Before the
Commission on Common Ownership Communities
Montgomery County, Maryland

In the Matter of:	
Decoverly I Homeowners Association	
Complainant,	
v.	Case No. 69-06
	May 31, 2007
William Kidd and Kathleen Jens	
Respondent	

DECISION AND ORDER

The above-entitled case came before the Commission on Common Ownership Communities for Montgomery County, Maryland, for hearing and arguments on March 21, 2007, 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

Decoverly I Homeowners Association (Complainant) filed a complaint with the Office of Common Ownership Communities on October 6, 2006. Complainant alleged the following:

1. William Kidd and Kathleen Jens (Respondents) removed a balustrade from the front of their unit in Decoverly I – 10104 Sterling Terrrace, Rockville, Maryland – without submitting an architectural change request or receiving permission from Complainants' Board of Directors (Board).
2. Pursuant to its authority as a governing body to require action involving a unit in Decoverly I, Complainant can order Respondents to reinstall the balustrade.

Complainant requested that Respondents be required to reinstall the balustrade.

Findings of Fact

Respondents testified that there was evidence of roof leaks in the unit when they purchased it in 2000. Respondents added caulk around the balustrade, and the home inspector accepted that as sufficient. Respondents noted additional water damage in 2002. Respondents paid a contractor to repair the roof and permanently remove the balustrade, as the contractor indicated he could not provide a warranty for the repairs if the balustrade was reinstalled. Respondents stated that they did not apply for an architectural change for the balustrade.

Respondents also stated that they should have known about the application process because Respondent Mr. Kidd was previously a member of the Architectural and Environmental Review Committee (AERC).

The Complainant's current Managing Agent testified that he had inspected Respondents' unit at 10104 Sterling Terrace and determined that it was in violation of Article VII of Respondent's Declaration of Covenants, Conditions and Restrictions regarding architectural control and use restrictions because the balustrade had been removed. The Managing Agent stated that letters were sent to Respondents by his predecessor in June, August, and October 2003, notifying Respondents of the architectural violation for removing the balustrade. He stated that at some point in 2003, after the first letter had been sent, his predecessor gave Respondents oral approval to modify their unit by removing the balustrade. However, this was not the standard procedure for architectural changes, and the previous Managing Agent did not have the authority to grant such a change.

Complainant's current Managing Agent sent a final notice of violation to Respondents in March 2005 after beginning to work through Complainant's backlog of unresolved violations. Final notices of violation were sent to Respondents from Complainant's law firm in May 2005, October 2005, and January 2006. Respondents attended the January 2006 Board meeting to raise the issue of the balustrade. Per Complainants' procedure, Respondent was required to request in writing reconsideration of an architectural decision for the matter to be considered at a Board meeting. Respondents attempted to send a letter to the Managing Agent in February 2006 asking the Board to reconsider the decision. However, Complainant did not receive the letter in advance of the February 2006 Board meeting. Minutes of the February 2006 Board meeting indicated the Board had not seen Respondents' letter and that the Board would respond after reviewing the letter.

Respondents' letter of February 2006 stated that the part of the roof with the balustrade had to be repaired because of leaks in November 2002. Respondents further stated that the roofing contractor would not provide a warranty for repair work if the balustrade had to be reinstalled because of a design flaw associated with the balustrade. Respondents asked the roofing contractor to slope the roof to match the roof over the unit's front door. Respondents asked the Board to reconsider its decision to order the balustrade reinstalled.

The minutes of a March 2006 "Special Meeting," or "Executive Session," by Complainant's Board stated the Board's view that it had reviewed the decision regarding Respondents' balustrade and affirmed its position that the balustrade needed to be replaced. Respondents were not present during the Special Meeting.

Minutes of the June 2006 Board Meeting state that the Board received an e-mail that evening from Respondents (via Complainant's Managing Agent) asking the Board to reconsider the decision regarding the balustrade. Respondents' e-mail specifically requests that the matter be considered with Respondents present and states that Respondents would not be able to attend the June 2006 meeting but could attend the July 2006 meeting. The Board reaffirmed its decision to require the balustrade to be reinstalled. Respondents were not present at the meeting.

Respondents testified that they had informed Complainant's Managing Agent in advance that they would not be able to attend the June 2006 meeting.

At the July 2006 Board meeting, which was open to all homeowners, the Board reaffirmed its decision that Respondents' balustrade needed to be reinstalled. Respondents attended this meeting but were not permitted to provide any information about the conditions leading to their decision not to reinstall the balustrade. Respondents testified that between the February and July 2006 meetings that the Board President promised Respondents an opportunity to present such information to the Board.

