BEFORE THE
COMMISSION ON COMMON OWNERSHIP COMMUITIES
FOR MONTGOMERY COUNTY, MARYLAND

In the Matter of:

Blackburn Village Homeowners Association	*	
c/o Lerch Early & Brewer Chartered	*	
3 Bethesda Metro Center	*	
Suite 460	*	
Bethesda, MD 20878	*	
Complainant,	*	
	*	
v.	*	Case No. 06-06
	*	October 31, 2006
Deloris Saunders	*	
3727 Berleigh Court	*	
Burtonsville, MD 20866	*	
Respondent	*	

DECISION AND ORDER

The above-captioned case having come before the Commission on Common Ownership Communities for Montgomery County, Maryland, for hearings on May 24, 2006, pursuant to Sections 10B-5(i), 10B-9(a), 10B-10, 10B-11(e), 10B-12 and 10B-13 of the Montgomery County Code, 1994, as amended, and the duly appointed Hearing Panel, having considered the testimony and evidence of record, finds, determines and orders as follows:

The Dispute

The Respondent, Dr. Deloris Saunders, is the owner of a townhouse within the Blackburn Village development, which is governed by the Blackburn Village Homeowners Association (the "Association"). The Association utilizes the services of a management company, Community Association Services, Inc., to oversee its properties. On November 3, 2004, the Association, through its management agent, sent the Respondent a notice of violation of the Association's Architectural Guidelines and governing documents that were in need of correction. Specifically, these violations were identified as painting the front door a dark burgundy color, installing a black storm door with spiral decoration, and installing a privacy screen on the deck. Commission Exhibit 1 at 172. It is not clear from the record what action was taken on the paint color, but the Respondent offered to remove the privacy screen from the deck. The installation of the storm/security door was the only issue brought before the Commission by the

Association.

PROCEDURAL HISTORY

After receiving the notice of violation, Dr. Saunders submitted a Request for Review with the Association's Architectural Committee seeking approval of the security screen and the storm/security door. Commission Exhibit 1 at 173-76. On December 1, 2004, the Association's Board of Directors responded to Dr. Saunders' application by certified and regular mail. The Board advised Dr. Saunders that the Architectural Committee had denied her request to install the storm/security door. The Architectural Committee ruled that the door was "not within the community standards," noting that "[a]ll storm doors on Berleigh Hill Court must be full view and be white in color." Commission Exhibit 1 at 177-78. Dr. Saunders was further instructed that the door was to be removed as soon as possible.

On December 29, 2004, Dr. Saunders submitted to the Board a memorandum in which she requested that the Board reconsider its denial of her request to install the storm/security door. In her memorandum Dr. Saunders made a distinction between storm doors and security doors. Dr. Saunders, referring to the Association's "Homeowner's Handbook," asserted that "both the rules and the by-laws are silent on security doors." While conceding that the rules and by-laws address storm doors and the specifications for such doors, Dr. Saunders noted that storm doors do not provide security or protection from forced entry. Commission Exhibit 1 at 179-80.

It appears from the record that the Association did not respond to Dr. Saunders' memorandum until March 3, 2005, when the Community Services Association sent the Respondent correspondence by regular and certified mail. In this letter Ms. Susan Szajna, the Association's community manager, advised Dr. Saunders that the Board had considered her appeal at its January 25, 2005, meeting. Ms. Szajna further advised Dr. Saunders that the Board had denied her appeal to keep the storm/security door. Commission Exhibit 1 at 181-82.

Counsel for the Respondent, Mr. John Racin, submitted for the record a letter he sent on June 2, 2005 via messenger to Ms. Szajna. Commission Exhibit 1 at 188-89. In his letter, counsel again asked the Board to reconsider its decision that Dr. Saunders be required to remove the storm/security door. Counsel noted that Dr. Saunders had "only reluctantly" removed the lattice partition from her back deck (the privacy screen) "hoping it would serve as a demonstration of good faith" in trying to resolve the issue of the security/storm door. *Id.* at 188.

Counsel noted the "routine" occurrence of residential crime in Montgomery County, arguing that the Board should want a single woman living alone to have further protection against intruders. Counsel also repeated Dr. Saunders' prior assertion that the Association's by-laws and rules were silent on the subject of security doors. Counsel went on to note that, "[t]o the extent the Board contends the problem to be an absence of a uniform glass door at 3727, it has plainly acquiesced in other solutions at nearby

residences." *Id.* The record does not indicate what, if any, response the Board made to Dr. Saunders' letter of June 2, 2005.

