COMMISSION ON COMMON OWNERSHIP COMMUNITIES
MONTGOMERY COUNTY, MARYLAND

Potomac Crossing Homeowners Association

Complainant

v.

Richard Meddings

Case #77-10
Panel Hearing Date:
May 19, 2011
Decision Issued:
November 18, 2011

Respondent

MEMORANDUM DECISION AND ORDER

Potomac Crossing Homeowners Association ("Complainant" or the "Association") filed a dispute with the Commission on Common Ownership Communities alleging that (1) Richard and Leslie Meddings (the "Respondent" or the "Homeowners") submitted an application to the Association's Architectural and Environmental Control Committee ("AECC") which was approved by the AECC on March 9, 2009, to build a play fort in the backyard of the townhouse property owned by the Homeowners; (2) that the application was not properly prepared because it did not have the signatures of the neighbors; (3) that the application was not properly submitted because it did not go through the HOA's management company; (4) that Richard Meddings, who was a member of Complainant Board of Directors on March 9, 2009, and/or Leslie Meddings, who was a member of the AECC on March 9, 2009, "influenced the decision of the AECC because one or both of them were present at AECC meetings during which the case was discussed" and "their presence during the AECC discussion and deliberation process raised serious concerns about conflict of interest, the appearance of impropriety, and undue influence; (5) that there were "serious questions" about AECC approval of the Respondent's application because (a) AECC members allegedly were led to believe that the Board of Directors already discussed and approved of the play fort application, (b) certain AECC members allegedly claimed the application would not have been approved if it had been submitted by a homeowner other than Meddings; and (c) there was "serious doubt about whether any approval purportedly given was the collective decision of the AECC".

The Complaint further alleged that the AECC subsequently decided to reverse the approval for Homeowners' play fort application and instead make a "compromise" proposal; that the Homeowners appealed the AECC "reversal" to the Board of Directors; that the Board heard the appeal on November 9, 2009,

that on November 15, 2009, all of the members of the Board (except Mr. Meddings who was not present at the November 15, 2009 meeting) voted to revoke all prior AECC decisions on the play fort application, and by letter dated November 24, 2009, directed the Homeowners to remove the play fort within 30 days of November 24, 2009. The Homeowner offered on or about January 15, 2010 to remove the play fort under certain conditions, including the condition that the Association give him $1,800.00 to cover the material and labor costs for building and removing the fort. The Board requested the Homeowner several times to provide documentation in support of the request for payment of $1,800.00 so the Board could consider it. The Homeowner provided a list of materials and costs on August 25, 2010.

The Association filed its Complaint against the Homeowner in the Commission on Common Ownership Communities ("CCOC") on or about September 27, 2011. The Homeowner filed his response to the Complaint on or about October 20, 2010, denying the allegations contained therein, and alleging that (1) the Association was seeking to force him to remove the play fort; (2) that the play fort application was approved by proper procedure; and (3) that a properly submitted application had approval from a "collective" AECC. The CCOC accepted jurisdiction of this case on January 5, 2011. The parties subsequently participated in mediation but did not reach a settlement.

A hearing was held on May 19, 2011 before a Commission on Common Ownership Communities Hearing Panel comprised of Commissioners Allan Farrar and Arthur Dubin, and Corinne G. Rosen, Panel Chair.

Findings of Fact

1. Complainant Potomac Crossing Homeowners Association is a homeowners association within the meaning of the Maryland Homeowners Association Act and Chapter 10B of the Montgomery County Code. The Association's Declaration of Covenants, Conditions, and Restrictions (the "Covenants") are recorded in the Land Records for Montgomery County, Maryland at Liber 6748, Folio 345, et. seq. Respondent is a homeowner of a townhouse unit in the Association.

2. Complainant enforces the aforementioned covenants, as well as rules and regulations for the Potomac Crossing Community. The Association compiled a "Homeowner Handbook" in year 2003, which contains Association rules and policies.

3. The Association's Covenants, Article VII, Sections 1 through 6 prescribe the framework and procedures for architectural changes. In general, the Covenants provide for an Architectural and Environmental Control Committee (AECC) appointed by the Board of Directors. Changes, modifications or additions

to exterior elements of a Lot require an application to, and approval from, the AECC. The Covenants also provide as follows: *"The decisions of the Architectural and Environmental Control Committee shall be final except that any member who is aggrieved by any action or forbearance from action by the Committee…may appeal the decision of the Architectural and Environmental Control Committee and, upon request of such member, shall be entitled to a hearing before the Board of Directors of the Association. A decision of the Architectural and Environmental Control Committee may be affirmed by a majority vote of the Board of Directors or modified or reversed by a vote of seventy-five percent (75%) of the Board of Directors."*

4. The Association's Architectural Guidelines and Review Procedures (the "rules") state that "*All applications must be in writing and submitted to management".* The rules further provide that*, "if approved, all work must be started within six (6) months and completed within one year from the start of the work*;" they also state that *"Applicants are encouraged to complete the work as soon as possible*".

