always comply with the rules regarding trash disposal. A core element of the instant dispute is the question of whether Respondent is properly and consistently enforcing the rules. Respondent provided a report of homeowners cited for trash violations over the past three years. Both Respondent and Complainant stipulated that the trash rules reflect the requirements of Montgomery County laws related to the proper packaging of trash for removal.

As part of his testimony related to the improper packaging of waste for disposal, Complainant noted that he had been directed in the Settlement Agreement to report his concerns to the association through a designated email address, and he had been doing that until the manager informed him that he did not need to continue with such reports.

Complainant explained that his home is located near a community recreation facility which includes a club house, pool, and basketball court. Complainant reported that there have been incidents at the community center which have caused him to contact the police. Complainant reported that there have

been disturbing events near his home, and he expressed concern that screening landscaping has been removed, as well as his desire to have the landscaping restored. Complainant reported that some of the lighting at the basketball court had been modified over the past year, and that had ameliorated the situation somewhat. Complainant expressed concern about the quantity of trash and litter at the community facility, and the length of time between the deposit of the litter and its removal by the Respondent. Complainant provided evidence and testimony that there have been some noise disturbances associated with the club house, as well as incidents of excessive trash associated with private rentals of the club house. Because of the proximity of his home to the clubhouse, Complainant found the incidents particularly offensive. Complainant reported that conditions had generally improved over the preceding summer, and that he had not reported every incident to the Respondent through the designated email, nor had he reported every incident of concern to the police. Complainant addressed the issue of private security, noting that when he served on the board of directors, he had supported the use of private security, but the current board had not authorized such a contract. He expressed support for contracting again for private security.

With regard to landscaping issues, all parties stipulated that at some point in the past, a number of evergreen trees had been planted on community property between the Complainant's home and the adjacent street. All parties stipulated that the Complainant had not planted them. More recently, Complainant had planted additional trees in the same general area, but further down, and on community property. Both parties stipulated that these smaller, newer plants had been installed by the Complainant without prior permission.

In attempting to fulfill the terms of the Settlement Agreement from Complaint #29-13, Respondent reported that a number of unapproved plantings were discovered in various areas of community property throughout the association. Respondent authorized the removal of some of these unapproved plantings and requested homeowners to remove plantings in those instances where homeowner responsibility could be identified. Respondent provided those homeowners with an estimate of the projected cost of the planting removal and turf restoration, should Respondent's contractor be required to do the work, and homeowners were provided a deadline and a request to contact Respondent about the issue. Complainant removed the unauthorized plantings but did not restore the turf to its previous condition, nor did he contact the Respondent. Respondent paid a contractor to restore the turf, but the restoration has apparently been unsuccessful. Respondent stated that it is requiring Complainant to restore the turf. Respondent has submitted several invoices to Complainant for work performed to date; both parties stipulated that the invoices have not been paid by Complainant.

Complainant expressed concern about tree roots encroaching onto his property from plantings on community property and he requests that Respondent be responsible for removing the tree roots and restoring turf on the private property of 13644 Hayworth Drive. Complainant denied responsibility for the invoices and noted that some elements of the invoices were confusing. Respondent stipulated that an unclear and potentially confusing invoice was sent to Complainant originally, and a follow-up invoice was not itemized or detailed, and included a different amount payable.

Complainant alleges that Respondent has discriminated against his neighborhood with regard to landscaping and beautification. He drew attention to a map of the area and showed that some

intersections have flowerbeds and others do not. Respondent explained that some intersections with major county roads do have flowerbeds, as do some others in the community. Respondent asserted that landscaping funds are spent commensurate with the needs of each area, as for example when one area requires more tree removal than another, funds will be spent in that manner. Respondent expressly denied discriminatory landscaping decisions or spending levels.

Findings of Fact

1. Complainant is the owner of 13644 Hayworth Drive, Rockville, Maryland 20854, and a member of the Respondent.

2. Respondent is a homeowners association as defined by Section 11B-101 of the Real Property Article of the Code of Maryland.

3. The Settlement Agreement for Complaint #29-13 required Respondent to consider requests from the Complainant with regard to plantings on community property adjacent to his home, required the Respondent to consider the installation of a permanent trash receptacle adjacent to Complainant's unit, and required Respondent to review procedures related to rule enforcement.

4. Based on the evidence provided by the Respondent, the panel finds that the Respondent considered plantings adjacent to Respondent's unit, and throughout the community as a whole. As part of that consideration, Respondent decided to uniformly enforce the prohibition on plantings and barriers on common areas. All unit owners who had installed plantings and barriers were requested to remove these items and notified that if they failed to do so, the items would be removed and the costs assessed to the owners.

5. The panel finds that, as required under the Settlement Agreement, the Board had determined that plantings along curbs where parking is permitted, such as the area adjacent to Complainant's unit, created undesirable barriers to resident use of those areas.

