Before the
Commission on Common Ownership Communities
Montgomery County, Maryland

In the Matter of

Julien Nicolas Coly Faye	x	
12131 Amber Ridge Circle	x	
Germantown, MD 20876,	x	
Complainant,	x	
	x	
v.	x	Case No. 548-O
	x	September 20, 2002
Amber Ridge @ Milestone	x	
Community Assn.	x	
ComSource Mgmt, Inc.	x	
16 Executive Park Court	x	
Germantown, MD 20874,	x	
Respondent.	x	

DECISION AND ORDER

The above-entitled case, having come before the Commission on Common Ownership Communities for Montgomery County, Maryland, 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 Commission, having considered the testimony and evidence of record, finds, determines and orders as follows:

Background

Julien Nicolas Coly Faye (Complainant), owner of 12131 Amber Ridge Circle, Germantown, Maryland, a unit covered by the Declaration of Covenants, Conditions and Restrictions of the Amber Ridge at Milestone Community Association, Inc., filed a complaint with the Office of Common Ownership Communities on November 16, 2001, alleging that the Amber Ridge at Milestone Community Association (Respondent or Association) had ordered him to remove brick edging which he constructed around the perimeter of his property.

On behalf of the Amber Ridge at Milestone Community Association, the management company responded that Mr. Faye had constructed a brick wall without applying for or receiving approval in accordance with Association documents and that the wall is in violation of the Community Declaration.

Inasmuch as this matter was not resolved through mediation, this dispute was presented to the Commission on Common Ownership Communities for action pursuant to Section 10B-11(e)

on April 3, 2002, and the Commission accepted jurisdiction. The matter was scheduled for public hearing on July 24, 2002 and a public hearing was conducted on that date. At the conclusion of the hearing the record was closed.

Findings of Fact

Mr. Faye testified that in November of 1999 he had prepared and submitted an application to build a fence around his property. The application form includes a request that the applicant get the signature of neighbors to indicate their awareness of the application. Mr. Faye and Ms. Cheryl Douglas, one of his neighbors, both testified that each had signed an application on behalf of the other at the same time, just prior to his submission of his application. He submitted the application to the person who was then the manager for Amber Ridge. The application was returned to him by a neighbor and member of the Board of Directors, Eugene Davenport, as Mr. Faye had not signed the application in the space where the owner's signature is requested. Two weeks later, Mr. Faye testified, he resubmitted the application. That application is not in the management records of the community and no one on behalf of the community was able to testify that they had seen it.

The application submitted by Ms. Douglas at the same time Mr. Faye first submitted his application was also for a fence and was denied.

The Declaration of Covenants, Conditions and Restrictions for Amber Ridge at Milestone Community Association, Inc. is extremely comprehensive, and includes many provisions more commonly found in community by-laws. Article VII relates to Architectural Control and Enforcement and prohibits "excavation, construction, building, landscaping, development or other improvements...including any change or alteration or exterior addition to any improvements" situated within the community without compliance with this Article.

The Article provides for the establishment of an Architectural Standards Committee to consider and act upon such proposals or plans submitted to it. The Committee is authorized to establish reasonable rules for the submission of applications and to adopt and promulgate architectural standards. At section 7.11, the Committee is required to act on an application submitted in accordance with rules which it has adopted within 60 days of submission and if it fails to do so the applicant may submit a written notice to the Committee advising it of its failure to act. If the Committee fails to approve or disapprove the application within 30 days after receiving such a reminder, the application is deemed approved.

The Board of Directors for Amber Ridge has not appointed an Architectural Standards Committee and performs these responsibilities.

Mr. Faye testified that he had sent to the community manager for the Architectural Standards Committee a reminder of his pending application in accordance with section 7.11 on February 6, 2000. This letter is not in the Association records. Mr. Faye received no response to

his application or the reminder letter.

Due to other events in his family in the months following submission of the reminder letter, Mr. Faye did not begin construction until April 7, 2001, more than a year after his application might have been considered deemed approved. The application form filed by Ms. Douglas in 1999, which is presumably a duplicate of that Mr. Faye submitted at the same time, includes conditions to which the applicant agrees by signing the application. They include at paragraph 2. "...that no work on this request shall commence until written approval of the Architectural Control Committee has been received by me." and at paragraph 8. "...that alteration authority granted by this application will be revoked automatically if the alterations requested have not commenced within 180 days of the approved date of this application and/or completed by any date specified by the Committee."

Article IX of the Covenants relates to Use Restrictions for Amber Ridge at Milestone. At section 9.2.21. "Fences and Walls" it says:

> Except as installed by the Declarant or any Builder, no fence, wall or other similar enclosure may be built on any Lot. The foregoing restriction shall not be construed to prohibit the growth of an ornamental hedge fence, which shall be kept neatly trimmed, and shall be trimmed to a height of not more than three (3) feet in the front yard of any Lot and the side yard of corner lots.

