

BEFORE THE
COMMISSION ON COMMON OWNERSHIP COMMUNITIES

In the Matter of
Valarie D. Eiland
14322 Astrodome Drive
Silver Spring, MD 20906

Complainant,

v.

Autumn Walk Condominium Association, Inc.
Pat Liller, President
Board of Directors
14431 Astrodome Drive
Silver Spring, MD 20906

Respondent.

Case No. 257-0
June 16, 1995

DECISION AND ORDER

The above-entitled case, having come before the Commission on Common Ownership Communities for Montgomery County, Maryland for hearing, on March 22, 1995 and April 12, 1995 pursuant to §§ 10B-5(i), 10B-9(a), 10B-10, 10B-11(e), 10B-12, 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:

BACKGROUND

On November 29, 1993, Valerie D. Eiland (.Eiland. or .Complainant.), owner of a condominium unit at 14322 Astrodome Drive, Silver Spring, Maryland, 20906, filed a complaint with the Office of Common Ownership Communities. The Complaint alleged that the Autumn Walk Condominium Association, Inc. (.Association. or .Respondent.) failed to maintain and repair faults in the foundation and main walls of Eiland's basement. The Complainant requested that the Association assume full planning and financial responsibility for diagnosing and fully repairing and maintaining the foundation and main walls, as well as the window wells, of the unit. Eiland also requested that the Association replace the damaged personal property in the basement, pay for a qualified inspector to certify the sound condition of the foundation and main walls upon completion of repairs, and pay Eiland's legal fees in this matter.

On behalf of the Respondent, Joselyn Wells (.Wells.), of Community Associations, Inc., agent for the Association, responded to the Office of Common Ownership Communities by letter dated January 31, 1994. In that letter, Wells stated that the Autumn Walk Condominium has a history of underground springs, and that the Association's Board of Directors has a policy of paying \$200.00 to each affected homeowner toward the installation of a sump pump to control unit

Walk Condominium has a history of underground springs, and that the Association's Board of Directors has a policy of paying \$200.00 to each affected homeowner toward the installation of a sump pump to control unit flooding problems. Wells' letter acknowledged that the Association has the responsibility to correct "any cracks in the foundation" of a unit. The letter stated that the Association has been unable to determine if there are any foundation leaks in Eiland's unit because of a dispute over who would pay the cost of removing and replacing wood paneling in the basement in order to permit an inspection of the interior foundation walls. The Association has taken the position that Eiland is responsible for the cost of removing and replacing the basement paneling.

Inasmuch as the matter was not resolved through mediation, this dispute was presented to the Commission on Common Ownership Communities for action pursuant to § 10B-11(e) on August 3, 1994, and the Commission voted that it was a matter within the Commission's jurisdiction. The original hearing was scheduled for October 19, 1994 and was postponed at the request of the Respondent. The rescheduled hearing was held on March 22, 1995 and April 12, 1995. The Complainant was represented at the hearing by Shelah F. Lynn, Esquire. The Respondent was represented at the hearing by Steven A. Silverman, Esquire. On agreement of the parties, the Complainant submitted memoranda of law on certain issues by April 22, 1995 in response to memoranda of law submitted by the Respondent at the hearing. The record was closed on April 22, 1995, on agreement of the parties.

STATEMENT OF FACTS

The following facts were presented to the hearing panel in the form of oral testimony and documentary evidence introduced by the parties:

1. Eiland owns a condominium unit at 14322 Astrodomo Drive, Silver Spring, Maryland 20906. This unit is located within the Autumn Walk Condominium Association.
2. Eiland purchased the condominium unit in February 1992. The unit's basement began flooding with water during frequent rains, beginning in spring 1992. Eiland on July 31, 1992 paid for clean-up services in the amount of \$82.74 in relation to basement flooding. (Complainant's Hearing Exhibit 1). Eiland initially contacted the Association's property management office in spring 1992, and in July 1992 she spoke with Wells, the Association's property manager, concerning the flooding.
3. Eiland next experienced basement flooding in the fall of 1992, and again contacted Wells. Eiland paid \$83.24 on November 12, 1992 for clean-up costs in relation to the flooding. (Complainant's Hearing Exhibit 2).
4. Eiland sent a letter dated December 10, 1992 to the Association's Board of Directors (Commission Exhibit 1C). The letter described the basement flooding, and requested the installation of a sump pump in the basement to discharge any flood water.
5. In response to Eiland's December 10, 1992 letter, the Association gave

Eiland a check in the amount of \$200.00 toward the installation of a sump pump. Eiland deposited the \$200.00 into her bank account, but did not install a sump pump.

