

**BEFORE THE
COMMISSION ON COMMON OWNERSHIP COMMUNITIES
FOR MONTGOMERY COUNTY, MARYLAND**

Potowmack Preserve, Inc.,)	
)	
Complainant)	
)	
v.)	Case No. 73-12
)	March 21, 2014
)	
Michael Ball and Peter Ball,)	
)	
Respondents.)	
_____)	

DECISION AND ORDER

The above-captioned case came before the Commission on Common Ownership Communities for Montgomery County, Maryland (“CCOC”), on October 10, 2013, pursuant to Chapter 10B of the Montgomery County Code. After considering the testimony and evidence presented, this Hearing Panel finds, determines, and orders as follows.

BACKGROUND AND PROCEDURAL HISTORY

On December 3, 2012, Potowmack Preserve, Inc. (“the Association”), a Maryland homeowners association, filed this action against two of its members, Michael Ball and Peter Ball (collectively “Respondents”). In its complaint, the Association alleged that the Respondents violated the rules of the community by undertaking construction on the Respondents’ home that did not conform to drawings approved by the Association in the following four respects:

1. constructing a deck in a style that was not approved;
2. constructing a storage shed or room attached to the house instead of separate from it;
3. constructing an unapproved “garden wall”; and
4. failing to complete approved construction.

In addition to the allegations the Association advances in the instant dispute, the Association attempted to amend its complaint to raise new disputes and allegations involving other changes made to the house by Respondents. The panel denied permission to amend the complaint because they were untimely and the Respondents did not have sufficient time to respond to them. As a result, the Association filed a new dispute – Case No. 72-13 – in which the Association challenges other architectural changes implemented by Peter Ball, purportedly in violation of the Association’s governing documents. That matter is pending for a hearing.¹

¹ In addition to the pending CCOC cases in which Peter Ball is a Respondent, Peter has been a party to at least two other CCOC cases, at least one of which involves similar facts. *See, e.g., Potowmack Preserve, Inc. v. Peter Ball and Iryna Sivinska*, Case No. 720-G, 33-06 (June 13, 2008) (ruling that architectural changes constructed by Ball and Sivinska violated the Association’s governing documents; ordering the removal all architectural changes to the

After the Association filed the complaint in this case before the CCOC, the Respondents filed suit against the Association in the Circuit Court for Montgomery County, Maryland. *See Ball, et al. v. Potowmack Preserve, Inc.*, Case No. 372523V (Cir. Ct., Montgomery County). Among other things, the Respondents sought an injunction preventing the CCOC from hearing the instant dispute.

At its February 6, 2013, meeting, the CCOC accepted jurisdiction of this matter and denied Respondents' motion to stay the CCOC proceeding in favor of the Circuit Court action. Though the CCOC denied the motion to stay, a temporary stay of the CCOC proceeding was approved pending the Circuit Court's ruling on Respondents' request for an injunction.

On April 9, 2013, the Circuit Court denied Respondents' motion to stay the CCOC proceeding. The following month, the CCOC granted the Association's motion to lift the temporary stay and accepted jurisdiction of the instant dispute.

On September 18, 2013, the Association filed a "Supplement to Complaint," alleging additional violations by the Respondents. Because these violations involved substantially different facts from those raised in the Complaint, and because the new allegations would generate a substantial delay in the proceedings that might be no longer than that involved if the Association were to file a new complaint with the CCOC addressing the new allegations, the Supplement to Complaint was stricken from the record pursuant to a September 25, 2013, CCOC order.

On October 10, 2013, this case proceeded to a hearing. Commission's Exhibit 1 was admitted into evidence without objection. In addition to the pleadings, the parties' communications with the CCOC, and panel orders admitted into evidence pursuant to Commission's Exhibit 1, Peter Ball's application for architectural changes to his home, photographs of the Respondents' home, copies of permits issued by the County arising out of the construction on the Respondents' home, and a copy of Peter Ball's active sales license from the Maryland Department of Labor, Licensing and Regulation, among other exhibits, were admitted into evidence without objection.

At the hearing, the Association called two witnesses in its case-in-chief: (1) Dr. Raj Barr, Association President; and (2) Lynn Gowan, Association Secretary. Respondents also presented two witnesses: (1) Respondent Peter Ball; and (2) Michael Hancock, a custom home builder.

The hearing lasted more than five hours. At the close of the hearing, both parties moved for attorneys' fees. An exhibit itemizing the legal bills incurred by the Association's counsel in connection with this case and the related Montgomery County Circuit Court case instituted by Respondents was admitted into evidence without objection.

FINDINGS OF FACT

After thoroughly considering the testimony and evidence, this Panel makes the following findings of fact.

I. The parties.

1. Potowmack Preserve, Inc. is a homeowners association as defined by Section 11B-101 of the Real Property Article of the Code of Maryland, and is a common ownership community pursuant to Montgomery County Code Section 10B-2(b).

2. The Association's property and actions are subject to restrictions in its governing documents, which include a recorded Declaration and the Association's Bylaws.²

property or the filing of a proper application with respect to the non-compliant changes; and awarding the Association attorneys' fees).

² The Association changed its name from "The East Gate I Homes Association, Inc." to "Potowmack Preserve, Inc." The governing documents admitted into evidence in Commission's Exhibit 1 refer to the Association's prior name.

3. Michael Ball ("Michael") is the record owner of a lot commonly known as 10600 Vantage Court, Potomac, Maryland 20854 ("the Vantage Court home" or "Vantage Court property"), which is located in Potowmack Preserve. Michael is a member of the Association.

4. Peter Ball ("Peter") is Michael's father and a resident of the Vantage Court home. Peter is a salesman for Potomac Home Improvement Company, and has worked in the construction business since 1995. Approximately 95 percent of his experience is in residential construction. In particular, Peter specializes in residential renovations. Peter is also a member of the Association.

5. Members of Peter and Michael's family, including Peter and Michael individually, have held title to the Vantage Court home, transferring title among each other. *See also Potowmack Preserve, Inc. v. Ball et al.*, CCOC Case Nos. 720-G, 33-06 (June 13, 2008).

6. Dr. Raj Barr has been the President of Potowmack Preserve for more than two years. Before his election to this office, Dr. Barr served as Vice President of the Association. Dr. Barr is a licensed architect and interior designer in Maryland, Virginia, and the District of Columbia. Dr. Barr has 32 years' experience as an architect, among other educational and practical qualifications in the architecture and design architecture fields.

