BEFORE THE MONTGOMERY COUNTY
COMMISSION ON COMMON OWNERSHIP COMMUNITIES

OFFICE OF ZONING AND ADMINISTRATIVE HEARINGS
Stella B. Werner Council Office Building
Rockville, Maryland 20850
(240) 777-6660

IN THE MATTER OF:		
POTOWMACK PRESERVE, INC.	*	
	*	
Complainant	*	
	*	
Raj Barr	*	
Lynn Gowan	*	
Peter Gibson	*	
Rande Joiner	*	
Sharon Washburn	*	
Linda Green	*	
Judy Dworkin	*	
Lee Alfer	*	
Adrian Miller	*	
Alexis Reisin Miller	*	
	*	
Supporting the Complainant	*	
Corinne Rosen, Esquire	*	
Attorney for the Complainant	*	CCOC Case No. 72-13
	*	(OZAH Referral No. 14-01)
v.	*	
	*	
MICHAEL AND PETER BALL	*	
	*	
Leo Schwartz	*	
Mary Beth Bentolila	*	
Lance Pelter	*	
Charles Bruno	*	
Peter Ball	*	
Michael Ball	*	
	*	
Supporting the Respondent	*	
Farrokh Mohammadi, Esquire.	*	
Asim Humayan, Esquire	*	
Attorneys for the Respondent	*	

* *

Before: Lynn A. Robeson, Hearing Examiner

HEARING EXAMINER'S REPORT AND RECOMMENDED DECISION

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I. INTRODUCTION

It is difficult to know where to begin recounting the tale of this case. The Complainant, Potowmack Preserve, Inc. (Potowmack or Association) filed a complaint with the Commission on Common Ownership Communities (CCOC) charging that the architectural plans approved by the Board did not authorize raising the existing roofline on a dwelling owned by Michael Ball and occupied by his father, Peter Ball, and that Respondents constructed a roof higher than the existing roof. The Board also filed a Supplement to Summary in Original Complaint (Supplemental Complaint) (Exhibit 7), containing 16 other alleged violations of the approved plans, including items related to storm water management and use of the County right-of-way. On December 16, 2013, Respondents assert they filed an application to approve changes made to the construction that deviated from the approved plans, but the Board failed to act on the application. Thus, they argue, the application to amend the original approval should be "deemed approved" under the Board's governing documents. Exhibit 90.

The Hearing Examiner's recommendation here, unfortunately, is lengthy, and relies to some extent on facts contained in prior litigation between various parties that has spanned the course of a decade.[1] The parties disagree on numerous facts and Potowmack's theory of the case has shifted during the course of the hearing as adverse facts were discovered.

It may be simplest to begin with the fact that all of the plans the parties assert to be those approved by the Board show that the roof would be raised. When Respondents' counsel pointed out to Potowmack's president that the additional height was shown on the plans, the Board theorized that the plans were ambiguous, and then later, purposefully deceptive. The Hearing Examiner finds, for the reasons that follow, that the Board has not met its burden of

[1] The Hearing Examiner took official notice of three CCOC cases in this case: CCOC Case No. 720-G, CCOC Case No. 73-12, and CCOC Case No. 30-12.

proof that any of these theories are true, that the Board filed the complaint and Supplemental Complaint in bad faith, that the filing of both the original complaint and the Supplemental Complaint was unauthorized by the Board, and that the claims therein are not ripe for adjudication. Should the CCOC find that these claims should be pursued, the Hearing Examiner recommends they be denied for the reasons set forth.

The Hearing Examiner also finds that Respondents' application to amend their original approval, delivered to the Potowmack's vice-president on December 16, 2013, has not been deemed approved as provided in the governing documents, but may not be ignored by Potowmack. As a result, she recommends that the CCOC require Potowmack to process this application *in accordance with its Architectural Control Committee Rules of Procedure*, and that the Board's secretary, Ms. Gowan, as well as its president, Dr. Barr, recuse themselves from further proceedings on the application. Should the Board need expert architectural advice, the Hearing Examiner recommends that the CCOC require the Board to seek an expert that has not participated in this litigation and is independent of either party. She also recommends that the CCOC require the Board to pay the cost of this expense.

The Hearing Examiner recommends that the CCOC award attorney's fees to the Respondents, Peter and Michael Ball.

II. STATEMENT OF THE CASE

Potowmack filed this complaint with the CCOC in November, 2013. It made the following pertinent allegations (Exhibit 4(a)):

> Plans and drawings submitted by Peter Ball as part of his construction application which was approved by the Association show all new roofs over the house as in line with the existing roof height, and were approved as such by the Association.

> Respondents have built the roof line at a higher height than the existing roofline. New roof trusses have been laid over the existing roof to enclose the extension to the Entry Foyer, raising the roofline higher than the existing roof. The roof of the addition over the garage projects well above the existing roofline, and both new roofs extend higher than the height of the existing chimney.

The Supplemental Complaint lists 16 additional alleged violations of the covenants, although not all are related to the approved plans. Exhibit 7. The Supplemental Complaint raises issues about the Balls' use of the County's right-of-way, and requests that they be required to install drywells for storm water management. *Id.*

The Balls answered the complaint on December 23, 2013 and filed a counterclaim (later amended by the Balls) alleging that the Board's denial of vinyl siding for the construction was arbitrary. The counterclaim also alleged that the Board engaged in a pattern of failing to follow procedures required by State law and the governing documents. It also sought removal of Dr. Barr as Potowmack's president, alleging that the Board's actions were directed solely by Dr. Barr. Exhibits 13, 14, 20, 21. Count I of the Counterclaim alleged that the Board's decision to deny the Balls' request for vinyl siding was arbitrary, as it had been used in other homes in the neighborhood. Exhibit 21.

Potowmack then filed a motion to strike and/or dismiss the counterclaim and a request to enter a judgment by default. Exhibit 15. After retaining counsel in this matter, the Balls filed amended answers to the complaint, an amended counterclaim, and an opposition to the Potowmack's Motion to Dismiss. Exhibits 19-22.

The CCOC referred this matter to the Office of Zoning and Administrative Hearings on March 7, 2014. The Hearing Examiner issued summonses to the Balls on March 13, 2014. Exhibit 25. After receiving advice from CCOC staff that the Commission generally accepted Counterclaims in CCOC cases, the Hearing Examiner granted Potowmack's request to dismiss

Count I of the counterclaim (alleging that the Board's denial of vinyl siding was arbitrary) because it was an independent claim for which a complaint should be filed. She denied Potowmack's request for entry of a default judgment and to dismiss Count II of the counterclaim. Exhibits 40, 42.

The parties proceeded to discovery. Potowmack filed several objections to the Balls'request for production of documents. One of these objections is pertinent to the outcome of this case. Potowmack objected to providing any plans (Exhibit 48):

> …not otherwise available to or in control of requesting party. Respondents should have control or copies of any plans submitted by them for construction on their home for the last 5 years or can obtain them.

The Hearing Examiner sustained this objection by order dated May 1, 2014, and the parties filed pre-hearing statements in the case, including brief statements of their legal theories. The Balls' pre-hearing statement included the following items (Exhibit 55):

> The HOA consistently failed to abide by its own rules and regulations in raising issues, approving plans, holding meetings, and votes, and bring the instant action. The HOA's failures preclude them from pursuing the action and asserting that there were deviations of which the Respondents were aware of.
>
> The HOA has dealt in bad faith with the Respondents, especially given the history between the Respondents and some of the HOA Board members, including Raj Barr and Lynn Gowan, who is also a neighbor of the Respondents and has been involved in a number of disputes between them. The HOA's decision are tainted by bias and past animosities and are not reasonable as defined by the Court.

The Hearing Examiner held a public hearing on the complaint on June 12, 2014, and continued to June 30, 2014, July 10, 2014, July 25, 2014, August 4, 2014, September 15, 2014, September 19, 2014, and October 6, 2014.

During the course of the public hearing, Potowmack's secretary, Ms. Gowan, acknowledged that she had not provided complete copies of the Board's minutes for the years requested in discovery. Rather, she provided excerpts of those exhibits that she prepared for litigation. Full copies of the Board's minutes were not provided until the July 10, 2014, public hearing. 6/30/14 T. 18-19, 114-117; 7/10/14 T. 57-64.

III. SUMMARY OF TESTIMONY AND EVIDENCE

A. Past Litigation

To understand the parties' claims in this case, it is helpful to revisit *briefly* the litigation between the parties that has gone on for the last decade, as the Panel deciding this case may not be the same as those deciding the prior cases.

1. CCOC Litigation

Recorded history (at least in this record) of the conflict between the two parties begins in 2003 or 2005, when Mr. Ball filed an application with the Board's Architectural Committee to build two wooden decks with a shed roof on both sides of his house. The Architectural Committee approved this application in 2003. Mr. Ball then built a single, fully enclosed above-ground addition on the north side of his house. Mr. Ball later applied for permission to convert both side decks into enclosed rooms; the Board denied this application. Nonetheless, Mr. Ball had already commenced construction on the enclosure on one side. CCOC Case No. 720-G, Decision, p. 5. Mr. Ball testified that he began construction on one of the enclosures because he felt that the improvement didn't impact any neighbors. 8/4/14 T. 113-114. At some point Potowmack filed a complaint with the CCOC requesting an order requiring Mr. Ball to remove the improvements. In March, 2008, the CCOC Panel held its hearing and, later that year, issued an order requiring Mr. Ball to remove the improvements unless he filed an

application to reinstate his 2003 approval. At the time, Mr. Jeffrey Williams was both president of the Board and Chairman of the CCOC. 9/15/14 T. 118-119. Mr. Williams testified on behalf of the Board before the CCOC Hearing Panel, representing himself and Dr. Raj Barr as "co-presidents." According to Dr. Barr, Dr. Barr was vice-president at the time, although he acknowledged that Mr. Williams repeatedly identified them as "co-presidents" to both community members and the CCOC. *See, e.g.,* CCOC Case No. 720-G, Decision, p. 1; Exhibit 127 (Notice of Annual meeting for April 21, 2008). Later that year, the CCOC Panel issued a decision in favor of Potowmack, assessing attorney's fees against Mr. Ball. In doing so, it found that Mr. Ball had a "minimal regard" for the covenants applicable to his property. CCOC Case No. 720-G, p. 12. The CCOC's order required Mr. Ball to remove all of the improvements unless he filed a complete application to reinstate his original approval within 15 days of the date of the order. Mr. Ball submitted an application, but the HOA deemed it incomplete, a finding that was upheld by the Board. CCOC 720-G, Supplement Order. Mr. Ball testified that he complied with the CCOC's Supplemental Order and paid the attorney's fees. For him, the CCOC's decision "resolved the issue." 8/4/14 T. 113-114. He later apologized to Mr. Williams, stating that (Exhibit 153):

> I am afraid that my impetuous nature and impatient way of doing things have led me to stretch the rules for seeking approval of architectural changes. I apologize to the members of the Architectural Control Committee and the Board of Directors for the situation I caused by the decision to alter the design of my utility deck/work space during construction and implement the changes before receiving approval.

A second complaint (CCOC Case No. 73-12) filed by Potowmack involves the same plans as this Complaint. Potowmack charged that Mr. Ball constructed a shed and deck that did not conform to the plans approved by the Board. The CCOC agreed with Potowmack that the deck failed to conform to the plans because it was offset from the rear façade by one foot,

rather than the two feet mandated by the plans, and because it included an exterior stairway not shown on the plans. CCOC Case No. 73-12, Decision and Order, March 21, 2014. It concluded that Mr. Ball constructed a "garden wall" and a shed that did not conform to the approved plans. It found that the construction had been delayed beyond the 6-month period represented by Mr. Ball. *Id.* For some reason, numerous acts relevant to both proceedings were never relayed to the CCOC in that case.[2] The Board also awarded Potowmack attorney's fees against Mr. Ball in that case. *Id.*

Mr. Charles Bruno filed a different complaint before the CCOC (CCOC Case No. 30-12), which impacts the proceedings here. Filed in March, 2012, Mr. Bruno alleged that the Board failed to follow the requirements of State law and its own governing documents by failing to properly adopt a budget, to give proper advance notice of meetings, and to conduct open meetings. The Panel found that (CCOC Case No. 30-12, Amended Memorandum Decision and Order, p. 8 (August 6, 2013)):

> [T]he Association has violated its governing documents in numerous areas over the years, including repeated failures to send notice of Association and Board meetings, by conducting Board business outside of a meeting without the unanimous consent of all Board members, and by failure to adopt a budget.

The Panel rejected Potowmack's argument that the Board's failure to comply with its governing documents was not malicious. The Hearing Panel was "extremely troubled" with the Board's failures, "particularly since the Association specifically agreed to properly notify members of meetings as a result of mediation in 2008." *Id.* The Panel further found that the "Association's Board of Directors has engaged in long-standing behavior showing a complete lack of interest or understanding of the governing documents or of Maryland law governing

[2] It appears from the record in that case that the Board never submitted the Association's procedures and design guidelines for architectural applications, described below. Exhibits 69-70. Nor was the complete history supporting Mr. Ball's claims of bad faith presented to the Board.

community associations." CCOC Case No. 30-12, Decision, pp. 8-9 (August 6, 2013). Pertinent to this case, the Panel required the following actions (*Id.* at pp. 10-11):

> A. Within 45 days from the effective date of this Order, the Respondent must schedule a Board meeting and all of the actions taken by the Board outside of meetings or at any Board meetings other than the January 30, 2012 [meeting] must be on the agenda for that Board meeting.
>
> B. Notice of that Board meeting must be provided to owners at least ten (10) calendar days in advance of that meeting.
>
> C. The meeting notice must include the agenda items which will be discussed at the meeting.
>
> D. Notice of the Board meeting must be sent by first-class mail or hand-delivered to owners unless owners have provided consent to receive notice of meetings electronically as described in subsection 3 of this Order. A member of the Board of Directors must certify that the notice was sent out in this manner and that certification must be filed with the minutes of the Board meeting which was noticed.
>
> E. Within 45 days of the date of this order, the Respondent must require at least 4 members of its board of directors to take at least 4 hours of training on the property management of community associations that is directed towards new Board members…
>
> F. The expense, if any, for this training must be paid by the Association.
>
> G. Respondent must provide proof of attendance of the classes must be [sic] provided to the Commission by December 31, 2013.

While many of the events in this case took place prior to the CCOC's guidance to the Board in CCOC Case No. 30-12, several critical events occurred afterwards. Respondents renew the charges that many of the Board's actions in this case did not comply with the governing documents or with Maryland law, particularly with meeting notices and Board actions taken outside meetings.

The Board's secretary, Ms. Lynn Gowan, testified she sends copies of the notices out for every Board meeting and provided the Respondents with copies of all of the notices; she could produce only a few actual notices, however. Ms. Gowan testified that she only had copies of notices for three meetings in 2013 and 2014. She acknowledged that other meetings

had occurred in those years, but did not have the notices. 7/10/14 T. 81-82. Dr. Barr testified the Board mails only the notice for the annual meeting; notices for regular Board meetings is hand-delivered in individual mailboxes. If someone is scheduled to make a presentation, whoever chairs the meeting sends an e-mail to that individual notifying him of the meeting. 7/25/14 T. 202-203.

According to her, the notices are generic and a typical agenda lists the items as president's report, treasurer's report, environmental, architectural, old business, new business, and new items. 6/30/14 T. 322-324. Ms. Gowan testified that she produced all of the meeting notices she could find. 7/10/14 T. 80. The notices have been published in a Yahoo group forum (referred to as Potowmack's "blog") because many homeowners have requested this. When asked how a property owner would know that the Board was discussing his/her property at a particular meeting, she agreed that they would not unless the owner receives letters or e-mails about their particular issue. 6/30/14 T. 322-324.

Dr. Barr admitted that he did not read the governing documents until he became president, and even then, only because of Case No. 30-12. Dr. Barr previously testified that he became president suddenly after Mr. Williams' departure (due to a federal indictment), although Dr. Barr has been president for several years after that. He testified that the Board is still "shell-shocked" by the requirement to send out notice of meetings to 159 property owners, some of who are not on e-mail. 10/6/14 T. 134-135.

Mr. Judy Dworkin, a community member for 11 years, testified that she has received notices by e-mail since she has lived there. She does not recall if she has ever received notices by regular mail or hand-delivery, nor does she remember "opting in" to join the blog. 9/19/14 T. 210-214. Mr. Adrian Miller, Mr. Ball's neighbor on the opposite side of Ms. Gowan,

testified that when he moved into the community in November, 2011, some individuals came to his house with a welcome package that included information on how to sign onto the blog to communicate throughout the community. He signed on for the blog and attended a Board meeting. He also received notice through the mail and e-mail as well. He has never been present at any Board meeting with Peter Ball; he has been to only two Board meetings. 10/6/14 T. 22.

Mr. Lance Pelter, a Board member for 9 years and President of the Potowmack for 7 years, testified that he did not receive notices of Board meetings, despite complaints to the Board member assigned to his district area. He also raised it at an annual meeting when they voted to revise the By-laws to require notice by mail. 7/25/14 T. 92-93, 98. He has received "a couple notices" by U.S. mail, but not for all of the Board meetings. 7/25/14 T. 122.

According to Mr. Pelter, he receives written notices for the annual meeting, but never for individual meetings. The notice for the annual meeting is dropped in his mailbox without any date on it. 7/25/14 T. 88. Both Mr. Ball and Mr. Pelter stated that they had never received notice meetings critical to this case, including the July 17, 2013 Board meeting or the October 28, 2013, Board meeting (at issue in this case, described below). He did not know of those meetings until informed by Mr. Ball's counsel in preparation for this case. Nor did he receive notice or hear of any meeting in which the Board authorized the HOA to litigate against Mr. Ball. 7/25/14 T. 92-93; 8/4/14 T. 215.

Mr. Bruno, who filed the Complaint in CCOC Case No. 30-12, testified that he has noticed some changes since the CCOC's decision in Case No. 30-12, but they are inconsistent. He is aware of the "blog," which is a Yahoo Board, that he used to look at, but no longer does

so. He never opted into receiving notices electronically and he still does not receive notice of all of the Board meetings by mail. 7/25/14 T. 122-123.

The Balls' nearby neighbor, Ms. Beth Bentolila, also testified that she did not receive notice of Board meetings. Ms. Bentolila testified that she does not receive notices of meetings by mail or hand-delivered to the house. She did not live at the property for approximately 2 years because her house burned down. If any were hand-delivered, she did not receive them. Her mailing address did not change during that time, and she regularly picked up her mail at the post office every two weeks. Prior to using the "blog," she never received notices of Board meetings; she learned of them either through the blog or through Mr. Ball. 7/25/14 T. 52-56, 73-80.

All witnesses agree that Potowmack has a "blog," which evidently is a Yahoo forum group. There is no "opt in" procedure for the blog, which does contain meeting notices. 7/25/14 T. 122-123. Ms. Bentolila has become aware of some Board meetings because she visits the HOA's blog, where the time and date of the meetings is posted. The blog does not include an agenda. According to her, there is no requirement that members join the blog and she believes that "very few" of the members have done so. 7/25/14 T. 51-55. Mr. Pelter testified that he is aware of the blog, but has not used it because he has heard that it contains a "lot of hostility and personal items" going back and forth and, therefore, he has "no interest" in participating. 7/25/14 T. 98-99.

2. Private Litigation

Litigation between Ms. Gowan and Mr. Ball also impacts this case.

Ms. Lynn Gowan joined the Board in 2012 and is currently its secretary. 7/10/14 T. 81. She lives next door to Mr. Ball and the two have engaged in two separate individual

lawsuits stemming from a property line dispute. According to Mr. Ball, their first dispute began when he erected a fence along their common property line. Mr. Ball stated that he did not have a survey at the time, so he erred on the side of putting the fence up closer to his side of the property line than necessary. About 6-7 years after erecting the fence, Mr. Ball notified Ms. Gowan that he would be replacing the fence (because it was rotting and tilting over) and suggested that she move plants near the fence. According to Mr. Ball, Ms. Gowan informed him that she had commissioned a survey that showed that the fence was on her property. Mr. Ball testified that he commissioned his own survey showing that the fence was on his property. The court agreed and he then sued Ms. Gowan in District Court for the $500 cost of the survey. After the suit, Ms. Gowan moved her plants. 8/4/14 T. 143-144.

Mr. Ball then constructed the fence, although he admitted placing the less attractive side of the fence facing Ms. Gowan's property. He testified that he did that because Ms. Gowan called the police and accused him of trespassing on her property when he installed the fence. Ms. Gowan then sued Mr. Ball approximately 6-7 months after the fence was completed, claiming again that the fence was located on her property. The survey submitted in this second suit showed that the fence was located on Mr. Ball's property, except for approximately 1/8 inch that was on her property. The judge found in Ms. Gowan's favor and awarded her $1.00 in damages. 8/4/14 T. 144-145.

According to Mr. Ball, Ms. Gowan has filed 12 or 13 complaints against him with the County, ranging from issues relating to storm water runoff to the height of the roof. 8/4/14 T. 145. Mr. Ball submitted into the record Ms. Gowan's complaint to the Department of Permitting Services (DPS) complaining of storm water runoff from his property that, according to Ms. Gowan, prevents grass from growing in her side yard. Exhibit 120; 6/30/14 T. 257-258.

Mr. Ball also produced the DPS Inspector's report regarding her complaint, which concluded that the erosion occurring on Ms. Gowan's property was the result of conditions on Ms. Gowan's property rather than Mr. Ball's.

When presented with the DPS complaint at the public hearing, Ms. Gowan initially could not confirm whether it was the complaint she filed, but later admitted, with prompting, that she had filed the complaint. 6/30/14 T. 258. Even when presented with the DPS Inspector's written findings, Ms. Gowan testified that she had no independent recollection of the DPS Inspector informing her of this. *Id.* at 259. Ms. Gowan still maintains that the inability to grow grass in her side yard stems from storm water runoff emanating from Mr. Ball's property. *Id.* at T. 258-259. She bases this in part on the fact that she experiences storm water problems every time the Ball's dig in their yard, which she characterizes as "strange." *Id.* at 260. She admitted that she has filed multiple complaints against the Balls about storm water runoff, but could not remember how many. *Id.* at 260-261.

Ms. Gowan continues to maintain in this case that storm water runoff from the Ball's property damages her property. *Id.* at T. 39. According to Dr. Barr, Ms. Gowan prepared the Supplemental Complaint the Board filed in this case (Exhibit 7), which includes allegations that storm water from the Ball's property causes erosion on her property. The substantive and procedural claims relating to the Supplemental Complaint are described in detail below.

Ms. Gowan testified that she has filed other complaints against the Balls with DPS. She called DPS in November, 2011, when Mr. Ball began construction of the retaining wall (part of CCOC Case No. 73-12.) She called DPS because no one notified her that plans had been approved or that construction would begin (this is discussed in more detail later.) According to her, she "volunteered" to call DPS on behalf of the Board to discern what was

going on. Ms. Gowan could not recall filing any other complaints about the property. *Id.* at 262.

Potowmack alleges that Mr. Ball has acted in bad faith in part because of his actions toward Ms. Gowan. Ms. Gowan believes that Mr. Ball has exhibited bad faith because, when she was taking photographs of Mr. Ball's property (in preparation for the public hearing) and Mr. Ball yelled expletives at her. According to her, she was asked to take pictures because, at the pre-hearing conference in this case, the Hearing Examiners "told the Balls not to do any construction." 6/12/14 T. 50-59.[3] In response to Mr. Ball, Ms. Gowan testified that she "bowed and curtsied" to Mr. Ball to stop him. *Id.* at 58. Ms. Gowan also submitted the following a photograph of a sign posted on her property containing obscenities, which is in the record of Case No. 73-12.

When asked to characterize their relationship, Mr. Ball testified that, "[T]here is no relationship." 8/4/14 T. 145. When Ms. Gowan was asked the same question, she refused to acknowledge that the relationship between them was not friendly, and the Hearing Examiner found her reply to be unresponsive and evasive. 7/10/14 T. 73-79.

Mr. Ball contends that Ms. Gowan's participation as a Board member acting on his application is evidence of Potowmack's bad faith because of their past relationship and her actions regarding this application, which will be described in another section of this Report.

Mr. Peter Gibson, Potowmack's vice-president, testified that he was aware of Ms. Gowan's past history with Mr. Ball. When asked to characterize the relationship, Mr. Gibson responded that the issues have personally impacted her over the years. She has initiated

[3] The Hearing Examiner clarified on the record that she did not order the Ball's to stop construction at the pre-hearing conference, but requested them to do so. 6/30/14 T. 59. Respondents' attorney correctly pointed this out as well. *Id.* The Hearing Examiner could not order the Balls to stop construction during a pre-hearing conference because that would not be included within the record of this case.

complaints, raised issues, and been actively involved in determining whether Mr. Ball has committed any HOA violations. He was not aware of the lawsuits between Mr. Ball and Ms. Gowan, but did know of the, "ongoing…issues" between the two for a long time, including complaints filed with DPS. Mr. Gibson testified that the history was "fairly lengthy" because they had been neighbors for a long time. He did not consider them friends. 8/4/14 T. 23, 24. When asked to characterize Ms. Gowan's behavior, he described it as "diligent." 8/4/14 T. 26.

Dr. Barr testified that he was not aware of the "deep-seeded thing" between Ms. Gowan and Mr. Ball until he saw the photograph of the sign containing obscenities in the record of CCOC Case No. 73-12. 7/25/14 T. 182.

B. Governing Documents and Architectural Procedures

Before setting out more of the factual background of this case, the Hearing Examiner will summarize pertinent portions of the governing documents, as well as the evidence and testimony on Potowmack's procedures for exterior alterations, both written and unwritten (although some testimony is contradictory).

1. Governing Documents

The governing documents include the Articles of Incorporation, Declaration of Covenants, and By-Laws.[4] Exhibits 10(a)-(c). Article X of the Articles of Incorporation imposes a duty on the Board of Directors to act in good faith for the benefit of the corporation. Exhibit 10(a). It prohibits the Association from entering into any "contract or other transaction" in which one of its Board members is self-interested, "pecuniarily or otherwise,"

[4]The governing documents use the name Eastgate I Homes Association, Inc. According to Dr. Barr, the Association's name was changed to Potowmack Preserve, Inc. 6/12/14 T. 130. In response to the CCOC's order in Case No. 30-12, Potowmack has recently adopted new governing documents that meet the requirements of Maryland law. Exhibit 156. The former governing documents controlled the parties' actions in this case.

unless the conflict is disclosed and a majority of disinterested Board members approve the transaction. *Id.*

The Declaration authorizes the Board to establish an Architectural Control Committee made up of the Board of Directors, or by three community members appointed by the Board. Exhibit 10(c), p. 8. The Declaration vests the Board or Committee with authority to approve exterior architectural changes. It also contains a "deemed approved" clause (Exhibit 10(c), p. 8), stating:

> In the event the Board of Directors, or its designated committee, fails to approve or disapprove such design and locations within 45 days after said plans and specifications have been submitted to it, approval will not be required and this Article will be deemed to have been fully complied with.

The Articles impose on the Board a duty to keep a complete record of all of its acts and corporate affairs, and to make them available to members of the community.

The By-Laws of the Corporation prohibit standing committees, but give authority to the Board to appoint a committee "as it deems necessary and appropriate" consisting of three members of the community, one of whom must serve on the Board of Directors. Exhibit 10(b).

2. Architectural Procedures

The Board has published a pamphlet containing both architectural guidelines the Board should use to determine compatibility of exterior alterations and procedures for filing and reviewing architectural change applications. Exhibit 70. The former are listed under the heading "Potowmack Preserve Architectural Design Guidelines" (Design Guidelines); the latter are entitled "Procedures for Filing Architectural Applications" (Architectural Procedures). As set forth below, Dr. Barr apparently distinguishes between the two, asserting that the Design Guidelines are controlling of the Board's actions, but was uncertain that the

Architectural Procedures govern the Board's actions. The pamphlet is set forth in full in an appendix to this Report, but pertinent procedures are summarized here.[5]

Briefly, the Architectural Procedures authorize an Architectural Control Committee (now referred to as the "Architectural Review Committee" (ARC)) consisting of three Board members appointed for one year. They vest authority in the Committee to approve or disapprove applications, unless there are written allegations by a community member that the proposed change is not in harmony with the "surrounding structures and/or topography." 6/12/14 T. Exhibit 70, p. 4.

The ARC must forward the application to neighbors. Neighbors then have an opportunity to object, which they must do in writing. Once an objection is filed, the application is forwarded to the Board of Directors. After referral to the Board, the Board then invites the applicant to meet with the Board. 6/12/14 T. 135.

These published procedures also require the Board to provide "notice of the method to be used in applying for permission for architectural change" at least once a year, although failure to provide the notice does not invalidate the *covenants* themselves. Exhibit 70. Significant to this case, the published procedures state that the notice to community members on the procedure for architectural applications "should advise" that the correct practice is to file applications with the Association's President. The stated reason for this is so that architectural changes do not go undetected until the property is resold. *Id.*

Another procedure at issue here is the requirement, contained in the architectural control committee procedures, that the President must mark applications with an application

[5] The Board's Architectural Guidelines and Procedures were not included with the Complaint. When the Hearing Examiner requested that the "guidelines" be placed in the record, Potowmack provided only the page containing the Design Guidelines, but not the Architectural Procedures. Counsel for Mr. Ball provided the latter document. Exhibits 69, 70.

number once they are received and **"the Association has 45 days from the date the receipt of an application to approve or disapprove it."** *Id.* (Emphasis in original.)

The procedures require the President to ensure that affected neighbors are advised of the application in time for them to voice any concerns they may have. At a minimum, the procedures state that adjacent neighbors are to be considered "affected", as well as any other name that can see the improvement. *Id.*

The published Architectural Procedures give the ARC authority to approve applications to which there are no objections. If objections are made, the committee makes a recommendation to the Board of Directors, and is required to notify the applicant of the recommendations. Those objecting, as well as the homeowner, must be invited to attend the Board hearing. They also require the President to report its decision to the homeowner-applicant as soon as possible after the vote. The procedures assign the duty for "keeping all Board members informed of each architectural change application as it is logged and as it is acted upon" to the Board's president. *Id.* Perhaps most critically to this case, the ACC procedures mandate that:

> Each application for architectural change, action taken or status, shall be a subject of the agenda of the next regularly scheduled Board of Directors meeting and the minutes shall reflect, by case number, applicant property address and action taken. The minutes will provide the record for the architectural change application.

In the event that a homeowner constructs an architectural change without approval, the Architectural procedures *require* the president seek an application from the homeowner for the changes made. The responsibility for actually filing the application remains with the homeowner. *Id.* at 5.

Finally, the Architectural Procedures require that a homeowner who submits an application after being denied must allege different material facts or make modification to the original proposal. Only the Board may consider resubmissions. Exhibit 70, p. 4.

The Design Guidelines contain the list of materials required for an application. These require accurate site plans (at a minimum scale of 1" – 20'0"), floor plans, sections, and elevations (at a minimum scale of 1" – 8'0"), as well as color photographs of existing conditions.

The Architectural Procedures permit some variance from the "strict technical rubric" of the procedures without invalidating actions taken by the Board. The Board's authority to deviate from strict compliance with the procedures is limited by the requirement to provide all those affected with "substantial due process." *Id.* at 5.

Dr. Barr is president of Potowmack and is a licensed architect, with an undergraduate degree in "built environment." 6/12/14 T. 28-29. He practices as an architect and construction manager. His professional memberships include the American Institute of Architects (former president), the Royal Institute of British Architects (corporate member), the U.S. Green Building Council (corporate member), and a professional member of the International Interior Design Association. He has worked in the field of architecture for approximately 40 years. 6/12/14 T. 29. He has also qualified as an expert in architecture before the CCOC.[6] 6/12/14 T. 30.

Dr. Barr acknowledged that Potowmack's Articles of Incorporation prohibit standing committees. 6/12/14 T. 131. Nevertheless, in 1994, it was recommended that they set up an

[6]The Hearing Examiner's refusal to qualify Dr. Barr as an expert in this case did not relate to his qualifications as an architect; rather, it was based on lack of clarity between expert and factual testimony that can arise where a party acts as its own expert. *See, U.S. v. Lopez-Medina,* 461 F.3d 724 (2006).

architectural committee to intake all applications. Dr. Barr explained that changes to the Articles of Incorporation are difficult; Potowmack's have remained the same since 1974, until they were changed in 2014 in response to the CCOC's decision in Case No. 30-12 (described above). 6/12/14 T. 130-133.

