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

WALTER GOLD Complainant v. **FALLSTONE HOMEOWNERS ASSOCIATION** Respondent	Case No. 66-12 June 28, 2013

DECISION AND ORDER

The above-captioned case came before a Hearing Panel of the Commission on Common Ownership Communities for Montgomery County, Maryland for hearing on May 22, 2013, pursuant to Chapter 10B of the Montgomery County Code ("M.C. Code"). Both parties were represented by counsel. Based on the testimony and documents submitted by the parties and argument of counsel, the Panel finds, concludes and orders as follows.

I. BACKGROUND

Complainant Walter Gold, a unit owner and resident within Respondent Fallstone Homeowners Association (the "Association"), complains that the Association acted without authority in allegedly favoring Beverly Haller with respect to a parking issue. Mrs. Haller is a member of the Association's Board of Directors and she and her husband also own a unit and live within the Association.

Specifically, Mr. Gold complains about the Association's: (1) removal of the fire lane designation on a dead end stub of Hollowstone Drive located next to the Hallers' residence (the "Stub"); (2) repainting the curb at the same location at a cost to the Association of $281.33; (3) allegedly entering into a secret agreement with the Hallers to grant them exclusive parking on the Stub, thereby effectively ceding a common element to private use; and (4) obtaining an unnecessary survey, with stakes, of the Hallers' lot at a cost to the

Association of $800.00. Mr. Gold also claims that these actions were taken without proper notice and without formal votes at open Board meetings, in violation of a prior settlement agreement between him and the Association.

The Association's position is that only the County Fire Marshal, not the Association, determines the location of fire lane designations; that the Association erred when it originally painted the curb to indicate no parking and it was simply correcting that error when it repainted the curb; that there was no secret agreement with the Hallers; that the Stub is owned in fee by the Hallers, subject to easements which the Association and the Hallers will continue to observe; that obtaining the survey was a reasonable action taken on advice of counsel in defense of Mr. Gold's complaint; that the Association acted lawfully when it held closed Board sessions to obtain the advice of counsel; and that all its actions were authorized by vote of the Association's Board at open meetings after proper notice.

There was evidence that three other dead end stubs within the Association are erroneously designated as fire lanes, and that the Association is considering taking similar action with respect to those designations. However, the parties stipulated at the hearing that those designations are not before the Commission and that the only issues for the Panel to decide relate to the Hallers' property.

At the outset of the hearing, the Panel received in evidence, without objection, the Commission's administrative record in this case (CX1) and the addendum to that record (CX2).

Mr. Gold testified in his case-in-chief. He also called Mrs. Haller and Richard Merritt, a unit owner and resident within the Association who regularly attends Association meetings; and Marc Podnos, a Board member. Mr. Gold offered the following exhibits, which were admitted without objection:

* Cmplt. Ex. 1: Declaration of Easement dated 4-6-94 and recorded 4-18-94 at 12533/157.

* Cmplt. Ex. 2: Declaration of Easement dated 4-6-94 and recorded 4-18-94 at 12533/166.

* Cmplt. Ex. 3: Deed to Hallers dated 4-11-11 and recorded 4-29-11.

* Cmplt. Ex. 4: House location surveys dated 3-8-94 and 3-9-11.

* Cmplt. Ex. 5: 8 photographs of the Stub and vicinity.

* Cmplt. Ex. 6: Association meeting notices.

* Cmplt. Ex. 7; Association newsletter, October 2012.

* Cmplt. Ex. 8; Email dated 9-18-12.

* Cmplt. Ex. 9; Letters dated 12-24-12 from Sandra Budock of Quantum Property Management to the Hallers and the owners at the three other dead end stubs.

* Cmplt. Ex. 10; Surveyor's invoice for $800.00.

* Cmplt. Ex. 11; Mediated Agreement between Mr. Gold and the Association.

* Cmplt. Ex. 12; Handyman invoice for $281.33.

* Cmplt. Ex. 13; Newspaper story about a fire in a unit within the Association.

