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

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| Melvin L. DePamphilis<br>16706 Gooseneck Terrace<br>Olney, MD 20832-2458<br><br>Complainant | : | |
| vs. | : | Case No. 511-O<br>(Hearing Dates: 6/13/01 and 1/23/02) |
| Victoria Springs Homeowners Association, Inc.,<br>c/o Community Associations Services, Inc.<br>P. O. Box 5309<br>Latonsville, MD 20882<br><br>Respondent | : | |

**DECISION AND ORDER**

The above-entitled case came before the Commission on Common Ownership Communities for Montgomery County, Maryland, for hearing on June 13, 2001 and January 23, 2002, pursuant to Sections 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 duly appointed hearing Panel considered the testimony and evidence of record, and finds, determines and orders as follows:

**BACKGROUND**

This is a complaint brought by the owner of a lot in a Maryland homeowners association against his association. The issues presented are whether the allocation of costs between the single family detached homes and townhouses in the community for the years 1998, 1999 and 2000 was correct, and if it was not, then what is an appropriate remedy. The parties agree with each other that the association has correctly calculated the single family detached and

townhouse allocation of costs for the year 2001.

**FINDINGS OF FACT**

1. Complainant Melvin L. DePamphilis is a lot owner in Victoria Springs Homeowners Association, Inc. and is thereby a member of the association. He owns a single family detached home.

2. Respondent Victoria Springs Homeowners Association, Inc. is a Maryland Homeowners Association consisting of 120 homes. 72 homes are single family detached homes and 48 homes are townhouses.

3. Article IV, Section 4.02 of the Declaration of Covenants, Conditions and Restrictions for Victoria Springs Homeowners Association, Inc. provides in part:

> "Notwithstanding anything contained herein to the contrary, all costs associated with the maintenance, replacement, repair and improvement (including reserves therefor) of the private streets located in Parcel D on the Subdivision Plat known as "Lots 14 through 61 and Parcel D, Block 4, BROOK MANOR FARMS", recorded at Plat Book 165 at Plat number 18664 among the Land Records of Montgomery County, Maryland shall be borne by and allocated to, exclusively, the owners of the townhouse Lots shown on such Subdivision Plat." (Emphasis added)

By virtue of a resubdivision, the property on Plat 18664 is now recorded on Plat 19220, and Parcel D is now Parcel E.

4. The parties agree with each other on the manner in which the above language must be applied. The parties also agree with each other that for the years in question, fiscal years 1998, 1999 and 2000 the association did not correctly apply this language to allocate costs. The parties further agree with each other that as a result the single family detached homes were overcharged in their share of costs for 1998, 1999 and 2000.

5. The parties do not agree with each other on the amount by which the single family detached homes were overcharged, and they do not agree with each other on an appropriate remedy. Specifically, the association does not agree that restitution to the single family detached home owners sought by the Complainant is an appropriate remedy.

6. When the developer of Victoria Springs, Winchester Homes, controlled the homeowners association, it represented to the purchasers of the townhouses that their privately owned yards would be maintained by the association. The association provided landscape maintenance and lawn service, including mowing, edging, weeding, turf maintenance and upkeeping of shrubbery for the townhouse front and side yards privately owned by the owners of the townhouses as well as for the common areas owned by the association.

7. When the homeowners took control of the association, they inherited a system from the developer whereby all expenses were allocated in the budget separately between general expenses for the community and expenses attributable solely to the townhouses.

8. Pursuant to an amendment to the Declaration of Covenants, Conditions and Restrictions dated May 9, 1995, the original annual assessment for the single family detached lots was fixed at $340.00 and the original annual assessment for the townhouse lots was fixed at $524.00. The documents, therefore, provide for different assessments between the two types of units.

9. During the years in question in this case (1998, 1999,

2000), the costs items allocated exclusively to the townhouses for maintenance of the private streets on Parcel D, now Parcel E were as follows:

a. Electricity - to operate street lights distributed along the private TH streets.

b. Storm Water Maintenance - to maintain the oil grit separators located in the grass at the ends of the TH streets. The function of these devices is to separate grit and oil from the water that runs off of the private streets belonging to the TH community.

c. Snow Removal - from the association streets serving the TH.

d. Transfer to Reserve - to provide for future maintenance of TH property, such as concrete sidewalks, concrete curbs/gutters, asphalt parking lots, asphalt sealcoat, street lights, wood deck, and oil grit separators.

