

**BEFORE THE  
COMMISSION ON COMMON OWNERSHIP COMMUNITIES**

In the matter of

CYNTHIA FAVILLE  
13306 Kilmarnock Way #K  
Germantown, Maryland 20874

Complainant,

vs.

Case No. 560-O

BROOKSTONE CONDOMINIUM, INC.  
c/o Jeffrey Van Grack, Esquire  
Lerch, Early & Brewer  
3 Bethesda Metro Center  
Suite 380  
Bethesda, Maryland 20814

Respondent.

**DECISION AND ORDER**

The above-captioned case having come before the Commission on Common Ownership Communities for Montgomery County, Maryland (the "Commission") for hearing on July 9, 2003 pursuant to §§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:

**Background and Summary of Testimony and Evidence**

This matter comes before the Commission pursuant to a Complaint filed January 25, 2002 *pro se* by Cynthia Faville, a resident of Brookstone Condominium in Germantown, Maryland against the Brookstone Condominium, Inc. ("Respondent" or "Brookstone"). Following the filing of the Complaint, Respondent contended that Complainant had failed to exhaust her administrative remedies under the governing documents at the Board level. On November 14, 2002, the Brookstone Board of Directors held a hearing to assess the Complaint of Complainant. Thereafter, Complainant made a further request to Respondent that additional sound testing be performed in her unit to assess noise level. On December 23, 2002, the President of Respondent sent a letter to Complainant outlining to her the Board's decisions regarding her complaints and the request for additional testing, in which the Board denied her request for additional testing and denied Complainant's request that additional insulation be installed at the expense of Respondent. While the original Complaint filed by Complainant addressed a number of issues, the Commission accepted jurisdiction of the Complaint only *with regard to the issue of noise* on as reflected in the Case Summary filed March 5, 2003. At the July 9, 2003 hearing, Complainant was represented by Alice Pare'-Johnson, Esquire.

At the beginning of the hearing before the Hearing Panel, the Panel Chair, Louis S. Pettey, advised the parties that in the course of his review of the record, he realized that his client, Craftstar Homes, Inc., was the builder of Brookstone Condominium, and that the title company of which Mr. Pettey is an owner, Fenton Title Company, conducted the settlements on the purchases of the units of Complainant and the President of Respondent when they purchased from the builder. While Mr. Pettey advised that he did not believe that these facts would constitute a conflict of interest in his acting as Panel Chair for the subject dispute between the condominium Board of Directors and the Complainant, and that such representation would not affect his decision or any rulings in the case, the disclosure of these facts was made to the participants for their information. Each party, after consultation with counsel, agreed that Mr. Pettey should continue as Panel Chair.

### **Findings of Fact**

Complainant is the owner of and the resident of a unit within Brookstone Condominium, a garden-style condominium project located in Germantown, Montgomery County, Maryland. The Complaint, as accepted by the Commission, pertains to excessive noise from the condominium unit directly above Complainant's unit. At the hearing July 9, 2003 before the COCOC Hearing Panel, Complainant offered her own testimony and presented one exhibit, a memo dated November 14, 2002 from Richard J. Peppin, President of Scantek, Inc., a sound testing firm, to Kenneth Tecler, Esquire regarding sound testing results. The exhibit, marked Complainant's Exhibit #1 was not accompanied by the graphs referenced in the memo.

At the hearing, the Complainant recited a history of her complaints, made to the Board and to the Housing Opportunities Commission for Montgomery County, Maryland ("HOC") regarding what she considered to be excessive noise from the condominium unit above her unit, which is owned by HOC and occupied at various times during the past 6 years by tenants placed in the unit by HOC. She testified that she had complained about noise made by each of the tenants that had previously occupied the unit as well as the current tenants. She admitted upon examination by the Panel that the noise was not a result of loud parties or constant loud music, but consisted primarily of isolated, periodic noises. During cross-examination, Complainant confirmed that it was her opinion that the construction of her unit was faulty regarding noise insulation, and she also stated that she knew of about a dozen other residents who had complained about noise to the Board of Directors, but that even though she had been the Secretary of Brookstone, she did not know the names or dates pertaining to any such complaints.

