

**BEFORE THE MONTGOMERY COUNTY
COMMISSION ON COMMON OWNERSHIP COMMUNITIES**

In the Matter of

Steven Botman and Nancy Coleman
Unit B-9, 4921 Crescent Street
Bethesda, Maryland 20816

Complainants

v.

The Crescent I Condominium, Inc.
Rebecca Bell, President
Board of Directors

Respondent

Case No. 283-0
January 17, 1996

DECISION AND ORDER

The above-entitled case, having come before the Commission on Common Ownership Communities for Montgomery County, Maryland for hearing, on October 25, 1995, pursuant to Sections 10B-5(i), 10B-9(a), 10B-10, 10B-11(e), 10B-12, and 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 August 3, 1994, Steven Botman and Nancy Coleman ("Complainants"), owners of 4921 Crescent Street, Bethesda, Maryland 20816 ("Unit"), filed a formal dispute with the Office of Common Ownership Communities ("Office" or "Commission"). The Complainants allege that the Board of Directors, The Crescent I Condominium, Inc. ("Association" or "Board"), refused to make necessary repairs to a "...60+ square inch hole between the mansard roof and supporting exterior wall," of their dwelling unit, a common element of the condominium, which caused them to have the work done themselves; and further, that the Association refuses to reimburse them for the expense they incurred to obtain a professional engineering study (\$1200) and the cost they incurred to have the damage repaired (\$18,607.00). The Complainants contend that the Board's refusal to accept responsibility for the repairs is a violation of Section 18(a) of the Association's Bylaws, which states that the Board is responsible "To provide for the care, upkeep, protection, and maintenance of the Common Elements of the condominium and the exterior surfaces of the Condominium Units..." The Complainants further assert that the problem was exterior to the unit and therefore, a common element of the condominium.

In response, by correspondence dated October 25, 1995, Marianne R. Loman, attorney for the Board, informed the Office, in part, that "In the case of Crest I Condominium, the council of unit owners is not responsible for unit care, upkeep, protection, and maintenance, or repairs, except for that involving the exterior surfaces of the condominium units; and further, based on the engineering reports, the problem is an interior problem, which has gone uncorrected for some period of time. The resulting condition will require extensive corrective work on the interior parts of the Unit, specifically, the rafters, joists, collar ties and ridge board in the attic. Because these interior problems have remained uncorrected for a significant period of time, consequential damages to the exterior of the Unit have now occurred: the roof has shifted, causing a gap between the roof and the rear wall."

Inasmuch as the matter was not resolved through mediation, this dispute was presented to the Commission for action pursuant to Section 10B-11(e) of the Montgomery County Code, 1984, as amended, on September 6, 1995, and the Commission voted that it was a matter within the Commission's jurisdiction. The hearing was held on October 25, 1995. The Complainants were represented by Jeffrey Van Grack, Esq. The Respondent was represented by Marianne R. Loman, Esq. On agreement of the parties, the parties submitted additional documentary evidence and argument. The record was closed November 24, 1995.

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. The Complainants own the condominium at 4921 Crescent Street Bethesda, Maryland 20816. The Unit is located within the Crest I Condominium Association, and is one of 20 units which were constructed starting in 1969 (Commission Exhibit at page 47).
2. In late 1993, after the Complainants had lived in the Unit for about seven years, a hairline crack appeared in the ceiling of the Unit and proceeded down at the joint of two walls. Gypsum wall board was removed from portions of the walls and ceiling to observe the affected area (Commission Exhibit at page 9). Upon investigation, the complainants determined that there was a "60+ square-inch hole" between the mansard roof and the supporting exterior wall (Commission Exhibit at page 6). Due to the hole, the ridge of the roof had bowed, such that the edges of the roof did not sit flush against the supporting structure, and rain and animals were able to enter the Unit through this hole.
3. On March 30, 1994, Wainright Engineering visited the site of the Unit to provide a structural evaluation of the opening. Following the visit, on April 12, 1994, Wainright prepared a report, which included pictures, calculation sheets, notes, and a recommended procedure (Commission Exhibit at pages 9-22). The report stated, in pertinent part:

The roof rafters are of wooden two-by-eights spaced at sixteen inches with collar ties of two-by-sixes, typically spaced at thirty-two inches. The rear edge of the

roof is supported on a two-by-four stud wall. This wall also supports a shingled mansard roof which extends downward to the ceiling level of the first floor.

