MONTGOMERY COUNTY, STATE OF MARYLAND

SOUTH VILLAGE HOMES CORPORATION,	**:** COMMISSION ON COMMON **:** OWNERSHIP COMMUNITIES **:**
Complainant,	**:** **:** Case No. 50-10
v.	**:** **:** Record Close Date: January 31, 2011
KAY TOOSSI,	**:** Hearing date: December 2, 2010 **:**
Respondent.	**:** Decision Issued: March 22, 2011 **:** (Panel: Burgess, Caudle, and Farrar)

Memorandum Decision and Order By: Ursula Koenig Burgess

MEMORANDUM DECISION AND ORDER

The above-captioned case came before a Hearing Panel of the Commission on Common Ownership Communities for Montgomery County, Maryland ("Commission") for a hearing pursuant to Chapter 10B of the Montgomery County Code 2004, as amended. The duly appointed Hearing Panel considered the testimony, evidence and arguments presented and does hereby find, determine and order as follows:

BACKGROUND

On or about June 14, 2010, the Complainant, South Village Homes Corporation ("South Village" or "Association") filed this Complaint with the Commission alleging that the Respondent, Kay Toossi ("Mrs. Toossi") was parking a commercial vehicle in her driveway in violation of the Association's governing documents. (Record ("R.") at 4-7). On July 16, 2010, Mrs. Toossi and her husband filed an answer to the Complaint stating that they have been parking a commercial vehicle on their driveway for

approximately 23 years and that there was nothing in the Association's Declaration prohibiting them from parking a commercial vehicle there. (R. at 229-230). The Association declined mediation in the matter and on October 6, 2010, the Commission accepted jurisdiction of the Complaint and scheduled this hearing. (R. at 239).

At the hearing, the parties presented witnesses and testimony to support their respective positions, including a non-certified copy of a deed dated June 24, 1987 which appeared to be the deed by which Mrs. Toossi took ownership of the property at issue. (Complainant's Exhibit 2). In addition, at the end of the hearing, South Village submitted "Complainant's Memorandum of Law" ("Association Memorandum") which was not previously provided to Mrs. Toossi or the Hearing Panel. The Hearing Panel ordered that the record would remain open for 60 days for Mrs. Toossi to confirm that the deed admitted as Complainant's Exhibit 2 was in fact the deed by which she purchased the property and to file a response to the Association Memorandum. On January 13, 2011, the Commission received a "Memorandum in Opposition to Complainant's Memorandum of Law and in Support of Respondent's Request for Relief" ("Toossi Memorandum") prepared by Mr. Toossi and the record officially closed on January 31, 2010, without receiving a response from South Village.

FINDINGS OF FACT

1. South Village is an incorporated Maryland homeowners association within the meaning of the Maryland Homeowners Association Act, Section 11B-101, *et. seq.* of

the Real Property Article of the Code of Maryland and it is located in Montgomery County, Maryland.

2. Mrs. Toossi purchased a single family home located at 9843 Dockside Terrace, Montgomery Village, Maryland on June 24, 1987 ("Property"). The Property is located within the Association and is subject to South Village's governing documents.

3. On or about August 14, 1978, a Declaration of Covenants, Conditions and Restrictions for South Village Homes Corporation was recorded in the Montgomery County Circuit Court land records at Liber 5185, Folio 834, *et seq* ("Original Declaration"). (R. at 46-56). Mr. Toossi and his wife received the Original Declaration when they purchased the Property. (Toossi Memorandum, Lines 69-75).

4. On or about August 14, 1978, a First Supplementary Declaration of Covenants, Conditions and Restrictions for South Village Homes Corporation ("First Supplementary Declaration") was recorded in the Montgomery County Circuit Court land records at Liber 5185, Folio 854, *et seq*. (R. at 66-71). At the hearing, Mr. Toossi admitted that he and his wife received the First Supplementary Declaration at the time they purchased the Property.

