

**MONTGOMERY COUNTY, MARYLAND
COMMISSION ON COMMON OWNERSHIP COMMUNITIES**

WILLIAM SIEFKEN AND ANNA SIEFKEN)	
Complainant)	
)	
vs.)	Case No. 75-12
)	May 6, 2014
TIVOLI COMMUNITY ASSOCIATION)	
Respondents)	

DECISION AND ORDER

Before Elayne Kabakoff, Aimee Winegar, and Shontz

The above-entitled case came before the Commission on Common Ownership Communities for Montgomery County, Maryland, for hearing and arguments on September 12, 2013, pursuant to Sections 10B-5(i), 10B-9(a), 10B-10, 10B-11(e), 10B-12, and 10B-13 of the Montgomery County Code. The hearing panel has considered the testimony and evidence presented, and finds, determines, and orders as follows:

BACKGROUND

Siefken ("Complainant") filed a complaint with the Office of Consumer Protection for adjudication by the Commission on Common Ownership Communities against Tivoli Community Association ("Respondent"). Complainant alleged the following:

1. Respondent did not properly maintain the common areas, which caused damage to Complainant's property.

SUMMARY OF TESTIMONY AND EVIDENCE

1. In approximately 2010, Complainant began to have water entering his basement during large precipitation events. Complainant claims current and ongoing damage from surface runoff, including:
 - a. Erosion on his property.
 - b. Standing water on his property at various times.
 - c. Ice covering the driveway and sidewalk at various times.
 - d. Damage to the deck from erosion.

- e. Mold in the basement.
 - f. Complainant testified that he had obtained an estimate from a contractor to fix damage to the deck, but the deck would likely need further future repairs if the water erosion is not addressed.
2. Complainant introduced extensive photographic and video evidence showing the condition of Complainant's property and the subject common area following large rain events.
 3. Respondent's property manager testified that erosion control measures had been put in place in other common areas in the community.
 4. Respondent's property manager testified that Respondent does some maintenance in the wooded portions of all common areas to remove dead trees. Respondent's property manager initially could not testify as to whether such maintenance had been performed in the subject common area but later testified that no maintenance has ever been performed on the subject common area during her tenure.
 5. Respondent's property manager testified that Respondent does not mow the grass-covered portion of the subject common area, claiming lawn maintenance equipment would have to be moved through other units' properties, i.e., the subject common area is "landlocked" within privately-owned units in the community.
 6. Respondent's property manager testified that she obtained an estimate from a landscaping firm of \$5,885 to install erosion control on the subject common area.
 7. A representative from the Montgomery County Department of Environmental Protection ("DEP") testified as follows:
 - a. The DEP representative examined the subject common area and Complainant's property.
 - b. The grass-covered portion of the subject common area includes a "grassy swale," which is a grass-covered berm and trench that collects surface runoff and channels the flow of water across the subject common area to a point uphill of Complainant's property.
 - c. Sediment on Complainant's driveway indicated some surface runoff flow across Complainant's driveway.
 - d. The DEP representative proposed a rain garden on the grass-covered portion of the subject common area along with a rain garden on Complainant's property and possibly some conveyance as a way to address the erosion and water flow on Complainant's property. However, further study of the subject common area and Complainant's property would be required to determine the location, size, and extent of appropriate mitigation measures.

- e. A rain garden is a small area of cultivated plants and changes to surface water flow to collect water and allow it to soak into the ground, rather than allowing the water to flow across the ground and cause erosion.
 - f. Too much water appears to be entering Complainant's property to be addressed by a rain garden only on Complainant's property. The only surface runoff mitigation measures possible exclusively on Complainant's property would be a combination of a rain garden and "conveyance," i.e., measures to move water across Complainant's property. However, a conveyance would likely cause erosion and excessive water to accumulate on Complainant's neighbors' properties, which would require Complainant's neighbors to undertake mitigation measures as well.
 - g. Montgomery County offers rebates to property owners of up to one-quarter of the cost of installing a rain garden if the property owner hires a contractor deemed "qualified" by DEP. In this case, a rain garden on the subject common area and on Complainant's property would be treated separately for rebate purposes.
 - h. The DEP representative described drawings he had made regarding the flow of surface runoff based on his analysis of the subject common area and surrounding properties. He testified that there is a manmade swale at the edge of the top of the hill behind Complainants' house, that this swale has openings in it to allow rainwater to escape, that these openings channel the rainwater instead of allowing it to be diffused, that below these openings the formerly undisturbed forest is beginning to erode, and that at the base of the hill, below one of the openings, the channeled stream of rainwater has begun to gouge out more severe erosion at the edge of the Complainants' lot.
8. A member of Respondent's Board of Directors ("Board") testified that Respondent has a duty to maintain the common areas.
9. The member of Respondent's Board testified that the Board does not approve erosion control measures. However, during cross examination, the member of Respondent's Board was confronted with Board meeting minutes that indicated the Board deliberating on and approving erosion control measures.
10. It was not disputed that a manmade swale exists at the top of the hill in the common areas of the Respondent and that this swale contains openings to allow surface water to escape and flow downhill; it is also not disputed that the Respondent did not construct the swale.