* Cmplt. Ex. 14; Email dated 6-11-12 from Mrs. Haller.

* Cmplt. Ex. 15; Minutes of 9-12-12 Board meeting.

* Cmplt. Ex. 16; Minutes of 10-17-12 Board meeting.

The Association called Dr. Marie LeBaw, a civil engineer employed by the County Fire Marshal; George Place, a surveyor who surveyed the Hallers' lot at the Association=s request; Sandra Budock, who, as an employee of Quantum Property Management, manages the Association's property; and Pamela Cooley, the Association's President. The Association offered the following exhibits, which (except as otherwise noted) were admitted without objection:

* Rspt. Ex. 1: Memo from Mr. Gold to Association residents.

* Rspt. Ex. 2: Subdivision plat of the Association.

* Rspt. Ex. 3: Email dated 3-31-12 from Mrs. Haller.

* Rspt. Ex. 4: Email chain dated 4-24-12 and 4-25-12.

* Rspt. Ex. 5: Email chain involving Mrs. Haller, Ms. Budock and others.

* Rspt. Ex. 6: Email from Mrs. Haller to Ms. Budock and others.

* Rspt. Ex. 7: Email chain dated 5-17-12 and 6-13-12.

* Rspt. Ex. 8: Email chain among Dr. LeBaw, Mrs. Haller and others.

* Rspt. Ex. 9: Fire Lane Establishment Order dated 6-8-94.

* Rspt. Ex. 10: Letter dated 4-12-06 from MCFRS to the Association.

* Rspt. Ex. 11: 7 photographs of Stub and vicinity.

* Rspt. Ex. 12: Association budgets, 2010, 2011, 2012 and 2013.

* Rspt. Ex. 13: Invoices from the Association's attorneys (admitted over objection).

* Rspt. Ex. 14: Association meeting notices.

* Rspt. Ex. 15: Easements relating to Stub and three other dead end stubs.

* Rspt. Ex. 16: Affidavit of the Association's attorney (admitted over objection).

During closing argument, the Association requested an award of attorneys' fees. The Panel ordered that the record remain open to allow the parties to brief the attorney's fee issue. Briefs have since been filed and considered by the Panel.

II. FINDINGS OF FACT

1. The Association is a homeowners association, as defined in the Maryland Homeowners Association Act, Md. Code, Real Prop. Section 11B-101, and it is a common ownership community as defined in M.C. Code Section 10B-2(b).

2. The Association consists of 115 single-family townhouses located in North Bethesda, Maryland, built in 1994.

3. The Association's Declaration of Covenants, Conditions and Restrictions, recorded 4-16-93 (CX1 at 21), contains the following provisions:

Section 1.2. "Common Area" shall mean all real property owned, leased or maintained by the Association (including improvements thereon) for the common use and enjoyment of the Owners. Notwithstanding the foregoing, in the event the Association maintains all or any portion of any Lot(s), such property shall not be considered a Common Area.

Section 3.1. Owner's Easements of Enjoyment. Every Owner shall have a right and easement of enjoyment in and to the Common Area, including an easement for the use and enjoyment of the private streets and parking lots and walkways within the Common Area, which shall be appurtenant to and shall pass with the title to every Lot . . ..

Section 7.4. Parking. Parking within the Property shall be subject to the following restrictions: (a) The Association shall be entitled to establish supplemental rules concerning parking on any portion of the Common Area and Lots . . ..

Section 8.2. Association Maintenance. The Association shall maintain and keep in good order the Common Area . . .. In addition, the Association shall maintain and keep in good repair rights-of-way, entry strips and entrance features or improvements, whether owned as part of a Lot or dedicated for public use . .

4. The Association is professionally managed by Quantum and its employee, Ms. Budock. Quantum has been the Association's property manager since 2004.

5. The Association's annual budget is more than $210,000.00.

6. Quantum has been granted authority to spend up to $500.00 of Association funds without Board approval.

7. The Hallers purchased a unit on Hollowstone Drive within the Association, designated as Lot 24, in 2011. They continue to reside there.