6. The panel finds that, as required under the Settlement Agreement, Respondent provided evidence that it considered the installation of a permanent trash receptacle and determined that it was not appropriate.

7. The panel finds that, as required under the Settlement Agreement, Respondent was enforcing rules related to trash through notices in accordance with its procedures.

8. The panel finds that, as required under the Settlement Agreement, Respondent provided evidence that Complainant was or should have been aware of the proximity of the community recreational area when Complainant purchased the property and further that the Complainant's concerns about traffic, trash and noise associated with the community center, pool, and basketball court are associated with Complainant's proximity to the community center.

9. Complainant has not regularly informed the Respondent of specific incidents of concerns related to the use of the community center such as trespassing by non-residents and vandalism.

10. Pursuant to the Settlement Agreement, Respondent provided evidence that it had sent out more than 100 trash violation notices in the preceding year. The panel finds that the Respondent has taken steps to enforce the trash rules.

11. The panel notes that Complainant provided numerous photographs from various trash days showing noncompliance among residents of the Association. However, even the single largest collection of violation photographs did not exceed 30 households in violation, which represents an overall compliance rate of more than 90% (the Association includes more than 600 homes). Furthermore, because the photographs do not contain visible date stamps or clear addresses, the panel finds that the management staff would not use the photographs as actionable evidence that could be used as the basis for violation notices. Finally, the panel finds that the manager's statement to the Complainant that further such photographs were not needed was an indication that the photographs were not useful in enforcing the rules.; however, the panel finds that this unfortunately implied to the Complainant that he should no longer comply with the requirements of the Settlement Agreement directing him to report concerns to the Association in a specific way.

12. With regard to the allegation of discriminatory landscaping, the panel finds that the diverse conditions of any large community lead to a similar diversity in landscaping. The panel did not find evidence of improper discrimination in the establishment or removal of any type of planting or landscaped bed.

13. With regard to the removal of plantings adjacent to the Complainant's property, all parties stipulated that mature plantings were removed by the Respondent at the expense of the Association. With regard to the less mature plantings placed on property adjacent to the Complainant's unit by the Complainant without consent of the Association, the Complainant reported that the plants were removed by him and placed in his rear yard. The Respondent billed the Complainant for additional work to restore the greenspace in that area, including filling the holes where plants had been, and adding seed. Further, the Respondent had required the Complainant to complete the restoration of the property. The panel finds that the bills and statements provided to the Complainant were confusing and insufficiently detailed

Conclusions of Law

1. The panel concludes that the Respondent has substantially complied with the terms of the Settlement Agreement which arose from mediation associated with Complaint #29-13.

2. The panel concludes that by failing to notify the police, the Complainant has not availed himself or the community with the services of Montgomery County law enforcement officers. Respondent's

ability to ensure safety is limited by a number of factors, including the costs of hiring private security companies. The extent to which the Respondent must take measures to ensure the safety of its residents is largely governed by the business judgment rule and we find no reason not to apply that rule here. The panel concludes that the police are primarily responsible for responding to safety or security concerns, including those involving drug use, vandalism, loitering, hooliganism, excessive noise during Montgomery County quiet hours, trespassing, and other violations of the law.

3. The panel concludes that the Respondent's decision as to whether or not to hire additional private security staff is shielded by the Business Judgment Rule, and the panel finds no evidence of bad faith in the matter. Similarly, the Respondent's decision as to whether or not to contract for any designated level of trash removal service is shielded by the Business Judgment Standard, and the panel finds no evidence of bad faith.

4. The panel concludes that the party responsible for addressing crime and vandalism in a publicly accessible amenity is the police department. The panel concludes that the Respondent's decision not to hire private security is shielded by the Business Judgment Standard, and the panel finds no evidence of bad faith.

5. The panel concludes that the Respondent's actions to enforce (or not enforce) hours of use for the basketball court are shielded by the Business Judgment Standard, and the panel finds no evidence of bad faith.

6. The panel concludes that the Complainant has failed to comply with the Settlement Agreement requirement that he report his concerns to the Respondent through the use of a designated email address. However, the panel concludes that with regard to Respondent's complaints about trash rule enforcement, the failure to report concerns is understandable following potentially confusing or contradictory information from the manager, i.e., informing Complainant that further photographs of violations were not required. Because of this confusing communication, the panel concludes that the Complainant had cause to disregard that specific requirement of the Settlement Agreement.

7. With regard to the Complainant's request that the Respondent remove tree roots encroaching onto his property, the panel concludes that pursuant to Article 12, Section 12.1 of the Association's Declaration of Covenants, Conditions and Restrictions, each owner must maintain his or her own lot. Specifically, Article 12, Section 12.1 states the following:

> Section 12.1 Except as otherwise specifically provided in the Governing Documents, each Owner and/or Resident of a Lot within the Community shall Keep such Lot, and all improvements therein or thereon, in good order and repair and free of debris, including but not limited to the seeding, watering and mowing of all lawns, the pruning of all trees and shrubbery and the painting (or other appropriate external care) of all buildings and other improvements located on such Lot, all in an manner and with such frequency as is consistent with good property management.