Dr. Barr is sure that the Design Guidelines control the Board's authority but was somewhat equivocal as to whether the procedures included in the same pamphlet are binding, although his testimony on this point is not entirely clear. Initially, Dr. Barr testified that the Board never approved the procedures contained in the pamphlet with the Architectural Guidelines because they dated "way back" to 1994; he later testified that he knew that the Design Guidelines were approved by "his" Board, but he could not recall whether the procedures were ever approved by the Board. He described the procedures as the document handed down from Board secretary to Board secretary, and "suspected" that "his Board" had approved the document in 1994 because "no one would sit there and make this up." 6/12/14 T. 133, 130-133.

The practices of Potowmack differ from the published guidelines and Dr. Barr acknowledged that they have "evolved" over time. 6/12/14 T. 130. He stated that the president is not involved in the initial process anymore—they have set up an architectural committee with three members. *Id.*

According to testimony in this case, the Board now requires architectural applications to be accompanied by a specific application form, although the Board could not point to specific authority for the form in the Architectural Guidelines or governing documents. 6/12/14 T. 128-129. Nevertheless, Dr. Barr testified that an application without this form is considered "incomplete" and will not be processed. 6/12/14 T. 47. When asked whether the application

form now required was mentioned in the architectural guidelines, Dr. Barr responded that it was not because the "Guidelines" are the standards for approval of the exterior work. When asked whether the form was mentioned in the part of the pamphlet entitled, "Procedures Relating to Architectural Applications," he did not acknowledge that it was not mentioned; rather, he stated that the Board had been using the form since 1994. 6/12/14 T. 129-130.

According to Dr. Barr, the procedures setting forth the requirement that exterior applications be submitted to the architectural committee utilizing this form are very clearly set forth, in his opinion, at least once a year in the HOA's newsletter. Dr. Barr testified that, "normally they [potential applicants] call the architectural committee chair who has the form." 6/12 14 T. 129.

Dr. Barr was not entirely clear exactly what the newsletter “notification” consisted of, but testified that the newsletter instructs property owners to contact the chair of the Architectural Committee before making exterior alterations. 6/12/14 T. 127-129, 133. Documentary evidence in the record, however, includes only one newsletter, dated Spring, 2014, which included the application form as an attachment. 6/12/14 T. 47; Exhibit 127. In Dr. Barr's opinion, however, the form is "fairly well-known" in the community. *Id.* at T. 127-129. Recently, the form became available on Potowmack's website. 6/12/14 T. 47.

The 45-day period for the Board's review of the application begins when the application is deemed "complete," according to Dr. Barr. 6/12/14 T. 48. A "complete" application must include the required application form, and the application will not be processed until the form is supplied. *Id.* at T. 47-48. The balance of items required for a "complete" application is disputed in this case (as set forth below). In Ms. Gowan’s opinion, a “complete application” includes the application form, scaled plans, a site plan, and samples of proposed materials. If

any of these items are not submitted, she testified that the Architectural Review Committee would notify the property owner and request they be supplied. 6/30/14 T. 41-42. The chair of the architectural committee or the Board notifies the applicant by letter specifying the additional information needed. *Id.* at T. 48. Dr. Barr testified that the purpose of the requirement for scaled drawings is to prevent submission of plans with no dimensions. 7/10/14 T. 31-32.

Board members acknowledged (and Board minutes confirm) that Board members were incorrectly under the impression that they could discuss and vote on an architectural application in closed session, which they did in the instant case.[7] 9/19/14 T. 238. Thus, as demonstrated below, Mr. Ball did not know the exact conditions placed on the Board's approval until a letter was sent communicating those conditions.

The record becomes fuzzier as to Potowmack's handling of amendments to approved applications. Dr. Barr testified that minor changes do not need HOA approval as long as the applicant keeps everyone in the "knowledge loop," although he acknowledged that this was standard wasn't contained in the published procedures. 6/30/14 T. 211. According to Dr. Barr, the Board determines whether the deviation is major or minor, once a violation is reported. 6/12/14 T. 210-212.

While Dr. Barr testified that the Board does not normally notify someone that a property is in violation without first taking a vote, he testified that he is the person "designated" by the Board to determine whether a violation exists, along with two other Board members. According to Dr. Barr, the three Board members inspect the property containing the alleged violation and then report their findings to the Board. 6/12/14 T. 197. Ms. Gowan testified that

[7] One of the Board's actions that had to be ratified after the CCOC's decision in Case No. 30-12 was the approval of Mr. Ball's application. Exhibit 127.

if the Board thinks there is a problem, they will "try" to notify the homeowner of the violation so the homeowner knows to stop the work. 6/30/14 T. 147.

Mr. Gibson initially testified that amendments to approved applications require something to be submitted in writing identifying what changes were being made, along with samples of any new materials, although he did not know of any "written protocol" for this procedure. 6/30/14 T. 94-95. He later testified that, during his tenure on the Board, they had never received an application to amend a prior approval so he did not know the procedure (although Mr. Gibson was on the Board when Mr. Ball filed two applications to amend the subject approval). 6/30/14 T. 133.

Ms. Lee Alfer, who is the current chairperson of the Architectural Committee, testified that if there are any deviations from the approved plans, one must file a new application with the Architectural Committee, and the original process would begin again. If there was an objection to the modification, the application to amend the original approval would be referred to the Board. 9/19/14 T. 222-223. If the Board requests additional modifications, it again must first be submitted to the Architectural Committee, and the cycle repeats itself.[8] 9/19/14 T. 227. If a plan is submitted to the Architectural Committee without the application form, the Committee will ask the homeowner to fill out the form. If the plans are not submitted to the Committee, she cannot ask the homeowner to fill out the form. According to Ms. Alfer, she has required every person to fill out a form if they file an application. If she finds out that someone made an exterior alteration without the HOA's approval, she goes to the homeowner and provides them with a form so they can apply. If she believes that there are strong objections to something that was done without going through the application process, she then

[8]According to the published procedures, amendments to applications should go directly to the Board. Exhibit 70.

goes back and tells the homeowner that it would be brought before the Board. 7/19/14 T. 242-243.

If an application is denied, Mr. Gibson testified, an applicant must re-submit an entirely new application, complete with full drawings and material samples. 6/30/14 T. 93.

C. The Subject Application

Despite the 45-day time period provided for review by the Board, Mr. Ball submitted an application in 2008 that, according to the parties, the Board did not approve for three years. While the litigation in Case No. 720-G was ongoing (before the Panel hearing and decision in that case), Mr. Ball filed an application for a larger addition. Mr. Ball testified that he decided that he would submit the application to accommodate all of the space he would need in the future, thus dealing with the Board only once. 8/4/14 T. 145-146. Mr. Ball's initial 2008 application was rejected by the Architectural Committee because it was incomplete and because (allegedly) Mr. Ball was delinquent in his assessments, although minutes of the Board's January 29, 2008, meeting reveal that members discussed rejecting the new application because they considered him in violation of the approvals considered in CCOC Case No. 720-G. Exhibit 127. Mr. Ball resubmitted his application, with the materials requested by the Board, in May, 2008, after the CCOC Panel's hearing in Case No. 720-G, but before its decision.

Only fleeting glimpses of events occurring between 2008 and 2010 shine through this record, and it is difficult to discern any of the steps required in the published Architectural Control Committee procedures. Minutes of Board meetings reveal Board members repeatedly complained of Mr. Ball's "pattern" of skirting HOA regulations, although not when Mr. Ball

was present. Exhibits 127, 75. In fact, part of Potowmack's original case consisted of reading Board member's statements citing this "pattern" from meeting minutes. 6/12/14 T. 57, 60.

Mr. Ball testified that he submitted three or four hand-drawn plans during this time that were rejected by Dr. Barr, who wanted scaled plans. Mr. Ball understood that the delay in acting on his application was due to Dr. Barr's rejection of the initial, hand-drawn sketches that were submitted by Mr. Ball. 8/4/14 T. 118. Mr. Ball also testified that he repeatedly requested Dr. Barr to give him guidance as to what the Board would approve so that he would have some idea before paying for plans. *Id.* at T. 118-119**.**

Dr. Barr (who was vice-president in 2008) initially testified the Board met continuously between 2008 and 2010 *"ad nauseum."* 6/12/14 T. 137. He later acknowledged that there were no meetings on the application until 2010, and there were numerous communications among individual members of the Board. *Id.* 6/12/14 T. 137. Beginning in 2010, according to Dr. Barr, the Board held an "endless parade" of meetings with Mr. Ball. 6/12/14 T. 155.[9]

At the October 6, 2014 public hearing before the Hearing Examiner, Dr. Barr testified that he had never received requests from Mr. Ball to clarify what the Board desired under architectural guidelines because he was not the president at the time. He did testify that he did not believe it was up to the Board to design the house for Mr. Ball. 10/6/14 T. 162-163. When asked whether Mr. Ball had submitted plans with the 2008 application, Dr. Barr responded he didn't recall seeing them. When asked where the Board's denial of the May, 2008, application was, Dr. Barr stated that it must be in the secretary's or architectural committee's files,

[9] The record in this case reveals that there were two meetings that Mr. Ball attended up to the time the Board approved the application, including the meeting at which it was approved. Board minutes also reflect that Mr. Ball attended three additional Board meetings—September 27, 2011 (to request vinyl siding), July 17, 201 (to present constructed changes to the Board, (and one at the special meeting October 7, 2013 (to ratify the Board's approval of his plans). Potowmack, however, never supplied a complete set of Board minutes during this period of time.

although there is nothing in this record. 10/6/14 T. 153. Dr. Barr did not think the Board voted on the application while Mr. Williams was president (he was president at least until March 2010) and assumed that it was still pending in February, 2010, based on a letter sent by Mr. Williams to the Balls in February (more on this letter below). 10/6/14 T. 37.

Mr. Peter Gibson, now vice-president of the Board, characterized the 2008 application process as "iterative." He believed that the application was never "complete," although the record does not reveal that Mr. Ball was notified of this fact. Mr. Gibson also admitted that Mr. Ball's history of non-compliance contributed to the delay in approving the application, although he denied this history had anything to do with filing the complaint in this case. 8/4/14 T. 77-78.

Despite the lengthy pendency of Mr. Ball's application, the chairperson of the Architectural Review Committee reported at the April 29, 2009, annual meeting that the year had been quiet. Exhibit 127. Nor do the Board's minutes even suggest that the Board held meetings on the application.

Mr. Ball's application was, apparently, discussed at the Board's January 30, 2010, meeting. These minutes demonstrate that some drawings had been submitted to the Board, as one Board member refers to "drawings" that completely changed the back of the house. Exhibit 127. Dr. Barr suggested that the Board send a letter to Mr. Ball stating that the drawings did not conform to the guidelines, and Mr. Williams volunteered to draft the letter and circulate it to the Board. *Id.*

At the same Board meeting, the minutes disclose that Mr. Williams stated that the "45-day clock" begins with a vote, and he suggested that the Board not vote so they can "continue the discussion" with Mr. Ball. The record does not reveal the authority in the governing

documents relied upon by Mr. Williams for this statement, as the 45-day review period in the Architectural Procedures clearly begins with an application. *Id.*

One Board member at this meeting reported that Mr. Ball made a "7th" transfer of title of his house to his son, Michael, for $1.00.

The February 10, 2010, letter forming the basis of Dr. Barr's conclusion that the application was still pending was addressed to both of the Balls. Exhibit 127; 10/6/14 T. 36. The letter purported to be from both Mr. Williams and Dr. Barr (Dr. Barr is listed first as a signatory). Exhibit 87. Dr. Barr, however, denies that he reviewed any of the correspondence purportedly co-signed by he and Mr. Williams, apparently a practice of Mr. Williams. 10/6/14 T. 127. The February 10, 2012, latter appears to responds to a request from Michael Ball to clarify the Architectural Guidelines as applied to the Ball's property, although the letter from Michael Ball is not in the record. *Id.* The letter mentions that prior drawings had been returned to Mr. Ball (never mentioned in any Board minutes), stating that:

> Your letter advises that you are considering making some exterior changes to your house and asks the committee for its guidance. Your letter included three pages of drawings on letter size paper. The drawings appear to be identical to larger drawings you submitted over a year ago.[10]

The letter then goes on to defend the community's architectural guidelines, apparently against the Balls' charge that the guidelines were vague as applied to Mr. Ball's project. In it, the Board articulates the guidelines in a slightly different manner than set forth in the Design Guidelines (Exhibit 87, p. 1):

> The Association has always believed for more than thirty years that owners should have the choice to provide individual architectural elements and style to their homes while maintaining the consistent look and feel of the five original models that make up our community of 159 homes…While that doesn't mean that every home must look exactly like all others of its model, it authorizes the

[10] The drawings submitted by Mr. Ball prior to February 2, 2010, are not in the record of this case.

> board and committee to protect the harmony of styles throughout the Association.

The letter also purports to be a "preliminary and informal" denial of the drawings submitted, presumably the drawings included with the January 2010, letter. In response to Mr. Ball's request for guidance, the letter suggests that Mr. Ball retain an architect familiar with contemporary home styles with the goal of retaining the harmonious look of the five styles of homes from the street views while providing him with the home space you desire. Exhibit 87, pp. 1-2.

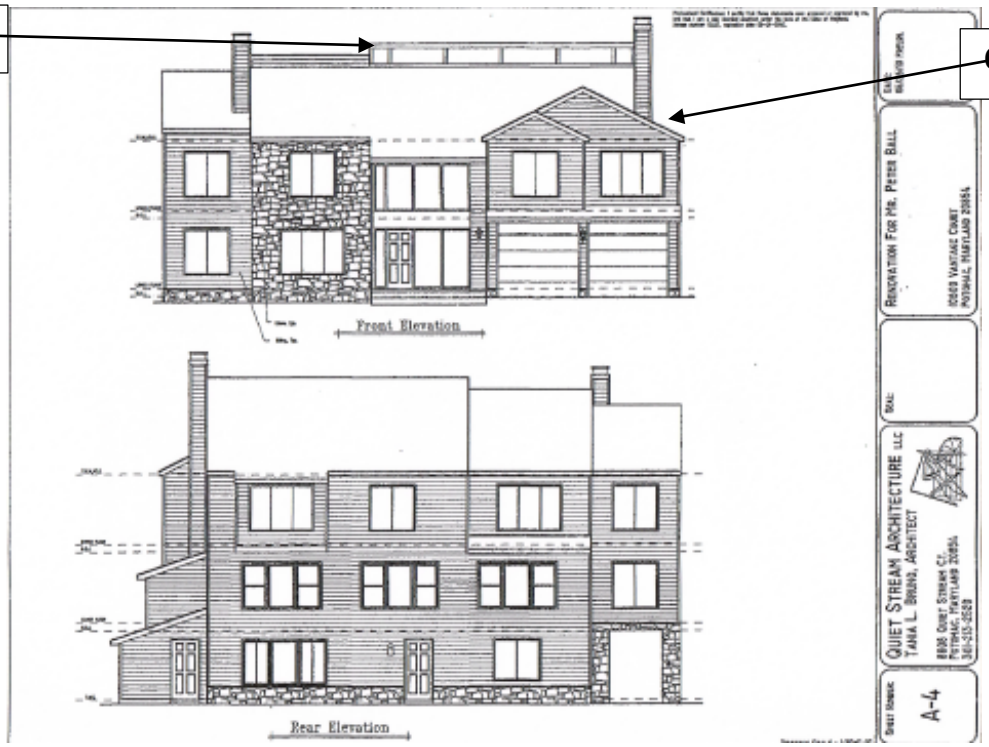
The record is silent again on the application until June 24, 2010, when, apparently, Mr. Ball submitted new plans drawn by Ms. Tania Bruno, a registered architect and a member of the Board. Mr. Ball testified that he hired Ms. Bruno because she lived in the same model of house that he lived in, she is a registered architect, and she gave Mr. Ball a reasonable rate. In addition to those factors, she agreed to help him interface with Potowmack, and especially Dr. Barr. Mr. Charles Bruno, Ms. Bruno's spouse and the Complainant in Case No. 30-12, testified that it was Mr. Gibson's idea for Mr. Ball to retain Ms. Bruno because he thought she could help resolve Mr. Ball's conflict with the Board. 7/25/14 T. 155.

Ms. Bruno sent an e-mail to Dr. Barr, individually, enclosing the "exact plans" that had been submitted to the architectural committee. Excerpts from these plans on the following page (Exhibit 126(a)).

The initial set of 2010 plans included a gabled roof over the full-story addition above the garage. Mr. Ball testified that he included the gabled roof because his adjacent neighbor at 10602 Vantage Court had the same feature on his home and he felt that was a sign the Board would approve it. 8/4/14 T. 121.

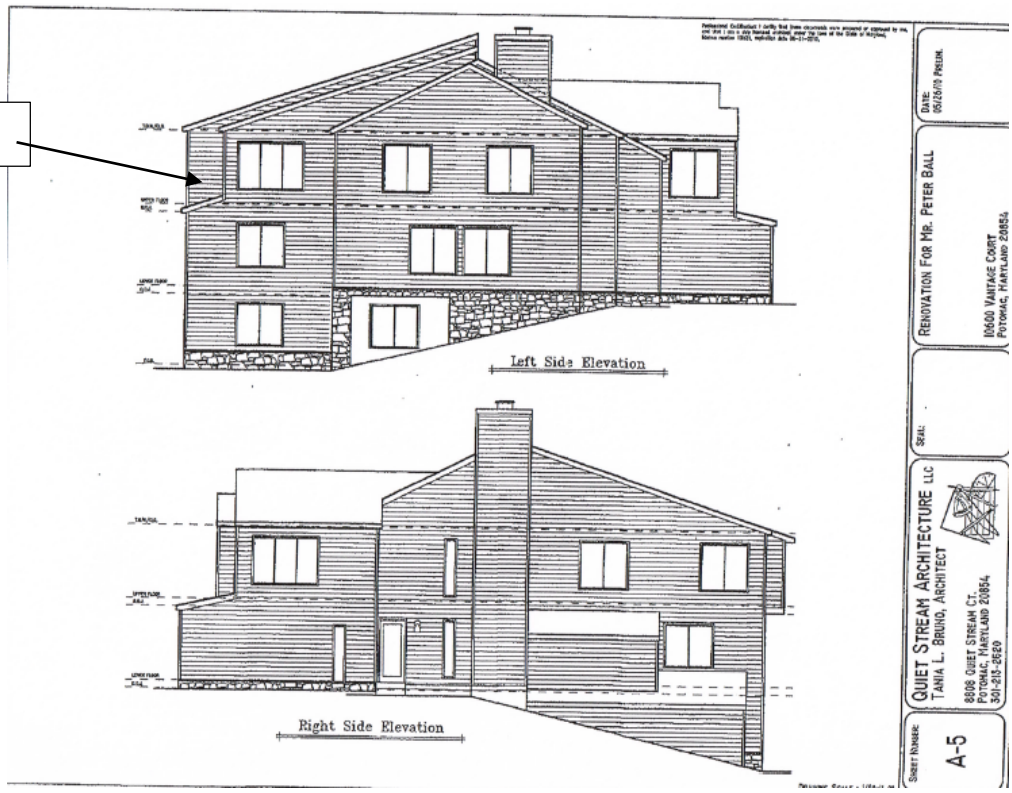
Transom

Gable Roof



Front and Rear Elevations
Exhibit 126(a)

Full Upper Story



Side Elevations
Exhibit 126(a)

Board minutes reflect that Ms. Bruno presented the plans to the Board at a meeting on June 29, 2010, at which Ms. Bruno, Mr. Steinberg (Mr. Ball's adjacent neighbor on the side opposite from Ms. Gowan), Mr. Williams, Dr. Barr, and Mr. Gibson were present. Exhibit 127. Several Board members expressed concern over Mr. Ball's non-compliance with HOA approvals and with the exterior condition of his property. Mr. Steinberg and Mr. Williams mention that an existing stairway and shed don't comply with previously approved plans (apparently the CCOC Panel's decision in Case No. 720-G). Mr. Steinberg expressed his concern that more construction will encroach on his property, and that Mr. Ball "never completes projects and never conforms to plans." Mr. Steinberg is quoted as saying, "he could start by replacing the rotting siding on his home," and states that Mr. Ball is probably "running out of money." Exhibits 75, 127. Mr. Williams reassured the members that "this Board" would not let Mr. Ball fail to conform to the plans. Exhibit 127.

In support of Mr. Ball, Ms. Bruno explained that Mr. Ball desired an addition over his garage, and that she had attempted to provide some interest and variety to the elevation to prevent the home from looking like a "big box." *Id.* The minutes note that Mr. Williams found the biggest problem with the drawings to be the “3rd floor”; in his opinion, the easiest solution was to "change the roof," although the minutes do not further describe the solution Mr. Williams proposed. *Id.* A later e-mail from Ms. Bruno indicates that he suggested lowering the slope of the roof to accommodate the addition without significantly increasing the height. Exhibit 85.

Apparently, the Board rejected this design, although there is no record that this was memorialized in writing to Mr. Ball, and the parties differ as to the reason. According to Mr. Ball, the rear elevations shown on Exhibit 126(a) showed an additional full story on the rear

of the house that Dr. Barr rejected, because the rear of the house faced the street and the addition made it appear too large. Mr. Ball recalled that Dr. Barr also objected to the gable roof over the garage. To the best of Mr. Ball's recollection, Dr. Barr felt it was not sufficiently contemporary. 8/4/14 T. 122.

Dr. Barr testified that Mr. Williams rejected the application because it was too tall. 7/10/14 T. 20-24. After the Complainant's expert architect testified that Mr. Ball could have used a gable roof to mitigate the height increase, Dr. Barr testified that the reason for the original denial was not the gable roof, and he was surprised that Ms. Bruno had not included it on the second set of plans. 10/6/14 T. 134.

After that set of plans was rejected, Mr. Ball stated that Dr. Barr gave him no indication of what he needed to do to have the plans approved. He identified Dr. Barr specifically because, according to Mr. Ball, Dr. Barr makes decisions on architectural applications "pretty much unilaterally." 8/4/14 T. 122-123.

In July, 2010, Ms. Bruno sailed once more into the breach of negotiations with the Board through an e-mail informing the Board that Mr. Ball was willing to forfeit the third story as suggested for a "roofed area" instead because she could not use a low-sloped roof as suggested by Mr. Williams. Exhibit 85. According to the e-mail, this met Mr. Ball's needs to (1) increase the pitch of the existing flat roof (because it was leaking), and (2) to gain a "minimal amount of closet space in the upper floor under the roof." *Id.* She informed the Board that a roof at a 3/12 pitch is the lowest slope that can be used for customary shingles; lower sloped roofs, according to her e-mail, require unattractive materials. *Id.*[11]

[11] According to Respondents' expert in residential building construction, a "3/12 pitch" means that the roof rises 3 inches for every 12 inches of length.

Ms. Bruno further explained that using a 3/12 roof pitch where the flat roof used to be would mean that the roof would hit the existing rear wall "quite high," at 5 feet above top of the second floor wall. She then stated, "at that point the roof geometry Peter would like to use is not so different, but it does give him the closet space he and his family needs [sic]." Exhibit 85. Of significance to this case, Ms. Bruno also stated (Exhibit 85):

> Peter is willing to abandon the transom detail, so the roof will not appear so high, and would be agreeable if the new roof only spanned from the lower floor top of wall to the upper floor top of wall (not to the top of the main house ridge). This roof will include skylights for light and fresh air. Skylights will help give variation to the roof plane (as windows do for a wall).

. Dr. Barr responded to this seemingly happy news with a request to see actual drawings, including "plans, sections and elevations" because "as you know, drawings explain a lot more." Exhibit 85.

As of the October 2010, Board meeting, Ms. Bruno and Mr. Ball had not submitted revised plans. The minutes reflect that Dr. Barr conveyed to the Board that the "issue is the slope of the roof," and that Ms. Bruno had not yet provided revised drawings to the Board. He also stated (according to the minutes), "[A]fter 45 days, the time has expired and Irma [Spencer, then chair of the Architectural Committee] can write a letter saying its done." Exhibit 127.[12]

There was, apparently, some additional activity on Mr. Ball's application in the hiatus after October, 2010. A letter from Mr. Ball to Dr. Barr indicates that he included paint samples requested on March 2, 2011, with his "submission" on that date, although what was submitted with his March 2, 2011, letter is also not in the record. Exhibit 76.

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[12] The Hearing Examiner does not interpret the architectural guidelines to require *denial* of the application after 45 days; rather, the guidelines place the 45-day deadline on the *Board* for review.

Board minutes demonstrate that Mr. Ball attended the Board's March 31, 2011, meeting to discuss the application. Exhibit 127. Dr. Barr expressed neighbors' concerns as consisting of the (1) larger footprint, (2) more water shedding to other properties, (3) lack of a cohesive façade, (4) lack of sample materials, (4) the location of the roofline was "unclear", (5) the location of the property line lacked clarity, and the "bump outs" (Dr. Barr's phrase for additions). Mr. Ball responded to these concerns (according to the minutes) by stating that the footprint had increased by only 200 feet, and that he had made a mistake with the flat roof on the rear elevation. To reduce the square footage, Mr. Ball removed the back deck from the second story rear, so the back elevation is "continuing the roof slope." Id. Mr. Ball stated that he was only asking for the addition over the garage and on the left side of the house and that he would use balconies on either side to break up the massing. He agreed to provide samples of the materials, but reiterated that he planned to use materials found elsewhere in the community. He also proposed HardiePlank siding to replace the T1-11. *Id.*

Dr. Barr again expressed his belief (as reported by the minutes) that the rear of the home had to be attractive because it faced an entrance to the neighborhood and questioned how high the slope of the rear roof had to be. The minutes reflect that Mr. Ball responded that the roof needs to be "that high" in order to get the correct pitch. He felt that he'd given up 50% of what he originally complained that he couldn't keep throwing out designs and wondering what would work. When Dr. Barr again asked Mr. Ball what the height of the roof would be, Mr. Ball stated that it would not exceed 30 feet in height. Exhibit 127. [13]

Dr. Barr wanted to know the length of time the house would be under construction. Mr. Ball represented that, once he got the approval, he would start at the end of June with the

[13] According to the experts in this case, all of the plans submitted in this case show the roof as being under 30 feet.

garage, then proceed to the rear, and finally to the addition facing Crossing Creek. He estimated that construction should take approximately six months.

Apparently, the Board continued discussing Mr. Ball's "issues" after Mr. Ball left the March 31st meeting. Dr. Barr stated that "we" asked for more information because the drawing needs sections and samples of materials. *Id.*

It appears that Dr. Barr communicated most of the Board's concerns (other than those relating to Mr. Ball's past history of skirting HOA violations) shortly after the Board's March 31st meeting. This communication is not in the record, although an April 15, 2011, letter from Mr. Ball to Dr. Barr, responding to these concerns, refers to this communication, which were contained in an e-mail dated April 1, 2011. Exhibit 76.

The Board held its annual meeting that year on April 11, 2011. The agenda for the meeting lists an item entitled, "Committee Reports: Architectural; Environment; Welcome Committee," but not explicitly Mr. Ball's application. Exhibit 127. The minutes reveal that Dr. Barr gave all three committee reports; the Architectural Committee Report included an "update" on the "Peter Ball situation." *Id.* While the minutes of this meeting reflect that 2011 had been a "relatively calm year for architectural committee applications" with only 2-3 non-contested applications, it also reports that two Board members (including Mr. Ball's adjacent neighbor) discussed again Mr. Ball's pattern of skirting HOA and County regulations. Exhibit 127.

The record demonstrates that Mr. Ball responded to Dr. Barr's earlier correspondence conveying the Board's concerns by letter dated April 15, 2011. The letter states (Exhibit 76):[14]

> A drawing is attached with through sections for all the proposed construction, and with the height to the ridge and the other dimensions you requested.

[14] Through sections show the measurements of many dimensions, including floor height. T.

Mr. Ball contends that drawings dated April 6, 2011, including the cross-sections requested, were included with the letter. Mr. Bruno also testified that he was at a Board meeting at some point prior to the Board's approval of the plans and saw the cross-sections. He remembers this because he reviewed them with Mr. Gibson, who did not understand the drawings. 10/6/14 T.

This letter from Mr. Ball also addresses the concerns of the Board that were communicated in writing. Of contention here is Mr. Ball's representation that (Exhibit 76):

> There are some larger homes of the same model in our community that have added shed roofs in the rear that are either the same height of the ridge on the existing house or exceed it. Our request is to only change the roof from flat to sloped, and because we are using asphalt shingle [sic] to be consistent with the rest of the community, Montgomery County Cod requires a 3/12 pitch. The height of the existing structure is only eight feet, so at a minimum, where the new roofline would meet the current structure would only leave 28" from the new roof to the ridgeline. To join the new sloping roof only 28" below the ridge of the current roof would not be consistent with good design [sic] principle [sic], and would make the rear of the house out of proportion, whereas if it joined at the current roof ridge, it would be a much more flowing design and be much more attractive.

Mr. Ball explained that the revised plans eliminated a full story on the rear elevation. He testified that, by following the 4/12 pitch, the new roof above the existing flat addition would meet the rear wall below the existing roofline. He intended in the letter to communicate that the geometry created made the roofline look odd because the roofline on the front of the house would much be higher. According to Mr. Ball, he was conveying that he needed to change the pitch of the roof at some point so that the rear roof would meet the new roofline. 8/4/14 T. 132. Dr. Barr interpreted the letter to mean that the pitch change above the flat roof would permit the rear roof to join at the existing roof ridge. 6/12/14 T. 63.

The parties differ on what plans were before the Board at this meeting. The parties agree that on April 26, 2011, the Board's secretary (prior to Ms. Gowan) forwarded a set of

plans to the Board via e-mail. Exhibit 77. In the e-mail, the secretary states that she was able only to scan smaller sections of the drawings because of their size. *Id.* This communication also stated that Mr. Ball wanted to add a trellis to the rear elevation, but it was not yet shown on the plan. The plans forwarded with the secretary's e-mail are 8.5" x 11", and include partial segments of the proposed construction, but did not include "as-built" drawings (i.e., drawings showing the existing construction) or a scale. Exhibit 77.

Initially, Dr. Barr assured the Hearing Examiner that these partial plans were the ones approved by the Board and Dr. Barr could not confirm whether he had ever seen large plans. He complained that he repeatedly asked Mr. Ball for dimensions, but Mr. Ball had never supplied them; the plans only showed dashed lines running horizontally to the ground. Dr. Barr testified that the plans kept changing, and he was trying to resolve the case. He did ask for dimensions, but Mr. Ball only submitted dimensions for the new construction shown on the floor plans and not the height of the roof. 6/12/14 T. 161-168.

Ms. Gowan, however, testified that she recalled seeing larger plans with a scale. When asked where they were, she replied, "You're looking at them," even though only the 8.5 x 11" plans were in the record. 6/30/14 T. 286. She stated that she did not see the larger plans before joining the Board, but recalled seeing them afterwards. She was not involved in the approval process and did not see all of the submissions between 2008 and 2011. 6/30/14 T. 267. The larger set of plans was not produced in discovery because, according to Ms. Gowan, she was not aware that the Respondents wanted both sets of plans. She believes that both sets of plans were identical; one was just larger in size. 6/30/14 T. 267-276.

At the July 10, 2014, public hearing in this case, the Board submitted a larger set (11" x 17") of plans, asserting that these represented the approved plans as well. Exhibit 126;

7/10/14 T. 18. This set of plans includes drawings of the proposed construction, the "as-built" drawings (elevations showing the existing structure), and a scale permitting one to ascertain the approximate dimensions on the drawing. According to Dr. Barr, the drawings of the proposed construction are identical to the proposed drawings in the smaller version that had been approved by the Board. Exhibit 126; 7/10/14 T. 11-19. Dr. Barr explained that he had only seen the smaller (incomplete) set of plans at the Board meeting when the plans were approved; if he had ever seen the larger set, "he did not pay attention" because all the Board had before them at the May 5, 2011, meeting was the 8.5" x 11" plans. 7/25/14 T. 158. He did not use the large plans with a scale (Exhibit 126), and did not have the as-built plans in front of him when he voted, because he had looked at them quite intently in July, 2010. At that time, Mr. Williams gave them to Dr. Barr for review because Mr. Williams didn't understand them. 7/25/14 T. 158-161.

