BEFORE THE
COMMISSION ON COMMON OWNERSHIP COMMUNITIES
FOR MONTGOMERY COUNTY, MARYLAND

HIGHLAND MANOR HOMEOWNERS ASSOCIATION	)	
Complainant	)	
v.	)	Case No. 87-10
	)	October 20, 2011
SUZANNE McCLURE	)	
Respondent	)	

DECISION AND ORDER

The above-captioned case came before the Commission on Common Ownership Communities for Montgomery County, Maryland for hearing on August 24, 2011, pursuant to Chapter 10B of the Montgomery County Code. Based on the parties' submissions and argument and the record herein, the Hearing Panel finds, concludes and orders as follows.

I. BACKGROUND

Complainant Highland Manor Homeowners Association (HOA) asks the Commission to order Respondent Suzanne McClure (Ms. McClure) to cease operating a business known as Helping Hands Mailing Service at her home. The business consists of printing mailing labels, folding and stuffing envelope inserts, and sealing envelopes. The HOA claims that the business violates provisions of the HOA's Declaration of Covenants, Conditions and Restrictions (Declaration) to which Ms. McClure's home is subject.

Ms. McClure responds that the business qualifies as a "profession" as defined in the Declaration and is therefore permitted. She further contends that the original developer of the community gave her permission to operate her business and approved certain modifications to her house to accommodate the business. Finally, she contends that the business is a "no-impact" business permitted by State and County law. She says she would not have bought the house if she could not operate her business there.

The Commission has jurisdiction over the dispute pursuant to Mont. Cnty. Code § 10B-8(4)(A)(i).

The Panel is informed that the parties participated in mediation, but were not successful in resolving the matter there.

Both parties were represented by counsel at the hearing.

Commission Exhibit 1 (CX1) and Commission Exhibit 2 (CX2) were admitted in evidence at the hearing without objection. Those exhibits are the Commission's administrative file in this matter, including the HOA's governing documents.

The HOA called witnesses Michael Halpert (the current President of the HOA), Roy E. Stanley (the original developer), and Ms. McClure. The HOA also offered in evidence four photographs taken in March and April 2010 (Cmplt. Ex. 1 through 4), which were admitted without objection.

Ms. McClure testified in her case-in-chief. She did not call any other witnesses. She offered in evidence Section 11B-111.1 of the Maryland Code Real Property Article (Rspt. Ex. 1), photographs of certain equipment used in her business (Rspt. Ex. 2), and photographs of the exterior of her home (Rspt. Ex. 3). Those exhibits were admitted without objection.

Both parties requested an award of attorneys' fees. At the conclusion of the hearing, the Panel pointed out that it had no evidence before it on which to base an attorneys' fee award should the Panel decide such an award to be appropriate. The parties then stipulated that each party had incurred fees of $2,000 in connection with the prosecution and defense, respectively, of this case.

The record was closed at the conclusion of the hearing. Thereafter, the Panel requested the parties' attorneys to submit supplemental briefs on the following two questions:

1. Is Respondent's business a "no-impact home-based business" within the meaning of Md. Code, Real Prop. § 11B-111.1?

2. If so, does Complainant's Declaration of Covenants, Conditions and Restrictions contain "a provision expressly prohibiting the use of a residence as a . . . no-impact home-based business" within the meaning of § 11B-111.1?

Both counsel submitted supplemental briefs as directed and the record was re-opened to receive those briefs.

II. FINDINGS OF FACT

Based on the testimony and exhibits admitted in evidence at the hearing, the Panel finds the following facts:

1. The HOA is a homeowners association as defined in Md. Code, Real Prop. § 11B-101 and it is a common ownership community as defined in Mont. Cnty. Code § 10B-2(b).

2. The HOA consists of 10 detached homes and a vacant lot on Highland Manor Court in Gaithersburg, Maryland.

3. Ms. McClure's home is part of the HOA and is subject to the HOA's governing documents.

4. In late 2003 Mr. Stanley (or a company owned by him), developed the HOA by, among other things, subdividing the land that is now owned by the HOA and recording the Declaration among the Montgomery County land records. CX1 at 44.

