

Before the  
Commission on Common Ownership Communities

January 13, 1995

In the Matter of	x	
Murray and Florence Schott, Owners	x	
4960 Sentinel Drive	x	
Bethesda, MD 20816	x	
Complainant	x	Case 250-0
	x	
vs.	x	
	x	
Sumner Village Condominium Two, Inc.	x	
Franc Wertheimer, President	x	
Board of Directors	x	
Respondent	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, 10B-11(e), 10B-12, and 10B-13 of the Montgomery County Code, 1984, as amended, and the Commission having considered the testimony and evidence of record, it is therefore this 13th day of January, 1995 found, determined and ordered as follows:

On September 24, 1993, Murray and Florence Schott, owners of 4960 Sentinel Drive, Bethesda, Maryland, 20816 (hereinafter the "Complainants"), filed a formal dispute with the Office of Common Ownership Communities. The Complainants alleged that the Board of Directors, Sumner Village Condominium Two, Inc., (hereinafter "Respondent"), demolished and refused to replace certain improvements made to the breezeway adjacent to their unit, a limited common element of the condominium. The Complainants allege that the Respondent wrongfully refused to allow them to reconstruct the improvements made to the limited common elements adjacent to their condominium unit and, further, they alleged that the Respondent should be responsible for paying for the replacement of those improvements.

The Respondent alleges that the breezeways of the condominium units included certain concrete pads that were adjacent to each unit. The concrete pads had deteriorated and needed replacement and, as a result, all improvements on top of that limited common element needed to be removed. Once removed, the Respondent alleged that Complainants needed new approval to

replace the structure and that such approval was not forthcoming because Rules and Regulations that were adopted by the Council Of Unit Owners strictly prohibited the type of addition requested by Complainants.

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 November 30, 1994, the Commission conducted a public hearing in this case before a panel consisting of commissioners, Bruce Blumberg, David Glancy and panel chair, Jonathan Bromberg.

#### 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 Complainants are the owners of a condominium unit located at 4960 Sentinel Drive, Bethesda, Maryland, 20816 ("the unit") having purchased the unit from the developer in 1975.

2. A portion of the breezeway adjacent to their unit is a limited common element appurtenant to their unit.

3. Sometime in 1975, the Complainants received official approval from the then Board Of Directors to construct certain improvements upon the breezeway adjacent to their unit.

4. Certain regulations were subsequently adopted by a later Board Of Directors in April of 1984 that strictly prohibited the future construction of any type of improvement similar to that which had been previously approved and legitimately installed by the Complainants.

5. Pursuant to that newly adopted Regulation, "An existing enclosure around a limited common element, as of the effective date of this Regulation, may be retained, so long as the owner of the unit adjoining the enclosure maintains the enclosure in good condition and in accordance with the initial design of the enclosure. *An existing enclosure may be temporarily removed at the owner's expense to permit necessary maintenance and repair of the limited common element.*" (emphasis added)

6. The improvements constructed by the Complainants had been maintained in good condition and in accordance with the initial design of the enclosure through 1991. In fact, the Complainants had recently expended in excess of \$2,000.00 in repairing and maintaining the enclosure prior to November, 1991.

7. In the fall of 1991, it became apparent that the concrete pads that were the limited common elements adjacent to the condominium units had deteriorated to the point that replacement was necessary. Further, all improvements and structures that rested upon that pad had to be removed and/or demolished to allow for the necessary repairs.

8. Repairs were made to the concrete pad adjacent to the Complainants unit in late November or early December of 1991.

9. As a result of the reconstruction of the concrete pads, the improvements that were erected and maintained by the Complainants were demolished and substantially all the pieces were destroyed except for a few minor portions of the structure.

10. Subsequently, the Complainants requested the Respondent to allow them to reconstruct their enclosure on the limited common element, and they requested the Respondent to pay for those improvements. There was also testimony that Complainants offered to "split the costs" of those improvements with the Respondent.

11. Respondent subsequently approved the construction of a reduced version of the enclosure and, after some period of time, withdrew that approval as well.

