

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

In the Matter of	x	
Norman Turner, Owner of	x	
16920 MacDuff Avenue	x	
Complainant	x	
	x	Case No 111-0
vs.	x	June 29, 1992
	x	
Board of Directors	x	
Paul Jarosinski, President	x	
Cherrywood Homeowners Association	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, 1984, as amended, and the Commission having considered the testimony and evidence of record, it is therefore, this 29th day of June, 1992, found, determined and ordered as follows:

On August 6, 1991, Mr. Norman Turner, owner of 16920 MacDuff Avenue, Olney, Maryland, hereinafter the Complainant, filed a formal dispute with the Office of Common Ownership Communities. The Complainant alleged that Cherrywood Homeowners Association Board of Directors, hereinafter the Respondent, failed to fix the amount of the annual assessment at least thirty (30) days in advance of the 1991 annual assessment period, and failed to send written notice of the annual assessment to the membership at least thirty (30) days in advance of the 1991 annual assessment period, asserting that such failures violated the provisions of Article V, Section 3 and Section 7 of the Community's Declaration of Covenants, Conditions and Restrictions, hereinafter the Declaration of Covenants, and Article VIII, Section 2(c) of the Community's Bylaws. Additionally, the Complainant alleged that the Respondent failed to properly conduct its meetings and failed to maintain meeting minutes which accurately reflect association business.

The Complainant sought an order requiring the Respondent to refund all monies collected as a result of the 1991 increase in annual assessment, plus interest; and an order banning current Board President Paul Jarosinski from being an officer on the Board for a period of not less than three (3) years.

Inasmuch as the 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 February 5, 1992, the Commission voted to hold a public hearing, which commenced and concluded on May 14, 1992.

FINDINGS OF FACT

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

1. In April, 1987, control of the Community's Board of Directors was transferred from the Developer to the homeowners.
2. The Complainant served as a member of the Board from April, 1987, through December 20, 1990, at which time he resigned.

3. The testimony of Paul Jarosinski and a copy of the December 10, 1987 meeting minutes entered into the record, reflect that the amount of the maximum annual assessment was increased to \$35.00 per member, per year, at a Special General Meeting of the Association membership.

4. The testimony of Paul Jarosinski and former board member John Butler, as well as copies of the 1989 and 1990 Assessment Notices entered into the record, reflect that the 1989 and 1990 annual assessments were set at \$25.00, per member, per year.

5. Based upon the testimony of Paul Jarosinski and the Complainant, as well as the minutes of the October 11, 1990 Board of Directors Meeting entered into the record, the Respondent voted to approve the proposed 1991 annual budget totalling \$14,700.00.

6. Based upon the testimony of Paul Jarosinski and the Complainant, as well as a copy of meeting minutes entered into the record, on October 24, 1990, at the Association's Annual Membership Meeting, the Respondent presented the 1991 Annual Budget and indicated that the 1991 Annual Assessment would remain unchanged.

7. Based upon the testimony of Paul Jarosinski and the Complainant, as well as meeting minutes entered into the record, on December 13, 1990 the Board adopted a revised 1991 Annual Budget totalling \$20,552.00, and set the 1991 Annual Assessment at \$35.00 per member, per year.

8. Based upon the testimony of Jim Dailey, Respondent's Comptroller, as well as a copy of the January 4, 1991 postmarked envelope entered into the record, the Respondent sent written notice of the \$35.00 1991 Assessment to the membership of the Association between December 18, 1990, and January 4, 1991.

9. Article V, Section 7 (as amended) of the Community's Declaration of Covenants states, in relevant part:

... The Board of Directors shall fix the amount of the annual assessment against each lot at least thirty (30) days in advance of each annual assessment period.... Written notice of the annual...assessments shall be sent to every owner subject thereto. The due dates shall be established by the Board of Directors.

10. Article VIII, Section 2, of the Community's Bylaws, sets forth that as part of its duties, the Board of Directors shall:

...(c)(1) fix the amount of the annual assessment against each Lot at least thirty (30) days in advance of each annual assessment period.

(2) send written notice of each assessment to every Owner, subject thereto at least thirty (30) days in advance of each annual assessment period.

11. Article V, Section 3, of the Declaration of Covenants discusses annual assessments and indicates that increases in the maximum annual assessment will be effective on January 1st of each year. At Article V, Section 7, prior to the amendment of this section, reference was made to adjusting the first annual assessment according to the number of months remaining in the calendar year. In the 1981 Amendment this language was eliminated, apparently because the situation requiring such pro-rating no longer existed.