Dr. Barr contends that the larger plans (Exhibit 126) were the ones that had been enclosed with Mr. Ball's April 15, 2014, letter. According to Dr. Barr, these plans were delivered to his doorstep, and he gave them, on the same day, to the Board's secretary. He blamed Mr. Ball for the fact that the Board had the smaller plans on Mr. Ball because he could have provided all the Board members with the full set of plans. 10/6/14 T. 44.

Mr. Gibson initially testified that the Board reviewed only the smaller set of plans at the May 5, 2011, meeting, which were the only set of plans he'd seen. 6/30/14 T. 102-105; 8/4/14 T. 48. At a later hearing, Mr. Gibson expressed surprise because he did not know that the Board had acknowledged that the larger set of plans (Exhibit 126) were also the plans approved by the Board. 9/15/14 T. 259-262. After realizing that the Board presented the larger scale plans (Exhibit 126) as the approved plans, he acknowledged that a large set of

plans could have been at the May 5, 2011, meeting, although he couldn't recall what set of large plans was there. He assumed that Board members relied on the plans distributed by e-mail, and then stated that he didn't know whether Mr. Ball submitted the plans to the Board in a larger size. Ms. Alfer stated that she had only seen the smaller, 8.5" x 11" plans. 9/19/14 T. 222-223.

Mr. Ball testified that even the larger set of plans deemed "approved" by the Board (Exhibit 126) is incomplete because it does not show all of the dimensions requested by the Board. 8/4/14 T. 125. Mr. Ball testified that he dropped off revised plans to Dr. Barr on April 14, 2011 (Exhibit 148). He pointed out that this set of plans is dated April 6, 2011, which corresponds with the date of his April 15, 2011, letter referencing a set of plans with dimensions. 10/6/14 T. 211-214. These plans include through sections that show the dimensions of the roof ridge elevation. The cross-section dimension shows that the height of the roof ridge would be 27 feet, 8 inches. Notations on this plan also show the existing and proposed roof pitches over the foyer, garage, and left side addition. Mr. Ball could not explain why Potowmack did not have these plans, although he believes that, "someone left them out on purpose." 8/4/14 T. 125-128. This set of plans also includes notations showing the existing and proposed roof pitches over the foyer, garage, and left side additions. *Id.* He recalls that he attached the full set of plans sent to Dr. Barr because they were too large to attach in e-mails to all Board members and because it's always been his contention that the only person that mattered in the Board's decision-making process was Dr. Barr. 9/15/14 T. 8-10. Mr. Ball also believes that the more detailed plans were submitted because they are the same as the permit drawings he submitted later to DPS. 9/15/14 T. 108-112; Exhibits 148, 88. The plans submitted to the Board and DPS are not completely identical because the plans submitted to

DPS show a pergola on the rear elevation (similar to the "terrace" mentioned in the April 26, 2011, e-mail from the Board's secretary to the Board.) He included the pergola on the permit plans because that was one option that he and Dr. Barr discussed that would alleviate vinyl siding, as set forth below. 9/15/14 T. 128-130.

Mr. Ball attributed his failure to introduce these plans at the CCOC hearing in Case No. 73-12 to poor representation from his prior attorney. He gave the permit plans approved by DPS to Dr. Ball before beginning construction and to Peter Gibson in early June 2013, and Dr. Barr had these plans before a Board meeting on July 17, 2013. 9/15/14 T. 20-28.

At some point during this time period, Mr. Ball made known his desire to amend the application to change the siding from HardiePlank to vinyl. The minutes of the May 5, 2011, meeting reflects that Mr. Ball raised this issue during his presentation on the application. According to the minutes, Mr. Ball asserted that he could not install HardiePlank because the "track is too shallow" and he could not bear the cost. 8/4/14 T. 61. Mr. Ball also requested a change to the roof pitch to comply with building code regulations. Dr. Barr found Mr. Ball's request for vinyl siding "quite disappointing," because Mr. Ball had originally proposed HardiePlank siding. 10/6/14 T. 97. Dr. Barr further explained his disappointment—Mr. Ball had proposed HardiePlank siding in the first application in 2008, and at the March 31, 2011, Board meeting, Mr. Ball stated that he would accept that siding. Dr. Barr felt that the application was a "moving target." Id. at 98. The March 31, 2011, Board meeting was the last meeting prior to the May 5, 2011, Board meeting where the application was approved. According to Dr. Barr, he indicated to Mr. Ball at the May 5, 2011, Board meeting that "siding was no longer an issue," because Mr. Ball wanted to "cherry-pick" his application. Id.

Dr. Barr asserts that Mr. Ball represented that the roof would meet the existing roof ridge and therefore, would not exceed the existing roof height. Dr. Barr testified that this is the only discussion about roof height that occurred during the seven or eight meetings with Board representatives over a year and one half. T. 64-65. Mr. Ball disagrees, as set forth below.

The Board voted on the Balls' application at the May 5, 2011, meeting in closed session. Dr. Barr explained that the vote was initially 4 to 3 to deny the application, and he voted to deny to the application. After their vote, the Board invited Mr. Ball into the meeting to discuss the application with the Board. At that point, Mr. Ball stated that he could not afford the vinyl siding and also indicated that he would complete the project as soon as he received the Board's approval. Mr. Ball left the meeting, and the Board continued its deliberations. Dr. Barr testified that he switched his vote to approval based on Mr. Ball's representation that he would finish in six months.[15] 6/12/14 T.

Shortly afterwards (on May 10, 2011), Dr. Barr sent a letter to Mr. Ball informing him that the Board had approved his application with conditions. The Board rejected his request for vinyl siding because, "[D]espite a few houses where vinyl siding 'slipped under the wire more than 10 years ago," neither horizontal nor vertical vinyl siding is acceptable. Exhibit 78. The Board "strongly urged" Mr. Ball to "consider" using vertical siding. *Id.* It also made the following requests/instructions (Exhibit 78):[16]

> The Board requires planting of appropriate evergreen plants to provide privacy and to screen the mass of the building from the street. Please submit a drawing indicating plant species, type, height of planting, rate of growth, and location on site, prior to commencing construction.

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[15] The Board ratified its approval of Mr. Ball's application on October 7, 2013, in accordance with the CCOC's Decision in Case No. 73-12.

[16] While the Board considered these conditions mandatory, several are not phrased in mandatory terms, but in the form of requests. *Id.*

> All work must be constructed in strict conformity with the drawings as submitted and approved. Any changes or substitutions must be submitted for approval by the Board.
>
> Please ensure exterior work is started and carried through continuously throughout construction, ideally in June to December 2011 time frame mentioned at the March 31 meeting.
>
> Please ensure all construction materials, equipment and trucks are stored on your property and no construction debris or equipment inconveniences the neighborhood.
>
> Please submit copy of building permit for our records.

Mr. Ball's response to this approval, apparently, was not all that the Board hoped for, as he continued his quest to use vinyl siding. According to Mr. Ball, vinyl siding was a big cost issue; the HardiePlank was three to four times more expensive to install than vinyl siding. He also did not understand the Board's position because over 14 homes in the neighborhood had vinyl siding, including, Ms. Gowan's and neighbor across the street. 8/4/14 T. 146. Mr. Bruno testified that the Board would not let Mr. Ball use the same vinyl siding that it had approved for Mr. Bruno's home.

Mr. Ball testified that the May 2011, plans included a deck with a shed underneath. He did not immediately build the deck because the Board had denied his request for vinyl siding and he wanted that issue resolved before he removed the deck for economic reasons. According to Mr. Ball, he went "back and forth" with Dr. Barr for six or seven months on the siding issue, but Dr. Barr never gave him a reason why he would not approve vinyl siding, given that other community members had vinyl siding. 8/4/14 T. 114-116. Finally, at the end of 2011 or beginning of 2012, he decided to pull a permit just for the deck, which he started building in January or February 2012. He stated that he told Dr. Barr that he would do the

house in phases by addition. The only reason he began construction on the deck was because he thought it was so straightforward that no issues could occur. 8/4/14 T. 149.

As part of the "back and forth" on the vinyl siding, Mr. Ball asked to present samples of vinyl siding to the Board at its meeting September 27, 2011. Exhibit 128. Dr. Barr responded, telling Mr. Ball that the request had been previously denied, stating that he could make a "fresh application," by filing a new submittal with applications, drawings, and samples to Lee Alfer (chair of the Architectural Review Committee). CCOC Case No. 73-12, Exhibit 1, p. 19. Dr. Barr informed Mr. Ball that, if he wanted to change only the brick exterior, he would "receive the material and give it to Lee for review" as a "courtesy" to Mr. Ball. Dr. Barr instructed, "[P]lease drop it off outside my front door as before." CCOC 73-12, Ex. 1, p. 19.

Mr. Ball did attend the September 27, 2011, Board meeting (according to the minutes). Exhibit 127. The minutes reflect that Board members informed Mr. Ball that vinyl siding went against the "neighborhood value" to retain a contemporary look and feel. Dr. Barr instructed Mr. Ball to "start the process over" to use a different brick. *Id.*

Undaunted, Mr. Ball filed an application on the form used by the Architectural Committee to change the color of the brick and to use vinyl siding on September 30, 2011. Exhibit 128. Dr. Barr testified that the Board felt that the work had been approved "holistically," and did not want to revisit "one element of that." 6/12/14 T. 72. According to Dr. Barr, the Board did not want to go through another lengthy approval process—both the architectural committee and the Board felt that it was going to "open a whole can of worms back up again." 6/12/14 T. 73. Dr. Barr also testified that the request for vinyl siding came after Potowmack filed a complaint with the CCOC and he felt that Mr. Ball was attempting to

"get back" at the Association for filing the complaint. *Id.* at T. 72. Dr. Barr did not identify the complaint to which he referred; the Board did not file the complaint in Case No. 73-12 until November 30, 2012. CCOC Case No. 720-G concluded in 2008. CCOC Case No. 720-G, Supplemental Order. At the time of Mr. Ball's application for vinyl siding, testified Dr. Barr, construction had already gone well past the "deadline" for completion. They felt that Mr. Ball would have to submit a complete drawing and application, which they communicated to Mr. Ball. *Id.* According to Dr. Barr, to complete an application, the applicant must submit a complete set of drawings and material samples. 6/30/14 T. 74.

The Board sent written denial of Mr. Ball's application on October 5, 2011, which stated that it rejected the application because the vinyl siding had been rejected as part of its original approval. Exhibit 169(c), 171.

Ms. Gowan testified that Mr. Ball began construction of the deck in November 2011. She complained to the Board when construction began because Potowmack had not given the surrounding neighbors notice that the Board had approved exterior changes.[17] 6/30/14 T. 261. She asked the Board if they had approved the construction, and was told that no building permits had been filed with the Board. Nothing in the record indicates that Ms. Gowan was told that the Board had approved the plans. According to Ms. Gowan, she "was asked" to call the permitting office to find out "why they were building if they weren't allowed." She then stated she "volunteered" to call and did so. 6/30/14 T. 262. *Id.*

[17] If Ms. Gowan is correct, this would mean that the Board did not follow its published procedures, which would have required them to notify surrounding property owners. According to the published rules of procedure, she would have been notified as an adjacent neighbor, as she testified that she has lived at the property for 15 years. 6/30/14 T. 28.

A DPS inspector visited Mr. Ball's property on November 22, 2011, according to Dr. Barr. Dr. Barr read from the DPS Inspector's report, which found that Mr. Ball constructed a retaining wall that didn't require a building permit. Dr. Barr interpreted that to mean that Mr. Ball was *not* starting an addition to his home, but rather building a "garden wall." [18] 10/6/14 T. 120. Once Dr. Barr realized, however, that the "garden wall" followed the outline of the deck above, he thought that, given Mr. Ball's past history, he was constructing something not included on the approved plans. He asked himself, "[h]ow could now this wall transform itself into something that has to go to meet the underside and be included in the house?" The approved plans showed that the new storage area would have siding. *Id.*

The construction of the retaining wall prompted a letter from Dr. Barr on December 28, 2011. In it, Dr. Barr thanked Mr. Ball for dropping off the building permit for the deck and noted the following: (CCOC Case No. 73-12, Ex. 1, p. 21):

Deck

1. The deck sketched on the site plan, approved on November 29, 2011, has no dimensions shown and appears to be different on the plat than the covered deck approved in concept by the HOA.
2. Drawings submitted to the HOA show a deck dimensioned as 10-feet, - inches by 31', 51/2", setback 2 feet, 0 inches from the corner.
3. The deck approved by Building Permit makes no reference to a covered deck.
4. Drawings submitted to the HOA show that the roof was extended to cover the deck, a proposal that requires the supporting structures to deal with roof load, live load and snow load.
5. Why did the Deck Permit exclude this important structural information?
6. Any variation from the design and dimensions of the deck must be submitted to HOA for approval before any further construction.
7. The county approved deck must be inspected and approved by the County for structural stability and integrity, including supports, footings and foundations.

[18] This retaining wall was part of Potowmack's complaint in CCOC Case No. 72-13.

Shed:

8. The HOA drawings show an enclosed shed under the deck, accessed by a door.
9. The "garden wall" built without county inspection required, to the max height of 54 inches, is now under the deck.
10. Any wall enclosing the proposed shed, needs properly sized and inspected structure, footings and foundations.

Ms. Gowan joined the Board in 2012, and her relationship to Mr. Ball (however characterized) is described above. 7/10/14 T. 81. Shortly after Dr. Barr's letter to Mr. Ball, above, Ms. Gowan filed her complaint with DPS alleging that storm water from the Balls property caused sediment and erosion in her yard. In testimony, Mr. Gibson acknowledged that he had sent an e-mail to Mr. Bruno stating that Ms. Gowan had joined the Board to be "closer to the action" on the Ball property, although he qualified this by stating that this was "speculation" on his part. 8/4/14 T. 26.

The Balls renewed their request for vinyl siding in January 2012, (although that letter is not in the record) and asked to review HOA records concerning his application. Case No. 73-12, Ex. 1, p. 22. Dr. Barr responded 10 days later (on January 29, 2012) alleging that Mr. Ball's letter was inaccurate and that Mr. Ball either "did not understand "or had "forgotten" the HOA application process. *Id.* The letter informed Mr. Ball that the Board would not discuss his application at the January, 2012, Board meeting because the Board had already spent an "extraordinarily long time" reviewing the first application, and provided Mr. Ball "many opportunities" to meeting with the Board. *Id.* Dr. Barr also denied Mr. Ball's request to review the HOA records until the corrections listed in his December 28th letter (relating to the retaining wall and deck) had been made.[19]

[19] The Hearing Examiner found no authority in the governing documents for this position.

Dr. Barr then proceeded to charge Mr. Ball with violating the Board's conditions of approval by not notifying the Board of the date he planned to start construction, as "promised," and by beginning construction without a building permit by constructing a "garden wall." *Id.* He stated that the deck was not set back as shown in the plans. Dr. Barr further accused of Mr. Ball of providing a building permit for the deck only, rather than for the entire project. *Id.* According to Dr. Barr, the permit for the deck showed no dimension and did not appear to be the same shape approved by the Board. The December 28, 2011, letter from Dr. Barr mentions that Mr. Ball characterized the construction as a "temporary" storage shed. Dr. Barr points out that the Board had not approved a storage shed. Dr. Barr finally instructed Mr. Ball to submit a building permit for the entire project before beginning construction and instructed Mr. Ball to stop work until it conforms to the approved plans. Case No. 73-12, Ex. 1, p. 22.

When the Hearing Examiner asked Dr. Barr to identify the Board's requirement to inform the Board that Mr. Ball was beginning construction, Dr. Barr cited to the condition of approval requiring Mr. Ball to submit a building permit prior to construction. Dr. Barr testified that he had assumed this condition meant that Mr. Ball would provide the Board with building permit plans for the entire project before beginning any construction, regardless of whether the construction required a building permit. 8/4/14 T. 113; 10/6/14 T. 124. According to Dr. Barr, the "normal" practice is for a builder to provide an owner with plans for the entire project at once, although the record reflects that Mr. Ball and Ms. Bruno disputed this assertion. Exhibit 127; CCOC 73-12, Ex. 1, p. 26.

Despite his assurance to Mr. Ball that the application for vinyl siding would *not* be discussed at the next Board meeting; the Board did discuss it, although the content of the discussion is not recorded in the Board's minutes, and the Board did not consider it as an

application. Exhibit 127 (Minutes of January 30, 2012, meeting). Dr. Barr gave another "update" on the "Ball situation." Exhibit 127. Dr. Barr informed the Board that Mr. Ball did not follow through on his promise to provide permits prior to beginning construction on a garden wall. Despite his allegation that Mr. Ball had not provided permits in advance, Mr. Ball also acknowledged at the meeting that no permit was required for the retaining wall. Dr. Barr represented that Mr. Ball provided a permit for the deck a month after beginning construction, although he referred to construction of the retaining wall, rather than the deck itself. *Id.* The record here reflects that Mr. Ball provided a building permit for the deck itself prior to beginning construction of the deck. Exhibit 127.

At the same meeting (i.e., January 30, 2012, meeting) Ms. Bruno clarified for the Board that she was no longer Mr. Ball's architect of record and agreed that the deck was not set back by 2 feet. Lee Alfer suggested that the guidelines on vinyl should be more specific; Dr. Barr, however, told her "they've" always "told people" that they can use natural or natural looking materials. Exhibit 127.

A series of letters ping ponged between Dr. Barr and Mr. Ball during 2012. Mr. Ball responded to Dr. Barr's letter requesting him to halt construction in a letter (dated February 10, 2012,) stating that Mr. Ball was "upset" with Dr. Barr's continued use of the description of the retaining wall as a "garden wall" constructed under a "technicality" of the building Code. CCOC Case No. 73-12, Exhibit 1, p. 26. In the letter, Mr. Ball stated that Dr. Barr's representations made it seem as if Mr. Ball subverted the County permit process. He stated that the deck was not offset as required at that point because the old deck hadn't been removed. He reiterated that the "shed" had always been part of the approved plans, and was shown on Sheet A1. Because the shed is an integral part of the layout, according to Mr. Ball, he planned

to complete it as soon as the siding issue was determined. Mr. Ball reiterated that it was "absolutely normal to provide building permits sequentially," which he had discussed with Dr. Barr. Finally, he informed Dr. Barr that the retaining wall didn't require a permit, and he invited all Board members to visit his property. CCOC Case No. 73-12, Ex. 1, p. 26. Mr. Ball expressed that he was (*Id.* at 27):

> …tired of your self serving letters that constantly cast me as not following the HOA's rules, even when you are aware that I am in compliance as in the examples above. I would like nothing better than to proceed with this project and complete it in a timely manner.

Dr. Barr responded (on February 16, 2012), reiterating Mr. Ball's transgressions. The letter also states that Ms. Bruno should have recused herself from the comments at the Board's [January 30, 2012] meeting because "she cannot be considered independent." *Id.* Dr. Barr's basis for this assertion was that Mr. Ball had invited her to the Board meeting as the architect who prepared the plans for Mr. Ball's house. *Id.*

In February 2012, Mr. Ball did meet with Mr. Gibson and Dr. Barr at Mr. Ball's home.[20] According to Dr. Barr, he, Peter Gibson, and Tania Bruno had a long discussion with Mr. Ball about the vinyl siding. Dr. Barr stated that he explained to Mr. Ball that horizontal vinyl siding would extend the linear quality of rear elevation. Originally, Mr. Ball's home had vertical T1-11 siding. According to Dr. Barr, he suggested many types of vertical siding would be acceptable, and that there were many other materials available for that. Dr. Barr testified that Mr. Ball was back asking for the vinyl siding, which had already been denied and the Board was not going to revisit the issue. Dr. Barr reiterated that he told Mr. Ball at the May 5, 2011,

[20] Correspondence from Mr. Ball to Dr. Barr indicates that the meeting took place on February 18, 2012. CCOC Case No. 73-12, Exhibit 1, p. 31.

meeting that the vinyl siding was not in keeping with what the original neighborhood design. 10/6/14 T. 98-99.

Mr. Ball agreed that he and Dr. Barr discussed vinyl siding at the February, 2012, meeting at Mr. Ball's property. According to Mr. Ball, when Dr. Barr stated that horizontal vinyl siding would make the back of the house look too massive from the street, Mr. Ball pointed out that the Board approved vinyl siding on Ms. Gowan's house and that a neighbor across the street also had vinyl siding. According to Mr. Ball, Dr. Barr indicated that horizontal siding might be acceptable if he included ways to break up the vinyl siding. Mr. Ball testified that they talked about several options, such as bumping out a window and putting in a pergola, and Dr. Barr agreed that that "might be something" to break it up. In an attempt to get the vinyl siding approved, he had the pergola placed in the permit plans. Given the Board's denial of his application for vinyl siding, Mr. Ball testified that he does not now plan to build the pergola, even though it was shown on the permit plans. He did not submit an application for the pergola to the Board. 9/15/14 T. 128-130.

Shortly after the meeting at Mr. Ball's house, Dr. Barr wrote to Mr. Ball summarizing the outcome of their meeting. Dr. Barr instructed Mr. Ball to make corrections to the deck, and, after he did so, he should proceed with construction of the deck only as soon as possible after receiving a building permit. Dr. Barr instructed Mr. Ball not to undertake further construction (including the shed) until he submitted detailed construction drawings and obtained a building permit for the entire project. He also requested Mr. Ball to "maintain area ways to assist in storm water management." CCOC Case No. 73-12, Ex. 1, p. 30).

Mr. Ball wrote back to Dr. Barr to "clarify" some of the issues discussed at the February, 2012, on-site meeting. CCOC Case No. 73-12, Exhibit 1, p. 31. Mr. Ball stated that

it was his understanding that (1) the Board had approved his plans, (2) the issue is Mr. Ball's desire to use vinyl siding, and (3) "proposed changes to the rear elevation is my attempt to reach a compromise so that I can use horizontal vinyl siding." *Id.* He also states that he had been ready to start the project since the fall of 2011, but the siding issue had not been resolved. He stated that he did not wish to pull the building permit until they could resolve that issue. *Id.*

Mr. Ball testified that sometime in February or March, 2012, he asked Ms. Bruno to revise the April 6, 2011, plans to show a trellis or pergola because the vinyl siding was still an issue. The resulting drawings were the basis of the construction plans submitted to DPS in August of 2012. He submitted the plans to Dr. Barr to see if he would approve the vinyl siding, but Dr. Barr did not agree to the vinyl siding, so Mr. Ball did not pursue the trellis. 9/15/14 T. 128-130; 10/6/14 T. 211-214.

Ms. Bruno then joined the fray by e-mail (on February 22, 2012), clarifying again that she was no longer representing Mr. Ball, and that she attended the February on-site meeting as a Board member. She also asserted that she need not recuse herself because the design had not been hers (she had taken Mr. Ball's design and converted it into scaled CAD drawings.) Exhibit 142. Dr. Barr shot back to Ms. Bruno that her "conversation on the site visit certainly gave me the impression that you were back on the job." *Id.*

To add to the acrimony between the parties, Mr. Charles Bruno filed his complaint to the CCOC on March 2, 2012 (summarized above.)

Three weeks later, Dr. Barr sent another missile to Mr. Ball by letter. He indicated that he visited Mr. Ball's property because of many complaints about building materials stored in public view, construction not in conformance with approved plans, construction debris and

other issues. He informed Mr. Ball that Ms. Bruno agreed that the deck should be stepped back to mitigate the long façade, and that horizontal vinyl siding would exacerbate this length. Dr. Barr reiterated that, many aspects of the construction were discussed over many meetings with Mr. Ball and his "lawyer friend," and the vinyl siding had been rejected. CCOC Case No. 73-12, Ex. 1. p. 32; Exhibit 169(c).

Michael Ball entered the picture again; apparently sometime in April 2012, apparently to request copies of Potowmack's records relating to his father's application. CCOC Case No. 73-12, Exhibit 1, p. 32. Dr. Barr responded in writing to both Balls:

> This is in response to an email received from a Michael Ball, sent from the same email address as Peter Ball. Who is Michael Ball? Is he the Homeowner at 10600 Vantage Court? If so, when did he become the homeowner?

The series of accusations from Dr. Barr and return defenses by Mr. Ball continued. Renewed in July, 2012, (apparently in response to a letter from Mr. Ball) were charges by Dr. Barr that Mr. Ball did not provide notice as to when he would begin construction, had not answered whether the deck had been corrected, had not provided a copy of a building permit for the entire project, and poured a concrete floor without a building permit. In it, Dr. Barr accused Mr. Ball of attempting to make him the "villain of the piece" even though he changed his vote on the plans from denial to approval. CCOC Case No. 73-12, Ex. 1, p. 35. The letter contains a laundry list of Mr. Ball's transgressions, which have already been set forth. Finally, Dr. Barr denied Mr. Ball's request to present an application on vinyl siding because the "Board's rules" state that those in violation of architectural approvals are not members "in good standing." CCOC Case No. 73-12, Ex. 1, p. 35.

Mr. Ball submitted plans for the entire project to DPS in August, 2012. 8/4/14 T. 149. As noted, these plans were based on the plans dated April 6, 2011, (Exhibit 148) that he

contends were submitted to the Board. He pulled the permit in August, 2012, because a new building code was going to take effect in September, 2012, that would have impacted construction costs. 10/6/14. T. 211-214.

Needless to say, the ball continued to remain in play. Mr. Ball responded (on August 11, 2012) reiterating his position in earlier letters. This letter, however, adds the following (*Id.* at 38):

> It is my understanding that most, if not all, of the allegations and conclusions of Mr. Barr, as President of the HOA, were his and his alone, and that the Board has not been informed of them, let alone voted on them. If I am incorrect in this regard, and there have been votes taken and these are indeed the actions of the Board, please let me know and I will stand corrected.

Mr. Ball commenced construction of the project in March 2013, and provided a copy of the building permit for the entire project to Dr. Barr in advance of beginning work. 8/4/14 T. 150-151.

In May or June of 2013, Mr. Ball saw a lot of communications about his house on the HOA blog, and testified that Rande Joiner was one of the most vocal in stating that he did not have the approval of the HOA. Most of the comments asked whether his construction had been approved. Mr. Ball testified that he was upset because no one on the Board ever informed these individuals that the Board had approved his construction. Rather than responding on the blog, he sent letters to the individuals complaining on the blog and invited them to view the construction at his home. 8/4/14 T. 152.

In April, 2013, Mr. Ball and Dr. Barr met to see if they could reach compromise in this case. While initially promising, the joint effort failed for several reasons. According to Dr. Barr, Mr. Ball had promised to run numbers on using HardiePlank siding, get the landscape plan required by the letter of approval, and meet all other conditions of the approval, install

Hardie-Plank siding on the rear of the house to resolve the issue with the shed (in CCOC Case No. 73-12). Exhibit 169(c). Two weeks after this meeting, Mr. Ball proposed a compromise—he asked that he be allowed to install vertical HardiePlank siding on the rear elevation if he could install horizontal vinyl siding on the front elevation. Mr. Ball copied his attorney at that time, Mr. Dever, on the letter. Dr. Barr rejected Mr. Ball's proposal, in part because Mr. Ball had involved an attorney and because he "reneged" on the agreement they had reached. *Id.*

Still attempting to implement the approval, Mr. Ball enclosed a copy of a proposal from a landscaping company for 5 evergreens along Crossing Creek Road in a letter to Dr. Barr on May 19, 2013. Exhibit 120. Mr. Ball informed Dr. Barr that he consulted with an arborist and submitted two proposals to plant trees along the left side of the property. One option was to plant 6 Green Giant Arborvitae along the left side of the house, and the alternative was to plant 5 American Hollies. Mr. Ball also states that, "[T]he property that adjoins Lynn Gowan would not need any plantings because she has already planted Leland Cypress along our property borders." Exhibit 121.

In June, 2013, prior to the hearing in CCOC Case No. 73-12, Ms. Gowan sent an e-mail addressed only to Dr. Barr. That e-mail informed Dr. Barr that a neighbor called her over Mr. Ball's construction and mentioned that someone told Mr. Ball that Ms. Gowan had requested a Board meeting to discuss Mr. Ball's property. Exhibit 122. In the e-mail, Ms. Gowan also informs Dr. Barr that she got copies of the "stuff" Mr. Ball filed with the County and instructs Dr. Barr not to tell Peter Gibson because he might let Mr. Ball know:

> Concerned that it could jeperdize [sic] our further CCOC meeting if he knows exactly what we are doing and can plan his excuses ahead of time.

She further states, "[O]therwise, you are giving Peter Ball the ammo he needs at the CCOC meeting and the HOA could "eat" our attorneys fees." Exhibit 122.

In June, 2013, Peter Gibson e-mailed Mr. Ball and asked him for a copy of the approved DPS plans, although Mr. Ball had hand-delivered a copy of the building permit plans to Dr. Barr three days before beginning construction. 8/4/14 T. 151. Mr. Ball complied with Mr. Gibson's request. Mr. Gibson visited Mr. Ball's home on June 28, 2013. At that point, the room above the existing living room, the brick veneer, and the knee walls at that location had already been done and the foyer had been started. The garage had also been demolished. Mr. Gibson told him "everything looked good." 8/4/14 T. 152. Mr. Ball said that he explained why the left side addition had to be made smaller. Mr. Ball expanded that when Ms. Bentolila's house had been rebuilt; the excavator hit a PEPCO line and knocked out all of the electricity for their block. He called Miss Utility for his project and they found that there was a PEPCO and Washington Gas line that ran under where the front of the left side addition would have been. He was told that they could not place the addition over those utilities.

This required him to deviate from the approved plans. Instead of having a solid front, he built an opening so that the addition straddled the utility lines. He also had to create a greater front setback to avoid the lines. Therefore, the addition was pushed back approximately five feet from where it was approved. 8/4/14 T. 151-152. According to Mr. Ball, Mr. Gibson told him to "keep moving." *Id.* at T. 152.

The Board held a meeting on July 17, 2013. Mr. Ball asked Ms. Bentolila, Mr. Lance Pelter, and Mr. Bruno, to go with him. Mr. Ball and Mr. Pelter testified that they did not receive notice of the meeting. 7/25/14 T. 89, 8/4/14 T. 158. Mr. Ball learned of the meeting

from Mr. Bruno, who could not remember how he knew of it. 7/25/13 T. 123. The first issue discussed was his property.

The parties disagree on what occurred at the July 17, 2013, Board meeting. Mr. Ball testified that Dr. Barr stated that the deviations from the approved plans were not of great consequence and that Dr. Barr had compared the approved plans with the plans submitted to DPS and the two were identical. According to Mr. Ball, the bulk of the meeting was on the timing of completion. There was some discussion of imposing a penalty on him if he did not finish. 8/4/14 T. 153. Mr. Ball felt that he had been given the "green light" for his changes and had been asked to complete construction. 8/4/14 T. 154.

Mr. Pelter also recounted the events of the July 17, 2013, Board meeting. He testified that the general topic at that meeting was the ongoing construction on Mr. Ball's property. In his opinion, the major concern of residents in the community was to have the construction finished. He stated that he attended the meeting to offer a solution to the problems, i.e., to "put everything in the past behind use and alter the plan to get it completed." 7/25/14 T. 89. He discussed resolution of the ongoing construction with Rande Joiner, and they both felt that there was a way to end the issue. According to Mr. Pelter, Lynn Gowan was "hostile" to that approach. He testified that when the possibility of resolving the conflict arose, she "jumped up" and said, "[w]e can't forget all the other stuff that went on—he just can't do this." At one point, Mr. Pelter testified, Dr. Barr had to come over and physically tell her to sit down and be quiet. 7/25/14 T. 90.

Mr. Pelter testified that the Board was hostile to Mr. Ball at the meeting, and that other property owners have told him they are not interested in serving on the Board because of this hostility. He offered to find a solution because the issue is consuming a lot of everyone's time.

