

Before the
Commission on Common Ownership Communities
for Montgomery County, Maryland
October 7, 1993

In the Matter of:	X	
Walter A. Braun, President	X	
Board of Directors	X	
Montgomery Village Foundation,	X	
Inc.	X	
10120 Appleridge Road	X	
Montgomery Village, MD 20886,	X	
Complainant	X	
	X	
Vs.	X	Case No. 218-G
	X	
Donald and Helen Ryan, Owners	X	
9812 Canal Road	X	
Gaithersburg, MD 20879	X	
Respondents	X	

Decision and Order

The above-entitled case, having come before the Commission on Common Ownership Communities for Montgomery County, Maryland, for hearing, on August 25, 1993, pursuant to Sections 10B-5(i), 10B-9(a), 10B-10, 10B-11(e), 10B-12, and 10B-13 of the Montgomery County Code, 1984, as amended, and the duly appointed hearing Panel having considered the testimony and evidence of record, finds, determines and orders as follows:

On February 12, 1993, John F. McCabe, attorney for Montgomery Village Foundation, Inc. (hereinafter the "Complainant" or Montgomery Village Foundation) filed a formal dispute with the Office of Common Ownership Communities. The Complainant alleged that Donald and Helen Ryan, owners of 9812 Canal Road (hereinafter the "Respondents") installed a new front door that had been disapproved by the Architectural Review Board, in violation of Article VIII of the Community's Declaration of Covenants, Conditions and Restrictions.

The Respondents' attorney, David H. Bamberger, responded that "the Architectural Review Board and Executive Committee decisions were arbitrary and capricious and, therefore, unenforceable as a matter of law." The Respondents further contend that the Commission on Common Ownership Communities does not have jurisdiction in this matter because the dispute involves the judgment or discretion of the governing body in taking or deciding not to take a legally authorized action under Section 10B-8(4) of the Montgomery County Code.

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) on June 2, 1993

and the Commission voted that it was a matter within the Commission's jurisdiction and the hearing date was scheduled. The Respondents requested reconsideration of the Commission decision to accept jurisdiction, and on July 7, 1993 the Commission reviewed this request and upheld its earlier decision.

Findings of Fact

Based on the testimony and evidence of record, the Panel makes the following findings:

1. Donald and Helen Ryan own the property at 9812 Canal Road in Gaithersburg, which is in the Whetstone section of Montgomery Village. The Ryans are thus members of Montgomery Village Foundation, Inc., a non-stock Maryland corporation.

2. The Declaration of Covenants, Conditions and Restrictions for the Whetstone community in Montgomery Village, hereinafter Declaration, at Article VIII, Architectural Control Committee, provides:

Section 1. Review of Committee. From and after the completion of construction and first sale and settlement of a Private Dwelling Unit within Whetstone by the Developer, its heirs, successors or assigns, no building, fence, wall or other structure shall be commenced, erected or maintained within Whetstone nor shall any exterior addition to or change or alteration therein be 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 and location in relation to surrounding structures and topography by the Board of Directors of the Montgomery Village Foundation or by the Board. In the event said Board, or its designated Committee, fails to approve or disapprove such design and location within thirty (30) days after said plans and specifications have been submitted to it, approval will not be required and this Article will be deemed to have been fully complied with. The Montgomery Village Foundation shall have the right to charge a reasonable fee for reviewing each application in an amount not to exceed \$25.00. Provided that nothing herein contained shall apply to any buildings, fences, walls or other structures commenced, erected, maintained or to be erected upon land within Montgomery Village as long as title to such land is held by the Developer. Any such exterior addition to or change or alteration made without application having first been made and approval obtained as provided above, shall be deemed to be in violation of this covenant and may be required to be restored to the original condition at Owner's cost. (emphasis added).

3. Montgomery Village Foundation, Inc. has adopted Procedures for Dispute Resolution, governing the internal procedure for disputes which are within the jurisdiction of and may be submitted to the Montgomery County Commission on Common Ownership Communities for resolution. Both parties to this dispute have followed those procedural rules.

4. On July 10, 1992, the Ryans submitted a Property Improvement Request to the Architectural Review Board for Montgomery Village Foundation.

5. On August 5, 1992, at a regularly scheduled meeting, the Architectural Review Board disapproved the Ryans' request and they were so notified by letter dated August 7, 1993. The reasons given for the denial were that:

...it was felt that a Victorian style door is not in keeping with the Colonial style of the home particularly with the pediment entrance feature. It was also noted that the natural wood of the door is not compatible with the used brick, shutter color, or house trim.

The Architectural Review Board went on to suggest in this letter that an alternative style door and side lights included in the catalog submitted by the Respondent were potentially acceptable.

