

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

ROSEMARY WILLIAMS)	
)	
Complainant)	
)	
vs.)	Case No. 578-0
)	
OAK SPRINGS TOWNHOUSE)	
ASSOCIATION, INC.)	
)	
Respondent)	
)	

DECISION AND ORDER

The above-entitled case having come before the Commission on Common Ownership Communities for Montgomery County, Maryland, pursuant to Sections 10B-5(I), 10B9(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 other evidence of record, it is therefore this 15th day of May, 2003, found, determined and ordered as follows:

BACKGROUND

Rosemary Williams is a homeowner in the Oak Springs Townhouse Association. Oak Springs is a community that has had a continual problem with trash and debris littering the streets, yards and common areas within its boundaries. In an effort to decrease the amount of the litter present, the community initiated a campaign to remind residents that the Association's Rules and Architectural Guidelines prohibit residents from placing trash outside "except on days of trash collection." Record at 15.

In a letter to residents, dated October 18, 2000, the Association discussed numerous community issues and events including the trash issue.

One of the biggest problems which homeowners reported was with regard to trash removal. Many residents are still putting their trash out for collection on the common areas several days in advance of pick-up. Please remember that trash should be placed out for collection **at the curb in front of your home no earlier than**

sunset on Tuesday and Friday evening. * * * Because this has become such a large problem in the community, which has resulted in trash being blown throughout the common areas, the Board will bill any homeowner/resident who is found to be in violation of these procedures. The bill will equal the cost to have a contractor remove your trash from the common area. Please be sure to follow these trash collection procedures to avoid this action. (Emphasis in the original.)

October 18, 2000, Letter from Oak Springs Townhouse Association to Homeowners/Residents. The Association regularly placed similar notices in the community newsletter.

On Tuesday, November 20, 2001, Ms. Williams needed to travel to Pittsburgh to deal with pressing family business. She left at approximately noon. Prior to her departure she placed a bag of trash out for collection the next day.

Later that day, the Association had a contractor patrol the community to collect trash that had been placed for collection early. The contractor billed the Association \$225.00 for the following services:

Patrolled for trash all common areas and parking lots.
Hauled misc bulk items from various areas throughout the property.
Checked bags of trash for names that were placed outside for pick-up too early on 11-20-01.

DCI Invoice. Record at 97.

The contractor searched trash bags it collected and identified four individuals, including Ms. Williams, who had left trash out too early. On December 11, 2001, Oak Springs notified Ms. Williams, by letter, that on November 20, 2001, she had placed trash out too early. The letter indicated that Ms. Williams owed the Association \$56.25 for her "proportionate share of the expenses to clean up these items." Record at 96.

On December 13, 2001, Ms. Williams responded with a hand-written note strongly objecting to the charge. Record at 99. On February 20, 2002, the Association wrote Ms.

Williams notifying her that at the Board of Director's meeting on February 13, 2002, the Association's Board reduced the charge to \$30.00 because she was "a first-time offender." The letter also invited Ms. Williams to attend the next Board meeting if she "wish[ed] to discuss the matter further." Record at 104. Ms. Williams and Oak Spring exchanged numerous letters during the next two months. The Board reconsidered its decision to bill Ms. Williams at both the March and April meetings, with Ms. Williams present at the April meeting. On April 19, 2002, the Association confirmed, by letter, that it denied her request to waive the payment.¹ Record at 113. On April 22, 2002, Ms. Williams filed her complaint with the Commission on Common Ownership Communities.

