MONTGOMERY COUNTY, STATE OF MARYLAND

David O'Connell,	:
	: COMMISSION ON COMMON
Complainant	: OWNERSHIP COMMUNITIES
	: Case No. 55-09
vs.	:
	: Date of Decision: October 7, 2010
Greencastle Lakes Community Association,	:
	:
Respondent	:
	:

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

Pursuant to a prehearing order dated July 16, 2010, the parties agreed to a Joint Statement of Facts, which was entered into evidence as Joint Exhibit 1 at the hearing on August 25, 2010. The Joint Statement of Facts is attached hereto and incorporated herein as a part of this Decision and Order.

The Complainant, David O'Connell, owner of a single family detached home within the community, challenges the manner in which Respondent, Greencastle Lakes Community Association, assesses the single family homes for reserve funding for private parking spaces, visitor parking spaces and associated roadways within the duplex and townhome portion of the

community. Specifically the Complainant contends that the single family detached homes should not be charged the same assessment fees as the townhomes and duplexes for those items.

The Respondent Association answers that the assessment structure, which is essentially a multi-tiered structure in that it charges townhomes, duplexes and single family homes different assessments, is an assessment structure that the Board of Directors has the authority to make and it is within the sound business judgment of the Board of Directors to adopt this assessment structure.

The outcome of this case hinges upon whether Greencastle Lakes Community Association has the authority under its governing documents to adopt a multi-tiered assessment structure. A corollary to that issue is: Whether, if the Association does have that authority, has it properly implemented the authority with the assessment structure currently in place? The authority or power to act is the first question to be answered in applying the business judgment rule. Black v. Fox Hills, 90 Md.App. 75, 599 A2d 1228 (1992). In Ridgely Condo v. Smyrnioudis, 343 Md. 357, 681 A2nd 494, 499 (1996) the Court of Appeals of Maryland also recognized that the threshold question in reviewing the validity of an association action is whether the association had the authority to act. Ridgely was a condominium case, but the same principle applies here. The court found that the association did not have the authority to enact the rule at issue and therefore it did not reach the other questions briefed by the parties.

A reviewing body does not reach the issues whether a board of directors acted in good faith and without fraud or self dealing, until it decides whether the board had the authority or power to act at all with respect to the matter before it. The source of this authority is found in the governing documents, in statutes, and in court and administrative decision interpreting and

applying those governing documents and statutes.

The Respondent's authority for levying assessments is in Article V, Section 1 of the March 27, 1985 Declaration for Greencastle Lakes, found at Commission Exhibit 1, Page 44. Article V, Section 1 states:

> "Annual Maintenance Assessments. Except as assessments of the Declarant is limited by the provisions of Article VI of this Declaration, each person, group of persons, corporation, partnership, trust or other legal entity, or any combination thereof, who becomes a fee owner of a lot within the Property, (i.e., each Class A member of the Association), by acceptance of a deed therefore, whether or not it shall be so expressed in any such deed or other conveyance, shall be deemed to covenant and agree to pay the Association, in advance, a monthly sum (hereinelsewhere sometimes referred to as "maintenance assessments") equal to one-twelfth (1/12) of the member's proportionate share of the sum required by the Association, as estimated by its Board of Directors, to meet its annual expenses, including but in no way limited to the following:
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> (a) the cost of all operating expenses of the common areas and community facilities and the services furnished to or in connection with the common areas and community facilities, including charges by the Association for any services furnished by it; and
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> (b) the cost of necessary management and administration of the common areas and community facilities, including fees paid to any Management Agent; and
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> (c) the amount of all taxes and assessments levied against the common areas and community facilities; and
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> (d) the cost of liability insurance on the common areas and community facilities and the cost of such other insurance as the Association may effect with respect to the common areas; and
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> (e) the cost of utilities and other services which may be provided by the Association, whether for the common areas and community facilities or for the lots, or both; and
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> (f) the cost of maintaining, replacing, repairing, and landscaping the common areas, including, without

limitation, maintenance of any storm water detention basins or the like located upon the common areas and the cost of the maintenance of all pathways upon the property, together with such equipment as the Board of Directors shall determine to be necessary and proper in connection therewith; and

(g) the cost of funding all reserves established by the Association, including, when appropriate, a general operating reserve and a reserve for replacements;

(h) the "Neighborhood Assessment" as hereinafter defined.