7. Lynn Gowan is the Secretary of Potowmack Preserve. Ms. Gowan lives next door to the Vantage Court home. Ms. Gowan works for the federal government as a design and construction coordinator and, through the federal government, is certified as a project manager. In addition to Ms. Gowan's undergraduate design degree, she holds a post-graduate degree in architectural construction.

II. Peter Ball seeks Association approval of architectural changes to the Vantage Court home.

8. On or about June 24, 2010, Peter Ball, with the assistance of his architect, filed an application with the Association's Architectural Control Committee to change certain aspects of the Vantage Court home. In particular, Peter sought to add, among other things, a shed to the basement level of the home. Peter's application neither identified Peter as the property owner, nor referenced Michael in any respect.

9. Peter submitted revised designs in or about April 2011. In this application, Peter again sought to add a shed to the basement level of the Vantage Court home, as well as a deck on the ground floor, among other things. In the revised drawings, Peter labeled the "New Shed" as a 10 foot by 15 foot, 10 inch structure with a two-foot setback. The shed was drawn as a permanent, enclosed structure, accessible via a door. The drawings identified the "New Deck" as a 10 foot by 31 foot, 5 ½ inch structure, which would sit directly above the shed, also subject to the two-foot setback. The application did not seek approval for construction of a garden wall.

10. Peter attended two of the Association's Board meetings and made presentations at both regarding his requested architectural changes.

11. In addition to the two Board meetings, the Board met with Peter and his architect on at least three occasions and with Peter and Peter's attorney, James Dever, twice.

12. In a letter dated May 15, 2011, Association Board President Dr. Raj Barr notified Peter Ball on the Association's behalf that Peter's application for architectural changes to add a deck and shed to the Vantage Court home had been approved, subject to certain caveats, four of which are relevant to the instant dispute. First, Dr. Barr instructed as follows: "All work must be constructed in strict conformity with the drawings as submitted and approved. Any changes or substitutions must be submitted for approval by the [B]oard." Second, Dr. Barr identified the Board's preference for the work to "ideally" be completed "in the six month time-frame from June to December 2011," which

Neither party objected to the application of the governing documents on the grounds that they referred to the Association's prior name. As such, we decline to address this matter further.

Peter purportedly proposed in a March 31, 2011, Board meeting. Third, Dr. Barr asked Peter to submit a copy of his building permit for the Board's records. Fourth, regarding exterior materials, the Association rejected Peter's request for horizontal or vertical siding, indicating that the "recommended materials for changes" were "natural materials," including "brick, wood and stone." The Association did not foreclose the possibility of Peter using hardy board, and requested that Peter submit samples of the proposed material "prior to construction."

13. When notifying Peter of the conditional approval of his architectural application, Dr. Barr explained the basis for the same: while the Board was "eager to cooperate with any home owner [sic] making a request for changes," the Board's "primary concern [wa]s to continue to preserve the texture, harmony, mass and scale of the neighborhood." In this way, the Board sought "to encourage changes which retain the original spirit of th[e] planned community."

14. The Association approved the construction of a 10 foot by 31 foot, 5 ½ inch deck on the lower floor of the home that was to be offset two feet from the rear elevation.

15. The Association approved the construction of a 10 foot by 15 foot, 10 inch storage shed, to be located directly under the deck and also setback two feet.

16. The Association did not approve the construction of a garden wall.

17. After the May 15, 2011, letter was delivered, Peter submitted an additional application to the Architectural Control Committee that "covered the same construction submitted in [his] previous application" and, as a result, the Board construed the application as a "request to revisit the previous application and decision." The Board reiterated the terms of its May 15, 2011, conditional approval, as well as its express rejection of vinyl siding, among other things. Once again, the Board reiterated Peter Ball's representation that the work would be completed within six months of construction commencing.

III. Peter Ball applies for and obtains a building permit to construct the deck.

18. After obtaining approval from the Association's Architectural Control Committee to construct the deck and shed as described above, Peter filed an application for a residential building permit with the Montgomery County, Maryland Department of Permitting Services on November 26, 2011, seeking a permit to build the deck. Michael Ball is identified on the application as the applicant, while Peter Ball is identified as the "contact person."

19. The permit application did not seek approval for the construction of a shed or garden wall.

20. In the section of the application seeking information regarding the "description of the work," Peter represented that he would "use the Montgomery County deck guideline" to construct the deck.

21. On November 29, 2011, the Montgomery County Department of Permitting Services issued a building permit to Michael Ball, allowing him to construct a deck "per Montgomery County Deck Details." Notably, the permit instructed that its issuance did not confer upon the permit holder the authority to dispose of any applicable Association covenants:

Many subdivisions and neighborhoods within Montgomery County have private deed restrictions and covenants regulating building construction. Obtaining a building permit does not relieve the property owner of responsibility for complying with applicable covenants.

22. The permit identified its expiration date as November 29, 2012.

23. The "Location Drawing" attached to the approved building permit did not contain dimensions for the deck. Instead, the drawing merely contained the hand-written notation "Deck" inside a drawing of the dimensions of the deck that appeared proportionally divergent from the deck approved by the Association.

24. The permit set approved by the County identified the deck as an "Existing Deck," and conformed to the dimensions in the drawings submitted to the Association.

25. The permit set approved by the County also identified the shed for which Peter sought Association approval as an "Existing Shed," though it had not yet been constructed. The dimensions of the shed in the County-approved permit set are the same as those identified in the Association-approved plans.

IV. After construction of the deck and shed commences, the Association identifies non-conforming aspects of the construction to Peter Ball.

26. In November 2011, before Peter provided the deck building permit and site plan to the Association, construction commenced on the deck and shed. As construction continued, Peter built the deck without the two-foot setback approved in the plans. Stairs were also added from the deck on the right side elevation of the home. Additionally, Peter excavated land in the location approved for the shed, built a retaining wall/ garden wall³ underneath the deck upon the excavated land, and poured a concrete floor in the area corresponding to the approved location of the shed. The rear elevation side of the shed was altered to include a diagonal corner. Rather than affixing a permanent, opaque material to the shed, Peter affixed lattice panels.