FINDINGS OF FACT

1. Rosemary Williams, complainant, is a homeowner residing at 1200 Twig Terrace, Silver Spring, MD 20905. This residence is located in the Oak Springs Townhouse Association.
2. The Oak Springs Townhouse Association is a townhouse community located in Silver Spring, Maryland. The community is governed by Articles of Incorporation, Bylaws, and a Declaration of Covenants, Conditions and Restrictions.
3. On Tuesday, November 20, 2001, at approximately noon, Ms. Williams placed a bag of trash outside her townhouse in anticipation that it would be collected on Wednesday, the regular collection day.
4. When residents placed trash out prior to sunset on the evening prior to collection, Oak Springs hires a contractor to collect the early trash and identify, if possible, the resident responsible for the trash.
5. On November 20, 2001, Oak Spring's contractor identified four residents, including Ms. Williams, responsible for placing trash outside before sunset. The contractor invoiced Oak Springs \$225 for work on that day. Oak Springs billed each identified resident 25 percent, i.e. \$56.25, of the contractor's charge. Oak Springs subsequently reduced the amount to \$30.

¹ The Association had originally imposed a \$10 late fee because Ms. Williams failed to pay the money within the stated time. The April 19 letter no longer discussed the late fee and at the hearing the Association acknowledged that the late fee was withdrawn pending a resolution of the dispute.

CONCLUSIONS OF LAW

1. The Oak Springs Townhouse Association Articles of Incorporation, Bylaws, and Declaration of Covenants, Conditions And Restrictions are valid and enforceable documents. Markey, et al. v. Wolf, et al., 607 A.2d 82, 87 (Md. 1992).
2. Article VIII, Paragraph 1, of the Declaration of Covenants, Conditions And Restrictions entitled Use Restrictions, gives the Association the authority to place controls on the placement of household trash. "Trash, garbage or other waste shall not be kept except in sanitary containers and such shall not be permitted to remain in public view except on days of trash collection."
3. Absent a showing of fraud or bad faith, the policy decisions of a homeowners association board of directors are not subject to judicial review. Black v. Fox Hills North Community Association 90 Md. App. 75 (1992). The implementation of such a policy must be accomplished in a way that is not arbitrary and capricious.

DISCUSSION

On February 12, 2003, a hearing was held in this case. Prior to the hearing a number of issues were presented to the panel chair for resolution. The first issue addressed the question of whether Ms. Williams could be represented by an individual not licensed to practice law. This issue arose during a pre-hearing telephone conference. In an attempt to guarantee Ms. Williams all the process that she was due, and because the panel chair had not researched the question, the panel chair allowed Ms. Williams' representative to participate in the telephone call. Subsequent to the call, the panel chair reviewed a memorandum prepared by the County Attorney's office and concluded that under Maryland law Ms. Williams could either represent herself or be represented by an attorney licensed to practice in the State of Maryland. The panel chair notified both parties, by e-mail, of his conclusion. The panel chair also informed both parties that he would allow Ms. Williams' representative to "sit at the table reserved for the parties." At the hearing, counsel for Oak Springs objected to allowing Ms. Williams' representative to sit at the table. The panel chair overruled the objection.

The second pre-hearing issue addressed discovery issues. On November 17, 2002, Ms. Williams filed a timely Request for Production of Documents and Interrogatories to the agent for

Oak Springs. Record at 210. A second Request for Production was deemed untimely. During the pre-hearing telephone conference, it was determined that Ms. Williams had received or had access to all documents sought in the November 17 Request. However it was not clear that she had received responses to her interrogatories. Again, after researching the appropriate procedures regarding Interrogatories, the panel chair, in an e-mail dated February 7, ordered Oak Springs to respond to the interrogatories. Counsel for the Association noted that the questions had been answered and objected to the lateness of the order. The objection is noted for the record.

During the February 12 hearing, Ms. Williams stated that she believed Oak Springs did not have the authority to require her to reimburse them for collecting the trash she placed outside prior to the time frame noted in the community's governing documents. She requested the panel find that she is not liable for the \$30 expense imposed by the Association and further requested that the panel order Oak Spring to pay her \$10,000 (ten thousand dollars). She also argued that when Oak Springs allowed its agent (the trash contractor) to search her trash, that Oak Springs violated her Fourth Amendment rights against unreasonable search and seizure.