#### CONCLUSIONS OF LAW

Accordingly, the Commission concludes based upon a preponderance of the evidence, and after a full and fair consideration of the evidence of record, that:

1. The Complainants had proper authority to originally construct and maintain the improvements that they had erected on the limited common elements.

2. By virtue of the Regulations adopted by the Board Of Directors in 1984, the Complainants had sole responsibility for paying for and maintaining the improvements "...in good condition and in accordance with the original design of the enclosure."

3. The Respondent had a legitimate need and the right to repair and reconstruct the limited common elements that resulted in the destruction of the improvements that had been constructed and maintained by the Complainants.

4. By virtue of the Regulations adopted in 1984, "An existing enclosure may be temporarily removed at the owner's expense to permit necessary maintenance and repair of the limited

common element." As such, the Complainants had the right to temporarily remove their structure and then to replace it after the repair work was complete.

5. By virtue of the Regulations adopted in 1984, "an existing enclosure shall be removed when the owner of the unit adjoining the enclosure sell the unit."

6. The Commission finds that, as a matter of law, a so-called "temporary removal" of a structure does not, necessarily, require the use of precisely the same materials in replacing the structure after it has been temporarily removed. As such, Complainants had, and continue to have, the unlimited right to reconstruct the enclosure so long as the reconstructed enclosure substantially is "...in accordance with the initial design of the enclosure" and so long as they (or either one of them) remain owners of the unit.

7. The Commission finds that Respondent's request for attorneys fees is not supported by the evidence and that Complainants have substantially prevailed in this Action. As such, there is no basis for award of Attorney's fees to the Respondent. In fact, had Complainants retained counsel, the Commission believes that Complainants would be entitled to be reimbursed for their own counsel fees.<sup>1</sup>

#### ORDER

In view of the foregoing, and based on the evidence of record, the Commission orders that:

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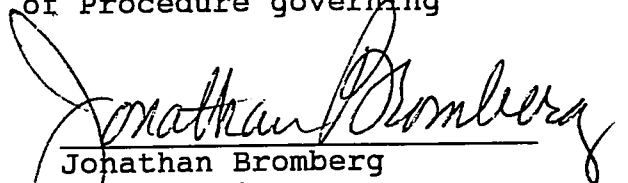
<sup>1</sup> The Commission is troubled by the lack of cooperation demonstrated by the Respondent in attempting to resolve this dispute. From the record, it appears that Respondent has incurred to date, and has asked for an award of, nearly \$8,200 in counsel fees in fighting one of its own members on clearly questionable grounds. As such, Complainants (along with all their neighbors) will now be forced to bear a proportionate share on the legal fees incurred in fighting them through payment of their own condominium assessments. In fact this is clearly the type of dispute that should have been resolved through negotiation. Complainants appeared to have presented various flexible approaches to Respondent including reasonable variations to the design of the reconstructed enclosure. The Commission trusts that Complainants and Respondent will now be able to reach a mutually acceptable redesign of the enclosure.

1. The Complainants shall have the unlimited right to reconstruct, at their own expense, an enclosure of the limited common element adjacent to their condominium unit so long as the reconstructed enclosure is in accordance with the initial design of the prior enclosure.<sup>2</sup>

2. The Complainants shall have the unlimited right to maintain any such enclosure so long as they (or either one of them) remain owners of the unit.

3. The foregoing was concurred in by panel members Blumberg, Glancy and Bromberg.

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

  
Jonathan Bromberg  
Panel Chairperson  
Commission on Common  
Ownership Communities

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<sup>2</sup>This is not to impose an absolute requirement on all parties that an exact duplicate of the original structure be recreated. In fact, the Commission encourages Complainants and Respondents to reach a mutually agreeable compromise regarding the ultimate design of the rebuilt enclosure. However, should the parties be unable to reach a mutually agreeable compromise, the Complainants are granted the unlimited right to reconstruct the enclosure so long as the reconstructed enclosure is substantially in accordance with the prior enclosure.