8. Mr. Gold is an original owner within the Association and he has resided there since 1994.

9. In 2008, following his filing of an earlier complaint with the Commission, Mr. Gold and the Association entered into a written Mediated Agreement (Cmplt. Ex. 11), which provides in pertinent part as follows:

> Notification of any upcoming community wide financial and or punitive proposal will be made by including a clear description of the proposal in the proposed agenda for the next Board meeting at which the subject will be discussed and adopted. The proposed agenda will be made available on the community's website prior to the meeting. The mailed notice will include a reference to the subject matter of the proposal to be discussed and adopted.

10. All the units within the Association, including the Hallers' unit, have two-car garages and driveways wide enough to accommodate two cars. Historically, parking spaces within the common area have not been assigned to specific unit owners.

11. Although the Hallers' driveway is wide enough to accommodate two cars, it is too short to accommodate the length of a full-sized car. All the other driveways in the Association are long enough to accommodate full-sized cars.

12. Hollowstone Drive is a private roadway within the Association. Hollowstone Drive is maintained by the Association and, except as described below, is owned by the Association as a common element.

13. The Stub runs approximately east and west, dead-ending at the western end. The western end of the Stub is part of the Hallers' Lot 24, owned in fee by the Hallers. Ex. 4, p. 2; Rspt. Ex. 11, pp. 1 and 3.

14. The spray-painted marks on Rspt. Ex. 11 show the easterly boundary of Lot 24 as determined by George Place, the surveyor hired by the Association. [1]

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[1] The parties agreed at the hearing that the western end of the Stub, as marked by the Place survey, is part of Lot 24 owned in fee by the Hallers, so that title to the Stub was not in issue. The Commission does not have jurisdiction to resolve title disputes. M.C. Code Section 10B-8(5)(A).

15. Not only do the Hallers own the paved portion of the Stub, they also own a portion of the grassy strip to the south of the Stub, adjoining Lot 23, and a corner of the driveway that serves Lot 25.

16. The Stub is subject to two easements, Cmplt. Ex. 1 and 2, made by the original developer of the Fallstone subdivision. [2]

17. The easement marked as Cmplt. Ex. 1 grants to the owners of Lots 24, 25 and 26 a perpetual, non-exclusive right of passage across the Stub for purposes of vehicular and pedestrian ingress and egress to and from their lots. The easement prohibits parking of vehicles, except for "temporary parking as may be reasonably necessary in connection with the loading or unloading of vehicles." The easement authorizes and requires the Association to maintain Hollowstone Drive, including the Stub portion of Hollowstone Drive owned by the Hallers.

18. The easement marked as Cmplt. Ex. 2 grants to the owner of Lot 25 a perpetual, non-exclusive right of vehicular parking on and across the portion of Lot 24 that constitutes a part of Lot 25's driveway.

19. The Hallers' deed (Cmplt. Ex. 3) conveys Lot 24 to the Hallers "subject to all . . . easements and rights of ways as contained in deeds and instruments forming the chain of title to" Lot 24.

20. At the time the Hallers bought Lot 24, the western end of the Stub was marked as a fire lane. Specifically, a sign was posted there which read, "NO PARKING FIRE LANE," and the curb was painted yellow. The Association had placed the sign and painted the curb pursuant to an order of the Fire Marshal.

21. The designation of the western end of the Stub as a fire lane was based on a 2006 Fire Marshal order that had not in fact been properly adopted. The only relevant Fire Marshal order that is in effect is dated June 8, 1994; it does not designate the Stub as a fire lane.

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[2] The two easements were created by the developer and recorded after the Association's Declaration was recorded. No party questioned the validity or enforceability of the easements and the Panel will not do so either.

22. Mr. Gold testified that, in his opinion, the western end of the Stub should be designated as a fire lane. Dr. LeBaw, from the Fire Marshal's office, testified that in her professional opinion, the western end of the Stub need not be designated as a fire lane. Dr. LeBaw further testified that the matter is now under review by the Fire Marshal. The Panel makes no finding on this issue.