5. The Declaration contains the following relevant provisions:

> 8.1 Restrictions on Structures. Following the conveyance of any Lot by the Declarant, no structure shall be commenced, erected or maintained upon such Lot, nor shall any exterior addition to or change or alteration therein be made until the Owner has obtained written approval of the detailed site location plan, construction plans, specifications and applicable landscaping plans as to harmony of external design and location in relation to surrounding structures and topography from the Architectural Committee . . ..
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> 8.2 Structures Restricted to Single-Family Residences. The Lots, and any Structures now or hereafter erected on such Lots, shall be occupied and used for single family residential purposes . . ..
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> * * *
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> 8.5 Permitted and Restricted Uses. The Lots shall be used for residential purposes exclusively, and no building shall be erected, altered, placed or permitted to remain on any such Lot other than one used as a dwelling. Notwithstanding the aforegoing, Owners may use their residences for professional offices, provided that (i) such use is limited to the person actually residing in the dwelling; (ii) no employees or staff other than a person actually residing in the dwelling are utilized; (iii) such use is in strict conformity with the provisions of any applicable zoning law, ordinance or regulation and (iv) the person utilizing such professional office maintains a principal place of business other than the dwelling. As

> used in this section, the term 'professional office' shall mean rooms used for office purposes by a member of any recognized profession, including doctors, dentists, lawyers, architects and the like . . ..
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> * * *
>
> 11.1 Enforcement. Declarant, the Association, or any Owner shall have the right to enforce, by any proceeding at law or in equity, including injunction, all restrictions, conditions, covenants, reservations, liens and charges now or hereafter imposed by the provisions of this Declaration. Failure by the Association or by any Owner to enforce any covenant or restriction herein contained shall in no event be deemed a waiver of the right to do so thereafter. The Owner of any Lot who violates or permits the violation of any covenants herein contained agrees to reimburse the Association, the Declarant and/or any Owners for all costs and expenses which may result from said violations, including but not limited to, court costs and reasonable attorneys' fees. . . .

CX1 at 58-59, 65.

6. After subdividing the land, Mr. Stanley sold lots to individual purchasers. The individual purchasers in turn contracted with builders to build homes on their lots.

7. While in control of the HOA, Mr. Stanley held power to approve or disapprove plans for construction of homes within the HOA. In exercising that power, Mr. Stanley was mainly concerned with the external appearance of the homes and whether they were compatible with other homes within the HOA.

8. In 2004, Ms. McClure purchased a lot within the HOA and engaged a builder named Dean T. Slaughter / Dean T. Builders, Inc. to build a home for her.

9. During the process of designing her home, Ms. McClure told Mr. Slaughter that she wanted to operate her mailing business from her home. In order to accommodate the business, Mr. Slaughter made certain modifications to the *interior* of the space which would normally have been the garage of the home. He made no accommodating modifications to the *exterior* of the home.

10. On or about September 16, 2004, Mr. Slaughter sent Ms. McClure a fax which reads in pertinent part as follows:

> I have shown the proposed house plans with modifications for your mailing business to Roy Stanley. He is the President of the Homeowner's Association at the present time. He has approved the plans and indicated that you can run your home based mailing business out of the house. You

> will not be in violation of the rules outlined in the Highland Manor Covenants, Conditions, and Restrictions, Article VIII Section 8.5. He said the only item you need to follow up on would be (iii) about the applicable zoning laws for Montgomery County.

CX1 at 22. [1]

11. Ms. McClure believed she could operate her business at her home and she would not have proceeded with building her home had she not believed that she could do so.

12. Although Mr. Stanley did not deny that he had approved the plans for Ms. McClure's home and approved her operating a business at her home, he did not recall doing so.

13. Governance of the HOA was later turned over to the homeowners themselves.

14. Ms. McClure has been operating her business from her home since about 2005.

15. Ms. McClure also rents warehouse space in Rockville which she uses for storage and other purposes related to her business.

16. Ms. McClure's business time is spent, on average, 50% to 60% at her home and the remainder at the warehouse.

17. According to photographs admitted in evidence (Rspt. Ex. 2), some of the equipment used in Ms. McClure's business appears to be larger and heavier than, for example, a stand-alone copying machine found in a typical office.

18. Prior to 2010, the HOA had received no complaints from other owners about Ms. McClure's business and the HOA had not focused on the possibility that her business might be in violation of the Declaration.

19. In 2010, Ms. McClure won a large contract from the Bureau of the Census. In fulfillment of that contract, for a two-month period Ms. McClure brought workers into her home who did not reside there, she placed large amounts of recyclable trash in front of her home, and a number of cars were parked on the street in front of her home.

20. Following completion of the Census contract, Ms. McClure's business operations at her home returned to the level they were at before the Census contract.

[1] Neither party called Mr. Slaughter as a witness or explained his absence.

21. One neighbor has since complained to the HOA about bright lighting within Ms. McClure's home shining through the windows where her business operations are conducted.