Complainant testified that at various times loud booming and banging sounds emanate from the HOC unit, as well as the sound of running children. She testified that the sounds cause her great distress and violate the provisions of the Brookstone Condominium governing documents, specifically the provisions of Rule #4 of the Rules and Regulations of the Condominium which provide in part: *"No Unit Owner shall make or permit any disturbing noises in the buildings of commit or permit any actions, which will interfere with the rights comfort and convenience of the other owners."*

The record presented to the Commission and received as Commission's Exhibit #1 contained 447 pages, of which over 50 percent were email and other correspondence relating to Complainant's complaints about the noise in her unit. Other than the Complainant's Exhibit #1, however, Complainant presented no evidence to corroborate her testimony regarding the noise. That Exhibit contained the conclusion of the President of the sound and vibration company (initially engaged by HOC) that *"the complaints to (sic) not correlate well with the recorded sound levels."*

During cross-examination of the Complainant, Respondent introduced Respondent's Exhibit #1 containing the December 23, 2002 letter from George Tillery, President of Brookstone Condominium, Inc. to Complainant rejecting her request for further testing of the sound levels in her unit and advising her that the Board of Directors did not find that her unit was not constructed according to applicable building code, and that even if such were the case, Respondent would not agree to pay for the remediation efforts, as such efforts would be cost prohibitive. Complainant was not specific during her case as to the basis for her complaint against Respondent and the relief sought, but the Panel must infer that at this stage in the proceedings, it is this December 23, 2002 decision of the Brookstone Board of Directors which Complainant contends is contrary to the governing documents of the condominium.

At the conclusion of the Complainant's case, Respondent moved for a dismissal of the Complaint, arguing that the Complainant had failed to present sufficient evidence of a dispute. The Panel took the motion under advisement and the Respondent proceeded to present its case.

Respondent called to the stand Andrew Oxendine, a supervisor with HOC. Mr. Oxendine testified that he had reviewed all of the files of HOC in preparation for this hearing and confirmed that 4 tenants of HOC had lived in the unit above Complainant since HOC had acquired the unit, and that Respondent had also formally complained to HOC based upon Complainant's complaints. The HOC staff often received daily emails from Complainant regarding noise from the unit owned by HOC. He testified that the field personnel, Sandra Barnes and Nicole Aiken, were highly skilled, professional and dedicated employees who had attempted on many occasions to accommodate Complainant to alleviate the noise situation about which she had complained. Testimony revealed that HOC, at its expense, had replaced the carpet and padding in its unit in order to reduce the incidence of noise being transmitted to the unit below.

Respondent then called to the stand its President, George Tillery, who testified as to his knowledge of the complaints made by Complainant over the terms of his years on the Board of Directors of Brookstone. Mr. Tillery testified that the Board had very seriously considered the many complaints of Complainant, who was also a member of the Board of Directors. He testified regarding the conduct of 2 hearings held by the Board as to the noise complaints. The Respondent introduced the record of the hearing held by the Board of Directors on November 14, 2002. Also introduced was a further memo from Mr. Peppin, dated July 3, 2003, contained in Respondent's Exhibit #1, summarizing the results of his two sets of tests performed on Complainant's unit and the HOC unit above her. In the July 3, 2003 memo, Mr. Peppin concluded, in part, *"None of the test results I reviewed anything abnormal. The noises disturbing Ms. Faville are not excessive."*

At the conclusion of Respondent's case, counsel for Respondent made a motion that attorney's fees be awarded against Complainant, under the provisions of Montgomery County Code, §10B-13(d), for filing and maintaining of a frivolous claim. Mr. Tillery testified that the recent financial statements of Brookstone indicated expenditures of about \$9,500.00 in attorney's fees exclusively relating to the claims of the Complainant. The Panel agreed to keep the record open for the sole purpose of permitting Respondent to provide additional documentation of the attorney's fees in the event that the Panel determined that the imposition of attorney's fees against Complainant was appropriate. Following the hearing, counsel for the Respondent provided copies of invoices totaling \$13,423.44 with his letter to the Commission dated July 11, 2003. Those invoices did not include any time for the month of July, and therefore did not include time for the hearing July 9, 2003.