FINDINGS OF FACT

1. Complainant is a resident of a homeowners association community as defined by Title 11B of the Real Property Article of the Code of Maryland, and Respondent is a homeowners association, which has its covenants filed in the land records of

Montgomery County, Maryland, and these covenants run with the land and bind all the lots referred to in the covenants, including the lot owned by Complainant.

2. Complainant moved into the property in approximately 1992.
3. Complainant's property is a detached house with yard space on all four sides.
4. Complainant's property fronts onto a public street, has other private property units adjacent on both sides, and has a common area adjacent at the back (hereafter "subject common area").
5. The subject common area is uphill from Complainant's property, and Complainant's property appears to generally slope downhill from the border with the subject common area to the street in front of Complainant's property.
6. The subject common area consists of a wooded section on the downhill side and a grass-covered section on the uphill side. At the edge of the wooded section is a swale intended to catch surface water flowing from the lots at the top of the hill, which was constructed by the developer of the Respondent, and this swale contains at least one opening to allow the water to drain out of the swale. The opening has the effect of concentrating the surface water instead of diffusing it.
7. The subject common area is adjacent to backyards of multiple community properties on the uphill, grass-covered side.
8. Extensive erosion on Complainant's property is being caused by surface runoff water entering from the subject common area and from the opening in the swale.
9. Large amounts of standing and flowing water were present on Complainant's property on at least two occasions.
10. Erosion in the wooded section of the subject common area is the result of surface runoff and is directly connected to the erosion path on Complainant's property.
11. There is no indication that significant surface runoff is entering Complainant's property from the adjacent neighbors on either side, but Complainant conceded that water may be entering from the adjacent side neighbors.
12. In March 2012, Complainant requested Respondent's Board of Directors ("Board") help Complainant address the ongoing damage to his property.
13. In April 2012, Respondent's Property Manager responded to Complainant without informing Respondent's Board.
14. In August 2012, Respondent's Board responded to Complainant that they had consulted an attorney and had no obligation to take action to address the surface runoff on the subject common area because doing so would potentially alter the "natural flow" of water in the subject common area.

15. Respondent has put in place erosion control measures on other common areas within the community that were accessible without traversing privately-owned property. This includes a rain garden installed by Montgomery County.
16. Respondent does some maintenance in the wooded portions of common areas to remove dead trees, but no such maintenance has been done in the subject common area during the tenure of Respondent's current Property Manager.
17. Respondent does not mow the grass-covered portion of the subject common area, but the community covenants do provide Respondent an easement over privately-owned property to access all common areas.
18. At least one property uphill and adjacent to the subject common area has a downspout extension directed at the subject common area and the low end of the grassy swale in the subject common area.
19. Respondent has a duty to maintain the common areas in good condition.
20. Respondent's Board considers and approves erosion control measures in common areas in the community.
21. Complainant's property affected by surface runoff does not include any common or limited common elements based on the evidence presented.
22. There are surface water mitigation measures that could be taken in the grassy portion of the subject common area that would not necessitate the removal of any trees.
23. The grassy swale in the subject common area is a man-made alteration to the original ground surface that is the direct cause of accelerated and concentrated surface runoff in and through the subject common area and through Complainant's property. This concentrated surface water flow is damaging the subject common area and Complainant's property through erosion and periodic accumulation of water in quantities that cannot be readily absorbed by the soil, i.e., standing water and ice. However, this alteration was likely made by the original property developer, not by Respondent.
24. One or more property owners adjacent to and uphill of the subject common area have altered the natural flow of water, including by measures such as downspout extensions, in a manner that may be contributing to the accelerated and concentrated flow of surface water entering the subject common area and causing erosion.

