Before the

COMMISSION ON COMMON OWNERSHIP COMMUNITIES
Montgomery County, Maryland

In the matter of:

Kara Collins	x	
c/o John L. Heise, Jr., Esq.	x	
Heise Jorgensen & Stefanelli, P.A.	x	
Suite 400	x	
18310 Montgomery Village Avenue	x	
Gaithersburg, MD 20879,	x	
Complainant,	x	
	x	
v.	x	Case No. 601-O
	x	February 17, 2005
Thomas Choice Condominium	x	
c/o John F. McCabe, Jr., Esq.	x	
Suite300	x	
200A Monroe Street	x	
Rockville, MD 20850,	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 §§ 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

On or about August 22, 2002, Kara Collins, owner of 19525 Brassie Place, Gaithersburg, Maryland ("Complainant"), filed a complaint with the Office of Common Ownership Communities against Thomas Choice Condominium ("Respondent") alleging that Respondent had failed to address water damage to her property resulting from inadequate maintenance of common elements. Ms Collins' unit is within the Thomas Choice Condominium community and is covered by the provisions of the community documents.

Respondent replied that the issues for which the Condominium was responsible had been addressed and that Complainant was responsible to resolve the remaining problems.

Inasmuch as the matter was not resolved through mediation, this dispute was presented to the Commission on Common Ownership Communities for action pursuant to § 10B-11(e) of the Montgomery County Code on February 4, 2004, and the Commission accepted jurisdiction. A hearing was scheduled for April 14, 2004. At the request of the parties, who indicated that they thought they could resolve the outstanding issues, the scheduled hearing was cancelled. When the parties determined that the issues could not be resolved a hearing was scheduled for October 20, 2004 and was conducted on that date.

Findings of Fact

In January 2001 damage was done to Complainant's property in a rainstorm. The damage was caused, at least in part, by a downspout that was not in proper repair. Most of the damage resulting from that event has been repaired. Complainant was compensated under the Condominium insurance policy and signed a general release "for all injuries, known and unknown, both to the person and property, which have resulted or may in the future develop from an accident which occurred on or about the 21st day of January, 2001…."

However, Ms Collins contends that the limited common area immediately behind her unit, including her patio, is still in disrepair as a result of continuing water damage. She alleges, and the Condominium agrees, that the area to the rear of her unit needs to be regraded to assure that water will run away from the unit. In order to regrade this area, the slate patio, which was in place when she purchased her unit and is now in serious disrepair, needs to be removed. Ms Collins asserts that it is the responsibility of the Condominium to regrade, and replace the patio after the regrading is done. She argues that replacement is the responsibility of the Condominium because the damage to her patio was caused by the failure of the Condominium to provide the maintenance that it is required to provide.

The Thomas Choice developer installed a concrete slab patio in the limited common area behind many of the units, estimated by the engineer for the Condominium to have been approximately four feet by eight feet and four to six inches thick, as part of the original construction. The Condominium manager testified that the Condominium is responsible for the improvements constructed by the developer. There was no testimony regarding when the concrete patio was replaced by the larger slate patio and the Condominium records do not include an application for this modification. Ms Collins testified that the slate patio was there when she purchased her unit in June 1997.

The Disclosure Statement the Condominium prepared in March 1997 for Margaret Fitzgerald, apparently Ms Collins' predecessor in interest, states:

> The Board of Directors has no knowledge that any alteration or improvement to the subject unit named above or to the limited common elements assigned thereto violates any provision of the Declaration, By-laws, or Rules and Regulations except as follows: none.

The Condominium manager testified that the people who do the investigation to prepare the Disclosure Statements would not know that the patio had been replaced without the required application and approval. She said that in her experience unless the modification to the unit was unsuitable they would be unlikely to look in the records for an application and approval. She indicated that the slate patio at Ms Collins' unit would have appeared similar to others in the community that had been upgraded by homeowners.

The Declaration of Covenants, Conditions and Restrictions for Thomas Choice, at ¶ 2., requires application and approval for "any exterior addition to, or change, or alteration…" The Thomas Choice Condominium leaflet, "A Guide to Community Living," under the heading "Architectural Control," instructs condominium unit owners, "Before any type of exterior addition or improvement can be made to your homes or yard, you must receive clearance from the Thomas Choice Architectural Control Committee and approval from the Board of Directors." Thus, prior to installation of a new patio an application should have been submitted. Testimony regarding the record keeping at Thomas Choice Condominium was that records have been kept by address for each unit since the first unit was sold. The absence of an application in the appropriate file is evidence that no application was submitted. Thus, the patio is an unapproved alteration or improvement to the limited common element assigned to this unit that was not noted in the Disclosure Statement.