6. In May 1993, Eiland experienced additional basement flooding and again contacted Wells. On or about June 5, 1993, the Association sent a contractor, Struct-A-Bond, to Eiland's home for an inspection. During the inspection, the contractor directed that the paneling covering the basement wall be removed in order to determine whether there were interior foundation cracks. A disagreement ensued as to whether Eiland or the Association was responsible for the cost of removal and reinstallation of the paneling. No further inspection was conducted by Struct-A-Bond.

7. At the Commission's hearing, Eiland presented a witness, Mark H. Jaffe, of Jaffe & Associates, Inc., who was qualified as an expert in water infiltration. Jaffe had inspected the Eiland residence and prepared a report dated November 21, 1994. (Complainant's Hearing Exhibit 6). The report stated that the unit's concrete foundation wall is cracked along both the exterior and interior portions of the wall, noting that the interior wall paneling was removed during Jaffe's investigation. Jaffe's report stated that the exterior water proofing/damp proofing elements along the concrete foundation at the rear of the house is in "very poor" condition, that the exterior window-wells are poorly designed and not sealed, and that other penetrations (gas service line, HVAC line, etc.) are poorly sealed. The report contained photographs that documented water damage to the interior finishes of the basement, including the wood paneling, and floor tile.

8. In Jaffe's opinion, the apparent volume of water that penetrates the Eiland home must be stopped at the point of entry. Jaffe's report recommended that the entire foundation wall along the rear of the house be excavated, and that a new redesigned waterproofing and drainage system be installed. Jaffe estimated the cost of implementing his recommendations to be at between \$5,000.00 and \$7,000.00, depending on the extent of damage to the structure, missing drainage components and other factors. (See Complainant's Hearing Exhibit 6).

9. Wells, the Association's agent, was called as a witness for both the Complainant and the Respondent at the hearing. After receiving Eiland's initial complaint regarding the flooding in July 1992, Wells stated that she attempted to correct the problem in August 1992 by disconnecting two underground drainage pipes and replacing them with above ground corrugated piping. (Respondent's Hearing Exhibit 5, ¶ G). She had believed that these measures corrected the flooding problem until Eiland called her to report additional flooding in November 1992.

10. In response to Eiland's December 10, 1992 letter (see paragraph 4 above), Wells authorized the payment of \$200.00 to Eiland for installation of a sump pump. Wells described the \$200.00 payment as being in accordance with a "long-standing policy" of the Association in responding to unit owner flooding complaints involving common area defects and/or failures.

11. Wells sent a letter dated January 19, 1993 to Eiland requesting a copy of the paid bill for the sump pump. (Respondent's Hearing Exhibit 6). Wells did not receive a response to this letter. Wells stated that she was unaware that Eiland had not installed a

sump pump until Eiland had called her concerning additional basement flooding in May 1993. Based on the renewed complaint, Wells arranged for Struct-A-Bond's inspection in June 1993.

12. Wells confirmed receiving Eiland's July 7, 1993 letter requesting that the Association correct the structural problems causing water leakage. (Commission Exhibit 1A). Wells stated that she called Eiland in July 1993 to advise her that the Association would not undertake any structural repairs unless Eiland agreed to pay for the cost of removal and reinstallation of the basement paneling to permit a full inspection.

13. Pat Liller, the Association's Board President, testified as both a witness for the Complainant and the Respondent. Liller confirmed that the Association has had a policy of paying each unit owner with flooding problems \$200.00 toward the installation of a sump pump. Liller stated that the Association has accepted its responsibility for making necessary repairs to common elements if they are causing water leakage at Eiland's residence.