5. Paragraph 7 of the First Supplementary Declaration states, "No commercial vehicle of any type shall be permitted to remain overnight on the community property or on the property of a Private Dwelling Unit within South Village other than as may be used by the Developer in conjunction with building operation." (R. at 68).

6. On or about September 24, 2003, the South Village Board of Directors adopted parking regulations which were set out in a document entitled "Regulation Governing Vehicles and Parking" ("Vehicle Regulations"). (R. at 13-23).

7. Article I, Section B(3) of the Vehicle Regulations states that commercial vehicles are prohibited. It further states that if there is magnetic signage on the vehicle, it must be removed from the vehicle in order to be parked overnight. (R. at 16).

8. Article I, Section A(2)(a) of the Vehicle Regulations requires all trucks to have bed caps or covers. (R. at 14).

9. The current South Village Board President testified that the Vehicle Regulations were deposited with the homeowner's depository for Montgomery County. Mrs. Toossi did not refute this testimony.

10. The truck at issue here has ladder racks installed, signage on the doors and there is no bed cap or cover installed.

11. The Board President testified, and no evidence was presented to refute his testimony, that South Village has enforced the commercial vehicle restriction against other owners in the Association and most owners brought their vehicles into compliance or began parking their commercial vehicles in their garages. He did testify that the Association has another case pending before the Commission on this same issue.

12. Mr. Toossi testified that he bought the truck at issue in approximately 2002 and had black iron ladder racks installed on the truck immediately. He testified that they

were necessary for his work and that they could not be removed for the installation of a bed cover or cap.

13. The Board President testified that the Board received complaints from residents that the Toossis' truck was a commercial vehicle being parked in their driveway in 2001 or 2002. He stated that no action was taken at that time.

14. The Board President testified that the Board received additional complaints regarding the Toossi truck in 2008 and on or about May 12, 2008, the Association sent a letter to Mrs. Toossi advising her that a hearing had been scheduled for May 28, 2008 to determine whether there was a commercial vehicle being parked on the property in violation of the Vehicle Regulations. (R. at 12). Notably, Mr. Toossi testified that he and his wife received an earlier letter from the Association in 2005 asking them to remove the truck, but this letter was not presented at the hearing. (See Toossi Memorandum, lines 148-150).

15. Both Mr. and Mrs. Toossi attended the hearing with the South Village Board of Directors on May 28, 2008, and all parties testified that it was not a contentious hearing. On June 18, 2008, the Association sent Mr. and Mrs. Toossi a letter advising them that they had 60 days "to respond to the Board of Directors on what action you will take in order to remove the violation of parking a commercial vehicle in your driveway." (R. at 8).

16. By letter dated July 17, 2008, Mr. and Mrs. Toossi stated that the lettering on the truck would be removed, but asked for permission that the ladder rack remain and

that the Board waive the requirement that a bed cap or cover be installed on the truck. (R. at 9).

17. By letter dated September 18, 2008, the Association advised Mr. Toossi that his waiver requests were denied. (R. at 9).

CONCLUSION OF LAW

As a threshold manner, the panel finds that the Commission has jurisdiction to hear this dispute under Section 10B-8(a)(i) of the Montgomery County Code.

I. Mrs. Toossi Received Notice of the Prohibition Against Commercial Vehicles at the Time That She Purchased Her Home.

At the hearing, Mr. Toossi, on behalf of himself and his wife, argued that they did not receive any notice of the prohibition regarding commercial vehicles in the Association.

It is uncontroverted that the First Supplementary Declaration clearly prohibits the parking of commercial vehicles in the Association overnight. At the hearing, Mr. Toossi admitted that he had received a number of documents at the time his wife purchased the Property and in fact, he had some of those documents at the hearing. In response to questioning by counsel for South Village, Mr. Toossi pulled a copy of the First Supplementary Declaration from those documents. Accordingly, there is no doubt that the Toossis were provided a copy of the First Supplementary Declaration at the time that the Property was purchased. The Hearing Panel can only surmise that the Toossis did not review the First Supplementary Declaration until this Complaint was filed, but that failure does not relieve the Toossis of the obligation to comply with that document.

