MONTGOMERY COUNTY, MARYLAND
COMMISSION ON COMMON OWNERSHIP COMMUNITIES

ALEXANDER KOPPEL Complainant	)	
vs.	)	**Case No. 53-13** May 29, 2014
COLLEGE SQUARE CONDOMINIUM, INC. Respondents	)	

DECISION AND ORDER

Before Rand Fishbein, Aimee Winegar, and Douglas Shontz

The above-entitled case came before the Commission on Common Ownership Communities for Montgomery County, Maryland, for hearing and arguments on March 27, 2014, pursuant to Sections 10B-5(i), 10B-9(a), 10B-10, 10B-11(e), 10B-12, and 10B-13 of the Montgomery County Code. The hearing panel has considered the testimony and evidence presented, and finds, determines, and orders as follows:

BACKGROUND

Koppel ("Complainant") filed a complaint with the Office of Consumer Protection for adjudication by the Commission on Common Ownership Communities against College Square Condominium, Inc. ("Respondent"). Complainant alleged that Respondent attempted to retroactively rescind approval of Complainant's deck after Complainant had completed construction and is attempting to force modification of Complainant's deck at Respondent's expense.

FINDINGS OF FACT

The Panel makes the following findings of fact based on the evidence and testimony presented:

1. Complainant is a resident of a condominium association community as defined by Section 11-101 (e) of the Real Property Article of the Code of Maryland, and Respondent is a condominium association, which has its covenants filed in the land records of Montgomery County, Maryland. These covenants run with the land and bind all the lots referred to in the covenants, including the lot owned by Complainant.

2. Based on a 1999 opinion from Respondent's legal counsel, Respondent learned that several decks in the community extended beyond the boundaries of the unit owners' exclusive ownership area and into common or limited common elements, in violation of Section 11-108(a) of the Real Property Article of the Maryland Code.

3. As of 2004, Respondent has had a policy of requiring these encroaching/non-conforming decks to be modified at the time each encroaching unit is sold. The encroaching portion of each non-conforming deck has an easement until the time of resale.

4. Complainant applied for approval of Respondent's Architectural Review Committee to construct a deck on his unit in April 2013.

5. Respondent approved Complainant's deck construction on or about April 17, 2013, and memorialized the approval in a letter sent to Complainant.

6. On May 10, 2013, a member of Respondent's Board of Directors ("Board"), who is also a member of Respondent's Architectural Review Committee, observed that Complainant's deck appeared to extend too far from the rear of Complainant's unit beyond the boundary of Complainant's property, similar to the existing, non-conforming decks described in paragraphs 2 and 3 above. The member of Respondent's Board informed Complainant orally at the time that the deck was non-compliant.

7. As of May 10, 2013, Complainant's deck was complete or substantially complete, and built according to the approved plans.

8. On June 27, 2013, Respondent informed Complainant that the deck was non-compliant because it extended beyond Complainant's lot boundary and that Complainant would be required to bring the deck into compliance at Complainant's expense. No evidence was presented indicating Complainant intended to encroach beyond the lot boundary.

9. Respondent's Board subsequently changed its position and stated its willingness to pay the cost to bring Complainant's deck into compliance. Complainant refused to allow any changes to his deck.

10. Approximately 28 other units in the community have non-conforming decks, all built before 2004.

CONCLUSIONS OF LAW

Accordingly, the Panel concludes as follows:

1. Complainant and Respondent are proper parties to this dispute pursuant to Section 10B-8 of the Montgomery County Code.

2. Respondent's main assertion is that Respondent's Board and Architectural Review Committee did not have the authority to approve Complainant's deck as it was designed and built. In other words, Respondent made a mistake and did not have the legal authority to approve a non-compliant deck.

3. However, Respondent does not contend that Complainant did not follow proper procedure in getting approval for the deck construction.

4. In this case, a previous Commission on Common Ownership Communities ("CCOC") case, *Milne v. Crawford Farms Townhouse Association*, Case Number 151-0 (1994), is instructive. There the Panel concluded that the association was estopped from enforcing a covenant on a resident's fence after the resident had properly applied and received approval for the fence from the association. That Panel relied in part on *Speer v. Turner*, 33 Md.App. 716, 366 A.2d 93 (1976).