On January 13, 2006, the Association filed a complaint with the Montgomery County Commission on Common Ownership Communities. The Commission so informed Dr. Saunders by mail on January 19, 2006. Commission Exhibit 1 at 183-84. Dr. Saunders responded to the complaint, through counsel, on February 17, 2006. In her response, Dr. Saunders submitted the letter of June 2, 2005, plus photographs and other submissions. Commission Exhibit 1 at 185-201. The Complainant rejected an offer of mediation and the Commission accepted jurisdiction of the dispute at its April 5, 2006, meeting. Notice was sent to each party that the Commission had accepted jurisdiction of the complaint.

DISCUSSION

In her response to the Association's complaint, and again at the hearing, Dr. Saunders provided evidence that crime has increased in the area in which she lives. Respondent's counsel argued that this fact is relevant given that the Respondent lives alone and has been combating a life-threatening illness. According to counsel, these facts necessitate the installation of a security door in order to assist in keeping out intruders.

The standards we must follow when reviewing an action of a board of directors are those set out in *Dulaney Towers Maintenance Corp. v. Obrey*, 24 Md. App 464, 418 A.2d 1233 (1980) and *Kirkley v. Seipelt*, 212 Md. 127 (1957). The hearing panel must determine if the action or rule in dispute was properly adopted, and if so, whether there is a reasonable basis for it. So long as a reasonable basis exists, the Panel is not free to substitute its own judgment for that of the board. *See, e.g., John McPherson v. Morningside Homeowners Association*, CCOC No. 614-O (December 22, 2004); *Dufief Homes Association v. Nicoletta Sacchi*, CCOC No. 589-G (March 29, 2006). If, however, a rule is not applied in a consistent manner then the use of that rule to deny a proposed change can be overturned by the Panel on the grounds that it is arbitrary or capricious. *Markey v. Wolf*, 92 Md. App. 137, 163-64, 607 A.2d 82 (1992).

It was entirely appropriate for Dr. Saunders to raise these issues with the Association; both in her application for the storm/security door and in any efforts she might undertake to convince the Board to change its Architectural Guidelines. Indeed, it is incumbent upon any homeowners association to consider the safety and security of its members in fashioning both its by-laws and the rules by which it enforces them.

Respondent's counsel has failed to persuade us, however, of the relevance of these issues to the Commission. Neither the Commission nor this panel has the authority to alter the Association's Architectural Guidelines. The Commission's sole function is to review the guidelines as they exist and determine whether the Association provided Dr. Saunders with due process by applying the guidelines in a fair and consistent manner. Indeed, were this panel to consider the additional facts proffered by counsel, it would be placed in the position of reviewing whether there were other, less visibly intrusive means

by which Dr. Saunders could ensure her security (e.g., burglar alarms, motion detection security lights). This panel has neither the jurisdiction nor the qualifications to perform these functions.

In her response to the complaint, Dr. Saunders advised the Commission that she expected the evidence to show: "(1) unduly broad application of the Association's advance approval policy; (2) assuming the policy applies to the addition of a security door in these circumstances, inadvertent failure to seek such approval; and (3) undue and unreasonable burden entailed in removing an aesthetically pleasing and protective security door for a [sic] older woman living alone in a high crime area." Commission Exhibit 1 at 186. The Respondent further asserted as an affirmative defense an absence of legal capacity for the Association to bring the proceeding "in that we do not believe its Board of Directors could have approved such an irrational and wasteful expenditure on behalf of its constituent membership." *Id.*

Article V of the Association's Declaration of Covenants provides that no "exterior addition to or change or alteration therein be made" to any building or structure until the plans and specifications of the proposed change were submitted for approval, in writing, to the Board of Directors or a covenant committee. Commission Exhibit 1 at 23. Dr. Saunders has submitted no evidence that would convince us that the covenant did not apply to the addition currently before the Commission.

Paragraph 18 of the Architectural Guidelines specifically prescribes the appearance and color scheme for storm doors within the Community. Commission Exhibit at 161. It is Dr. Saunders' assertion that paragraph 18 does not apply to the security door she installed. This does not strike us as a valid distinction.

It is true that paragraph 18 of the Architectural Guidelines does not provide a specific definition as to what constitutes a storm door. We find, however, that a storm door, as commonly understood, serves a distinct function: to protect a home's primary door from wear associated with long-term exposure to the elements. Having served that function, a storm door may also be reinforced to fulfill the additional function of providing additional security against intruders. This additional function does not detract from the storm door fulfilling its primary (or, as the Respondent would have, alternative) function. We therefore cannot find the Association's application of its architectural policy to the security door unduly broad.

