MONTGOMERY COUNTY, STATE OF MARYLAND

Penny Prue,	:
	: COMMISSION ON COMMON
Complainant	: OWNERSHIP COMMUNITIES
	: Case No. 39-09
vs.	:
	: Date of Decision: March 16, 2010
Manor Spring Homeowners Association, Inc.,	:
	:
Respondent	:
	:

MEMORANDUM DECISION AND ORDER

The above captioned case came before a Hearing Panel of the Commission on Common Ownership Communities for Montgomery County, Maryland pursuant to Chapter 10B of the Montgomery County Code, 1994, as amended. The Hearing Panel considered the testimony and evidence of record and finds, concludes and orders as follows:

I.
TESTIMONY AND EVIDENCE

This is a complaint filed by a property owner in a homeowners association against the homeowners association. The property owner contends that the homeowners association improperly approved the location of a fence on property immediately adjacent to the Complainant's property. The Respondent homeowners association contends that its decision to approve the subject fence is protected by the "business judgment rule" and it has requested that this case be dismissed for lack of jurisdiction under Chapter 10B, Montgomery County Code.

The testimony and evidence of record established the following.

The Declaration of Covenants, Conditions and Restrictions for Manor Spring Homeowners Association, Inc. (“the “Respondent” or “Association”) provide that no fence may be constructed upon the property subject to the covenants until an application has been submitted and approved in writing by the Board of Directors of the Association. The Board of Directors of Manor Spring Homeowners Association, Inc. sits as the architectural review committee for the community. Declaration of Covenants, Article 6.

The Declaration of Covenants further provides that

> “No tree, hedge or other landscape feature shall be planted or maintained in a location which obstructs site lines for vehicular traffic on public streets or on private streets and roadways.”

The Association board has also adopted Suggested Architectural Control Guidelines, October 2005. With respect to fences those guidelines provide that fences

> “should not exceed six (6) feet in height and should be made of pressure treated wood or white vinyl. Mixed fence styles are not recommended. The fence may enclose the backyard only and not come forward of the rear corners of the house.”

The above provision is contained in a guideline adopted by the Board of Directors and not in the recorded covenants or in the bylaws of the Association. The testimony of the Association was that this provision has been applied as a guideline and not as a strict rule. Both Complainant and Respondent presented examples of fences in the community approved by the Board of Directors which are located forward of the rear corners of the house. The Board of Directors has also denied some fences which property owners sought to locate before the rear corners of the house and has gone so

far as to file actions in the Circuit Court for Montgomery County, Maryland to enforce this guideline.

In 2009 the owner of 2207 Manor Spring Terrace, the property adjacent to Complainant's property, applied for and received approval (in writing) of a fence, which was constructed on or about May 6, 2009. Respondent's Exhibit 1, tab 8, a copy of which is attached hereto, shows the location of this fence. The property on which the fence is located, 2207 Manor Spring Terrace, is a corner lot. The rear of the dwelling on 2207 Manor Spring Terrace faces the side yard of Complainant's property. This configuration is shown on Complainant's Exhibit 1, tab 6A, a copy of which is attached hereto.

The subject fence is located forward of the rear corners of the house on both sides. The president of the Association, James C. Herger, testified that the Board approved this location for the following reasons. The applicant requested that the fence be allowed to be located forward of the rear corner of the dwelling on the Manor Spring Court side due to the existence of a deck and irregular topography at that location. The deck is located flush against the rear of the house and in that location the land scopes downward toward Manor Spring Terrace. On the other side of the house, the photographs of the property, Complainant's Exhibit 1, tab 7, showed that at this rear corner of the house there are a downspout and a stairwell leading to the lower level. The Board of Directors therefore did not strictly enforce the guideline requiring that fences not be located forward of the rear corners of the house due to these conditions. The testimony presented at the hearing on January 14, 2010, included photographs of a

number of dwellings where for various reasons, such as the location of a window, the Board also did not strictly enforce this guideline.

Complainant testified that the subject fence violates the following requirements of the Association governing documents:

1. The fence is located forward of the rear corners of the house in violation of the October 2005 Guidelines. (This location also places the fence partly beyond the boundaries of the rear yard.)
2. The fence obstructs site lines in violation of Article 7, Section 7.2(g) of the Declaration of Covenants.
3. The fence fails to meet the criteria of “harmony of external design and location in relation to surrounding structures and topography and conformity with the design concept for the Property” as required by Article 6, Section 6.1.

As a consequence, Complainant’s position is that the fence can only be constructed as approved by waiving the declaration and guidelines.

Although Complainant asserted that the fence is located beyond the rear yard of 2207 Manor Spring Terrace, Complainant did not identify or define “rear yard”. Mr. Herger testified that the Board has uniformly defined the rear yard as that area behind the rear wall of the house. Except for the two points where the Board allowed the subject fence to be located forward of the rear corners of the house, the fence is located in the rear yard as the Board of Directors has consistently defined it.

