Before the
Commission on Common Ownership Communities

In the Matter of

Merry-Go-Round Clusters	x	
Homeowners Association	x	
Tyler Abell, President,	x	
Complainant,	x	
	x	
v.	x	Case No. 402-G
	x	April 5, 2000
Thomas Buckingham	x	
11608 Luvie Court	x	
Potomac, MD 20854,	x	
Respondent.	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, 1994, as amended, and the Commission, having considered the testimony and evidence of record, finds, determines and orders, as follows:

Background

Merry-Go-Round Clusters Homeowners Association (Complainant or Association) filed a complaint with the Commission on Common Ownership Communities against Thomas Buckingham (Respondent), owner of a lot within the Association, on May 18, 1998. The Complaint alleged that Mr. Buckingham had constructed a fence without the required approval of the Association Architectural Committee, failed to complete planting in accordance with a landscaping plan, has failed to complete certain aspects of house construction, specifically the garage roof, vent and exhaust pipes, and closing off the underside of the deck, and has stored equipment under the deck and failed to maintain the lot in accordance with the requirements of the Association covenants. At the opening of the hearing, counsel for complainant indicated that the issues regarding the landscaping plan as it related to the right side of the house facing the garage and the garage roof had been settled.

Mr. Buckingham responded briefly to the complaint on June 17, 1998, claiming compliance with the Association documents, waiver of requirements or consent to his actions by the Association, and that the Association had acted in an arbitrary and capricious manner. He further asserted lack of jurisdiction by the Commission over the matter, improper enactment of

Montgomery County Code provisions and that the "Montgomery County Code is in violation of Constitutional provisions."

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 July 1, 1998, and the Commission voted that it was a matter within the Commission's jurisdiction. The matter was scheduled for public hearing on September 16, 1998 but was continued to October 21, 1998 at the request of counsel for the Complainant without objection by the Respondent. The hearing was reconvened on April 13, 1999, to enter additional evidence into the record and then continued to October 15, 1999 with both parties submitting closing argument in writing in the weeks following completion of the hearing. The Panel met on January 7, 2000, reviewed and closed the record.

Commissioner and panel member David Glancy's term as a member of the Commission expired after the first hearing but before the hearing was reconvened on April 13, 1999 and both parties, through their counsel consented to his continuing to sit on the panel in consideration of this case.

Respondent has challenged the legal authority of the Commission on Common Ownership Communities to provide an alternative dispute resolution forum for a homeowners' association dispute. Should this decision be appealed, the reviewing court will decide whether to consider the appeal to be a de novo hearing or an administrative appeal.

Respondent has also moved for a new hearing on the ground that Complainant's counsel was elected to the Montgomery County Council during the period between the first hearing and the issuance of this decision. The motion is denied. There is no prohibition against a member of the County Council appearing before a Commission Panel and for the proceedings following election of Complainant's original counsel to the County Council, Complainant has been represented by a different attorney from the same law firm.

In Complainant's Reply to Respondent's Supplemental Memorandum additional evidence of Respondent's failure to comply with the continuing responsibility to maintain his lot in accordance with the Declaration was included. Respondent submitted a Motion to Strike and Impose Sanctions. The evidence submitted by Complainant was disregarded by the Panel in consideration of the issues in this case and in preparation of this Decision and Order. Respondent's Motion for Sanctions is denied.

Findings of Fact

1. The documents in the record indicate that Merry-Go-Round Clusters Homeowners Association is incorporated in Maryland. Complainant submitted with the complaint in this case a Declaration of Easements, Covenants, Conditions, and Restrictions for Merry-Go-Round Farm (Declaration) and a set of Bylaws of Merry-Go-Round Clusters Homeowners Association, Inc.

which are dated in March 1993. There is no evidence in the record in this matter that these documents have been filed with the land records of Montgomery County but no question has been raised during the pendency of this case regarding the authenticity or applicability of these documents.

