

**BEFORE THE  
COMMISSION ON COMMON OWNERSHIP COMMUNITIES  
FEBRUARY 8, 1995**

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In the Matter of )  
Peachwood Estates )  
Homeowners Association, Inc. )  
Henry J. Henley, President )  
Board of Directors, )  
P.O. Box 10297 )  
Silver Spring, Maryland )  
20917-0297 )

Plaintiff, )

v. )

Case No. 261-G )

Renato and Teresita )  
San Miguel, Owners )  
1143 Netherlands Court )  
Silver Spring, Maryland )  
20905 )

Defendant. )

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**DECISION AND ORDER**

The above-captioned 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 8th day of February, 1995, found, determined and ordered as follows:

**BACKGROUND**

On February 24, 1994, Henry J. Henley, President, Board of Directors, Peachwood Estates Homeowners Association, Inc. (hereinafter "Complainant") filed a formal dispute with the Office of Common Ownership Communities. The Complaint alleges that Mr. Renato (a/k/a Rene) and Mrs. Teresita San Miguel (hereinafter "Respondents"), of 1143 Netherlands Court, Silver Spring, Maryland

20905 (hereinafter the "subject property") constructed a retaining wall and installed an in-ground swimming pool at the subject property without obtaining prior written approval of the Association's Architectural Committee, in violation of Article V (Architectural Control) of the Association's Declaration of Covenants, Conditions and Restrictions (the "Declaration of Covenants").

Inasmuch as this matter was not resolved through mediation, the dispute was presented to the Commission on Common Ownership Communities for action pursuant to Section 10B-11(e). On August 3, 1994, the Commission determined that this case was a matter within the Commission's jurisdiction, and this matter was scheduled for a hearing. The hearing was held on December 28, 1994, and the record was closed at the conclusion of the hearing.

### FINDINGS OF FACT

1. The Peachwood Homeowners Association, Inc. is a non-stock corporation organized under the laws of Maryland. The affairs of the Association are managed by a Board of Directors (the "Board") consisting of not more than nine (9) members.
2. The Respondents own the residence at 1143 Netherlands Court, Silver Spring, Maryland 20905 which is in the Peachwood Estates community.
3. On February 24, 1994, the Complainant filed a Complaint to initiate a formal dispute in the Office of Common Ownership Communities (Commission Exhibit 1). The Complaint stated that the Respondents constructed a fence, with the approval of the Association, but that the retaining wall which was constructed to support the fence was not approved. The original Complaint also stated that the Respondents constructed an in-ground swimming pool without approval by the Association in accordance with the Declaration of Covenants.
4. The original Complaint in its requested relief sought to have the Respondents remove the unapproved retaining wall and in-ground swimming pool. The original Complaint also stated that the Respondents would be permitted to resubmit new proposals for the "fence" and in-ground pool consistent with the Association's governing documents and applicable Montgomery County regulations regarding fences and residential swimming pools.
5. At the hearing in this case, in response to a motion of the Respondents to limit the issues, the Complainant withdrew its request that the Respondents be ordered to remove the in-ground swimming pool. The Complainant and the Respondents at the hearing agreed that the issues in this case, as restated here, are: (1) Whether, based on the evidence presented in this case, the Complainant may require the Respondents to remove the retaining wall; and (2) if the Complainant does not have sufficient grounds to order the Respondents to remove the retaining wall, whether the Complainant may, as a condition of

approval of the retaining wall, require that the Respondents at their own expense provide landscaping, including shrubbery, outside of the retaining wall on property not belonging to the Respondents.

6. The Declaration of Covenants (Commission Exhibit 1b) under Article V, Architectural Control, states as follows:

No building, fence, wall or other structure, or exterior painting, shall be commenced, erected or maintained, upon the Properties, 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 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 Association, sitting as the Architectural Control Committee, or by an Architectural Control Committee composed of three (3) or more representatives appointed 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. [Emphasis added.]

7. The Respondents in this case were represented by Robert S. Bourbon, Esquire. The position of the Respondents was first presented in a March 21, 1994 letter from Mr. and Mrs. San Miguel (Commission Exhibit 6a) along with a three-page attachment containing copies of certain photographs and explanatory text. The original attachment, including photographs, were admitted into evidence at the hearing in this case.

