

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

HAWKINS LANDING HOMEOWNERS)	
ASSOCIATION,)	
Complainant)	
)	
versus)	Case No. 23-11
)	February 28, 2012
MARK DELVECCHIO AND SUSAN)	
GIANETTI,)	
Respondents)	

DECISION AND ORDER

Before Shontz, Weinstein and Whelan

The above-entitled case came before the Commission on Common Ownership Communities for Montgomery County, Maryland, for hearing and arguments on December 7, 2011, 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

Hawkins Landing Homeowners Association (Complainant) filed a complaint with the Office of Consumer Protection for adjudication by the Commission on Common Ownership Communities on May 31, 2011 against Mark DelVecchio and Susan Gianetti (Respondents), the owners of the residential unit located at 24222 Hawkins Landing Drive, Laytonsville, Maryland. Complainant alleged the following:

1. Respondents' residential unit is within the Complainant's community.
2. Respondents failed to maintain their property in good condition and in accordance with community rules.
3. Respondents installed fixtures, fencing, and landscaping features without approval.

FINDINGS OF FACT

1. Complainant is a homeowners association as defined by Section 11B-101 of the Real Property Article of the Code of Maryland, which has its covenants filed in the land records of Montgomery County, Maryland, and these covenants run with the land and bind all the lots referred to in the covenants, including the lot owned by Respondents.

2. Complainant's Board of Directors (Board) consists of a president, vice-president, secretary, treasurer, and member-at-large.
3. At the time of the hearing, Complainant stated that four alleged violations remained on Respondents' property: a hole in the backyard; failure to maintain backyard landscaping; fence installed without approval; and unfinished staircase in the backyard (not a feature attached to the house).
4. The hole in Respondents' backyard is the result of an unfinished waterfall-pond below a retaining wall. Complainant issued a violation letter to Respondents. Respondents subsequently submitted an application that was approved by Complainant's Board. In the approval, Complainant's Board gave Respondents two months to complete the project, and Respondents did not complete the project in that time period.
5. Complainant testified that even though the governing documents require 6 to 12 months to complete an approved modification, Complainant's Board decided to allow Respondents only two months because the hole had been present for "so long."
6. The backyard landscaping consists of plants and ornamental grass that naturally grow taller than standard grass and are commonly planted on residential properties. Complainant alleged the area of Respondents' yard in question is "overgrown with weeds" and is a violation of the governing documents. Complainant testified that the assessment of the landscaping is an "aesthetic assessment" and that the Complainant's "Board position" is that ornamental grasses must be cut back.
7. The fencing installed by Respondents is approximately eight feet tall and consists of thin black plastic intended to keep deer away from landscaping. Complainant alleged the fence is made of material that is not part of the architectural guidelines and cannot be approved. Complainant testified that no provision has been made to allow community residents to restrict deer access to property.
8. The stairs were installed by Respondents to allow easier access to the terraced backyard, which contains a considerable incline. Respondents submitted an application for the stairs, but it was disapproved by Complainant's Board. However, Complainant's Board provided no guidance for how to design the stairs to receive approval. Complainant testified that Respondents did not request a hearing on the stair disapproval. Complainant also testified that the stairs must be inspected by Montgomery County and comply with Montgomery County Code requirements.
9. Complainant discovered Respondents' alleged violations during an October 2010 inspection and sent violation letters to Respondents on October 18, 2010, and March 23, 2011. Respondents testified that they requested on March 30 and 31, 2011, that Complainant conduct another inspection but that Complainant refused. Respondents testified that they attempted to contact Complainant by telephone and left a voicemail message. Respondents were notified by Complainant on April 29, 2011, of the hearing date of May 17, 2011, for their alleged violations. Respondents informed Complainant on May 8, 2011, that they could not attend on May 18 and requested a different date. Complainant conducted the hearing on May 17 as scheduled.

10. Complainant testified that Complainant's Board's policy is to only communicate with community residents by e-mail and paper mail to ensure all communications are recorded.
11. Complainant inspected Respondents' property, with Respondents present, during the week before this hearing to determine the current status of the alleged violations.

