Before the

Commission on Common Ownership Communities
Montgomery County, Maryland

In the matter of:

Ricardo Bodmer	x	
and	x	
Magda Bodmer	x	
12618 Tartan Lane	x	
Fort Washington, Maryland 20744	x	
Complainants,	x	
	x	
v.	x	**Case No. 69-10**
	x	July 31, 2013
Potomac Meadows Homeowners	x	
Association	x	
c/o Sean Suhar, Esquire	x	
147 Old Solomon Road, #400	x	
Annapolis, Maryland 21401	x	
Respondent.	x	

DECISION AND ORDER

The above-captioned case came before the Commission on Common Ownership Communities for Montgomery County ("CCOC"). Pursuant to Chapter 10B of the Montgomery County Code, 1994, as amended, the duly authorized Hearing Panel ("the Panel") considered the testimony and evidence of record, and finds, determines, and orders as follows:

Background

Ricardo Bodmer and Magda Bodmer (the"Complainants") are the owners of the property improved by 11806 Filly Lane, North Potomac, Maryland (the"Bodmer Property"). The Property is located within, and the Complainants are members of, The Potomac Meadows Home Owners Association (the"HOA" or the"Respondent"). The Complainants do not reside at the Property and instead operate it as a rental property.

The Complainants filed a Complaint (the"Complaint") with the CCOC against the Respondent on or about August 2, 2010. The Complainants alleged that their neighboring owner, Donald Stinson ("Stinson"), the owner of 11808 Filly Lane, North Potomac, Maryland (the"Stinson Property") was violating the HOA's Declaration of Covenants, Conditions and Restrictions ("Declaration"), Architectural Guidelines and Review Procedures ("Guidelines") and/or other rules by: (i) planting, sometime in, or before, the year 2003, a tree that was too close to the lot line separating the properties and subsequently maintaining that tree, which now encroaches upon the Bodmer Property; (ii) allowing a sign in his back yard that was not related to the rental or sale of the property; (iii) maintaining junk and vegetable plants in the front of his

property; and (iv) installing and/or maintaining a wire mesh that was affecting the common gutter for three townhouses in the Potomac Meadows community. The Complainants further contended that the Respondent had failed in its duties under the Declaration of Covenants and the Bylaws to enforce the Respondent's governing documents against Mr. Stinson.

The Respondent answered the complaint by filing an Answer, Motion to Dismiss for Lack of Jurisdiction and Request for Attorney Fees. The basis for the Respondent's motion was that the Board of Directors had made a good faith determination that the tree issue was a purely private matter to be resolved by and between the Complainants and Mr. Stinson and thus there was no "dispute" to be resolved over which the Commission had jurisdiction. The Montgomery County Code, Section 10B-8 (5) (E), provides that a "dispute" does not include the exercise of a governing body's judgment or discretion in taking or nor deciding not to take any legally authorized action. Thereafter, the Respondent filed an Amended Answer, arguing that the Board's decision not to take additional action did not constitute bad faith and that the Respondent's decision was protected by the "business judgment rule" as defined in *Black v Fox Hills North Community Association, Inc.*, 90 Md. App. 75, 599 A2d 1229 (1992).

The CCOC accepted jurisdiction over this dispute because it alleged the failure of the governing body, when required by law or association documents, to exercise its judgment in good faith concerning the enforcement of association documents against any person who is subject to those documents, *see* Section 10B-8 (4) (B) (viii) of the Montgomery County Code. The Commission denied the motion to dismiss on the grounds that the Respondent did not make a convincing showing in its Answer and Motion that it had, in fact, exercised its judgment in response to the claims made by the Complainants.

Summary of the Evidence

1. At the outset of the hearing, Complainants conceded that the issue of accumulated trash in the rear yard of the Stinson Property had been resolved as a result of an alleged District Court action against Mr. Stinson and the alleged intervention of County housing code enforcement inspectors.

2. Complainants also testified that Stinson complied only intermittently with the rules against signage as he replaced the signs from time to time. In addition, the Complainants alleged that Stinson placed wire netting barriers on his portion of the common gutters that prevented water from reaching the downspouts and which caused Complainants' portion of the gutters to overflow.