The Board of Directors shall determine the amount of the maintenance assessment annually, but may do so at more frequent intervals should circumstances so require. Upon resolution of the Board of Directors, installments of annual assessments may be levied and collected on a quarterly, semi-annual or annual basis rather than on the monthly basis hereinabove provided for. Any Class A member may prepay one or more installments on any annual maintenance assessment levied by the Association, without premium or penalty."

The definition of "Neighborhood Assessment", referenced in Article V, Section 1(h), is in Article V, Section 6, Commission Exhibit 1, Page 46:

"Neighborhood Assessment. As a part of the annual maintenance assessment aforesaid, each Owner shall be deemed to covenant and agree to pay to the Association a Neighborhood Assessment, which Neighborhood Assessment shall reflect the cost of maintaining, operating, managing, replacing, repairing, landscaping and funding the reserves for any facilities or amenities constructed or developed within a Neighborhood and restricted to the use and benefit of Owners within such Neighborhood. Such Neighborhood Assessment shall be determined initially by the Board of Directors of the Association, with the advice of the builder developing such Neighborhood. The Neighborhood Assessments, after the initial determination thereof, shall be made by the Board of Directors with the advice of the "Area Councils," as provided in the By-laws of the Association." See also Association Bylaws, Commission Exhibit 1, Page 27.

The definition of "Neighborhood" is in Article I, Section 1(j), Commission Exhibit 1, Page 42:

> "'Neighborhood' shall mean and refer to a parcel of land within the 'Project' or 'Community' which is developed, improved and marketed by a single builder or developer."

The definition of "Neighborhood Facilities" is in Article II, Section 4 of the Declaration, Commission Exhibit 1, Page 43:

> "'Neighborhood Facilities': Recreational or other community facilities developed within a neighborhood and not available for use or enjoyment by members other than those of that neighborhood shall be the sole financial responsibility of such neighborhood alone, funded by the Neighborhood Assessment, as more particularly described hereinafter."

The Association's By-laws, Article V, Section 3(l), Commission Exhibit 1, Page 31, elaborate on how the initial and subsequent determinations of the "Neighborhood Assessment" are to be made:

> "(l) to effect an initial determination of the Neighborhood Assessment, as hereinbefore defined, with the advice of the builder developing such neighborhood. After the initial determination thereof, the Neighborhood Assessment shall be made by the Board of Directors with the advice of the 'Neighborhood Councils', as provided in the Article VII."

The By-laws explain the process for establishing Neighborhood Councils in Article VII, Commission Exhibit 1, Page 34. The Members of each Neighborhood select a Neighborhood Council.

The process for having a Neighborhood Assessment is, based upon the above, briefly as follows. There must first be a "Neighborhood", which is an area developed, improved and marketed by a single builder or developer. In that Neighborhood there must be facilities or amenities restricted to the use and benefit of Owners or Members within such Neighborhood.

"Neighborhood Facilities" further defines the nature of such facilities. They may be recreational or other community facilities, and they must be developed in a Neighborhood, and not available for use or enjoyment by Members other than those of that Neighborhood. The "Neighborhood Facilities" shall be the sole financial responsibility of such Neighborhood alone, hence the basis for Neighborhood Assessments. The Board of Directors, initially in consultation with the builder developing a Neighborhood, and thereafter with the advice of the Neighborhood Councils, develops a budget for the cost of operating and maintaining the Neighborhood Facilities. The term "Area Facilities" also finds its way into the language of the governing documents, but that term is nowhere defined.

