BEFORE THE
COMMISSION ON COMMON OWNERSHIP COMMUNITIES
FOR MONTGOMERY COUNTY, MARYLAND

In the Matter of

Mira Kaplan Elizabeth Kaplan 10601 Forest Landing Way Rockville, MD 20850	*	
and	*	
Gail Kaplan Verbitsky 10618 Forest Landing Way Rockville, MD 20850	*	
Complainants	*	
v.	*	Case # 549-O
Stonebridge Homeowners Association, Inc. c/o Vanguard Management P.O. Box 39 Germantown, MD 20875-0039	*	
Respondents	*	

DECISION AND ORDER

The above-captioned case having come before the Commission on Common Ownership Communities for Montgomery County, Maryland, for hearing on July 31, 2002 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 duly appointed Hearing Panel having considered the testimony and evidence of record, finds, determines, and orders as follows:

Preliminary Matter Regarding Clarification of Parties

The complaining parties in this matter were listed as Mira Kaplan and Elizabeth Kaplan. At the hearing of this matter on July 31, 2002 the status of the parties and their relationship to the property at 10601 Forest Landing Way (the "Property") were clarified as follows.

Mira Kaplan is the owner of the Property. Elizabeth Kaplan is Mira Kaplan's niece, and at the time that the complaint was filed on October 26, 2001, she resided at the Property, but had no ownership interest in it. At the time of the hearing on July 31, 2001, Elizabeth Kaplan no longer resided at the Property and did not have an ownership interest in the Property.

Section 10B-8 (7) of the Montgomery County Code includes an occupant of a dwelling unit in a common ownership community as a "party" that can participate in a dispute. While Elizabeth Kaplan was a proper party at the time the dispute was filed, the Panel determined that at the time of the hearing, she was not a proper party to participate in the dispute, because she had neither of the characteristics of a party as defined in Chapter 10B, i.e. ownership or occupancy of the property. Therefore, the Panel removed Elizabeth Kaplan from this dispute as a party.

Mira Kaplan's sister, Gail Kaplan Verbitsky appeared at the hearing on July 31, 2002. Gail Kaplan Verbitsky did not join in filing the original complaint. However, Ms. Verbitsky could have been a complaining party when the complaint was filed since she owns 10618 Forest Landing Way, a property within the Stonebridge community that is subject to the Declaration of Covenants. She testified that she had personal knowledge of the circumstances of the dispute. The Panel determined that the Respondent had no objection to Gail Kaplan Verbitsky participating in the dispute as a Complainant, and on the basis of her ownership of property in the community and in the interest of consolidating any similar disputes for efficient resolution, the Panel permitted Gail Kaplan Verbitsky to be added to this case as a Complainant.

Background & Summary of Testimony and Evidence

As noted above, Mira Kaplan and Elizabeth Kaplan filed complaint # 549-O against Stonebridge Homeowners Association, Inc. (Stonebridge) with the Commission on October 26, 2001. The complaint was signed by "M. Kaplan." In her complaint, Ms. Kaplan alleged that Stonebridge had improperly permitted another homeowner in the townhouse community to place a basketball hoop in the parking area near the Property. The complaint challenged the authority of Stonebridge to alter or add to a common area or element by permitting the hoop to be placed in the common area. Ms. Kaplan asked the Commission to require Stonebridge to remove the hoop from the parking lot.

Subsequently, Stonebridge's legal counsel, Gordon J. Brumback, Esquire, filed a response to the complaint on January 9, 2002. In his response, Mr. Brumback confirmed that the hoop was located on Stonebridge's common property, and cited provisions in the Stonebridge documents permitting Stonebridge to adopt reasonable rules respecting use of the common areas and allowing the Board of Directors to grant rights of use in all or any part of the common areas.

The complaint was not resolved through mediation, and the dispute was presented to the Commission on Common Ownership Communities, which voted that the dispute involved matters within the Commission's jurisdiction, and scheduled the dispute for hearing.

Ms. Mira Kaplan, Ms. Elizabeth Kaplan, and Ms. Gail Kaplan Verbitsky appeared for the hearing. As noted above, at the time of the hearing Elizabeth Kaplan did not meet the criteria for being a party and she was removed as a party to the dispute, and Gail Kaplan Verbitsky, the Complainant's sister, who also owns a townhouse in Stonebridge, was joined in the complaint as a party, with no objection from Stonebridge.