3. Complainants provided evidence to show the history of this dispute. Beginning in April 2003, Complainants first complained orally to Respondent about the existence of trash and stored equipment in Stinson's rear yard. (Commission Exhibit 1 at 13, hereinafter "CE1.) They also complained about a tree Stinson planted close to the fence in the front yard. Complainants claimed there was no response and the record shows no evidence of a response.

4. Complainants wrote to the Respondent in August, 2004, again complaining about trash and the tree. This letter included photographs showing the existence of a tree, approximately 12 feet tall, almost all of which was hanging over the fence into the Complainants' yard, with signage, large amounts of trash and stored items in the rear yard and numerous planting boxes in the front yard. (CE1 at 15-17.) Complainants claim they received no response and there is no evidence of a response to this letter in 2004 or 2005.

5. In November, 2006, Respondent wrote to Mr. Stinson to inform him that he had planted a tree without permission and must remove it, and it followed up with a reminder in November, 2006. (Respondent's Memorandum of August 16, 2012.)

6. Complainants made oral complaints to the Respondent in 2007 on the same topics. There is no evidence that the Respondent took any action in response to those complaints or to follow up on its November, 2006, notice to Stinson.

7. On April 22, 2009, Complainants again wrote to Respondent about the conditions in the Stinson Property, including the tree, the blockage of the gutters, and the signage. (CE1 at 18-19, Respondent's Memorandum of August 16, 2012.)

8. On August 27, 2009, the Respondent wrote to Stinson, reminding him of the November, 2006 notice to remove the tree and telling him to remove all signs, not to obstruct the gutters, and to remove the tree. (Respondent's Memorandum of August 16, 2012.) Shortly thereafter, on August 29, 2009, the Respondent notified the Complainants that "we have already taken the appropriate measures to have the homeowner of 118081 Filly Lane comply with any and all violations concerning this home. In regards to the tree we will have the landscaper remove it if we do not hear from the homeowner before Wednesday, September 2, 2009." (CE1 at 20.) It followed this letter up with a reminder on September 24, 2009 (Respondent's Memorandum of August 16, 2012.) However, in a later letter of December 2, 2009, the association's manager informed the Complainants that "[T]he Board has carefully reviewed the matter between you and Mr. Stinson and has determined that this is a matter best resolved between homeowners." (CE1 at 21.) The letter did not state what action the Respondent would take about the other alleged violations on the Stinson Property.

9. The Complainants answered the December, 2009, notice with a letter dated April 23, 2010, alleging that Mr. Stinson was still maintaining a "NO TRESPASING[sic] PRIVATE PROPERTY" sign in his backyard, that the tree was one of the reasons that the Complainants' tenants had vacated the Bodmer Property, and that in their litigation with Mr. Stinson the District Court had stated that "any matters with the tree and signs is a mater [sic] between you and your homeowner's association."

10. On April 20, 2010, the Respondent wrote to Stinson to tell him to remove the trash and stored items from his rear yard. This brought forth a letter from the Complainants to the Respondent reminding it of the complaints about the tree and the signage. There is no evidence of any follow-up by the Respondent to this letter.

11. On August 2, 2010, the Complainants filed this complaint, alleging the existence of the tree, the signage, junk and debris, vegetable gardens in the front yard, and the obstructed gutter. They followed this up on August 14, 2010, with an amendment alleging the existence of numerous planting boxes in the front yard, and alleged that all of these conditions were violations of the Respondent's governing documents.

12. On June 20, 2011, Respondent's attorney wrote to the Stinsons and stated that "[y]ou did not submit an application or receive approval to plan a tree in your front yard in violation of Article II, Section D96) of the Guidelines which required approval for all trees to be planted by owners." This letter also alleged that the Stinson Property violated Article II, Section D(4) of the Guidelines by having flower pots and other gardening materials in the front yard which were not well maintained and orderly as required by Article II, Section F; that there was trash and debris on the lot in violation of the Declaration of Covenants, and that there was an obstructed gutter in violation of Article IV, Section A of the Guidelines.

13. On July 23, 2011, the Complainants asked for a hearing with the Respondent's Board of Directors on all outstanding issues. By that time the Complainants had refused to pay their monthly assessments, alleging as cause the Respondent's ongoing failure to enforce its rules, and the Respondent had initiated collection actions against them. The Respondent did not agree to a hearing.

14. On August 5, 2011, the Respondent notified the Complainants that "your" tree constituted a rule violation and that the Complainants must remove it. A month later, the Respondent admitted that this letter was sent in error.