5. We agree with the ruling in CCOC Case No. 151-0 and conclude that Respondent cannot enforce the property boundary after giving its approval and allowing construction to proceed to completion or near completion. We disagree with Respondent that allowing Complainant to maintain the non-conforming deck causes substantial harm and will open the door to other unit owners building non-conforming decks in the future. As the Panel in *Milne* noted, failure by an association to enforce a restriction or covenant once does not prevent the association from enforcing that restriction or covenant in the future. In this case, Respondent is under no obligation to approve, and in fact should not approve, non-conforming decks in the future. However, Complainant appeared to follow Respondent's procedure to gain approval, and the community has approximately 28 other non-conforming decks. Thus, there does not appear to be any substantial harm in allowing Complainant's deck to remain as constructed until the time of resale, in accordance with Respondent's 2004 policy.

6. Respondent is permitted to enforce against Complainant's unit the 2004 policy of requiring modification of Complainant's deck at the time of resale.

7. Finally, the Panel notes with concern that Respondent was unwilling to participate in mediation of this case. Respondent's Board members appear to fundamentally misunderstand the purpose and benefit of mediation. Mediation is not a negotiation in which the parties move to a "middle ground" to settle a case. Rather, mediation is a means by which the parties can explore possible ways to resolve the dispute in a manner assisted by a neutral third party. Respondent's Board members and Respondent's property manager clearly have a communication problem, given the overly broad and conclusory assertions given at times during testimony. Therefore, the Panel encourages Respondent to better track the processing of modification requests, improve communication with residents, endeavor to apply modification decisions with greater consistency in keeping with a close adherence to the bylaws and architectural guidelines, and consider adopting a redundant process for contacting residents to ensure that mail sent to them is actually received and understood. Further, the Panel encourages residents to familiarize themselves with the community's policies and procedures with respect to the processing of applications for property modifications, the use of, and encroachment upon, common areas, and appealing adverse decisions.

DECISION AND ORDER

1. Based on the foregoing, the hearing panel orders the following:

    a. Respondent shall within thirty (30) days notify Complainant in writing that Complainant's deck does not need to be modified, except in accordance with the 2004 policy applicable to the other non-conforming decks.

    b. Respondent shall, at Respondent's Board's next meeting, review the procedures of the Architectural Review Committee and Respondent's procedures for resolving complaints and disputes raised by community residents. In accordance with the community's governing documents, Respondent shall provide ample and timely written notice to all residents of the community that this issue will be on the agenda and that community input is being sought.

    c. Respondent shall within sixty (60) days mail a copy of this Decision and Order to all units in the community.

Any person aggrieved by this decision may file an appeal with the Circuit Court for Montgomery County, Maryland, within thirty (30) days after the date of this decision, pursuant to the Maryland Rules for judicial review of administrative agency decisions.

Commissioners Fishbein and Winegar concur.

Douglas Shontz

Douglas Shontz, Panel Chair
Commission on Common Ownership Communities

MONTGOMERY COUNTY, MARYLAND
COMMISSION ON COMMON OWNERSHIP COMMUNITIES

AZZAM ABDELKARIM Complainant	)	
vs.	)	**Case No. 73-13** May 29, 2014
COLLEGE SQUARE CONDOMINIUM, INC. Respondents	)	

DECISION AND ORDER

Before Rand Fishbein, Aimee Winegar, and Douglas Shontz

The above-entitled case came before the Commission on Common Ownership Communities for Montgomery County, Maryland, for hearing and arguments on March 27, 2014, pursuant to Sections 10B-5(i), 10B-9(a), 10B-10, 10B-11(e), 10B-12, and 10B-13 of the Montgomery County Code. The hearing panel has considered the testimony and evidence presented, and finds, determines, and orders as follows:

BACKGROUND

Abdelkarim ("Complainant") filed a complaint with the Office of Consumer Protection for adjudication by the Commission on Common Ownership Communities against College Square Condominium, Inc. ("Respondent"). Complainant alleged the following:

1. Respondent improperly determined that Complainant did not get approval for deck construction in 1995 and is improperly refusing to honor policy regarding deck modification at Respondent's expense.

2. Respondent is selectively enforcing rules about stone paths and patio extensions in the common elements, and Complainant should be permitted to reinstall and maintain a stone path that was removed by Respondent.

FINDINGS OF FACT

The Panel makes the following findings of fact based on the evidence and testimony presented:

1. Complainant is a resident of a condominium association community as defined by Section 11-101 (e) of the Real Property Article of the Code of Maryland, and Respondent is a condominium association, which has its covenants filed in the land records of Montgomery County, Maryland. These covenants run with the land and bind all the lots referred to in the covenants, including the lot owned by Complainant.