2. The Declaration includes requirements for approval for any construction (7.4) and explicitly for the erection of any fence or wall (7.6.21). The approval or disapproval of the Architectural Committee shall be in writing and the owner shall be given notice thereof; a majority of the Committee constitutes a quorum and all actions are by majority vote (7.5). To obtain approval of the Architectural Committee for construction, an owner must submit an application in such form as the Committee may prescribe (7.4). If the Committee fails to act within 45 days of receiving an application in accordance with the application procedures established by the Committee, the failure to deny approval is deemed to be approval (7.5). Further, the Declaration includes in Article VI, "Maintenance of Lots", requirements for owner maintenance of lot, structures, and landscaping.

3. In addition to the Declaration, Merry-Go-Round has provided "Architectural and Landscape Design Guidelines" (Complainant's Exhibit 1), a document of more than 70 pages which is described in a "Note" at the beginning as a companion to the Covenants (Declaration) intended to provide general information and guidance. At page 8 of this document some guidance is offered on fences and deck construction.

4. Tyler Abell is developer of the property, President of the Homeowners Association and a member of the Architectural Committee. Elizabeth Abell is a trustee for the property and a member of the Board of Directors and of the Architectural Committee.

5. Thomas Buckingham purchased lot 38 in the Merry-Go-Round Clusters Homeowners Association in January 1995. Mr. Buckingham subsequently submitted an application to the Architectural Committee for the house he wanted to build and upon receiving approval from the Committee built his house. The record indicates that this application did not include a landscaping plan or a fence. Mr. Buckingham had some difficulties during construction due to the financial difficulties of his builder.

6. Mr. Buckingham testified that he had not received final approval of the plans for his house in writing but that he ran into a member of the Architectural Committee and asked about the status of approval to build his house and was told that the plans were approved; he said that that was the only notification he ever got from anybody on the Architectural Committee. Mr. Abell testified that he did not remember whether Mr. Buckingham was given approval for his plans in writing. Mr. Buckingham testified that he was told not to come to the meetings at which his building plans were considered and that he was represented by his architect in the process of getting approval from the Architectural Committee for the design of his house. Mr Buckingham's architect did not testify.

7. Several versions of a document headed "Erin and Tom Buckingham's House for Lot 38 - Architectural Committee comments" were produced and are a clear indication that the Merry-Go-Round Architectural Committee addressed plans for the Buckingham house in writing at some length. The document appears to have been a running record of the Committee's consideration of the Buckingham's house design plans. The two documents which seem to be latest in time are Complainant's Exhibits 50 and 51. Complainant's Exhibit 50 is a letter dated June 14, 1995 from the Buckingham's architect to the Merry-Go Round Architectural Committee and has handwritten marginal notes. Complainant's Exhibit 51 is the running commentary from the community Architectural Committee with a hand-written notation "6/23/1995" in the upper left-hand corner of the first page. The architect's letter indicates that vents have been added and the system will conceal the vents; that the deck will have a decorative skirt/lattice work and that the porch enclosure will be framed lattice. The Architecture Committee's running commentary includes a query about vents and an indication of a high level of concern about the treatment of vents, and repeated comments, concerns and admonitions about masking the underside of the porch and deck. At the hearing on October 21, 1998, Mr. Abell indicated that a ceiling of 1" x 4" boards with spacing adequate to prevent water from collecting to mask the joists and superstructure was an alternative to installing tight weave privacy lattice enclosing the entire underside. The Architectural Committee comments in Complainant's Exhibit 51 regarding masking the underside of the porch and deck indicate that this is an important design feature in this community. There is also a provision in the Guidelines that prohibits tall decks which have exposed undersides, so that appropriate masking is a requirement to have a tall deck.