6. By letter dated September 3, 1993, the Ryans notified the Montgomery Village Foundation of their intent to appeal the disapproval by the Architectural Review Board. With this letter the Ryans submitted photographs of a number of doors of other houses in the general area. The Ryans also offered to change the paint color of their shutters and trim and modify the entrance pediment to a more simple design if those changes would reduce the incompatibilities between the house and the door which had caused the Board to deny their application.

7. It was the undisputed testimony of Delbert Gerald Liu, Chairman of the Architectural Review Board, that members of that Board present at the meeting at which they reconsidered Respondents' application, noted that some of the doors in the photographs submitted by the Ryans had not been approved by the Board. Mr. Liu stated that enforcement of the architectural control provisions of the Declaration was the responsibility of the Montgomery Village Foundation staff.

8. By letter dated September 18, 1992, the Architectural Review Board denied the Ryans' appeal/resubmission for the proposed replacement door. The reasons why the door would not be acceptable on the Ryans' house even with the changes that the Ryans had offered to make were:

The detailed glass in the door and the sidelights would create a competing pattern with the multi-colored brick on this house. The pictures you submitted are all of single doors without sidelights on homes with either siding or subdued brick colors. It was felt that a wood door might be acceptable if it had a plainer style of glass and the house colors were changed to be more compatible with the brick as well as a stained wood door.

9. By letter dated September 29, 1992, the Ryans appealed the decision of the Architectural Review Board to the Executive Committee of the Montgomery Village Foundation Board of Directors, in accordance with Complainant's Procedures for Dispute Resolution. Their appeal was heard by the Executive Committee on October 9, 1992. Undisputed testimony of Walter A. Braun, President of Montgomery Village Foundation and Chair of the Executive Committee at the time, was that some members of the Executive Committee and the Architectural Review Board visited the Ryans' house, after the October 9 meeting but prior to issuance of a decision, and viewed the door, which was then still in packing but was at least partially visible.

10. By letter dated October 13, 1992, the Executive Committee notified the Ryans that they had upheld the decision of the Architectural Review Board to disapprove the door proposed by the Ryans for installation. The reasons for their decision were set forth as:

Although there are other wood stained doors in Whetstone, some of which have bevelled glass, no other approved door also has the side lights or the intricate pattern of cut glass designs. It was determined that the overall effect of the door in relation to the existing house brick and colonial pediment was not an enhancement. The multi-colored brick, the pediment, and the ornate door and sidelights do not compliment each other. Each village home has its own character and design. Some modifications can work on a particular home but not on another. The proposed door extending over three separate windows is very elaborate and only conflicts with the existing house features particularly the brick pattern.

11. After October 13 and before November 19, 1992, the Ryans installed the door which Complainant had disapproved.

12. By letter dated November 19, 1992, Complainant informed Respondents that their action in installing a door for which their application had been denied would be referred to the Montgomery Village Foundation attorney for legal action.

13. At the hearing in this case, Diane B. Stasiewicz, Director of the architectural control staff for Montgomery Village Foundation, testified that her staff is in charge of enforcement of the architectural control provisions of the Declaration. She also testified that the Board has instructed the staff to not go looking for violations of the architectural control provisions but to enforce those which come to their attention. She said that is what they do.

14. Mr. Liu testified that the Architectural Review Board reviews applications for alterations to houses within the context of the original design of the house.

15. Mr. Braun testified that the Architectural Review Board maintained the intent of the builder in their review of Property Improvement Requests.

16. Mr. Bamberger cross-examined Ms. Stasiewicz regarding a number of doors in the Whetstone community which Complainant's records indicated had been replaced and some enforcement action had been taken in the months before the Commission hearing. These doors were of a number of different designs and had been installed over a period of time not brought out in testimony, on houses of differing styles. In some cases the owners had submitted an application after the Complainant had notified them that their door was not approved. Most of these were approved, with or without some modification. In other cases doors were approved without the submission of applications. There were a few doors on which action had not yet been completed and the action which would be taken was not predicted.

17. Testimony revealed that the owners of the house at 9808 Canal Road had made application for installation of a replacement door. The application had been approved with conditions. The door which they wished to install is a single door without side lights. It has a large oval glass design. The glass design was allowed on that house but only if it was uncolored translucent glass and not stained glass. The owners installed the door with stained glass. Complainant's testimony was that the Architectural Review Board's enforcement decision was to allow this door to remain as it was installed and to file a document indicating noncompliance so that the change would be necessary at such time as title to the property is transferred. This is one of the enforcement tools available to Complainant and one that it has sometimes used. In the case of the door at 9808 Canal Road, this enforcement action was chosen because the door, while noncompliant with community design, was not found to be so offensive to the design standards as to require immediate removal.

18. Mr. Ryan testified that he and his wife had lived in Montgomery Village for fifteen years. They wanted to replace

their door because it needed replacement. They believed that the door they chose suited their house. They talked to a contractor and chose the door style. A replacement door for their house needed to be custom built due to the size of the door space on the house. Mr. Ryan testified that he believed the contractor understood that the door was not to be ordered until Mr. Ryan notified him that approval had been granted for the door to be installed. However, the Contractor apparently ordered and delivered the door during the process of Respondents appeal of the denial by the Architectural Review Board of the Ryans' Property Improvement Request.