Dr. Saunders undertook to modify the appearance of her townhouse without first submitting her plans to the Association's Architectural Committee for approval. Dr. Saunders terms this failure "inadvertent." It should be noted that Dr. Saunders is not a novice in such matters. She testified that when living in another community, she served as president of the residents' association. Even granting her assertion that the association of that community did not bother members on aesthetic improvements of their residences, she should have a greater awareness than the average association member that homeowners should consult the association's by-laws and regulations before undertaking

any alteration of their properties. And, by purchasing property within Blackburn Village, Dr. Saunders did agree to abide by the terms set forth in the Association's governing documents. Thus, Dr. Saunders is responsible for any failure to comply with the Association's procedural requirements, regardless of whether that failure to comply was inadvertent.

The Respondent asserts that removing an "aesthetically pleasing and protective security door" would be an undue and unreasonable burden upon Dr. Saunders. Whether the door is "aesthetically pleasing" is a subjective matter and not one currently before this panel. As for whether removing the door would constitute an undue and unreasonable burden, the Association's by-laws specifically note that homeowners who undertake to make alterations to their property prior to receiving approval do so at the risk of being subsequently ordered to undo any alterations.

The Declaration of Covenants provides for the maintenance of the architectural consistency of the community. Presumably, a majority of the residents of Blackburn Village reside in the community out of an aesthetic desire to maintain and enforce that consistency. It therefore strikes us that any burden Dr. Saunders might incur in correcting her unapproved alteration would be outweighed by the burden the rest of the community would incur by having its regulations ignored.

As for the Respondent's affirmative defense that the Board could not have approved "such action an irrational and wasteful expenditure on behalf of its constituent membership," this is an issue most appropriately taken up with the constituent membership either at a Board meeting or at the next election. It is not, however, an issue that concerns the Commission. So long as there is a reasonable basis for the rule, the rule was properly enacted under the bylaws, and is not inconsistent with any law, the Commission must enforce it. *Dulaney Towers Maintenance Corp. v. O'Brey*, 46 Md.App.464, 466 (1979)

The only issue remaining before us is whether the Association, through the Board and its Architectural Committee, acted to enforce its rules in a manner consistent with the requirements of due process and of its own rules. It is here that the Association has fallen short.

At the hearing, the Association presented testimony from Mr. Leonard Morton. Mr. Morton is a member of the Association's Board of Directors and chairs the Architectural Committee. It would be more accurate to state that Mr. Morton is the Architectural Committee in that he is its only member due to an absence of other members of the community being willing to serve.

According to Mr. Morton's testimony, rather than submitting an application for an alteration of their residences in writing, residents in the community often would approach him and describe their project. Mr. Morton frequently would then either approve or disapprove a project based upon the oral description. Should Mr. Morton disapprove, the applying resident could then either modify his proposal or appeal to the entire Board of

Directors. Should Mr. Morton approve, however, then the resident could commence with his project without further approval or review by the Board.

The difficulty of such a system was demonstrated during cross-examination of the Association's witnesses. During the cross-examination of the community manager, Ms. Szajna was shown Respondent Exhibit 6, a photograph of a storm door of another property within the community. The storm door had a full fronted glass window behind which was a grid work of slender brass rods. The rods were equally spaced and ran the length of the door, two running in a vertical direction and four running horizontally. Asked her opinion of the door, Ms. Szajna opined that the door violated the Architectural Guidelines. Ms. Szajna further testified that she first noticed the door two weeks prior to the hearing and that the homeowner would be receiving a violation notice.

However, when shown the same photograph, Mr. Morton testified that the door did comply with the guidelines and that he would have given his approval if approached by the homeowner. Both the homeowner and the Association would be placed in a difficult position if the owner of the door represented in Respondent Exhibit 6 had acted upon the prior approval of Mr. Morton and then subsequently received a violation notice from the managing agent. The Board would then be placed in an unfortunate position if the majority agreed with its managing agent that the door was in violation after the homeowner had acted in good faith by relying on an informal approval from the chair of its Architectural Committee.

Article V of the Declaration of Covenants and its supporting rules and guidelines provide that the Architectural Committee must consist of three or more members, one of whom must be a Board member. Having the Architectural Committee consist of only one member is a direct violation of the terms of Article V. The fact that Mr. Morton acted in such an informal manner in approving or disapproving projects without consultation with other Board members means that the Committee was carrying out its duties in an arbitrary and capricious manner.

