

Before the
Commission on Common Ownership Communities
for Montgomery County, Maryland
May 10, 1994

In the Matter of	X	
Middlebridge Village Homeowners	X	
Association, Inc.	X	
Complainant	X	
	X	
Vs.	X	Case No. 236-G
	X	
Herman Feinberg	X	
Stuart Feinberg	X	
1900 Middlebridge Drive	X	
Silver Spring, MD 20906	X	
Respondents	X	

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), 10B-9 (a), 10B-10, 10-B-11 (e), 10B-12 and 10B-13 of the Montgomery County Code, 1984, as amended, and the Commission having considered the testimony and other evidence of record, it is therefore, this 10th day of May, 1994, found, determined and ordered as follows:

BACKGROUND

On May 25, 1993, the Middlebridge Village Homeowners Association, Inc., (the "Complainant") filed a formal dispute with the Office of Common Ownership Communities in which the Complainant alleged that Herman Feinberg and Stuart Feinberg (the "Respondents") had violated Article VIII, Section 7 (l) and (p) of the Declaration of Covenants ("Declaration") for the Middlebridge Village Homeowners Association by installing a basketball backboard on the driveway in front of their property at 1900 Middlebridge Drive, Silver Spring, Maryland 20906. In its Complaint the Complainant seeks an Order directing the Respondents to immediately and permanently remove the basketball backboard and related components from their lot which is located within the Middlebridge Homeowners Association.

The Respondents contend that their basketball backboard does not violate the provisions of the Association's Declaration of Covenants because it is not attached to the exterior of their dwelling, and because they filed an application to move it to a location which they claim is behind the front building line of their property and therefore does not violate the provisions of the Declaration cited by the Complainant. Respondents further allege that the Association's Architectural and Environmental Review Committee failed to approve their plan to move the basketball backboard and hoop within sixty (60) days after the plans were submitted as required by Article VII, Section 3 of the Declaration, and therefore no approval is required.

Inasmuch as this 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 January 26, 1994, the Commission conducted a public hearing in this case, following which the record was left open for ten (10) business days in order for both sides to this dispute to submit written comments on a memorandum from the Montgomery County government dated January 25, 1994, which was introduced at the time of the hearing on January 26, 1994. The record was then closed on February 9, 1994.

FINDINGS OF FACT

Based on the stipulations of the parties and the testimony and evidence of record, the Commission makes the following findings:

1) The Complainant is a community association consisting of 193 single-family homes and 112 townhomes located in Silver Spring, Maryland, and is governed by a Declaration of Covenants recorded at Liber 6438, Folio 424 among the Land Records for Montgomery County, Maryland. The issues in this case involve the meaning and application of Article VIII of Declaration. This Article governs the construction of any building, fence, wall or other improvements or structures on Association properties and contains a list of prohibited uses and nuisances in Section 7 thereof. The parties have disputed the meaning of particular provisions contained in Section 7 which are set forth hereinbelow:

ARTICLE VIII

* * *

Section 7. Prohibited Uses and Nuisances. Except for the activities of the Declarant during the construction of development of the community, or except with the prior written approval of the Board of Directors of the Association or the Architectural and Environmental Review Committee, or as may be necessary in connection with reasonable and necessary repairs or maintenance to any dwelling or upon the common areas:

* * *

(1) no play equipment including, without limitation, basketball backboards, basketball hoops and other equipment associated with either adult or juvenile recreation, shall be attached in any manner to the exterior of any dwelling. Any basketball backboards, hoops, supporting standards and the like which are permitted to be erected by the Architectural and Environmental Review Committee shall be painted to match the trim color of the dwelling situated upon the lot on which such equipment is constructed and shall be maintained in good order and repair at all times.

(p) no play equipment shall be installed beyond the front building line of the dwelling on any lot or upon the rear deck of the dwelling of any Townhouse Lot.