8. Mr. Buckingham complained about the Homeowners Association and Mr. Abell. For instance, Mr. Buckingham testified that he thought he had assurance from Mr. Abell that the house on the adjacent lot would be built far enough back so that Mr. Buckingham would have a clear view from his living room and dining room. However, no writing to indicate such an understanding was introduced into evidence in this case. Further, Mr. Buckingham's architect seems to have been aware that the purchaser of the lot adjacent to Mr. Buckingham's might locate the house on the adjacent lot in a manner disadvantageous to one potential siting for Mr. Buckingham's house since it is indicated in Complainant's Exhibit 50, written by the architect during the house architectural approval process, that there were two different site plans for the Buckingham house because the siting for the house on lot 39 [sic] (correctly lot 37) was unknown. Another cause for complaint was that Mr. Buckingham's next door neighbor, on lot 37, built an unapproved fence (which has since been taken down). Mr. Buckingham seems to have assumed that the Association took no action to address the unapproved fence, arguing based on that assumption, that the alleged inaction was evidence of the application of different standards within the community.[1] In the later sessions of the hearing in this case, correspondence with the owner

[1] In a letter to the Buckinghams dated August 12, 1996, Mr. Abell wrote in response to questions raised by the Buckinghams regarding their neighbor's fence application, "The Architectural Committee has withheld approval of the fence pending submission of the complete landscape plan. We have indicated that the Architectural Committee does not approve fences in front of the houses, and that the Architectural Guidelines stipulate no fence closer than six feet to the property line, that fences should be screened, and that fences should not be on slopes greater than 25%. The Architectural Committee also suggested that if adjoining property owners agreed on a

of the unapproved fence was introduced (Complainant's Exhibit 39) which established that the Association in fact exerted efforts with that owner similar to those exerted with Mr. Buckingham to get the owner to get approval and restructure the fence in accordance with the approval.

9. By letter dated April 18, 1997, Mr. Abell indicated to Mr. And Mrs. Buckingham, in relevant part, that the construction of their house was not complete in accordance with the approved plans, and that a landscape plan, which is required by the Declaration, had not been submitted.

10. By letter dated April 25, 1997, Mrs. Abell sent a summary of the substance of a meeting Mr. Buckingham had with Mr. and Mrs. Abell on April 22, 1997. The summary indicates that Mr. Buckingham would submit a landscaping plan to the Architectural Committee no later than May 18, 1997 and that items to be completed on the house included: "[d]eck, gazebo, lattice, color all vents to match surface they go through."

11. On May 18, 1997, the Buckinghams submitted a landscaping plan which included a fence. This is the first time in the records of this case the Buckinghams have applied for approval to build a fence. In response, by memorandum dated June 21, 1997, the Merry-Go-Round Architectural Committee communicated concerns on the landscape plan including the proposed fence to the Buckinghams. The comments on the fence included a request for more detail and for construction specifications, stated that the chain link fence should be mat [sic] black vinyl finish including posts and hardware, recommended that the fence be set back from the property line 6' along the shared line with the Stern lot and required that it be set back 6' in the rear where the lot abuts HOA property. Lastly, the Buckinghams were told that fences along a joint property line would be allowed only if the placement was agreed to by both property owners and responsibility for maintenance was clearly established. The agreement between the property owners had to include a covenant that would run with the land and be recordable with the land records. The Architectural Committee reserved the right to review such a document before approving a fence on a joint property line.

12. Mr. and Mrs. Buckingham walked their rear property line with Edward Alexander, a landscape architect and member of the Merry-Go-Round Architectural Committee, sometime in the spring or summer of 1997 and discussed with him the siting of the fence they wished to install.

13. By letter dated July 8, 1997, the landscape design company working with the

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fence that a fence closer to the line than six feet would be approved, if the agreement to maintain it ran with the land and was properly recorded." This is entirely consistent with the later treatment of the Buckingham landscaping and fence application.

By letter dated November 5, 1996, the Buckinghams made it clear that they did not agree to a fence on the neighboring property that was less than 6' from the common property line.

Buckinghams provided another submission, letter and landscaping plan, answering some of the questions of the Architectural Committee. According to a letter from Tyler Abell to the Buckinghams dated August 15, the plan was delivered to Architectural Committee members on August 14. Regarding the fence, the letter from the landscape design company indicates that they do not provide detailed construction plans for fences and thus most of the requested fence details were not included. The plan did indicate a 6' fence. The Buckinghams testified that this was an error. They never intended to install a 6' tall fence.