This is not to suggest that Mr. Morton was in any manner acting in bad faith in carrying out his duties. Contrary to the suggestions of Respondent's counsel, the panel believes Mr. Morton was attempting to perform his duties in a conscientious manner. The difficulty was with the Board making Mr. Morton a one-person Architectural Committee. According to the Declaration of Covenants, any decisions regarding the architectural integrity of the community must have been handled by either a three-person committee appointed by the Board or by the Board as a whole.

By entrusting the Architectural Committee to only one person, the Board of Directors denied Dr. Saunders, and potentially all the other residents of Blackburn Village, their due process rights. If Dr. Saunders had approached Mr. Morton either on the right day, or perhaps with a slightly different door, she might have had received his approval and thus been immune to having the door subsequently disapproved by the Board as a whole. If however, she had filed an application in writing to the management agent or the Board of Directors as a whole, she would have been denied. The fact that

Dr. Saunders did neither and instead acted without prior approval does not, in our opinion, mitigate the lack of due process protections that were available to her.

Because our decision finds that the Complainant's actions in this dispute violated its own procedural requirements, we do not conclude that the Complainant may never enforce its storm door rule against Respondent's security door. However, if it wishes to do so, it must do so properly. At the same time, the Respondent is free to demonstrate to the Association her arguments that a rule prohibiting security doors is unwise, and to seek a change in that rule.

At the hearing, the Respondent made a request for attorney's fees. The Respondent subsequently submitted additional filings in the record in support of her request. In her filings, the Respondent took issue with the testimony of Ms. Szajna regarding the storm door depicted in Respondent Exhibit 6. In support of her position, Dr. Saunders included an affidavit by Mr. Romuald S. Dallo, owner of the residence with the storm door depicted in the photograph. The Association objected to the filing of this affidavit, arguing it went beyond the scope of the Panel's order and denied the Association an opportunity to cross-examine the witness. We agree with the Association on this point.

The Respondent also argues that bad faith was demonstrated by the refusal of Ms. Barbara Jennings to testify at the hearing and her subsequent outburst in response to a point being made by opposing counsel during the course of the hearing. The Panel concedes that the behavior of Ms. Jennings was less than respectful to the proceedings. We would further note that, by not testifying, there is no evidence in the record to explain why Ms. Jennings, a member of the Board of Directors, chose to make an alteration to her unit (a gazebo) without first seeking the required approval of the Architectural Committee. The Panel will further note that, as with Mr. Dallo, the Respondent had failed to subpoena Ms. Jennings as a witness and it was fortuitous that she was present at the hearing at all. Whether Ms. Jennings' testimony would have been harmful to the Association's case, merely embarrassing or completely inconsequential is entirely speculative. At the hearing, the panel withheld its final ruling on whether Ms. Jennings should be compelled to testify pending the hearing of the testimony of the other witnesses. Following the hearing of that testimony, neither side sought to revisit the issue of compelling Ms. Jennings to testify.

Finally, Respondent seeks to establish that the Complainant acted in bad faith by the fact that Mr. Morton became aware of the Dr. Saunders' storm/security door when his wife first noticed the door complained about it. What the Respondent has failed to establish is that Mr. Morton's wife had a personal interest in the outcome other than an interest common to the entire Association of having its architectural standards consistently enforced. This panel is thus unwilling to credit an accusation that Mr. Morton acted in bad faith in performing his duties to enforce the Association's architectural standards simply because it was his wife who first noticed an alleged violation.

Request for Removal of Storm Door

FINDINGS OF FACT

1. Dr. Deloris Saunders is the owner of the property at 3727 Berleigh Court, Burtonsville, MD 20866. This property is located within the Blackburn Village development.

2. All homeowners within the development are, by virtue of their home ownership, members of the Blackburn Village Community Association As members of the association, all homeowners within the Blackburn Village community are required to maintain their property pursuant to guidelines set forth in the Association's Declaration of Covenants, By-Laws and Articles of Incorporation and to rules set forth by an elected Board of Directions.

3. To maintain the architectural integrity of the community, the community's Declaration of Covenants requires that before making any alterations to their property, homeowners must obtain prior approval of the Board of Directors or its appointed Architectural Committee.