Gail Kaplan Verbitsky testified that she lived in Stonebridge, on Forest Landing Way, and that she visited her sister every day and had observed children using a portable basketball hoop that was continuously present and placed next to the parking lot serving the Property. She said that she had observed children using the basketball hoop and that she believed the same children damaged flowers on Mira Kaplan's lot, deposited trash and soft drink cans in the common area, failed to control a basketball that subsequently made contact with a car and caused the alarm on the car to sound, made noise with a whistle, and used the basketball hoop as late as 11:30 p.m. She testified that her sister (and in her belief some additional residents), in order to avoid interacting with the basketball players and to minimize contact between their cars and basketballs, would not use the parking space closest to the basketball hoop, and that consequently, she believed that parking spaces in the lot were effectively reduced. She further testified that she was concerned for the children's safety when she had seen the hoop up-ended, and that she was generally concerned that the interaction between cars and children in the parking lot did not create a safe environment for the children. She testified that she had contacted Vanguard Management to complain about the safety issues and her concern that children from throughout the community, not just Forest Landing Way, were attracted to the hoop. She testified that Vanguard Management had reiterated that the hoop had been approved by the Board, and also explained that the Board of Directors had established restricted hours of use for the hoop.

On cross-examination, Ms. Verbitsky testified that she had also observed gatherings of teenagers in the parking lot (unrelated to the basketball hoop) and also that the parking lot was used for a variety of other play activities by the children, including skateboarding and other games involving balls. Mira Kaplan provided similar testimony, and characterized the parking lot as a "very dangerous" area for children to play.

The Complainants provided several pictures that were admitted into the record, showing the hoop, the common area, some of the lighting in the parking lot, and the distance from the hoop to the Property and the cars in the lot.

Bernice Stossel, an employee of Vanguard Management, which manages certain aspects of Stonebridge under contract, testified that the Board of Directors had considered the placement of the hoop on the common elements at its meetings in April and May of 2001, and consented to the hoop remaining in the common area, subject to

hours of use being limited to between 8:00 am and 9:00 pm. She testified that she was unaware of any incidents where the street lights in the parking lot had been broken as a result of use of the hoop, and that there was no special lighting for the hoop, only the same type and intensity of street lights as found elsewhere in the community. In response to questions from Commissioner Skobel, she stated that the basketball hoop, although placed on common elements, had not been recognized or represented as an amenity by Stonebridge, and had not been specifically included in the insurance coverage for the community.

Jim Madaras, also a resident of Forest Landing Way, testified that he believed the basketball hoop had been in its current location for up to six years, that it was not placed in the parking area, and did not cause parking spaces to be unusable. He testified that a survey of the property owners adjacent and near to Forest Landing Way indicated that a majority of the property owners did not object to the presence of the hoop. He testified that he had observed children using the basketball hoop and did not believe that the hoop contributed to an unsafe environment for children in the community.

Mr. Brumback cited two provisions of the Stonebridge governing documents as authority for the Board to permit the basketball hoop to remain in the common area. These were Article IV, Section 1(c) of the Declaration of Covenants, Conditions and Restrictions, permitting the Association to adopt reasonable rules respecting use of the common areas, and Article V, Section 3(i) of the By-Laws, which grants the Board of Directors the power to grant licenses and other rights of use in all or any part of the common areas. He also argued that the Board's decision to permit the hoop in the common area was a decision entitled to be upheld under the application of the "business judgment rule" as applied to a homeowners association's board of directors through the holding of the Maryland Court of Special Appeals in *Black v. Fox Hills North Community Ass'n*, 90 Md. App. 75, 599 A.2d 1228 (1992).

Upon conclusion of the hearing, the record was held open pending submission of a plat showing Forest Landing Way, which was transmitted to the Commission staff by Mr. Brumback on August 8, and accepted into the record on August 14, 2002. Other exhibits in the record included the Commission's file on this dispute, including the Stonebridge governing documents, and records of the Board of Directors meetings noted above.

Findings of Fact

1. The Property is subject to the Declaration of Covenants, Conditions, and Restrictions for the Stonebridge Homeowners Association (the "Association") and decisions of the Board of Directors made pursuant to the Association's By-Laws.

2. There is a portable basketball hoop placed in the Stonebridge common area adjacent to Forest Landing Way at its eastern end, near the Property. The hoop is used by children who also use the nearby portion of Forest Landing Way as the "court" surface for their basketball activity. No special lights have been installed to facilitate use of the court, and no other modifications to the common area or Forest Landing Way have been made in connection with the basketball hoop.

3. The owner of the hoop and the details of when it was placed were not established definitively in the record, but the hoop appears to have been in place for several years, and the Board of Directors of Stonebridge took affirmative action to permit the hoop to remain in place on the common area, at its meeting on May 15, 2001.

4. The Board of Directors' action to permit the hoop in the common area was accompanied by a condition that hours for use of the hoop were to be limited to the period from 8:00 am to 9:00 pm. There was no evidence introduced into the record that the Board of Directors has taken any other action with regard to the basketball hoop, such as inspecting the hoop to determine its condition or placement for safety, establishing ownership of the hoop to resolve future issues of maintenance and liability, or establishing insurance coverage to protect the Association or an injured party in the event of an injury.