27. In a series of letters, emails, and oral communications, the Association, through Dr. Barr, explained to Peter Ball that the deck and shed, as well as the garden wall, did not conform to the Association-approved plans. For nine months, the Association's communications to Peter Ball fell on deaf ears: notwithstanding the Association's specific descriptions of the non-conforming aspects of the deck, shed, and unapproved garden wall, Peter persistently argued that the construction was in conformity with the Association-approved plans. To illustrate the Association's repeated, extensive efforts, as well as its willingness to work with Peter to bring the construction in conformity with the approved plans, some of this correspondence is addressed below.

28. In a December 28, 2011, letter, Dr. Barr identified non-conforming aspects of the deck and shed. First, regarding the deck, Dr. Barr noted the absence of dimensions on the drawings attached to the building permit, suggesting that the drawings attached to the permit contained proportions different than those approved by the Association. Second, with respect to the shed, Dr. Barr noted that, contrary to the drawings approved by the Association, a "garden wall" was constructed "without county inspection . . . under the deck." In this context, Dr. Barr advised Peter that "[a]ny wall enclosing the proposed shed[] need[ed to be] properly sized," and that the "structure, footings and foundations" inspected.

29. Once again, on January 29, 2012, Dr. Barr contacted Peter to identify still non-conforming aspects of the deck and shed. First, regarding the deck, Barr reported that it "is not offset as shown on [the] plans." Second, with respect to the shed, Barr explained as follows: "The storage room is shown on your drawings as integral with and of similar construction and finishes as the rest of the house. However, . . . you have since described what you are building as a temporary storage shed. A temporary storage shed was not shown on your application drawings, and one was not

³ At the hearing, the parties often used the terms "garden wall" and "retaining wall" interchangeably. Indeed, the Respondents asserted that there is no distinction between the two terms. However, in Peter Ball's February 10, 2012, letter to Dr. Barr (Commission's Ex. 1 at 26), Peter appears to suggest that there is a distinction, the details of which are unclear. Because it appears Respondents abandoned that position in the hearing, we do not address this further.

approved.” Third, Barr maintained that Peter “built[] a ‘garden wall’ under a technicality,” which “is now transformed into a wall enclosing the ‘temporary’ storage shed.” In light of the purported non-conforming aspects of the construction, Dr. Barr requested that Peter “[p]lease make the corrections needed to bring the new construction into conformance with the approved drawings before proceeding with any further construction.”

30. Peter responded to Dr. Barr’s January 29, 2012, letter on February 10, 2012, insisting that the construction conformed to the Association-approved plans. In particular, Peter averred that the deck did not yet comport to the two-foot setback requirement because the “old existing deck” had not yet been removed. Upon its removal, Peter claimed the deck would be constructed pursuant to the two-foot setback requirement. Peter explained that, like the deck, the shed was not yet complete: the shed “is an integral part of the layout” that “will be finished on the outside as shown on the Plans.” Peter also addressed what Dr. Barr identified as the “garden wall,” characterizing the structure as a “retaining wall” “meant to hold back the soil” to “create space under the deck.” Peter maintained that the retaining wall was constructed without a permit “because Montgomery County does not require a permit for retaining walls that are 54” or less.”

31. On or about February 18, 2012, Dr. Barr, along with Peter Gibson, the Vice President of the Association’s Board of Directors, met with Peter Ball and Ball’s architect at the Vantage Court property. Those present agreed the deck was not built in conformity with the approved setback.

32. In a February 19, 2012, letter, Dr. Barr summarized the February 18 meeting. Regarding the deck, Barr instructed Peter to conform the deck to the Association-approved drawings by setting the deck back two feet “from the face of the rear elevation” and “ensuring that the deck dimensions conform to the drawings.” As explained in this and subsequent letters, the purpose of the setback was to mitigate the appearance of the “large flat expanse” of the rear façade. Indeed, the Association rejected Peter’s request to use horizontal vinyl siding on the deck for this reason. While Peter was asked to “proceed with the deck construction ASAP,” he was instructed to cease all other construction pending the submission of detailed construction drawings and the acquisition of a building permit for the entire project.

33. Peter Ball’s March 15, 2012, email in response to Dr. Barr’s February 19, 2012, letter illustrates the complete disconnect between Peter and the Association’s conceptions of the conformity (or lack thereof) to the approved construction at the Vantage Court property. Rather than addressing the issues raised by Dr. Barr, Peter generally maintained that “[t]he Board has already approved [m]y plans,” and again raised his request to use horizontal vinyl siding on “the rear elevation,” notwithstanding the Architectural Control Committee’s express rejection of this request and Dr. Barr’s repeated statements confirming this rejection.

34. Additional correspondence was exchanged between Dr. Barr and Peter Ball in the months after the correspondence addressed above. In this subsequent correspondence, the parties in large part remained entrenched in their previous positions, though the Association added to its repertoire Peter’s failure to complete the approved construction within six months. Peter similarly clung to his position: in an August 11, 2012, letter, Peter maintained that “[a]ll construction was done with the HOA’s approval” and all required permits were obtained. Regarding the deck, Peter inconsistently maintained that it conformed to the Association-approved plans, notwithstanding the fact that “[t]he offset is approximately 12” because there is a window there.” As for the shed, Peter argued that “there [wa]s no reason for [him] to not complete” it, as it was approved by the Association, “conform[ed] to all the County’s requirements,” and did not require a permit. Further, with regard to the exterior of the shed, Peter explained that he had affixed lattice paneling “because the siding issue is still unresolved.”

35. Frustrated with Peter Ball’s failure to conform the deck and shed to the approved plans, the Association in a July 15, 2012, letter directed Peter to remove the shed and to make all corrections within 30 days.

36. Sixty days later, when Peter Ball still had failed to remove the shed or otherwise bring the remainder of the construction in conformity with the Association-approved plans, the Association reiterated its position with respect to the deck and the shed in a September 15, 2012, letter, and again asked Peter to "rectify the violations."

37. After nine fruitless months of correspondence and meetings with Peter Ball, the Association in or about November 2012 voted to file the Complaint that is the subject of this proceeding.

38. Notably, at the hearing of this matter, Peter Ball conceded that, obtaining a building permit did not relieve him, as an Association member, of his responsibility to comply with Association covenants, including those requiring Association approval before commencing construction.