The testimony and evidence of record established that there has been in place for some time a multi-tiered assessment structure for Greencastle Lakes Community Association. That structure provides for an assessment of the townhouses and duplexes, in addition to the general maintenance assessment provided for in Article V of the Declaration, and the Association has loosely considered this additional assessment to be a "Neighborhood Assessment". For the townhomes, the additional assessment consists of an allocation of part of the snow removal costs for the community exclusively to the townhomes . For the duplexes, the additional assessment consists of an allocation for snow removal, and for private yard maintenance, which includes snow removal and yard maintenance on privately owned properties that are not part of the common areas but are owned by the duplex unit owners.

The Neighborhood Facilities, when there are any, are by definition part of the common areas and common facilities. Declaration, Article I, Section 1(d), Commission Exhibit 1, Page

41.:

> "Common Areas" and "Common Facilities" shall mean and refer to all real property owned or leased by the Association or otherwise available to the Association for the benefit, use and enjoyment of its Members, to include Neighborhood Facilities".

By definition therefore any Neighborhood Facilities are part of the common areas and are "real property owned or leased by the Association or otherwise available to the Association". Commission Exhibit 1, Page 41. Neighborhood Facilities are specifically not privately owned property.

Neither of the parties presented evidence regarding the existence of a "Neighborhood" as defined in the governing documents. The Association presented evidence that it considers each group type of dwelling to be a separate "Neighborhood". That is, there are three "Neighborhoods", the areas of townhouses, of duplexes, and of single family detached homes. However no evidence was presented to establish that those housing types are located in areas "developed, improved and marketed by a single builder or developer". The best the panel can determine from the evidence presented is that one builder built the entire community, without delineating separate "Neighborhoods". Thus, the entire community might be called a "Neighborhood", but there are not separate Neighborhoods within the community. There are also no Neighborhood Councils or Neighborhood Budgets. See By-laws, Article VII, Section 3, Commission Exhibit 1, Page 34.

FINDINGS OF FACT

1. As stated previously, the Panel incorporates herein by reference and attaches hereto the Joint Statement of Facts developed by the parties and admitted into evidence as Joint

Exhibit 1.

2. In the history of the Association, there has been no identification of any separate "Neighborhood", as "Neighborhood" is defined in the governing documents. There also have been no Neighborhood Councils as defined in the governing documents.

3. There are currently no "Neighborhood Facilities" as defined in the governing documents. None of the common areas which primarily serve the townhouses and duplex units, specifically roadways, parking areas, and sidewalks, can be characterized "not available for use or enjoyment by members other than those of that neighborhood". First, there has been no identification of a Neighborhood. Second, even if one were to accept the gloss offered by the Respondent that each housing type comprises a separate Neighborhood, nevertheless the roadways, parking areas and sidewalks, are not limited to the exclusive use or enjoyment by the members who own townhouses and duplexes. If the Panel considers snow removal and maintenance of parking areas, sidewalks and roadways in the townhouse/duplex areas to be services which are "amenities", nevertheless those "amenities" are not restricted to the use and benefit of the townhouse and duplex owners.

4. The activities that the community performs on private properties are by definition not performed on Neighborhood Facilities or Common Areas, since private properties are not part of the definition of Common Areas.

5. Neither of the parties presented evidence, testimony or argument regarding the scope of authority contained in Article V, Section 1(e) to provide "services" to the lots. Snow removal and lawn maintenance on private lots might constitute "services" to the "lots". Neighborhood assessments, because they apply only to maintenance on common areas, could not

be used for this purpose however.

6. The provisions of Article VII, Section 11 which allow the Association the right to remove or correct violations on private properties do not go so far as to allow voluntary maintenance and snow removal on private properties. Those provisions pertain only to violations and the correction of violations.

CONCLUSIONS OF LAW

The threshold question before the Panel is: Did the Association have the authority to establish the multi-tiered assessment structure now in place? Before the Panel can address whether the Association's decision was within the sound business judgment of the Board of Directors, it must determine whether the authority to make that decision existed in the first place. Black v. Fox Hills, supra.