14. Vincent H. Berge, P.E. testified for the Association and was qualified as a witness on drainage erosion and storm water management. Berge conducted an initial inspection of the Eiland residence in October 1994 and a second inspection in March 1995. The Association has relied on the conclusions and recommendations in Berge's March 14, 1995 report. (Respondent Hearing Exhibit 3).

15. At the hearing, Berge responded to questions from the Complainant's counsel about his initial October 1994 inspection and October 26, 1994 report on the Eiland residence. (Complainant Hearing Exhibit 11). The report noted "several historic drainage courses" through the Autumn Walk Condominium, and recommended the installation of a sump pump as the primary drainage control mechanism to correct the water leakage problem. At the hearing, Berge stated that following his March, 1995 inspection, he is no longer recommending the installation of a sump pump as the primary drainage control mechanism for Eiland's unit.

16. Berge's March 1995 report concluded that the water leakage appeared to be primarily from a surface water source rather than a ground water source. Berge stated that surface water flowed down the outside basement wall and into Eiland's unit. The report noted a leaking hose bit and the lack of positive grade away from the home, gaps between the concrete patio and rear basement wall, and gutter problems on the adjacent roof all contributed to the water leakage.

17. Berge's March 1995 report recommended various measures to water proof and seal exterior areas of Eiland's unit. The recommendations included "jacking up" the rear patio two inches to regrade water away from the unit, the installation of new gutters to Eiland's unit and adjacent units, and other measures to direct surface or rain water away from the walls of unit.

18. Commenting on Jaffe's report, Berge stated that he does not agree with Jaffe that it is necessary to excavate, inspect and repair cracks in the rear foundation wall, if the water proofing and other recommendations in Berge's report are followed and correct the flooding problem.

19. Berge's March 1995 report did not contain a cost estimate for implementing the recommendations. At the hearing, Berge estimated the cost to implement his recommendations to be between \$1,000.00 and \$2,000.00.

20. The Association's responsibility for maintenance and repair of common areas is stated in the Architectural Policies and Regulations for the Autumn Walk Condominium Association adopted January 15, 1976 (Commission Exhibit 1J); Autumn Walk Condominium Bylaws (Commission Exhibit 1F); and in a policy resolution of the Association adopted on November 24, 1993 (Commission Exhibit 1G).

21. The 1976 "Architectural Policies and Regulations for the Autumn Walk Condominium Association" states that the Association is responsible for the maintenance of all common areas, including unit exteriors. This responsibility includes "general common elements" including "foundations, main walls columns, girders, beams, supports, . . . ; yards and gardens water tanks and pumps, and a like; in general, all devices or installations existing for the common use; and all other elements rationally of common use or necessary for existence, upkeep and safety." The Association's maintenance responsibilities are also outlined in a Association policy resolution adopted on November 24, 1993 (Commission Exhibit 1G).

22. Eiland's position in this case is that the Association failed in its obligation to take timely and corrective measures to correct the water leakage problems in her unit. The Association's policy of paying \$200.00 toward the installation of a sump pump is stated to be inadequate. Eiland notes that the Association has abandoned its initial position that the water leakage problem in her unit was associated with underground springs. Eiland states that she timely notified the Association of the water leakage occurrences in her unit.

23. Eiland requests that the Association at its expense implement the recommendations in the Jaffe report for repair and correction of the flooding in her unit. Eiland also seeks damages for replacement of fixtures and personal property damaged in the flooding. Eiland requests \$1,306.13 for installation of replacement floor tiles (Complainant Hearing Exhibit 7), damages amounting at between \$1,597.02 and \$1,778.18 for installation of new wall paneling (Complainant Hearing Exhibit 7), \$199.00 as the replacement cost for an oriental rug (Complainant Hearing Exhibit 9), and \$69.00 as the replacement cost for a book shelf damaged in the flooding (Complainant Hearing Exhibit 10).

24. In addition, Eiland requests \$3,174.00 for the loss of use of her unit's basement. This amount equals one-third of her total mortgage payment, including taxes and insurance, between May 1992 and March 1995. The basement occupies approximately one-third of the total square footage of Eiland's home. Finally, Eiland seeks recovery of the attorneys' fees and expert witness fees that she incurred in this action.