CONCLUSIONS OF LAW

1. Complainant and Respondent are proper parties to this dispute pursuant to Section 10B-8 of the Montgomery County Code.

2. As noted by the member of Respondent's Board, and as shown in Respondent's governing documents, Respondent has a duty to maintain the common areas of the community.
3. Respondent's main assertion is that Maryland is governed by the "civil law rule," and because Respondent has never modified the subject common area, Respondent has no duty to address the water flow entering Complainant's property. The civil law rule states generally that a property owner is only subject to liability for damage to other properties caused by the flow of water if the property owner alters the "natural flow" of water on his property. See, e.g., *Sainato v. Potter*, 222 Md. 263, 159 A.2d 632 (1960).
4. However, Respondent neglected a critical part of Maryland jurisprudence on the subject. Maryland is governed by the civil law rule modified by the test of reasonableness. As the Maryland Court of Appeals stated in *Beane v. Prince George's County*, 20 Md. App. 383, 315 A.2d 777 (1974):

The doctrine of reasonable use was developed in equity to mitigate the rigors of the civil law rule, adopted early in Maryland, pertaining to the control of the natural flow of surface waters. That rule was stated by Judge (later Chief Judge) Prescott in *Sainato v. Potter*, 222 Md. 263, 159 A.2d 632 (1960), as follows:

"... the owner of higher land is entitled to have surface water flow naturally onto the lower land of an adjoining landowner. [citing cases.] And the lower landowner cannot obstruct the running of natural surface waters onto his land from that of the higher owner. [citing cases.] This rule is, however, subject to the important limitation that the higher landowner cannot artificially collect surface water and discharge it at one point over the lower land, so as to injure it, nor can he precipitate it in greatly increased or unnatural quantities upon his neighbor below to the substantial injury of the latter." [citing cases.]

And in *Biberman v. Funkhouser*, 190 Md. 424, 58 A.2d 668 (1947), it was said at p. 429:

"This rule of the civil law [which accords to the owner of the upper land a right to the uninterrupted flowage of surface waters] is subject to the qualification that the upper owner has no right to increase materially the quantity or volume of water discharged on the lower land owner ... [nor] to discharge water into an artificial channel or in a different manner than the usual and ordinary course of drainage, or put upon the lower land water which would not have flowed there if the natural drainage conditions had not been disturbed. *Neubauer v. Overlea Realty Co.*, 142 Md. 87, 99, 120 A. 69."

But in *Sainato, supra*, the Court described the tempering role of equity as applied to the rule:

“In cases where a strict application of the general rule would result in hardship upon either the higher or lower landowner, Courts have recognized what is termed a ‘reasonableness of use’ rule. An application of this rule creates no precedent, nor does it change the adopted rule of law. It is based upon the facts of a particular case, and provides mitigation for the harsh application of the general rule. This Court has recognized the rule on several occasions.” [citing cases.] 222 Md. at 267-68.

And in *Kidwell v. Bayshore Dev. Corp.*, 232 Md. 577, 194 A.2d 809 (1963), the Court said of this rule:

“It depends upon the facts of each particular case, is peculiarly appropriate for an equity court to follow, and, in cases where undue hardship will ensue to one or the other of property owners by a rigid application of the civil-law rule, it has the advantage of flexibility, whereby the rights of the respective owners may be equitably determined by an assessment of all the relevant factors relating to the disposition of surface waters. * * *.” 232 Md. at 583-584. *Id.* at 393-95.

5. This appears to be a clear case of a situation where “strict application of the general [civil law] rule would result in hardship” on Complainant. As the evidence in the case showed, the natural flow of surface water was altered by the developer, so that Complainant cannot adequately handle the volume of water entering his property by making changes only to his property. Complainant could mitigate some of the surface runoff by installing a rain garden on his property, but the need to install a conveyance would require alterations to Complainant’s neighbors’ properties. Moreover, Complainant cannot simply block the water from entering his property because then he would violate the civil law rule by redirecting the “natural flow” onto his neighbors’ properties.
6. Further, the current flow of water in the subject common area is causing damage to the subject common area through erosion.
7. Therefore, the hearing panel concludes that Respondent has violated its duty to maintain the subject common area and is bound by the reasonableness standard of Maryland’s application of the civil law rule. Respondent has a duty to maintain the subject common area, yet the subject common area is being eroded by surface runoff and Respondent has not abated that erosion. In addition, Respondent is aware (or at least constructively aware) that uphill property owners have altered the “natural flow” of water by installing downspout extensions that concentrate and accelerate the flow of rain water into the subject common area and ultimately onto Complainant’s property. Respondent is also aware that Complainant cannot mitigate the flow of