### **Conclusions of Law and Discussion**

Upon a review of the organizational documents of Brookstone Condominium, Inc., the testimony and other evidence submitted as set forth above, the Panel concludes that Brookstone Condominium, Inc. has not violated the law or the terms of its governing documents with regard to the complaints as to noise made by the Complainant. In particular, the Panel has determined:

1. Complainant has failed to present credible and objective corroborating evidence of unreasonable noise emanating from the unit owned by HOC located above her unit that would give rise to a responsibility on the part of Respondent to take any action. Complainant has the burden of proof in this proceeding to demonstrate that the noise level from the unit above her violates the governing rules of her condominium. The applicable rule, also recited above, states: "*No Unit Owner shall make or permit any disturbing noises in the buildings or commit or permit any actions, which will interfere with the rights comfort and convenience of the other owners.*" While the rule prohibits "*any disturbing noises*" the rule must be interpreted as prohibiting noises that would unreasonably disturb a person of normal sensibilities. While the Panel is convinced that the noises complained of are disturbing to the Complainant, no evidence was presented by the Complainant to corroborate her complaints, and the only objective evidence introduced by Complainant, the November, 2002 report of Mr. Peppin, concluded that the noise was not excessive. There are certainly types of noise that would be considered to be inherently unreasonable, such as excessive loud music, large numbers of people walking or dancing on the floor, loud machinery, etc. which would constitute a form of noise nuisance upon which the condominium should have some affirmative responsibility to act. In this case, however, the noise complained of is not of that nature. As was stated in the Commission's Decision and Order filed in the case of *Malespin v. Sierra Landing Condominium Association*, Case No. 551-O, "Anybody who has ever lived under another apartment can appreciate that noise resulting from another's living habits can be annoying. However, people who live in close quarters, such as apartments and condominiums, understand that such noise will occur. Some of this will result from the mechanization of modern living including heating units, dishwashers, garbage disposals even flushing toilets, unless the noise is excessive, it must be accepted as a part of life in close condominium quarters."<sup>1</sup>

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<sup>1</sup> *Malespin v. Sierra Landing Condominium Association*, Case No. 551-O, June 9, 2003, page 3

2. Complainant has consistently complained about noise being made by all four of the tenants that have occupied the HOC unit, and testified that she believed that the construction of her unit was faulty. Commission's Exhibit #1 contains a sometimes daily recital via email of the noises by Complainant's. It is the conclusion of the Panel that so long as anyone lives in the unit above the Complainant, she will be disturbed by noise from that unit. The mere fact that noise disturbs an owner does not create a responsibility on the part of the condominium. There must be a showing that the noise is of a nature that is unreasonable in order to provide any such duty. Complainant has failed to provide any evidence of such unreasonable noise.
3. Complainant has failed to prove construction defects in the common elements which would give rise to a duty on the part of Respondent to take remedial action. No evidence regarding construction defects was produced by Complainant other than Complainant's Exhibit #1 which did not indicate any construction defect regarding sound. As a result, the Panel finds no duty on the part of the Respondent to take any remedial action within the common elements.
4. While in Paragraph 2 above the Panel has concluded that Complainant has failed to prove any construction defect in the common elements regarding noise insulation, the Panel has further determined that, assuming for the sake of argument that a construction defect had been proven by Complainant, the Board of Directors made a prudent and reasonable business judgment in denying the request because of lack of funds in the budget for the remediation to Complainant's unit and the probable need to perform remediation on many of the 94 condominium units similarly situated.
5. The Panel does not find that the Complaint made was frivolous, however, and therefore, the Panel declines to award attorney's fees in favor of Respondent.

#### **ORDER**

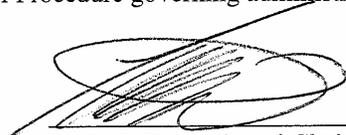
Based upon the evidence of record and for the reasons set forth above, it is this 2/13/07 day of August, 2003, by the Commission on Common Ownership Communities:

ORDERED, that the Complaint filed in Case No. 560-O is hereby dismissed with prejudice; and it is further

ORDERED, that Respondent's motion for the award of attorney's fees is hereby denied.

Panel Members Arlen Perkins and Howard Cihak concur unanimously in this decision.

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 governing administrative appeals.

  
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Louis S. Pettey, Panel Chair

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