2. Based on a 1999 opinion from Respondent's legal counsel, Respondent learned that several decks in the community extended beyond the boundaries of the unit owners' exclusive ownership area and into common or limited common elements, in violation of Section 11-108(a) of the Real Property Article of the Maryland Code.

3. As of 2004, Respondent has had a policy of requiring these encroaching/non-conforming decks to be modified at the time each encroaching unit is sold. The encroaching portion of each non-conforming deck has an easement until the time of resale. If a unit owner can prove the deck was approved by Respondent prior to 2004, the unit owner submits an estimate for modification in accordance with Respondent's procedure, and Respondent approves the estimate. Respondent will pay the cost of bringing the deck into compliance, even if not modified at the time of resale.

4. In 2004, Respondent notified Complainant of aspects of Complainant's property that were in violation, including divider fences and a deck extending too far from rear of Complainant's unit, and a concrete patio. Respondent stated that Complainant would be required to bring the fences and deck into compliance at the time of resale or reconstruction.

5. In 2004, Complainant requested Respondent pay approximately $1,500 for Complainant to bring his deck into compliance in accordance with the policy stated above in paragraph 3.

6. Respondent subsequently notified Complainant that Respondent would not pay for Complainant's deck modification because Complainant had not provided proof of Respondent's pre-2004 approval of Complainant's deck, as required by Respondent's policy.

7. On June 24, 2013, Respondent agreed to allow a stone walkway installed by Complainant, without Respondent's advance approval, to remain in place on the common element extending behind the building that contains Complainant's unit and other units. Respondent also agreed to reimburse Complainant $614.06 for the cost of the walkway materials. Respondent determined that the stone walkway benefitted multiple units and therefore could remain in place. However, Respondent ordered Complainant to remove a stepping stone path extending from the stone walkway to the rear of Complainant's patio, and lights installed by Complainant next to the stepping stone path, because these items were installed in common elements without approval. Respondent also stated that plants installed next to the stepping stone path were allowed to remain but that they became property of Respondent and could be removed from the common element by Respondent at any time.

8. On September 18, 2013, Respondent notified Complainant that Complainant had not complied with Respondent's order to remove the stepping stone path and lights and informed Complainant that Complainant was required to attend a meeting of Respondent's Board of Directors ("Board") on October 15, 2013. Complainant did not attend the October 15 meeting and provided no evidence of having requested a different date.

9. On October 16, 2013, Respondent notified Complainant that Complainant had failed to appear at the October 15 meeting and that Respondent's Board had decided to fine Complainant $50 for failing to correct the violations of the stepping stone path and lights installed in the common element. Respondent informed Complainant that Complainant had 14 days to file a complaint with the Commission on Common Ownership Communities before Respondent would enforce its decision.

10. Between October 31 and November 22, 2013 (the date of Complainant's complaint), Respondent enforced its October 15, 2013 decision and hired a contractor to remove the stepping stone path from the common area, placing the stones on Complainant's patio. Despite assertions in Complainant's testimony, there is no evidence of Respondent's contractor enforcing Respondent's decision in a manner that was abusive of Complainant.

11. Complainant subsequently reinstalled the stepping stone path on the common element.

12. A brick walkway installed in a common element that was not approved in advance by Respondent remains installed in the community. Respondent has allowed the brick walkway to remain because it has been in place for so long and appears to benefit multiple community residents and the waste removal personnel.

CONCLUSIONS OF LAW

Accordingly, the Panel concludes as follows:

1. Complainant and Respondent are proper parties to this dispute pursuant to Section 10B-8 of the Montgomery County Code.

2. Complainant's main assertion is that Respondent is engaging in selective enforcement by requiring him to remove the stepping stone path but not requiring the removal of the stone walkway (see paragraph 7 in Findings of Fact) and the brick walkway (see paragraph 12 in Findings of Fact).

3. In this case, a previous Commission on Common Ownership Communities case, *Milne v. Crawford Farms Townhouse Association*, Case Number 151-0 (1994), is instructive. As the Panel in *Milne* noted, failure by an association to enforce a restriction or covenant once does not prevent the association from enforcing that restriction or covenant in the future. The Panel cited *Kirkley v. Seipelt*, 212 Md. 127, 128 A.2d 430 (1957), as part of the basis for this conclusion.