19. Mr. Ryan indicated that in his view the reasons given by the Complainant in the series of letters denying his application were internally inconsistent and changed from decision to decision, so that he did not understand why the Complainant had denied his application. Mr. McCabe led Mr. Ryan through a series of questions in which he suggested that words in one letter might mean or describe the same thing. Mr. Ryan did not understand the words to mean what Mr. McCabe was suggesting they meant and no testimony was introduced supporting Mr. McCabe's suggested interpretations.

Conclusions of Law

This case is appropriately decided under the rule of law set forth by the Maryland Court of Special Appeals in Black v. Fox Hills North Community Association, Inc., 90 Md.App. 75, 599 A.2d 1228, cert. denied 326 Md. 177 (1992). Since Montgomery Village Foundation, Inc. is a non-stock corporation of which the Ryans are members, the Commission on Common Ownership Communities, like the courts, should not interfere with the internal affairs of the corporation except under limited circumstances, including fraud, bad faith or incompetence.

Counsel for the Respondent cited several cases relating to the construction of restrictive covenants and argued that the rule of law that should be applied in this case is the modern rule of "reasonableness" in the construction of covenants. Harbor View Improvement Association, Inc. v. Downey, 270 Md. 365, 311 A.2d 422 (1973), Kirkley v. Seipelt, 212 Md. 127, 128 A.2d 430 (1957), Markey v. Wolf, 92 Md.App. 137, 607 A.2d 82 (1992), Souza v. Columbia Park and Recreation Association, Inc., 70 Md.App. 655, 522 A.2d 1376 (1987), Lindner v. Woytowicz, 37 Md.App. 652, 378 A.2d 212 (1977).

Based on these cases, it is clear that Maryland law adopts a strict construction of restrictive covenants, modified by reasonableness. However, Respondent failed to present a factual case to support that the construction of the covenants are at issue herein. The issue in this case deals instead with the authority of the Board of Directors to take action and whether such action was done in good-faith.

The Montgomery Village Foundation Board of Directors is vested by the Whetstone Community Declaration with authority to review any exterior alteration to the houses in that community and to approve or disapprove such proposed alteration, based on its harmony of external design and location in relation to surrounding structures.

The Ryans and Montgomery Village Foundation both complied with the established procedures for such an application. The appropriate agencies and officials of Montgomery Village Foundation consistently denied the Ryans' replacement door. Such decision was within the business judgment and authority of Montgomery Village Foundation.

On behalf of the Ryans, Mr. Bamberger argued that denial of the Ryans' application was arbitrary and capricious because it was the only door replacement application among those he presented at the hearing that was denied, and because enforcement of the architectural control standards in the community is inconsistent and selective. The record does not support a finding that Complainant's disapproval of this application was so unreasonable to be in bad faith or fraudulent. The Panel upholds the authority and decision of Montgomery Village Foundation regarding its denial of the application by the Ryans for this replacement door.

Notwithstanding the fact that the Board had authority to disapprove the door, the Panel is troubled at the fine lines drawn in the choice of enforcement remedy. The evidence displayed two replacement doors which were installed within a few houses of each other. One application was approved subject to a condition, but the door was installed in violation of that condition. The other application, involving the door at issue, was disapproved, but the door was installed in disregard of the denial. The result is two noncompliant doors. One is being enforced by legal process to get immediate replacement. The other is being tolerated until such time as the property is transferred to another owner. The effect of this enforcement is that the current occupant in one instance is left to enjoy the door of their choice without regard to the community standards, while the other occupants must remove their door immediately. This distinction in enforcement action is based on an undefined degree of disharmony with the intended design. This difference in enforcement is not supported by comprehensible reasoning and is found to be the result of bad faith or incompetence in consistently enforcing the governing documents.

Order


In view of the foregoing, and based on the evidence of record, it is, on this 7th day of October, 1993, hereby Ordered by the Commission Panel that:

1. Montgomery Village Foundation, Inc., has the authority to approve or disapprove the Property Improvement Application for the replacement door; and it is further Ordered that

2. Montgomery Village Foundation, Inc., choose the same enforcement remedy for the noncompliant doors at 9808 Canal Road and the subject door at 9812 Canal Road: to wit, by either enforcing the current removal of both doors or such part thereof which is noncompliant; or, by taking the same action it took with the 9808 door by filing such notice of noncompliance in a manner to impede transfer of title, thereby allowing both doors to remain in place until replacement or transfer of title.

The foregoing was concurred in by panel members Chester, Glancy 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.


Dinah Stevens, Panel Chair
Commission on Common
Ownership Communities