8. With respect to the facts of this case, the Respondents state that Mr. San Miguel in late August 1992 initially inquired with Mr. Collier, as the chairman of the Architectural Committee, about the application and approval process for building a fence/retaining wall on the subject property. Mr. San Miguel stated that he sought expedited consideration of the request because he wanted to begin construction of the fence and wall during the upcoming Labor Day holiday weekend. (Labor Day was on Monday, September 7, 1992.) Mr. Collier asked Mr. San Miguel to present his request at the Association's next Board of Directors

meeting on August 25, 1992 at the residence of then Board President Stephen C. Gerwin. <sup>1/</sup>

9. Mr. San Miguel attended the August 25, 1992 Board meeting with Eddie Lozano, the Respondents' next door neighbor who also planned to build a fence and retaining wall on his property, in conjunction with the Respondents' project. In his testimony, Mr. San Miguel stated that the Respondents and Mr. Lozano at the Board meeting were given verbal approval to start their fence/retaining wall projects, and that he understood that the Architectural Committee would follow up with written confirmation later. Mr. Lozano also testified in this case, and corroborated Mr. San Miguel's testimony concerning the August 25, 1992 Board meeting.

10. Mr. San Miguel stated that at the August 25, 1992 Board meeting, the Board requested that the Respondents provide landscaping along the outside of their planned fence/retaining wall. The stated purpose for the landscaping was to minimize the overall height of the wall and the fence itself would be six-feet high, and generally, to beautify the entrance to the Peachwood Estates community. Mr. San Miguel stated that a discussion ensued concerning who would pay the costs of the landscaping. Mr. San Miguel said that he offered to pay one-half of the costs of shrubbery outside his fence/retaining wall, but that the Board wanted him to pay the entire cost of the shrubbery. In their testimony in this case, Mr. Sam Miguel and Mr. Lozano also stated that the Board requested that shrubbery be placed outside of Mr. Lozano's fence/retaining wall.

11. Mr. San Miguel stated the planting of shrubs outside of the Respondents' retaining wall was made a "condition" of the Board's approval of the Respondents' fence and retaining wall. At the hearing in this case, Mr. San Miguel stated that he has withdrawn his offer to the Association to pay one-half of the costs of landscaping outside the retaining wall.

12. Following the August 25, 1992 Board meeting, Mr. San Miguel submitted letters dated September 1, 1992 and September 3, 1992 to the Architectural Committee that requested permission to erect a six-foot fence as shown on an attached drawing and plat. The application, drawings and plat did not show that a retaining wall was going to be built to support the fence. (Commission Exhibits 8b and 8c). On behalf of the Architectural Committee, Mr. Collier sent a letter dated September 3, 1992 to the Respondents which stated that the committee approved the fence, as submitted. Mr. Collier's letter also stated that he understood

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<sup>1/</sup> Mr. San Miguel's March 21, 1994 letter (Commission Exhibit 6a) stated that he spoke with Mr. Collier on or about August 28, 1992 and that he attended the Board of Directors meeting a "couple of days" later. At the hearing, the Complainant presented written minutes that indicated that the Board of Directors' meeting was held on August 25, 1992. (Complainant Hearing Exhibit No. 5).

that the Respondents "may wish to construct a retaining wall upon which to erect a portion of the fence. This must also be submitted in order to be approved."  
(Commission Exhibit 8d.)

13. By letter dated September 17, 1992, the Respondents submitted to the Architectural Committee a request for permission to build a retaining wall on the Good Hope Road side of the Respondents' property, as shown on an attached drawing. The Respondents' property is a corner lot at the intersection of Windmill Land and Good Hope Road, and is at an acknowledged entrance to the Peachwood Estates community. The Respondents' letter and drawing described the size, type and dimensions of the lumber to be used for the retaining wall, and the depth of the wall. (Commission Exhibit 8e.)

14. Mr. Gerwin, then Association President, sent a letter dated October 4, 1992 to the Montgomery County Government Division of Development Services concerning the Respondents' retaining wall. The letter stated that the wall "would appear to be of questionable design" and asked whether proper permitting procedures were followed for the project. (Commission Exhibit 8f.)

15. By letter to the Respondents dated October 16, 1992, Mr. Collier on behalf of the Architectural Committee stated that the Respondents' request to build the retaining wall was "denied, at this time". The letter stated that "it is felt that the wall is of questionable design", and that there was a need to verify whether a County permit was needed for the project. The letter stated that the Architectural Committee would extend the period for obtaining approval by an additional 30 days in order for the Respondents to contact the County. The letter requested that the Respondents respond "in writing" to the Architectural Committee by November 17, 1992, as to their findings. (Commission Exhibit 8g.)