First, the panel was troubled by Ms. Williams request for a payment of \$10,000 for her troubles. She provided no support for her monetary claim. That, combined with her cavalier attitude towards the trash rules, demonstrated by her statement that sometimes she just throws the bag of trash from her door and lets it stay where it lands, leads the panel to conclude that the unjustified request for \$10,000 should be denied.

Next, she argued that the Association, acting through its agent the trash contractor, violated her rights when they opened her trash bag to find some identifying information. The Supreme Court of the United States has addressed a similar question, holding that trash left for collection retains no expectation of privacy.

Here, we conclude that respondents exposed their garbage to the public sufficiently to defeat their claim to Fourth Amendment protection. It is common knowledge that plastic garbage bags left on or at the side of a public street are readily accessible to animals, children, scavengers, snoops, and other members of the public. Moreover, respondents placed their refuse at the curb for the express purpose of conveying it to a third party, the trash collector, who might himself have sorted through respondents' trash or

permitted others, such as the police, to do so. Accordingly, having deposited their garbage "in an area particularly suited for public inspection and, in a manner of speaking, public consumption, for the express purpose of having strangers take it," respondents could have had no reasonable expectation of privacy in the inculpatory items that they discarded.

California v. Greenwood, 486 U.S. 35, 40-41 (1988)(citations and footnotes omitted). The panel need not determine if the protections of the United States Constitution apply to this case.² Clearly, if the heightened protections of the Constitution do not grant Ms. Williams a privacy right in her trash, Ms. Williams has no such right without the Constitution applying. Therefore, the panel finds that the Association did not violate Ms. Williams' rights when it inspected her garbage.

Ms. Williams' claim that the Association does not have the authority to charge her for the additional costs associated with collecting her trash outside the normal collection days is unavailing. The first question before the panel is: did the Oak Springs Board of Directors have the authority to implement a policy that allows it to charge residents who place their garbage out prior to sunset on the day before the scheduled collection the additional cost associated with collecting that garbage? The answer is yes. This is the quintessential application of the "business judgment rule." "The 'business judgment' rule . . . precludes judicial review of a legitimate business decision of an organization, absent fraud or bad faith." Black v. Fox Hills North Community Association, 90 Md. App. 75, 82 (1992). The rationale for this rule is that:

[a]lthough directors of a corporation have a fiduciary relationship

² Counsel for Oak Springs argued that the Fourth Amendment did not apply to the Association because it is a non-governmental body. There are arguments that homeowners associations, because of their quasi-judicial nature, may, under certain circumstances, have some constitutional constraints on their actions. See THE RULE OF LAW IN RESIDENTIAL ASSOCIATIONS, 99 Harv. L. Rev. 472, 488 ("Because an illiberal residential association would present the same kinds of dangers to dissidents and to democratic politics within the association that local governments present to a broader community, this premise of American constitutionalism has equal application to residential associations."); Laura T. Rahe, THE RIGHT TO EXCLUDE: PRESERVING THE AUTONOMY OF THE HOMEOWNERS' ASSOCIATION, 34 Urb. Law. 521 (Some legal scholars "argue for classifying homeowners' associations as state actors in part in order to regulate their relations with outsiders"). As noted above, the panel does not address the question.

to the shareholders, they are not expected to be incapable of error. All that is required is that persons in such positions act reasonably and in good faith in carrying out their duties Courts will not second-guess the actions of directors unless it appears that they are the result of fraud, dishonesty or incompetence.

NAACP v Golding, 342 Md. 663, 673 (1996). There is a “presumption that directors of a corporation acted in good faith and in the best interest of the corporation.” Whittman v. Crooke, 120 Md. App. 369, 376 (1998).

Although the Board has the authority to promulgate such a policy our inquiry does not end. Prior to allowing the enforcement of a challenged policy, such as Oak Spring’s policy on trash, we must conclude that the promulgation and enforcement of the policy was not done in an arbitrary and capricious manner.