25. The Association's position in this case is that it took timely and corrective actions in response to Eiland's reports of water leakage in her unit. The Association states that corrective measures were performed in July 1992 after which Eiland did not report any additional flooding until November 1992. The Association stated that its December 1992 payment of \$200.00 to Eiland toward the installation of a sump pump was reasonable in light of Eiland's December 10, 1992 letter request for installation of a sump

pump, and the limited nature of water leakage problems in her unit and other units as of that time. It is noted that after Eiland received the \$200.00 in December 1992, Eiland did not report any additional flooding until May 1993. The Association at the hearing stated that it will implement at its expense the recommendations in March 1995 Berge report to correct the water leakage problems identified in Eiland's residence.

26. The Association asserts that Eiland as of at least December 1992 had an obligation to mitigate damages by installing a sump pump system or taking other corrective measures at her own expense (less the \$200.00 paid by the Association). The Association disclaims the responsibility for any damages incurred as the result of Eiland's failure to mitigate damages.

27. The Association objects to the written estimates introduced by Eiland at the hearing for the cost of new floor tile, wall paneling, a rug and a bookshelf. The Association contends that Eiland did not meet her burden of establishing these damages, by failing to call witnesses to testify as to the appropriateness of each item of damage. If Eiland is entitled to any personal property damages, the Association contends that Eiland may receive, at most, the value of the personal property items at the time they were damaged, not their replacement cost. The Association states that Eiland is not entitled to any "loss of use" damages because Eiland failed to take timely remedial action to correct the water leakage problems. Finally, the Association states that Eiland has not established a basis for recovery of legal fees and expert witness fees.

FINDINGS AND CONCLUSIONS

Based upon a preponderance of the testimony and documents admitted into evidence, after a full and fair consideration of the evidence of record, including the legal arguments made by the parties, the Commission makes the following findings of fact and conclusions of law:

1. The Complainant's condominium unit in the Autumn Walk Condominium Association since the spring of 1992 has experienced water flooding in the basement that is attributable to defects and/or failures in common areas of the condominium.

2. The Respondent under the condominium's governing documents is responsible for the maintenance of all common areas of the condominium, including unit exteriors. This responsibility extends to foundations, main walls, patios, and all other elements of common use or necessary for unit existence, upkeep and safety.

3. The testimony and documentary evidence presented by expert witnesses of the Complainant and the Respondent indicate that the flooding in the Complainant's unit may be attributable to a number of common area defects and failures, including, but not limited to, gaps between the concrete patio and rear basement wall, the lack of positive grade away from the unit, a leaking hose bit, inadequate sealing of window wells and other exterior finishes, gutter defects in the roofing, and cracks in the interior and exterior foundation walls of the unit.

4. The Respondent is responsible for repairing and correcting the common area defects and failures that are causing water flooding in the Complainant's unit. Given this responsibility, the Respondent may seek the advice of a qualified expert to determine the causes of the water flooding. If implementation of the expert's recommendations fail to correct the unit flooding, the Respondent has the responsibility to undertake additional analyses, repairs and measures addressing common area defects and failures until the flooding problems in the unit are corrected.

5. As a consequence of the flooding in the Complainant's unit, the Complainant incurred cleanup expenses which are required to be reimbursed by the Respondent. These expenses consist of the July 31, 1992 statement for \$82.74 and the November 12, 1992 statement for \$83.24.

6. Although the Respondent took some limited corrective measures in responses to the reports of unit flooding, these measures were inadequate and failed to arrest the damage to fixtures and personal property suffered by the Complainant. Consequently, the Respondent has the responsibility to pay for replacement of the Complainant's basement fixtures and personal property that were damaged in the unit's flooding.

7. The evidence demonstrates that the Complainant's basement, wall paneling, floor tile, rug and bookshelf were damaged beyond reasonable costs of repair. The Complainant is entitled to receive monetary damages for the fair market value of replacement of these fixtures and personal property items.

8. The Complainant testified and presented written estimates from vendors for replacement of the wall paneling, floor tile and personal property items. The Complainant was not required to introduce vendor witness testimony as to each estimate. The Respondent has not been denied access to a reasonable inspection of the fixtures and personal property, and the Respondent was free to examine the Complainant and to introduce its own evidence regarding the comparability and reasonableness of the cost estimates for replacement property. The Complainant is entitled to receive \$1,306.13 for installation of replacement floor tile, a payment of the actual cost for installation of new wall paneling not to exceed \$1,778.18, \$199.00 for an oriental rug, and \$69.00 for the book shelf.