23. After the Hallers purchased Lot 24, they engaged contractors to perform various work at their unit. Mrs. Haller became concerned whether the contractors' vehicles could be parked at the western end of the Stub while the contractors were working at her unit. Mrs. Haller's inquiries to the Fire Marshal prompted a review and the eventual determination that the fire lane designation was in error.

24. After the Fire Marshal's office confirmed to the Association that the fire lane designation was in error, the Association removed the "NO PARKING FIRE LANE" sign and it repainted the curb white, at the cost of $281.33.

25. Ms. Budock authorized the $281.33 expense based on Quantum's authority, without obtaining specific Board approval.

26. In October 2012 the Association proposed adopting new parking rules. Among the proposed new rules were the following:

> 2. Owners/residents are required to park in their garage, driveway or assigned space.
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> * * *
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> 14. Fallstone residents shall not harass, restrict, confine, or ticket alleged parking violators.

27. Mr. Gold filed his complaint in this matter in November 2012.

28. The Association, through Quantum, engaged a surveyor in the spring of 2013 to survey and stake the Hallers' lot at the cost of $800.00. Cmplt. Ex. 10.

29. The only minutes of Board meetings offered in evidence were those from the September 12, 2012 and October 17, 2012 meetings (Cmplt. Ex. 15 and 16). Those minutes do not reflect any formal Board action relating to Lot 24 or the fire lane designation on that Lot. The only mention of those matters is a comment made by Mr. Gold at each of the meetings.

30. Both parties offered copies of notices of Board meetings. Cmplt. Ex. 6; Rspt. Ex. 14. The following notices appear to be relevant to the matters at issue here:

* 2-23-12 notice: "parking rules"

* 4-28-12 notice: "restriping of parking lot and painting fire lanes"

* 6-12-12 notice: "Review of Revised Parking Regulations" and "fire lane discussion/new information"

* 9-12-12 notice: "Review of Revised Parking Regulations"

* 3-20-13 notice: "CCOC Complaint Status"

31. There is no agreement between the Association and the Hallers purporting to allow the Hallers to park on the Stub.

III. CONCLUSIONS OF LAW

A. Mr. Gold's Complaints

Addressing Mr. Gold's complaints in turn, the Panel concludes as follows:

1. Removing the Fire Lane Designation

The evidence is abundantly clear that only the Fire Marshal determines what is and what is not a fire lane. See COMCOR ' 49.5.2.2 ("The Fire Marshal may require the designation of one or more fire lanes on roads to ensure adequate Fire and Rescue Service apparatus access"). In this case, the Fire Marshal determined that the Stub was not properly designated as a fire lane and it authorized removal of the sign and curb markings.

Mrs. Haller appears to have been the moving force in focusing the Fire Marshal's attention on the Stub. She did so because of Mr. Gold's interference with her contractors, who parked on the Stub while working at her home. Her initial contact with the Fire Marshal's office was simply to ask how long a service vehicle could remain there consistent with a fire lane designation. That inquiry prompted a review by the Fire Marshal and a determination that the Stub had been erroneously designated. Mrs. Haller had a right to contact government offices and pursue the issue as she did.

The Association's only involvement was complying with the Fire Marshal's determination. The Association bears no liability to Mr. Gold for that determination.

2. Repainting the Curb

In general, the Association has no authority to maintain property that is not part of the Association's common elements. But in this case, the Association is bound by an easement to maintain the Stub. Repainting the curb was consistent with its maintenance obligation.

Apart from the Association's maintenance obligation, the Panel would deny any relief to Mr. Gold regarding the $281.33 expenditure because "[t]he law does not concern itself with trifles." *Echard v. Kraft,* 159 Md.App. 110, 120 (2004).