The Complainant presented the testimony of an expert in the areas of applying

declarations and bylaws, enforcing architectural designs and guidelines, and receiving and administering applications for architectural approvals, Pamela Wiles, CMCA, AMS, PCAM. Ms. Wiles reviewed a number of the governing documents of the homeowners association. She testified that, in her opinion, the location of the fence is a problem, but not the style of the fence. However, she also testified that while she disagreed with the Board's decision to approve the fence in its present configuration and location, she believed that it was within the Board's purview to approve this fence in its present location.

Complainant presented a number of photographs showing fences in the community located in advance of the rear corners of the house. Complainant's expert agreed in particular with respect to the fence at 10 Manor Spring Court located forward of the rear corner of the house to accommodate a window, that this approval was appropriate, notwithstanding that it did not conform with the Suggested Architectural Control Guidelines, October 2005.

Complainant also testified that she believes she was entitled to a face to face meeting with the Board regarding her opposition to the subject fence, but that the Board did not conduct regular annual meetings of the Association, regular meetings of the Board of Directors or regular meetings of the Board of Directors as an architectural review committee. It appears from the testimony of James C. Herger that the Board has had difficulty in obtaining a quorum for its annual meetings and that the Board in fact does not conduct regular board of director meetings or regular meetings of the board of directors sitting as an architectural review committee. The meetings are open, but

residents learn of these meetings only indirectly, as no formal notice of the meetings is given.

The Panel asked Ms. Wiles whether there is any reason why the Board of Directors, sitting as an architectural review committee could not have met with Ms. Prue, listened to all of her objections to the fence and still decided to approve the fence as it has been constructed. Ms. Wiles answered that while she felt such a decision would not be reasonable it was within the purview of the Board to make it. The Panel understands this statement to mean that the decision to approve the fence was within the Board's business judgment to make.

Mr. Herger testified that prior to approval of the subject fence the Board visited the subject property, noted the site lines, and noted the reasons for allowing the fence to be located a distance forward of the rear corners of the house. The Board did not meet with the Complainant because she was not the applicant for the fence.

There was also much testimony about the requirement on some earlier forms of architectural applications that the applications be presented to adjoining neighbors. That requirement has been dropped. There does not appear to be any requirement in the governing documents of the Association for approval by adjoining neighbors or even a requirement to exhibit an application to adjoining neighbors.

The owner of 2207 Manor Spring Terrace is not a party to this action.

FINDINGS OF FACT

1. The Respondent Manor Spring Homeowners Association, Inc. is a homeowners

association within the meaning of Chapter 11B, Real Property, Annotated Code of Maryland.

2. The Complainant and the Complainant's neighbor on whose property the subject

fence is located are members of the Association subject to its governing documents.

3. The Board of Directors of the Respondent sitting as an architectural review

committee approved the subject architectural application for the subject fence in accordance with the procedures of the Association requiring that any architectural change be subject to an application and prior written approval.

4. The requirement that a fence not be located forward of the rear corners of a house

is in a Suggested Architectural Control Guideline, October 2005 and not in the recorded covenants or in the bylaws of the Respondent.

5. The Respondent has allowed waivers from the guideline in appropriate cases and

when appropriate has strictly enforced the guidelines in other cases, to the extent that it has even gone to court to enforce those guidelines.

6. The Respondent has consistently identified the rear yard of properties in fence

applications as that area rear of the rear building line of the house. That is the definition that it applied in the subject case as well.

7. The Respondent had a factual basis for allowing the fence to be located forward of

the rear corners of the subject house. Furthermore, the Complainant identified no adverse effect resulting to her from this relaxation of the guideline.

8. The portion of the subject fence that faces Manor Spring Court and that is adjacent to Complainant's property is set sufficiently far from the street to enable Complainant to view oncoming traffic before she enters Manor Spring Court.

CONCLUSIONS OF LAW

There are two Maryland cases that set the legal standard for review of association

approvals and denials of architectural applications and enforcement of governing documents. They are Kirkley v. Seipelt, 212 Md. 127 (1957) and Black v. Fox Hills North Community Association, 90 Md. App 75 cert denied 326 Md. 177 (1992). In Kirkley, the Court of Appeals applied the reasonableness test to determine first whether the covenant itself was valid and then to review the association's denial of the modifications made. Kirkley was a case in which architectural modifications were denied.