9. The Complainant took reasonable steps to prevent losses to the unit's fixtures and personal property by notifying the Respondent of each flooding episode, and by opening her unit to reasonable inspection and corrective measures at the Respondent's expense. The Complainant was not required to expend large amounts of money or incur substantial financial obligations to make repairs, or to install remedial measures, when the causes of the flooding and the appropriate remedial measures were not known.

10. The Complainant received a \$200 payment from the Respondent in approximately December 1992, toward the installation of a sump pump. The Complainant was not obligated to purchase the sump pump, and she did not expressly nor impliedly agree to accept the \$200 in full satisfaction of her claims. The Respondent is entitled to a credit of \$200 as an offset to the damages that it must pay the Complainant in this case.

11. The Complainant is not entitled to receive damages for loss of use of

her unit basement as a result of the flooding. While several instances of flooding were reported, the evidence does not establish that the Complainant lost all reasonable use of the unit's basement since May 1992. Loss of use damages are not deemed appropriate in the present case where there were significant periods of time between the instances of flooding reported to the Respondent, where the Respondent took certain corrective steps to address the unit's flooding, and where the Respondent did not have prior notice of equivalent flooding problems in other units.

12. The Complainant has not established grounds to support an award of attorneys fees and expert witness fees in this case. While the Association's response to the Complainant's unit flooding proved to be inadequate, the evidence does not establish that the Respondent failed to act in good faith or without substantial justification.

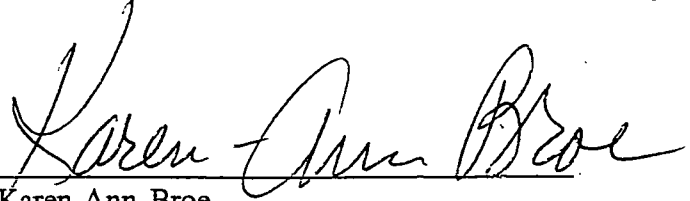
ORDER

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

1. Within forty-five (45) days from the date of this Order, the Respondent shall submit to the Complainant its plan for repairing and correcting the common area defects and failures that are believed to be the cause of the water flooding in the Complainant's unit basement. The corrective measures in the Respondent's plan shall not be less extensive than the measures recommended in the March 14, 1995 report of Vincent H. Berge, P.E.
2. The Respondent shall coordinate and consult with the Complainant regarding the nature of corrective measures to be performed, and time schedule for performance of the work. The corrective measures shall be performed within ninety (90) days of the date of this Decision and Order, unless this time period is waived by the Complainant.
3. In the event that the corrective measures implemented by the Respondent fail to correct the unit flooding, the Respondent shall immediately consult with the Complainant and propose alternative corrective measures. The Respondent shall be responsible for undertaking additional repairs and measures to common area elements in order to eliminate flooding in the Complainant's residence.
4. Within sixty (60) days of the date of this Order, the Respondent shall pay to the Complainant the sum of the following monetary damages: \$82.74 (July 31, 1992 cleanup bill), \$83.24 (November 12, 1992 cleanup bill), \$1,306.13 (replacement floor tile), \$199.00 (oriental rug), and \$69.00 (book shelf). The Respondent shall reimburse the Complainant for the cost of replacing the wall paneling, based on an invoice presented by the Complainant, provided that the total cost does not exceed \$1,778.18. The Respondent's previous payment of \$200.00 to the Complainant shall be deducted from the amount due to the Complainant. In sum, the Respondent shall pay the Complainant an amount not to exceed \$3,318.29, in accordance with this Order.
5. Time is of the essence with respect to each time frame stated in this Order.

The foregoing was concurred in by panel members Broe, Glancy and Huson.

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

A handwritten signature in cursive script that reads "Karen Ann Broe". The signature is written in black ink and is positioned above a horizontal line.

Karen-Ann Broe
Panel Chair, Commission on Common
Ownership Communities