

MONTGOMERY COUNTY, STATE OF MARYLAND

John H. McPherson
7 Silver Moon Drive
Silver Spring, MD 20904

Complainant

vs.

Morningside Homeowners Association, Inc.
c/o Community Association Services
P.O. Box 5309
Laytonsville, MD 20882

Respondent

:
:
: COMMISSION ON COMMON
: OWNERSHIP COMMUNITIES

:
:
: Case No. 02-614-0

:
:
: Panel Hearing Date: Nov. 17, 2004
:
: Decision Issued:

Panel Chair Memorandum By: John F. McCabe, Jr.

MEMORANDUM DECISION AND ORDER

The above entitled case came before a Hearing Panel of the Commission on Common Ownership Communities for Montgomery County, Maryland, for hearing on November 17, 2004 pursuant to Sections 10B-5(i), 10B-9(a), 10B-10, 10B-11(f), 10B-12, and 10B-13 of the Montgomery County Code, 1994, as amended. The duly appointed Hearing Panel considered the testimony and evidence of record, and finds, determines and orders as follows:

BACKGROUND

This is a complaint filed on November 22, 2002 by a unit owner in a homeowners association against the Association. The Complainant filed an application for approval of a deck with a “privacy fence” or “lattice”. The Association, by its Board of Directors sitting as the Covenant Committee, approved the deck but denied the privacy fence/lattice. The Complainant contends that the denial

was unreasonable and contrary to decisions regarding privacy fences or lattices on other decks in the community.

FINDINGS OF FACT

1. The Complainant, John H. McPherson, is the owner of a townhouse in the community of Morningside and a member of the Morningside Homeowners Association, Inc.

2. The Respondent, Morningside Homeowners Association, Inc. is a homeowners association within the meaning of the Maryland Homeowners Association Act, Title 11B, Real Property, Annotated Code of Maryland.

3. Respondent consists of approximately 150 units of which approximately 130 are townhouses; the remaining units are single family detached homes.

4. Article VI, Section 6.01 of the Declaration of Covenants, Conditions and Restrictions for Morningside Homeowners Association, Inc. requires, in substance, that no structure shall be erected and no exterior addition or change or alteration to any property shall be made until the plans have been submitted to and approved in writing “as to harmony of external design and location in relation to surrounding structures and typography and conformity with the design concept for the Property by the Board of Directors of the Association, or by a Covenant Committee composed of three (3) or more representatives appointed by the Board of Directors of the Association.”

5. Respondent produced as Respondent’s Exhibit 1 a filing from the depository in the Clerk’s Office for the Circuit Court of Montgomery County, Maryland which consisted of Morningside Homeowners Association Architectural Guidelines. Section IIC addresses patios and decks. Section IIC2(d) provides “patios and decks on town homes may not be screened or enclosed.”

6. On April 23, 2002 Complainant filed an application with the Respondent for

approval of a deck which also showed a “privacy fence” or “lattice”. By letter dated May 29, 2002 the Respondent approved the deck as modified. The modification was that the privacy fence or lattice on the deck was denied.

7. The testimony of record was that while the Respondent, at the time of Complainant’s application, had appointed a Covenants Committee, that committee never functioned and never heard any applications. With respect to Complainant’s application, it was heard by the Board of Directors at a meeting on May 25, 2002. That meeting was a closed meeting of the Board.

8. Complainant appealed the decision of the Board of Directors to deny the privacy fence/lattice. On June 24, 2002 the Board of Directors held an appeal hearing which was an open meeting. The record does not indicate, and the parties were able to produce no evidence which established that the Board of Directors ever issued a decision on the appeal.

9. At the time that Complainant filed his application for approval of his deck with a “privacy fence” or “lattice”, there were no more than three townhouses in the community which had decks with privacy fences or lattices.

10. As of the date of the hearing on November 18, 2004 there remained only one deck in the community which had privacy fencing or a lattice, the deck located at 13401 Silver Moon Way.

11. The testimony and evidence showed that the privacy screening on the deck in the community at 13401 Silver Moon Way was constructed without approval. The property owner who constructed the deck thereafter moved, but failed to deliver to the new owner a disclosure statement as required by law. Consequently the Respondent was not asked to specify whether any violations at the property existed at the time of this sale. Therefore, the new owner moved into the property

without knowledge that the privacy screen was in violation of the covenants and guidelines. Thereafter, Respondent approved the deck at 13401 Silver Moon Way for the following reasons: The property is a corner lot overlooking a parking area which is a source of activity, noise and lights. As such, the normal activity of automobiles parking, coming and going, intrudes upon the reasonable enjoyment of the property. Additionally, the current property owner was innocent of the violation and of knowledge of the violation. This deck is the only deck currently existing in the community with a privacy fence and it is the only privacy fence on a deck approved by Respondent.

12. A former Board member of Respondent testified that it does not approve privacy screens or lattices on decks because it wishes to preserve the openness of the community and to avoid the disharmonious appearance which would likely result from the construction of several different styles and types of privacy fencing on elevated as well as ground level decks. Respondent has consistently enforced this principle with the sole exception of the deck at 13401 Silver Moon Way.