2) On July 21, 1992, George Hedrick, as property manager for the Complainant, notified the Respondents by letter that the basketball backboard installed in front of their home violates Article VII, Section 7, Subparagraph (1) of the Association's Declaration and must be removed within ten (10) days. In response to this letter, the Respondents requested approval of a basketball backboard in front of their home located at 1900 Middlebridge Drive. The request was hand-delivered to Alan Plevy, a member of the Architectural and Environmental Review Committee. Mr. Stuart Feinberg testified that this was done on July 23, 1992, although no date appears on the handwritten request.

3) In his application, Mr. Feinberg agreed to move the basketball pole, backboard and hoop assembly from its present position just in front of the cantilevered portion of his garage to a position where the metal pole would be installed into his driveway just behind the cantilevered portion of the second floor of his dwelling. However, after the pole is moved to the location indicated in Mr. Stuart Feinberg's plans, the metal supports, backboard and rim will extend beyond the cantilevered portion of his home.

4) Mr. Hedrick testified that he was not sure when the Respondents' application was received, but that it was faxed to the Association's attorney, Shelah Lynn, on August 6, 1992. Mr. Hedrick further testified that the Board of Directors of the Complainant Association, sitting as the Architectural and Environmental Review Committee, met and reviewed the Respondent's application at its regularly scheduled board meeting on September 3, 1992, and voted to deny the request. At the hearing on this matter, Shelah Lynn, counsel for the Complainant, advised the Commission that no minutes for this meeting were taken. It was noted that the then-secretary of the Association, Sarah Morrison, ordinarily took the minutes at Board meetings but Mrs. Morrison was not present at the September 3, 1992 Board meeting because she was traveling to Ohio to attend her mother's funeral in early September of 1992. The Respondents dispute whether this meeting took place on September 3, 1992 and claim that their application was not reviewed within sixty (60) days, as required under Article VIII, Section 3 of the Association's Declaration, which requires, inter alia:

Section 3. Approvals, etc. In the event the Committee fails to approve or disapprove any specifications which may be submitted to it pursuant to the provisions of this Article within sixty (60) days after such plans and specifications (and all other materials and information required by the Architectural and Environmental Review Committee) have been submitted to it in writing, then approval will not be required and this Article will be deemed to have been fully complied with.

5) By letter dated September 23, 1992, Shelah Fidellman Lynn, attorney for the Complainant, advised the Respondents that their basketball backboard extended beyond the front building line of their home, in violation of Article VIII, Section 7 (p) of the Association's Declaration, and must be removed with fifteen (15) days. Complainant alleges that this response, coupled with the Board's decision on September 3, 1992, complied with the requirements of Article VIII, Section 3. It is noted that the Board of Directors for the Complainant Association acts as the Architectural and Environmental Review Committee and that no separate body exists to perform that role. Accordingly, any decision by the Board on September 3, 1992, constitutes a decision by the Architectural and Environmental Review Committee for purposes of Article VIII, Section 3 of the Declaration.

6) In addition, Complainant notes that Article VIII, Section 4 of the Declaration requires that any construction or alterations approved by the Architectural and Environmental Review Committee must be "commenced within six (6) months following the date upon which the same are approved by the Committee." Therefore, the Complainant argues that even if the Respondent's plans were deemed approved under Article VIII, Section 3, that approval lapsed because the Respondents failed to move the basketball backboard to the position shown in their plans within six (6) months following the date of approval.

7) In addition to the procedural dispute raised by the Respondents, they argue that the application submitted by them does not violate the requirements of Article VIII, Section 7(p) of the Declaration because the basketball pole and assembly will be placed underneath the cantilevered portion of their home which constitutes the front building line of the dwelling for purposes of that Subsection. In support, Respondents cite the memorandum dated January 25, 1994 from John Reinhard of the Montgomery County Department of Environmental Protection to Miriam Sanders Miller, Program Manager for the Office of Common Ownership Communities. This memorandum was submitted in response to a request by the Commission that the Department of Environmental Protection interpret the meaning of the term "building line" as employed in the zoning ordinance for Montgomery County. According to Mr. Reinhard, the term "building line" is defined as a line "beyond which the foundation wall or any other enclosed or covered portion of a building shall not project" and "a cantilevered projection of the building would therefore be controlled by this restriction." Furthermore, the Respondents argue that their proposal does not violate Article VIII, Section 7(1) of the Declaration because the pole and backboard will be placed in a hole in their driveway and are therefore not "attached in any manner to the exterior" of their dwelling.