12. The Bylaws at Article XIV control and establish that the fiscal year of the Association is the calendar year.

13. Based upon testimony, as well as meeting minutes entered into the record for December 10, 1987, January 13, 1988, October 18, 1989, February 8, 1990, February 14, 1990, October 24, 1990, November 8, 1990, November 19, 1990, December 13, 1990, January 10, 1991, and April 11, 1991, the Respondent maintained minutes of the meetings of the Board of Directors.

14. Based upon testimony of Paul Jarosinski, who has been on the Board for several years and is currently President, and the Complainant, as well as meeting minutes entered into the record dated January 13, 1988, February 8, 1990, February 14, 1990, October 11, 1990, December 13, 1990, January 10, 1991, and April 11, 1991, the Respondent provided itself the opportunity to amend prior meeting minutes by its own action.

15. The testimony of both Paul Jarosinski and the Complainant, as well as a copy of the form used by the Board, which was entered into the record, reflect that in 1988, the Respondent passed a motion to use a standard form to identify motions and votes of the Board.

16. The December 13, 1990 Board meeting minutes entered into the record reflect discussion of the handling of meeting minutes and a consensus that the "present procedures, of listing changes in following minutes, was adequate." A discussion of the procedures for motions ensued in which the group approved a procedure that "all motions should be read before vote was taken."

17. Article XI, Section 5 of the Community's Bylaws states in relevant part:

Resignation and Removal. Any officer may be removed from office with or without cause by the Board.

18. There was no evidence entered into the record to the effect that the Complainant filed or maintained a frivolous dispute, or filed or maintained a dispute other than in good faith; unreasonably refused to accept mediation of a dispute, or unreasonably withdrew from ongoing mediation; or substantially delayed or hindered the dispute resolution process without good cause.

CONCLUSIONS OF LAW

Accordingly, the Commission concludes based upon a preponderance of the evidence, including, but not limited to testimony and documents admitted into evidence, and after a full and fair consideration of the evidence of record, that:

- 1) In 1987, the Respondent established the amount of the maximum annual assessment at \$35.00 per member, per year, in compliance with Article V, Sections 3 and 6 of the Community's Declaration of Covenants.
- 2) The annual assessment period is from January 1st, through December 31st each year pursuant to Article XIV of the Community's Bylaws and Article V of the Declaration of Covenants.
- 3) The Respondent failed to fix the amount of the Community's 1991 annual assessment at least thirty days in advance of the 1991 annual assessment period, in violation of Article V, Section 7, as amended, of the Community's Declaration of Covenants and Article VIII, Section 2(c)(1) of the Community's Bylaws.

- 4) The Respondent failed to send the membership written notification of the 1991 annual assessment at least thirty days in advance of the 1991 annual assessment period, in violation of Article V, Section 3(b) of the Community's Declaration of Covenants, and Article VIII, Section 2(c)(2) of the Community's Bylaws.
5. While not technically in compliance with the Declaration of Covenants and Bylaws of the Community, the Board's action of increasing the 1991 assessment was performed in good faith. The panel does not order a return of the increased 1991 assessment amount, as it would be fiscally burdensome, unduly expensive to the Community and not in the best interests of the Community or its members.
- 6) The Respondent properly conducts its meetings and maintains meeting minutes which adequately reflect Association business.
- 7) The Board by its own action may remove an officer of the Board of Directors in a manner consistent with Article XI, Section 5 of the Community's Bylaws.
- 8) The Commission concludes that neither party evidenced a pattern of behavior which would justify the award of attorney's fees in this matter. Therefore, neither the Complainant nor the Respondent have responsibility for the payment of the other party's attorney's fees pursuant to the provisions of Section 10B-13(d) of the Montgomery County Code, 1984, as amended.

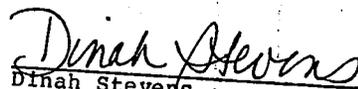
ORDER

In view of the foregoing, and based on the evidence of record, the Commission orders that:

1. The Respondent must fix the amount of all future annual assessments at least thirty (30) days in advance of the annual assessment period, which is the calendar year; and
2. The Respondent must send written notification to the Membership, of the amount of the annual assessment in all future actions, at least thirty (30) days in advance of the annual assessment period.

The foregoing was concurred in by panel members Stevens, Blumberg and Gordon.

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 Chapter 1100, Subtitle B, Maryland Rules of Procedure.



Dinah Stevens
Panel Chairperson
Commission on Common Ownership
Communities