

Commission on Common Ownership Communities
Montgomery County, Maryland

In the Matter of

Shirley Kessel x
6715 Fairfax Road x
Chevy Chase, MD 20815, x
Complainant, x

v. x

Case No. 506-O
January 9, 2002

Kenwood Forest One, Condominium x
c/o Thomas C. Schild, Esq. x
Silverman & Schild x
Suite 240 x
8555 16th Street x
Silver Spring, MD 20910, x
Respondent. x

DECISION AND ORDER

The above-captioned case, having come before the Commission on Common Ownership Communities for Montgomery County, Maryland, pursuant to sections 10B-5(i), 10B-9(a), 10b-10, 10B-11(e), 10B-12, and 10B-13 of the Montgomery County Code, 1994, as amended, and the Commission having considered the testimony and evidence of record, finds, determines and orders as follows:

Background

On or about November 16, 2000, Ms Shirley Kessel (Complainant), owner of 6715 Fairfax Road, Chevy Chase, a unit covered by the condominium association documents of Kenwood Forest One Condominium, filed a complaint with the Office of Common Ownership Communities against Kenwood Forest One (Respondent) seeking to have the Association require Ms Kessel's neighbor to tear down a fence and stairs constructed outside of their house, which Ms Kessel alleged had not been approved in accordance with Association procedures. Ms Kessel's neighbors are Mr. and Mrs. Robert Shapiro. The Shapiros are not a party to this case.

Ms Kessel's complaint also requested remedies for her allegations that the Respondent

Board was dilatory in making meeting minutes available to owners and was otherwise not interacting with owners appropriately. These issues were withdrawn at the hearing with the explanation that Complainant thought that the problems of concern to her had been mitigated as a result of her complaint.

Inasmuch as the matter was not resolved through mediation, this dispute was presented to the Commission on Common Ownership Communities for action pursuant to section 10B-11(e) of the Montgomery County Code on July 11, 2001, and the Commission voted that it was a matter within the Commission's jurisdiction. The case was scheduled for public hearing on October 17, 2001 and a public hearing was conducted on that date.

Ms Kessel testified on her own behalf and Ms Betty Redmond, presently President of the Board of Directors, testified on behalf of Kenwood Forest One Condominium at the hearing. Neither Mr. or Mrs. Shapiro were present at the hearing.

Counsel for Respondent moved at the opening of the hearing that the case be dismissed for lack of jurisdiction based on the holding in *Black v. Fox Hills North Community Association*, 90 Md. App. 75, 599 A.2d 1228 (Md. App. 1992). The Panel took this motion under advisement until the completion of the hearing. At the close of the hearing, Counsel for both parties requested leave to address this issue and others in written argument submitted after the hearing. The Panel agreed to this and counsel for both parties submitted written argument after the hearing.

Findings of Fact

In July 1999, the Shapiros had submitted an application to the Kenwood Forest One Architectural and Environmental Control Committee (AECC) to modify the design of and replace exterior stairs and fencing around their unit. In accordance with the Kenwood Forest Community Handbook provisions on Alterations to Condominium Units, the management company sent notice of the application and a copy of the plan to Ms Kessel. Ms Kessel objected in writing to the design of the replacement structures because of the impact she foresaw the new structures would have on the view from her unit. The Chair of the AECC denied the Shapiro application specifying the reasons and suggesting design changes that would be more favorably received.

Ms Redmond testified that the Kenwood Forest Community Handbook¹ was an explanation of community operating procedures and policies and as such had never been adopted by the homeowners and is not on file with the condominium documents or with the land records.

¹ The copy of the Kenwood Forest Community Handbook in the record indicates it was last updated in 1998. No evidence or testimony was presented that it had ever been adopted in accordance with the applicable provisions of the Maryland Condominium Act, Real Property Article, Title 11 of the Annotated Code of Maryland, or Montgomery County Code with respect to the adoption of rules.

On or about June 16, 2000, Ms Kessel observed a load of building lumber outside the Shapiro's house and started inquiring of Board and AECC members whether the Shapiros had submitted another application for exterior alterations. She was told that no application had been submitted. On June 18 and 20, 2000, the Shapiros tore down the existing exterior stairs and fence.

In a letter dated June 21, 2000, Mr. Shapiro explained to the Board that he did not understand that he was required to submit an application for replacement of an existing structure with minor changes, he attached a description of the planned structures and a sketch and requested whatever approval was necessary. He also indicated that the project was in progress and thus that he would appreciate a quick response. At its June 22, 2000 meeting the Board reviewed Mr. Shapiro's application on an emergency basis, rather than referring it to the AECC. At the hearing, Ms Redmond testified that there was concern that the absence of the stairs might be a hazardous condition. The Board approved the structures with some conditions and sent Mr. Shapiro a letter so informing him dated July 6, 2000.

On June 26, 2000, the Shapiro's new fence and stairs were completed. Ms Kessel found that the new structures had a greater and an adverse impact on her view than the previously existing fence and stairs. She testified that the new fence is four inches taller than the one it replaced. She explained that because of an earlier conversation with Mr. Shapiro about replacing his fence with a taller one, she had measured the old fence at four feet six inches. She testified that, according to her measurements, the new fence is four feet ten inches. She also testified that the new stairway was larger than the old one. On June 29, 2000, she sent a letter to the Board asking that they reconsider their approval and stating her reasons for this request.