13. Respondent has claimed attorney's fees pursuant to Article XII, Section 12.05 of the Declaration of Covenants which provides in part

“If the Association or any Owner or Mortgagee of any Lot, successfully brings an action to extinguish a violation or otherwise enforce the provisions of this Declaration or the Articles of Incorporation or Bylaws of the Association, the costs of such action, including legal fees, shall become a binding, personal obligation of the Owner committing or responsible for such violation, and such costs shall also be a lien on the Lot of such Owner, provided that the requirements of the Maryland Contract Lien Act are substantially fulfilled.”

The amount of attorney's fees requested is in excess of \$13,000.00.

14. The Complainant has not been charged with any violation of the covenants or guidelines of Respondent with respect to his deck. When the Complainant was constructing his deck,

Respondent sent him a cease and desist letter advising him that he did not have approval to construct a privacy fence or lattice on the deck. The Complainant never constructed a privacy fence or lattice on the deck. There was some testimony that the posts which the Complainant constructed on his deck were in violation of his approval, but there was also testimony that they were not in fact in violation. The clear testimony, uncontradicted, was that Complainant has not been charged with any violation of the covenants or guidelines as a result of the construction of his deck in its present form.

CONCLUSIONS OF LAW

1. The governing legal principles applicable to this case are those set out in Kirkley vs. Seipelt, 212 Md. 127, 128 A.2d 430 (1957), and cases decided thereafter. In general, the Panel must apply a reasonableness test, which means that it must decide whether it is possible to conclude that a reasonable person could act as Respondent did. The Panel does not second guess Respondent. Additionally, because issues have been raised as to other decks in the community, although there were only three at the time that the Complainant filed his application and only one presently, the Panel must consider whether the covenants have been abandoned or waived or the character in the neighborhood has changed or that violations of the covenants have been acquiesced in to an extent that the prohibition against privacy fences or lattices on decks may not be enforced.

2. While Respondent may not have carefully articulated its reasons for denying the privacy fence/lattice requested by Complainant, nevertheless, the standards of Article VI, Section 6.01 of the Declaration of Covenants are sufficient, in themselves, to support a denial which is reasonable and made in good faith. Respondent has indicated that the denial is based primarily upon the preservation of open space and of the harmony of the appearance of the community. In a town house community, standards must often be more rigid because of the density of the community.

The Panel cannot conclude based on the evidence presented that denial of the privacy fence/lattice is an action which no reasonable person could take under the circumstances. Furthermore, the existence of three, and later one, privacy screen/lattice does not provide a sufficient factual basis on which to reach the legal conclusion that the covenants have been abandoned, waived, that the character of the neighborhood has changed or that violations of the covenants have been acquiesced in.

3. The Panel can reach this decision based upon the language of Article VI of the Declaration of Covenants. Additionally, the architectural guidelines for the Association, which have been properly filed in the depository in the Circuit Court have language quoted above which prohibits screening on decks on town houses. That provision could reasonably be interpreted to prohibit the privacy fence/ lattice sought by Complainant. However, even without the guidelines the Panel would reach the same result in this case.

4. Respondent failed to accord the Complainant proper treatment in at least two respects. First, it decided Complainant's application at a closed meeting on May 25, 2002. There is no basis in law for deciding the application in a closed session. Second, while it held an appeal hearing, it never gave Complainant a result. The Respondent should have held an open meeting to decide Complainant's application and it should have given the Complainant the courtesy of a decision on his appeal.

5. The Panel finds that the process whereby the Board of Directors sits as the Covenants Committee, and an appeal from that decision is to the same Board, is one which will often offer little opportunity for a homeowner to achieve a reversal. Nevertheless it is a process set forth in the recorded covenants and the homeowners have constructive notice of those covenants when they purchase in the community. The Panel is not able to say that process is inherently a

denial of due process.

6. Article XII, Section 12.05, by its language applies only to an action brought by Respondent (or others named therein) to extinguish a violation or to enforce the provisions of the Declaration. Complainant was never guilty of a violation and no action was ever necessary to enforce the provisions of the Declaration against him. Therefore the facts in this case do not fall under the express language of Article XII, Section 12.05. Consequently there is no basis for an award of attorney's fees.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law it is this _____ day of _____, 200

ORDERED:

1. The appeal is denied and the decision of the Respondent to deny the privacy fence/lattice is upheld.
2. Because the Respondent held a closed meeting to decide Complainant's application, and then failed to apprise Complainant of the result of his appeal, the Complainant is awarded a refund of the filing fee incurred in filing this application.
3. Because Complainant was never guilty of any violation of the covenants the provisions for award of attorney's fees do not apply and none are awarded.

The foregoing was concurred by the panel members Sarah M. Havlicek and Lawrence Stein.

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 of this Order, pursuant

to the Maryland Rules of Procedures governing administrative appeals.

John F. McCabe, Jr., Panel Chair