CONCLUSIONS OF LAW

1. When the actions of a homeowner association limit the right of a member to use his property, or require the member to remove changes he has made to his property, we must uphold those decisions so long as they are made pursuant to the rules of the association, and so long as the refusal to approve a change is "based on 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." *Kirkley v. Seipelt*, 212 Md. 127, 133 (1956).
2. Both Complainant and Respondent are proper parties to this dispute pursuant to Section 10B-8 of the Montgomery County Code, as it was in effect at the time this dispute was filed.
3. The Commission has jurisdiction of this dispute under Section 10B-8(3) (B) (i), (ii) of the County Code.
4. The hearing panel finds no authority for Complainant's Board to only allow Respondents two months to complete the approved waterfall-pond project when the governing documents clearly require six to twelve months. Therefore, the hole still being present two months after the approval date was not a violation.
5. The hearing panel finds no authority for Complainant's Board to prohibit ornamental grass and other plants that are commonly grown on residential lots. The Complainant has not provided evidence that it has adopted any standards for ornamental plantings. While we find that the Complainant may properly prohibit weeds, we find that the plants in dispute are not weeds. The Complainant's "Rules, Regulations and Architectural Guidelines", at page 9, state that approval is required for "hardscaping, brickwork, stone work, structures, etc.," but not for "planting shrubs, trees, lawn, flowers." The rule cited by the Complainant as governing these plants is Article X, Section 10.1 of the Covenants, but that section refers to the maintenance of the plants in good condition, such as the proper care of lawns and pruning of trees and shrubs. There is no evidence that the "general plan of development" excluded ornamental plants, including ornamental grasses. On the contrary, the general plan seems to assume that these lots will contain trees, shrubbery, and other landscaping plants. We therefore hold that the ornamental grasses are not a violation so long as they are maintained in good condition.
6. The hearing panel finds that Respondents' black plastic fencing is not an approved fencing material that complies with the architectural guidelines. Therefore, the fence is a violation. However, the hearing panel encourages Complainant's Board to consider adopting appropriate measures to allow community residents to prevent deer from damaging landscaping.

7. The hearing panel finds that Complainant has the right to regulate the construction of stairways, but finds that the Complainant's Board did not act reasonably in disapproving Respondents' stair application. The Complainant offered no guidance on what was acceptable and it did not provide any basis for the denial or guidance for altering the application for potential future approval. It is unfair to require a homeowner to have to make repeated guesses about what might be acceptable. The hearing panel also questions Complainant's requirement that the stairs be inspected by Montgomery County as the stairs are not attached to any part of Respondents' house or the common areas of the community. There was no proof offered by the Complainant that the County regulated this stairway. We therefore find that the Complainant's decision regarding the stairway is arbitrary and unreasonable, and we order appropriate relief.

8. The hearing panel is generally disappointed with the nature of communication between Complainant and Respondents. While e-mail and paper mail are appropriate to memorialize discussions and decisions, many community issues can be resolved more expeditiously and without creating protracted disputes through telephone and face-to-face communication. The hearing panel strongly urges Complainant and Complainant's Board to modify their practices in the future.

DECISION AND ORDER

1. Based on the foregoing, the Panel orders the following:

- a. Respondents must complete the waterfall-pond project to bring the hole into compliance within six (6) months from the date of this decision.
- b. Respondents must remove the black plastic fence within thirty (30) days from this Decision. If Respondents do not remove the fence, Complainant may begin to impose allowable fines per the governing documents.
- c. Complainant must, within sixty (60) days from the date of this decision, initiate the process of creating a rule or guideline that either sets standards governing the construction of stairways on the lots, or else prohibits stairways entirely. Within thirty (30) days after the adoption of the rule, the Respondents must apply for permission to construct a stairway that complies with the rule or guideline, or else must remove the stairway, entirely if the rule or guideline prohibits all stairways. Respondents must comply with any decision on their application. The stairway as constructed may remain in place, without penalty, until the Complainant adopts a rule or guideline pursuant to this Order.
- d. The claim that the landscaping is a violation is dismissed with prejudice.
- e. Complainant must immediately rescind all fines assessed against Respondents for the violations alleged in this complaint.

2. Commissioners Weinstein and Whelan concur in this Decision.

Any person aggrieved by this Decision may file an appeal with the Circuit Court for Montgomery County, Maryland, within 30 days after the date of this decision, pursuant to the Maryland Rules for appeals from administrative agency decisions.

Douglas Shontz, Panel Chair
Commission on Common Ownership Communities