14. Two letters addressed to the Buckinghams from Tyler Abell dated August 15, 1997 are in the record. The first offers that when Mr. Buckingham has another written presentation for the Architectural Committee, Mr. Abell would be willing to go over it with Mr. Buckingham to insure that it is complete. The second raised or repeated questions relating to the landscaping plan and reiterated the need for submission of construction details on the fence, specifically disapproving the 6' height shown.

15. By letter dated September 24, 1997, which according to testimony was hand delivered to Tyler Abell on September 26, 1997, Mr. Buckingham provided some additional details about the fence he wished to install and where he wanted to locate it. While Mr. Abell did not remember that a page of specifications from a fence construction company was attached to this letter, it seems probable that it was. The letter also references verbal agreement with one of Mr. Buckingham's neighbors to place the fence on their joint property line but indicates that the written agreement will be forthcoming. There is no reference to communication with the property owner on the other side and no permission from the HOA for the rear of the property. It was in this letter that the Buckinghams explained that they wanted a 5' fence because they intended to put a pool in their backyard in the future.[2]

16. A letter dated November 18, 1997, from Mr. Abell as Chairman of the Architecture Committee to Mr. and Mrs. Buckingham, indicates that some parts of the undated landscape plan which had been delivered to most members of the Architectural Committee within the past two weeks were approved but that the approval did not include the fence or landscaped screening thereof. Since the fence had already been constructed, the letter concludes, on behalf of the Architectural Committee and the Board of Directors, by urging the Buckinghams to mitigate the damages which might have been incurred by this premature construction by removing the fence.

Conclusions of Law

This case is about compliance with the community Declaration. The Homeowners'

[2] Mr. Buckingham testified that the requirement of the Montgomery County Code for a swimming pool was 5' and had been so for thirty years. While Mr. Buckingham is correct as to the current requirement (Montgomery County Code Sections 51-15 and 51-16), this has been in effect only since July 1990. Prior to that date, a fence enclosing a pool needed to be 42" tall or in lieu of a fence a pool could have an automatic cover which was kept closed when the pool was not attended.

Association has alleged and proven that the Buckinghams failed to comply with the Declaration in that they failed to get approval to build a fence before they built it, they failed to comply with the conditions included in the approval for construction of their house which is thus not yet complete, and they have failed to maintain their property in accordance with the requirements of the Declaration.

In the case of *Kirkley v. Seipelt*, 212 Md. 127 (1957), likely the leading Maryland case on the issue of covenants of this nature, the Court of Appeals indicated that when the intention of the parties is clear and the restrictions in the covenants are within reasonable bounds, they will be upheld, characterizing them as a contract between parties voluntarily entered into and not in violation of public policy. at 133. The court also referred to *Jones v. Northwest Real Estate Co.*, 149 Md. 271 (1925), in which covenants described as providing for drastic control had been upheld.

Mr. Buckingham did not have the written approval of the Architectural Committee to build his fence nor did he have approval deemed to have been granted if an application as prescribed by the Committee had been submitted without response within 45 days. The record indicates that no complete landscaping plan including fence design and construction specifications and the written agreements from both neighbors, which were required for review by the Architectural Committee prior to approval of the fence as part of the landscaping plan had been submitted prior to construction of the Buckinghams' fence. In addition to the guidance offered in the Declaration and community Guidelines on the requirements of a complete submission, the Committee through Mr. Abell had provided the Buckinghams with questions and comments on additional details that the Committee deemed necessary for this application for approval starting with the Memorandum of June 21, 1997. The Buckinghams did not meet the requirements for a complete application as clearly requested prior to construction of their fence. They have continued to submit information since the construction of the fence, but this piecemeal submission following unapproved construction is not a substitute for getting approval prior to construction.