The governing documents of the Association allow for a general maintenance assessment and for one additional increment to that assessment, the Neighborhood Assessment. For there to be a Neighborhood Assessment there must be Neighborhoods defined by the developer, Neighborhood Councils, and Neighborhood Facilities. None of these elements exist at Greencastle Lakes Community Association. The Panel is not saying that there may not in fact be a basis for defining separate Neighborhoods, meeting the definitions, limitations and requirements of the governing documents. However, the testimony and evidence of record did not establish the existence of any Neighborhood. Without the existence of Neighborhoods there could be no Neighborhood Facilities and there could be no Neighborhood Assessments.

Although Article V, Section 1(e) allows for general maintenance assessments to meet the cost of services for the lots, neither party invoked this section either for or against its position in

this case. This provision must be read consistently with two other provisions. Article V, Section 1 requires a member to pay one-twelfth "of the members' proportionate share" of the sum required to meet annual expenses. Article V, Section 4 requires that:

> "The annual maintenance assessment shall be levied at a uniform rate for each lot to which a Class A membership is appurtenant."

Pursuant to Article III, Section 1(a) there are 828 Class A memberships in the association. (The Joint Statement of Facts says "822"). The record owner of each lot is a Class A member. Each Class A member is entitled to one vote for each lot. Article V, Section 4, read in conjunction with Article III, Section 1(a) leads to the conclusion that a uniform rate for each lot means that each lot pays the same assessment. This language, read together with the language of Article V, Section 1 that the monthly assessment is equal to one-twelfth of the members' "proportionate share of the sum required by the association...to meet its annual expenses" further leads to the conclusion that the assessment for each of the 828 lots must be the same. That is, the "proportionate share" is the same for all Members.

This language also leads to the following interpretation of Article V, Section 1(e). That section allows for the inclusion in the annual maintenance assessments of the cost of utilities and other services provided by the association for the lots as well as for the common areas. Because the assessments must be uniform, the logical interpretation of Article V, Section 1(e) is that utilities and services for the lots must be for <u>all</u> of the lots, so that the assessment on each lot is uniform. Thus the only authority in the governing documents for other than a uniform assessment is the authority for the Neighborhood Assessment. As previously stated, however, the association does not have Neighborhood Facilities and therefore there is no basis for Neighborhood Assessment. There is no other basis for a multi-tiered assessment structure.

The Panel therefore concludes as follows:

1. The premise for the assessment of "Neighborhood Assessments", as defined in the governing documents of Greencastle Lakes Community Association does not currently exist.

2. Therefore the currently in place multi-tired assessment structure is without support in the governing documents. The Board did not have the power to establish it.

3. While the Panel does not reach issues of good faith or self-dealing under the business judgment rule, since the authority to act did not exist, nevertheless, the Panel does state that the Association was attempting to act in the best interests of its members and there is no evidence of fraud or bad faith. Consequently, the Panel believes that the fair decision in this case is to make its decision prospective only, applicable to the assessments for 2011, and the budgets and assessments thereafter.

The Panel therefore orders:

1. Effective with the next fiscal year of the Association, which the Panel believes begins on January 1, 2011, the Association must adopt a budget and an assessment structure that applies uniform assessments to all unit owners, that is the same annual maintenance assessment for each member.

2. The Association must cease providing maintenance and snow removal to private properties in the duplex part or any other part of the community that are paid for out of annual maintenance assessments. If the Association can find other authority or other legal basis for contracting with unit owners to provide comprehensive amenities such as lawn maintenance and snow removal on a basis other than by payment out of annual maintenance assessments, then

it is free to do so.

The decision of the Panel is unanimous. Any party aggrieved by the action of the Panel may file an administrative appeal to the Circuit Court of Montgomery County, Maryland, within thirty (30) days of the date of this decision, pursuant to the Maryland Rules of Procedures governing administrative appeals.

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John F. McCabe, Jr., Panel Chair