The ceiling of the second floor is supported by wooden joists placed in a direction perpendicular to the roof rafters. Plywood sheathing has been attached to the upper surface of these joists except in the area within about three feet of the front and rear walls. In this area, short joists or struts have been installed, parallel to the roof rafters and at various spacing, between the ceiling joists and the rear wall.

The top of the rear mansard wall has moved outward about five inches at the right side. The bottom of this wall appears to be in its original location. The wall is tilted outward but it appears to be firmly attached to the wall and floor below.

Some of the collar ties in the attic have been pulled from their connections with the roof rafters. The nails forming these connections have been bent from this distortion.

The rear most ceiling joist is bowed outward toward the rear wall and a number of the connections between this joist and the struts have been pulled apart.

The ridge of the roof is bowed downward in the center.

I observed no cracking of either the brick chimney in the center portion of the rear wall nor of the front brick veneer wall.

Based upon these observations, it is apparent that there is insufficient thrust support for the roof rafters. Because of this, the rafters have pushed the rear wall outward away from its original position. Sloping roof rafter impart a horizontal thrust as well as a vertical load to their support. Ordinarily, this thrust load is conveyed into the ceiling joist system or into the collar ties.

4. On May 31, 1994, General Contractors Smith, Thomas & Smith, Inc. prepared a proposal to furnish the necessary labor and materials to move the rear outer wall on the second floor and raise the roof ridge (Commission Exhibit at page 23-4). The proposal, in pertinent part, contemplated the following:

Attach new cross beams to existing front and rear struts with the revised connections.

Attach the tightening devices around the cross beams at the front and rear of the attic.

Tighten the tightening devices gradually and evenly. When the lateral roof load is carried by the tightening devices, disconnect the struts from the ceiling joists. Disconnect the collar ties. Provide an adequate gap at the forward end of the rear struts for the required forward movement of the rear roof line.

Draw the rear edge of the roof rafters forward to properly align the roof.

If necessary jack the ridge board upward . . . attach the ridge to the roof rafters.

Attach new tendons with the rear edge of the roof are in their final position.

Remove the tightening devices.

Patch the roof edge and flashing.

5. The cost of the engineering report was \$1200 (Commission Exhibit at page 31; Complainant's Exhibit C-9). The general contractor quoted a price of \$18,607.93 (Complainant's Exhibit C-9).

6. On June 8, 1994, at a Board meeting, the Board agreed to solicit a legal opinion from an expert on condominium law and to review its insurance policy (Complainant's Exhibit 7). On that same date, the Board wrote to the Complainants noting that it had received a copy of the engineering and contractor's reports from the Complainants, and seeking clarification of the action the Complainants wished the Board to take (Commission Exhibit at page 26).

7. On June 9, 1994, Board member Hillary Burchuk wrote to the John Manougian Insurance Company (Respondent's Exhibit 4). Ms. Burchuk enclosed the engineering and contractor's reports and requested advice as to whether any portion of the proposed work would be covered under any policy maintained by the condominium.

8. The response from the insurance company, dated June 21, 1994, was that the damage to the Unit was excluded (Commission Exhibit at page 90; Respondent's Exhibit 4). Specifically, it appeared to the insurance company from the engineering report that the cause of loss was improper or faulty construction. The policy does not cover fault or inadequacy in design or material.