Mr. Buckingham has suggested that Mr. Alexander approved the fence when he visited the property in spring or early summer but the continuing correspondence between Mr. Abell, on behalf of the Committee, and the Buckinghams, either themselves or by submission of documents prepared by their landscape designer or fence contractor, undermine the credibility of this assertion. Mr. Alexander by himself does not have authority to grant approval and is fully aware of that, as he testified, so it is unlikely that he told the Buckinghams that he was granting approval during their conversation.

Respondents' counsel, in an effort to establish that Mr. Abell was prejudiced against the Buckinghams and was responding to them inappropriately, set up a confusing record examining each issue regarding the landscape and fence application separately and claiming that the Merry-Go-Round Architectural Committee was not careful and consistent in their practices. However, the records produced on behalf of the Homeowners' Association in response to the request for additional information by the Commission Panel indicate a reasonably consistent practice and

continuing efforts to maintain the overall design of the community.

In accordance with the guidance offered in *Black v. Fox Hills North Community Association*, 90 Md. App. 75, Court of Special Appeals 1992, the decision by a community to enforce or not to enforce a covenant falls within the business judgment rule. The effect of the business judgment rule is to preclude judicial review of a legitimate business decision of an organization, absent fraud or bad faith. at 82. The Buckinghams have not demonstrated that the Association acted with fraud or bad faith in the decisions to enforce the Declaration raised in this case.

The Buckinghams had their fence built prior to final action by the Committee. They had not received approval but they also had not received a denial of approval to build a fence. With regard to the fence this decision does not address a denial or final decision.

The decision in *Kirkley v. Seipelt*, *supra*, provides the standard for review of denials of applications for approval under community covenants as, "any refusal to approve the external design or location...would have to be based on a reason that bears some relation to the other buildings or the general plan of development; and this refusal would have to be a reasonable determination made in good faith, and not high-handed, whimsical or captious in manner." at 133. Final action on this application, when it is submitted with adequate sufficiency, remains within the discretion of the Committee in accordance with the Declaration and the guidance of the Court set forth above.

The negative response provided to the Buckinghams' request to place their fence on their property lines on three sides was in accordance with the Association Design Guidelines and appears to be the policy governing in this community. The fact that other applications to place a fence on a property line have been approved does not require that every application for such a variation from the policy be approved. The reasons given in testimony by Mr. and Mrs. Abell relating to those fences for which approval has been granted to be placed on a property line do not defeat the community design or general plan of development.

The documents which relate to the approval of the Buckinghams' application for house construction approval both from their architect and from the Architectural Committee include sufficient reference to concealing vents and masking the underside of a porch or deck to presume that the Buckinghams were on notice as to what the community, represented by the Committee, expected in the construction of those aspects of their house.

The section in the Declaration at 6.2 on Owner's Duties of Maintenance, taken in conjunction with the provisions of section 7.6, are a clear indication to prospective buyers and homeowners in this community that the standard of upkeep and maintenance is stringent. Respondent is under a continuing responsibility to meet this standard.

Order

In view of the foregoing, and based on the record, for the reasons set forth above, the Commission orders:

1. Respondent shall submit to Complainant a landscaping plan with a complete description of the fence as built, or as he anticipates modifying it, all remaining proposed landscaping, and any other documentation in accordance with the Architectural Committee's previous requests. To the extent that Respondent's application is the same or similar to those previously submitted, the Architectural Committee is limited to the areas of concern which have previously been expressed. The landscaping plan with fence design shall be submitted within 30 days after the date of this decision or, if this opinion is appealed, within 30 days after the court renders the final decision in this matter if this decision is affirmed. A representative of the Architectural Committee shall inform Respondent within ten days after receipt of this application if there is any additional information or documentation required in 0order for the application to conform with the Architectural Committee's application procedures. Respondent shall provide any supplementary material to the Architectural Committee within ten days after such request. The Committee shall inform Respondent of any continuing insufficiency in this application not later than five days after receipt of the corrections or amendments requested and Respondent will provide the additional or amended information within five days after receipt of such request.

