Montgomery County
Consumer Affairs
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Received

Before the
Commission on Common Ownership Communities
for Montgomery County, Maryland
April 5, 2001

In the Matter of	:	
	:	
Neelsville Estates	:	
Community Association	:	
	:	Case No. 482-G
Complainant,	:	
	:	
vs.	:	
	:	
Charles Miller	:	
Marina Miller	:	
	:	
Respondents.	:	

Decision and Order

The above-entitled case, having come before the Commission on Common Ownership Communities for Montgomery County, Maryland, for hearing, on January 17, 2001, 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:

On May 26, 2000, Neelsville Estates Community Association (hereinafter the "Complainant" or "Association") filed a formal dispute with the Office of Common Ownership Communities against Charles and Marina Miller (hereinafter the "Respondents"). The Complainant alleged that the Respondents erected a fence on their lot without written approval of the Association as required by the Covenants of the Association. The Respondents admit that they erected the fence without obtaining approval but claim that the Association's allowance of similar fences barred the Association from requiring the removal of the Respondent's fence.

Inasmuch as the matter was not resolved through mediation, this dispute was presented to the Commission on Common Ownership Communities and the Commission voted that it was a matter within the Commission's jurisdiction and the hearing date was scheduled.

Findings of Fact

Based on the testimony and evidence of record, the Panel makes the following findings:

1. Charles Miller and Marina Miller are the owners of a single-family detached home within the Neelsville Estates Community Association known as 20408 Mill Pond Terrace, Germantown, Maryland 20876 ("Lot").

2. The Association was created by Articles of Incorporation and a Declaration of Covenants, Conditions and Restrictions ("Declaration") which was recorded among the land records of Montgomery County, Maryland and which encumber and bind the Respondent's Lot and approximately 150 other lots and common parcels.

3. Article VII, Section 1 of the Declaration states, *inter alia,* the following:

> ...no building, fence, wall or other improvements or structures shall be placed, moved, altered or maintained upon the Property, nor shall any exterior addition to or change or alteration therein be made...until the complete plans and specifications showing the location, nature, kind, shape, height, material, color...shall have been submitted to and approved in writing...by an Architectural and Environmental Preservation Committee designated by the Board of Directors.

4. On April 6, 1998, the Respondents submitted an application to the Association to erect a 5' board on board style fence on their Lot. Respondents requested a response by April 10, 1998, as they anticipated starting fence construction the following weekend, subject to receiving approval.

5. Respondent Charles Miller admits that Lynn Trusal, Chairperson the Association's Architecture Committee, stopped by the Respondent's residence on or about April 11, 1998 and informed the Respondents that proceeding without approval of the Architecture Committee was at the Respondents risk and the Respondent Charles Miller acknowledged the same.

6. On or about April 15, 1998, Respondents proceeded with the installation of the subject fence despite the fact that Article VII, Section 3 of the Declaration allows the Association 60 days to respond to applications.

7. On or about May 14, 1998, the Architecture Committee, by letter from Lynn Trusal, notified the Association's managing agent that the Committee had rejected the "already constructed" fence since the fence "...did not meet the style criteria as detailed in Section 9." Article VII, Section 9 of the Declaration states, inter alia, as follows:

> Any fence constructed upon the Property shall be substantially similar in design, dimensions and material to the fences installed by the Declarant as a part of original construction...

8. There was conflicting testimony as to when the Respondents were informed, in writing, of the denial of their application but Respondents admit that the fence was

installed well before the 60 day time limit afforded the Complainant to review applications under Article VII, Section 3 of the Declaration.

9. Complainant testified that the Association has always considered the original Declarant fence design to be "estate" style fencing (split rail) but admits that it did not promulgate any specific guidelines or standards governing what, in fact, constitutes an "estate" style fencing.

10. In support of their decision to proceed with the installation of the fence without approval, Respondents testified that at the time of their installation, two other lots within the community had similarly-styled board on board fences (6 Foxwood Court and 20405 Mill Pond Terrace) and that Complainant was unresponsive to Respondent's earlier inquiries (submitted to Complainant's prior management company) concerning appropriate fence-styles.

11. Complainant's unrebutted testimony was that the Association had proceeded against the owners of 20405 Mill Pond Terrace and that the fence had been removed; further, as to 6 Foxwood Terrace, Complainant admits that the fence in question was approved by the Association but was approved by the developer-appointed Board of Directors and the homeowner Board did not believe that the Association could legally require the fence's removal.

12. Despite demand Respondents have failed to remove the fence.

Conclusions of Law

The Association has the express authority in Article VII of the Association's Declaration to approve any exterior additions, changes or alterations upon the Property prior to commencement of the same.

The evidence supports the Association's position that Respondents never received approval for their fence and installed the fence with full knowledge that the fence had not been approved. Further, any dispute as to when the Respondents learned of the Association's rejection of the application was moot in that the Respondents installed the fence prior to the expiration of the Association's Declaration-mandated review period.

The fact that there were two other board on board fences similar in style to Respondents fence at the time that the Respondents installed their fence, in a community of 150 homes, did not justify Respondents proceeding without approval and did not constitute a waiver by the Association of any policy requiring "estate" style fencing. While written guidelines properly recorded in the homeowner association's depository are recommended, it is clear that the Association consistently enforced the unwritten policy of the Association regarding "estate" style fencing.

The Association's decision to deny the application was not arbitrary or capricious and was reasonably related to and consistent with the Association's interpretation of the style of fencing permitted by the Declaration.

No evidence was presented by either party as to the legal fees or costs incurred and therefore no award legal fees or costs shall be awarded.

Order

In view of the foregoing, and based on the evidence of record, it is, on this 4th day of April, 2001, hereby Ordered by the Commission Panel the Respondents must remove the fence not later than December 31, 2001.

The foregoing was concurred in by panel members Philbin, Weiss and Maloney.

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 from the date of this Order in accordance with the Maryland Rules of Procedure.

Peter S. Philbin, Panel Chair
Commission on Common
Ownership Communities