surface runoff strictly by modifications to Complainant's property that do not impact Complainant's neighbors. Respondent has taken active steps to address surface water flow and erosion in other common areas of the community, yet denies any duty to address water flow and erosion in the subject common area. The hearing panel finds Respondent has a duty to maintain the subject common area and is responsible for preventing further erosion of the subject common area by addressing the flow of water on and through the subject common area. Even though making changes to the subject common area will alter the "natural flow," the hearing panel finds that the reasonableness test under Maryland's application of the civil law rule requires Respondent to make such alterations to the subject common area.

8. The evidence showed alterations of the natural flow of water by property owners uphill of the subject common area. Those properties are outside the scope of this case. However, as part of Respondent's duty to maintain the common areas of the community, Respondent must examine whether any property owners have altered the natural flow of water in a manner that is contributing to the surface runoff and erosion problems in the subject common area.
9. The hearing panel's findings and conclusions in no way should be construed as indicating that Respondent has a duty to maintain Complainant's property. Actions required of the Respondent in this decision are limited to the subject common area.
10. Complainant requested award of attorney fees in this case. However, under the standard of Montgomery County Code, the hearing panel finds that Respondent did not pursue this case in a manner meriting award of attorney fees to Complainant.
11. Respondent argued that its governing documents declare that it is not liable for damages to private lots caused by water. Since we are not requiring the Respondent to pay damages to Complainants or to subsidize the costs of remediation on Complainants' lot, this argument is not relevant.

DECISION AND ORDER

1. Based on the foregoing, the hearing panel orders the following:
 - a. Respondent shall, within sixty (60) days from the date of this decision, retain the services of at least one qualified engineering and/or landscaping firm, as defined by the standards of Montgomery County and the State of Maryland, at Respondent's expense, to:
 - i. fully analyze the flow of water entering, traveling through, and exiting the subject common area, including the impact of uphill property owners' modifications such as downspout extensions; and
 - ii. provide a detailed proposal to DEP and Complainant for addressing and mitigating the flow of surface water on and through the subject common area, including such measures as potential alterations to the "grassy swale" and its berm, rain gardens, and other measures as appropriate. As these

mitigation measures may require alteration of the subject common area, Respondent will have a continuing duty to maintain these mitigation measures.

- b. Respondent shall, within sixty (60) days from the date of this decision, enlist the services of the Montgomery County RainScapes Program to ensure that any proposed changes to the subject common area comply with any applicable Montgomery County requirements. As noted in the Findings of Fact above, the evidence indicates no need to remove trees from the subject common area. However, if Montgomery County standards for mitigation require tree removal or a site plan amendment, Respondent shall have an additional thirty (30) days to comply with tree removal standards and site plan amendment initiation procedures.
- c. Respondent shall, within sixty (60) days from receiving the first proposal from a qualified engineering and/or landscaping firm, at Respondent's expense, hire a qualified engineering and/or landscaping firm to begin work to implement measures to address and mitigate the flow of water on and through the subject common area. Work on the mitigation measures in the subject common area must be completed within one hundred eighty (180) days from the date of this decision.
- d. Respondent shall, within seven (7) days after selecting a firm and proposal, provide a copy of the planned alterations to the subject common area to Complainant to allow Complainant the opportunity to coordinate mitigation measures on his property as appropriate.
- e. Respondent shall, within sixty (60) days from the date of this decision, examine whether property owners uphill of the subject common area have modified the "natural flow" of water on their properties in a manner that is contributing to concentrated and accelerated surface water flow entering the subject common area. Respondent shall, within sixty (60) days after that, take any legally permissible actions needed to mitigate the impact on the subject common area by uphill property owners' modifications of the natural flow of water.
- f. Respondent shall send a copy of all documents and any correspondence sent to Complainant related to compliance with this order to the Commission on Common Ownership Communities.

Any person aggrieved by this decision may file an appeal with the Circuit Court for Montgomery County, Maryland, within thirty (30) days after the date of this decision, pursuant to the Maryland Rules for judicial review of administrative agency decisions.

Commissioners Kabakoff and Winegar concur.



Douglas Shontz, Panel Chair
Commission on Common Ownership Communities