V. Testimony of Peter Ball's expert.

39. Peter Ball introduced the testimony of Michael Hancock, a custom home builder with more than 25 years' experience in the construction industry, into evidence. Mr. Hancock currently is a licensed Maryland Home Improvement Contractor, and works as a builder for Hancock Bentzel Homes, LLC.

40. Mr. Hancock testified that, contrary to the Association's request, Peter was not required by County law to obtain a permit to construct the shed.

41. With respect to the deck, Mr. Hancock testified that it was "in substantial compliance" with the plans approved by the Association. He further explained that, it is a Montgomery County requirement to insert stairs into decks of the kind at issue in this case and that, as a consequence, Peter was required to insert the stairs. Regarding the setback of the deck, Mr. Hancock averred that the deck as built does not "deviate much" from the approved plans, though he conceded he had not measured the deck.

42. Regarding the shed, Mr. Hancock testified that the shed as built is structurally sound, though it remains incomplete. He further explained that the retaining wall location was justifiably altered to accommodate the diagonal corner of the shed on the rear facing elevation. The corner was built on the diagonal to avoid cutting down a tree. According to Mr. Hancock, these types of alterations are not unusual.

43. Although we find Mr. Hancock's testimony credible, we find that it is irrelevant to the Associations' allegations that the Respondents violated the rules of the community by undertaking construction on the Vantage Court property that did not conform to drawings approved by the Association.

VI. The state of the deck, shed, and garden wall as of the date of the hearing.

44. As of the date of the hearing, the panel makes the following findings of fact with respect to the deck, shed, and garden wall.

45. The deck fails to conform to the Association-approved plans in two respects: (1) the deck is not set back two feet; and (2) unapproved stairs were installed leading from the deck into the yard. Regarding the setback, Peter testified that it is approximately one foot. The parties did not offer testimony regarding the exact dimensions of the deck.

46. As of the date of the hearing, the deficiencies with the shed are as follows. First, as Dr. Barr and Ms. Gowan testified, the elevation of the shed does not conform to the approved right side and rear elevation drawings. In contrast to the rear elevation drawing, a portion of the shed was constructed at an angle. Further, the placement of the shed does not conform to the right side elevation drawing, due in part to the placement and construction of the retaining wall. Second, the

exterior of the shed is non-conforming. On the right side rear elevation, lattice panels have been installed. The panels do not extend for the entire length of the deck. Instead, a portion of the shed adjacent to the stairs does not contain any exterior finishing – it is exposed to the elements. The rear elevation exterior is also non-conforming: blue-gray vertical siding was installed, as were two white double doors and incomplete white trim. On this matter, Ms. Gowan testified that this siding is overtly distinguishable from the siding on the exterior of the home and, as of the date of the hearing, lacked a “clean, finished look.” Photographs of the Vantage Court property substantiate this position: the exterior of the shed, including the lattice paneling and vertical siding, does not harmonize well with the rest of the home. Third, the shed is non-conforming because it contains a diagonal corner on the rear elevation side of the shed. No such corner was approved. Fourth, the shed is non-conforming because in its unfinished state, it appears to be a detached, temporary structure, rather than the permanent integrated shed approved by the Association.

47. As of the date of the hearing, the outer edge of the retaining wall is not located directly underneath the outer edge of the deck; instead, the wall was constructed in a location closer to the home. In this way, the dimensions and placement of the shed are non-conforming, as the deck hangs over the shed, rather than sitting directly on top of it. For these reasons, the retaining wall does not conform to the approved right side and rear elevation drawings.

48. As of the date of the hearing, the construction was incomplete.

VII. Attorneys’ Fees and Costs

49. At the hearing, Corinne G. Rosen, counsel for the Association, argued that attorneys’ fees are warranted in the instant case pursuant to Article VIII, § 9 of the Association’s bylaws and because, by filing the Montgomery County Circuit Court action rather than responding to the pending CCOC complaint, Peter Ball maintained a frivolous dispute in other than good faith and/or substantially delayed or hindered the CCOC dispute resolution process without good cause. *See Ball, et al. v. Potowmack Preserve, Inc.*, Case No. 372523V (Cir. Ct., Montgomery County).

50. Ms. Rosen argued that Peter Ball’s decision to file suit in Montgomery County Circuit Court was based on his goal of substantially delaying the underlying CCOC proceedings. As a result of this frivolous filing, for which Ms. Rosen asserted Peter Ball lacked standing to bring in the first instance, Ms. Rosen asserted that Peter caused the Association to incur needless attorneys’ fees arising out of the responses required in the circuit court action. She additionally argued that Peter and Michael Ball’s failure to divulge that Michael, not Peter, owns the Vantage Court property is further indicative of bad faith. As further evidence of Peter’s bad faith, Ms. Rosen introduced, through the testimony of Ms. Gowan, evidence of Peter’s use of vulgar, profane signs on the Vantage Court property directed as Ms. Gowan during the time the events giving rise to this action occurred.

51. Pursuant to the billing statements Ms. Rosen entered into evidence, the Association’s total request for attorneys’ fees is \$4,987.00. This figure is based on the CCOC proceeding and the Montgomery County civil suit instituted by Peter Ball. First, regarding the CCOC matter, the total figure is based on 21.1 hours of work before and including the CCOC hearing, 1.5 hours for which Ms. Rosen did not charge the Association. The fee is also based on Ms. Rosen’s \$150.00 hourly rate for work performed for the Association. Second, the remaining portion of the fee is based on the legal services rendered in Montgomery County Circuit Court Civil Case No. 372523V. Specifically, Ms. Rosen spent 13.3 hours doing the following: reviewing Peter’s Complaint and request for an injunction; filing an expedited opposition to Peter’s motion for an injunction; filing an expedited motion to dismiss Peter’s complaint; preparing for the hearing on the motions for an injunction and to dismiss the complaint; reviewing Peter’s amended complaint; preparing and filing second motion to dismiss; obtaining and reviewing transcript of motions hearing; preparing and filing supplement to second motion to dismissed; and preparing for and arguing the second motion to dismiss hearing.

The fee for the Circuit Court case is also based on Ms. Rosen's \$150.00 hourly rate for work performed for the Association.