Mr. Faye, Ms. Douglas and others had submitted applications to build fences which some home owners had understood at the time they bought their houses would be constructed by the developer. But the developer had filed for bankruptcy protection before constructing fences in this section of the community. Photographs submitted at the hearing show white picket fences constructed in other sections of the community. The Board of Directors, recognizing a problem in the expectation of homeowners to have fences and the language of the Declaration, in April 2000 requested an opinion from an attorney whether the Board could approve applications for construction of privacy fences. The attorney interpreted section 9.2.21 as prohibiting fences not built by the developer, other than hedges as described, and indicated that the only option was to amend the Declaration changing the language of that section. In August 2000, the Board circulated notice of a meeting and a proposed Declaration amendment to change section 9.2.21 so that fences similar to those constructed by the original builder could be approved by the Architectural Committee for corner lots and constructed by the homeowner. Changes to the Declaration require 90 percent approval of the homeowners and that was not achieved.

In April 2001, Mr. Faye began construction and his brick wall was completed at the end of July 2001. Mr. Faye characterizes the approximately one-foot high brick structure as a border; however, the Board considers it to be a wall, which is the more reasonable description. At about the time the wall was completed a member of the Board of Directors whose house is in the same neighborhood came by and told Mr. Faye that the wall was in violation of the Declaration. Mr. Faye submitted a new application for approval of the wall, which was denied by letter dated

October 1, 2001. This letter did not advise Mr. Faye that he could appeal the denial to the Commission on Common Ownership Communities (Commission). The Association property manager testified that he had advised Mr. Faye that the Commission offered a forum to appeal the Board's denial in a conversation he had with Mr. Faye after Mr. Faye had received the letter from the Board denying his application. It appeared that Mr. Faye had not heard this information and his report of the conversation was entirely focused on the requirement to remove his wall and lack of alternative options to protect his property. Both Mr. Faye and a neighbor testified that the neighbor had told Mr. Faye about the option of appealing to the Commission.

Discussion

The Association Board of Directors may want to explore with counsel whether they may assume the position of the declarant or builder for the purpose of permitting homeowners to build the fences which the builder would have built, apparently gave some purchasers the impression he would build, and did build in other sections of the community. The Court of Appeals in *Kirkley v. Seipelt*, 212 Md. 127, 128 A.2d 430 (1957) articulated the general rule for evaluating the validity of covenants as "where the intention of the parties is clear, and the restrictions within reasonable bounds, they will be upheld." The court went on to say that any refusal to approve an application for external changes under a covenant must be based "upon a reason that bears some relation to the other buildings or the general plan of development..." at Id. at 133, 128 A.2d at 434. It seems likely that the intention of the parties may not be entirely clear if the builder represented to buyers that there would be fences but did not get them constructed. Further, those fences would be part of the "general plan of development" for the community. These issues were not raised at the hearing in this case.

Montgomery County Code, Chapter 10B-9(d) requires that after a community association finds that a dispute exists, the association must notify the other parties of their rights to file the dispute with the Commission. The testimony on behalf of Amber Ridge Association was that they were unaware that Mr. Faye was disputing the denial of approval for his fence until notified by the Office on Common Ownership Communities that Mr. Faye had filed a complaint. The complaint was filed within the period allowed by the Board for Mr. Faye to correct the violation they had found. While it would be advisable to include notification of the right to appeal to the Commission in the written communication to homeowners when denying an application for architectural approval, that is not a requirement of the law.

Conclusions of Law

There are many possible explanations for the absence of Mr. Faye's application and letter reminding the Board of its pendency, but we need not explore them. If it were to be assumed that Mr. Faye in fact received default approval by the failure of the Board of Directors to act on his original application, even though the Declaration explicitly prohibits fences and walls, and by

signing his application form he agreed to not start work until he received approval in writing, he failed to begin or complete construction during the time in which such approval would have been effective.

Mr. Faye did not have approval to build his wall when he constructed it and such approval has not been granted. The Board of Directors acted within its authority in denying approval to Mr. Faye's post-construction application for the brick wall.

ORDER

Based on the evidence contained in the record, and for the reasons set forth above, the Commission orders that Mr. Faye remove the brick wall constructed around the perimeter of his property within 60 days, or such longer period as the Board of Directors of the Association may grant him.

Award of attorney's fees and costs from Mr. Faye requested by the Association is denied. The argument advanced on behalf of the community in favor of awarding costs and fees includes reliance on section 19.9 of the Declaration which indicates that the prevailing party in an action to "enforce" any provision of that document is entitled to an award of fees and costs of the suit. However, the Panel in this case interprets the condition precedent to this entitlement be that the action be brought to enforce the Declaration whereas in this case Mr. Faye filed his action seeking a basis for non-enforcement.

The foregoing was concurred in by panel members Neel, Weiss and Stevens.

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, pursuant to the Maryland Rules of Procedure.

Dinah Stevens

Dinah Stevens, Panel Chairwoman
Commission on Common Ownership
Communities