

**Before the
Commission on Common Ownership Communities
Montgomery County, Maryland**

In the Matter of:

Michael J. Cunningham and Lynn Fisher

Complainant,

v.

Decoverly I Homeowners Association

Respondent

Case No. 31-06

March 6, 2007

DECISION AND ORDER

The above-entitled case came before the Commission on Common Ownership Communities for Montgomery County, Maryland, for hearing and arguments on January 17, 2007, pursuant to Sections 10B-5(i), 10B-9(a), 10B-10, 10B-11(e), 10B-12, and 10B-13 of the Montgomery County Code. The hearing panel has considered the testimony and evidence presented, and finds, determines, and orders as follows:

Background

Michael J. Cunningham and Lynn Fisher (Complainants) filed a complaint with the Office of Common Ownership Communities on April 14, 2006. Complainants alleged:

1. They were authorized by Decoverly I Homeowners Association (Respondent) to add a deck to their residential unit located at 9956 Foxborough Circle, Rockville, Maryland.
2. The white vinyl deck rail that they installed matches fencing that was installed around the neighborhood perimeter.
3. They should not be required to paint the deck rail beige as demanded by Respondent.

Findings of Fact

In October 2002, Complainant submitted a plan for installation of a deck to Respondent's Architectural and Environmental Review Committee (AERC) in accordance with Respondent's procedures. Respondent approved the deck plan with the requirements that Complainants: 1) construct the deck with pressure-treated wood; 2) paint the deck railing to match the house trim; and 3) install decorative caps on the deck rail like those on the deck of the nearby unit at 9960 Foxborough Circle. Complainants were not given any additional instructions regarding construction of the deck. Some time after October 2002, but before Complainants installed the deck in spring 2003, Decoverly Master Association (not a party in this case) replaced the beige-

painted wood fence with finials surrounding the neighborhood with white, vinyl-wrapped wood fence without finials. In spring 2003, Complainants installed a deck with a white, vinyl-wrapped wood rail without finials. Complainants stated that white was the only available color for vinyl deck material at the time. To support this claim, Complainants introduced a letter from Railing Dynamics, Inc. (RDI), of Egg Harbor Township, New Jersey, dated May 23, 2006, stating that "Endurance Vinyl Railing was available only in white in early 2003." Complainants also stated that they did not seek approval from the Respondent's Board of Directors (Board) or AERC for the change in color for the deck rail or for permission to not install decorative caps consistent with an adjoining property. Complainants assumed the new white fence around the neighborhood was essentially an endorsement by Respondent of white vinyl-wrapped wood for use with residential units, unaware at the time of the difference between Respondent and the Decoverly Master Association. Complainants asserted that the kitchen "bump out" with white window frames should be considered white house trim, meaning the white deck rail already matches the "house trim," as required by the 2002 deck approval. Complainants also stated that painting the deck rail would void the manufacturer's warranty. Complainants supported this claim with a copy of the RDI warranty, which states, "This warranty does not apply to: ... products that have been painted or had their surfaces treated with other than approved chemicals."

Respondent's Board President stated that Complainants' unit is one of four home designs in Decoverly I and is known as a "Cross" unit. Respondent introduced a plan view of Decoverly I showing the locations and addresses of the four designs, with Complainants' unit identified as part of the "Cross Brick and Siding" style group. Respondent's Board President stated that "Cross" units have beige trim. Respondent introduced photographs of Complainants' unit that showed beige trim on all parts of the unit except the frames around the windows of the kitchen "bump out" on the rear of the unit. Respondent's Board President testified that he had researched vinyl-wrapped wood products in 2001 and determined that colors other than white were available at the time. The Board President also stated that vinyl-wrapped wood products were approved for use in Decoverly I some time after Complainants had installed their deck.

Respondent stated that its AERC inspected Complainants' unit and determined that the white deck rail was an architectural violation. Respondent notified Complainants of the violation by letter on October 20, 2004. Complainants initially appealed the decision by letter sent to the AERC on October 25, 2004. Respondent's response letter stated that the letter appeal was reviewed at a Board meeting on November 9, 2004, and the appeal was rejected. Complainants subsequently appealed the decision in person at a Board meeting on March 3, 2005. The Board rejected Complainants' appeal, upheld the AERC determination, and notified Complainants of the decision by letter on March 10, 2005. Respondent sent Complainants a final notice of violation letter on October 25, 2006, requiring Complainants to add finials to the deck posts and paint the deck rail beige to match the house trim color. Complainants again appealed the violation at Respondent's February 27, 2006, Board meeting. Complainants were notified by letter from Respondent dated April 3, 2006, that the AERC determination had been upheld.

Complainants filed a complaint with the Commission on April 14, 2006. On August 3, 2006, the parties participated in mediation in an attempt to resolve the dispute. Complainants stated that the parties reached an oral agreement that Respondent would propose multiple options

for resolution to the Board. Respondent disputed this claim. However, the Board President stated that he met informally with three Board members and discussed the options generated during the mediation. He stated that it was agreed that painting Complainants' house trim white was the only viable option to resolve the dispute. The Board President stated that he then met with the other two Board members and presented the proposal of painting Complainants' trim white. The Board President stated this was an acceptable proposal because other Cross units have white trim. On August 30, 2006, Respondent sent Complainants a letter offering to settle the dispute if Complainants painted their unit's trim white by October 30, 2006. The settlement offer did not affect one-hundred fifty dollars (\$150.00) in attorney's fees that had already been assessed against Complainants. As of the date of this hearing, Complainants had installed finials on the deck but had made no other changes to their unit.