52. In addition to attorneys' fees, the Association seeks the costs associated in filing this proceeding.

53. Counsel for Peter Ball, James Dever, also sought attorneys' fees, though he did not provide any statement for legal services during the hearing. At the hearing, Mr. Dever maintained that the CCOC action was the improper forum for resolution of the instant dispute, and that the Association's request for attorneys' fees arising out of the Circuit Court action "should be handled separately" without further explanation. Mr. Dever averred that his hourly fee is \$250.00 per hour, but did not provide any assessment of the total hours he worked on the instant matter. Mr. Dever later filed supplemental documents in an effort to substantiate his request for attorneys' fees.

CONCLUSIONS OF LAW AND DISCUSSION

This case considers whether Peter and Michael Ball violated the governing documents of Potowmack Preserve, Inc. by construing a deck, shed, and retaining wall in a style not approved by the Association, and by failing to complete the approved construction. For the reasons expressed below, the Panel concludes that the deck, shed, and retaining wall were not constructed in accordance with the Association-approved plans. Furthermore, the Panel rules that the Respondents failed to complete the approved construction.

The Panel makes the following conclusions of law.

I. Standard of Review.

When a homeowners association makes a decision that restricts a member's right to use his own property, or when the association opts to take some action that penalizes the member, the CCOC applies the "reasonableness rule" outlined in *Kirkley v. Seipelt*, 212 Md. 127, 131-34 (1957). See, e.g., *Syed v. Gatestone Homeowners Ass'n, Inc.*, CCOC No. 46-09 (July 30, 2010) (applying reasonableness rule elucidated in *Kirkley*). Under this standard, the association's decision will be upheld if the association can produce a good reason for it and the decision is otherwise made in compliance with applicable laws and governing documents. See *Kirkley*, 212 Md. at 133 (in the context of an association's decision to reject an application to change the appearance of a home, the rejection must be upheld if "based upon a reason that bears some relation to the other buildings or the general plan of development," and if the "refusal [was] . . . a reasonable determination made in good faith, and not [in a] high-handed, whimsical or captious in manner").

II. Architectural regulation of the deck, shed, and retaining wall.

It is very common, if not universal, for associations to require their members to apply in advance for permission to make a change to the appearance of their unit or home. The CCOC routinely upholds such rules. See, e.g., *Inverness Forest Ass'n, Inc. v. Salamanca*, CCOC Case No. 17-08 II (association rules requiring approval in advance for changes to roofs will be upheld); *Greencastle Lakes Community Ass'n v. Kelley*, CCOC No. 87-06 (Apr. 24, 2008) (construction of a fence without prior written approval by association's architectural and environmental review committee violated association governing documents requiring such prior approval); *Oak Grove Homeowners Ass'n v. Ford*, CCOC No. 72-06 (Apr 4, 2008) (same).

A homeowner who obtains approval for an application, but then makes changes and does not build according to the approved application, can be ordered to submit a new application for the structure as finally built and to comply with the association's ruling on the revised application.

Greencastle Lakes Com'ty Ass'n v. Chan, et al., CCOC No. #64-06 (Aug. 30, 2007); see also *Lake Hallowell HOA v. McLister*, CCOC Case No. #166 (if homeowner builds something different from what he applied and obtained approval for, and if the changes do not meet the community's architectural standards, the CCOC will uphold the standards and require the homeowner to comply with them and make necessary alterations). For example, in *Greencastle Lakes Community Association v. Chan, et al.*, the homeowners applied for permission to construct a stairway from a deck but, in the application, failed to specify the design of the deck railing. *Id.* The homeowners subsequently constructed a railing that failed to conform to the association's architectural standards. *Id.* Because the homeowners failed to adhere to the community's architectural restrictions, the CCOC ruled that the homeowners were responsible for correcting the architectural violation and ordered the homeowners to submit an architectural change request. *Id.*

Just as homeowners who fail to build according to approved applications may be ordered to submit new applications on the structure as finally built, so too can owners who make exterior changes to their homes using unapproved materials be required to remove and replace them with proper materials. *Greencastle Lakes Community Ass'n v. Davis*, CCOC Case No. 11-06 (Apr. 10, 2008). For example, in *Greencastle Lakes Community Association v. Davis*, the homeowner installed a shed on her property without the association's approval. *Id.* The shed did not comply with the community's architectural and environmental review committee guidelines, as it was too large, used the wrong material for siding, and used the wrong color. *Id.* The panel concluded that the homeowner was responsible for correcting these architectural violations, and ordered her to either later the shed to meet community requirements or to remove it completely. *Id.*

A homeowners association has the legal right to reject a member's plan to make certain architectural changes to his property even if the County issues approval for the same work. See *Mikolasko v. Schovee*, 124 Md. App. 66, 87 (1998); see also, e.g., *Colandrea v. Wilde Lake Community Ass'n*, 361 Md. 371 (2000) (homeowner association can deny permission to a homeowner to turn a home into a group home for the disabled even though the homeowner obtained approval from and support of the relevant government agency). The Court of Special Appeals has addressed the interplay between zoning regulations and restrictive covenants, explaining that the two are "concurrent but separate systems of law," both of which the homeowners must obey. *Mikolasko*, 124 Md. App. at 87. In this way, members of associations must comply with both County law and the rules of their association, unless the law states that it overrides such rules. *Flores v. Highlands of Olney Condominium*, CCOC Case No. #553; *Eynin v. Decoverly IV Condominium, Inc.*, CCOC Case No. #586. Consequently, approval from a County agency is not a defense to a homeowner's non-compliance with association covenants.

The Potowmack Preserve governing documents contain provisions relevant to the architectural control at issue in this case. First, the Declaration requires association members to obtain Association approval before altering real property in the community. In particular, Article VIII, Section I provides in pertinent part as follows:

Except for original construction or as otherwise in these covenants provided, no building, fence, wall, or other structure shall be commenced, erected, or maintained upon The Property, nor shall any exterior addition or change (including any change in color) or alteration herein by made until the plans and specifications showing the nature, kind, shape, height, materials, color and location of the same shall have been submitted to and approved in writing as to harmony of external design, color and location in relation to surrounding structures and topography by the Board of Directors of

the Association, or by an architectural control committee composed of three (3) members appointed by the Board of Directors.

Declaration, Art. VIII, § I.

The Declaration also vests the Association with the authority to remove or correct violations of Article VIII, provided that reasonable notice is provided to the homeowner and no action is taken without a resolution by the Board of Directors or the architectural control committee. Art. VIII, § 4.

The Potowmack Preserve Bylaws also generally address architectural control as follows: "The purpose of this Corporation is to . . . provide architectural control for the residential properties located therein." Bylaws, Art. II.