5. The rules also provide that "*Upon disapproval* (of an application) *the applicant may pursue an appeal to the Board of Directors in accordance with Section VII of these Rules and Procedures. The applicant may request a hearing before the Board of Directors of PCHOA. The Board of Directors may affirm the AECC decision, or may modify or reverse the AECC decision by a vote of 75% of the Board members present at the meeting".*

6. The Association's rules concerning sheds for town home lots provide as follows: *"Sheds shall be constructed adjacent to a six foot (6') privacy fence with the shed no longer or higher than the fence…the shed may not exceed six feet (6') in height (at the peak)".*

7. Neither the Covenants nor the rules require an applicant to obtain the signatures of neighboring lot owners on an application for architectural change or modification.

8. Respondent submitted an Application for Architectural Change dated March 5, 2009, which was date stamped as received by the Association, as "Mar 09, Ent'd". The Application proposed replacing the 14 year old roof on the existing shed with a new roof which "will be higher in the center to allow for play space". Attached to and made part of the application a drawing of a "Playhouse", showing the proposed structure to be "11 ft total height", and showing representations of the "side view as seen from neighbors yards" and "open side out to common area".

9. The AECC approved Respondent's application on March 9, 2009.

10. On March 11, 2009, the Association mailed the Homeowner a letter informing him that the AECC received his architectural request and approved his request "to install a new roof to your shed and "playhouse" as submitted to the AECC". The March 11, 2009 letter thanked the Homeowner "for submitting all the necessary documentation to the AECC for review".

11. The "Application for Architectural Change" form used by the Homeowner was the same application form used by other Homeowners who submitted architectural change applications from October 2007 through January 2010 (Exhibit R-1 and Exhibit R-2). The application form did not contain instructions or a designated area for neighbors to sign the form acknowledging that they were aware of the applicant's application for architectural change or modification. The application form used by the Homeowner was the same application form the Association had on its website at least until January of 2010. The Association maintained another application form at the office of its managing agent which did have an area for adjacent lot owners to sign regarding an application, but that form was not posted to the Association's website before January of 2010.

12. The Homeowner completed construction of the shed roof and play fort in or about late June of 2009.

13. On November 2, 2009, the AECC notified the Homeowner that it had reconsidered and reversed its March 9, 2009, decision to allow the play fort, and instructed them to remove the fort; it further advised them that if the Homeowner disagreed with the decision it could appeal to the Board of Directors. The reasons given for the revised decision was that the AECC should have required the Homeowner (who was a Board member) and his wife (who was a member of the AECC), to recuse themselves, during the AECC decision-making process on the application; that the Board believed that the AECC "misunderstood" certain facts concerning the application and claimed that "When Richard presented the application to the AECC, the AECC were led to believe that the Board had already approved the proposed play fort"; and that the "Play fort as constructed is considerably more massive than presented in the plans, taller, and out of scale for the structures that it is near", and that the Association had received a number of complaints about the structure. The AECC directed the Homeowner to modify the structure within 60 days or to remove it within 60 days.

14. The Homeowner appealed the revised AECC decision to the Board of Directors. The Board of Directors (the Homeowner who was a Board member recused himself) voted on November 9, 2009 to revoke all prior AECC decisions concerning the play fort application based on its findings that the application had not been submitted to management as required by the rules; the architectural rules limit the height of a shed for townhouses to 6', and the play fort built on top of the shed extends about 4' above the privacy fence – this does not comport with the language and intent of the height limitation set forth in the architectural

rules. The Board of Directors directed the Homeowner to remove the play fort within 30 days from the date of its letter dated November 24, 2009.

15. The Board and the Homeowner subsequently discussed possible resolutions of this matter, including the Homeowner removing the structure, and the Association tendering payment to the Homeowner in the amount of $1,800.00 to cover the costs of materials used for construction of the structure, the removal of the structure and disposal of debris therefrom, materials to rebuild the shed roof, and labor. The Homeowner did not submit any documentation to support his request for $1,800.00 until August 2010 , despite repeated requests by the Association for such documentation. The documentation submitted by the Homeowner consisted of a list for materials in the amount of $993.10.

Conclusions of Law

In reviewing this dispute, the Commission applies the doctrine first laid out in *Kirkley v. Seipelt,* 182 A.2d 430 (Md. 1957), in which the Court held that the decision of a homeowner association's board of directors that restricts a homeowner's right to alter the appearance of his dwelling or lot must be upheld so long as it is "based upon a reason that bears some relation to the other buildings or the general plan of development and this refusal would have to be a reasonable determination made in good faith, and not high-handed, whimsical or captious in manner." In cases such as this, Commission hearing panels do not sit as courts holding trials *de novo* which make their own determinations of fact and law but rather as appellate courts which must allow the association's board a certain degree of discretion. *See, Simons v. Fair Hill Farm HOA* CCOC #66-09 (May 6, 2010) (opinion per Charles Fleischer, panel chair).

The documentary and testimonial evidence presented at the hearing does not support the Complainant's allegations that the Homeowner, who was a Board member at during the relevant time period, or his wife, who was an AECC member during the relevant time period, acted improperly, or with any deliberate intention, or made any attempt to exert undue or inappropriate influence in connection with the Homeowner's submitted application for the play fort.

