

COMMISSION ON COMMON OWNERSHIP COMMUNITIES
FOR MONTGOMERY COUNTY, MARYLAND

In the matter of:

POTOMAC MILL FARM HOA	:	
	:	
Complainants	:	COMMISSION ON
	:	COMMON OWNERSHIP COMMUNITIES
vs.	:	
	:	Case No. 03-633-G
PHAP VU AND KIM DUNG DINH	:	Panel Hearing Date: September 8, 2004
	:	Decision Issued: January 13, 2005
Respondent	:	

DECISION AND ORDER

The above entitled case having come before the Commission on Common Ownership Communities for Montgomery County, Maryland pursuant to Sections 10 B-5(i), 10 B-9(a), 10 B-10, 10 B-11(e), 10 B-12, and 10 B-13 of the Montgomery County Code, 1994, as Amended, and the Commission having considered the testimony and other evidence of record, finds, determines and orders as follows:

Background

Prior to the hearing, Respondents filed discovery requests and a motion to compel production of documents upon Potomac Mill. The Panel Chairman issued a ruling on the Respondents' Motion to Compel. Respondents indicated sufficient satisfaction with the Panel's ruling on their Motion to Compel to proceed to hearing.

The issues raised by the Complaint and evidence adduced at the hearing concern the Complainant, Potomac Mill Farm HOA Association (hereinafter Potomac Mill) effort to enforce Potomac Mill's Architectural Guidelines for Respondents' alleged failures to bring their residence into compliance with Potomac Mill's Declaration of Covenants and Restrictions as these pertain to changes and alterations to the exterior structure of their residence.

Article IX, Section One of the Complainant's Declaration of Covenants and Restrictions provides in pertinent part:

No building, fence, wall or other structure...shall be commenced, erected, or maintained upon the properties, nor shall any exterior addition to or change, alteration, or improvement thereof be made until the plans and specifications showing the nature, kind, shape, height, materials, and location of the same shall 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 Architectural Control Committee.

Further, under Section Three, the Covenants provide in pertinent part:

In the event the Architectural Control Committee fails to approve or disapprove any plans and specifications which may be submitted to it pursuant to the provisions of this Article within 60 days after such plans and specifications (and all other materials and information required by the Architectural Control Committee) have been submitted to it in writing, then approval will be deemed to have been given, except in the case of any action which would alter the structural integrity of any building.

Potomac Mill asserts the Respondents failed to inform the Architectural Committee of the installation of certain siding to the front façade of their home and that the installation never received formal approval by the Architectural Committee (A.C.). Complainant argues in the alternative, that although the Respondents submitted plans for construction of siding for a "library room" on or about January 12, 2000, which was approved, the installation of siding to other portion(s) of their residence was installed even after oral notice of its "unapproved" status. Complainant requests the Commission to order the removal of all unapproved replacement siding with original vinyl/aluminum siding material. In addition, the Complainant asserts that a "crown/top" mailbox failed to comply with neighborhood harmony of external design and requests its height to be "lowered".

The Respondents assert that the type of siding approved by the AC for the "library" section located in the front portion of the residence is known as "Hardie" siding. The AC erroneously referred to the unapproved "new" siding as "stucco". Respondents assert they

notified the AC it was proceeding with the "alternative design" that was submitted with the original application. Also, they informed the AC that because of difficulties of finding qualified contractors to complete the work, the project had been interrupted for almost a year. Respondents' position is that essentially the objectionable "unapproved" siding is an extension/continuation of the approved Hardie siding previously installed for the library section of the exterior of the residence.

Respondents assert that between April and June of 2001 they orally notified the Architectural Committee of the need to make additional changes of "brick" in materials and design including the mailbox, entrance door and sidings. The work on the mailbox was begun in June of 2001 following oral approvals from the Architectural Committee. Respondents received a letter on July 20, 2001 advising that no written drawings of the mailbox had been submitted and approved by the Architectural Committee and to remove the constructed structure.

Complainant contends that on or about September 28, 2002, the Respondents were advised by a member of the Architectural Committee that the "stucco" that they were installing on their home had not been approved by the Committee and was "inconsistent" with "approved" plans. On October 2, 2002, Potomac Mill sent a notice to the Respondents that "the work that you are currently performing on your house does not meet with the architectural design of the community and, therefore, it is not an item that would be approved by the Board". Potomac Mill's agent notified Respondents to "cease and desist" inasmuch as their continued construction was "in violation of the Covenants". Respondents met with the Agent and on October 16, 2002 advised in writing that the material mentioned in the letter was not "stucco" but known as "Hardie" siding; that as the construction progressed, all modifications were clearly and continuously communicated to the AC; that because of difficulties in finding qualified

contractors to complete the extension work, the overall completion was delayed but noted that although the progress towards completion had been interrupted, the materials utilized were those previously approved by the AC. In addition, Respondents assert they informed the AC that a Mr. Bill Hermann, a member of the AC, had given them oral approval for the construction extension and that they relied upon that oral representation.