Here, after numerous meetings with Peter Ball, Peter's architect, and Peter's attorney, the evidence reflects that the Association's Architectural Control Committee approved by letter dated May 15, 2011, Peter Ball's application to add a deck and a shed to the Vantage Court property. In particular, the Association approved the construction of (1) a 10 foot by 31 foot, 5 ½ inch deck on the lower floor of the home that was to be offset two feet from the rear elevation and (2) a 10 foot by 15 foot, 10 inch storage permanent shed, to be located directly under the deck and also set back two feet. The deck as approved did not contain stairs, as shown on the right side rear elevation of the approved plans. Although the approved plans did not specify the exterior material to be used to enclose the shed, the Association expressly rejected Peter Ball's request to use horizontal or vertical siding. In this context, the Association instructed Peter to submit samples of the proposed exterior material before construction. He did not do so.

The Association's May 15, 2011, letter approving the deck and the shed did not reference, much less approve, the construction of a garden wall or retaining wall.

The Association identified a six-month time frame for the work, relying on Peter Ball's representation that the scope of the work would be completed during this period.

A. Respondents violated the governing documents by constructing a deck that fails to conform to the Association-approved plans.

The testimony of Dr. Barr, Ms. Gowan, and Peter Ball, the photographs of the Vantage Court property, and the drawings approved by the Association and the permitted drawings approved by the County, reflect that the deck fails to conform to the plans approved by the Association.

Peter Ball conceded that the deck as constructed did not conform to the two-foot setback requirement; indeed, he testified that the setback is approximately one foot. Additionally, the testimony and photographs clearly establish that the deck contains stairs. As the approved right side elevation plans plainly reflect, no stairs were approved, much less discussed.

Peter Ball and Mr. Hancock testified that the adjustment to the two-foot setback and the stairs leading from the deck are required by the Montgomery County Code. These adjustments are not reflected on the Montgomery County permitted drawings. Assuming *arguendo* that Peter Ball and Hancock's representations are accurate (notwithstanding the conflict with the Montgomery County permitted drawings), the Association still did not approve the stairs or change to the setback. Consequently, the proper procedure would have been for Peter to seek approval for these changes. That is not what happened here. Peter's failure to seek such approval rendered the construction as built non-conforming to the approved plans. The Association should not have to take Peter's word for it – or any Association member's word for it, for that matter – that County law compels changes to the approved design. After all, the Association is not charged with enforcing County law; it is instead authorized to "provide architectural control for the residential properties located therein," Bylaws at Art. II, to ensure "harmony of external design, color and location in relation to surrounding

structures and topography,” Declaration, Art. VIII, § I. As Dr. Barr explained to Peter on many occasions, while the Board was “eager to cooperate with any home owner [sic] making a request for changes,” the Board’s “primary concern is to continue to preserve the texture, harmony, mass and scale of the neighborhood” and, in that respect, it strives “to encourage changes which retain the original spirit of th[e] planned community.” For these reasons, Respondents violated the Association’s governing documents.

Peter obtained a permit from the County to construct the deck. At the hearing, Peter’s counsel appeared and asserted the County’s approval as a defense to Peter’s non-compliance with the Association-approved plans. As explained above, approval from the County is not a defense to non-compliance with association covenants. Respondents have pointed to no law stating that it overrides the Association’s rules in this case, and we have found none. Furthermore, the face of the County permit reminded Respondents as much:

Many subdivisions and neighborhoods within Montgomery County have private deed restrictions and covenants regulating building construction. *Obtaining a building permit does not relieve the property owner of responsibility for complying with applicable covenants.*

For these reasons, the County permit did not absolve Respondents of their responsibility to comply with Association rules, which Respondents did not follow in this case.

B. *Respondents violated the governing documents by constructing a shed that fails to conform to the Association-approved plans.*

The shed similarly fails to conform to the plans approved by the Association. As of the date of the hearing, the shed failed to conform to the Association-approved plans in several respects. First, elevation of the shed does not conform to the approved right side and rear elevation drawings. In contrast to the rear elevation drawing, which did not contain any corners, a diagonal corner was added. Further, because of the retaining wall placement, the right side elevation differs from the Association-approved elevation drawings, and the dimensions are also, by extension, inconsistent. Second, the exterior of the shed is non-conforming. On the right side rear elevation, lattice panels have been installed. The panels do not extend the entire length of the deck. Instead, a portion of the shed adjacent to the stairs does not contain any exterior finishing. The rear elevation exterior is also non-conforming: blue-gray vertical siding was installed, as were two white double doors and white trim. This seemingly haphazard selection of different exterior materials fails to harmonize with the other exterior materials used on the home. Third, the shed is non-conforming because it contains a diagonal corner on the rear elevation side of the shed. No such corner was approved. Fourth, the shed is non-conforming because, in its unfinished state, it presents as a detached, temporary structure, rather than a permanent shed integrated with the home, as approved. Taken together, these non-conforming aspects of the still-unfinished shed failed to deliver to the Association the shed it approved and, by extension, constitute a violation of the Association’s governing documents. *See* Bylaws at Art. II; Declaration, Art. VIII, § I.

C. *Respondents violated the governing documents by constructing an unapproved retaining wall.* Respondents violated the Association’s governing documents by constructing an unapproved retaining wall, the exact height of which was not established at the hearing. Respondents’ construction of the deck, storage shed/room and garden wall at issue in this case did not conform to

the Association's May 11, 2011, approval of architectural changes to the property. This unapproved construction violates Potowmack Preserve's governing documents.

The plans approved by the Association do not reference, much less approve, the construction of a garden wall. The garden wall materially altered the right side and rear elevations approved by the Association: rather than constructing a shed in accordance with the existing ground elevation, Peter excavated the earth to affect a change in ground elevation that exceeded the angle of repose of the soil. In this way, Peter's desire to "create space under the deck" via the use of the retaining wall constituted an unapproved change to plans approved by the Association. Furthermore, the placement of the retaining wall also rendered the shed non-conforming: the deck hangs over the retaining wall, rather than having an outer edge that is flush with the outer edge of the shed.

