

Before the
Commission on Common Ownership Communities
October 14, 1994

In the Matter of

John S. Kearns
12752 Turquoise Terrace
Silver Spring, MD 20904

Complainant

Vs.

Snowdens Mill Townhouse
Association #2, Inc.
P.O. Box 10463
Silver Spring, MD 20904

Respondent

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Case No. 255-O

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 14th day of October, 1994, found, determined and ordered as follows:

BACKGROUND

On November 8, 1993, John S. Kearns, owner of 12752 Turquoise Terrace, Silver Spring, Maryland, (hereinafter the "Complainant"), filed a formal dispute with the Office of Common Ownership Communities in which he alleged that the Board of Directors, Snowdens Mill Townhouse Association #2 (hereinafter the "Respondent"), improperly assessed a \$25.00 late fee for his failure to pay his July/September 1993 quarterly assessment as of July 31, 1993. The Commission held a public hearing on the matter on July 27, 1994.

FINDINGS OF FACT

Based upon the testimony and evidence of record the Commission makes the following findings:

1. At all pertinent times hereto, the Complainant, John S. Kearns, was a resident of Snowdens Mill Townhouse Association #2.

2. The Declaration of Covenants, Conditions, and Restrictions, (Exhibit 18), Snowdens Mill Townhouse Association #2 Bylaws, (Exhibit 17), and Snowdens Mill Townhouse Association #2, Inc. Administrative Resolution #1, (Exhibit 19), are validly recorded documents and legally enforceable to regulate the affairs of the Snowdens Mill Townhouse #2, Inc.

3. The Snowdens Mill Townhouse Association #2, Inc.'s (hereinafter "SMTA #2") Board of Directors assessed the Complainant a late fee of \$25.00 for failure to pay to SMTA #2 the quarterly assessment of \$124.00 on July 1, 1993.

4. Because the payment was not received within 30 days, the Respondent assessed a late fee of \$25.00 requiring Mr. Kearns to pay \$149.00 to bring his account current.

5. Mr. Kearns paid the \$25.00 late fee under protest on or about October 22, 1993 (Exhibit 1a) with his next quarterly payment.

6. The Declaration of Covenants (Exhibit 18), in Section 8 provides for an imposition of a 6% per annum late fee for any assessment not paid within thirty days after the due date.

7. Snowdens Mill Townhouse Association #2, Administrative Resolution #1, (Exhibit 19), Section II (A), in reference to the authority in Exhibit 18 Section 8, provides that the account shall bear interest at the rate of six percent (6%) per annum until paid.

8. On November 10, 1992, the Respondent at a meeting called and attended by a majority of Board members (four of a total of seven), adopted a resolution to increase the "quarterly late fees from \$20.00 to \$25.00 effective January, 1993." These minutes were approved at the December 11, 1992 Board Meeting.

9. The Respondent, pursuant to the resolution, assessed the Complainant the quarterly assessment plus a \$25.00 late fee.

10. The Complainant, intending to make a timely payment, mailed a check for \$124.00 to the Snowdens Mill Homeowners Association in Burtonsville, Maryland on or about July 16, 1993, instead of to the address of Snowdens Mill Townhouse Association #2 in Silver Spring, Maryland. The check, although eventually forwarded to the SMTA #2, did not arrive until after the thirty day grace period had expired, and it was deposited on or about September 8, 1993 by the Respondent.

11. Article VII of the Bylaws, Section 2 (Exhibit 17) provides for the authority of the Board to make "assessments". Article XIV of the Bylaws provides that if such an assessment "is not paid in thirty (30) days after the due date, the assessment shall bear interest from the day of delinquency at the rate of six percent (6%) per annum..."

CONCLUSIONS OF LAW

1. There is no authority for the Respondent to change Article XIV of the Bylaws or Article IV, Section 8 of the Declaration of Covenants, Conditions, and Restrictions without a formal amendment thereto properly adopted and passed by the membership pursuant to the procedures as set forth in the Covenants and Bylaws. Therefore, the resolution adopted by the Respondent on November 10, 1992, was not a proper exercise of their authority.

2. Because the Respondent improperly assessed the \$25.00 late fee on Mr. Kearns in excess of 6% per annum, he is entitled to a refund from the Respondent for the excess amount of the late fee he has paid. The late fee should have been \$7.44 ($\$124.00 \times .06\%$), not \$25.00. Therefore, the Complainant overpaid the Respondent in the amount of \$17.56.

3. It was the Complainant's burden to ensure that his quarterly assessment payment was received by the Respondent by the time and at the place prescribed by the Respondent. Complainant failed to meet this burden. Because the burden of proving agency is upon the Complainant and, based upon the evidence the Panel had to consider, the Panel concludes that there was insufficient proof to establish a direct agency relationship for purposes of mailing the assessment to the Burtonsville address in lieu of the Silver Spring address.

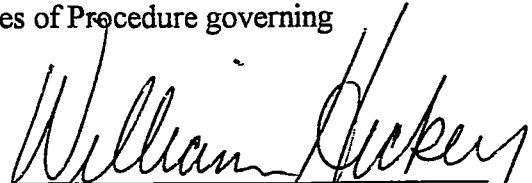
ORDER

In view of the foregoing and based on the evidence of record, it is hereby ORDERED that:

1. Within thirty (30) calendar days of the date of this Order, the Board of Directors, Snowdens Mill Townhouse Association #2, Inc., must refund to John S. Kearns the sum of \$17.56.

The foregoing was concurred in by panel members Gick, Mehler, and Hickey.

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.


William Hickey, Panel Chair
Commission on Common Ownership
Communities