7/25/14 T. 90. At the end of the meeting, Mr. Pelter stated that the decision was "left loose," but the Board began discussing stopping the litigation. *Id.*

Mr. Bruno's version of the meeting was consistent with Mr. Pelter's. The Board focused much of the discussion on completing construction by December. The two vocal members of the Board were Peter Gibson and Raj Barr. According to Mr. Bruno, Lynn Gowan brought up other issues. Mr. Bruno stated, "[T]hey basically just kept on Peter to finish the project and wanted some kind of guarantee he'd finish the project." 7/25/14 T. 124. Mr. Bruno recounted that Ms. Gowan mentioned something about windows that had to be fixed, and Dr. Barr looked at her and said something like "we're past that…" *Id.* At the end of the meeting, Dr. Barr and Mr. Gibson kept telling Mr. Ball to finish the construction. *Id.*

Mr. Bruno described Ms. Gowan's interaction with Mr. Ball at the meeting. He stated that Ms. Gowan got up and yelled something at Mr. Ball, although he couldn't make out the exact words. Mr. Ball simply sat in his seat and made a hand movement to Mr. Bruno, which Mr. Bruno interpreted to mean, “see, this is what she does." 7/25/14 T. 125. He has never seen that type of interaction between Lynn Gowan and Mr. Ball at any other time. *Id.* He testified that the Board did not vote on anything at the July 17, 2013. He does not recall any discussion of roof height. *Id.*

The minutes of the Board’s July 17, 2013, meeting reflect that Dr. Barr took the opportunity to provide a detailed history of Mr. Ball’s conflicts with the Board, reaching back to 2002. Dr. Barr continually referred to Mr. Ball as the "tenant" of the property and, in his litany of Mr. Ball's failings, stated that Mr. Ball "claimed" that he did not have an erosion problem. Exhibit 127. Dr. Barr then recounted the events of CCOC Case No. 73-12, stating that Mr. Ball began building the deck without a permit and that deck was not set back by two

feet as required by the plans. The minutes support Mr. Ball's testimony that Dr. Barr acknowledged that the permit plans matched the Board's approved plans, although Dr. Barr mentioned that Mr. Ball had "added embellishments." Exhibit 127. The minutes reflect that Mr. Ball informed the Board that the deck could not be setback by two feet because he could not move a window, but Lynn Gowan disagreed and told Mr. Ball that she has seen many windows change over the years. Ms. Gowan stated that the property is in continual disrepair and full of construction debris. She asserted that none of the existing conditions match the plans submitted to the Board. *Id.*

On July 26, 2013, Mr. Gibson sent an email to Mr. Ball stating that he had spoken with Dr. Barr, and "despite what other people in the neighborhood say", they thought the work thus far "reasonably conforms" to the approved plans. Exhibit 146.

In August, 2013, the CCOC Panel handed down its decision on the CCOC Complaint filed by Mr. Bruno (i.e., CCOC Case No. 30-12), which ordered the Board to ratify actions taken outside of Board meetings within 45 days of the date of the meeting. CCOC Case No. 30-12, Decision and Order, August 6, 2013.

Prior to the meeting called to fulfill the CCOC's order, Mr. Gibson again visited Mr. Ball at Mr. Ball's property on September 10, 2013. 6/30/14 T. 106. Mr. Gibson made the visit because he had learned from neighbors in the community that the construction was non-compliant and he thought it would be helpful if a Board member other than Dr. Barr or Lee Alfer view Mr. Ball's progress. 6/30/14 T. 107. Mr. Gibson stated that he did not go on behalf of the Board, but he thought he might be able to facilitate things between Mr. Ball and the Board. 6/30/14 T. 69-70. Mr. Gibson stated that he was there in an unofficial capacity, although he could not recall whether he communicated that to Mr. Ball. *Id.* at 107. Mr. Gibson

testified that he observed that Mr. Ball made a "fair amount" of progress in the construction, although there was some discussion among Board members on whether it complied with the approved plans. According to Mr. Gibson, Mr. Ball walked with him around the property and explained the items that varied from the original plans, which Mr. Ball described as "field changes." They did not discuss the height of the roof. 6/30/14 T. 69-72, 140. According to Dr. Barr, Mr. Gibson reported that everything was fine at the site and there were no discussions about the roof. 6/12/14 T. 195.

The next day, however, Mr. Gibson sent Mr. Ball an e-mail informing Mr. Ball that the roof did not comply with the approved plans. Exhibit 112. Mr. Gibson testified that he based his e-mail on information provided by Dr. Barr. Dr. Barr asked Mr. Gibson whether he had noticed anything about the roof, and Mr. Gibson replied that he had not. Dr. Barr, however, informed Mr. Gibson that the roof did not comply with the approved plans based on information provided by other property owners, including Rande Joiner. 6/30/14 T. 109. When asked whether Dr. Barr had been informed by Ms. Gowan, Mr. Gibson replied, "I'm sure that was, that was the case, but I was referring more to non-board members." *Id.* at 110. Mr. Gibson acknowledged that Ms. Joiner was an attorney, and did not have expertise in construction. Mr. Gibson confirmed that no architects other than Dr. Barr have inspected the property. *Id.* at 110-112.

A few days later (on September 14, 2013), Mr. Gibson met Mr. Ball again at the site, this time with Dr. Barr and Lee Alfer. Dr. Barr asked Mr. Gibson to set the meeting up because he began to receive a "very important set of e-mails" stating that the roof on Mr. Ball's house was too high. While Dr. Barr deemed these e-mails important, they were not submitted into the record of this case. 6/12/14 T. 194-195. Dr. Barr felt that the meeting onsite would assist

Mr. Ball in understanding the issue before going to the expense of construction. At that meeting, according to Dr. Barr, he told Peter Ball that the Board "was not interested in the methods and needs of construction by which he is going to achieve what the Board approved." He told Mr. Ball to make corrections and complete construction. 6/12/14 T. 191-195.

Mr. Ball testified that when Dr. Barr arrived at the meeting, the first thing he said was that the roof was too high. Mr. Ball had the approved plans with him, and pointed out that approved plans showed the slope of the roof at a pitch that would require the roof to be higher than the existing ridge with the second floor addition above the garage. Despite this, according to Mr. Ball, Dr. Barr insisted that he constructed the roof higher than approved based on his knowledge of the plans. 8/4/14 T. 154-155.

Mr. Gibson testified that the focus of the September 14, 2014, meeting was the height of the roof above the garage and foyer. He testified that the issues were not apparent to him because he is not an architect, but were immediately apparent to Dr. Barr. 6/30/14 T. 72. Mr. Ball kept asking Dr. Barr how to fix the non-conformities and Dr. Barr responded that he needed to comply with the approved plans. According to Mr. Gibson, Dr. Barr felt that it was not the Board's responsibility to give advice on how to change the house. 8/4/14 T. 65.

Ms. Alfer testified that she did not suggest that Mr. Ball bring the height back into compliance with the plans because she was not an architect and couldn't make that decision, but relied on Dr. Barr. She recalled that the gist of the conversation was whether roof pitch was in compliance with the approved plans. 9/19/14 T. 235-237. Dr. Barr testified that "they" asked Mr. Ball to bring the building into conformity with the approved plans. According to Dr. Barr, Mr. Ball's response was to cover the roof with a blue tarp and let it set like that for 6.5 months. 6/12/14 T. 81-84.

The day after the on-site meeting, Dr. Barr sent a letter to both Michael and Peter Ball. The letter reiterated that he had received many complaints from community members regarding the height of the roof, which exceeded the height approved. The letter also informed Mr. Ball that use of roof trusses contravened standard construction practice, and requested that he remedy the non-compliance immediately. Exhibit 79. Mr. Ball's expert in residential construction, Mr. Leo Schwartz, later testified that it is common to use trusses to construct a new roof. 7/10/14 T. 207.

When asked why Dr. Barr sent the letter before meeting with the Board to determine whether a violation existed, Dr. Barr stated that he, acting as president, the vice president and the architecture committee chair were the most informed about this construction. Dr. Barr believed that he was still operating under the approval given on May 5, 2011, and this violation was under the same approval. He reasoned that the Board had already voted to file a complaint with the CCOC under that approval (CCOC 73-12), at which time Mr. Ball had been given a chance to present his position to the Board. He was the designated person to determine whether a violation exists, and they had a "threesome" that went out to inspect the property. 6/12/14 T. 197. When asked whether a vote had been taken, Dr. Barr responded that he, Lee Alfer, and Peter Gibson took a vote at the property "if you want to make it official," although that vote is not recorded anywhere. Dr. Barr did not wish to wait the 10 days before a Board meeting could be held to save Mr. Ball the expense of having to remove additional construction. 6/12/14 T. 198-199. They did not request additional drawings; they simply told Mr. Ball to correct the roof height. *Id.*

Ms. Gowan testified that Dr. Barr had to send the letter without speaking with the Board because there were so many complaints about the construction and a large load of trusses had

been delivered to the property. She felt that "we" had to do something now to prevent the problem from becoming bigger because it is difficult to return used trusses and because they have a small Board that was difficult to get together. 6/30/14 T. 144-147.

Mr. Gibson did not think that the Board had seen the letter before it was sent, but acknowledged that it captured the concerns of all three Board members. According to Mr. Gibson, they decided to send the letter without Board approval because they didn't want Mr. Ball to incur more expense. 6/30/14 T. 86-90.

Mr. Ball approached Mr. Gibson shortly after the on-site meeting (on September 16, 2013) asking that they meet again at Mr. Ball's home. Gibson agreed with the caveat that he didn't wish to give specific guidance on the plans because he was not an architect. 6/30/14 T. 78-81.

Mr. Gibson and Dr. Barr exchanged e-mails on September 16 and September 17, 2013, about whether the Board had approved the correct plans. Apparently, Ms. Bruno forwarded to Mr. Gibson a set of drawings that the parties contend were the April 6, 2011, drawings that Mr. Ball contends were submitted to the Board (Exhibit 148), and which were the basis of the building permit plans. Mr. Gibson informed Dr. Barr that Ms. Bruno dropped plans off that were different than Exhibit 77 and questioned whether the Board knew which plans had been submitted. Exhibit 169. The attachments to this e-mail were not in the Board's records, and were not submitted until requested by the Hearing Examiner. 9/19/14 T. 251.

Dr. Barr refuted any contention that the plans had been submitted to the Board, calling them "orphans" because they did not have a signature block and were different than the April 6, 2011, plans because they show a trellis. 10/6/14 T. 67-71.

As ordered by the CCOC Panel in Case No. 30-12, the Board scheduled a special meeting for October 7, 2013. Initially, Dr. Barr testified that he did not see the notice sent for the meeting; later, he recalled seeing the notice. There are two different agendas in the record for that meeting, although Ms. Gowen could not explain why. Exhibit 127; 9/19/14 T. 186. One agenda listed an agenda item as "Validating Board Actions." The other agenda listed specific actions to be validated by the Board, including the "conditional approval of construction at 10600 Vantage Ct." Exhibit 127. Both agendas list "Old Business" as an agenda item as well. *Id.* Ms. Gowan testified that she believed that the more general agenda had been used for the HOA's Listserv, and the one that had been mailed to property owners had a more specific listings. 9/19/14 T. 186. Mr. Bruno testified that he received a "general" notice hand-delivered in his mailbox before the meeting. 7/25/14 T. 126. Neither agenda listed Mr. Ball's violation of the Board's approved plans.

The parties are far apart as to the events that occurred at the Board's special meeting, particularly as to whether the Board took a vote to prosecute Mr. Ball for deviating from the approved plans. Mr. Bruno testified that the Board brought up whether to file a new Supplemental Complaint that the CCOC Panel refused to consider in CCOC Case No. 72-13. 7/25/14 T. 126.

Mr. Ball, Mr. Bruno, Ms. Gowan and Mr. Gibson attended the special meeting on October 7, 2013. Mr. Ball and Mr. Pelter, and initially Mr. Gibson, testified that the Board voted (legally valid or not) at the October 7, 2013, meeting *not* to prosecute Mr. Ball for the deviations from the approved plans. 6/30/14 T. 79.

Later in the course of the hearings in this case, Mr. Gibson changed his testimony, stating that if he had used the word “vote” to describe what occurred at the October 7th meeting,

he must have been mistaken. According to him, it was not an official vote because that would have required a motion and a second. Mr. Gibson now described what occurred as a "general discussion" on whether to work with Mr. Ball informally or take him to the CCOC. 9/19/19 T. 245-246. In November of 2013, however, Mr. Gibson sent the following e-mail to Mr. Bruno (Exhibit 176(b)):

> As a side note between us kids, the vote on the 7th was genuine. Recall that I was pushing for it, Ben reluctantly agreed, and at least 2 other Board members weren't present. Everyone was present at the subsequent meeting so the vote turned the other way. Bottom line is that almost no one on the Board believed he'll do the right thing on this own. They truly believe that external pressure like a CCOC filing is the only thing that will spur the right action. Time will tell if they are right.

In a separate e-mail to Mr. Bruno, Mr. Gibson stated:

> There was a subsequent Board meeting where a decision was made to proceed with the filing. A critical mass of the Board members felt that historical behavior reflect a low likelihood that further discussions would not result in adequate changes. It was also made clear that this doesn't mean that further discussions and negotiations should discontinue, it just adds leverage that might help.

Returning to the October 7, 2013, meeting, Dr. Barr testified that he did not believe that the Board took a vote at the meeting, although he was not present. He based his belief on the fact that it was a special meeting to ratify the Board's prior actions. He believes that Mr. Gibson just provided an update on the situation because, if Mr. Gibson had taken a vote, he would have told Dr. Barr and it would have appeared in the minutes.[21] 7/25/14 T. 209.

Ms. Gowan testified that Mr. Gibson must have been incorrect when he testified that the Board took a vote at the October 7, 2013, Board meeting, although she agreed that Mr. Ball

[21] The Hearing Examiner notes that the minutes of the Board's October 28, 2013, reflect only a motion made by Dr. Barr to file this Complaint, but no vote is recorded. Exhibit 127.

was present. Her recollection is based upon her meeting notes and some personal notes she had taken. 9/19/14 T. 190-192.

Mr. Bruno testified that he did receive notice for the October 7, 2013, meeting. He observed the Board take a vote not to file the Complaint with the CCOC. He was not surprised to learn that the Board took another vote at the October 28, 2013, Board meeting because "that's the way they do things." 7/25/14 T. 152. Mr. Bruno corroborated Mr. Ball's testimony, stating that Mr. Gibson voted not to file the complaint against Mr. Ball at the October 7th meeting. 7/25/14 T. 151. According to Mr. Bruno, the Board took a brief vote to affirm all of the items on the agenda, and spent the rest of the meeting discussing whether to take Mr. Ball to the CCOC. 10/6/14 T. 210. Mr. Ball testified that he also observed the Board take a vote not to file a complaint with the CCOC. 8/4/14 T. 154-155.

The minutes of the Board's October 7, 2013, (prepared by Ms. Gowan) meeting reflect little of the discussion that occurred. The minutes report that the Board ratified its actions pursuant to the CCOC's order in Case No. 30-12. Exhibit 91. They also state that Peter Gibson reported for the Architectural Committee that Mr. Ball had been instructed to correct the non-compliant construction, some Board members mentioned Mr. Ball's history of non-compliance, and that Mr. Gibson stated that construction should conform to the approved plans (a position supported by Ms. Gowan), and that some Board members wanted to see a timeline for completion. *Id.*

When asked when the Board *did* take the vote to prosecute this case, Ms. Gowan initially testified that she could not recall, but believed that it was sometime in October, 2013, and was supplied with the October 28, 2013, meeting minutes by Potowmack's counsel. 6/30/14 T. 301.

While the Board provided a copy of the notice of the October 28, 2013, Board meeting, Mr. Pelter, Mr. Bruno, and Mr. Ball each testified that they never received this notice. Mr. Pelter learned of it when he met with the Balls' counsel in preparation for this case. 7/25/14 T. 92-93. Mr. Bruno did not receive notice; he learned of the meeting from Mr. Ball. 7/25/14 T. 128. Mr. Ball testified that he never received a notice of that meeting. 8/4/14 T. 158.

Dr. Barr found this testimony "extremely incorrect," because "when Peter didn't -- Peter Ball told me he had missed one, that someone didn't deliver, and I think he e-mailed me or somehow; e-mail it must have been. I immediately made sure it was given the next day…" 7/25/14 T. 202. Dr. Barr

The parties agree that Board voted on October 28, 2013, although exactly what was before the Board is not straightforward. The minutes of the October 28th meeting state that Dr. Barr made a motion to file a second complaint with the CCOC. Exhibit 127. When the Hearing Examiner queried where Mr. Ball's property was listed in the agenda for that the October 28, 2013, meeting, Dr. Barr stated that it was listed as "old business" and the following exchange occurred (7/25/14 T. 207-208):

> MS. ROBESON: Well, how can it be old business if it's a new violation? I guess that's my question.
> THE WITNESS: It's old -- it was old business in our thinking, the board's thinking, because it was under the same approval that was given for this construction that was a whole construction. It was --
> MS. ROBESON: So you're looking at one vote as saying, as giving permission to take every violation under this plan to the CCOC; is that your position?
> THE WITNESS: Yeah. Quite frankly, we didn't expect any more violations because we had had --
> MS. ROBESON: No, don't --
> THE WITNESS: Yes, that's the position.
> MS. ROBESON: I'm just trying to --
> THE WITNESS: That's the position, that --

MS. ROBESON: I'm trying to understand your position.
THE WITNESS: That was our understanding, that this was all part of the one approval. We found one violation; we were hoping there'd be no others; and then, lo and behold, when everything looked like it was going well, there was this major happening.
MS. ROBESON: So you brought it up on the agenda --
THE WITNESS: As, under old item.
MS. ROBESON: -- but you listed it as old business?
THE WITNESS: Right.

Further to this rationale, Dr. Barr then explained that the vote at the October 28, 2013, was not really about the roof because the Board had already voted to file the Supplemental Complaint before the CCOC in Case No. 73-12 (although that complaint did not list the roof as a violation.) According to Dr. Barr, there was some discussion about having some windows up and some windows not, but "I wasn't really focused on it." 7/25/14 T. 187. The issue at the October 28th meeting was not the roof, according to Dr. Barr, which he characterized as an issue "just buzzing around." 7/25/14 T. 190. The vote at the October 28, 2014, was not a "separate vote," according to Dr. Barr, but just to ratify the Board's earlier action to prosecute Mr. Ball in CCOC 73-12. Dr. Barr told the Board that Mr. Ball's property had been a problem, and he presented the issue as being that the Board should take action to correct it. He mentioned the roof, and also mentioned other items such as doors and windows that don't match up. 7/25/14 T. 191-192. He also testified that the main purpose of this vote was to have the Board decide to fund the attorney's fees necessary to litigate the case. 7/25/14 T. 209. Ms. Gowan agreed with Dr. Barr. 9/19/14 T. 190-193. None of this is mentioned in the minutes of the Board's October 28, 2013, meeting. Exhibit 127.

Dr. Barr further explained that the issue before the Board was "an extension of the previous vote for taking a two-foot setback that was not made" and that, "they [the Board] were saying this is much bigger as an item." 7/25/14 T. 201. He acknowledged that it would have

been helpful to the Board to know the issues they were deciding, but this was an agenda item under "old business" and what "we" were really doing was making sure they understood that this was a case "separate from the original" because the CCOC had not accepted the Supplemental Complaint in CCOC 73-12. The October 7, 2014, meeting was a special meeting. The October 28, 2014, board meeting was to bring people up to date on what was happening, according to Dr. Barr. He further testified that only Board members attended the October 28, 2014, meeting. 7/25/14 T. 292.

The origin of the Supplemental Complaint, including who prepared it and who approved it, is even murkier. Dr. Barr testified that four members of the Board had seen the supplemental complaint before the vote on October 28, 2013. These were Ms. Gowan, himself, Lee Alfer and Peter Gibson. 7/25/14 T. 210. None of the Board members had the supplemental complaint in front of them when they voted to take the action to the CCOC, whenever that was. 7/25/14 T. 216.

When asked what the Supplemental Complaint contained, Dr. Barr responded, “I am not supposed to memorize these things,” and referred these questions to Ms. Gowan. 7/25/14 T. 199; 6/12/14 T. 93-94, 99. He acknowledged that the Board “probably” did not know all items on the supplemental complaint when they voted to take this case to the CCOC, but again characterized the issue before the Board as “an extension of the previous vote in CCOC Case No. 73-12. He felt that the Board is saying that this (the height) is a much bigger item. 7/25/14 T. 200. He recounted the Board’s concerns as relating to the “big picture” items. When asked to explain this, he stated that these were anything that “jars” when one is driving by, visible from a distance, such as height, bumps on the side, and missing windows. 7/25/14 T. 214. Minor items would be trim. *Id.* at 215.

Mr. Gibson corroborated Dr. Barr's testimony that an e-mail containing the supplemental items had been circulated to some Board members. 8/4/14 T. 34. Ms. Gowan testified that she did not think that the Board saw the Supplemental Complaint before it had been filed. 6/30/14 T.301.

After the Hearing Examiner questioned whether notice of the vote had been provided to Mr. Ball, Ms. Gowan changed her original testimony regarding the date of the vote taken to file the second complaint against Mr. Ball to the CCOC. She testified that the vote did not occur at the October 28, 2013, meeting; rather it occurred in April, May, or June, 2012. She reiterated Dr. Barr's testimony that the Board's vote on October 28 was solely to fund more litigation against Mr. Ball. 9/19/14 T. 190-193.

On December 16, 2013, Mr. Ball dropped off revised plans at Mr. Gibson's house. Exhibit 90. Mr. Ball testified that he did not use a form application for this submission because he did not have a current copy of the form. 9/15/14 T. 100. The text of the cover letter states that a copy of the elevations from the approved plans, and attached elevations for the adjustments to the approved plans were "submitted for the Board's approval." Exhibit 90. The letter stated that the adjustments address all items in the supplemental complaint and will result in lowering the roof height originally approved by the Board. *Id.* The letter went on to state (*Id.*):

> Please inform us when a meeting will be held to discuss our request. We wish to attend any and all meetings that will address the matter to explain why these adjustments were made and to provide further information to the Board members.

Mr. Gibson confirmed that Mr. Ball dropped off a set of plans and a letter at Gibson's house in mid-December, 2013. He found the plans and the letter on his doorstep when he arrived home, but did not know who delivered them. The materials did not include an

architectural application form and Mr. Gibson did not consider it to be an application. He eventually gave the documents to Dr. Barr. According to Mr. Gibson, the plans enclosed with the letter were large scale rather than 8.5 x 11" plans. 6/30/14 T. 82-83. Gibson testifies that he did not forward the plans to Dr. Barr until January because he was busy and his family traveled over the holidays. He thought Ball left him the plans as a response to Gibson's suggestion that he get the construction back into compliance. Gibson never considered these plans an "official" new application because "the horse was way out of that barn." 6/30/14 T. 126-129. Mr. Gibson confirmed his receipt of the plans with Mr. Ball, stating that there was not enough information on the foyer and above the garage. He promised to give the plans to Dr. Barr before leaving for vacation on December 23, 2013. Exhibit 113. Mr. Gibson testified that he suggested that Mr. Ball provide more detail and a list of items that explains and describes the differences between the originally approved plans and the plans that were dropped at his house. 6/30/14 T. 82-83.

Mr. Gibson testified that Dr. Barr's prior testimony on Architectural Committee procedures referred to the procedures for filing a new application—not to amendments to the applications. He understood the plans to be in response to curing the noncompliant construction because of his previous conversation with Mr. Ball. He did not know if there had ever been a request to amend approved plans, although later he acknowledged seeing an e-mail regarding the Board taking a vote to permit a homeowner to amend an existing approval. 6/30/14 T. 130-133.

Dr. Barr says he was not aware that Mr. Ball submitted the December 2013, application for approximately one and one-half months. Dr. Barr later received them, but had already been told that it was not an application because it didn’t include the requisite form. When asked

why no letter was sent stating that the application was incomplete, Dr. Barr stated that it was because the plans were just dropped off at somebody's mailbox. According to Dr. Barr, it was never referred to the Board of Directors. Mr. Ball was never asked to resubmit the application with the form because his attorney him not to communicate with Mr. Ball while the matter was in litigation. As a result, he never responded to the submittal. 6/12/14 T. 195-196.

Dr. Barr testified that Mr. Ball resumed construction on the roof in March, 2014, shortly after the CCOC's decision in Case No. 73-12. According to Dr. Barr, the construction did not correct the height of the roof, and looks nothing like the original model of Dr. Barr's house. 6/12/14 T. 84-85. He testified that the Fair Hill model had a straight, flat face with the garage bumped out and the living room sticking out slightly. In his opinion, the improvements look like four townhouses slapped together, each roof stepping higher. Dr. Barr found architectural guidelines important because the average price of a home in the community is $950,000, and some have exceeded $1,000,000. It's also important, testified Dr. Barr, because the house is located at a prominent point at the entrance to the neighborhood, and he knows of nothing like what's actually been constructed in the neighborhood or anywhere else in Potomac. 6/12/14 T. 93. A picture of a different home representing the Fair Hill model, submitted by Ms. Gowan, is shown on the following page (Exhibit 72).

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In April, 2014, Dr. Barr attempted to recruit Mr. Ball's next door neighbors, the Millers, to be on the Board after receiving a complaint from them about construction materials on the property line. He urged (Exhibit 122):

> We need your support on the board so we can beat Ball once again (he is 0 for 2 now)…we hope to put him away. Otherwise, his architect would come on the Board.

When the Hearing Examiner asked Dr. Barr to identify the architect referred to in the e-mail, he stated that it was Tania Bruno. When asked why he still referred to her as Peter Ball's architect after she had clarified two years ago that she was not the architect of record, he replied (10/6/14 T. 110-111):

> And I didn't realize that or understand that, because she had, in my mind, been the person who had done the design work, until Mr. Ball's testimony came in the interrogatories, saying that he hired Tania Bruno as the architect to do the

> conceptual drawing at the front end for the HOA approval; then he hired another architect in December to do the December drawing, 2013 drawing, that he did the permit set, that he himself did the –
>
> MS. ROBESON: Well, it's in an e-mail to you from two years before. It's an e-mail from Ms. Bruno to you.
>
> THE WITNESS: Yeah. What -- right. What we had to go on –
>
> MS. ROBESON: 2/22/12, Exhibit 142.
>
> THE WITNESS: Yes.
>
> MS. ROBESON: So why, why are you saying that she's his architect?
>
> THE WITNESS: Because we have approved drawings that were approved primarily on the strength that she came on. In fact, when she came to the meeting and produced the first set of drawings in 2010 -- the minutes will reflect whenever that was, July 2010 -- that I said we finally have drawings that look like drawings that you could understand and we're glad to have an architect on board. And she actually made a good effort in the schematic version, trying to make things happen, as she said in the July 2010 letter…

All parties agree that construction has not been completed. Respondents' expert in residential building construction, Mr. Leo Schwartz, opined the construction has proceeded in a typical manner, but is not yet finished. He testified that using trusses to raise the height of the roof is normal construction practice. Typically, builders will add the new addition before dismantling the existing house to prevent exposing the lower floors to the weather. The existing roof would not be dismantled until the new roof is weather tight. After the new exterior is weather tight, the interior walls are removed.

Based on his observation of the property, Mr. Ball has not finished the exterior construction. Among other items, he still needs to finish the trim, raise the chimney on the right side until it matches the chimney on the left side as shown on the plans. He also has to finish trimming the windows and put siding on the house. 7/10/14 T. 207-208. In Mr.

Schwartz's expert opinion, it would take two to three months to complete the construction, weather and supplies permitting. The addition over the flat roof must still be built, Mr. Ball must remove the roof over the flat room, and he must still build the roof on the left rear elevation. The trim work must be completed before siding may be installed and the chimney must be raised. 7/10/14 T. 224. Detailed testimony on all items that still must be constructed may be found in the transcript of the July 10, 2014, public hearing on pages 216-224.

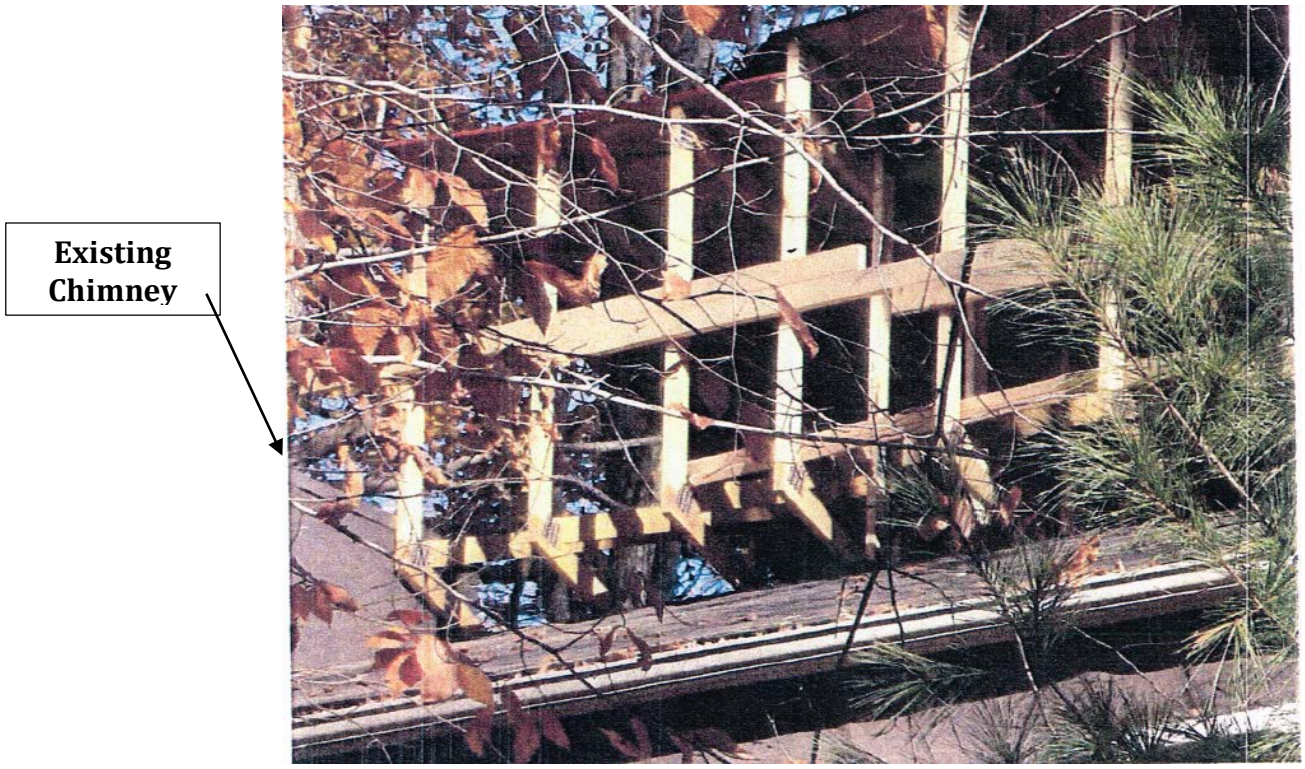
Ms. Sharon Washburn, Potowmack's expert in architecture, stated construction on three sides is not complete and no construction has begun on the rear elevation. On the front elevation, the new addition and living room area is as complete as she would expect, but the details aren't finished or complete. She agreed that the foyer has not been completed, nor is the area above the garage. She acknowledged that items constructed could be changed, although that would not be typical, and that remaining construction could comply with the plans. She agrees that the roof ridge over the garage was the highest point of the roof ridge and that other roofs could be raised to create a straight roof line. 9/19/14 T. 118-122.

D. Roof Height

Initially, neither Dr. Barr nor Ms. Gowan were aware that the approved plans do show the existing roof was to be raised. Both based their conclusion that the roofline violated the approved plans when they observed the trusses being placed on the existing roof.

Dr. Barr testified that he determined that the roof was too high because the trusses were higher than the existing chimney on the right hand side of the home. 6/12/14 T. 79-80. According to Dr. Barr, the on-site inspection revealed the increased height extended to the left half of the house where, according to him, no work had been proposed. 6/12/14 T. 81.

Ms. Gowan also concluded that the height exceeded that approved for the same reason. Her point is illustrated on Exhibit 81, a photograph she submitted showing the roof trusses in relation to the existing chimney (6/30/14 T. 48):



Ms. Gowan arrived at this conclusion alternatively by looking at the right-side elevation on the plans, which didn't appear higher than what was existing; according to her, the ridge appears to have been utilized again and then just the roof brought forward to cover the upper level of the garage. 6/30/14 T. 292. The right side elevation shown on Exhibit 77 is reproduced on the following page.