Black involved an action seeking to compel a community association to use its power to enforce a covenant to reverse an approval, similar to the case here. In Black the Court of Special Appeals applied the business judgment rule to hold that the association's decision not to enforce the covenant so as to reverse its prior approval can only be overturned upon a showing of fraud or bad faith. In cases involving a determination whether courts should intervene in the disputes of voluntary membership

organizations, courts have interpreted “fraud” to include action unsupported by facts or otherwise arbitrary. NAACP v. Golding, 342 Md. 663, 677 (1996). The same, or similar standard would apply to community associations under the holding in Black. The Complainant here is asking the Hearing Panel to reverse a decision that allowed a fence and to compel a new decision denying the fence and requiring its removal.

The reasonableness test requires the Panel to conclude that no reasonable person would reach the decision that the association reached before it can overturn that decision. *See,* Rideout v. Department of Public Safety and Correction Services, 149 Md. App 649, 656 (2003). The Panel cannot say that is the case with respect to the approval of the subject fence, notwithstanding that the Panel may not agree with the decision. 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.

The Panel therefore concludes the following:

1. The Association’s understanding and definition of rear yard as consistently applied

in this case and in other cases is reasonable.

2. It is within the authority of the Association to waive the Suggested Architectural

Control Guidelines, October 2005 with respect to the location of fences forward of the

rear corners of the house provided that the Association has reasons for doing so, which it did here.

3. The Association's refusal to reverse its decision and bring an action against the

owner of the fence was not taken fraudulently in bad faith or without legal authority.

4. The Complainant reads Article 7, Section 7.2(g) to address sight lines from

Complainant's property. However, the plain language of that section appears to address only sight lines of persons in vehicles on public or private streets. Based upon the photographs in the record, the subject fence does not obstruct sight lines from public or private streets.

The Panel therefore faces a decision of a Board of Directors sitting as an architectural control committee that was conducted in accordance with all appropriate procedures. The applicant for the subject fence filed an application and obtained prior written approval, after which the applicant constructed the fence. Even the expert testimony of Complainant's witness was that, had the Board considered all of the Complainant's objections, which apparently it did since it visited the property and was mindful of the issues of site line and location of the fence, nevertheless the Board had the authority to make the decision it made.

Complainant is thus asking the Panel to reverse a decision that involved the judgment or discretion of the governing body of Manor Spring Homeowners Association, Inc. in deciding how to enforce its covenants and guidelines. That type of decision clearly exempted from the definition of "dispute" by Section 10B-8(4)(e), Montgomery

County Code. For that reason, the Panel grants Respondent's Motion to Dismiss the Complaint and the Complaint is hereby dismissed.

The Panel does not find this to be a frivolous dispute under Section 10B-13(d)(1), Montgomery County Code. Additionally, Article 12, Section 12.4 of the Association's declaration allows for an award of attorney's fees only where the association brings an action to enforce the governing documents and is successful. Since neither of those circumstances applies here, the Panel declines to award attorney's fees to the Association.

There is an additional matter that is of significant concern. In the course of the testimony,

in particular the testimony of James Herger and Seth Arnega, Board members, it became apparent that the Association does not give notice of its Board meetings or the meeting of the Board of Directors when it sits as an architectural review committee. This issue was not directly the subject of the Complaint. Additionally, since the Panel finds that the Association could lawfully make the decision it made, there is no basis for vacating that decision because proper notice of meetings might not have been given. The substantive result would be the same on a remand, namely approval of the fence.

However, Section 11B-111, Real Property, Annotated Code of Maryland requires that all meetings of homeowners association, including meetings of the Board of Directors or a committee of the homeowners association, shall be open and all members of the homeowners association shall be given reasonable notice of all regularly scheduled open meetings of the association. An association cannot evade this notice requirement by having no regularly scheduled meetings. While all meetings of

this Association were apparently open, since the Association gave no notice of those meetings, members could learn of the meetings only indirectly by word of mouth or otherwise.

The Panel therefore strongly suggests that the Association establish procedures for regularly scheduled meetings and procedures for giving notice of those regularly scheduled meetings, as well as of meetings not regularly scheduled. The Panel further suggests that the Association not continue to avoid this notice requirement by having no "regularly" scheduled meetings. At some point, the failure to give notice of Association meetings could lead to the conclusion that those meetings are not in fact "open". If no one but the Board knows about them, how can it be said that they are open to the community that has no knowledge of them?

The most likely sanction for conducting business in a closed meeting or in a meeting where there should have been notice but there was none is to vacate any decisions that were made. The Panel has not done so in this case because the substantive result would have been the same on remand and because the open meeting/notice issue was not directly part of the complaint that was filed. However, while the Panel declines to make a decision on an issue which was not properly raised, and has no real impact in this case, that does not mean that another panel in another case would do the same, particularly where the open meeting/notice issue is directly before it.

The decision of the Panel was unanimous.

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 of

this Order, pursuant to the Maryland Rules of Procedures governing administrative appeals.

John F. McCabe, Jr., Panel Chair