

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

In the Matter of:

Romaine Chase
3803 Gawayne Terrace
Silver Spring, MD 20906
Complainant,

v.

Georgian Colonies Condominium
c/o Thomas Stone, Esq.
200A Monroe St., #300
Rockville, MD 20850
Respondent

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Case No. 40-06
Date: February 13, 2007

DECISION AND ORDER

The above-captioned case having come before the Commission on Common Ownership Communities for Montgomery County, Maryland, for hearings on December 14, 2006, 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 duly appointed Hearing Panel, having considered the testimony and evidence of record, finds, determines and orders as follows:

The Dispute

The Complainant, Ms. Romaine Chase, is the owner of townhouse located at 3803 Gawayne Terrace. This townhouse is part of the Georgian Colonies Condominium development, which is governed by the Georgian Colonies Condominium Council of Unit Owners, Inc. (the Respondent). The Complainant's townhouse is a three story unit that includes a basement. The basement is accessed from the outside of the unit by a flight of stairs leading down to the basement. On either side of these stairs is a pair of brick walls (hereinafter "retaining walls"). Adjacent to one of the retaining walls is a patio constructed of flagstone. The patio was installed by the Complainant within two years of her purchasing the unit.

It is this retaining wall that is at issue in this case. The wall shows signs of failure and collapse and is in need of repair. In her complaint, Ms. Chase seeks to have the condominium association repair the retaining wall, asserting that the association is

responsible for the upkeep and repair of the retaining walls as a common element of the condominium community. The Council of Unit Owners denies liability for these retaining walls, taking the position that under the association's bylaws the walls are defined as a limited common element and, as such, are the responsibility of the individual unit owners.

Ms. Chase further asserted in her complaint, as an alternative theory, that the failure of the retaining wall is due to improper drainage on her property. Ms. Chase contends that the drainage issue is the responsibility of the condominium association. The Council of Unit Owners denies that any action (or lack of action) on their part is responsible for the failure of the wall, which it attributes to age and the resulting natural wear.

Procedural History

These parties were previously before the Commission in CCOC Case No. 726-O (decided August 19, 2005). Prior to the resolution of that case, Ms. Chase sought to include the issue of repair of the retaining walls. The Panel in that case refused to address the issue, noting that the issue had not been properly raised. On June 9, 2006, Ms. Chase filed the complaint currently before the Commission. The parties agreed to submit the dispute to mediation. A mediation session was conducted on September 12, 2006, but the parties were unable to resolve the dispute. The Commission accepted jurisdiction of the dispute on November 1, 2006 and the case was referred for a public hearing which was held on December 14, 2006.

DISCUSSION

The standards we must follow when reviewing an action by the governing board of a condominium association are set out in *Dulaney Towers Maintenance Corp. v. Obrey*, 24 Md. App. 464, 418 A.2d 1233 (1980) and *Kirkley v. Seipelt*, 212 Md. 127 (1957). The hearing panel must determine if the action or rule in dispute was properly adopted, and if so, whether there is a reasonable basis for it. So long as a reasonable basis exists, the Panel is not free to substitute its own judgment for that of the board. *See, e.g., John McPherson v. Morningside Homeowners Association*, CCOC No. 614-O (December 22, 2004); *Duffief Homes Association v. Nicoletta Sacchi*, CCOC No. 589-G (March 29, 2006). If, however, a rule is not applied in a consistent manner then the use of that rule to deny a proposed change can be overturned by the Panel on the grounds that it is arbitrary or capricious. *Markey v. Wolf*, 92 Md. App. 137, 163-64, 607 A.2d 82 (1992).

At the request of the hearing panel, Respondent supplemented the hearing record with a copy of Georgian Colonies' bylaws and Declaration of Covenants. Respondent's Supplementary Exhibit. On page 39 of the bylaws we find Article IV, Section 4 which sets forth the duty to maintain the community. According to Section 4 of the bylaws, other than those maintenance requirements imposed upon the Council of Unit Owners, individual unit owners have a duty to maintain, at their own expense, "the interior of

[their] condominium unit and any and all equipment, appliances, or fixtures therein situated, and its other appurtenances.” *Id.* The section defines such appurtenances as those “designated herein or in the Declaration or the Condominium Plat as a limited common element reserved for exclusive use by the owner of that particular condominium unit” *Id.*

The definition of what constitutes the “limited common elements” is further set forth in Article IV, Section 1 contained on page 3 of the condominium’s Declaration. Respondent’s Supplementary Exhibit. According to Section 1 of the Declaration, limited common elements are “those common elements designated as such on the Condominium Plat” plus “such other common elements as are agreed upon by all of the unit owners to be reserved for the exclusive use of one or more, but less than all, of the unit owners.”