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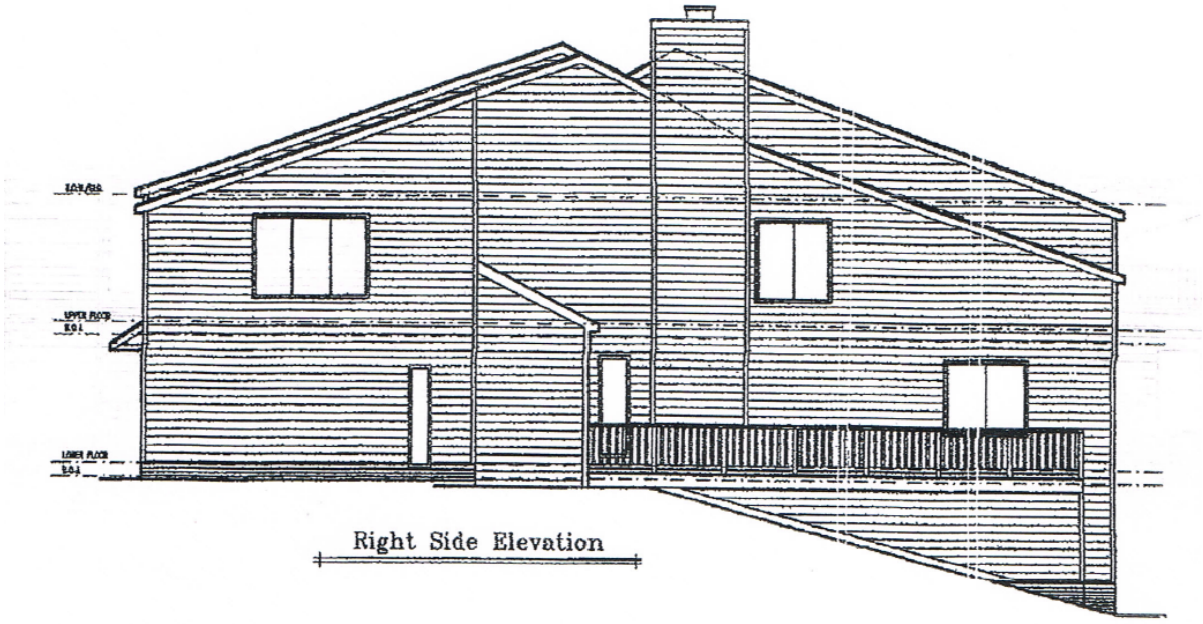


When asked how a second story over the garage could be built without raising the roof, Ms. Gowan replied:

> The roof that existed over the main part of the house, the—as you look at the side elevation, if you looked at above the window where it's got the dotted line, from there to the ridge, it appeared that that was the same, but what is being constructed now is much higher, significantly higher. 6/30/14 T. 292.

She testified that the roofline in the plans "look higher or taller" than the existing roof. 6/30/14 T. 290. The left and right side elevations appear to be long and relatively low, which is consistent with the home's existing roof size and pitch. According to her, the height of the roof doesn't appear very tall and doesn't produce a very steep slope—the slope is consistent with what exists currently. When Mr. Ball "raised" the roof, it presented a much more "vertical look," or looked taller, even from the front. 6/30/14 T. 291.

She further bolstered her position by explaining that she could use some elements of the plans to measure distance; she stated that the double dotted lines running horizontally on the plan are eight-foot sections. She knows that it measures 8 feet because the first floor in all of the older houses in the neighborhood is eight feet high, although some houses are nine, although this is not an "exact science." 6/30/14 T. 293-294. Her observations of the trusses on the roof indicate that they are approximately 6-8 feet higher. Ms. Gowan admitted that she did not know the height of the roof as constructed. 6/30/14 T. 295.

Dr. Barr testified he believed that the approved plans maintained the existing roof height because the Board already rejected the 2010 plans with a full third story on the rear elevation. Dr. Barr apparently refers to the "preliminary and informal" denial from Mr. Williams and Dr. Barr on February 2, 2010 (although that didn't specifically mention the additional story).

After rejecting plans with the full third-story, according to Dr. Barr, Mrs. Bruno wrote the e-mail to the Board that Mr. Ball was prepared to forgo the third level in the back on top of the flat roof, but he would like a walk-in closet off the master bedroom. 7/25/14 T. 163. Dr. Barr reiterated that Ms. Bruno stated that the roof on the rear elevation would extend only from the top of the wall of the flat roof to the existing ridgeline. Exhibit 85. According to Dr. Barr, that was the only discussion about the level of the roof, which occurred after the Board had already rejected an additional level over the flat roof. 7/25/14 T. 162-163. The Hearing Examiner notes that Mr. Ball was asked at the May 5, 2011, hearing what the height of the roof would be, and Mr. Ball responded that it would be no higher than 30 feet. Exhibit 127.

Dr. Barr testified that, if he had seen Exhibit 126 (the larger plans with a scale), he did not pay attention to it because when it came to the vote, all they had was Exhibit 77. According

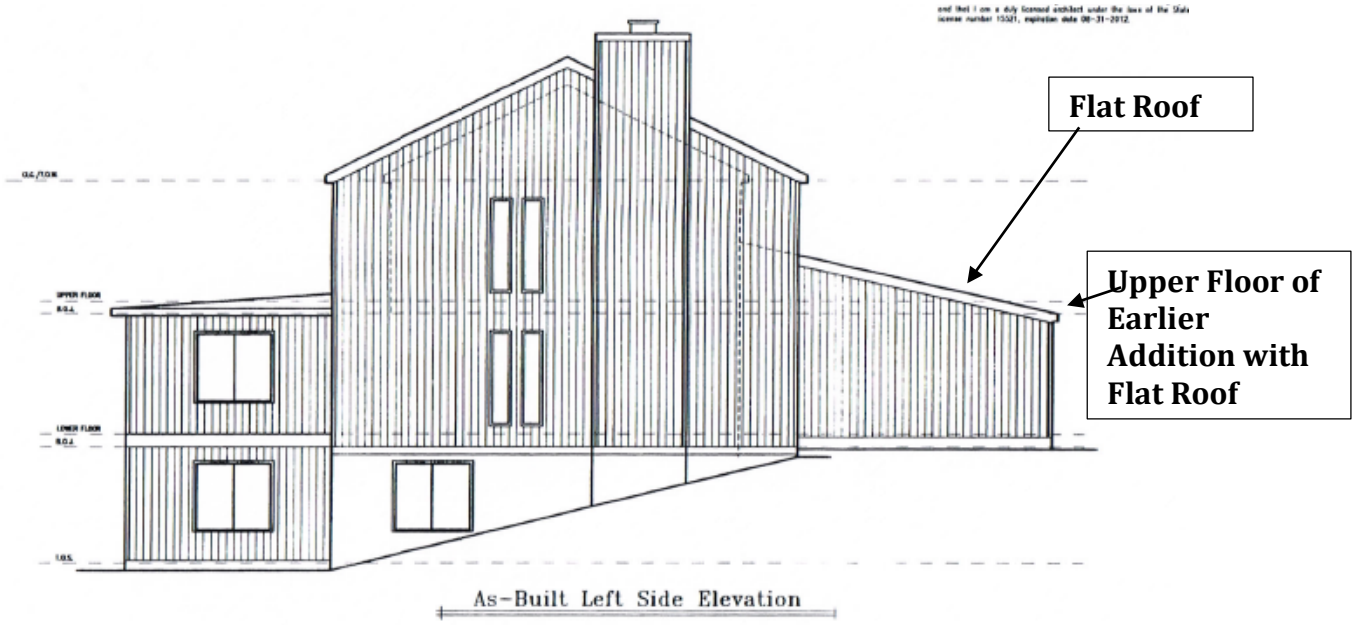
to Dr. Barr, he was "not reading this set of plans" but was going by Exhibit 77 because that is what was e-mailed to Board members. Now that he has had the opportunity to compare Exhibit 77 to Exhibit 126, the plans are the same, just at different scales. He testified that the Board's secretary had to send excerpts in order to email it, and Exhibit 77 does not include the as-built plans, which he had seen before. 7/25/14 T. 158. When asked whether he had the as-builts in front of him when he voted, he responded that he had looked at them in July 2010 when Jeff Williams gave the plans to him because Mr. Williams couldn't understand them. According to Dr. Barr, Mr. Williams felt that there was nothing showing what was being added. He had to study the as-builts quite intently to discover what the additions were on the proposed plans. 7/25/14 T. 160-161.

When Dr. Barr presented the larger set of plans (Exhibit 126) that included a scale at the July 10, 2014, public hearing in this case, he testified that he did not look at the scale because these are inaccurate when copied. 7/10/14 T. 20-24. Respondents' counsel, however, pointed out to him both the small and large sized plans showed the new roof starting a few feet *above* the existing flat roof, apparently the walk-in closet requested by Mr. Ball, as shown on the following two pages. (Exhibit 126, 7/10/14 T. 35).

Dr. Barr stated that it was the "first time that I've noticed it." Dr. Barr admitted that when one places Sheet A5 (the proposed construction) over AB-5 (the existing construction) of Exhibit 126, one could tell that the addition was taller than the existing roof ridge. He did not notice it earlier because there was no dimension of the height and he had interpreted the

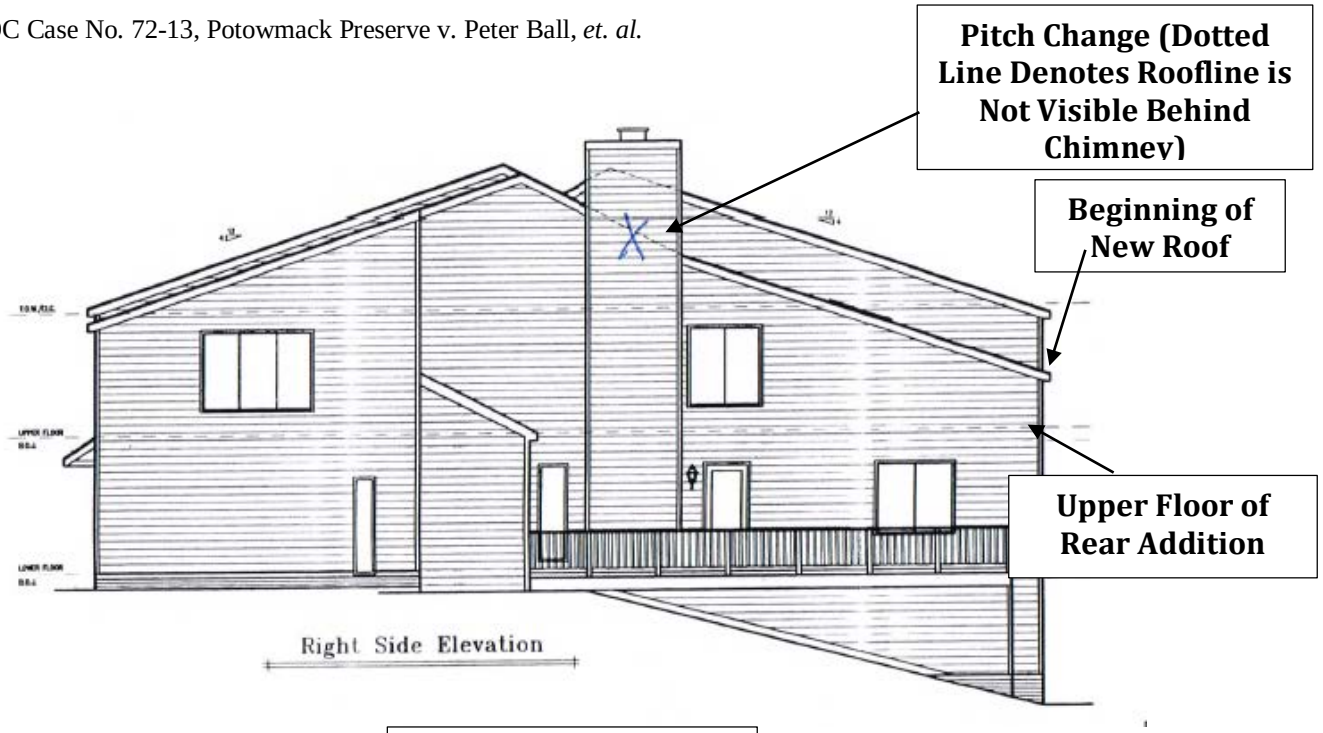
text from Ms. Bruno's submission to mean that the roof ridge would not be raised. 7/10/14 T. 35-36.[22]

Mr. Ball stated that the language relied upon by Dr. Barr referred (in Exhibit 76) was intended only to signal the pitch change necessary on the rear elevation and marked where this is shown on the plan. He demonstrated this by comparing the as-built right side elevation on Exhibit 148 to the proposed construction shown on the same exhibit. He marked the pitch change that he contends he was requesting with an "x" (8/4/14 T. 132, Exhibit 148), below and on the following page:



As –Built Elevation (Shows Home Prior to Construction) Exhibit 148

[22] In order to minimize the size of this Recommended Decision, the Hearing Examiner uses just Exhibit 148 to illustrate that the drawings show the ceiling above the flat roof begins just slightly above the upper floor of the flat roof. She perceives no material difference in the excerpts shown between the two plans.



Proposed Elevations Exhibit 148

According to Mr. Ball, this was clearly set forth in more detailed plans submitted to the Board with his April 15, 2011, letter, which include through sections and dimensions. These are shown below (Exhibit 148):

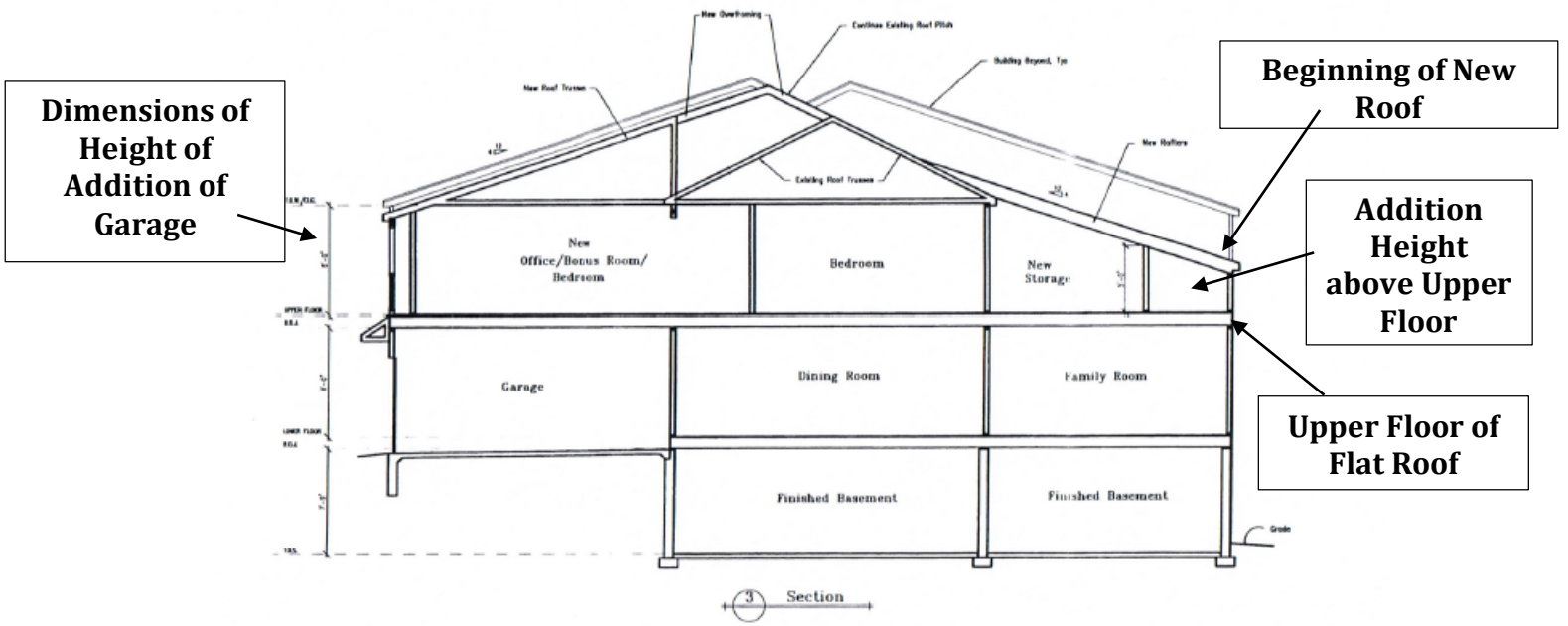


Exhibit 148 (Section of Proposed Construction)

This cross-section from Exhibit 148 also labels new and existing roof trusses and includes the roof pitches proposed.

Mr. Leo Schwartz, the Balls' expert in residential construction, opined that the 8.5 x 11" plans (Exhibit 77) show the roof would be raised. Because his testimony is also relevant to the ambiguity of the plans, the Hearing Examiner includes it in the next section.

Mr. Schwartz stated that he has viewed the house and taken measurements. He compared the actual measurements with the plans that Potowmack contends were approved (Exhibits 77 and 126). He had not seen the larger set of plans (Exhibit 126) until the day of the July 10, 2014, public hearing. He opined that the height of the roof is under the limit set by the County, and it is very, very close to the height shown on the plans (without "getting laser on it.") 7/10/14 T. 187.

Potowmack's expert in architecture, Ms. Sharon Washburn, was unable to measure actual height of the new roof because the red light of a laser measure is difficult to distinguish in daylight. Nevertheless, she opined that the construction is higher than the approved plans. She bases this on her ability to scale off drawings and photos and used standard dimensions of items in the photograph. 9/19/14 T. 114-117.

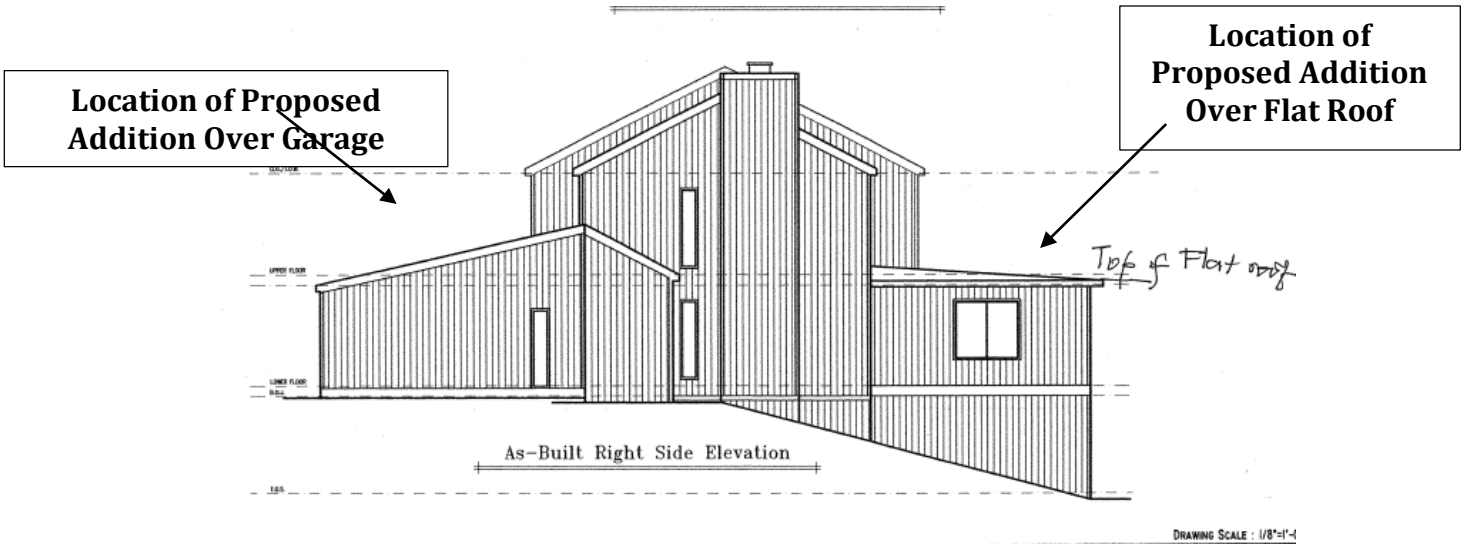
F. Ambiguity of Approved Plans

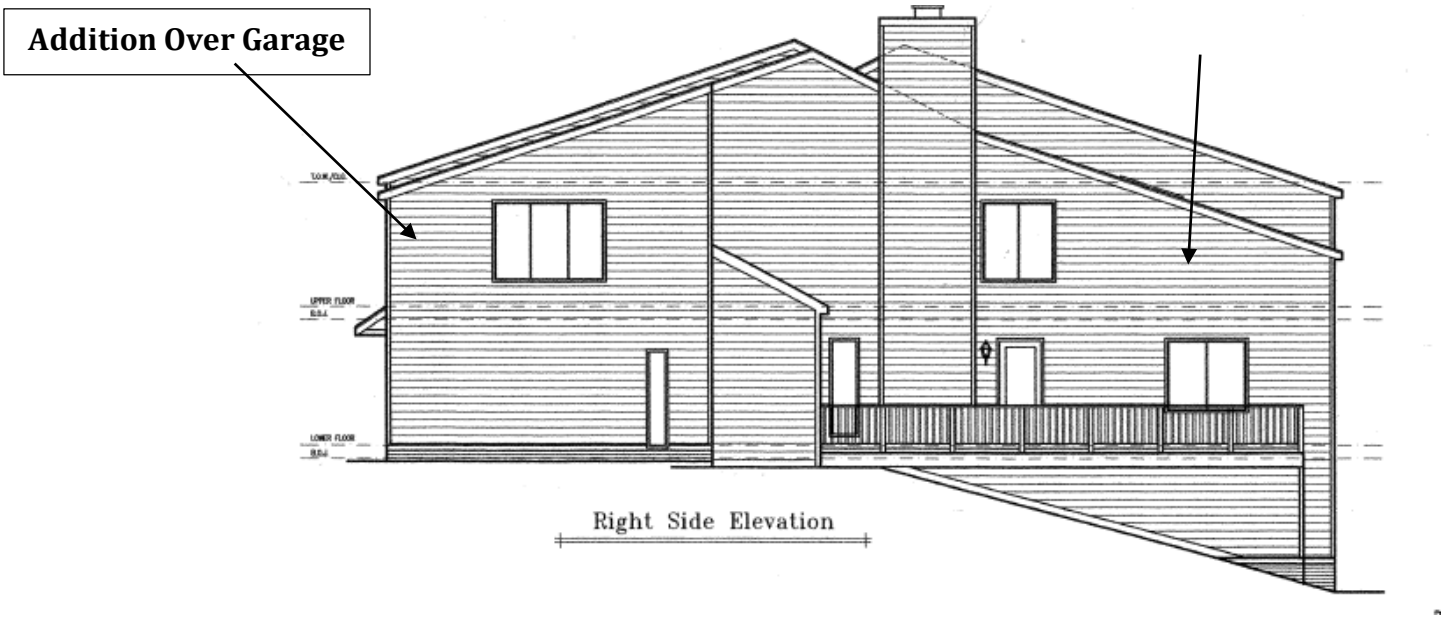
Mr. Leo Schwartz opined that there is no conclusion other than the roof height must be raised over the garage if one proposes an 8-foot high addition over the garage with a 4/12 pitch. He explained that there were several ways to determine the roof proposed was higher, even looking simply at the smaller (8.5 x 11") plans (Exhibit 77).

The first method was based on the pitch of the roof shown on the small plans. He testified that a 4/12 pitch means that the roof rises 4 inches for every foot. The increase in

height of the roof may be calculated by measuring the length of the truss shown on any sheet of the plans to a point on the center of the floor plans that was the approximate location of the roof ridge. While he was not able to determine the exact height of the existing ridgeline, he was definitely able to determine that the roof shown on the proposed plans was higher than the current roof ridge. 7/10/2014 T. 188-197.

Mr. Schwartz opined that he also could determine the height of the addition above the garage by comparing Sheet AB5 and Sheet A5 of Exhibit 126. Dotted lines on the sheet are labeled. Labels include "CLG" for Ceiling, BOJ for "Bottom of joist," "TOJ" for "top of joist, and "TOS," which is labeled as "top of slab." 7/10/14 T. 17. The top line of sheet A5 is different from the corresponding as-built sheet, and clearly shows the roof beginning at a higher point. Mr. Schwartz reiterated that you couldn't add an eight-foot addition above the garage and maintain the existing roof ridgeline. 7/10/14 T. 188-201. The right side elevation of Sheet AB5 from Exhibit 126 and Sheet A5 from Exhibit 126 are shown below and on the following page:





Proposed Construction
Exhibit 126

The left-side elevation also shows the addition and raised ceiling height, opined Mr. Schwartz. Hatched lines mark the top of the slab, the lower floor, the upper floor, a ceiling going across, and an addition over the garage. Sheet A3 shows hatched lines above the garage, and is marked "new office/bonus room/bedroom." 7/10/14 T. 203. All of the hatched lines on Sheet A3 indicate multiple rooms that are additions on the upper floor of the house. 7/10/14 T. 203.

The hatched lines on the as-built left side elevation show a first and second floor—these lines go all the way through to the right side of the house. This reveals that the ceiling of the area marked as "storage" is raised and the new roof will be placed above that, which is considerably above the upper level floor lines. Just as the addition over the garage on the right side of the house forces the roof height upwards, the addition shown on the left side also

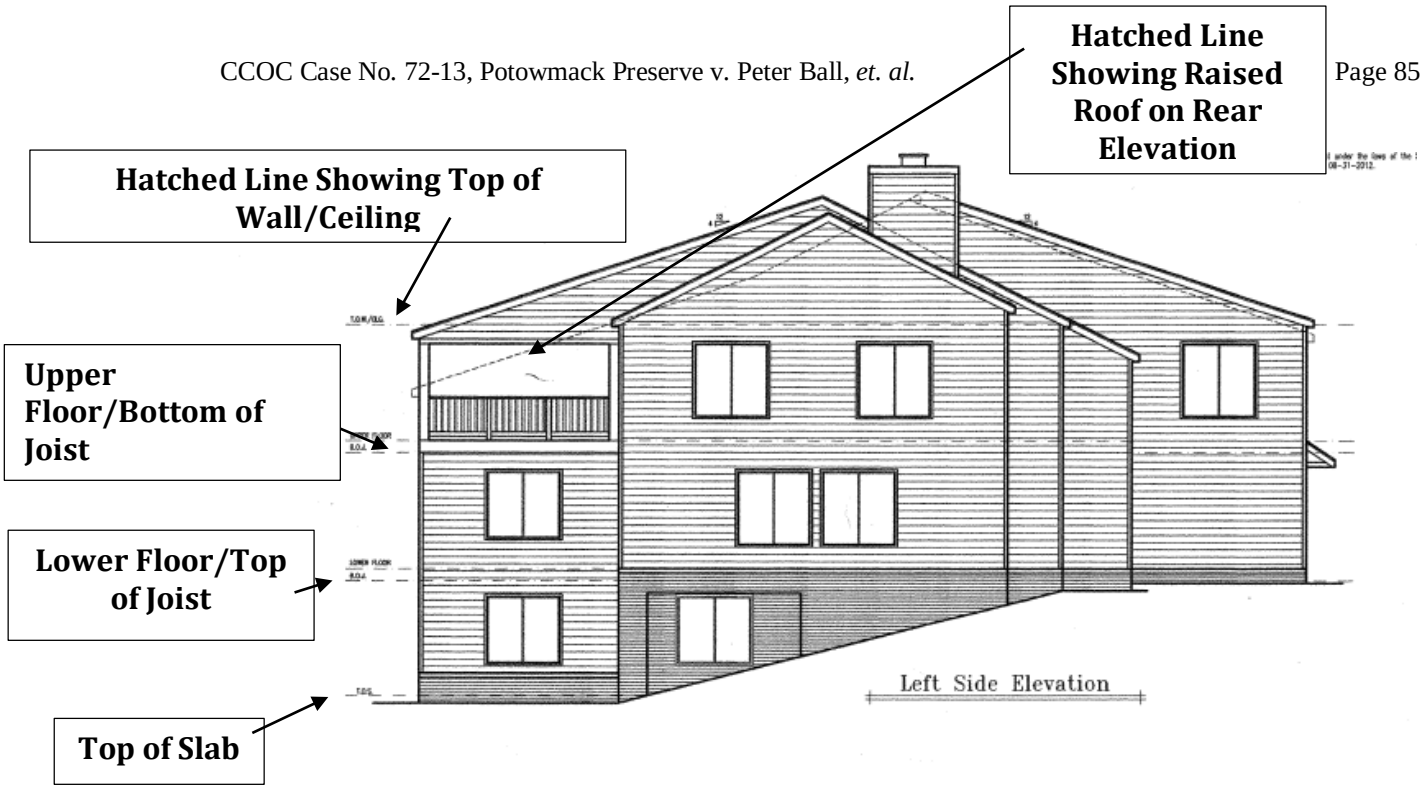


Exhibit 126
Proposed Construction

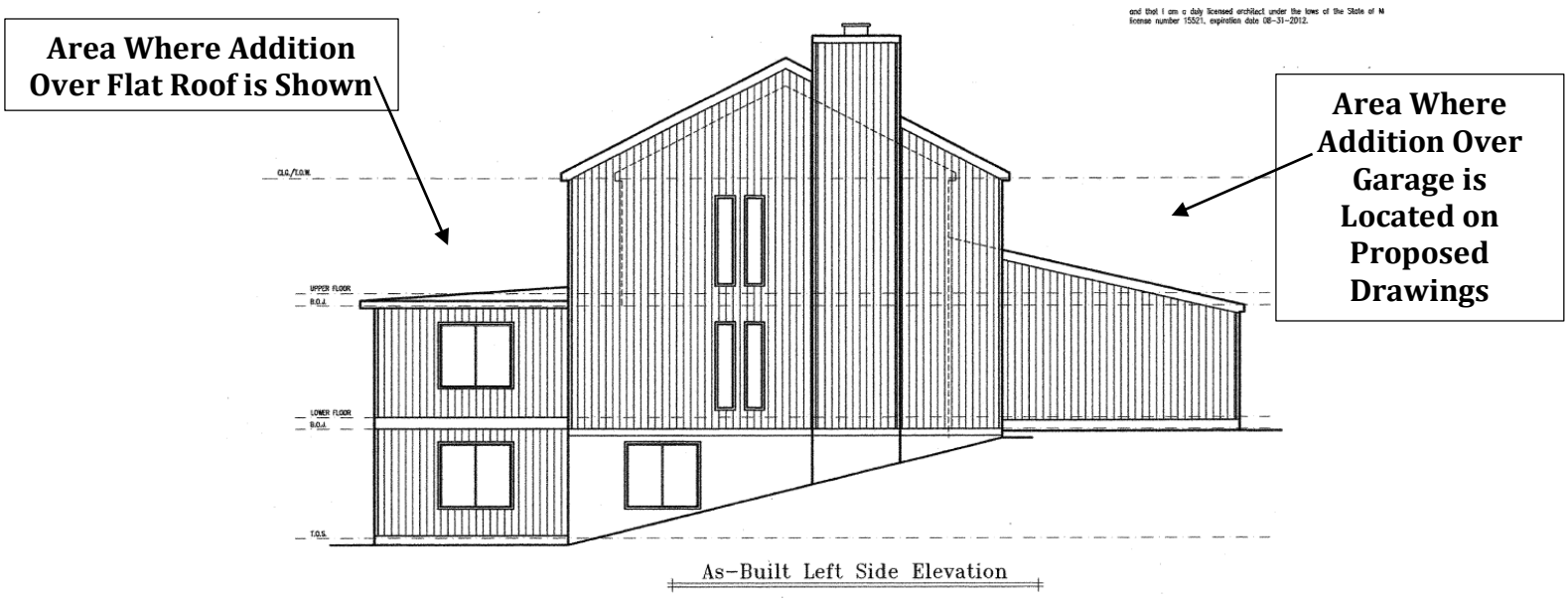


Exhibit 126
As-Built Construction

requires a raised roof. He opined that he is able to discern that the existing roofline has to be raised simply by reviewing the plans. 7/10/14 T. 209-210.