The Complainant's complaints about tree roots fall within the scope of the "Massachusetts Rule" adopted by the Maryland Courts, and the panel concludes that Complainant is responsible for the maintenance and pruning of any roots on his property. In *Melnick v. C.S.X. Corporation*, the Maryland Court of Appeals was asked to decide whether a landowner in a developed or urban area

has a cause of action against the adjoining property, cause injury to the former's property. 312 Md. 511, 540, A.2d. 1133. The Court adopted the "Massachusetts Rule," which limits an owner's remedy to self-help. *Id*. At 520. In its ruling, the Court stated:

> Among the various rules discussed, and in the absence of relevant statutory provisions, we agree with both courts below that the Massachusetts Rule is preferable.... In addition, as pointed out by the Supreme Judicial Court of Massachusetts in Michalson v. Nutting (citation omitted) to grant a landowner a cause of action every time tree branches, leaves, vines, shrubs, etc., encroach upon or fall on his property from his neighbor's property, might well spawn innumerable and vexatious lawsuits. We have gotten along very well in Maryland, for over 350 years, without authorizing legal action of this type by neighbor against neighbor. *Id.*

Consequently, the panel concludes that the Complainant is responsible for maintaining his own private property, including the removal of tree roots.

8. The panel concludes that the same reasoning should apply to work remaining to be done on common property adjacent to the Complainant's unit, now that unauthorized plantings have been removed. In view of the lack of clarity and detail in the billings and notices sent to the Complainant both before and after the removal of unauthorized plants, the panel concludes that the Respondent has failed to provide sufficient evidence to support its claims for financial reimbursement and is responsible for restoring community property at its own expense.

9. The panel concludes that the presence or absence of flower beds, trees, ornamental plantings, or other horticultural amenities is not discriminatory and is, rather, based on the diverse needs of various locations within the Association.

10. The panel concludes that the Complainant misused the discovery process by requesting almost 20 years' worth of documents, receiving 5 years' worth of documents, and then declining to enter any of them into evidence, despite receiving instruction on how to do so by Commission staff.

11. The panel concludes that the Complainant's failure to accept the results of and to disregard the Respondent's efforts to comply with, the Settlement Agreement in #29-13, to meaningfully participate in mediation in #95-14, and the Complainant's expansive discovery request caused the Complainant to maintain a frivolous dispute... or substantially delayed or hindered the dispute resolution process without good cause. In accordance with Section 10B-13(d) of Montgomery County Cod, this finding by the panel permits the award of certain attorney's fees.

Order

1. Given the issues involving plants, rule enforcement, condition of the amenities such as the basketball court, etc. were addressed through mediation and the Respondent has complied with the Settlement Agreement, the Respondent's motion to dismiss the elements of Complaint #95-14 which are restatements of Complaint #29-13 is GRANTED, with prejudice.

2. The Complainant must immediately fulfill the terms of the Settlement Agreement directing him to communicate his concerns related to association management to the manager using a designated communication mechanism.

3. The Respondent must not request further payment from the Complainant with regard to property restoration related to the community property adjacent to his home, and must not require Complainant to take further action on that property.

4. The Complainant must not plant any plants on community property without proper authorization from the Respondent as outlined in the Association's governing documents and rules, policies and procedures.

5. The Complainant must, within 120 days from the date of this order, restore his yard as required by the Association's governing documents and rules, policies, and procedures, including the removal of tree roots and other deficiencies if he desires or if those actions are required by the Respondent. Respondent need not remove tree roots crossing into Complainant's lot from the common areas.

6. The Complainant must, within 60 days from the date of this order, reimburse to the Respondent the costs of complying with the discovery request beyond what the panel finds reasonable in the amount of $6,631.50, as reflected in the list below, derived from the invoice submitted by the Respondent's counsel:

7/31/2015	Review discovery order	210.00
8/3/2015	Finalize supplemental response for submission to CCOC	504.00
8/10/2015	Review issues with production order	252.00
8/20/2015	Telephone conference regarding preparation of document production materials	168.00
8/25/2015	Review discovery provided by agent	168.00
9/3/2015	Review file and prepare discover responses	94.50
9/4/2015	Draft, review and revise discovery responses	598.50
9/9/2015	Revise discovery responses	189.00
9/11/2015	Receipt and review of client documents, coordinate production set, scanned and Bates-stamped PDFs	291.50
9/15/2015	Revise and finalize production response	168.00
11/11/2015	Review and analyze document production from complainant	546.00
11/11/2015	Review case and strategy [described as a document production meeting]	126.00
11/16/2015	Review documents produced and received	1457.50

TOTAL	4773.00

Commissioners Fishbein and Coyle concur.

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

Aimee Winegar

Aimee Winegar, Panel Chair
February 25, 2016