9. On June 16, 1994, the Complainants wrote to the Board requesting that it authorize the structural repair of the roof, including the related expense for the engineering report (Commission Exhibit at page 27). The Complainants stated that Items 38(a)(6), 69, and 71 of the Crest Bylaws required the Board to act on the matter.

10. On July 12, 1994, the Complainants wrote again to the Board, stating that the Board had had over a month in which to address the requested repair (Commission Exhibit at page 29).

The Complainants gave the Board until July 25, within which to respond to their previous request.

11. On July 15, 1994, Marianne Loman, Esq., wrote to the Board, stating that, in her opinion, the recommended repairs were the responsibility of the Unit owners, and not that of the Board (Commission Exhibit at page 37). Ms. Loman relied upon the Master Deed, Section 11-108.1 of the Maryland Condominium Act, the Crest Bylaws, and the engineering report and contractor proposal. Ms. Loman concluded that the work recommended on the Complainant's Unit appeared to be internal, and did not appear to involve the exterior surfaces of the Unit, except possibly to some very minor and incidental extent.

12. Ms. Loman also wrote to Board member Hillary Burchuk regarding possible insurance coverage of the repairs to the Unit. Ms. Loman noted that the insurance did not appear to cover the cost of the repairs (Commission Exhibit at page 41).

13. On July 19, 1994, the Board responded to the Complainants, noting that it had requested outside expertise to interpret the material submitted, as well as the Crest I Master Deed and the Bylaws (Commission Exhibit at page 33). The Board informed the Complainants that, as a result, the Association would not bear the cost of the repairs.

14. On July 19, 1994, the Complainants wrote to the Board stating that they would be forced to personally execute the contract for the repair of the Unit. The Complainants noted that they were not, however, waiving their right for recovery of the expenses, and requested copies of documents used in making the decision and Board meeting notes for each meeting at which the Unit repairs was discussed (Commission Exhibit at page 36).

15. On July 29, 1994, the Complainants wrote to the Board thanking them for the documents and informing the Board that they disputed Ms. Loman's assumption that she and the board did not consider a large hole between the mansard roof and the supporting exterior wall as an exterior surface (Commission Exhibit at page 91).

16. Testimony reflects that the Complainants had some discussion between themselves as to whether they could merely fix the roof or whether they would stabilize the structure, as they knew that they would have to get a building permit to stabilize the structure.

17. Thereafter, the Complainants proceeded with the work on the Unit. An October 11, 1994, bill from Smith, Thomas & Smith, notes that work had been completed on the contract dated May 31, 1994, and that the Complainants had made payment in full in the amount of \$11,481.47, for a total of \$18,607.93 (Complainant's Exhibit C-9).

18. Testimony and documentary evidence reflect that, in March or April of 1995, Bethesda Sheet Metal submitted a proposal to and replaced the roof of the Complainants' Unit (Complainant's Exhibit C-6).

19. The Complainants introduced evidence at the hearing consisting of invoices from Bethesda Sheet Metal for work done at the Crest I condominiums for the period from 1991 to 1995 (Complainant's Exhibit C-6). These invoices reflect, in pertinent part, the following:

Job Number E4449, May 6, 1992; removed loose fascia board where squirrels were entering and removed nesting material; resecured same fascia board and covered with white aluminum; resecured metal ridge cap flashing; total price \$312.00

Job Number E4426, June 2, 1992; removed existing wood shake roof; installed one new layer of 1/2" plywood over existing spaced sheathing boards; installed new 15 lb. felt paper and new fiberglass shingle roof; installed new flashing; removed galvanized roofing and wall cap at junction between two units; and removed existing metal from dormer windows; total price \$18,645.00

20. Certain proposals from the Bethesda Sheet Metal contain the notation that any hidden damaged or deteriorated woodwork found is not included in any proposed prices and would be extra on a time and material basis (Complainant's Exhibit C-6).