15. The Architectural Guidelines of the Respondent (Commission Exhibit 1 at 36-46, hereinafter referred to as "CE1") state the following:

> a) vegetable gardens can be located only in the rear of each lot;
> b) planting boxes are allowed only at the entrance to the house or under the windows;
> c) no trees can be planted without prior approval;
> d) no signs are allowed except for temporary "for sale" purposes;
> e) no trash or junk can be stored on the lots.

16. The Architectural Guidelines of the Respondent also state that if the Respondent issues a violation notice which receives no response, then the Respondent shall hold a hearing on the issue (CE1 at 49) and that other members of the community have the right to attend that hearing and present evidence (CE1 at 50).

17. The Respondent's initial answer to the complaint, filed on August 25, 2010, claimed that the tree dispute was a private dispute in which the Board of Directors had decided not to become involved. The answer provided no evidentiary support for this claim, such as minutes of board meetings, or the date the decision was made, etc. In addition the answer ignored all the rest of the violations alleged by the Complainants.

18. The Respondent, now represented by different counsel, filed an amended answer on March 11, 2011, again claiming the protection of the business judgment rule and stating that "[o]bviously the Board is aware of the Bodmers' complaints and has made a decision to not take any additional action." (CE1 at 67.) Again, however, there was no evidence presented to support the claim that the Board had made a decision or to provide a basis for this alleged decision.

19. At the hearing, Debra Mullins, who then was and who then had been a member of the Board of Directors for approximately 12 years, testified that the August 29, 2009, letter was sent because the Respondent had originally believed the tree was on the Complainants' property. However, a subsequent report from the Respondent's landscaper concluded the tree was on the Stinson Property, so as a result, the tree was not cut down and the matter was considered a private dispute. She also testified that she inspected the Stinson Property regularly and was not aware of any violations although she did notice some potted tomato plants. Finally, she testified that she assumed Stinson had a permit for the tree.

20. Another Board member, Valentien Nikki, testified that she had not received other complaints about the Stinson Property and that the Board was reluctant to spend money on minor violations.

21. At the conclusion of the hearing, the record was left open for the limited purpose of allowing Respondent to provide records of a permit for the Stinson tree and of the relevant Board meeting minutes referring to Complainants' complaints, and also for the purpose of allowing Complainants to present photographs of the current condition of the Stinson Property. Respondent did not file anything. Complainants filed responsive photographs.

22. Respondent submitted a Memorandum dated August 16, 2012, in which it argued that the Complainants claims were barred by a three-year statute of limitations. It did not raise this issue in its answers or at the hearing.

Findings of Fact

1. The Complainants are members of the Potomac Meadows Homeowners Association. The neighboring lot, the Stinson Property, is also part of the Potomac Meadows Homeowners Association and subject to its governing documents. The Respondent is a homeowners association within the meaning of Chapter 11B of the Real Property Article of the Code of Maryland.

2. Beginning as early as 2003, the Complainants complained to the Respondent that the Stinson Property contained a collection of trash and a recently-planted tree that hung over the fence into the Property. They reiterated this complaint a year later, adding new claims about signs posted in the Stinson Property and the existence of numerous planting boxes in the front yard of the lot, all of which Complainant claimed were violations of the Respondent's Declaration of Covenants or Architectural Guidelines.

3. There is no evidence to show that the Respondent took any action in response to these 2003 and 2004 notices.

4. In 2006, Respondent notified Stinson that he had planted a tree without permission and must remove it; however it did not notify him of any of the other violations alleged by Complainants, which presumably were in plain sight, and Respondent did not explain why it failed to do so. Respondent did not follow up on this 2006 notice by removing the tree.

5. In 2007, and again in April, 2009, Complainants complained to the Respondent about the alleged violations on the Stinson Property, adding a new allegation (obstruction of the common roof gutter). Respondent took no action until August, 2009, when it notified Stinson that the gutter obstruction, the tree and the signs were violations and must be removed. It did not mention the planting boxes or trash. At that time, Respondent threatened to remove the tree if Stinson did not do so himself.

6. However, in December, 2009, Respondent notified Complainants that it would not remove the tree or take any other action because the tree dispute was merely a private dispute between homeowners. It did not address any of the other specific complaints made by Complainants. Respondent did not hold a hearing on the complaints.