Mr. Schwartz opined that the chimney height approved by the HOA in Exhibits 77/126 is higher than the height of the existing chimney. He reached this conclusion by comparing the as-built plans with the proposed plans. The as-built elevations show the chimneys at either end of the house at two different heights. The approved plans show the chimneys at the same height.

Mr. Schwartz testified regarding the importance of scaled drawings in residential construction. He opined that it is customary to use scales to measure building heights and dimensions in residential building plans. Although the typical rule of thumb is that one should rely on written dimensions over scale, but scale is still used frequently. Scales can change when plans are reduced, although reproduced drawings retain their original scale somewhat. With original drawings, one can measure the dimensions using a scale. 7/25/14 T. 7-8.

Reliance on dimensions is preferable to scales because dimensions are more exact, Mr. Schwartz opined. 7/25/14 T. 36. Mr. Schwartz testified that cross-hatching to denote additions is not used consistently on elevations, although it is on floor plans. In his opinion, it is unusual that approved plans do not show dimensions (i.e., measurements) of the varying distances. While there are no dimensions in Exhibit 77, there is a scale on Exhibit 126

Typically, when building a house, he would prefer to use written dimensions because that's what the architect would specify. However, if no written dimensions were given, he would use the scale. 7/25/14 T. 9. Mr. Schwartz testified that he was surprised that the Board approved plans without dimensions, given Dr. Barr's testimony stating that he wanted plans with dimensions and to scale. Exhibit 77 has no dimensions—or they are whited out or taken

off. The County requires both scaled and dimensioned drawings to apply for a building permit. He opined that it was "out of the ordinary" in his experience to approve plans with neither scale nor dimensions. 7/25/14 T. 11.

The plans have a scale of one-eighth inch to one foot. Using a scale on these plans (Sheet A4), Mr. Schwartz measured the roof height at 28 feet. The roof height on the as-built plans (Sheet AB4) comes to 24 feet using the scale. Thus, he is able to determine simply from scaling Exhibit 126 that the roofline shown on the approved plans is higher than that of the existing home. He opined that it is important to know the size of drawings the scale is based on. Nevertheless, if he was told that the letter-sized reproductions of the plans (Exhibit 77) were based on drawings the size of Exhibit 126, he would have been able to use the scale to determine all of the dimensions. 7/25/14 T. 14-17.

Mr. Schwartz acknowledged that there is no textual reference regarding increasing the roof height on the plan. Nevertheless, he could tell the roof pitch would be raised from Exhibit 77.

He also opined that the roof pitch (shown on Exhibit 77) also indicates that the roof would be raised. It is very difficult to have a pitch lower than 2' – 3'/12 because the roof must be made of metal or rubber, not shingles. The plans do not show a metal or rubber roof. It is very difficult to escape the conclusion that adding an addition with the same pitch as the existing roof must increase the roof height. 7/25/14 T. 38-39.

Ms. Sharon Washburn was the primary witness supporting the Board's position that the plans were ambiguous. In her opinion, the ambiguity resulted from Ms. Bruno’s communications (as well as Mr. Ball’s) regarding the roof pitch on the rear elevation, and the

lack of written text explaining that the roof would be higher, dimensions, or a hatched line showing the existing roofline on drawings of the proposed construction.

She stated that there are methods she uses to explain the plans to laymen or contractors. She adds graphic information to the drawings to make them more understandable. One method she uses is to include written dimensions. When she presents things to non-architects, she includes written descriptions on the drawing so that layman can understand the drawings. She testified that textual descriptions are put on to show changes, if no text is shown on the plan, "by implication there is no change." In her opinion, it is very important to have written words to describe what the person intends to do. She labels plans "new section" or "new siding" or "old siding" to clarify this. 7/25/14 T. 25.

Ms. Washburn explained Ms. Bruno's statement (in Exhibit 85) and Mr. Ball's statement (in Exhibit 76) regarding the slope of the roof on the rear elevation. On the as-built right side elevation of Exhibit 126, Sheet AB5, there is a room that sticks out with a low, almost flat roof. Starting from the beginning point of Ms. Bruno's description, which is the lower floor top of wall, the roof would extend only to the upper floor top of wall, not to the top of the main house ridge, as shown below (Exhibit 163, shown on the following page). 9/25/14 T. 29-35.

Ms. Washburn explained that the description does not change based on the proposed or the as-built plans because it starts from the same location on both—the top of wall, lower floor. 9/25/14 T. 40.

Ms. Washburn acknowledged that she might not have reviewed all of the correspondence between Mr. Ball, Ms. Bruno, and the Board. She also admitted that the raised wall in the rear elevation is depicted graphically on the plans, but felt there should be text or

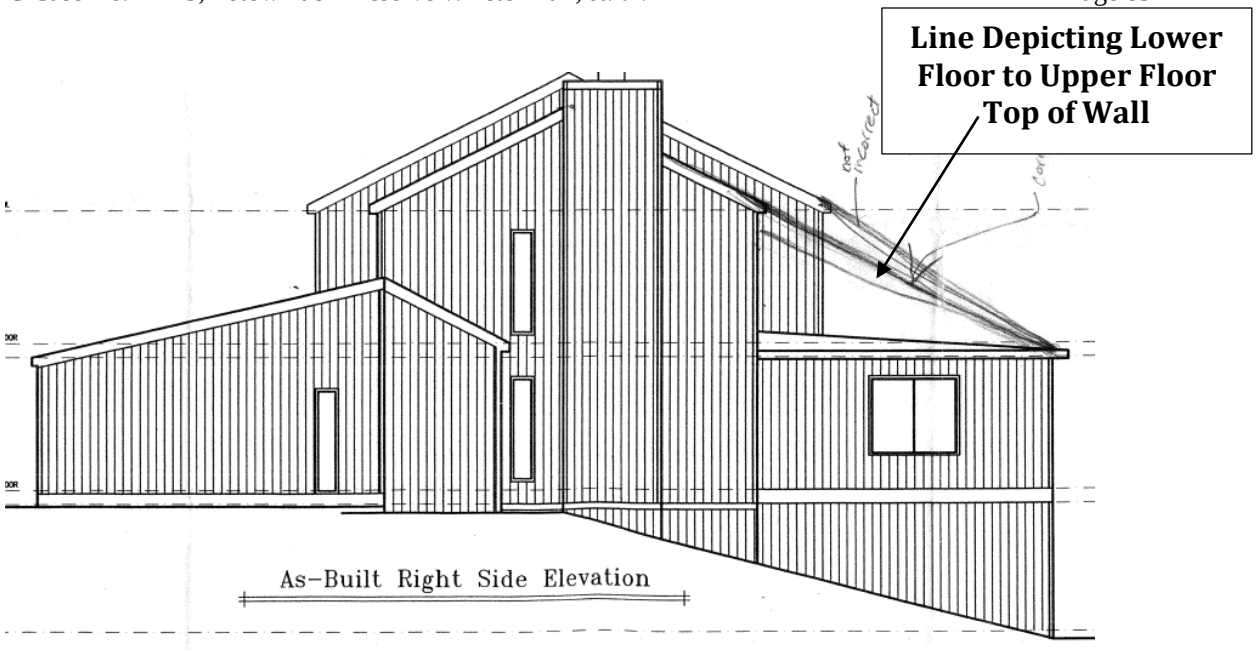


Exhibit 163

dimensions to indicate it. It becomes more obvious if the proposed plans are overlaid on the as-builts, but "you would not expect people to take two drawings, particular ones that aren't transparent like this that you can see through, but that are solid – you would not expect anybody to put them together, hold them up to the light, to see if there is a difference." 9/25/14 T. 45. If there is no text saying "raised chimney", one is not going to look for it. *Id.*

In addition, Ms. Washburn testified, it is standard in architectural drawings to use dashed lines to indicate items that are either hidden or that you cannot see. She testified that the approved drawings should have shown the existing roofline in order to compare it with the proposed roofline. If she overlays Sheet A4 over Sheet AB4, you can see the existing roofline, revealing that the proposed roofline is higher. CAD programs will automatically show the differences between what is there and what is proposed because you start with what's there and you change it. When changed, the as-built drawing, including the existing roof ridgeline, would remain visible. Therefore, on a CAD drawing, the architect would have a line showing the location of the existing roofline. She would have expected to see that information because

of its importance. That is the only clue that is clear and graphic that the roof is being raised other than written words. She would have shown a dashed line on Sheet A4 showing the existing roof line. 9/25/14 T. 45-49. She also testified:

> To not have that dashed line says to me that it was specifically, in CAD drawing speak, erased or taken out, so that that information is omitted and hidden, and it appears that it's – the drawings are falsified. 9/25/14 T. 49.

When asked by the Hearing Examiner whether Ms. Washburn was accusing Ms. Bruno of purposefully misrepresenting the roof height on the plans, Ms. Washburn then clarified that she meant that she personally "would not have omitted that" because it is a major way of showing that this is happening. While Ms. Washburn acknowledged that the plans do show an additional floor, they do not show where the old roof was relative to where the proposed roof is. 9/25/14 T. 50. She further stated that, "if all these other lines are shown, why was that one line that made it clear what was happening not shown?" 9/25/14 T. 50. She later testified that she would have shown dashed lines where the existing chimney on the right side had been raised. 9/25/14 T. 70. She would have shown the line of the existing chimney on the plans of the proposed construction. She would also have shown an exterior treatment on the portion of the chimney being raised because that would have been a further "visual clue" that it was an addition. She does not believe that any builder would have bid off of these drawings. 9/25/14 T. 72.

In her experience, it is typical for an HOA to have an architectural committee and she was familiar with the guidelines for submissions in Potowmack Preserve. She found no place in the Guidelines that required written descriptions of work, although she believes the Association requires a form application. Nevertheless, a standard architectural drawing, in her opinion, is not just a drawing but a graphic representation of what is built including written

notes. Without the written notes, one does not have a full explanation of what someone is proposing to do. When asked whether the HOA could approve drawings without textual explanation, Ms. Washburn stated that she had seen requests for additional information from the Board. She stated that there are some written descriptions on the plan, but not as many as she would have expected for an appropriate set of drawings. When asked why the Board would have approved plans that were not sufficient, she compared Mr. Ball to a kid who "complains and whines" when they are denied candy at the grocery store, so that the parent loses patience and finally gives the child candy to be able to leave the store. 9/25/14 T. 93, 85-95.

E. Supplemental Complaint

As previously recounted, none of the Board members who testified other than Ms. Gowan could describe the items contained in the supplemental complaint. 6/12/14 T. 230-231; 8/4/14 T. 12. While Dr. Barr testified that the items in the Supplemental Complaint were inconsequential to him, Ms. Gowan stated that other Board members did care.

Ms. Gowan described the Supplemental Complaint as "kind of like a punch list" of "all the deficiencies" in the construction that she prepared last October (i.e., October, 2013). 6/30/14 T. 150. She prepared the list for the CCOC hearing in Case No. 73-12 in order to supplement the claims relating to the deck and shed in that case. [23] There are other issues involving Ms. Gowan's preparation of the supplemental complaint that relate more to the allegations of bad faith between the parties. These are set out in the next section of this Report. The Hearing Examiner will summarize the evidence regarding each substantive item in the Supplemental Complain here, in the order listed. All numbered items are quotes from the Supplemental Complaint (Exhibits 7, 25(a), 116).

[23] The CCOC in the case before refused to consider these claims because they came too late in the process and the Board felt it would delay a decision on the primary issues in that case.

1. Removal of Open Shed – (No original permit or request filed with HOA or Montgomery Permit Office and approved plans showing it as being removed.

Ms. Gowan marked the location of three sheds on the property referenced in the Supplemental Complaint, shown on the following page. According to Ms. Gowan, Shed 1 an open shed under the rear deck. Shed 2 is the shed at issue in CCOC Case No. 73-12, and Shed 3 is another shed near the laundry room entrance to the house. 6/30/14 T. 157-158.

She testified that she could find no record of Shed 1 having been originally approved by the HOA or the County, and asserted that it violated the zoning setbacks on the property.[24] She stated that the County did have on file a permit to repair the shed, Permit No. 280512, in June, 2002. 6/30/14 T. 158-162. She based her assertion that the shed violated zoning setbacks because there had been a complaint from Mr. Ball's neighbor on the other side of his property, and the County found that a violation existed. She believes that this was the genesis for the repair permit in 2002. At that time, the Ball's removed one of the walls so that it looks like two fences with posts holding up the roof. 6/30/14 T. 168.

[SPACE INTENTIONALLY LEFT BLANK]

[24] The Hearing Examiner notes that this shed is near Ms. Gowan's property line.

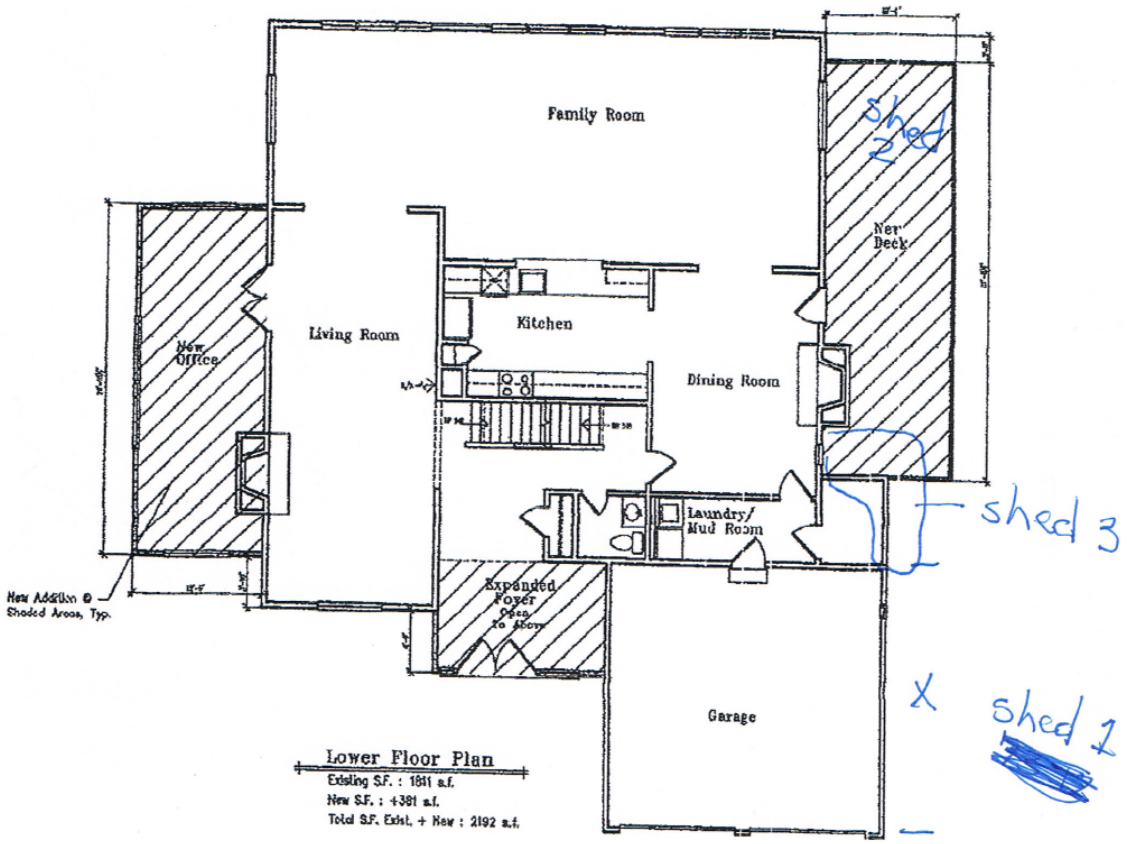


Exhibit 77

Ms. Gowan submitted a photograph of this shed into the record (Exhibit 84(a)), shown below.

2. Removal of enclosed shed at Laundry Room – approved plans show this as being removed.

Ms. Gowan identified this shed and marked it as "Shed 3" on Exhibit 77. She objects to this shed because it was never approved by the HOA, has not been removed, and it is not flush with the garage as shown on the approved plans. 6/30/14 T. 172-173.

3. Brick veneer façade on front of original house (living Room and upper Bedroom) to be corrected to match brick style around windows as shown on approved plan or be removed. Windows to be replaced to match approved plans. No specifications provided to HOA- But sheets and specifications to be provided before installation. Non complying windows/doors to be removed. Exhibit 25(a).

Ms. Gowan submitted a photograph (reproduced below) to illustrate the fact that the brick veneer did not comply with the approved plans (Exhibit 118), shown on the following page. According to her, the façade of the original living room shown on the lower level of the front façade on Exhibit 77. The approved plans do not show a "keystone" above the window that is not included on the approved plans, nor does the size of the window conform to the plans. Also, the approved plans show that the window should be recessed with only minor trim, rather than the double trim shown in the photograph. She believes that the brickwork

shown in the original plans fits better with the character of the neighborhood. In addition, the windows and veneer on the upper level don't match the approved plans. 6/30/14 T. 178-185.

4. Brick Knee walls to be lowered to match approved plans on all sides 3-5 courses maximum as shown on approved plans. This height and style matches surrounding homes.

Ms. Gowan testified that the brick knee walls in front of the garage are higher than shown on the approved plans and are not the same length along the entire façade. She believes that this is shown in Exhibit 82(a), reproduced below:

She stated that the approved plans show three courses of brick and a cap at this location. 6/30/14 T. 194.

5. All new windows and doors to match approved plans- Cut sheets and specifications to be provided for approval to HOA before installation. Non complying windows/doors to be removed.

Ms. Gowan testified that, by her count, Mr. Ball has installed at least 7 different sizes and three or four styles of windows. Ms. Gowan further testified that the door in the

middle of the rear façade should be changed to a six-panel door, which has not been done. 6/30/14 T. 197. Shed 2 (on the left side of the house) has not been removed. 6/30/14 T. 197.

Ms. Gowan described the windows she believes do not conform to the approved plans. Windows on the left side addition appear smaller and shorter than those shown on the plans. According to her, the windows on the new office area should be the same size on all three sides, but it appears that the windows actually installed on the rear do not match the others. She formed this conclusion by comparing the windows on the rear elevation with what has been installed on the sides. She acknowledged that it is difficult to compare what was approved and what was installed because no dimensions were provided on the plans, thus, she had to use visual comparisons. 6/30/14 T. 199-200.

Ms. Gowan agreed that submission of cut sheets for the windows would not assist in determining the correct size of the windows because there is no scale or dimensions shown on the plans. According to her, the cut sheets would show details of the panes or mullions. 6/30/14 T. 200-201.

Other non-compliant windows, she believes, include the window in the front left bedroom. This window was supposed to match the windows on the office, but those installed do not. 6/30/14 T. 206-207.

Neither the triple window on the right elevation nor the double windows on the left elevation, shown on the plans, have been installed. The window actually installed on the right elevation (close to Shed 3) is a multi-paned glass door. The plans also show that the doorway was to be moved, but this has not been done. 6/30/14 T. 207-210. The Balls located the door on the right side of the chimney at the deck level. 6/30/14 T. 211.

The second floor window on the right elevation shown on the plans has not been installed; there is also a little window on the left side of the chimney on the right elevation that remains, although the plans do not show it. 6/30/14 T. 210.

6. Addition over garage on right side to be corrected to show set back of 1'-6" with French doors a wood railing and overhanging roof aligning with front face of garage below or addition to be removed. Roof over this section must be lowered to match approved plans. Triple window to be installed on side as shown in approved plans. Left side addition over garage has short overhang – to blend in with style of homes in surrounding homes. Cut sheets and specifications to be provided for approval to HOA before installation. Non-complying windows/doors to be removed. Otherwise, addition is to be removed.

7. Addition on left side of house does not match approved plans in dimensions (length and width) – 2nd story in front of house is to be set back 1'-6" with French doors and a wood railing with roof overhang aligning with front face of 1st floor. The opening below 1st floor window is to be removed. Brick veneer low knee wall is to be installed-height to match same surround [sic] garage. The CMU block wall is to be brick veneered up to floor level of 1st floor and remain open on side and back. Roof on this addition is lower than main house. Install rainwater dry wells underground at down spots to collect/disperse rain water runoff to mitigate damage caused to public spillway. Cut sheets and specifications to be provided for approval to HOA before installation. Non complying windows/doors to be removed. Otherwise, addition is to be removed.

Ms. Gowan testified that the brick knee walls have not been included on the left side of the front elevation, and the left-side addition should have been setback by 3-feet, 10 inches. 6/30/14 T. 216. She stated that it is setback much more than that, approximately eight to ten feet. In addition, there is an opening in the front that is supposed to be an enclosed crawl space. On the second floor of the office, the whole façade is supposed to be recessed with French doors and a railing and the size of the window should match the window on the lower floor. While she acknowledged that the improvements constructed did have a recessed window, the plans show that there is an exterior wall that comes forward and aligns with the first floor façade—the rest of the area is recessed approximately one foot, six inches back. On the left side of the house, the

overhang of the roof is greater than the shallow overhang shown in the plans. 6/30/14 T. 182-186.

8. 2 story Entry does not match plans at all and should be removed. Original Entrance and second story window design to be reinstalled. This would be a concession to allow them to keep the non-conforming addition noted in #7 They can replace door with full glass door as shown in approved plans as an option.

Ms. Gowan testified that the foyer does not comply with the approved plans. The foyer was supposed to be a "window/door assembly", which she described as a very narrow double door adjacent to a very wide window. The entry installed is simply a double door. In addition, the area above the door was supposed to have windows spaced in a manner similar to the window/door assembly, but these have not been installed. 6/30/14 T. 210-213. The Supplemental Complaint calls for Mr. Ball to re-install the original foyer entrance. The original entry door was offset, not centered, along the front façade. Reinstalling the original entry would make the house blend more with the existing neighborhood. 6/30/14 T. 220.

9. Install rainwater and dry wells – underground to collect/disperse rain water runoff at downspouts at existing 1st story and basement addition from 2002-2003 at exterior of home to prevent further displacement of soil and silt displacement of excavated soil on property from damaging public spillway during storms.

This item, according to Ms. Gowan, would require the Balls to install storm water management dry wells. She agreed that this item is not part of the approved plans. She noticed that the spillway is absolutely topped off in mid- to large-size rainstorms. There has been exposed soil on the site for several years during the construction, and the runoff damages the spillway. According to her, it is a "little bit tricky" to drive by Mr. Ball's house during a storm. 6/30/14 T. 216-220.

10. The remaining additions along the 2nd floor rear of the house are not to be built. The HOA has no confidence the homeowner will build per approved plans nor meet any reasonable deadline since all current additions were not built to approved plans. They

have continuously built outside of the approved plans and the project has taken over 2 years instead of 6 month [sic].

Ms. Gowan explained that this item would require the Balls to forego construction of the addition on the second floor rear elevations, even though part of the approved plans. Ms. Gowan's rationale for this belief is that two years have expired since construction and the project is not close to being done. She feels that so many things have been built or installed that don't match the approved plans; she doesn't believe that Mr. Ball will continue to build in accordance with the plans. She wants to get back to having a peaceful neighborhood and just wants everything removed and completed in the rear. 6/30/14 T. 221.

In her opinion, changing the existing construction to conform to the approved plans should not take more than three months; these would include changing the windows and installing the HardiePlank siding. The one change that would take long would be removing the trusses on the roof. 6/30/14 T. 223.

11. Window and door trim is to be replaced to match approved plans, which is 2" to further help, this home site blend with the surrounding homes in this neighborhood. The plans approved showed this narrow.

Ms. Gowan explained that this alleges that the window and door trim are not consistent with the approved plans. The plans show very narrow trim, which is consistent everywhere. Other homes in the community have either 2- or 4-inch trim. 6/30/14 T. 225

12. Door at patio to be full glass door.

Item #12 of the Supplemental Complaint highlights, in Ms. Gowan's opinion, another discrepancy from the approved plans. The doorway on the right side of the house (on the deck) should be a full glass door. 6/30/14 T. 225.

13. HOA is still waiting for a planting plan. It was one of the main reasons to help this home site well within the plot and assist in water retention. We expect to see a plan within 1 month after this hearing and approved plants are to [b]e installed within 3 months.

Ms. Gowan testified that Mr. Ball was also required to submit a planting plan. According to Ms. Gowan, he actually refused to do so. She bases this assertion on a letter she recalled seeing from Mr. Ball stating that a planting plan was not necessary because the lot is heavily treed. 6/30/14 T. 226.

14. No equipment, supplies or yard debris can be kept out in the yard are [sic] on this property- covered or otherwise.

Ms. Gowan stated that this would require Mr. Ball to remove the construction equipment and debris kept in his yard. According to her, this has been an "issue" for "years." 6/30/14 T. 227.

15. Parking is not allowed on the easement along front and side of home site. No further parking on the easement is to be allowed. All gravel, blocks, wood to be removed along easement and grass to be installed. Easement to be kept clear of vehicles, yard and trash debris.

The Supplement Complaint, according to Ms. Gowan, also asks the CCOC to prohibit Mr. Ball from parking in the County right-of-way. Over the years, Ms. Gowan has noticed numerous "letters and things" indicating this is a problem. 6/30/14 T. 228.

16. 3 month time frame to complete all the above and contempt fines to be set at a per day amount if all of the above and the roof is not timely brought into compliance.

Ms. Gowan did not testify on this item.

On cross-examination, Ms. Gowan acknowledged that she had not measured any of the construction on the Ball property; her conclusions were based on visual observations. She was able to determine that improvements as constructed differed from the approved plans when the plans listed dimensions. 6/30/14 T. 284. She can tell that the old trim on the home is two

inches in width and the new trim is two to six inches in width by comparing the improvements with the approved plan. 6/30/14 T. 284. She knows that the trim at a certain location is two – four inches because the bricks are about three to four inches, so one can compare the two. She had never seen as-built plans except at the permitting office. 6/30/14 T. 286.

She agreed that construction on the Ball property hasn't been completed—several areas do not have siding installed or the roof completed. 6/30/14 T. 304. She did not know that the open shed (Shed 1) existed before Mr. Ball acquired the property; she acknowledged that the only problem with it was that it did not comply with the approved plans. She based her determination on the fact that a neighbor reported it had been built by the Balls. She believes the approved plans require its removal because it is not shown on the plans. 6/30/14 T. 305. Shed 3 has existed since she moved in, and she believes that it was under construction when she moved in. 6/30/14 T. 306.

Ms. Gowan determined the exact setback of the left side addition from the front façade of the main house by using a magnifying glass to find the dimension shown on the plan and by looking at another set of plans, which she stated were much clearer. 6/30/14 T. 307. She did not identify what plans were the "clearer" plans.

Ms. Gowan acknowledged that there is a downward slope along the left side addition. Nor was she aware whether the Board ever saw as-built drawings. 6/30/14 T. 311. She was unaware that work had to be stopped while issues were being litigated in court. She reviewed Exhibit 121 (the March 19, 2013, letter from Mr. Ball including the landscaping proposal) and stated that it was not a planting plan; rather it was a contract for landscaping and pricing. 6/30/14 T. 314.

F. Deviations From Approved Plans

Both Ms. Washburn and Mr. Schwartz testified that it is common that modifications to approved plans are required as construction proceeds.

Mr. Schwartz opined that, after the HOA has approved the plans, a residential builder must make them permit-ready. The plans would then be reviewed by the County, which either access them, or rejects them if there are any needed corrections. The County provides a list of the deficiencies in the plans that must be corrected to meet requirements of the County Code. After the County approves the plans, construction typically starts. When remodeling an existing home, it is normal that there will be deviations from the plans initially approved because there are a lot of unknowns before construction. Sometimes, a builder must submit new plans, but not always. Revised plans are not required for items like minor window adjustments or adjustments to interior partitions. Even the roof pitch may be changed provided the roof remains below the County's height limits. 7/10/14 T. 211-212.

The construction process also involves several County inspections, according to Mr. Schwartz. These inspections occur at different times, such as when the footings are placed, when the walls are up, plumbing inspections, and framing inspections. 7/10/14 T. 212.

In Mr. Schwartz's opinion, there are no material deviations between what has been constructed and what was shown in the approved plans. According to him, the completed construction is "pretty close" to the approved plans. 7/10/14 T. 213. One deviation is the windows on the right and left sides of the front elevation. The HOA-approved plans show a recessed balcony across the front of the addition. The construction has a recessed window, but it doesn't extend the length of the addition. He could not say whether there are any deviations on the rear of the structure because it hasn't been completed. He opined that the deviation for

the windows that were originally shown as French doors was "slight," and wouldn't characterize it as "material." 7/10/14 T. 213. He believes that the deviation was necessary to comply with a new County requirement to include wind-bracing on houses. This eliminates the option to have windows in the corner of houses; he believes that all windows must be a minimum of 27 inches from the corners. The windows originally designed would not permit any wind brace. None of the other deviations are material, in his opinion. 7/10/14 T. 214.

Mr. Schwartz opined that deviations are not material when they do not interfere with the basic design of the house. In his opinion, the windows on the front of the additions are not material because they are in the location of the original balcony windows. 7/10/14 T. 215.

Ms. Washburn disagreed with Mr. Schwartz's opinion that no material changes had been made. In her opinion, a material difference could be one that changes the look of the construction dramatically. This could include increasing the trim from 2 inches to 5 inches. 9/19/14 T. 22-23.

Ms. Washburn testified that there are windows that are shown on the approved drawings which have been removed and that there are windows added to the drawings in portions of the construction that are not yet built. The wind bracing paneled corners are very different from the original because they are windows rather than French doors. In her opinion, these changes alter the character of the approved drawings from a contemporary to a more traditional look, and are substantially different from the approved drawings. She opined that the improvements to the property do not substantially conform to the plans approved by the Board (i.e., Exhibit 126).

Much of her testimony was based on comparing Exhibit 126 and what the Balls submitted in the December 16, 2013, application (Exhibit 160, shown below), which she thought look the most like the existing construction. [25] 9/19/14 T. 28.

According to her, the roofline is very different from the one in the approved drawings, which show two different levels. These plans were also submitted to the CCOC to show the Board's approval of the deck in CCOC Case No. 73-12. 9/15/14 T. 32-34.

[25] Mr. Ball did not say the plans were identical because they were not finished, but did state that, if it were finished, it would look like Exhibit 160. 9/15/14 T. 34.

The Hearing Examiner ruled that the testimony regarding the roofline was not properly before her because it was submitted too late during Potowmack's rebuttal and was not raised in the pre-hearing statement, which alleged that the constructed roofline exceeded the existing ridgeline.[26] Giving the Respondents time to respond would have further delayed an already lengthy hearing. Testimony indicated that Potowmack had had these plans since December, 2013, and these items could have been included in the Supplemental Complaint, rather than after the hearing was almost completed. The Hearing Examiner further finds that these claims are not ripe because the Board should have considered the amendment under the Architectural Procedures. She also notes that the construction has not been completed. 9/25/14 T. 27-29.

G. Discriminatory Enforcement and Bad Faith

1. Mr. Ball's Claims

Mr. Ball alleges that Potowmack has singled him out for unreasonable levels of enforcement that have not been applied to other property owners. He believes that Ms. Gowan's participation on the Board has biased the Board against him, and that Dr. Barr refuses to give him a straight answer as to what he wishes to see. In support of this, he notes that it took him three years to get his original application approved.

In support of his position, Ms. Beth Bentolila testified regarding her own architectural application to rebuild her house after a fire. Lee Alfer told her that her best chance to get

[26]The original complaint contended that, "the Respondents have built the roof line at a higher height than the existing roof line. New roof trusses have been laid over the existing roof to enclose the extension to the Entry Foyer, raising the roof line higher than the existing roof. The roof of the addition over the garage projects well above the existing roof line, and both new roofs extend higher than the height of the existing chimney." Exhibit 4(a). While Potowmack contends that this statement raises the issue of multiple rooflines, gravamen goes to the fact that Potowmack thought the original roofline would be preserved. Consistent with this interpretation, Potowmack did not present any evidence on Exhibit 160 in its case in chief, even though it had been in its possession since December 16, 2013.

something approved was to choose one of the five original home models and build that. She ended up choosing something different from the original models that would blend with the community. She could not use the original models because of changes to the building codes since the 1970's. She also wanted to change some things she didn't like in the original design of the house. 7/25/14 T. 58-59.