3. Entering into Secret Agreement to Cede Common Element

The only direct evidence of an agreement between the Board and Mrs. Haller was hearsay testimony by Mr. Gold. That evidence was rebutted by the Association's President, by Mrs. Haller, and by the property manager, each of whom denied any agreement.

There was circumstantial evidence that an agreement may have been in the works at one time. As found above, the Hallers cannot park in their driveway, as do other unit owners. According to the Association's motion to dismiss filed in this case (CX1 at 8), "because the [fire lane] curb markings and signage prevented the Hallers from using the dead-end area for parking, they wanted the signs and curb markings removed." In addition, since parking at the far end of the Stub would not interfere with any other owner's access and was no longer prohibited by the Fire Marshal, such an arrangement would not seem unreasonable. With that background, the Association's October 2012 newsletter (Cmplt. Ex. 7) announced new parking rules to be considered by the Board at its next meeting, one of which states: "Owners/residents are required to park in their garage, driveway or *assigned space*" (emphasis added). One might infer that "assigned space" referred to the far western end of the Stub.

There appears to have been some confusion as to who controlled the Stub. Ms. Budock, the property manager, testified that Mr. Gold told her the Association should not plow snow on the Stub, implying that he would take some action against the Association if it did. Ms. Budock then contacted the snow plowing contractor and learned that it would cost more *not* to plow the Stub, because the Stub is used to dispose of plowed snow. At that point, Ms. Budock sent a letter to the Hallers, as well as the other three stub owners (Cmplt. Ex. 9), asking for permission to continue plowing the Stub. The letter was sent apparently without

recognizing that an easement *requires* the Association to maintain the paved portion of the Stub.

As late as December of 2012, the Association apparently still did not recognize the impact of the easement. In its motion to dismiss (CX1 at 8), the Association represented to the Commission that "[n]o decision has been made by the Association or its Board of Directors regarding future maintenance, repair and replacement in the dead-end areas."

In the end, no agreement was or could have been reached. The parties now recognize that the Hallers own the Stub, the paved portion of which is subject to an easement for the benefit of the Association and other lots, and subject to a maintenance obligation by the Association. That recognition came about at least in part because of Mr. Gold's complaint.

4. Obtaining the Survey

Mr. Gold argued that the survey was unnecessary and that it benefitted only the Hallers. Therefore, the Hallers should reimburse the Association for the $800.00 cost. The Association responded that the survey was obtained on advice of counsel in an effort to clarify the issues before the Panel, and after a vote of the Board at an open meeting.

It is not clear that the survey issue is properly before the Panel, since the survey was obtained long after Mr. Gold filed his complaint. In any event, the survey was indeed helpful in understanding the issues. Even if it had turned out not to be helpful, it was still within the Association's business judgment to obtain it. See *Black v. Fox Hills North Community Ass'n.*, 90 Md.App. 75 (1992) (applying business judgment rule to insulate corporate decision from attack). *Accord, Reiner v. Ehrlich,* __ Md. App. __, 2013 WL 2338476 (No. 33, decided May 29, 2013).

Finally, the relief sought by Mr. Gold on this issue (an order that Mrs. Haller reimburse the Association for the survey cost) is beyond the Panel's authority because Mrs. Haller is not a party to this case.

5. Violating Mediated Agreement

The Mediated Agreement (Cmplt. Ex. 11) requires the Association to notify its members about "any upcoming community wide financial and or punitive proposal [that] will be made by including a clear description of the proposal in the proposed agenda for the next Board meeting at which the subject will be discussed and adopted." Mr. Gold contends that the Board's de-designating the Stub as a fire lane, entering into a secret agreement to cede

property to the Hallers, repainting the curb, and obtaining a survey of the Hallers' property with stakes, did not comply with this requirement.

Mr. Gold had the burden of showing that the Association's actions violated the Mediated Agreement. However, neither he nor the Association offered any evidence or argument as to the meaning of "community wide financial and or punitive proposal." In the absence of any guidance other than the Mediated Agreement itself, the Panel concludes that a "community wide financial . . . proposal" is a proposal to adopt a budget, to raise homeowner assessments generally, or to incur a major expense. The Panel further concludes that none of the challenged Association actions was "punitive."