10. The evidence of record showed that the following two cost items were also allocated exclusively to the townhouses:

a. Lawn Service - to maintain the front and side yards belonging to each of the 48 TH lots.

b. Area Maintenance - to maintain other items in the TH area located in Parcel E, Plat 19220.

These two items were apparently carried together in the budgets under the category "Lawn Service (TH)"

11. Section 4.06 of the Declaration of Covenants provides that except as otherwise provided in Section 4.02 or elsewhere in the Declaration, annual and special assessments must be fixed at a uniform rate for all lots.

12. According to the Declaration of Covenants, the only costs to be allocated exclusively to the owners of the townhouse lots are those costs associated with the maintenance, replacement, repair

and improvement, including reserves, of the private streets located in Parcel D on the subdivision plat known as Lots 14 through 61 and Parcel D, Block 4 Brookmanor Farms recorded at Plat Book 165, at Plat No. 18664 among the Land Records of Montgomery County, Maryland (now Parcel E, Plat 19220) Those items are enumerated in Finding of Fact No. 9 above. (See also Finding of Fact No. 3)

13. The Complainant presented an analysis by a certified public accountant, Rogers & Associates, LLC, Complainant's Exhibit 3 which compared the analysis of income and expenses by the Complainant to the total income and expense data provided by the Respondent Victoria Springs Homeowners Association for the years in question. The report concluded that the total income and expenses on the Complainant's schedule agreed with the total income and expenses provided by Victoria Springs Homeowners Association.

14. Rogers & Associates, LLC, presented an analysis of actual expenditures for each of the years in question in its report. All expenses - accounting and audit, bank service charge, common area maintenance, County fees, electricity - entrance lights, income taxes, etc. - were allocated between the single family and townhouse owners on a 60%/40% basis according to the number of unit types, 72 single family detached and 48 townhouse units, total, 120 units. The accountant used this across the board allocation of expenditures to reach the conclusion that the single family homes had been overcharged and the townhomes had been undercharged for the years in question and gave precise figures for the overcharges and undercharges.

15. The Panel finds that the report of Rogers & Associates, Complainant's Exhibit 3, is an independent verification of the actual expenditures and revenues of the association for the years in question and an independent verification of the allocation of those expenditures and revenues between the single family homes and the townhouse homes by the Complainant. The Panel however disagrees with the conclusion that the allocation of all expenditures between the single family homes and townhomes included in those schedules is in compliance with Article IV, Section 4.02 of the Declaration quoted above. Therefore, such an allocation is not a valid premise for determining whether there has been an overcharge or an undercharge.

16. Neither the Complainant nor the Respondent presented evidence to show the proper allocation of costs in compliance with Section 4.02. The only costs which should have been allocated exclusively to the townhouses are those enumerated in Finding of Fact No. 9 above. Lawn service to the townhouses to maintain the private front and side yards belonging to each of the 48 lots was allocated exclusively to the townhouse owners and came out of townhouse assessments. This is an expense which should not have come out of any assessments. Costs for area maintenance to maintain other items in the townhouse area located in Parcel E were also allocated exclusively to the townhouse owners. This should have been a common expense borne by everyone, since the areas in question were common areas and not part of the streets identified in Section 4.02. There should be no other allocations of any

expenses between single family homeowners and townhouse owners. All of the other expenses are common expenses to be borne by everyone. Consequently, as stated, while the calculations of the Rogers & Associates report as to expenditures and revenues, Complainant's Exhibit 3, are deemed accurate, the conclusion that the allocation between single family homes and townhouse homes complies with Article IV, Section 4.02 is not correct. Thus, the stated undercharges and overcharges, if any, have not been properly substantiated.

17. The Panel finds that the homeowner - controlled board made an honest effort beginning in 1998 to remedy the errors instituted and perpetrated by the developer before the homeowners took control of the community. The association retained competent management and the testimony presented by the representative of the association's management company, Susan Szajna, reflects that management understood the need to arrive at a proper allocation of the assessments between the single family detached homes and the townhouses and attempted to do so.

**CONCLUSIONS OF LAW**

Based upon the above Findings of Fact, the Panel reaches the following conclusions of law:

1. While the action of the Board of Directors in allocating expenses of the association between single family detached homes and townhouses as it did for the years in question (1998, 1999 and 2000) was erroneous, there is no evidence to suggest that it was malicious or the result of intentional wrongdoing.