21. The Respondents introduced evidence at the hearing consisting of correspondence concerning repairs at Crest I condominiums by various companies for the period from 1991 to 1995 (Respondent's Exhibit R-3). These records reflect, in pertinent part, the following:

January 4, 1990, and March 28, 1991 - Roto Rooter cleared blockages in the main sewer lines; November 6, 1993 - Crest I authorized payment to snake out a drain and remove and replace a toilet

September 12, 1991; Crest I Association president, Complainant Botman, wrote to the Association Secretary to authorize partial reimbursement to a Crest I resident whose window and heat pump had been damaged by a tree downed by a storm

22. In pertinent part, Section 11-108.1 of the Maryland Condominium Act provides:

Except to the extent otherwise provided by the declaration or bylaws, the council of unit owners is responsible for maintenance, repair, and replacement of the common elements, and each unit owner is responsible for maintenance, repair, and replacement of his unit (Commission Exhibit at page 122).

23. In pertinent part, Crest I By-laws provide as follows:

By-law 18: It shall be the responsibility of the Board of Directors (a) to provide for the care, upkeep, protection, and maintenance of the Common Elements of

the condominium and the exterior surfaces of the Condominium Units as hereinafter provided (Commission Exhibit at page 72).

By-law 38(a),(b): Common expenses shall include expenses for the maintenance, repair, or replacement of the common elements, and shall also include the cost of maintenance, painting and repair of all of the exterior surfaces of the Condominium Units (Commission Exhibit at page 76).

By-law 57: The Crest Condominium shall be insured against casualty. Such coverage shall afford protection against loss or damage by fire, vandalism, malicious mischief, windstorm, water damage, and other hazards covered by the standard extended coverage endorsement, that is, including personal injury and property damage (Commission Exhibit at page 81).

By-laws 62, 63: If any part of the Common Elements or the Condominium Units shall be damaged by casualty, if the damage is only to those parts of one Condominium Unit for which the responsibility of maintenance and repair is that of the Co-owner, then the Co-owner shall be responsible for reconstruction and repair after casualty (Commission Exhibit at pages 83-4).

By-law 69: Each co-owner shall be responsible for the care, upkeep, protection, and maintenance of his Condominium Unit, except to the extent that the obligation therefor is imposed on the Board by Section 18(a). The responsibility shall include, but shall not be limited to, the interior surfaces of the walls, floors and ceilings (Commission Exhibit at page 87).

By-law 71: No co-owner shall make any additions or do anything which would or might jeopardize the safety or soundness of the structure (Commission Exhibit at page 87).

24. In pertinent part, the Crest Condominium Master Deed provides as follows:

2. IMPROVEMENTS: The unit designations of the townhouses, their locations, dimensions, areas, and boundaries are all as set forth in the building plans attached to the Plat of Condominium Subdivision.

3. COMMON ELEMENTS (a): Common Elements, in general, mean all land and portions of the improvements not located within the boundaries of the condominium units as shown on the Plat of Condominium, and include specifically, but are not limited to, all sidewalks, driveways, parking areas, and retaining walls (Commission Exhibit at page 48).

25. In pertinent part, the Plat of Condominium provides:

NOTES:

- (1) Each condominium unit consists of a three-level townhouse plus land. The outline of each townhouse is shown in solid lines.
- (3) The dimensions of the buildings as shown are measured to the outside of outside walls and to the center of party walls.
- (5) Height of each unit from the second floor ceiling to the roof peak varies (Commission Exhibit at page 40).