16. Mr. Collier on October 16, 1992 hand-delivered the letter bearing the same date to Mr. San Miguel at the Respondents' residence. On this occasion, it is undisputed that Mr. San Miguel showed Mr. Collier a Montgomery County "fence/retaining wall permit" dated October 13, 1992. (Commission Exhibit 8j). However, the Complainant and the Respondents have disagreed as to whether Mr. Collier on behalf of the Architectural Committee at this October 16, 1992 meeting gave Mr. San Miguel verbal approval for the retaining wall. The Respondents' position is that the retaining wall was verbally approved by Mr. Collier, and the Complainant's position is that the retaining wall was not approved, verbally or otherwise.

17. By letter dated May 24, 1993, Mr. Collier advised the Respondents that the Board of Directors had reviewed the Respondents' pending application for approval of the retaining wall, and that Board members "had basically two concerns". The concerns were:

. . . 1) that the fence, especially at the rear of your property at the corner of Windmill Land [stet] and Good Hope Road, be made straight, instead of its present leaning stance; and 2) that you submit to the Board what you would plant in the way of shrubs or landscaping along the retaining wall to help minimize the overall height of the wall and the fence...(Commission Exhibit 8l.)

18. Between June 9, 1993 and August 19, 1993, the Respondents and the Complainant, through the Association's representatives, exchanged correspondence stating their respective positions on the retaining wall. (Commission Exhibits 8m, 8n, and 8o). It is noted that the Respondents painted the fence in an effort to visually separate the fence from the retaining wall, and to minimize the overall visual height of the fence and wall.

19. By letter dated November 12, 1993, Mr. Henley, the Association's newly installed president, advised the Respondents that the Board of Directors had formally denied approval of the retaining wall. Mr. Henley's letter also stated that the Respondents may appeal the Board's decision at the Board meeting and public hearing to be held on January 6, 1994. (Commission Exhibit 8r). Mr. San Miguel attended the Board meeting, and sent a letter dated January 21, 1994 to Mr. Henley stating the Respondents' position on the retaining wall. (Commission Exhibit 8s). By letter dated January 28, 1994, Mr. Henley advised the Respondents that the Board of Directors had reaffirmed its November 4, 1993 denial of the Respondents' application for approval of the retaining wall. <sup>2/</sup> (Commission Exhibits 8t and 8u.)

20. The Respondents' position in this case is that the Complainant does not have the right to require them to landscape the publicly owned land outside of their retaining wall along Good Hope Road. In addition, the Respondents have alleged that the Complainant acted in an arbitrary and discriminatory manner in denying approval of the Respondents' retaining wall. As an example of arbitrary and discriminatory treatment, the Respondents stated that the Association previously approved a homeowners' installation of a shed on the homeowner's property without a landscaping requirement; and that a two-car garage was built in the backyard of Mr. Collier, the chairman of the Architectural Committee, "against the wishes of the Association." (Commission Exhibits 6b and 6c.)

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<sup>2/</sup> The Board meeting and the cited correspondence in November 1993 and January 1994 also pertained to the Respondents' August 1993 application for permission to construct an in-ground swimming pool. Under the modified issues in this case, as agreed to by the Complainant and the Respondents at the hearing, the swimming pool application is no longer at issue in this case.

21. At the hearing in this case, Mr. Collier on behalf of the Complainant testified that in the case of the shed cited by the Respondents, landscaping was required and installed at the expense of the homeowner to beautify the area surrounding the shed. Mr. Collier also stated that the two-car garage on his property was properly built in that the project was not approved or disapproved by the Association within the 30-day time limit as required under Article V of the Declaration of Covenants.

22. The Respondents have requested the following relief from the Commission in this matter: (1) that the Association approve their retaining wall in its present condition; (2) that the Association be responsible for landscaping outside the retaining wall; and (3) that the Respondents be reimbursed for their expenses incurred in this matter, "including but not limited to attorneys fees."