8) On February 3, 1994, the Complainant filed a letter with the Commission in which it claims that Montgomery County's interpretation of the term "building line" should not govern the meaning of that term in Article VIII, Section 7 (p) of the Declaration.

9) During the hearing on this matter, a discussion ensued regarding the possibility that the Commission might find that no application was currently before it because the application submitted by the Respondents on July 23, 1992, had not been constructed within six (6) months from the date of its alleged silent approval and had therefore lapsed. Both parties agreed and stipulated on the record to consider the application as a valid and current application for purposes of the Commission's decision.

CONCLUSIONS OF LAW

Based upon a preponderance of the evidence including, but not limited to, testimony and documents admitted into evidence, and after a full and fair consideration of the evidence of record, the Commission concludes that:

- 1) On or about July 23, 1992, the Respondents followed the established procedures adopted by the Complainant for submitting a request to construct an improvement on their structure by filing a handwritten request with attached plans to construct a basketball backboard and net beneath the cantilevered portion of the front of their garage. While no date appears on this application, the Commission finds that it was submitted on or about July 23, 1992, as stated by Mr. Stuart Feinberg at the time of the hearing in this matter.
- 2) The basketball backboard at issue in this case constitutes "play equipment" and therefore must be located behind Respondent's front building line as required by Article VIII, Section 7(p) of the Declaration.
- 3) The Commission concludes that the front building line of the Respondents' dwelling is defined in the manner set forth in the memorandum dated January 25, 1994 from John Reinhard of the Montgomery County Department of Environmental Protection as a line beyond which any cantilevered projection of the building may not project. In this case the front building line of Respondents' property would therefore be defined as the front of their second floor which is cantilevered approximately two feet over the first floor of the home. While the basketball pole will be placed beneath the cantilever and therefore behind the front building line, the Commission concludes that because the basketball backboard and rim will project in front of the cantilevered portion of their home, that it violates Article VIII, Section 7(p) of the Declaration. In reaching this decision the Commission finds that the entire basketball backboard assembly must be located behind the front of their home, not merely the pole, as argued by Respondents.

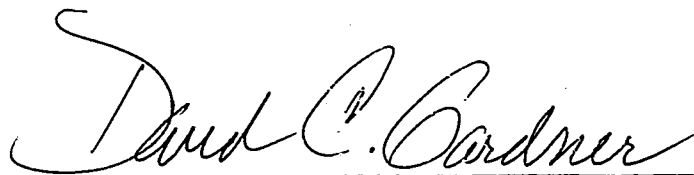
4) With regard to the procedural challenge raised by Respondents, the Commission concludes that the Complainant's Board of Directors acted within sixty (60) days, as required by Article VIII, Section 3 of the Declaration by denying the Respondents' application on September 3, 1992. This denial was communicated to Respondents by letter from Complainant's counsel dated September 23, 1992. Furthermore, even if the Board did not deny the application within sixty (60) days, as required by Article VIII, Section 3 of the Declaration, the Commission concludes that any silent approval of Respondents' application lapsed after the Respondent failed to commence construction or alterations within six (6) months from the date of the Complainant's silent approval, in accordance with Article VIII, Section 4 of the Declaration. Since this was not done, the Respondents have waived any claim that the Board approved their plans by inaction.

ORDER

In view of the foregoing, and based on the evidence of record, the Commission orders that the Respondents must remove the basketball pole, backboard, rim and related equipment located on their property at 1900 Middlebridge Drive, Silver Spring, Maryland, 20906, within thirty (30) days from the date of this Order.

The foregoing was concurred in by panel members Blumberg and Auvil.

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.


David C. Gardner, Panel Chair
Commission on Common Ownership
Communities