In the Toossi Memorandum, Mr. Toossi makes a number of arguments questioning the validity of the restrictions in and process of recordation of the First Supplementary Declaration. (See, e.g. lines 246-251 and 273-275 of the Toossi Memorandum). These arguments are made without any supporting case law or evidence and none of these arguments were made in Mrs. Toossi's answer to the complaint or at the hearing. Accordingly, there is no evidence before the Hearing Panel that the First Supplementary Declaration was not properly adopted or recorded.

Likewise, in the Toossi Memorandum, there are arguments presented for the first time that the restrictions in the First Supplementary Declaration are "unreasonable, high-handed, whimsical and captious in manner, are unconstitutional and infringe upon individual freedom of choice and expression." (See Toossi Memorandum, lines 204-206). Not only are these arguments being made outside the ruling of the Hearing Panel in regards to the record being kept open, the Hearing Panel has heard no evidence or testimony – and the Toossis have presented none in the Toossi Memorandum – to support these assertions. Accordingly, the Hearing Panel has no basis to consider them.

II. The Association Did Not Waive the Prohibition Against Parking Commercial Vehicles Overnight in the Community Nor Is It Estopped to Do So.

The Toossis aver that they have been parking a commercial vehicle in their driveway for the last 23 years and the Association has taken no action to have it removed; therefore, the Toossis believe that they should be permitted to park the vehicle at issue in their driveway overnight. While the Hearing Panel recognizes the Toossis' frustration

that this issue has not been previously addressed by the Association, the actions by the Association are not barred by the doctrines of waiver or equitable estoppel.

For the defense of waiver to apply, there must be proof of some word or act by one party to the other party representing that the covenant would not be enforced. *City of Bowie v. MIE Properties, Inc.,* 922 A.2d 509 (Md. 2007). The Toossis do not claim that the Association gave them permission to park their truck before they began parking it, and there is no evidence in the record to support such a claim.

In a leading decision on equitable estoppel as applied to land use disputes, *Savonis v. Burke,* 241 Md. 316, 216 A.2d 521 (1966), the Court of Appeals wrote:

> Pomeroy, in his Equity Jurisprudence [citation omitted] defines equitable estoppel as follows:
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> > "Equitable estoppel is the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might have otherwise existed, either of property, or contract or of remedy, as against another person who has in good faith relied upon such conduct, and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right, either of property, of contract, or of remedy."
>
> > We have adopted and have continually applied this definition of equitable estoppel. [Citations omitted.]
>
> > Equitable estoppel operates as a technical rule of law to prevent a party from asserting his rights where it would be inequitable and unconscionable to assert those rights. It is essential for the application of the doctrine of equitable estoppel that the party claiming the benefit of the estoppel must have been misled to his injury and changed his position for the worse, having believed and relied upon the representations of the party sought to be estopped. Furthermore, one claiming the benefit of an equitable estoppel must have acted in 'good faith and with reasonable diligence.' [Citations

omitted.]

Supra, 216 A.2d at 523.

Mere delay in enforcing a right is not enough to create an estoppel against the enforcement of the right. "The doctrine of equitable estoppel involves not merely an unreasonable delay in seeking relief but a delay that causes prejudice to another." W. Hyatt, CONDOMINIUM AND HOMEOWNER ASSOCIATION PRATICE: COMMUNITY ASSOCIATION LAW at 167 (ALI-ABA 3d Ed. 2007). *See also, Greenfield Station Homeowners Association v. Mehta,* CCOC No. 203 (June 10, 1993), holding that a 2-year delay in notifying the homeowner of a violation did not bar the association's claim in the absence of any evidence showing the homeowner suffered any prejudice as a result of that delay.

In this case, the evidence is clear that the Toossis began parking their commercial vehicles almost as soon as they moved into the community. Their conduct was not the *result* of any extended delay in enforcement but on the contrary it *preceeded* the delay. Rather than suffer any prejudice from the delay, they in fact benefited from the delay by being able to continue to store the offending vehicles on the property.