At the hearing, the Association and Peter Ball addressed whether a permit was required to construct the retaining wall. The Montgomery County Department of Permitting Services requires a permit to install a retaining wall "if the height of the wall measured from the bottom of the footing to the top of the wall is 54 inches or more or if it supports a surcharge." *See* Montgomery County Department of Permitting Services, "Fence and Retaining Walls, Permits and Information," available at <http://permittingervices.montgomerycountymd.gov/DPS/building/FenceandRetainingWallPermit.aspx>. Further, the County requires that retaining walls "be designed for a safety factor of 1.5 against lateral sliding and overturning," which, in turn, requires that the wall "be designed by a Maryland State Licensed Design Professional." *Id.*

We need not determine – nor could we determine⁴ – whether a permit was required to build the retaining wall, as such a determination is inapposite to the question before the Panel: whether the Respondents violated the Association's governing documents by constructing an unapproved garden wall. As expressed above, Respondents violated the documents by constructing the garden wall – a change to the approved plans – without obtaining prior permission from the Architectural Control Committee. *See* Bylaws at Art. II; Declaration, Art. VIII, § I. Of course, if Respondents choose to retroactively seek approval of the retaining wall and a permit would be required by the County to build it, the Panel's determination in this context in no way absolves the Respondents of obtaining a permit – a process the County, not the Association, is charged with administering.

D. Respondents have failed to complete the approved construction.

As the foregoing demonstrates, the construction remains incomplete, more than 2 ½ years after the Association approved the construction of the deck and shed – a building process Peter Ball represented would take six months.

VII. Attorneys' Fees and Costs

While we conclude that the Association is entitled to attorneys' fees and costs arising out of the instant CCOC action, we cannot pass upon whether it is entitled to fees arising out of the Montgomery County Circuit Court action – a case over which we know little and lack jurisdiction.

A. Fees arising out of the instant case.

Section 10B-13(d) of the Montgomery County Code allows the CCOC to require a party to pay the other party's attorneys' fees if the association's rules require it and the award is reasonable

⁴ The parties did not present evidence as to the exact height of the retaining wall, whether the wall supports a surcharge, or whether it was designed for a safety factor of 1.5 by a "State Licensed Design Professional."

under the circumstances, or if the party being charged the fees is guilty of some type of misconduct while the case is pending before the CCOC. "Misconduct" in this sense includes, among other things, unreasonable action such as filing or maintaining a frivolous dispute or in other than good faith, § 10B-13(d)(1), or substantially delaying or hindering the dispute resolution process without good cause, § 10B-13(d)(3). *See, e.g., Harary v. The Willoughby of Chevy Chase*, # 373 (Sept. 4, 1998) (awarding attorneys' fees because the complaint was frivolous). In the absence of "misconduct," the CCOC is precluded from awarding attorneys' fees unless the association's governing documents clearly require such an award in the type of case before the CCOC. *See Greencastle Lakes Community Ass'n v. Baker*, # 88-06 (Dec. 13, 2007) (attorneys' fees award was proper where, among other things, the association's rules allowed attorneys' fees in the type of case at issue before the CCOC).

In evaluating whether a homeowner acted in bad faith, the panel considers many factors, including, but not limited to the following: whether the party had legal counsel; whether it tried to follow the rules and CCOC policies or delayed them, whether there was a hearing on the merits of the claim so that evidence and intentions were thoroughly tested; the CCOC's policy in favor of simple and inexpensive dispute resolution; and whether the complaint appeared to be a reasonable one on the surface. *McDonald v. Briars Acres Community Ass'n*, CCOC No. 64-10 (Apr. 20, 2011) (considering all of these factors to support its determination that the association failed to present sufficient evidence showing that the homeowners filed or maintained a frivolous dispute or acted in bad faith and, as a result, the association was not entitled to attorneys' fees).

Here, we find that an attorneys' fees award arising out of the instant CCOC action is warranted.

First, the Association's bylaws require payment of fees in this case. Article VIII, Section 9 of the Potowmack Preserve Bylaws provides that the Association is entitled to "taxable court costs, attorney fees, and all other litigation costs" from an "owner of a dwelling or property who is a member of the Association" in two circumstances applicable here:

Each owner of a dwelling or property who is a member of the Association, (1) against whom any finding or conclusion is made in favor of the Association that a member has violated any of the By-laws, any of the covenants and Restrictions, or any of the rules implementing the By-laws or Declaration; or, (2) against whom a final judgment or other final determination is made in favor of the Association in any court, administrative, or other action or proceeding in which enforcement of, damages for, or any other remedy for violation of any of the By-laws, any of the covenants and restrictions contained in the Declaration, or rules implementing the By-laws or Declaration is sought, *shall pay all reasonable litigation expenses incurred by the Association in that action or proceeding, including taxable court costs, attorney fees, and all other litigation costs* incurred by the Association in seeking enforcement of any of the covenants and restrictions contained in the Declaration

Art. VIII, § 9 (numerals added for clarity; emphasis added).

As the Panel in *Potowmack Preserve, Inc. v. Peter Ball and Iryna Sivinska*, CCOC Case No. 720-G, 33-06 (June 13, 2008), noted, Section 10B-13(d) of the Montgomery County Code allows the CCOC to require a party to pay the other party's attorneys' fees if the association's rules

require it. Here, both of the circumstances in the Association's bylaws recited above requiring a property owner member of the Association to pay the Associations' attorneys' fees and costs arising out of the CCOC action are implicated here: (1) as this decision reflects, the Panel has determined that Respondents violated the Associations' governing documents by implementing architectural changes to the Vantage Court property without prior approval; and (2) in this forum, the Association sought enforcement of the governing documents, among other remedies and, by this CCOC Decision and Order, a final determination has been made in the Association's favor. Ms. Rosen's \$150.00 hourly rate is reasonable. Ms. Rosen spent 21.1 hours of work on the instant case. She did not charge the Association for 1.5 of these hours. Given the issues raised in this case, as well as the five-hour hearing, Ms. Rosen's request for 21.5 hours of preparation and representation at the hearing is reasonable. For these reasons, \$2,940.00 in legal fees arising out of the 21.1 hours of work she dedicated to handling the instant matter are reasonable, and are substantiated by the billing statements entered into evidence at the hearing. The Association is awarded these fees, as well as the \$50 cost of filing the CCOC action. Because the Association's governing documents clearly require an award of attorneys' fees and costs in the type of case presently before the CCOC, this award of fees and costs – to be paid by property owner Michael Ball – is proper. *Greencastle Lakes Community Ass'n. v. Baker* CCOC No. # 88-06. We further find that Ms. Rosen's hourly rate of \$150 is not only reasonable but is less than the prevailing average for such services in this area.