(At or about the same time, Complainant also had notified the Respondents that their front door and garage door needed to be replaced with doors that were consistent with the "original doors" and that the existence of the replacement doors was in violation of the "Covenants". The Complainant withdrew this complaint prior to the hearing before the CCOC Panel.)

Thereafter, on or about November 8, 2002, Respondents notified the AC that their "alternative" design would be completed soon and reminded the AC that both designs were included in their original proposal submitted on January 12, 2000. On December 6, 2002, the agent for Potomac Mill notified Respondents that "construction on some type of addition to your house" has been started without approval. On December 8, 2002 Respondents replied to that notice in writing that the AC had been given copies with the information on or about January 12, 2000 with the original request for approval.

Evidentiary Proceedings

Pre-hearing, Respondents filed document requests and thereafter filed motions to compel production of documents to include *inter alia*, minutes and related documents of all quarterly meetings of Potomac Mill; minutes and related documents of all application review meetings by the AC; written violations from the AC for non-conformance with Covenants; applications of all exterior changes including but not limited to replacements, designs, alternative materials, and

changes from original structure; architectural applications submitted to the AC; written warning and notices from Potomac Mill for failure to comply with Covenants in conformity with the community standards. On May 27, 2004, the Complainant was directed to provide for copying and inspection copies of any and all minutes of any annual meetings of the HOA or any quarterly or special meetings of the Board of Directors; any and all documents of the Architectural Committee maintained by the Committee or any member thereof pertaining to any and all applications, any and all notices of violations, any and all notes or documents related to any decision rendered by the Committee; and the list of all written warnings, notices and/or correspondence or documentations maintained by the Complainant pertaining to grounds inspections, upkeep of the premises and violations of rules and regulations pertaining thereto.

During the course of the hearing, Respondents challenged whether certain alterations, modifications and additions to members of the Board of Directors' residences had been appropriately applied for and approved inasmuch as no documentation was discovered supporting either an application or an approval. Complainant maintained that any such modifications were properly applied for and approved but had no explanation as to why documents did not exist supporting this conclusion.

Respondents put into evidence Respondents Exhibit F1 consisting of several photographs of residences of Potomac Mill HOA purporting to demonstrate incidences where "verbal approval" was received from the AC without the necessity of complying with the written application process (See Exhibits F1 through F16) and that this practice had been extended to members of the community prior to 2003. Respondents argued also that the Complainants' AC apparently utilized different standards of approval in regard to "alterations" Respondents' constructed as compared to other alterations deemed acceptable in the community. Respondents

presented evidence of uncontested testimonials from neighbors directly adjacent and across from them who positively supported the appearance changes and alterations made to the exterior façade of Respondents' residence. (Exhibit G 1 through G 24)

Complainant's photographic evidence (Exhibit 1) reflects the alternate design/improvement as completed over the garage. The materials utilized, "Hardie Siding," were the identical materials utilized for the "library room" improvement.

Discussion and Findings

Although the Potomac Mill's Covenants and Restrictions provide for prior written approval for changes to the structure or exterior alteration/addition to the originally constructed homes of the HOA, the Panel has concluded that the enforcement and practices of the AC was inconsistent and haphazard. The Panel further concludes that an appropriate written application was requested for a change to the external appearance and façade of Respondents' home and approval for the use of materials specified was confirmed by the AC (specifically "Hardie Siding"). These same materials were utilized to complete the "alternative" design as set forth in Respondents' original application and request of January 12, 2000. Further, the Panel finds as a fact that neither the mailbox as constructed nor the alternative design as completed to the Respondents' facade vary the harmony of the overall appearance in comparison to other residences of the community and that the external design is consistent with the external design and location of the surrounding structures and topography of the community.

As a consequence, the Panel finds that the AC's efforts to invalidate the improvements to the Respondents' residence as constructed and completed were waived and any such efforts to enforce remedial action such as destruction, tear down, or replacement constitutes an arbitrary and capricious exercise of authority. Eaton v. Rosewood Center, 86 Md. App. 366, 375, 586

A.2d 804 (1991) (citing Montgomery County v. Anastasi, 77 Md.App. 126, 549 A.2d 753 (1988)) (agency's unexplained deviation from prior precedents may constitute an arbitrary and capricious act).

ORDER/DECISION

In view of the foregoing and based upon the record, and for reasons set forth above, it is this 13th ^{January 2005} day of ~~December, 2004~~, by the Commission on Common Ownership Communities

ORDRED, that:

1. The Complainant's request that the Respondent's exterior siding be removed and replaced with original vinyl/aluminum siding is denied.
2. The mailbox as constructed does not offend the overall harmony and design of the neighborhood as constructed and Complainant's request that it be "lowered" in height is hereby denied.
3. Each party shall bear its own costs.
4. Panel Members Arlene Perkins and Lawrence Stein concurred in the foregoing decision. Any party aggrieved by the action of the Commission may file an appeal to the Circuit Court of Montgomery County, Maryland within thirty (30) days after the date of the entry of this order and in accordance with the Maryland Rules of Procedure.

By William John Hickey ^{WJH}
William John Hickey
Panel Chairperson, Commission on
Common Ownership Communities
This decision is affirmed by Panel
Members Arlene Perkins and
Laurence Stein