5. Plat # 14842 of Lots 68 thru 133 and Parcel C, Block E Stonebridge shows Forest Landing Way as a private street.

6. Article V, Section 3 of the Stonebridge By-laws provides in pertinent part as follows:

Section 3. Powers and Duties. The Board of Directors shall have all the powers and duties necessary for the administration of the affairs of the Association and . . . shall include, but shall not be limited to, the following . . .

> (d) promulgation and enforcement of such rules and regulations and such restrictions on or requirements as may be deemed proper respecting the use, occupancy and maintenance of the common areas and community facilities as are designated to prevent unreasonable interference with the use of the common areas and community facilities by the members and others . . .

Conclusions of Law and Discussion

The Panel concludes that the Board's decision on May 15, 2001 to permit the basketball hoop to remain in the common area is a decision it is authorized to make pursuant to the powers set forth in the Article V, Section 3 (d) of the By-laws set forth above.

Although the Complaint cast the Board's decision as involving the Board's authority to "alter or add to a common area or element," the Panel concludes that the Board's consent to the placement of the basketball hoop in the common area does not rise to the level of altering or adding to a common area or element; in the context of most declarations, adding or altering the common property means reducing or increasing the physical land area through a transfer, or substantially changing the improvements. Such actions commonly also require the consent of owners and mortgagees, because the changes affect the fundamental character of the community and the parties' financial interests and obligations. The Complainants presented no evidence to establish such an alteration or violation of the Declaration. Had the Board permitted the hoop to be placed *within* Forest Landing Way, that decision may have conflicted with the owners' easement rights in the streets and parking areas in the Declaration, Article XII, section 4, but these were not the facts before the Panel.

The By-law and Declaration provisions cited by the Respondent as authority for the Board's action are not applicable to the decision to allow the basketball hoop to remain. Article IV, section 1(c) of the Declaration does give the Association the right to adopt reasonable rules respecting reasonable use of the common areas and facilities, but only as regards to establishing reasonable limits on the *number of guests of members* who may use the facilities. This section is meant to authorize the Association to establish policies such as a maximum of five guests using a swimming pool, or a maximum number of persons permitted in an event in a clubhouse, and does not provide general authority to regulate the common areas.

Article V, Section 3(i) of the Declaration, also cited by the Respondent allows the Board to lease, grant licenses, easements, and rights-of-way and other rights of use in the common areas and community facilities. However, the facts in this case do not indicate that the Board took such an action. For example, ownership of the basketball hoop was not established, and the board did not grant any entity or person the right to place the hoop in the common area. All of the interests permitted in section 3(i) would have been granted to entities other than the Association, would likely have been memorialized in writing, would have specified the physical limits of the interest being granted, and most importantly, would also have shifted liability for injury relating to use of the common area to the grantee. The Board's action on May 15, 2001 has none of these characteristics. Section 3(i) is not applicable to a decision by the Board to allow *itself* to use the common area.

The Complainants' testimony did not address this legal analysis of the Board's authority to permit the basketball hoop, but rather focused on presenting evidence on the

effect of the children playing at the basketball hoop on the quality of their enjoyment of their homes on Forest Landing Court. While other cases recently before the Commission have dealt with hoop-related issues such as a Board's determination that a basketball hoop violated a covenant against "nuisance" activities (see *Graninger v. Overlook at Flower Hill,* Commission Case #540-O) and whether a basketball hoop violated a covenant to keep certain property in the rear yard (see *Campbell v. Lake Hallowell Association,* Commission Case #541-O), there are no Stonebridge covenants that provide a standard of conduct for the *Association's* actions on the common area, or placement of basketball hoops.

Therefore, the issue presented to the Panel is restricted to the Board's decision pursuant to a power granted in the By-laws, and does not involve a Board interpretation of a Covenant. The standard for evaluating the decision is the "business judgment rule" set forth in *Black v. Fox Hills North Community Ass'n,* 90 Md. App. 75 (1992), i.e., that a Board decision must be upheld absent fraud or bad faith. Neither was established in this matter.

ORDER

Based upon the evidence of record and for the reasons set forth above, it is this 2nd day of April, 2003 by the Commission on Common Ownership Communities,

1. ORDERED, that the Complaint in this matter be, and the same hereby is, DISMISSED, and it is further

2. ORDERED, that the relief requested by the Complainants be, and the same hereby is, DENIED.

Panel members Guynn-Werking, Hitchens, and Skobel concurred unanimously in this decision.

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.

Christopher Hitchens
Panel Chair
Commission on Common
Ownership Communities