2. Respondent's Motion to Dismiss on the basis of lack of jurisdiction and lack of standing is denied. However, the Panel declines to make restitution to the Complainant or to any property owner. To do so would be inequitable because it would be nearly impossible to determine a proper allocation given the purchases and sales of units over a period of time, and once a homeowner pays an assessment he retains no legal interest or vested right in that assessment, particularly after he sells his property. The assessment is in the possession and control of the association which has the fiduciary duty to spend it in accordance with the applicable covenants. Furthermore, it is not clear that the evidence of record would support any restitution figures which the Panel might award. Neither party presented evidence to show correctly how the costs should have been allocated between the single family detached owners and the townhouse owners in compliance with Section 4.02. The Panel therefore declines for the above reasons to make a monetary award to the Complainant or to any other property owner or to require any reallocation of funds.

3. The cost items which are to be allocated to the townhouses exclusively to maintain the private streets on Parcel D (now Parcel E) are those enumerated in Finding of Fact No. 9 above as follows:

a. Electricity - to operate street lights distributed along the private TH streets.

b. Storm Water Maintenance - to maintain the oil grit separators located in the grass at the ends of the TH streets. The function of these devices is to separate grit and oil from the water that runs off of the private streets belonging to the TH

community.

c. Snow Removal - from the association streets serving the TH.

d. Transfer to Reserve - to provide for future maintenance of TH property, such as concrete sidewalks, concrete curbs/gutters, asphalt parking lots, asphalt sealcoat, street lights, wood deck, and oil grit separators.

4. Lawn service to maintain the front and side yards belonging to each of the 48 townhouse lots is not a common expense to be paid out of assessments, either general assessments or assessments from the townhouse owners only. Rather it is an expense to be paid privately by the townhouse owners to maintain their own private property if they so choose.

5. Area maintenance to maintain other common areas in the townhouse area located in Parcel E is a general common expense to be borne by all homeowners, single family detached owners as well as townhouse owners, and not by townhouse owners alone.

6. All other costs, except for those enumerated in Conclusion of Law No. 3 above are common expenses to be borne out of general funds comprised of assessments from all homeowners, both single family detached and townhouses. As an example, costs for accounting and audit, bank service charge, common area maintenance, County fees, electricity - entrance lights, income tax, insurance, landscape replacement/improvements, lawn service (for all common areas), legal fees, management fees, miscellaneous administration, postage and printing are common expenses to be paid out of general funds and not allocated exclusively either to the single family detached owners or to the townhouse owners. If there is a perceived

inequity, this may be adjusted from year to year in the amount of assessments collected from each type of unit, but not by an after-the-fact allocation.

7. The association acted in good faith and with professional management to attempt to remedy the errors of the developer in allocating the association's expenses. However, the association continued the developer's error in the way that it allocated those expenses. The remedy, under the circumstances, will be prospective only.

**ORDER**

Based upon the foregoing Findings of Fact and Conclusions of Law it is this 8th day of May, 2002 ordered:

1. Beginning with the next budget year, 2003, the only costs to be allocated exclusively to the townhouse owners are the following, which are for the maintenance of the private streets on Parcel D, now Parcel E:

a. Electricity - to operate street lights distributed along the private TH streets.

b. Storm Water Maintenance - to maintain the oil grit separators located in the grass at the ends of the TH streets. The function of these devices is to separate grit and oil from the water that runs off of the private streets belonging to the TH community.

c. Snow Removal - from the association streets serving the TH.

d. Transfer to Reserve - to provide for future maintenance of TH property, such as concrete sidewalks, concrete curbs/gutters, asphalt parking lots, asphalt sealcoat, street lights, wood deck, and oil grit separators.

2. The association must make whatever adjustments it can

legally accomplish, without breaching any contracts, to allocate its costs for fiscal year 2002 in accordance with paragraph 1 of this order.

3. Except for the items enumerated in paragraph 1 of this order, all other expenses of the association are common expenses to be borne by all unit owners from the general assessments.

4. The association must specifically cease from maintaining any private property with assessment revenues, whether those revenues come from the townhouse owners or the single family detached owners. This is not in any way a common expense of the association.

The decision of the Panel is unanimous. Any party aggrieved by the action of the Commission may file an appeal to the Circuit Court of Montgomery County, Maryland within thirty (30) days after the date of the entry of this order in accordance with the Maryland Rules of Procedure.

John F. McCabe, Jr., Panel Chair
Commission on Common Ownership Communities