However, the Thomas Choice Condominium By-laws, in Article IV, Section 3, assign maintenance responsibilities to the Board of Directors and to the homeowners. The Board of Directors of the Condominium is responsible for maintenance of improvements originally constructed by the developer in the limited common elements but if an owner installs additional improvements on the limited common elements, the owner assumes responsibility for maintenance of what they have installed. This responsibility remains with successive unit owners.

Regarding maintenance of the limited common and common elements around Ms Collins' unit, the Condominium manager testified that the gutters and downspouts had been replaced and were cleaned out regularly two to four times a year and that the retaining wall next to Ms Collins' unit had been replaced.

Discussion

There was no testimony regarding when Ms Collins became aware that the patio behind her unit was not constructed and installed by the developer and was thus her responsibility.

Under the provisions of Real Property Article, § 11-135 of the Annotated Code of Maryland the Disclosure Statement required to be given to a purchaser by a seller is to include, among other information:

> (4)(a)(ix) A statement as to whether the council of unit owners has knowledge that any alteration or improvement to the unit or to the limited common elements assigned to the unit violates any provision of the declaration, by-laws, or rules and regulations;…
>
> (5) A statement by the unit owner as to whether the unit owner has knowledge:
>
> > (i) That any alteration to the unit or to the limited common elements assigned to the unit violates any provision of the declaration, by-laws, or rules and regulations;….

Neither the Condominium nor the precedent owner disclosed that the original patio constructed by the developer had been replaced without the required application and approval. It is not clear in this record whether the precedent owner knew that the patio construction had been done without approval.

While the Maryland statute requires disclosure of unapproved improvements, which the Association failed to do, the Condominium is not arguing that Ms. Collins' patio violates any provision of the community documents. Despite the fact that no application was submitted and approved, it seems that the Condominium found the appearance of the unapproved patio to be suitable. Disclosure that the patio had been replaced without approval by the Condominium would have put Ms Collins on notice that the patio was a homeowner improvement and thus her responsibility. However, the benefit of such notice is inconsequential since had the proper application and approval process taken place Ms Collins still would not have had the benefit of such notice, unless she inspected the Condominium files. Further, the Condominium is not responsible for the structure or grading of a homeowner installed patio because while in the course of an application and approval the Condominium can review the proposed structure and installation, once approved the Condominium ceases to be responsible and does not oversee the construction or installation to assure the quality of the structure.

The design, grading and installation of a patio replacing the one provided by the developer is the responsibility of the unit owner. This includes taking into account the grading surrounding the patio and the impact that grading may have on the patio.

Ms Collins alleges that the problems with the patio are the responsibility of the Condominium because there has not been adequate maintenance of the area behind her unit. She says that the retaining wall does not prevent water from coming into the area behind her house. As the Condominium engineer pointed out, retaining walls are not intended to control water but to retain earth where there is an elevation. In fact, many retaining walls have "weep" holes to allow water to drain rather than build up behind the retaining wall and undermine its structural soundness. Ms Collins agrees that the gutters and downspout problems have gotten better as they are more regularly cleaned and maintained. It appears at this point that Ms Collins' complaints are a result of the fact that nothing the Condominium has done has solved the problem with her patio. However, once the patio built by the developer had been replaced, the grading, construction and structure of the patio are the responsibility of the unit owner and not of the Condominium.

Conclusions of Law

The grading of the limited common element on which Ms Collins' patio is constructed and the maintenance of the homeowner constructed patio itself are Ms Collins' responsibility in accordance with the Condominium By-laws. The only specific event of maintenance failure resulting in damage that Ms Collins complained of in this record is the January 2001 event for which she has been compensated and for which she has signed a release. Ms Collins otherwise complains generally, but without direct relationship to any damage for which the Condominium is responsible, that the maintenance is inadequate. Testimony on behalf of the Condominium was sufficient to establish that the maintenance in the area is not negligent and Ms Collins has not established that damage to her patio is a result of omission or neglect by the Condominium for which she has not been compensated.

Order

In view of the foregoing and based on the evidence of record, the Commission orders that the Complainant's request for relief is denied. Ms Collins is required to submit an application to the Condominium Association for approval to reconstruct or to construct a new patio. At such time as she submits her application, the Association will also review the grading in the immediate surrounding area and regrade to the extent necessary to prevent the flow of water onto her new patio from the common area immediately surrounding the proposed new patio.

Panel members Sarah Havlicek and Richard Leeds have concurred in the foregoing decision and order.

Any party aggrieved by the action of this 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.

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Dinah Stevens, Panel Chairwoman
Commission on Common Ownership Communities