A copy of the plat for Ms. Chase’s unit, designated as Unit No. 20-3803, is included in the record. Commission Exhibit 1. The plat consists, for the most part, of a line sketch delineating the boundaries of the unit and its attached property with some basic components (such as the stoop and balcony) labeled for identification purposes. Those parts of the unit that are visible to the outside of the unit are designated by a heavy double line. This includes the two retaining walls that flank the stairs leading down to the basement. The plat as submitted does not, however, include a key that would indicate that the double lines are meant to designate any particular feature as either a common element or a limited common element. Furthermore, as noted by the development’s property agent during his hearing testimony, the double line encompasses the garage door to the unit, which is not a common element.

It is clear from the record that the retaining wall at issue in this case is a limited common element. The only obvious purpose of the retaining walls is to hold back the surrounding soil from the stairway leading down to the unit’s basement. No evidence has been submitted to support an assertion that any other unit owner within the Georgian Colonies development other than Ms. Chase benefits from her having an exterior access to the basement of her townhouse unit. Accordingly, absent intervening circumstances, the responsibility for its upkeep and repair would lie solely with the homeowner.

The issue of liability for repair of the retaining wall would be rendered moot, however, should it be established that the condition of the retaining wall is due to negligence on the part of the condominium association. In a previous complaint filed with the Commission (CCOC Case No. 726-O) the Complainant sought to compel the Respondent to regrade the area located behind her unit, asserting improper grading of the property had resulted in flooding in her basement. The Decision and Order issued in the prior case, instructed Respondent to correct the grading of the common element located behind that property. The Complainant now asserts that this prior condition either caused or contributed the current condition of the retaining wall.

In reviewing the record in this case, the Panel concludes that there is no evidence to establish this assertion. While it was previously established that the grading of the common element behind the property at 3803 Gawayne Terrace did result in flooding to

the basement, there is no evidence that water from the grading of the common element contributed to the degrading of the structural integrity of the retaining wall.

At the hearing the record was kept open to allow each party to supplement the record. Ms. Chase offered for submission a large pile of documents entitled "Sample of Irresponsible Interpretation of the By-laws." Included in her submission is a report dated June 7, 1993, from a home inspection Ms. Chase had performed by Home Sure Inspections.

In this report the inspector notes that "hydrostatic pressure is causing the areaway wall to shift." But this report does not attribute a source for the hydrostatic, other than to note that the brick patio had sunken and sloped towards the townhouse and that it should be rebuilt to route the water away for the house. Presumably this is the brick patio that Ms. Chase testified she replaced with a flagstone patio. Ms. Chase further testified that it was following the installation of the flagstone patio that she began to experience flooding problems in her basement. (It is unclear whether the inspection report, in discussing how to avoid basement water, is referring to prior or potential flooding.)

Otherwise, the supplemental evidence submitted by Ms. Chase basically revisits the issue of her basement flooding previously addressed by the Commission in its previously ruling. Nowhere in the record is there an opinion from an expert source asserting that the degraded condition of the retaining wall is due to conditions caused by the actions of the Respondent rather than being due to the age of the wall. Absent such evidence, the Panel possesses neither the competence nor the expertise to make such a finding.

FINDINGS OF FACT

1. Ms. Romaine Chase is the owner of the property (a townhouse) located at 3803 Gawayne Terrace, Silver Spring, Maryland. This property is located within the Georgia Colonies Condominium development.

2. All homeowners within the development are, by virtue of their home ownership, members of the governing association of the Georgia Colonies Condominium development. As members of the governing association, all homeowners within the Georgia Colonies community are required to maintain their property pursuant to guidelines set forth in the Declaration, Bylaws and all rules and regulations established by an elected Board of Directors.

3. According to the applicable sections of the Declaration, Bylaws and rules and regulations for Georgian Colonies Condominium, a limited common area consists of those areas necessary to the common use and enjoyment of the of the entire community and, as such, is the responsibility of the entire community for their upkeep and maintenance. Limited common areas are considered those features necessary for the private use and enjoyment of the individual units.

4. The walls located on either side of the stairway leading to the basement of the property located at 3803 Gawayne Terrace are solely for the use and enjoyment of the owner of that property, the Respondent and, as such, are considered part of the limited common element of that property.

5. The area located behind the property located at 3803 Gawayne Terrence is a common element and is thus the responsibility of the Georgian Colonies Condominium.

6.. There is no evidence that any prior flooding that may have been the result of improper grading of the common element located behind 3803 Gawayne Terrace contributed to the current condition of the retaining wall.

CONCLUSIONS OF LAW

1. The brick retaining wall is a limited common area as defined by the appropriate governing documents of Georgia Colonies Condominium; therefore the Complainant bears sole responsibility for its maintenance and repair.

Panel Members Antoinette Negro and Andrew Oxendine concur in the foregoing.

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

John Sample, Esq., Panel Chair
Commission on Common Ownership Communities