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. It is the Board's responsibility to provide for the maintenance of exterior surfaces of condominium units. It is the Unit owners' responsibility to maintain the interior surfaces of the walls, floors and ceilings.
2. According to the engineering report, the damage to the Unit was due to insufficient thrust support. This was deemed by the insurance company to be faulty design or construction of the unit, for which coverage was not available. The damage was not due to casualty.
3. The term "exterior surfaces" is not defined. The Plat of Condominium contemplates that, in measuring each condominium unit "interior", the dimensions are measured to the outside of the outside wall, and to the roof peak. Documentary evidence from Bethesda Sheet Metal reflects its intent, in calculating costs for jobs for the Association, to exclude costs for any hidden damaged or deteriorated woodwork found, that is, any damage not apparent on the "exterior" at the time the proposal was prepared.
4. Testimony reflected that when repairing a roof on a unit, the Board assumed responsibility for the top two "layers" of the roof, including the felt and the shingles. Documentary evidence on this point reflects that the Board assumed responsibility for repairing a roof in a unit which included installation of one new layer of 1/2" plywood over existing spaced sheathing boards, 15 lb. felt paper, and a new fiberglass shingle roof, that is the top three "layers" of the roof.
5. Testimony reflected that the Board might be willing to assume responsibility for costs if a hole in a roof resulted in further damage to the interior of a unit, that is, if an exterior hole caused interior damage. Documentary evidence reflects that, in at least one instance where payment was authorized by the Board for replacement of arguably interior items, it was caused by an outside force, e.g. a storm.

6. The evidence does not show that the damage to the "interior" of the Unit was due to causes from the exterior, such as from a storm. The Complainants therefore have not met their burden of submitting evidence that the cost of the entire repairs, apparently caused by insufficient thrust support, should be covered by the Board. The Complainants are therefore not entitled to the entire cost of the repairs.

7. The evidence reflects that the Board replaced the roof of the Complainant's Unit separate and apart from the earlier repairs at issue in the instant case. It is unclear to the Commission whether there was any overlap with respect to the work done in 1994 and the work done in 1995, or what precipitated the need for repairs to the Unit's roof in 1995, if anything.

8. On other units, the Board has repaired holes where squirrels were entering by resealing loose fascia board. The Board has also repaired the top three layers associated with the roof of a unit for a total cost greater than that involved for the repair of the Complainants' Unit. The Commission therefore finds that "exterior surfaces," as used in the instant case, includes shingles, felt, plywood, fascia board, if any, and flashing, if any,

9. The evidence does not show what portion of the cost of repairs can be allotted to exterior repairs, as used above, and what portion of the cost of repairs can be allotted to interior repairs.

10. Neither the Complainants nor the Respondent have established grounds to support an award of attorneys fees in this case. Each side will therefore bear its own costs.

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 Complainants shall obtain from the engineering firm or general contractor a breakdown of that portion of the cost associated with the replacement of shingles, felt, plywood, fascia board, if any, and flashing, if any. The cost of labor associated with installing the above items shall be in a percentage equal to the cost of the above parts as a percentage of the total cost. No further source shall be consulted, nor shall any documents be created or consulted that have not been entered into evidence.

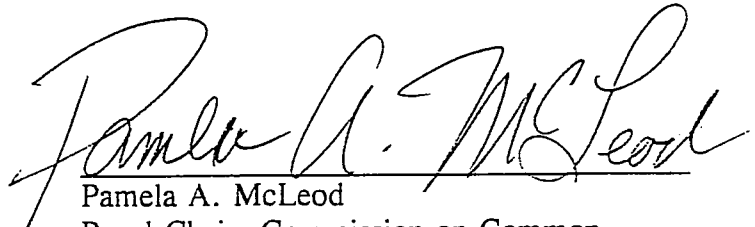
2. Within ninety (90) days from the date of this Order, the Respondent shall pay to the Complainant the sum specified as the cost for exterior work, as defined in paragraph one of this Order.

3. If the total costs cannot be broken down into interior and exterior components, the Complainants are denied recovery of the cost of repairs.

4. Time is of the essence with respect to each time frame stated in this Order.

The foregoing was concurred in by panel members McLeod, Chester, and Fox.

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, reading "Pamela A. McLeod". The signature is written in black ink and is positioned above a horizontal line.

Pamela A. McLeod
Panel Chair, Commission on Common
Ownership Communities