### CONCLUSIONS OF LAW

The Commission concludes, based upon a preponderance of the testimony and documents admitted into evidence, and after a full and fair consideration of the evidence of record, that:

1. The Association's Board of Directors at its August 25, 1992 meeting considered but did not approve the Respondents' verbal request for permission to construct a fence on the subject property. The Respondents have not established that at this Board meeting they also requested permission to construct a retaining wall to support the fence; in any case, the Board did not approve any request to construct a retaining wall. The Board of Directors at this meeting reserved the right to condition any subsequent approval of the Respondents' fence project on the requirement that the Respondents pay for the cost of landscaping, including shrubbery, outside of the Respondents' fence and retaining wall.

2. The Association's Architectural Committee on September 3, 1992 approved the Respondents' application to build a six-foot fence as described in the Respondents' September 1, 1992 and September 3, 1992 letters and attachments. The Respondents did not submit an application for permission to construct a retaining wall until September 17, 1992.

3. The Association's Architectural Committee, in a October 17, 1992 letter hand-delivered to Mr. San Miguel, denied approval of the Respondents' September 17, 1992 application to build a retaining wall to support the approved six-foot fence. The Board of Directors later affirmed the decision of the Architectural Committee and denied approval of the Respondents' application to build the retaining wall.

4. The Association's Architectural Committee and Board of Directors did not act in an arbitrary or discriminatory manner in denying approval of the Respondents' retaining wall.

5. The Respondents constructed the retaining wall to support the fence on their property without the approval of the Association's Architectural Committee and Board of Directors, and in violation of Article V of the Declaration of Covenants.

6. The Association's Architectural Committee and Board of Directors each has authority under Article V of the Declaration of Covenants to condition their approval of the Respondents' application to build the retaining wall on a commitment from the Respondents to pay the full cost of landscaping, including shrubbery, outside of the Respondents' retaining wall along Good Hope Road. Landscaping, including shrubbery, is a part of a fence and retaining wall project's "harmony of external design and location in relation to surrounding structures and topography" under Article V of the Declaration of Covenants.

7. If the Respondents are required by the Association to install landscaping outside of their retaining wall, it will be the Association's responsibility to pay the full cost of any ongoing maintenance of the landscaping for the purpose of beautifying the Good Hope Road and Windsor Lane entrance because the landscaping is for the benefit of the entire Peachwood Estates community.

8. The Complainant has the authority under the Declaration of Covenants to order the Respondents to remove the retaining wall if the Respondents fail to meet the Association's reasonable conditions for installation of landscaping at the site in accordance with this Decision and Order.

9. The Complainant has authority under the Declaration of Covenants to deny an application for approval of a retaining wall because of inadequate building design, inadequate building materials, and for other safety reasons. In the present case, the Complainant has not presented sufficient evidence in which to deny the Respondents' application for approval of the retaining wall on the grounds of inadequate building design, inadequate building materials, or for safety reasons unrelated to the harmony of external design and location of the project in relation to the entrance to the Peachwood Estates community.

10. The Respondents have not established any grounds to support an award of their expenses, including attorneys' fees in this case. The Complainant had substantial justification to file its Complaint against the Respondents in this matter for constructing a retaining wall without the approval of the Association.



## 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 Respondents shall, in accordance with Article V of the Declaration of Covenants, submit to the Association a proposed plan to provide landscaping at the Respondents' expense along the outside of the Respondents' retaining wall. The Respondents' proposed landscaping plan shall provide for a reasonable amount of visual coverage of the Respondent's retaining wall along Good Hope Road. The Association shall consider the Respondents' proposed landscaping plan as a modification to the Respondents' September 17, 1992 request for approval of the retaining wall in accordance with the Declaration of Covenants.

2. The Association may not deny approval of the Respondents' retaining wall for safety reasons, absent a professional opinion demonstrating an inadequate building design, inadequate building materials, or that the wall is in danger of collapsing, or for other safety hazards.

3. If the Association approves the Respondents' application for the retaining wall, including the proposed landscaping plan, the Association and the Respondents shall jointly seek all necessary permits and shall equally share the permit fee(s) for installation of the landscaping outside of the Respondents' retaining wall. If a permit cannot be obtained to install landscaping outside of the Respondents' retaining wall, then the Respondents will have no further obligation under this Decision and Order to install landscaping outside of the retaining wall.

4. The Association shall in its sole discretion determine the level of ongoing maintenance that is necessary for the landscaping installed by the Respondents in accordance with this Decision and Order. The Complainant shall be responsible to pay the full cost of any and all ongoing maintenance of the landscaping installed by the Respondents outside of the retaining wall on property not belonging to the Respondents.

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, Chester, and Mehler.

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.

*Karen-Ann Broe*

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