7. In early 2010, Respondent notified Stinson that his lot contained trash, but did not refer to the signs or the trees. Respondent did not take any further action concerning that notice nor did it take any action in response to the Complainants' subsequent letter reminding it of the signage and the tree.

8. In response to the filing of this dispute with the Commission, Respondent moved to dismiss the complaint on the grounds that the tree dispute had been decided by the Respondent's Board of Directors and therefore this complaint was barred by the "business judgment" rule; however, Respondent failed to provide any evidence to show what actions it took in response to the other allegations and failed provide any evidence to show that it ever made a decision regarding the tree or the other alleged violations.

9. Respondent's actions concerning its decision-making on the tree are inconsistent and contradictory. It alternatively stated the tree was a violation and that action would be taken and then declined to take action. Respondent asserted that the tree was planted with a permit and failed to provide any evidence in support of this contention. Respondent sent notices to Stinson stating the tree was a violation, and then notified the Complainants that the tree was *their* tree and that the *Complainants* must remove it.

10. Respondent failed to respond in a timely fashion and frequently failed to respond at all. Its lack of action is especially notable considering that all the alleged violations on the Stinson Property were in open view and could be easily verified.

11. Respondent failed to comply with its own rules mandating that it hold a hearing on alleged violations when Stinson failed to respond to the notice of violation.

12. There is no evidence to show that the Respondent's Board of Directors considered the Complainants' allegations in an open meeting or made any decision either to investigate them or to pursue or not to pursue enforcement action concerning them.

Conclusions of Law

1. The Commission has jurisdiction of this complaint under Section 10B-8(4)(B)(viii), "the failure of a governing body, when required by law or an association document, to exercise its judgment in good faith concerning the enforcement of the association documents against any person that is subject to those documents."

2. The "business judgment" rule has been discussed in *Black v. Fox Hills North Community Association, supra,* and other Maryland cases. *Black,* however, is especially relevant since it, like this dispute, involved a complaint about an association's failure or refusal to take action against a neighbor of the complaining party. As the Court explained, a board's decision not to enforce a rule must be upheld if it is a legitimate business decision of an organization, made without fraud or bad faith.

3. It is crucial to the business judgment rule that the association has *made a decision. Black* involved the formal decision of the board of directors to allow construction of a fence, and *Black* protected that decision as within the board's authority. However, in *Greenstein v. Council of Unit Owners of Avalon Court Six Condominium,* 201 Md. App. 186, 29 A.3d 604 (2011), the Court of Special Appeals held that a board that *fails to make a decision* in a timely manner can be sued for negligence when its failure results in the loss of its legal rights. One leading commentator has warned that:

> A board should have sufficient information to make an "informed" decision *and must actually make a decision.* The board must deliberate and decide, not procrastinate or equivocate, allowing inaction to produce a consequence called a "decision." The board must reasonably believe that it is acting in the best interest of the association, and must be free of direct self-interest of the association and direct self-interest different from the board members' interests as association members.

W. Hyatt, CONDOMINIUM AND HOMEOWNER ASSOCIATION PRACTICE: COMMUNITY ASSOCIATION LAW (3d Ed. 2000 at 99, emphasis added).

4. The *Black* court quoted the Court of Appeals' definition in *Martin v. United Slate,* 196 Md. 428, 441, 77 A.2d 136 (1950):

> [W]hen the tribunals of an organization.have power to decide a disputed question their jurisdiction is exclusive, whether there is a by-law stating such decision to be final or not, and the courts cannot be invoked to review their decisions of

questions coming properly before them, except in cases of fraud—which would include action unsupported by facts or otherwise arbitrary. (Emphasis added.)

5. We conclude, based on the evidence, that the Board failed to exercise its judgment concerning the Complainants' allegations; and we further conclude that the Board's actions were arbitrary. If the Respondent did not even know who owned the tree, or whether the tree was approved, then it is difficult to believe that the Board engaged in a reasonable and good faith determination as to whether or not to enforce the alleged violation. There was no evidence adduced at the hearing that the Board engaged in a detailed cost-benefit analysis of the merits of taking further enforcement action.

6. We further conclude that the Board violated its own governing documents by failing to hold a public hearing on the alleged violations.