According to Ms. Bentolila, she submitted plans to the architectural committee, who informed her that they would "discuss it behind closed doors." 7/25/14 T. 59. The application went to the Board, who approved it. She testified that she made changes to the construction approved without informing the HOA or submitting revised plans. Specifically, she changed the location of an exterior stairway. The roof of her current house is higher than the roof ridge of her original house; it is just under 35 feet. T. 60-61. Even though her property sits much higher than Mr. Ball's property, the Board approved a higher roof ridge on hers. Ms. Bentolila also testified that when her house was rebuilt, she did not submit floor plans. The Board requested the plans, but her builder refused and the Board let her complete construction. 10/6/14 T. 194. Ms. Bentolila testified that she had not had problems getting her plans approved, although there may have been a level of compassion from the Board because her original house burned. 7/25/14 T. 66.

With regard to Mr. Ball's property, she believes that most of the neighbors are upset primarily because the house isn't completed—they are not aware that Mr. Ball has been unable to complete the house. No one from the architectural committee ever approached her to see if she objected to his plans or solicited any comments from her. 7/25/14 T. 66-67.

Mr. Pelter testified that, at the July 17, 2013, meeting, the Board was hostile to Mr. Ball, and that people have told him they are not interested in serving on the Board because of

this hostility. He offered to find a solution because the issue is consuming a lot of everyone's time. 7/25/14 T. 90. At the end of the meeting, Mr. Pelter stated that the decision was "left loose," but the Board began discussing stopping the litigation. *Id.*

Mr. Pelter described in more detail what he referred to as the "absolutely apparent hostility" directed at Peter Ball by the Board. He stated that the Board gave more attention and time to construction on Mr. Ball's property than other landowners. He also noted that he observed Board members, and primarily Ms. Gowan, accusing Mr. Ball of lying and doing things intentionally to harm another Board member. At the annual meeting, he also observed Dr. Barr making negative comments about the construction, as if everything was Mr. Ball's fault. 7/25/14 T. 95-96.

Based on his experience, he does not believe that there is any reason for this dispute not to be resolved. He stated that the dispute between the Board and Mr. Ball has dragged on "unintentionally or intentionally" more than it should have. The hostility he has observed toward Mr. Ball is greater than he has observed with other people's architectural changes. 7/25/14 T. 95-96.

When ask to compare Mr. Ball's experience with an architectural approval that went smoothly, Mr. Pelter recounted that his neighbor constructed a fence incorrectly and no one complained. After his neighbor began construction, Lee Alfer came by with the application to inform him of the construction. He mentioned that his neighbor had already begun construction, and she simply stated that she had told his neighbor not to begin construction. He never received any notice when neighbor's work was being done. 7/25/14 T. 96.

Mr. Pelter acknowledged that Mr. Ball's behavior contributes to the hostility evidenced by the Board; nevertheless, Mr. Pelter handled several of Peter's applications and ended up

resolving them peacefully. That is the basis for his belief that resolution is "doable." 7/25/14 T. 102-103.

He believes that there is a good deal of mutual dislike between Mr. Ball and Ms. Gowan. He observed, however, that Mr. Ball has acted professionally when making objections to the Board's rulings. While Mr. Ball's behavior may become personal at times, he believes that this should not interfere with the Board's duty to perform their functions responsibly. 7/25/14 T. 105-106. Mr. Bruno also believed that Ms. Gowan, in particular, was hostile to Mr. Ball. 7/25/14 T. 131.

When asked to identify additional specific of the Board's hostility to Mr. Ball in particular, Mr. Pelter stated that other property owners were not subjected to continual checking and frequent "nitpicking." The Board found even minor discrepancies unacceptable. 7/25/14 T. 106. The community's big complaint about the construction is that it has not been finished. He believes the construction isn't finished because of the hostility between the Board and Mr. Ball. He stated that the scale and size of the home "have never been discussed." 7/25/14 T. 108. According to Mr. Pelter, every time the Board told Mr. Ball they wished the property to be in compliance and began to discuss timing of completion, the Board would impose a new requirement. *Id.*

Mr. Pelter gave another example of the behavior he described. At the July 17, 2013, meeting, Mr. Ball indicated that he would not drop his Circuit Court case. The Board stated that it would not pursue settlement and a letter went out to Mr. Ball requesting additional changes to the project. This letter is not in the record.

Another example is that the Board never followed up in any way on his offer to assist in reaching resolution of the dispute. Mr. Ball's non-compliance with the approved plans was

continually discussed at Board meetings, but the Board never gave him any formal instructions as to whether he should proceed or correct the items. He never observed the Board take a formal position requiring Mr. Ball to correct items. The Board always left that issue open. 7/25/14 T. 109-112.

His observations of the Board's interactions with Mr. Ball have led him to conclude that the Board has not been looking at the issues underlying the construction because they have been too involved in personalities. Several times, he has seen the Board act inconsistently with respect to Mr. Ball's applications than it would with other property owners. As an example, he stated that has never heard Board members make negative comments about anyone else that have applied for architectural approvals. 7/25/14 T. 112-115.

The Balls also contend that the denial of vinyl siding is an example of the Board's discriminatory enforcement.[27] Mr. Bruno corroborated Mr. Pelter's testimony that the Board treats Mr. Ball differently than other property owners in the community. At the July 17, 2013, Board meeting, Mr. Ball brought in some samples of vinyl siding. Mr. Bruno stated that, before Mr. Ball said anything, the Board said, "no…we're not, we're not accepting any changes." 7/25/14 T. 130. The Board refused to let him use vinyl, even though the Board approved the same siding for Mr. Bruno's home. Mr. Pelter testified that in the past, the Board's interpretation of the Architectural Guidelines was to permit vinyl siding as long as it looked natural from the street. 7/25/14 T. 112-115. Mr. Ball testified that the Board has approved vinyl siding on 14 homes in the neighborhood, including Ms. Gowan's. When he received the denial of vinyl siding, it didn't sit well with him because he knew that it had been approved

[27] While the Hearing Examiner dismissed Count I of the Balls' Counter-claim that the Board should have approved vinyl siding, she permitted testimony relating to the Board's denial of vinyl siding as relevant to the allegation of discriminatory enforcement.

elsewhere in the community. 8/4/14 T. 147-148. The material example Mr. Ball presented at the July 17, 2013, Board meeting was the same sample that the Board had approved on Mr. Bruno's house. 7/25/14 T. 131.

Dr. Barr testified that he had not been aware of the litigation between Mr. Ball and Ms. Gowan until the CCOC hearing in Case No. 73-12. He saw photographs of some impolite things painted on Ms. Gowan's property. Prior to that, he had no knowledge of her "deep-seeded [*sic]* thing." 7/25/14 T. 182. He did not agree with prior witnesses' characterizations of what occurred between Ms. Gowan and Mr. Ball at the Board hearing. He did not recall getting right into her face, although he admitted that he calmed her down and called for order. As to her statements, Dr. Barr testified that, "[S]he may have said something that I didn't think was relevant to the subject we were talking about." 7/25/14 T. 183. He believes that this was about the time this CCOC action was filed and acknowledged that the Board voted to bring the CCOC action at the October 28, 2013, meeting. He did not ask Ms. Gowan to recuse herself from that vote. After hearing some of the testimony in this case, Dr. Barr indicated that he should have been aware of the conflict, although he did not categorically state that Ms. Gowan should have recused herself from voting. 7/25/14 T. 184. He stated that, if he observed some type of deep seated hostility between a Board member and an individual now, he would ask them to recuse themselves from both the discussion and the vote. 7/25/14 T. 184-185.

As to the vinyl siding, Dr. Barr testified that the horizontal vinyl siding would have exacerbated the length and mass of the rear of the home, which was important because it faced the entrance to the community. *See, e.g.,* 10/6/14 T. 159, 175.

2. Potowmack's Claims

Potowmack's claims of bad faith in this record have evolved.

Potowmack alleges that Mr. Ball's actions toward Ms. Gowan constitute bad faith. Ms. Gowan testified that she believes that Mr. Ball has acted in bad faith because he yelled obscenities at her while she was taking numerous photographs of the construction in preparation for the hearing. 6/30/14 T. 50-55. Mr. Ball's yelling caused her to leave. 6/30/14 T. 56-57. She was asked to take the pictures because the Hearing Examiner at a pre-hearing conference told the Balls that they were not to do any construction while this proceeding was pending.[28] T. 58-59. Potowmack also contends that the sign posted on Ms. Gowan's property also demonstrates Mr. Ball's bad faith.

Ms. Gowan stated that she avoided Mr. Peter Ball after the "incidents" they had had. She fears for her physical safety because she believes that he bullies. He and a construction worker erected a fence on her property and when she confronted him about it, he refused to leave until the police came. He has approached her in a confrontational manner last summer at a Board meeting and in May, 2014. She has installed a security system, which according to her, is the only thing that keeps him off her property. 7/10/14 T. 56.

Potowmack alleged that Mr. Ball's failure to inform them that he did not own the property amounted to bad faith. Potowmack alleges that the governing documents do not permit it to claim bad faith against Peter Ball because Michael Ball owns the property. It further alleges that Mr. Ball purposefully transferred the property in 2008 to avoid paying legal fees in relation to this litigation. 8/6/14 T. 184-185. In this regard, Dr. Barr testified that he did not know that Michael Ball owned the property until he received a request to review the HOA's records in 2012. At the time of the original application, Peter

[28] As noted, the Hearing Examiner did not instruct the Balls to stop construction at the pre-hearing conference.

Ball and Ariana Savinska (phonetic spelling) owned the property. Peter Ball never informed the HOA that he no longer owned the property. 6/12/14 T. 70-71.

Mr. Ball responded that he paid legal fees in CCOC Case No. 720-G and did not transfer ownership of the property to avoid them in the future. He could not have done it in 2008 to avoid paying fees in this case because he didn't know of this case until five years after he transferred the property. 8/4/14 T. 186.

In closing arguments, Potowmack asserts that Mr. Ball in this case purposefully deceived the Board, both in the original plans approved and plans that have been submitted in CCOC Case No. 73-12. As to the original approval, Potowmack relies on the on the language from Mr. Bruno in 2010 (Exhibit 85) referring to the slope of the roof, and the language in Mr. Ball's letter (Exhibit 76) of the same period and the omission of a line on the drawings showing the existing roof.

Potowmack also alleges that the handwritten notations on Exhibits 159 and 160 are deceptive. Exhibit 159 are elevations included in building permit plans submitted to DPS. There were also provided to the CCOC at some point in Case No. 73-12, and contain the notation, "Approved Exhibit 2 Plans, 5/11/11." Exhibit 159. Dr. Barr found it strange that the DPS drawing was marked approved one year before it was submitted to that agency. 10/6/14 T. 84.

Potowmack believes that the notation on Exhibit 160, stating that it was approved on May 14, 2014, misrepresents that the HOA approved the application to amend its original approval filed on December 16, 2013. The plan contains a note "Submission for Deck Only," but at the bottom has a handwritten note, "Ex. 4, Approved 5/12/14."

Exhibit 160. Dr. Barr interpreted this as a representation that Potowmack had approved the entire elevation. 10/6/14 T. 83.

Mr. Ball refutes this, stating that he marked Exhibit 159 only to show the deck that had been approved by Potowmack in his original application in Case No. 73-12. That's why he wrote approved with the date 5/11/11. Exhibit 160 is the plan submitted to Potowmack for the approval of the deck pursuant to the CCOC's order in Case No. 73-12. It contains the words "Submission for deck only," and the date Potowmack approved the plans. 10/6/14 T. 220. These plans are shown below and on the following page:

Exhibit 159

Exhibit 160

Finally, Potowmack alleges that Mr. Ball exhibits bad faith by continually constructing improvements outside of the approved plan. They point to CCOC Case Nos. 720-G and 73-12 as examples of this.

H. Continuing Construction

Potowmack alleges that Mr. Ball wrongly continued construction while this case was pending. Initially, this theory was predicated upon the understanding that the Hearing Examiner ordered the Balls to cease construction at a pre-hearing conference. As the Hearing Examiner did not do so, the Hearing Examiner treats these claims as alleging that the Balls violated Potowmack's request (as stated in Dr. Barr's September 15, 2013, letter to the Balls) to cease construction.

Mr. Ball testified that the only work he has done is place weatherproofing over the roof to make it water-resistant. Ms. Bentolila, who lives directly across Vantage Court from Mr. Ball's property, also testified that she has seen Mr. Ball only place weatherproofing over the roof. She testified that the only work she had observed on Mr. Ball's property recently was replacement of the waterproofing on the roof that had blown off. According to her, Mr. Ball was attempting to cover those bare spots. She knew that because, in August or September of 2014, she called Mr. Ball to let him know there were bare spots on the roof. She then observed Mr. Ball repairing the waterproofing from her home. According to Ms. Bentolila, the work lasted for one afternoon. 10/6/14 T. 192-193. She could see the bare spots from her kitchen and from her yard because her house is at the top of a hill above Mr. Ball's house. 10/6/14 T. 196-197.

Ms. Gowan testified that she has seen work being done on the house in March, 2014. She witnessed some trim work, and work on some fasciae on the front two sections of the garage, some trim work on the sides, and then, recently, she saw some people working on the roof again that looked like actual construction. 9/19/14 T. 178-179. She stated that she had seen construction work on the house during several days in March, April and over the summer. When asked specifically how many days, she admitted that she "saw them one day." 9/19/14 T. 190.

Mr. Ball's adjacent neighbors (on the side opposite from Ms. Gowan) testified that they have seen construction activity in September, 2014. Specifically, Mr. Miller saw material being placed on the house to protect the wood in September, 2014. He observed someone applying sort of a white tape to the roof. He has also seen boxes of shingles right next to where he lives, but they have not been applied. 10/6/14 T. 24.

Mr. Miller's wife, Alexis Miller, recalled that roof trusses were delivered in September, 2013, and were installed and exposed. They are not now exposed. Currently the roof trusses are covered. At one point, they were covered with a blue tarp, but now they are covered with some sort of plastic that is not Tyvek. She does not know that much about construction, but believes they're covered with something that would go on before you would place siding on the exterior. 8/6/14 T. 28-29.

She has seen some activity on the roof recently. There was someone on the roof pulling up a membrane and adding a new one. She also saw construction being done on the entryway of the house. She thought it might have been a door because at one point, there were temporary doors. She also recalls windows being installed; she thought it odd because it looked like the shapes changed during the construction. She did not recall when the windows were installed. 10/6/14 T. 30.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Standard of Review

Without question, Potowmack has the authority to require applications for architectural approvals prior to construction, when the restrictions are reasonable and the Board exercises its authority in good faith. *Reiner v. Ehrlich,* 212 Md. App. 142 (2013). The CCOC applies the "reasonableness rule," articulated in *Kirkley v. Seipelt,* 212 Md. 127, 133 (1957) to association actions that seek to restrict property rights or penalize a member:

> We hold that any refusal to approve the external design or location by the Rodgers Forge Realty Corp. would have to be 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.

See also, Simons v. Fair Hill Farm HOA, CCOC No. 66-09 (May 6, 2010); *Syed v. Gatestone Homeowners Association, Inc*., CCOC No. 46-09 (July 30, 2010).

Generally, an association must follow its own procedures when enforcing its covenants. *Haddonfield Homeowners Association v. Tyra*, No. #263-G, (September 29, 1995). If, however, the CCOC determines that there is no reason to believe that the association would change its mind if it started over, the CCOC will decide the dispute. *See, Schott v. Sumner Village Condominium Two, Inc*., No. #250-O, (January 13, 1995).

The CCOC has also upheld claims that the Board's enforcement was discriminatory, in bad faith, and arbitrary. *Potomac Mill Farm HOA v. Phap Vu and Kim Dungh Din*, No. 633-G (January 13, 2005)(association's enforcement was arbitrary where homeowner proved that siding materials had been approved in alternate application). To show inconsistent enforcement, the homeowner must prove that the association has engaged in a well-defined pattern or practice by the association. *Whetstone Corporation v. Trevor and Angela Hightd-Walker*, No. 21-06 (November 28, 2006)

B. Height of Roof

Initially, the Board's evidence here was based on the assumption that the existing roof would not be raised and therefore, their proof on this issue extended only to the fact that the trusses installed exceeded the height of the existing chimney.

Beyond that, Potowmack's expert testified that she was unable to measure the exact height of the roof because of the difficulty of using a laser measure. Her determination that the roof is higher than approved is based on her knowledge of standard sizes of construction materials and her ability to scale photographs. Mr. Schwartz testified that he has taken actual

measurements of the property (although also not with a laser measure) and concluded that height was very close to that approved.

C. Ambiguity of Plans

As the parties now admit that the plans showed the roof being raised, the contested issue between the parties is whether the plans were ambiguous or purposefully deceptive. The Hearing Examiner finds that Potowmack has not met its burden of proof on this issue for several reasons.

First, Potowmack failed to prove that Exhibits 77/126 were the final plans submitted by Mr. Ball, and the evidence is stronger that it was not. The evidence supports Mr. Ball's contention that Exhibit 148, which included the cross-sections and actual dimensions showing the height of the roof, was submitted to the Board prior to the vote because this testimony is most consistent with the documentary evidence in this case.

The parties agree that Exhibit 126, which the Board contends are the approved plans, does not have dimensions showing the exact height of the roof. These plans are dated February 22, 2011. Documentary evidence (a letter from Mr. Ball to Dr. Barr) indicates that Mr. Ball submitted some plans on March 2, 2011, shortly after date of the plans labeled Exhibit 126.

Board minutes report that the Board discussed plans submitted by Mr. Ball at its meeting on March 31, 2011. These plans did not include dimensions of the height of the roof. The minutes quote Dr. Barr stating that the roofline is unclear, a concern that was conveyed to Mr. Ball at the meeting and summarized in an e-mail from Dr. Barr dated April 1, 2011, that is not in the record. At the same meeting, Dr. Barr asked Mr. Ball what the height of the roof was going to be. Mr. Ball replied that it would not exceed 30 feet.

The plans including the cross-sections (Exhibit 148) are dated April 6, 2011, shortly after the March 31st meeting. Mr. Ball's letter of April 15, 2011, addressed to Dr. Barr, stated that it submitted plans including dimensions as requested. Mr. Ball's testimony that Exhibit 148 was attached to this letter is corroborated by Mr. Bruno's testimony that he saw plans with cross-sections at a meeting prior to the Board's approval. The Hearing Examiner finds Mr. Bruno's testimony credible because he specifically recalled discussing the plans with Mr. Gibson.

This conclusion is further reinforced by that fact that the Board repeatedly insisted on receiving all elements of architectural plans. After three years of rejecting plans because they were hand-drawn, not to scale or did not have all of the required information, it is difficult to conceive that the Board suddenly settled for less. Board members rejected inadequate plans repeatedly between 2008 and 2010. When Ms. Bruno submitted the written description of Mr. Ball's modification to the original 2010 proposal, Dr. Barr requested drawings, including "plans, sections and elevations" because "as you know, drawings explain a lot more." Exhibit 85.

The record also demonstrates that Board members are unfamiliar with the Board's own records and their record-keeping is inconsistent, further supporting Mr. Ball's contention that the Board received the plans, but cannot now produce them. Board members initially testified that Exhibit 77 was the only plan approved. Dr. Barr clearly was not aware of the larger set of plans until Ms. Gowan mentioned them at the June 30, 2014, public hearing. Nor was Mr. Gibson aware that the larger set of plans (i.e., Exhibit 126) existed, as he didn't realize until the July 25, 2014, public hearing that the Board had acknowledged the larger plans as being approved by the Board. Finally, the Board initially brought this action alleging that the house

should be no higher than the existing roofline, even after it had received the building permit plans in March or April, 2012, clearly showing the increased height. The Hearing Examiner notes that Dr. Barr pronounced the building permit plans in conformance with the approved plans at the July 17, 2013, Board meeting.

Other records are also incomplete. Minutes from 2008-2010 are scant, and do not include correspondence from Board members (referenced in other documents) that occurred during the course of the application. At least one of the records produced by the Board (an e-mail from Mr. Gibson) did not include the attachment and the secretary acknowledged at the hearing that she did not have the attachments.[29] When Dr. Barr was asked to produce the Board's denial of the initial 2010 application, he stated that it "must be in the secretary's files or in the architectural committee files, and if it's come to the Board, then it comes to the Board's files." 10/6/14 T. 153. Dr. Barr's testified that he did not know that Michael Ball owned the property until 2012; while perhaps true, this fails to acknowledge that both the Board's minutes and a 2010 letter from Mr. Williams indicated that the Board *did* know of this at least two years before Dr. Barr says he became aware of it, even though Dr. Barr was on the Board the entire time. The Board produced two meeting notices for the October 7, 2013, meeting, but could not explain why the two were different, and the number of notices provided did not include all of the meetings described in this case.

Based on this evidence, the Hearing Examiner finds that the plans marked as Exhibit 148 were the final plans submitted as part of his application.

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[29]Potowmack's counsel points out that she was not required to affirmatively produce these documents because the Hearing Examiner upheld her position that she was not required to produce in discovery any plans provided by Mr. Ball in the last five years. While this is correct, the Hearing Examiner's point was not whether they should have been provided in discovery; rather, her point is that the Board's secretary did not have them. 9/19/14 T. 252.

Even assuming, however, that the Board only had Exhibits 77/126, the Hearing Examiner does not find these plans ambiguous. In this regard, Mr. Schwartz's testimony is persuasive because he correctly pointed out that it is simply not possible to add an eight-foot addition above the garage with a roof at the pitch shown without raising the roofline. As the plans show a consistent roofline going the length of the house, any increased height above the garage would extend for the same length. A comparison of the hatched lines on the upper floor of the as-built and proposed plans also demonstrate the roof would be raised.

Potowmack's theories that the plans are ambiguous are threefold: Ms. Washburn testified that Ms. Bruno should have shown the existing roofline on Exhibit 126. Dr. Barr relied on the language in communications from Ms. Bruno and Mr. Ball (Exhibits 86 and 175) stating that new roof over the flat roof in the rear would meet the top of the roof ridge. Dr. Barr also relied on the fact that the Board had already rejected the additional story above the flat roof, although this was never reduced to writing to Mr. Ball.

A review of Ms. Washburn's testimony indicates that she described how she would clarify the plans for a lay board or to bid the plans to a builder. Neither is the case here because Dr. Barr, a well-qualified architect, regularly reviewed plans for the Board and Mr. Ball is a builder. Rather than independently questioning the Mr. Ball, Board members clearly relied solely on Dr. Barr to review and interpret architectural drawings, had done so for several years and Dr. Barr has acknowledged expertise in reading plans. Mr. Gibson testified several times that he relied on information provided by Dr. Barr when communicating that the construction did not comply with the approved plans, specifically in his e-mail after the September 10, 2013 on-site meeting. Similarly, Ms. Alfer testified that she also relied on Dr. Barr's opinion that the roof was too high at the September 14, 2014, on-site meeting.

As to Dr. Barr's reliance on removal of the third floor, the Hearing Examiner once again reiterates that the exact basis for denial of that application was never reduced to writing. Nevertheless, Mr. Ball did remove the full story above the flat roof. What remained is a "low wall" as described by Ms. Washburn, from which point the roof sloped upward to a pitch change. This is consistent with Dr. Barr's testimony that Mr. Ball wanted a "walk-in" closet and Ms. Bruno's statements that Mr. Ball wanted storage space in that area. It is also consistent with the floor plans, which show new floor area being added in this location. While Ms. Washburn testified that it might be possible to include a closet without the low wall on the second story, this does not refute that these were new areas shown on the plans.

Dr. Barr's reliance almost exclusively on the text of the two communications, one from Ms. Bruno and one from Mr. Ball, also ignores the fact that both statements refer only to the addition on the rear elevation. Those states do not addresses the second floor addition above the garage that was described both in text and on the plans. Mr. Schwartz opined that if the roof on the garage must be raised, and the plans show the ridge running straight across the length of the house, one could only conclude that the entire line must be raised. The Hearing Examiner agrees.

Finally, it is difficult to say on this record that the application is ambiguous when the Board never reviewed the complete application, nor did it have the complete application before it when it voted to approve the plans. *See, Riss v. Angel,* 131 Wash. 2d 612, 934 P.2d 669 (1997)(Board actions were unreasonable when it failed to reasonably and objectively investigate the merits of the application); *Leonard v. Stoebling,* 102 Nev. 543, 728 P. 2d 1358 (1986)(committee's decision was arbitrary because of its perfunctory deference to its prior

approval of the original structure.) If the Board is to act reasonably and in good faith, it must at least review the full application submitted.

As noted, the evidence here clearly demonstrates that the Board relies almost exclusively on Dr. Barr's expertise when reviewing plans. In addition, Mr. Gibson, Dr. Barr, and Ms. Alfer both testified that they looked only at the 8.5 x 11" plans; Dr. Barr testified that, if the larger plans were at the meeting, he did not pay attention to them. As to the failure to include the as-built plans in Exhibit 77, Dr. Barr testified that he relied on his memory when he reviewed those plans in 2010. A reasonable investigation of the merits of the complaint would have required at a minimum submission of the as-builts and dimensions and a scale, used to support both the expert's conclusions that the roof would be raised, and as required by the Design Guidelines.

Potowmack relies heavily on the fact that neither Mr. Ball nor Ms. Bruno objected to the Board reviewing the "wrong" plans. 9/15/14 T. 14-15; 10/6/14 T. 254. This argument fails because the plans reviewed by the Board were incomplete rather than the wrong. Ms. Bruno could have assumed that the Board had reviewed the more detailed plans independently, and there is evidence the Board viewed Exhibit 148 at a meeting before the Board. Given the small size of the plans, Mr. Ball may simply not have known which excerpts of the plans the Board reviewed.

Potowmack argues that the CCOC is collaterally estopped from concluding that Exhibit 148 were the plans approved by the Board, citing ***Se****minary Galleria, LLC v. Dulaney Valley Improvement Ass'n., Inc., et. al.,* 192 Md.App. 719 (2010). The Hearing Examiner disagrees with Potowmack's argument. While "principles" of *res judicata"* may be applied to administrative agency decisions, the facts do not support such a claim.

Maryland courts have held that for collateral estoppel to apply, the issue of fact must be "actually litigated and determined by a valid and final judgment, and *the determination must be essential to the judgment...* *Janes v. State,* 350 Md. 284, 295, 711 A.2d 1319, 1324 (1998);(quoting, *Murray International v. Graham,* 315 Md. 543, 547, 555 A.2d 502, 504 (1989), quoting from Restatement (Second) of Judgments, § 27 (1982)). In CCOC 73-12, the claims were unrelated to the height of the building, and no claim was raised as to the ambiguity of the plans in this regard. The shed and deck are the same in Exhibits 77/126 as they are in Exhibit 148. The issue here is the height of the roof, and there is a material difference between the two plans because one explicitly includes dimensions. Therefore, the factual determination on which plan had been submitted was not essential to the CCOC's decision in CCOC 73-12 and the Balls are not collaterally estopped from raising the issue in this case.

C. Supplemental Complaint

The Hearing Examiner perceives several problems with the Supplemental Complaint.

Several of the allegations are outside the jurisdiction of the Board, and the evidence does not support some of the allegations. The Hearing Examiner will address the items by reference to their number in Supplemental Complaint (Exhibit 7).

Items 7 of (portion relating to dry wells), 9, 15, and 16: Potowmack has failed to identify any authority in the governing documents that authorizes them to regulate anything on the County right-of-way, require storm water management drywells, or assess *per diem* fees for violation of the covenants. Nor has Potowmack provided copies of any easements referenced in their complaint, thus, the Hearing Examiner is unable to find that Potowmack has any authority to enforce the easements referenced. In addition, the evidence supporting the claims that Mr. Ball's activity caused storm water problems on the roads and easements

adjacent to his home is speculative. A simple statement that it is "tricky" to drive on the road when it is wet is not sufficient to support the claim. To the extent these claims are pertinent to the County's right of way, the Board has no authority to enforce the County's rights in their own easement.

Items 1, 2 and 10: Items 1 and 2 are not ripe in this case because there is no requirement in the Board's approval that the sheds be removed prior to construction.

Item 10 requests that Mr. Ball be prohibited from continuing construction of the rear elevation because the Board has no confidence that he will build according to the approved plans. The Hearing Examiner knows of absolutely no legal authority for the Board to prohibit approved construction on this basis nor has she been directed to any. In addition, the evidence does not support the allegation in this case, because it purports to speak of the Board's viewpoint when testimony demonstrates that the Supplemental Complaint was never approved (or even seen) by the Board (see below).

Item 13 alleges that Mr. Ball failed to supply a planting plan. This ignores the evidence that Mr. Ball did supply a contract from a landscaping company that describes the proposed landscaping in sufficient detail to understand what will be installed. The Hearing Examiner finds that the Balls have complied with this requirement in the 2011 approval.

Item 14 requests that Mr. Ball be prohibited from storing construction equipment and supplies in his yard. The Board's approval (Exhibit 78) requires only that the Balls store all construction materials, equipment and trucks on his property. Potowmack has failed to demonstrate how the more restrictive requirement is necessary to effectuate the original approval and is arbitrary, as it is difficult to conceive how the Balls could continue construction without storing materials on the property.

The Balls contended the following with respect to items claimed in the Supplemental Complaint (Exhibit 55):

> 3. The HOA has consistently failed to abide by its own rules and regulations in raising issues, approving plans, holding meetings and votes, and bringing the instant actions. The HOA's failures preclude them from pursuing the action and asserting that there were deviations of which the Board was aware.

The Hearing Examiner agrees with Respondents' assertions and finds that the Board is equitably estopped from enforcing these items against the Balls. In Maryland, equitable estoppel bars a party from asserting rights that it may have had if the party's actions misled the other party (either intentionally or unintentionally), and relying this action, the other party changed his position for the worse. *Knill v. Knill*, 306 Md. 527, 531-532. (1986). A party's reliance on the action of the other party must also be reasonable and in good faith. *Id.*

While the CCOC has held that homeowners may not rely on oral approvals when they differ from the provisions of the governing documents, *Foo v. Dellabrook Homeowner's Association*, Case No. 58-09 (June 9, 2011), the Hearing Examiner finds that there are facts in this case distinguishing it from that precedent. Here, Dr. Barr testified at length regarding the Board's pattern and practice when presented with a violation of an architectural approval, which Potowmack asserts is an interpretation of the governing documents. According to him, he has been designated as the person to investigate a violation along with two other Board members. They make a recommendation to the Board, who votes on whether deviations from the approved plans are major or minor. If minor, the homeowner need only keep the Board "in the knowledge loop," according to Dr. Barr.

In this case, Mr. Ball *did* keep members of the Board in the "knowledge loop." He supplied the building permit plans to Dr. Barr, who acknowledged that they conformed to the approved plans prior to construction. He also informed Mr. Gibson of the changes at the first

on-site meeting with Mr. Gibson in June, 2013, and then at the July 17, 2013, meeting with the Board. Mr. Ball testified that, after the meeting, he felt that he had been given the "green light" (8/4/14 T. 154) to proceed, and testimony and evidence indicates that the primary feedback from the Board was to keep moving on the construction. Mr. Ball had no reason to think that the height of the roof would be an issue, because he had *already* given the permit plans, showing the height of the roof, to both Mr. Gibson and Dr. Barr. An e-mail from Mr. Gibson further relayed that Dr. Barr and Mr. Gibson felt that he should proceed with construction, if all else was in accord with the plans. Again, Mr. Ball had no reason to question the height of the roofline or the deviations he had made thus far, as he had already submitted the permit plans to them. Based on these representations, he continued construction of the house.

Added to these actions is the Board's action on October 7, 2013, although that occurred after Mr. Ball stopped construction. The Hearing Examiner finds that the Board did take a vote, as Mr. Gibson originally testified, and as corroborated both Mr. Ball's and Mr. Bruno's testimony. The Hearing Examiner does not find credible Mr. Gibson's later testimony that the Board had a "general discussion" regarding Mr. Ball's construction, especially in light of Mr. Gibson's e-mail to Mr. Bruno confirming that the vote was genuine. He also testified that no vote occurred because there had been no motion or second. While a community member may be on notice of the recorded governing documents, there is nothing imputing knowledge of Robert's Rules of Order to them as well. Mr. Ball's reliance on these actions is not unreasonable. As none of the Board's votes (only motions for votes) in this case are recorded in the minutes, the only evidence that the vote taken wasn't valid is Mr. Gibson's single statement no motion was made, and Ms. Gowan's testimony that no vote was taken, neither of which the Hearing Examiner finds credible. Failure to follow these procedures might render

the Board's vote unenforceable, but it would not affect the reasonableness of Mr. Ball's reliance on these actions.