The Toossis also argue that the association waived enforcement of the rule by allowing other members to violate it. The panel finds they have not proven this claim. As the Court of Appeals has recently written in another case involving similar allegations:

> Maryland appellate courts have long recognized the equitable defense of waiver in restrictive covenant cases. … The defense is manifested in two forms: (1) waiver by acquiescence, which involves a covenantee abiding the violative actions of the covenantor defendant, and (2) waiver by abandonment, which entails the covenantee abiding the violative actions of others besides the covenantor defendant which are taken as also waiving impliedly violative actions of the covenantor defendant. Our cases, slathered with a layer of common sense, dictate that in order for waiver to occur, the covenantee must be aware of the covenantor's acts or uses and their possible violative nature.

(internal citations and footnotes omitted) (emphasis supplied). *City of Bowie v. MIE Properties Inc.*, 922 A.2d 509, 398 Md. 657, 698-699 (2007). The Board President testified that the first time the Board received a complaint that the Toossis were parking a vehicle on their property in violation of the governing documents was in 2002. Although no action was taken on the complaints at that time, Mr. Toossi testified that the first notice that he and his wife received that the truck was in violation of the governing documents was in 2005 and that at that time, the truck was not removed from the property. The Toossis provided no testimony or evidence that other vehicles have been permitted to be parked on other lots in the Association during this time frame. Moreover, when questioned about other owners parking vehicles in violation of the governing documents, the Board President testified that all other owners of the community who have violated these restrictions have been notified about the violation and nearly all of these owners have come into compliance, although there is another complaint filed with the Commission against an owner who has not complied. Without any testimony or evidence that there have been widespread violations of these restrictions and the Board

had knowledge of them and allowed them to remain, we cannot find that the Association has waived this restriction.

III. The Association Did Not Selectively Enforce the Governing Documents Against the Toossis.

At the hearing, Mr. Toossi asked the Board President whether this restriction on commercial vehicles was being enforced against the Toossis because they were original owners. The Board President stated that this was not the case. He testified that two other original owners have been cited for the violation as well. In both instances, the tenants living in those homes were parking trucks that violated the vehicle restrictions. The tenants both claimed that they were not apprised of the vehicle restrictions by the landlords. In one case, the tenant installed a cap on the truck to bring it into compliance, and in the other instance, the vehicle was modified to fit into the garage. This was the extent of the evidence regarding selective enforcement at the hearing.

However, as previously noted herein, the Toossi Memorandum raises additional issues and arguments that were not raised at the hearing, one of which being the following:

> Respondent asserts that racially and politically motivated enforcement of a bogus, misleading, defective, phantom and unconstitutional restrictive covenant after a period of Twenty Three (23) years, very clearly, indicates not absence, but presence of fraud and bad faith.

(Capitalization in original) (Toossi Memorandum at lines 295-297). There were absolutely no arguments made by the Toossis at the hearing that this enforcement was racially or politically motivated and, in fact, the Toossis did not ask the Board President

any questions regarding race or political affiliations of the other two original owners and/or their tenants against whom the vehicle restrictions were enforced. Accordingly, the Hearing Panel has no evidence before it to hold that selective enforcement – on any basis – occurred.

The Toossis also argue that the First Supplementary Declaration is unenforceable because it attempts to regulate personal property (their vehicles) and not merely the use of the land. The Declaration does not attempt to govern what vehicles the Toossis can own or use, or what they do with their vehicles outside the boundaries of the community; but it does properly state that the lots governed by the covenants cannot be used for the parking of commercial vehicles. The presence of commercial vehicles also affects the overall appearance of the community. The restrictions on parking imposed by this Declaration are a valid use of covenants running with the land and as such are enforceable by the Association.

ORDER

Within 30 days from the effective date of this Order, the Respondents must cease parking any vehicles on their Lot overnight which violate the South Village governing documents.

Commissioners Caudle and Farrar concur in this opinion.

Any party aggrieved by the action of the Commission may file an 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.

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Ursula Koenig Burgess, Panel Chair
March 22, 2011