The evidence does show that the Association was primarily responsible for the conditions which led to the approval of the subject application, which the Association then revoked five months subsequent to the Homeowner erecting the structure and incurring costs and expenses in connection with the same.

The Board of Directors, the AECC, and Management are each charged in their respective capacities with enforcement of the Association's covenants and rules, including but not limited to, ensuring that the correct AECC application

forms are available to and used by applicants; ensuring that architectural requests which are presented on outdated forms are returned to the applicant with a correct form, rather than processed; and that applications which may be unusual or deficient in some manner are carefully examined, and if more information is needed to act on an application, then such information should be requested of the applicant before proceeding to act on the application. The Homeowner in this case, as a Board member, has the same responsibilities as the other Board members with regards to the Association's covenant enforcement procedures.

The AECC approved the Homeowner's application to construct a play fort atop a shed which the drawing submitted with the application showed would be 11' tall, which is 5' taller than the 6' privacy fence. While there are no specific rules concerning play forts, the rules concerning sheds and privacy fences do indicate a scheme of having no structures in town home yards exceeding the height of the 6' privacy fence. Thus, it would seem that the proposed play fort application was not in conformity with the Association's existing design scheme and rules at the time the application was submitted and approved. The testimonial and documentary evidence indicated that some neighboring Lot owners objected to the play fort structure, and some did not.

The Complainant Association then waited approximately five months after AECC approved the application and the Homeowner timely completed the construction to take issue with the application. The Board then invoked its Covenants to reverse the AECC decision, and demanded that the Homeowner remove the play fort structure within thirty (30) days. But the Homeowner did reasonably rely upon the AECC's approval in undertaking the construction, thereby incurring costs and expenses, and is likely to incur additional costs and expenses to remove and dispose of the play fort and put a new roof on the existing shed.

The Commission has upheld the right of associations to enforce their rules against members who have been in violation of such rules even though the violations were lengthy ones and the associations had long been aware of them. We held that "[m]ere delay in enforcing a right is not enough to create an estoppel against the enforcement of the right," and that for the defense of estoppel to bar enforcement of a rule there must be proof "of a delay that causes prejudice to another." *South Village Homes Corp. v. Toossi*, CCOC #50-10 (March 22, 2011) (opinion by Ursula Burgess, panel chair); *see also, Sweepstakes Homeowners Association v. Webb*, CCOC #55-10 (April 26, 2011). Here, we find that the Homeowner has met the requirements of equitable estoppel. The Homeowner applied for permission to construct a play fort, he received permission to construct the play fort, he had the right to rely on that approval, and he did rely on the approval by constructing the play fort. AECC approvals are final unless appealed to the Board of Directors and no appeal was

made from the decision approving the play fort. The Association was thus bound by the decision of its AECC.

The Complainant does have the legal authority under its Covenants to reverse a decision of the AECC if the Board reasonably believes that the proposed or in this case, now existing, structure, impairs the overall attractiveness of the Potomac Crossing Community and is not in accordance with the general design scheme and rules. In this case, the Board is upholding the AECC's reversal of its own prior decision. However, the Complainant in this case bears the responsibility for what it deemed five months later to be an erroneous approval of the Homeowner's proposed application. The Homeowner's constructed play fort appears to be generally consistent with the approved application. Thus, while the Association can now require the Homeowner to remove the play fort, the Complainant must also reimburse the Homeowner for the costs and expenses he incurred to erect the play fort, as well as the costs and expenses he will incur to remove it. Since the shed roof was 14 years old at the time the application was submitted and according to the Homeowner's application, "is in need of replacing", the cost of such roof replacement must be borne by the Homeowner, not the Association. *See, e.g., Marthinuss v. Lake Hallowell HOA*, CCOC #364 (January 8, 1998) (per William Hickey, panel chair) (when a design change has erroneously been approved by an association's board of directors and must be removed, the association should pay the cost of removal).

Order

Based upon the foregoing Findings of Fact and Conclusions of Law, we ORDER as follows:

1. Respondent shall remove the play fort structure from his Lot within sixty (60) days from the date of this Order.
2. Complainant shall pay to Respondent the sum of $993.10 within sixty (60) days from the date of this Order for the materials set forth in the list referenced in paragraph 15 of the Decision and Order.
3. Respondent shall, within seventy-five (75) days from the date of this Order, submit to Complainant a bill evidencing the actual costs incurred by Respondent for the removal and/or disposal of the play fort if Respondent wishes to be reimbursed for such actual costs incurred.
4. Complainant shall reimburse to Respondent said actual costs as set forth in the bill within fifteen (15) days after presentment of the bill to Complainant by Respondent in a timely manner as set forth in paragraph 3, above.

5. Complainant shall pay its own costs and attorney's fees in this proceeding.

Commissioners Farrar and Dubin concur in this Decision and Order.

The Panel retains jurisdiction over this matter pending compliance by the parties with the foregoing rulings.

By: _____
Corinne G. Rosen, Esq., Panel Chair

Date:_____