Within 90 days after the date of this decision or such date as it may become final, or within such extension of this period as may be granted by the Architectural Committee in writing, the Respondent shall have completed such reconstruction of the fence around his property as may be required in accordance with approval for construction of a fence granted by the Architectural Committee or shall remove the chain link fence. The landscaping approved shall be planted within 120 days after the final date of this decision.

2. The vent and exhaust pipes on Respondent's house shall be colored to match or blend with the surrounding house or be concealed and the underside of the deck shall be masked either with a ceiling of 1"x 4" boards or with acceptable lattice installed adequately to meet the requirements of the Association within 60 days after this decision becomes final.

3. Respondent shall maintain his property in accordance with the Declarations.

The foregoing was concurred in by panel members Skobel and Stevens. Panel member Glancy has dissented. The findings of fact included in the dissent, to the extent they are relevant and correct, were considered in arriving at the decision and order herein.

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 the Maryland Rules of Procedure governing administrative appeals.

Dinah Stevens, Panel Chairwoman
Commission on Common Ownership Communities

DISSENT

In reviewing the DECISION AND ORDER as drafted by Panel Chair Dinah Stevens, I, David Glancy, have found myself to have an opinion and conclusion that is contrary to that drafted by Ms. Stevens.

In Ms. Stevens' draft, the following Findings of Facts were not included:

1. No formal applications for the installation of fences were presented to the panel in the cases of Tsekares, D'Amico/Snyder, McManus, or Jordan nor were any written approvals. (N.B. such were requested by Panel Chair's letter of January 12, 1999.)
2. None of the fences installed meander, rather all involve a number of straight line segments. The D'Amico/Synder fence was installed on the Boizelle property line without the Boizelle's written or oral consent. The McManus fence is similar to the Buckingham fence except for height.
3. There is nothing in the record to indicate when the Buckingham's fence was installed. The November 18,1997 letter from the Architecture Committee was sent 50 days after Mr. Buckingham delivered his application, clearly not within the 45 days required by Section 7.5 of the Declaration.
4. Mr. Abell's letter of November 18, 1997 stated that "...the regulations, as I explained to Tom, on pools have changed over the years and might require more fence, less fence or no fence when, and if, you build a pool...."
5. The February 24, 1998 letter to the Buckinghams, signed by each of the HOA Board, clearly states "...If the Tseckares fence runs along the property line, the Board is not aware of it, and a review of Tseckares fence by all of the Board members convinces us that it appears to be set back considerably..." Testimony in the record clearly show that that statement was not correct.
6. Mr. Abell's letter to Ms. Stern and the Bindlers dated April 27, 1999 requesting them to withdraw their agreements for installation of the Buckingham's fence along their property line was sent 18 months after their consent agreements had been signed and after the second panel hearing had been held.

7. The Complainant's Exhibit 50 and 51 are not signed by anyone. The handwritten marginal notes and dates could have been added at any time. (Given the incorrect statement which was signed and dated noted in 5 above, how can undated and unsigned documents be relied upon?)
8. The Buckinghams installed a lattice ceiling in accordance with an April 5, 1998 memorandum from the Architecture Committee. In closing arguments, the Committee was said to find that unacceptable. No such written Committee documents were submitted to the panel.
9. The only mention of vents in the "Architectural and Landscape Design Guidelines" is contained in a 2 page so-called "Summary of Merry-Go-Round Farm Architectural and Landscape Design Guidelines" which is undated and unsigned and which Mr. Buckingham testified he had not received.
10. The vent issue changed over the period of the 3 panel hearings. Initially, it involved horizontal vents and it later involved vertical vents through roofs. No notices of violations to any other home owner, identified by the Respondent, were submitted for the record.
11. The HOA failed to maintain the common area behind the Buckingham's house (Respondent's Exhibit 19) but has permitted Mr. Abell to keep a rusted trolley car on HOA property for a long period of time.

In view of the foregoing, and based on the full record, the preponderance of evidence indicates that the Complainant's actions in this matter have been arbitrary and capricious. Therefore, the Complainant's request should be denied. Further, the Respondent's request for award of attorney's fees should be granted.

David Glancy
March 23, 2000