Conclusions of Law

Architectural Violation

The Panel agrees with Respondent that Complainants are in violation of Article VII of Respondent's Declaration of Covenants, Conditions and Restrictions regarding architectural control and use restrictions. Section 1 of Article VII states that any improvements will not be made "until the complete plans and specifications showing the location, nature, shape, height, *material, color* ... shall have been submitted to and approved in writing as to harmony of external design, *color* and location in relation to surrounding structures and topography and conformity with the design concept for the community by the Board of Directors of the Association or by an Architectural and Environmental Review Committee" (emphasis added). The Respondent's approval for Complainants' deck stated that it must use "pressure-treated wood" and "be painted to match [the] house trim." The Panel concludes that using white vinyl-wrapped wood did not meet these requirements and that white deck railing with beige house trim does not conform to the design concept.

Complainants stated multiple times that this was their first interaction with a homeowners association. However, Complainants understood they were required to submit a plan for a deck. Complainants apparently failed to make basic inquiries about deviating from the written instructions they received for the deck. The Panel also believes that Respondent offered a reasonable accommodation by allowing the option to paint the unit's trim white. While the Panel sympathizes with Complainants' concern about voiding a warranty if the deck rail is painted beige, the Panel must respect the Respondent's need to maintain architectural and environmental plans for the neighborhood. Therefore, the Panel concludes that Complainants are responsible for correcting the architectural violation associated with the deck rail.

Request for Attorney's Fees

At the conclusion of its presentation of evidence, Respondent requested that the Hearing Panel award it five-thousand six-hundred five dollars and six cents (\$5,605.06) as its reasonable attorney's fees associated with this matter. Section 10B-13(d) of the Montgomery County Code, allows the Commission to award attorney's fees "if an association document so requires and the award is reasonable under the circumstances." The Respondent's Declaration of Covenants,

Conditions and Restrictions states in Article VII, Section 14, in relevant part that Respondent “shall have the right. . . .either to take such action as is provided in Article XII, Section 4 of this Declaration and/or to enter upon the Lot and to take such steps as may be necessary to remove or otherwise terminate or abate such violation and the costs thereof and reasonable attorneys’ fees incurred thereby may be assessed against the Lot upon which such violation occurred.” Article XII allows the Respondent to file a legal action to compel compliance with the Declaration. Since the Respondent’s governing documents allow it to assess attorneys’ fees when it attempts to enforce its rules, and Respondent exercised its permitted discretion in requesting those fees, the Panel concludes that awarding reasonable attorneys’ fees in this case is justified under Section 10B-13.

However, the Panel believes that while Complainant failed to meet the association’s architectural requirements, Respondent must bear some responsibility for this long-standing dispute. First, Respondent provided minimal guidance in the deck approval. For homeowners’ clarity, Respondent should require that applications for architectural modifications include all applicable data. If any of the applicable data are missing, the application should be returned to the homeowner for completion. Further, Respondent should provide a detailed list of the requirements with the application and request, as appropriate, additional items like paint samples. Second, Respondent failed to follow its own procedures for addressing the matter. The Board of Directors’ President stated that he met informally with three board members following the mediation and then discussed only one of the possible methods of resolution with the remaining two board members. This is clearly not an appropriate approach. During his testimony, the Board President implied multiple times that there is an obligation on homeowners to read and follow the rules in the homeowner handbook. The Panel agrees and also believes there is an obligation for association boards to follow the rules for board meetings. The Panel also believes it is critical that homeowners and associations support alternative forms of dispute resolution like mediation. Thus, homeowners need to have confidence that association boards will abide by agreements that may prevent protracted conflicts that culminate in formal hearings. Finally, the Panel believes the attorney’s fees claimed are generally excessive for this type of case. Therefore, the Panel will award approximately half of the claimed attorney’s fees incurred as of the date of the hearing.

Order

Based on the evidence of record and the reasons stated above, it is ordered that within sixty (60) days of this decision, Complainants pay Respondent two-thousand eight-hundred dollars (\$2,800.00) in attorney’s fees and correct the architectural violation by one of the following methods that meets Respondents’ architectural requirements: 1) paint the white deck rail beige to match the beige trim on the exterior of the unit; 2) paint all beige trim on the exterior of the unit white to match the deck rail (if that offer is still acceptable to Respondent); or 3) replace the white vinyl-wrapped wood deck rail with a beige vinyl-wrapped wood deck rail. Complainants shall choose the corrective measure. If Complainants fail to meet the requirements of this order, Respondent may pursue any remedies available to it, including (to the extent permitted by Respondent’s governing documents) correcting the architectural violation in the least expensive manner that is agreed to by both parties and placing a lien on Complainants’ property subject to reimbursement for the associated costs and attorney’s fees.

Within thirty (30) days from the date of this decision, Respondent is ordered to distribute a copy of this decision to each unit within Decoverly I.

Commissioners Vicki Vergagni and Kevin Gannon concurred in this decision.

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, under the Maryland Rules of Procedure.

Douglas Shontz, Panel Chair
Commission on Common Ownership Communities