7. We are mindful of the fact that Stinson is not a party to this action (although the Respondent could have filed a claim against him and requested that that claim be consolidated with this one) and has not been granted the opportunity to respond to the Complainants' allegations of violations—has not, in short, been granted even minimal due process. We therefore refrain from making any findings of fact about the existence of violations of the Respondent's rules on the Stinson Property and do not reach the issue of whether the Stinson Property is in violation of the Respondent's governing documents. *See, e.g., Killea and McNulty v. Cabin John Gardens*, CCOC # 8-10/24-11 (October 3, 2012). Our review is limited to whether the Respondent has violated its governing documents by failing to respond to, and to exercise its judgment in good faith concerning, complaints involving allegations of rule violations by a person who is subject to those rules. The evidence is clear that it did so fail and that its failure is not protected by any deference otherwise provided by the business judgment rule or doctrine.

8. We find that the Respondent waived its defense of the statute of limitations by failing to raise it in a timely fashion in its answer or at the hearing. Even if the Respondent had raised it on time, we would reject it because the statute of limitations does not apply to the Commission's administrative hearing process. *See, Dufief Homes Association v. Sacchi & Karowiek,* CCOC #589 (March 29, 2006).

9. Respondent argued that Article VII, Section 7(i) of the Declaration, which prohibits the removal of "sound hardwood trees measuring in excess of six (6) inches in diameter two (2) feet above the ground" applies here to protect the disputed tree. First of all, there is insufficient evidence to show that the tree is hardwood or what its measurements are. In addition, Article II (D) (6) of the Respondent's Architectural Guidelines states that "[A]ny trees which are to be planted require AERC [Architectural and Environmental Review Committee] approval." Reading these sections consistently, as required by the rules of construction, it is clear to the Panel, and the Panel so finds, that Article VII of the Declaration is not a bar to the removal by Respondent of a tree that was not properly approved, such as Stinson's tree may have been. It is significant to the Panel that there may be a variety of enforcement mechanisms are available to the Respondent to assist it in resolving the tree dispute.

10. Finally, Respondent argued that the dispute is moot as to the signs because they were removed at some point. However, the Complainants testified that Mr. Stinson's compliance with the no-signs rule was sporadic and that he had a practice of removing and then reinstalling them. If Mr. Stinson removes, and then later replaces, the signs then the matter is not moot.

ORDER

Upon consideration of the foregoing, it is this 31st day of July, 2013:

ORDERED: that the Complainant's request for relief be, and hereby is, granted in part, and it is further

ORDERED: that the Respondent shall, within 30 days from the date of this Decision (i) inspect the entire Stinson Property to determine if it contains any conditions which might be violations of the Respondent's governing documents; (ii) take photographs of the Stinson Property to document its observations; (iii) make a written report stating each and every condition it observes which might constitute a violation; and (iv) provide a copy of the report to Complainants and to Stinson or the current owner of the Stinson Property; and it is further

ORDERED: that if the Respondent observes conditions which might constitute violations of its governing documents, it shall, within 30 days from the date of the inspection (i) give written notice to Stinson, or the current owner of the Stinson Property, of the alleged violations; (ii) offer that person a reasonable period of time in which to abate the violations; (iii) notify that person of the remedies that the Respondent has available to it to enforce its rules, and (iv) offer that person a hearing if he or she wishes to contest the allegations; and it is further

ORDERED: that if the alleged violations are not abated in the time allowed in the notice, or if the lot owner requests a hearing, the Respondent shall, within 30 days from the expiration of any deadline contained in the violation notice hold a public hearing of its Board of Directors on the alleged violations, with notice thereof to the Complainants, and shall allow the Complainants the opportunity to present evidence on the existence of the violations; and it is further

ORDERED: that following such hearing the Board shall vote on whether there are violations, and on what actions, if any, it shall take to enforce its decision. This order shall not be interpreted to mean, and is not intended to require, that the Board must take action to enforce the decision; but if it determines not to do so, it must state, in the minutes of its meeting, the reasons for its decision; and it is further

ORDERED: that Respondent shall reimburse Complainants within 30 days from the date of this Decision the sum of $50.00 as their costs in this matter; and it is further

ORDERED: that Respondent's motion for attorney fees is DENIED.

Panel members Farrar and Kabakoff concur.

Any party aggrieved by this Decision and Order may file an appeal within 30 days to the Circuit Court of Montgomery County pursuant to the Maryland Rules for Judicial Review of Administrative Agency Decisions.

Mitchell Alkon

Mitchell Alkon, Panel Chair