4. Dr. Saunders was required to seek prior approval before adding a storm door to her property but failed to do so.

5. The Association's Declaration of Covenants provides that architectural standards throughout the community are to be maintained by an Architectural Committee. The Committee is to consist of three or more members, one of whom must be a member of the Board of Directors. At the time of the hearing, only one individual, Mr. Leonard Morton, was serving on the Architectural Committee, and the Architectural Committee has thus been acting in violation of the Association's by-laws for some time.

6. Complainant has clear rules on the appearance of storm doors, which it was reasonable for the Complainant to apply to the appearance of security doors. However, at the time Respondent installed her storm/security door, Complainant was applying the storm door standards inconsistently to security doors.

CONCLUSIONS OF LAW

1. The legal principles applicable to this case are set forth in *Kirkley v. Seipelt*, 212 Md. 127, 128 A.2d 430 (1957) and *Markey v. Wolf*, 92 Md. App. 137, 607 A.2d 82 (1992). Rules establishing a general plan or scheme for the construction of dwellings so as to create an attractive and desirable neighborhood are enforceable in equity notwithstanding that no specific standards are set out in the covenants themselves; however, approval or disapproval of alterations or modifications to the property must be reasonable and made in good faith.

2. The present case involves an official denial of the installation and use of a storm door/security door on the grounds that the door as installed does not meet the standards for storm doors. The panel concludes that the rule is reasonable, properly adopted, and valid. The panel concludes that the Respondent's door violates the standards set for storm doors. The rules also require advance approval before a storm door is installed and the panel further concludes that Respondent violated that rule by installing the door without approval.

3. However, because we find that the evidence shows that the Complainant does not treat all storm doors/security doors consistently, the panel concludes, as a matter of law, that the denial of approval for Respondent's storm door was arbitrary and capricious, and is therefore unenforceable.

4. The Complainant violated its by-laws by appointing an Architectural Committee consisting of just one person; the decisions taken by this Committee as currently constituted are not binding and enforceable.

Request for Attorney's Fees

FINDINGS OF FACT

1. Each side has requested the awarding of attorney's fees.

2. The Association's by-laws provide that the Board of Directors has the right to institute legal action to enforce the architectural guidelines. The by-laws further provide that "the prevailing party is entitled to an award for counsel fees determined by the Court." Commission Exhibit 1 at p. 163.

3. After the close of the hearing, the record was kept open for 10 days to allow both sides to supplement the record. For Dr. Saunders the record was kept open so that she might present evidence in support of her application for legal fees. Dr. Saunders subsequently filed a supplemental submission in which it is argued that legal fees should be granted due to the Association conducting this action in bad faith. We do not find that the evidence submitted by Dr. Saunders supports this finding.

3. There is no evidence in the record to support a finding that either side acted to advance a frivolous dispute.

CONCLUSIONS OF LAW

The Association's by-laws provide for the awarding of attorney fees to the "prevailing party." In this instance, however, we do not find the awarding of attorney's fees to be appropriate. We find that both sides acted in good faith to protect what each regarded as their rights. At the same time, however, we also find that since both parties violated the rules of the Association neither party is entitled to prevail completely.

Accordingly, the requests for an award of attorney's fees by both sides are denied.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, and for the reasons set forth above, it is as of the effective date of this decision hereby ORDERED:

1. Complainant's request for relief is denied.

2. Complainant must, within thirty (30) days of the issuance of this Order, appoint an Architectural Committee whose make up complies with the requirements set forth in the Association's governing documents.

3. Complainant must distribute copies of this opinion within fifteen (15) days from the date of the issuance of this order to all members of the Association, either in printed form or electronically.

4. Within sixty (60) days from of the date of this Order, the Respondent must submit an application in proper form to the properly-constituted Architectural Committee for approval of her security door. The Architectural Committee must review that application in a manner consistent with the rules of the Association and applicable law, and may approve or deny it. Nothing in this Order restricts the Respondent from seeking a change in the architectural standards pursuant to the rules of her Association or from appealing an adverse decision of the Architectural Committee.

5. Complainant may take no adverse action against Respondent concerning the security door until such time as a duly-constituted Architectural Committee reviews and acts on her application.

6. The requests for attorney fees by both parties are also denied.

Panel Members Harold Huggins and Vicki Vergagni concur in the foregoing.

Any party aggrieved by the action of the Commission may file an administrative appeal to the Circuit Court of Montgomery County, Maryland, within thirty (30) days after the date of entry of this Order, pursuant to the Maryland Rules of Procedures governing administrative appeals.

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John Sample, Panel Chair
Commission on Common Ownership Communities