Second, the CCOC has ruled in a prior case – *Potowmack Preserve, Inc. v. Peter Ball and Iryna Sivinska*, Case No. 720-G, 33-06 (June 13, 2008), that the Association is entitled to attorneys' fees under Article VIII, § 9 of the bylaws if it prevails in an action seeking enforcement of any of the covenants and restrictions. In particular, after quoting the text of Article VIII, § 9, that panel concluded in pertinent part as follows:

The Panel concludes that it should interpret this Section as providing for the mandatory award of attorney's fees. Section 10B-13(d), Montgomery County Code, allows the Panel to award attorney's fees if an association document so requires and the award is reasonable under the circumstances. The Panel further concludes that at least \$3,200.00 of the legal fees incurred by Potowmack Preserve, Inc. relate directly to Case No. 720-G plus the filing fee of \$50.00 for the Complaint.

The above ruling that Association's bylaws provide for the mandatory award of attorneys' fees is *res judicata* and binding upon parties and this Panel. Whether the Association is entitled to fees in a particular case, of course, is an issue to be determined based on the particular facts and circumstances of that case. But, this isn't Peter Ball's first trip to the rodeo. He's been here before, and he knows that the Association can seek fees if it prevails in a rule enforcement action. His opposition to fees suggests bad faith.

For these reasons, the Panel determines that the Association is entitled to attorneys' fees and costs arising out of the CCOC action.

B. The Circuit Court action.

The Association also seeks attorneys' fees arising out of the Circuit Court action filed by Respondents. *See Ball, et al. v. Potowmack Preserve, Inc.*, Case No. 372523V (Cir. Ct., Montgomery County). As a threshold matter, we note that neither Commission's Exhibit 1, nor any other exhibits offered into evidence provides a clear, complete picture of the Circuit Court proceedings. Even if the record did provide such information, the CCOC would be precluded from awarding attorneys' fees in a suit over which it lacks jurisdiction: the matter before the Circuit Court does not constitute a "dispute" under Montgomery County Code § 10B-8(4)). *See* Montgomery County Code at § 10B-13(d) (authorizing the CCOC to award costs, including a reasonable attorneys' fee, under certain circumstances in a "dispute"). For these reasons, the panel denies the Association's request for attorneys' fees arising out of the Circuit Court action.

Respondents also seek attorneys' fees, but there is no basis for them. Consequently, Respondents' motion for attorneys' fees is denied.

ORDER

Based on the foregoing findings of fact and conclusions of law, it is therefore adjudged and ORDERED as follows:

1. The motion of Potowmack Preserve, Inc. for attorneys' fees is GRANTED. Potowmack Preserve, Inc. is awarded \$2,940.00 in attorneys' fees and a refund of the \$50 filing fee against Michael Ball, who is the record owner of the property located at 10600 Vantage Court, Potomac, Maryland. Michael Ball shall pay the sum of \$2,990.00 to Potowmack Preserve within 30 days after the effective date of this order. If the attorneys' fees are not paid within that time, then Potowmack Preserve may avail itself of any legal remedies or combination of legal remedies available to it to collect these fees.

2. Peter Ball and Michael Ball's motion for attorneys' fees is DENIED, as Respondents presented no factual or legal basis for an award of such fees.

3. Peter Ball and Michael Ball are ordered to cease any and all construction on the deck, storage shed/room, and garden wall as of the effective date of this order unless and until Potowmack Preserve approves architectural changes to these elements.

4. Within 30 days from the effective date of this order, Respondents are ordered to resubmit a complete application to the Association to construct architectural changes regarding the deck, storage shed/room, or garden wall. This application must solely seek approval for the presently non-compliant architectural changes to the deck, storage room/shed, and garden wall. Further, the application must provide detailed specifications for finishes and materials.

5. Potowmack Preserve must promptly and in good faith review any application filed by Michael Ball or Peter Ball pursuant to this order within 45 days of Respondents' submission of such an application.

6. Should Potowmack Preserve approve any architectural changes, the following framework applies:

- a. The Association must set a reasonable deadline for the completion of any changes approved.
- b. On-site work-in-progress meetings must be scheduled between the Association and Peter Ball at a mutually agreed-upon frequency, but not less than every 15 days.
- c. If the drawings approved by the Association are altered in any fashion by Montgomery County during the permit submittal process or during on-site inspections, within three days Peter Ball and/or Michael Ball must notify the Association in writing of the County's alterations, attaching supporting correspondence and/or other form of verification of the County's alterations. The

written documentation from the County must identify with particularity the nature of the alterations. Within three days after receiving written notice from Peter Ball and/or Michael Ball of any alterations by the County, the Association must review the alterations and respond in writing to Mr. Ball, specifying whether the County's alterations conform to Potowmack Preserve's governing documents and, by extension, whether the Association approves the same.

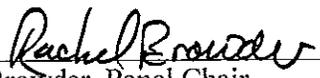
7. If Peter Ball and Michael Ball choose to file an application for architectural changes to the deck, storage room/shed, and garden wall, and that application is denied in whole or in part, within 45 days after the date of denial by the Association, Peter Ball and/or Michael Ball must ensure that the property conforms to the architectural changes approved by Potowmack Preserve on May 11, 2011. Should Peter Ball and/or Michael Ball fail to ensure that the property conforms to the construction approved by the Association on May 11, 2011, the Association may seek an order from the CCOC to remove it.

8. Under Section 10B-6.01.09(a) of the Code of Montgomery County Regulations, this Panel retains jurisdiction over the instant dispute for the purpose of assuring that the relief granted by the Panel is completed. The Panel further reserves its right to issue any further order it deems necessary and proper to effect this Decision and Order.

9. The parties are reminded that a failure to comply with an order of the CCOC is considered a Class A violation of the Montgomery County Code and subject to a fine of up to \$500.00 per day and an order of abatement at the discretion of the District Court.

Panel members David Weinstein and Aimee Winegar concur in this Decision and Order.

Any party aggrieved by the action of the CCOC may file an administrative appeal to the Circuit Court for Montgomery County, Maryland within thirty days after this Order, pursuant to the Maryland Rules of Procedure governing administrative appeals.



Rachel Browder, Panel Chair