Complainant's Board President testified that 23 units in Decoverly I were originally built with balustrades and that all units but Respondents' still have balustrades installed. He stated that the balustrade is considered a significant architectural feature of all the units with balustrades. Complainant presented pictures of units in Decoverly I with and without balustrades to demonstrate the architectural significance. Complainant's view that the balustrades are architecturally significant was not disputed by Respondents. Seven units have balustrades on the third floor, and 16 have balustrades over a second floor window, as in the case of Respondents' unit. The Board President also stated that maintenance of the caulk around the balustrades is sufficient to prevent roof leaks.

Complainant's Board President further testified that: an AERC for Decoverly I was formed in 2000; there was no AERC from late 2001 to late 2002; and the AERC was reestablished by the Board President in late 2002. He also stated that the Board decided not to attempt mediation of this matter during an Executive Session. A letter from Respondents to Complainant dated November 2006 specifically requests that Complainant participate in mediation of the matter.

At the conclusion of its case, Complainant requested the Panel order Respondents to reinstall the balustrade on the unit. Complainant also requested $2,608.50 in attorney's fees and costs and submitted an affidavit detailing the fees and costs incurred.

Conclusions of Law

Architectural Violation

The Panel agrees with Complainant that Respondents' removal of the balustrade could be considered a violation of Article VII of Complainant's Declaration of Covenants, Conditions and Restrictions regarding architectural control and use restrictions. Section 1 of Article VII states that no exterior change shall be made "until the complete plans and specifications showing the location, nature, shape, height, material, color … shall have been submitted to and approved in writing as to harmony of external design, color and location in relation to surrounding structures and topography and conformity with the design concept for the community by the Board of Directors of the Association or by an Architectural and Environmental Review Committee." The Respondents never submitted a change request regarding the balustrade.

However, the Panel believes that while Respondents failed to meet the association's requirements, Complainant bears some responsibility for this long-standing dispute and has not followed its own procedures. First, Complainant allowed the condition of Respondents' unit to exist unchallenged from October 2003 to March 2005. Second, Complainant never gave Respondents due process by permitting Respondents an in-person opportunity to discuss with the Board the reasons for removing the balustrade. The Board would not consider Respondents' request to reconsider the decision about the balustrade at the February 2006 meeting because it had not received Respondents' letter in advance. The Board then reaffirmed its decision at a March 2006 Executive Session without Respondents present. Despite Respondents' specific request to be present when the matter was being considered and a statement in advance that they could not attend the June 2006 meeting, the Board again reaffirmed its decision at the June 2006 meeting. The Board reaffirmed its decision about the balustrade a third time at the July 2006 meeting without permitting Respondents an opportunity to present information, even though Respondents were present. This is clearly not a fair and reasonable approach.

Section 7 of Article VII, "Appeals," states that any homeowner "dissatisfied with a decision of the Architectural and Environmental Review Committee may, within fifteen (15) days after the rendering of such decision, make an appeal thereof to the Board of Directors. Not less than fifteen (15), nor more than sixty (60), days after the noting of such an appeal, the Board of Directors shall conduct a hearing thereon." While Respondents did not specifically request such a hearing, the Panel believes that Respondents' repeated requests to present information to the Board about the balustrade is sufficient to meet the requirement for an appeal request. As noted, the Board never afforded Respondents an opportunity to provide information to the Board. Thus, the Panel believes Complainant has not followed its own procedures regarding architectural violation disputes.

Orders

Based on the evidence of record and the reasons stated above, it is ordered that within thirty (30) days after the date of this decision, Respondents may make a request in writing to Complainant's Board of Directors for an architectural violation appeal hearing in accordance with Section 7 of Article VII of Complainant's Declaration of Covenants, Conditions and Restrictions. If Respondents make such a request, Complainant must conduct an appeal hearing in accordance with Section 7 of Article VII. Complainant must submit the record and decision from the hearing to Respondents and the staff of the Commission on Common Ownership Communities no later than thirty (30) days after the hearing. If Respondents do not wish to request a hearing, they must submit in writing a letter to that effect to Complainant's Board and to the staff of the Commission on Common Ownership Communities within 30 days after the date of this decision.

The Panel will retain jurisdiction over this matter and render a final decision and order after the Respondents have had an opportunity to request a hearing within the timeframe stated above and the Complainant has notified the Respondent of the outcome of the hearing if the Respondents requested one.

Commissioners Vicki Vergagni and Kevin Gannon concurred in this decision.

Douglas Shontz, Panel Chair
Commission on Common Ownership Communities