The Board of Director of Oak Springs was well intentioned in deciding to implement the trash policy and it provided ample notice that there were trash issues within the community. However, the Board failed to articulate the parameters of the policy. The primary expression of this policy was:

Because this has become such a large problem in the community, which has resulted in trash being blown throughout the common areas, the Board will bill any homeowner/resident who is found to be in violation of these procedures. The bill will equal the cost to have a contractor remove your trash from the common area. Please be sure to follow these trash collection procedures to avoid this action.

October 18, 2000 Letter. While this notice would be a good reminder of an established policy, it is insufficient to give notice of the creation of a policy and how it will be implemented. The Association offered no other documentation (other than similar newsletter notices) regarding the policy. Without a written policy detailing for the residents the particulars of the policy, enforcement of the policy is deemed arbitrary and capricious.

Furthermore, the panel was not convinced that the enforcement of the policy was equitable. The question remaining is: does the billing represented the proportional cost to each

violator?

The contractor billed the Association \$225.00 for the following services:

Patrolled for trash all common areas and parking lots.

Hauled misc bulk items from various areas throughout the property.

Checked bags of trash for names that were placed outside for pick-up too early on 11-20-01.

DCI Invoice. Record at 97. The contractor then stated “the following names were recovered:” and identified four residents. Each subsequently received a bill for \$56.25. Without information regarding the total number of residents from whom trash was collected on November 20, 2001 and what proportion of the trash was “misc bulk items” as identified in the invoice, it is impossible to determine if the \$56.25 was Ms. Williams appropriate proportional share of the \$225 charge. Therefore, the panel finds the Oak Springs trash policy to be arbitrary and capricious and unenforceable as it now exists.

The panel would be remiss if it did not inform Oak Springs that it can correct the problems with the current policy very easily. Oak Springs should put the policy into written form and send it to each resident and homeowner. The policy should include, with specificity, the parameters of the policy including when trash may be placed outside, under what circumstances the contractor will be called to collect the early trash, and the method for calculating the reimbursement, this should include an accounting for trash whose owner can not be identified. The policy should include the process for appealing the decision. One avenue that might lead to wider community acceptance would be a provision in the policy that gives residents notice of the violation and an opportunity to cure, i.e. a letter that notifies a resident that they violated the trash policy but the community waives the charge because they are a first time violator, stressing that if they do it again they will face the reimbursement charge. Creation of such a policy will create some administrative burden for the association, it will also provide owners with a better understanding of the community standards and the results of violating those standards.

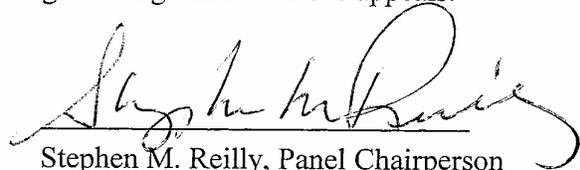
ORDER

In view of the foregoing, and based on the record, for the reasons set forth above, the Commission finds:

The Oak Springs Townhouse Association's trash policy is arbitrary and capricious. The policy is unenforceable in its current form. Any costs, including late fees, imposed by the Association on Rosemary Williams for placing her trash outside on November 20, 2001, must be dismissed. Each party is responsible for his/its own attorney fees and other costs associated with this action.

The foregoing was concurred in by panel members Bruce, Cihak and Reilly.

Any party aggrieved by the action of the Commission may file an administrative appeal to the Circuit Court of Montgomery County, Maryland within thirty (30) days from the date of this Order, pursuant to the Maryland Rules of Procedure governing administrative appeals.

A handwritten signature in black ink, appearing to read "Stephen M. Reilly", is written over a horizontal line. The signature is fluid and cursive.

Stephen M. Reilly, Panel Chairperson
Commission on Common Ownership
Communities