Alternatively, the Hearing Examiner agrees with Respondents that the remaining items (Items 3-6, and that portion of 7 dealing with left side addition (excluding dry wells), 8, and 11) of the Supplemental Complaint are unauthorized because the Board failed to follow the procedures required by State law, the governing documents, and the Architectural Procedures, as explained in the next section.

D. Improper Procedures

The record shows that the Board failed to follow the procedures in the governing documents, the Architectural Procedures, and its own pattern and practice enforcing violations of the covenants.

There is absolutely no basis in any of the documents for the three-year delay in approving Mr. Ball's 2008 application. Mr. Gibson acknowledged that the delay was caused by the Board's hostility toward Mr. Ball while Case No. 720-G was pending. There are several references in the minutes (cited above) regarding the 45-day rule, none correctly apply the rule. Evidence also shows that neighbors were not regularly informed of architectural approvals. Ms. Gowan was not informed about Mr. Ball's application even though she lived there in 2008, and called to find out what was going on when he finally began construction five years later.

The record is replete with instances where the Board failed to provide notice of hearings, some of which occurred *after* the CCOC handed down its decision in Case No. 30-12.

As explained in CCOC 30-12, State law requires that Board members conduct their business in open meetings. Throughout this case, and while Case No. 30-12 was pending, the

Board failed in numerous instances to notify community members of Board meetings. Mr. Bruno, Mr. Pelter, and Ms. Bentolila testified that they did not receive notice of meetings, including the July 17, 2013, meeting. While Mr. Bruno testified that he has begun receiving more notices recently, according to him, the practice is inconsistent. Those testifying that they received notice of meetings indicated that the notice came through e-mail, rather than mail and could not say whether they had opted in to that process.

Of particular concern here is the Board's failure to provide notice of the October 28, 2013, where it voted to file a second complaint with the CCOC (according to the minutes). The Hearing finds credible the testimony of Mr. Bruno, Mr. Ball, and Mr. Pelter that they did not receive notice of the October 28, 2013, Board meeting. Mr. Pelter testified that he did not learn of it until meeting with Respondents' counsel. The testimony and minutes indicate that only Board members were present (possibly due to lack of notice to the community). This Board meeting occurred after the Board took a vote *not* to prosecute this case, the validity of which Mr. Gibson later confirmed and which was relied on by Mr. Ball.

Now, apparently to avoid its failure to provide notice, the Board argues that the vote taken at the October 28th Board meeting was limited to authorizing attorneys fees for a second complaint with the CCOC. According to the Board, its vote to file the complaint in CCOC 72-13 (for the deck and shed) authorized the Board to file a complaint for any future violation of the approved plans.

The Hearing Examiner is unable to find this theory supportable for several reasons. If the Board relies on its vote to file the Complaint in CCOC Case No. 72-13 as authority to prosecute all future violations of the 2011 approval, it should have ratified this as required in CCOC Case No. 30-12 (the Board had to ratify all actions taken outside of the January 30,

2012, Board meeting). The best evidence of the date of the Board's vote (from the Board's minutes) indicate that the vote to file the complaint in CCOC Case No. 73-12 occurred in November, 2012, outside of the one Board meeting exempted in CCOC Case No. 30-12. Exhibit 127.

More important, ongoing authority file a CCOC complaint for any future violation stemming from the same plans ignores principles of fundamental fairness applied by the CCOC and by Potowmack's Architectural Procedures, and avoids the requirement that the Board (1) determine whether each violation exists, and (2) provide the opportunity to the homeowner to respond. Even though there is no explicit dispute resolution in the governing documents here, the Staff to the CCOC indicate:

> Associations must usually show that they have given written notice to the member of an alleged violation and the right to a hearing, and that they have also given written notice of their final decision together with notice of the right to appeal to the CCOC.

Staff's Guide to the Procedures and Decisions of the Montgomery County Commission on Common Ownership Communities, p. 11 (July, 2014). The CCOC will refuse to take jurisdiction in cases where a Board failed to vote on a particular violation, even though notice had been provided. *Id.* at 12; *See, e.g., Glenn v. Park Bradford Condominium,* CCOC Case No. 29-11, p. 23. .

Board members testified that their own past practice has been to have the Board vote on whether violations of architectural approvals are major or minor before bringing enforcement actions. The Board justifies the failure to have the Board vote on whether Mr. Ball violated the approved plans because they wanted to reach him early before he continued construction. As a result, Dr. Barr testified that he, Mr. Gibson, and Ms. Alfer voted at the on-

site meeting on September 14, 2013. As previously instructed in CCOC Case No. 30-12, Board members cannot conduct Board business outside of a meeting, and without notice.

Potowmack claims that the CCOC should still decide the issues raised in the Supplemental Complaint because the outcome will remain the same, relying on the CCOC's decision in *Schott v. Sumner Village Condominium Two, Inc.* #250-O (January 13, 1995); *see also, The Staff's Guide to the Procedures and Decisions of the Montgomery County Commission on Common Ownership Communities,* July, 2014, p. 44. The Hearing Examiner does not find this appropriate for this case given that she recommends that the CCOC require Dr. Barr and Ms. Gowan to recuse themselves from further proceedings on this application and any amendments thereto.

E. December 16, 2013, Application from Respondents

The record demonstrates, and the parties acknowledge, that Mr. Ball delivered a request to amend his application to Mr. Gibson, with elevations from the approved plans as well as a set of plans showing changes, that would address any discrepancies listed in the Supplemental Complaint. Exhibit 90. Mr. Gibson then forwarded these plans to Dr. Barr, who did not respond to Mr. Ball. According to Dr. Barr, he did not respond because the letter enclosing plans did not include the required application form and because his attorney told him not to speak with Mr. Ball while the matter was in litigation.

Potowmack's Architectural Procedures impose on the president the duty to seek an application from a homeowner that has constructed changes without approval. This is consistent with Ms. Alfer's testimony that amendments to an existing approval follow the same procedures as an original application.

The Hearing Examiner finds no basis in this record to excuse the Board from complying with its written procedures for several reasons. Ms. Alfer's testimony regarding the Board's practice for amendments to applications is consistent with the Architectural Procedures. Ms. Alfer testified that an individual must supply another application form to the Board and follow the same process as an original application. If the application is incomplete for an original application, all Board members testified that the Architectural Committee would notify the property owner and request the required items.

There is little evidence in this record of a consistently enforced Board "policy" that would permit the Board to avoid this processing an application to approve changes already constructed if the property is in violation of its architectural approvals. Any concern regarding direct communication with Mr. Ball could have been handled simply by having Potowmack's attorney communicate with Mr. Ball rather than the Board. Absent a better record substantiating the Board's consistent practice, the Hearing Examiner cannot find that this is a true Board policy rather than a post-hoc rationalization to excuse its failure to follow its own procedures in this case.

The Hearing Examiner does not agree, however, with Mr. Ball's position that the application is deemed approved under the rule requiring the Board to make a decision within 45 days of the date of the application. The Board does have authority to require a form. The Architectural Procedures contemplate deviations from the "strict rubric" of the procedures if notice is provided annually to community members and if the process still affords applicants with substantive due process. Exhibit 70. While the level of notice provided to the community is somewhat vague, Mr. Ball had actual notice that the Board would require a form. Nor does

the record make clear whether the plans left with Mr. Gibson in December, 2013, were complete.

As a result, the Hearing Examiner finds that the Board must process another application from Mr. Ball to address any deviations from the approved plans, which are Exhibit 148. The burden is on Mr. Ball to file the application.

E. Improper Construction

The Hearing Examiner finds completely unsubstantiated Potowmack's claims that the Balls violated her instruction to cease construction because she did not order the Balls to do so. She finds the evidence supporting claims that construction occurred in March, 2014, speculative, as neither Mr. nor Mrs. Miller could describe exactly what occurred and neither is familiar with residential building construction. Ms. Gowan's testimony was later limited that she saw activity on one day.

Ms. Bentolila's testified that she told Mr. Ball that his weatherproofing had come off and he fixed it, and the Hearing Examiner finds this credible.

F. Bad Faith

The Balls' allege that the Board acted in bad faith by allowing Ms. Gowan to participate actively in this case, despite past lawsuits and hostility between her and Peter Ball. Potowmack argues that the Balls failed to properly raise their bad faith claim in their counterclaim because they explicitly plead it only in Count I, seeking approval of vinyl siding, which the Hearing Examiner dismissed. Count II of the counterclaim explicitly pleads that the Board failed to follow its own procedures and requests that Dr. Barr be removed as president of the Board. In closing, the Balls acknowledged that the CCOC had no authority to do this, but requested instead that the CCOC employ the same relief imposed in CCOC Case No. 30-12 (to require

at least four Board members to attend a training session) but expand the requirement to the full Board.

CCOC hearings are not governed by formal pleading rules, such as the Maryland Rules of Civil Procedure. Rather, Sections 2A-1 and 2A-11 of the County's Administrative Procedures Act (APA) and Executive Regulations govern these proceedings. COMCOR 10B.06.01.03 authorize the parties to file a "complaint" and a "response." Thus, the basic principal governing administrative proceedings is that they be fundamentally fair to the parties, and provide notice of the claims against them.

Section 2A-7 of the APA requires the complainant to file a pre-hearing statement in advance of the hearing, containing a list of witnesses, exhibits and other items. The hearing authority may also require the same of the Respondent, which the Hearing Examiner did in this case. The Hearing Examiner also required the parties to include a brief statement of their legal arguments in the pre-hearing statement. Exhibit 44. Respondents alleged bad faith in their pre-hearing statement and also argued that the Board failed to follow its procedures in authorizing this suit, and therefore, the Complaint is not properly before the Board. *Id.* The Hearing Examiner concludes that these claims are properly before the CCOC.

The Hearing Examiner finds that Respondents have met their burden of proof that the Board acted in bad faith for several reasons, including Ms. Gowan's extensive participation in this action that has been unfettered by the Board. Aside from personal hostility, it is clear that Ms. Gowan has used this action to pursue her personal complaint that runoff from the Balls property causes erosion on her property; a position she continues to maintain even after a DPS Inspector informed her that it did not. 6/30/14 T. 39. Ms. Gowan expressed frustration that "they" (apparently the County) have asked her to build retaining walls and landscape and

mulch the back of her property, which she has done, but she asserts that rainwater runoff continues to take out the bedding along her garage on a regular basis. She further stated that the runoff occurs every time the Balls do a lot of "digging" in their yard, which, according to her, is "very strange." 6/30/14 T. 260. Ultimately, storm water issues encompassed several items in the Supplemental Complaint, including a request that the CCOC mandate that the Balls' install dry wells.

The Hearing Examiner notes that storm water management concerns were never part of the Board's original approval. Storm water appears as an issue at the Board's March 31, 2011 meeting. Exhibit 127. Dr. Barr testified he conveyed concerns voiced by neighbors to Mr. Ball, which included the home's large footprint and the resulting storm water discharge to other properties. 6/12/14 T. 58-59. Eerily reminiscent of the Supplemental Complaint, in February, 2012, Dr. Barr "requested" Mr. Ball to clear all construction debris from the site, move construction materials away from public view, and "maintain area ways to assist in storm water management." CCOC Case No. 73-12. Exhibit 1, p. 30. When asked where storm water factored into the Board's original approval, Ms. Gowan acknowledged that it had not. 6/30/14 T. 216-220**.**

The Board's governing documents impose a duty on the directors to act in good faith. If a director is self-interested, the governing documents permit this to be cured by disclosure and a majority vote of disinterested directors. There is no evidence in this case that Ms. Gowan's personal interest and conflict with Dr. Ball was ever disclosed to the full Board. Mr. Gibson testified that he knew of ongoing issues between the two, but was not aware of the lawsuits between Mr. Ball and Ms. Gowan. Mr. Gibson testified that the history was "fairly lengthy" because they had been neighbors for a long time. 8/4/13 T. 23-26. Moreover, the

record reveals that the Board of Directors never reviewed or voted on the Supplemental Complaint, and therefore, had no opportunity to ratify filing the Supplemental Complaint.

After eight days of hearings, it is also clear to the Hearing Examiner that Ms. Gowan is simply hostile to Mr. Ball, as he is to her. While Mr. Ball acknowledges that he "has no relationship" with Ms. Gowan and has, at times, acted inappropriately towards her, Mr. Ball is not actively participating in Board decisions to file enforcement actions.

Mr. Pelter testified that part of the Board's hostility is reflected in the level of scrutiny applied to Mr. Ball. Ms. Bentolila made exterior changes to her home without Board permission, include a stairway from a deck similar to that involved in CCOC Case No. 73-12. Ms. Gowan has reviewed Mr. Ball's building permit plans at DPS, and has filed multiple complaints with County agencies. Mr. Gibson characterized her actions toward Mr. Ball as "diligent." The Hearing Examiner characterizes them as biased.

The Hearing Examiner is concerned about several unfounded statements that appear in e-mails from the community that have no basis in fact. While the record does not reveal their source, these unsubstantiated statements increase the hostility between parties without reason and demonstrate the willingness of the Board to proceed against Mr. Ball without objective investigation of a fact. One example is the repetition by both Dr. Barr, Mr. Gibson, and Rande Joiner that Mr. Ball should use stick built construction rather than trusses to lower the height of the roof. Leo Schwartz testified that trusses are a normal way to construct a roof because they permit the interior to remain weather tight until the new roof is in place. There is no basis in this record in this record that either method will cause the roof to be lower.

As to the allegations of bias against Dr. Barr, the record reflects that Ms. Gowan and Dr. Barr have worked together, sometimes without involving other Board members, to

prejudice Mr. Ball's case before the Board (evidenced in Exhibit 122). There is no doubt in this record that Dr. Barr repeated Mr. Ball's past history at Board meetings when there was no need to do so. The Hearing Examiner particularly notes the litany contained in the minutes of the July 17, 2013, meeting, which went back to 2002. Mr. Pelter testified that Ms. Gowan and Dr. Barr made negative comments about Mr. Ball at Board meetings. The CCOC has held that reliance on the past transgressions of a property owner violate due process. *Winans v. Montgomery Village Foundation,* Case No. 353 (September 22, 1997). The pattern of reliance on past transgressions here is extensive, reaching back to the three-year delay in approving this case, acknowledged by Mr. Gibson to be caused by the Board's hostility to Mr. Ball, and reiterated through numerous Board meetings to the present.

Further, the record reflects that Dr. Barr has actively recruited Board members based on their feelings toward Mr. Ball. No matter how it is rationalized, the e-mail from Dr. Barr to the Millers asking them to be on the Board reflects this hostility. Not only does it solicit them in order to beat Mr. Ball at the CCOC again: it represents that Tania Bruno is still Mr. Ball's architect even though she explicitly told him she was not more than two years before. Exhibit 122.

The Board's denial of vinyl siding is also evidence of a discriminatory pattern against Mr. Ball. Several times Dr. Barr testified that the Board denied the vinyl siding because it exacerbated the mass of the house from the street. This is not borne out by this record. The 2011 approval states that the Board denied both *vertical and* horizontal vinyl siding. Further, the 2011 approved plans show the rear elevation has having *horizontal* siding, and the Board's approval only "strongly suggests" that Mr. Ball use vertical siding. Thus, the otherwise reasonable rationale relating to mass and scale was not the reason for the denial in this case.

Mr. Pelter, former president of the Board, testified that the Board had a policy to permit vinyl siding as long as it looked natural from the street. This is consistent with testimony that the Board approved vinyl siding on several other homes, including Ms. Gowan's and Mr. Bruno's houses. The only evidence supporting the Board's change of policy is Dr. Barr's statement that these "slipped under the wire." In light of Mr. Pelter's testimony that these homes were actually the result of Board policy, the denial of Mr. Ball's request was unreasonable.

Another issue related to bad faith is the complete failure of the Board to heed the CCOC's instructions in Case No. 30-12 (decided in August, 2013). In that case, the CCOC refused to find bad faith, but remained troubled by the Association's failure to notify owners of meetings because it had already agreed to do so in 2008. Here, the Board held a meeting without notice to homeowners only months after the Board's decision. While failure to follow the Board's procedures may not normally constitute bad faith, the record here indicates a reckless disregard of the CCOC's order.

G. Attorney's Fees

At the time this Complaint was filed, Section 10B-13 of the County Code provided that the CCOC may award attorney's fees as follows:[30]

(d) The hearing panel may award costs, including a reasonable attorney's fee, to any party if another party:

(1) filed or maintained a frivolous dispute, or filed or maintained a dispute in other than good faith;

(2) unreasonably refused to accept mediation of a dispute, or unreasonably withdrew from ongoing mediation; or

(3) substantially delayed or hindered the dispute resolution process without good cause.

[30] Potowmack's counsel correctly points out that the law governing attorneys is that in place when the case was brought. Thus, the recent amendments to this section do not apply.

The hearing panel may also award costs or attorney's fees if an association document so requires and the award is reasonable under the circumstances. The hearing panel may also require the losing party in a dispute to pay all or part of the filing fee.

Both parties have submitted claims for attorney's fees. An award of attorneys' fees is an extraordinary remedy, intended to reach only intentional misconduct and is reserved for the rare and exceptional case. *Black v. Fox Hills N. Cmty. Ass'n, Inc.*, 90 Md. App. 75, 83-84, 599 A.2d 1228, 1232 (1992)(Rule 1-341 sanctions should be imposed only when there is a clear, serious abuse of judicial process.). The rule was intended to eliminate abuses in the judicial process, but not to penalize a party and/or counsel for asserting a colorable claim or defense. *Id.*

More recent Maryland cases interpret *Black Hills* as requiring either that it was filed in bad faith *or* lacked substantial justification:

> Before imposing sanctions under Rule 1–341, the trial court must make an evidentiary finding that the subject pleading either (1) was filed in bad faith *or* (2) lacked substantial justification. *Johnson v. Baker,* 84 Md.App. 521, 528, 581 A.2d 48 (1990); *Legal Aid Bureau, Inc. v. Bishop's Garth Associates Ltd. Partnership,* 75 Md.App. 214, 220, 540 A.2d 1175 (1988). On appeal, the court's evidentiary finding will be reviewed under a clearly erroneous standard.

Jenkins v. Cameron & Hornbostel, 91 Md. App. 316, 324, 604 A.2d 506, 510 (1992). Bad faith is described as:

> "In bad faith" means vexatiously, for the purpose of harassment or unreasonable delay, or for other improper reasons. *See Roadway Exp. Inc. v. Piper,* 447 U.S. 752, 766, 100 S.Ct. 2455 [2464], 65 L.Ed.2d 488, 501 (1980); *Johnson v. Baker,* 84 Md.App. 521, 581 A.2d 48, *cert. denied,* 322 Md. 131, 586 A.2d 13 (1990).

Bad faith may include actions of the parties taken to further a personal agenda and self-interest. *Boisson v. 4 East Housing Corporation,* 129 A.D.2d 523, 514 NYS 2d 374, 375 (1984). Bad faith may include not just unsubstantiated claims, but may also include conduct in the course of the proceedings. *Jenkins* at 324.

The CCOC's decisions comport with this holdings. It has considered whether one party has proven a violation of the law or association's rules. *See, Lichtman v. Grand Bel Manor Condominiums,* Case No. 50-11 (November 21, 2012)(considering Board's improper acts in conducting elections). The intent of Section 10B-13 is to encourage reasonable behavior by the parties in resolving a dispute, and to discourage unreasonable actions that cause the opposing party to unnecessarily incur expenses. *Weiss v. Woodrock Homeowners Association,* Case No. 702 (March 29, 2006).

The Hearing Examiner finds that, in the unusual circumstances of this case, attorneys fees should be awarded to Respondents Peter and Michael Ball for several reasons. First, Potowmack's failure to provide notice of meetings, even after the CCOC's instructions in Case No. 30-12, was completely unwarranted. Potowmack continued to take actions on behalf of the Board outside of meetings, as evidenced by the "vote" at the September 14, 2014, on-site meeting to require Mr. Ball to conform to a violation that did not exist, again contrary to the CCOC's order. The Board also failed to provide the Balls with an opportunity to present their case before the Board, contrary to Potowmack's own stated practices. Had the Board provided notice and an opportunity for the Balls to respond, many of the facts regarding (1) what plans had been approved, and (2) what those plans showed could have been resolved without the need for litigation. The Board's failure to permit Mr. Ball to respond to the violation is

particularly troubling given that the Board acknowledges that it did not review even the complete set of plans it contends were approved by the Board.

The Board's continued refusal to comply with the requirements of Maryland law resulted in filing this complaint, and the Supplemental Complaint, without the requisite authority. Of particular concern in this case is the fact that the Board *never reviewed* the Supplemental Complaint, nor could Board members even describe what it contained. As a result, Ms. Gowan was able to further her personal agenda regarding storm water management, and her personal vendetta against Mr. Ball, without any supervision. Several of the claims in the Supplemental Complaint are unsupported by evidence, and outside the jurisdiction of the Board, and are frivolous.

Potowmack's president testified that he did not consider the items contained in the Supplemental Complaint of consequence, although Ms. Gowan contends that other Board members care. The latter is completely unsubstantiated, however, given that only four members of the Board ever saw the Supplemental Complaint and two of those members could not describe what was in it. The record includes an e-mail from Mr. Gibson to Mr. Bruno stating that the Supplemental Complaint had been added as "leverage" against Mr. Ball.

Ms. Gowan's self-interest and Dr. Barr's hostility in this case has also greatly hindered resolution of this dispute. The evidence in this case indicates that the Board twice expressed interest in resolving the dispute without resort to litigation, once at the July 17, 2013, meeting that Mr. Pelter attended, and once at the October 7, 2013, meeting where the disputed "vote" was taken not to prosecute Mr. Ball.

Potowmack's legal theories in this case and testimony on critical facts have frequently changed as adverse facts evidence was presented, which the Hearing Examiner finds extended

the hearing in this case unreasonably. While Dr. Barr characterized 2011 application as a "moving target," the Balls argue that Potowmack's legal theories are a moving target as well, extending the length of the hearing and requiring the Balls to respond to items that had not been raised in Potowmack's case in chief. This is evidenced by Potowmack's testimony in rebuttal regarding the rooflines shown in the Balls' December, 2013, application to amend the 2011 approval. In addition, the height of the roof was clearly shown on the building permit plans, which Dr. Barr pronounced were consistent with the approved plans at the July 17, 2013, meeting. The Board had the amended plans in December, 2013, but did not raise this in their case in chief. The same is true of the Board's tardy theory that the Board's vote to file the complaint in CCOC Case No. 73-12 authorized filing complaints for all future, unspecified, applications, clearly a violation of a homeowner's right to due process. Another example is their completely unsubstantiated claim, articulated late in the case, of a Board policy not to process amendments to existing approvals that are in violation of the existing approval.

Potowmack's claims that the Balls continued to construct their house after the Hearing Examiner ordered them to stop is also unfounded because the Hearing Examiner never ordered the Balls to stop construction.

The amount of fees differ greatly between Potowmack's costs and Respondents, although Potowmack's counsel acknowledges that she reduced her normal fees in light of the Association's budget. In light of the length of this hearing, the Hearing Examiner does not find the Balls' fees to be unreasonable. She recommends that the CCOC award attorney's fees in the amount of $34,313.00 to Respondents pursuant to the authority in §10B-13(d)(1).

IV. RECOMMENDED DECISION

Based on the foregoing, the Hearing Examiner recommends that the CCOC deny the Complaint and Items 7 of (portion relating to dry wells), 9, 15, and 16 of the Supplemental Complaint. She also recommends that the CCOC hold that the Board is estopped from enforcing Items 3-6, and that portion of Item 7 dealing with left side addition (excluding dry wells), Item 8, and Item 11. Should the CCOC disagree that the Board is so estopped, she recommends that the CCOC find that the Supplemental Complaint is not properly before the Board. Because of this alternative recommendation, she includes alternative orders below:

<u>If the CCOC finds that the Board is estopped from prosecuting matters raised in the Supplemental Complaint:</u>

1. The Respondents must file a complete application for any deviations or alterations from the approved plans (Exhibit 148) not included in the Supplemental Complaint as described in Ms. Gowan's testimony at the June 30, 2014, public hearing. The application must be filed within 90 days of the date the CCOC issues its decision. The application must include the required form, be filed with the Chairperson of the Architectural Review Committee, and the architectural plans must be prepared by an architect licensed in Maryland. Respondent shall pay the cost of the plans.

<u>If the CCOC finds that the Supplemental Complaint is not properly before the CCOC</u>:

1. The Respondents must file a complete application for any deviations or alterations from the approved plans (Exhibit 148). The application must be filed within 90 days after the date of this decision. The application must include the required form, must be filed with the Chairperson of the Architectural Review Committee, and the architectural plans must be prepared by an architect licensed in Maryland. Respondent shall pay the cost of the plans.

<u>Recommended orders for both alternatives</u>:

2. The Board must accept this application and process it in accordance with the Architectural Procedures; this must include at a minimum written notice, mailed by first-class mail to Mr. Ball of any Board meeting at which it discusses the application. All actions related to the application must be recorded in the Board's minutes.

3. Dr. Barr and Ms. Gowan must recuse themselves from participating in any Board action relating to any application to amend the approved plans (Exhibit 148); should the Board need expert advice to understand the plans, it must hire a licensed architect independent of either party in this case at the Board's expense.

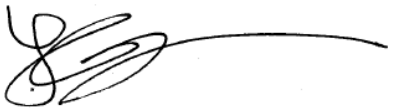
4. Respondents shall construct no further deviations from the approved plans (Exhibit 148) prior to the Board's decision on the amended application.

5. All current Board members must attend a training course similar to that required in CCOC 30-12, and file a certificate of completion with the CCOC within a year of the date of the CCOC's decision on this complaint.

6. The CCOC should retain jurisdiction over this case until the Board makes a final decision on any application to amend the 2011 approval filed within 90 days of the date of its decision and until the certificate of training has been filed by all Board members

The Hearing Examiner also recommends that the CCOC award attorneys fees in the amount of $34, 313.00 to Respondents, Peter and Michael Ball.

Respectfully submitted,



Lynn A. Robeson
Hearing Examiner

Issued this 1st day of December, 2014.

COPIES TO:

Corinne Rosen, Esquire
Farrokh Mohammadi, Esquire

APPENDIX

JUN 11 2014
Administrative Hearings

Procedures Related to Architectural Control Committee

1. The Architectural Control Committee consists of three Board Members appointed for one year. During the period when an application for architectural change is being processed, the President and/or the relevant Area Director shall meet with the Committee to provide facts and information. A quorum shall consist of two of the three Committee Members. The Committee shall have full authority to approve or disapprove applications, except as otherwise provided in these procedures. The Board of Directors will make all final decisions on architectural matters if there are written allegations by any member of the Association that the proposed change is not in harmony with the surrounding structures and/or topography.

2. A notice of the method to be used in applying for permission for architectural change should be distributed to members of the Association at least yearly. Failure to give this notice annually shall in no way affect the validity or enforceability of the covenants. All homeowners have the responsibility for understanding and abiding by the covenants. However, because no time limit is specified for action by the Committee or Board on unapproved construction, the notice to homeowners should advise that the correct practice is to file applications with the Association's President so objection to an architectural change is not raised months or years later after the change is implemented, perhaps when one wishes to transfer title. The notice should also state that the Association has court-tested power to prevent certain types of construction or alterations deemed not to be in harmony with surrounding structures and/or topography.

3. Upon receipt of an application for architectural change, the President will assign a serial case number (such as 94-1) and then review the matter with the Committee. According to the covenants, **the Association has 45 days from the receipt of an application to approve or disapprove it.** Homeowners should be advised to bear this in mind when planning architectural changes.

4. The President shall ensure that affected neighbors are advised of the application in time to enable them to provide, in writing, facts for consideration by the Committee and the Board prior to Committee action or Board approval or disapproval. Affected neighbors will be determined by the Committee. As a minimum, affected neighbors are those living on either side of the applicant and others nearby to whom the projected change is visible.

5. The Committee may approve applications deemed to be in harmony with the surrounding structures and/or topography provided no member of the Association has presented written allegations to the contrary.

6. If any member of the Association alleges lack of harmony, the Committee shall consider all facts and shall make recommendations to the Board of Directors, notifying the homeowner-applicant. If the recommendations is to disapprove an application the applicant shall be invited to appear personally before the Board. If the recommendation is to approve an application, any member of the Association who has presented facts in writing shall be invited to appear personally before the Board. In this latter case the applicant also shall be invited.

7. The Board of Directors shall consider applications and recommendations of the Architectural Control Committee at its next regularly scheduled meeting called for that purpose. Approval or disapproval of an application by the Board of Directors will be by majority vote. The President shall report action to the homeowner-applicant as soon as possible after the vote.

8. Unsuccessful applicants may resubmit their applications by providing additional material facts or by making modifications to the original proposal. At that time the resubmission will be treated as a new application, but may be approved only by the Board.

9. The President is responsible for keeping all Board members informed of each architectural change application as it is logged and as it is acted upon.

10. Each application for architectural change, action taken or status, shall be a subject of the agenda of the next regularly scheduled Board of Directors meeting and the minutes shall reflect, by case number, applicant property address and the action taken. The minutes will provide the record for the architectural change application.

EXHIBIT NO. 70

A copy of these minutes will be made available on request to the applicant or, in the future to the prospective home buyers or new homeowners at a fee to be determined by the Board.

11. Any Area Director who sees architectural changes being made in his/her area should contact the President to determine whether an application has been made. If none has been made, the President shall seek an application and, if necessary, provide a copy of the covenants to the homeowner making the change. The responsibility for filing applications on a timely basis rests solely with the homeowner, regardless of whether a Director has reported unauthorized changes.

12. These procedures are provided for the guidance of the Architectural Control Committee, the Board of Directors and all members of the Association in filing, processing and acting upon applications for architectural changes. Failure of either the Architectural Control Committee or Board of Directors to abide by the strict technical rubric of these procedures shall not invalidate any action taken by the Committee or Board as long as the applicant and all affected are provided substantial due process.

13. Tree removal. The covenants of the neighborhood DO NOT allow hardwood trees to be cut down without prior approval from the association. Approval is granted for trees that are diseased or unsafe. Please contact the Association President or Environmental Control Committee Chair prior to cutting down ANY trees. Please try to replace any removed trees with canopy high hardwood trees. All of our trees need periodic trimming to keep them healthy and to prevent them from growing over the houses. Tree trimming, not so extensive as to threaten survival of the tree, is not tree removal and does not need approval.

Copies of the Covenants and By-Laws may be obtained from the association secretary for the cost of reproduction. New homeowners are provided these documents and this directory for free.

POTOWMACK PRESERVE
ARCHITECTURAL DESIGN GUIDELINES

Preamble:
The following Design Guidelines are intended to provide guidance in renovations, repairs, additions and alterations in the area served by the Homeowner's Association, and shall be considered and applied by the Architectural Committee and Board of Directors in enforcing design and construction standards contained in the Association's Covenants, Bylaws, and Articles of Incorporation, and as provided by Maryland law:

1. All additions, alterations, repairs and renovations shall maintain the architectural character and compatibility of the neighborhood in style, materials, form, proportions and massing.

2. Style: Additions and alterations shall be in the Contemporary style. Extraneous architectural elements not found in the neighborhood such as Georgian or Federal architectonics, columns, broken pediments, etc. shall be avoided.

3. Proportions and Massing: The existing proportions and massing shall be maintained in all additions and alterations, avoiding ungainly or excessively large volumes.

4. Materials: Building exteriors in the neighborhood shall be of natural materials such as brick, stone and wood, of color and texture compatible with existing materials. Man-made "natural look" materials may be considered if deemed indistinguishable from the original.

5. Representative samples of all proposed materials must be submitted for approval with the required application.

6. Replacement exterior materials shall be applied in such a manner as to reinforce the form and massing of the design.

7. Glazing: Contemporary window styles and glazing are acceptable. Narrow bands of glass similar to existing may be used to emphasize breaks in the massing.

8. Operating clerestory windows and awning windows similar to existing window profiles are encouraged to aid in natural ventilation and sustainable development.

9. Accurate site plans (at minimum 1" = 20'-0"), floor plans, sections and elevations (at minimum 1" = 8'-0") showing existing and proposed designs must be submitted together with color photographs of existing conditions.