4. In this case, Respondent is under no obligation to allow Complainant to install the stepping stone path and lights on the common element in violation of community rules. While there is evidence of other walkways installed in common elements without advance approval of Respondent, Respondent has not given up its right to enforce those rules. Further, Respondent has considered and memorialized the approval of the stone walkway (see paragraph 7 in Findings of Fact) but formally ruled against the stepping stone path. Respondent has not been inconsistent or

arbitrary in its approvals of walkways, because it has permitted walkways that benefit more than one unit. However, the steppingstone path and its lights benefit only the unit belonging to Complainant. There is a reasonable basis for distinguishing between the walkways that are permitted and the one that Respondent wants to remove. The Panel finds no reason to reverse Respondent's judgment, and Respondent may take authorized actions to enforce its decision.

5. The Panel also finds no evidence that Respondent acted arbitrarily in deciding that Complainant did not provide proof of Respondent's prior approval of Complainant's non-conforming deck, such that Respondent would be obligated to pay for modification. Moreover, Complainant may at any time before resale or reconstruction of Complainant's deck provide the required proof in accordance with Respondent's 2004 policy.

6. Respondent is permitted to continue enforcing the 2004 policy against Complainant's unit of requiring modification of Complainant's fence and deck at the time of resale or reconstruction.

7. The Panel concludes that there was sufficiently lax prior enforcement that the somewhat abrupt shift should have included greater opportunity to bring units into compliance without assessing fines.

8. The Panel is also concerned about the actions and statements of Respondent's property manager. Respondent's property manager testified at multiple points in broad and absolute terms and then was forced to acknowledge that there had been exceptions made. Further, on December 2, 2013, Respondent's property manager sent a letter to the Commission on Common Ownership Communities in which he appears to be making legal judgments by stating that a Commission decision in another case involving Respondent would render Complainant's case "moot." Respondent needs to ensure that its property manager is acting strictly within the boundaries of his responsibility in a manner that is clear and consistent, and ideally fosters a pleasant living environment for the residents. Further, Respondent's Board members must ensure they are also acting and communicating where it is within their responsibility, rather than deferring or delegating to the property manager.

9. Finally, the Panel notes with concern that Respondent was unwilling to participate in mediation of this case. Respondent's Board members appear to fundamentally misunderstand the purpose and benefit of mediation. Mediation is not a negotiation in which the parties move to a "middle ground" to settle a case. Rather, mediation is a means by which the parties can explore possible ways to resolve the dispute in a manner assisted by a neutral third party. Respondent's board members and Respondent's property manager clearly have a communication problem, given the overly broad and conclusory assertions given at times during testimony.

DECISION AND ORDER

1. Based on the foregoing, the hearing panel orders the following:

a. Respondent shall within thirty (30) days notify Complainant in writing that Complainant is not subject to any fines and is not responsible for the cost of removal of the stepping stones, prior to this decision.

b. Complainant shall within thirty (30) days remove the stepping stone path and lights in accordance with Respondent's prior decision. If Complainant fails to do so, Respondent may take authorized actions, including imposing fines and charging costs to Complainant, only after following all required due process procedures as set forth in the community's governing documents.

c. If Complainant produces new documentation related to Complainant's deck, Respondent must consider, in accordance with required procedures and Respondent's 2004 policy, future requests by Complainant to reconsider Respondent's decision about reimbursing the cost of modifying Complainant's deck.

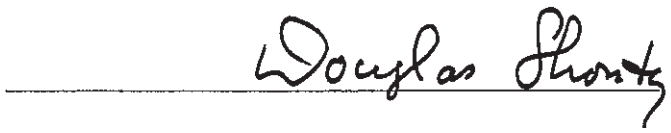
d. If Complainant demonstrates changed conditions related to common elements adjacent to Complainant's unit, Respondent must consider, in accordance with required procedures, future requests by Complainant to reconsider Respondent's decision regarding Complainant's stepping stone path.

e. Respondent shall, at Respondent's Board's next meeting, review the procedures of the Architectural Review Committee and Respondent's procedures for resolving complaints and disputes raised by community residents. In accordance with the community's governing documents, Respondent shall provide ample and timely written notice to all residents of the community that this issue will be on the agenda and that community input is being sought.

f. Respondent shall within sixty (60) days mail a copy of this Decision and Order to all units in the community.

Any person aggrieved by this decision may file an appeal with the Circuit Court for Montgomery County, Maryland, within thirty (30) days after the date of this decision, pursuant to the Maryland Rules for judicial review of administrative agency decisions.

Commissioners Fishbein and Winegar concur.



Douglas Shontz, Panel Chair
Commission on Common Ownership Communities