By letter dated August 11, 2000, the Board notified the Shapiros that the exterior stairway as constructed was not in accordance with the Board's approval, based on the plans submitted with the Shapiro's June 21, 2000 letter, and directed that the stairway either be removed or a new application be submitted within 30 days of the date of the letter. The observation of the Board was that the fence was not taller than the previous fence and no further action regarding construction of the fence has been taken.

Mr. Shapiro responded to the Board by letter dated September 3, 2000. He disagreed with some of the allegations of the Board, agreed with other allegations but offered explanations which he suggested overcame the variations in construction about which the Board expressed concern, including building or housing code requirements, and declined to remove the stairway or to submit a new application.

A letter, dated November 7, 2000, was sent to the Shapiros by an attorney representing the Condominium requesting that Mr. Shapiro reduce the height of the lower landing in the exterior stairway and that he provide evidence that the changes in construction of the stairway, uprights and railings were required by building or housing code. Mr. Shapiro has not responded to this letter.

Ms Redmond testified that the Board of Directors has subsequently voted unanimously to spend no additional association funds to take further legal action against the Shapiros regarding their exterior stairway and fence.

Discussion

Ms Kessel testified that she had pursued this case not only because of the impact on her view and on the value of her house but also because she believes in the rule of law and that the rules of a community ought to be applied to all equally.

Kenwood Forest One did not follow the procedures established in Article X of its bylaws for review and approval of an exterior alteration in this case. Testimony at the hearing indicated that this was due to a series of unintentional misunderstandings². The Shapiros thought that if they were going to replace existing structures they did not need AECC approval and removed the existing exterior stairway prior to learning otherwise. They then submitted an application for the replacement structure. Having removed the existing structure, the Shapiros and the Board of Directors both believed that there was a potentially dangerous situation that required expedited attention to approve the Shapiros' replacement structures and thus the Board undertook to consider the application rather than requiring that it wait for the next meeting of the AECC and notifying neighbors of the proposed alteration. At all times relevant to the issues which are subject of this complaint, there was an existing functioning AECC at Kenwood Forest One.

The greater misunderstanding appears to be in the concept of exact or identical replacement. The Shapiros' correspondence represented that they were planning to replace what was existing. The drawings which accompanied the letter requesting approval of the construction did not provide enough detail to show the differences between the previous structure and the planned replacement. The Board imposed some conditions but apparently did not recognize that the Shapiros' new exterior stairway would have a different configuration than the one it replaced.

It is possible that the AECC would have discovered the differences in the new structure by taking more time to examine the record, to ask questions, to allow neighbors to indicate their concerns, or for other reasons. The normal process followed under the rules of the community does provide a number of safeguards which might have prevented the misunderstandings about configuration of the stairway structure. But this is speculation.

Conclusions of Law

² Ms Kessel's complaint alleged, and her testimony suggested that there were personal biases in favor of the Shapiros and against Ms Kessel which affected the actions by the Board by which she was adversely affected. On balance and in light of the record as a whole, the Panel did not find evidence that the Board's decisions were influenced by either bias or conflict of interest.

The Kenwood Forest One By-laws at Article X establish the AECC and provide rules for its operation. Notwithstanding the foregoing, the By-laws at Article V, Section 3 make it clear that the Board of Directors has all the powers necessary for the administration of the affairs of the condominium which are not reserved to the unit owners. Thus, the Board of Directors had the authority to approve an application for exterior alteration and did not abuse its discretion in doing so under the circumstances in this case. *Black v. Fox Hills*, 599 A.2d at 1231, citing *Papalexidou v. Tower West Condominium*, 167 N.J. Super. 516, 401 A.2d 280, 285-286 (1979), "If the corporate directors' conduct is authorized, a showing must be made of fraud, self-dealing or unconscionable conduct to justify judicial review."

The Kenwood Forest Community Handbook has not been adopted in accordance with the provisions of Real Property Article, Section 11-111 of the Annotated Code of Maryland and does not represent binding regulation.

Due to the perceived exigencies, the Kenwood Forest Board of Directors did not follow its normal and prescribed procedure in processing the Shapiro's application for exterior alteration. However, when they received Ms Kessel's request for review or reconsideration testimony presented at the hearing suggested that they did take her concerns into account, looked at the structures as they had been constructed and took reasonable action to correct what they believed did not comply with their approval.

The determination of the Board of Directors not to spend additional association funds to further pursue enforcement action against the Shapiros is a decision within the business judgment rule set forth in *Black v Fox Hills North, supra*. There is no evidence in this record that this decision was tainted with fraud or bad faith. The Commission will not direct the community to do otherwise.

However, the motion to dismiss for lack of jurisdiction based on the *Black* case is denied. The Commission has jurisdiction to analyze the facts to determine whether the business judgment rule applies.

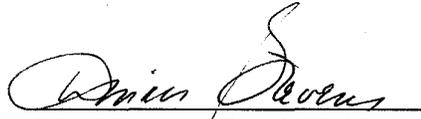
ORDER

Based on the evidence contained in the record, and for the reasons set forth above, the Commission orders that this complaint be dismissed. The Kenwood Forest One Condominium Board of Directors has determined not to enforce changes in structure to the exterior stairway and fence at the Shapiro's unit. This decision is within the power and authority of the Board and under the business judgment rule will not be subject to further action.

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

Any party aggrieved by the action of the Commission may file an administrative appeal to

the Circuit Court of Montgomery County, Maryland, within thirty (30) days from the date of this Order, pursuant to Chapter 1100, Subtitle B, Maryland Rules of Procedure.

A handwritten signature in cursive script, appearing to read "Dinah Stevens", is written over a horizontal line.

Dinah Stevens, Panel Chairwoman
Commission on Common Ownership Communities