As shown above, the Association neither designated nor de-designated the Stub as a fire lane. Similarly, the Association did not enter into an agreement, secret or otherwise, to cede Association property to the Hallers.

The decision to incur the $281.33 repainting cost did not, in the Panel's view, involve a "community wide financial . . . proposal" as the Panel understands that phrase.

Finally, as to the $800.00 survey, the Association offered evidence that the proposal was first made by its counsel in a Board session that was closed to obtain legal advice regarding the Gold complaint. Thereafter, according to the Association, the proposal was brought before the Board at its March 2013 meeting and voted on in open session. Neither party offered the minutes of that meeting and the Panel makes no finding as to whether a discussion and vote occurred as claimed. It does appear that the general topic of "CCOC Complaint Status" was included in the notice of the meeting. See Rspt. Ex. 14.

The Panel concludes that the survey cost, along with numerous other expenses incurred by the Association's counsel in defending Mr. Gold's complaint, was a normal part of the defense process, and that it was proper to consider that issue in closed session. It was not a "community wide financial . . . proposal" as the Panel understands that phrase. Therefore, it is immaterial whether the meeting notice, which simply said "CCOC Complaint Status," satisfied the "clear description" requirement of the Mediated Agreement.

The Panel notes that the Association may not have complied with the Maryland Homeowners Association Act, Md. Code, Real Prop. Section 11B-111, when going into closed session. That Code section specifies the procedures to be followed. The Association is reminded that those procedures are mandatory.

B. Attorneys' Fees

M.C. Code Section 10B-13(d) allows an award of reasonable attorneys' fees if an association's governing document so requires, or if a party delayed proceedings or pursued a frivolous dispute in bad faith. In this case, the Association relies on the delay/frivolous/bad faith prong of the statute.

As stated above, an agreement between the Board and Mrs. Haller may well have been in the works which, if consummated, would have violated the vehicle access easement (Cmplt. Ex. 1). It was Mr. Gold's pursuit of this case that ultimately brought the facts to light. Had this case gone to mediation, and had the easement been before the parties at that time, perhaps the case could have been resolved without incurring additional legal fees. But no mediation took place because the Association wanted to stand on its motion to dismiss.

Some of the issues Mr. Gold continued to advance (the $281.33 repainting and an order that Mrs. Haller reimburse the $800.00 survey expense) border on the frivolous. But in the Panel's view, they do not warrant an award of attorneys' fees.

IV. ORDER

It is, therefore, by the Panel, this 28th day of June, 2013, ORDERED as follows:

1. The Association must maintain the paved portion of the Stub consistent with the easement dated 4-6-94 and recorded 4-18-94 at 12533/157.

2. Mr. Gold is prohibited from personally harassing, confining, or otherwise interfering with alleged parking violators at the Stub. Any complaints Mr. Gold may have concerning parking or other use of the Stub must be addressed to the Association=s Board, its officers, its property manager, or other person designed by the Board to receive such complaints.

3. The Association's request for attorneys' fees is DENIED.

4. Mr. Gold's request for an award of his $50.00 filing fee is DENIED.

5. All other requested relief is DENIED .

6. Nothing in this Order is intended to change or nullify the Mediated Agreement between Mr. Gold and the Association.

7. Nothing in this Order is intended to prevent the parties in interest from amending the easements in accordance with the terms of the easements, the Association's governing documents and applicable law.

8. The Association must, within 60 days following the date of this Decision and Order, deliver copies of this Decision and Order to all unit owners within the Association.

Panel members Ken Zajic and Richard Brandes concur in this Decision and Order.

Any party aggrieved by the action of the Commission may file an administrative appeal to the Circuit Court for Montgomery County, Maryland within thirty days after this Order, pursuant to the Maryland Rules of Procedure governing judicial review of administrative agency decisions.

Charles Fleischer

Charles H. Fleischer, Panel Chair