22. Other than bright lighting, the exterior of Ms. McClure's home conforms with other homes in the HOA.

III. CONCLUSIONS OF LAW

A. Business as "Profession"

The HOA's Declaration allows use of residences for "professional offices," subject to certain conditions. Ms. McClure contends that her mailing service business is a "profession" within the meaning of the Declaration and is therefore permitted.

The Declaration defines "professional office" as "rooms used for office purposes by a member of any recognized profession, including doctors, dentists, lawyers, architects and the like." The examples listed in the Declaration are each subject to licensing and regulation by the State of Maryland. Md. Code, Health Occup., Title 14 (physicians); Md. Code, Health Occup., Title 4 (dentists); Md. Code, Bus. Occup. & Prof., Title 10 (lawyers); Md. Code, Bus. Occup. & Prof., Title 3 (architects).

More generally, "profession" is defined as

> one of a limited number of occupations or vocations involving special learning and carrying a certain social prestige, esp. the learned professions: law, medicine and the Church.

New Lexicon Webster's Dictionary (1989 ed.) at 798. Black's Law Dictionary (4th ed.) at 1375 defines the term as a

> vocation, calling, occupation or employment involving labor, skill, education, special knowledge and compensation or profit, but the labor and skill involved is predominantly mental or intellectual, rather than physical or manual.

See Poffenberger v. Risser, 421 A.2d 90, 96 (Md. App. 1980), citing Black's definition with approval.

The Panel concludes that Ms. McClure's business does not qualify as a "professional office" as that term is used in the Declaration. *First,* the business is not conducted in an office, but rather in garage space. *Second*, unlike the examples in the Declaration, Ms. McClure's business is not licensed or regulated by the State. *Third*,

there was no evidence that persons engaged in the business require special learning. *Finally*, activities of printing mailing labels, folding and stuffing envelope inserts, and sealing envelopes are predominantly physical or manual, rather than mental or intellectual.

B. Permission to Operate Business

Ms. McClure contends that even if operation of the business does violate the Declaration, she obtained permission for the business from Mr. Stanley, the then President of the HOA. She relies on a fax (CX1 at 22), purportedly from her builder, Mr. Slaughter, which purports to recite a conversation between Mr. Slaughter and Mr. Stanley. The fax may be admissible to prove Ms. McClure's *belief* that she had permission. The fax was not offered for that purpose, however, but instead was offered to prove that Mr. Stanley actually gave Ms. McClure permission to operate the business.

The Panel recognizes that strict rules of evidence do not apply in administrative hearings before the Commission. Section 8(e) of the County's Administrative Procedures Act, Mont. Cnty. Code § 2A-8(e), provides as follows:

> *Evidence*. The hearing authority may admit and give appropriate weight to evidence which possesses probative value commonly accepted by reasonable and prudent persons in the conduct of their affairs, including hearsay evidence which appears to be reliable in nature. It shall give effect to the rules of privilege recognized by law. It may exclude incompetent, unreliable, irrelevant or unduly repetitious evidence, or produce evidence at its own request.

On the critical question whether Mr. Stanley granted permission, the Panel concludes that the fax is unreliable double hearsay. The fax does not state to what extent Mr. Slaughter disclosed to Mr. Stanley the scope of Ms. McClure's business – presuming that Mr. Slaughter even knew the scope of the business. As the HOA's counsel argued at the hearing, Mr. Slaughter had an incentive to color his disclosure to Mr. Stanley in order to get the plans approved and build Ms. McClure's house. Furthermore, in the process of approving building plans, Mr. Stanley was mainly concerned with external appearances; in this case, accommodation of Ms. McClure's business did not require any changes to the exterior of the house.

For these reasons, the fax will not be considered by the Panel. In the absence of any other evidence that Ms. McClure had permission to operate her business, Ms. McClure failed to prove that in fact she had permission.

Although not expressly argued by Ms. McClure, the Panel also considered whether the fax might equitably estop the HOA from enforcing the Declaration against Ms. McClure. Equitable estoppel is defined as the effect of the voluntary conduct of one

party which precludes that party from asserting rights against another party, where the other party has relied in good faith upon such conduct and has been led thereby to change its position to its detriment. *Baiza v. City of College Park*, 994 A.2d 495, 503 n.4 (Md. App. 2010). [2]

Clearly, Ms. McClure relied on the fax in good faith when she proceeded with the design and purchase of her home. It is equally clear that such reliance would be detrimental if she can no longer conduct her home business. However, there is no admissible evidence that the conduct in question – sending the fax which purports to grant permission – is attributable to Mr. Stanley or the HOA. For that reason, the Panel concludes that the estoppel doctrine is not a bar to the HOA's enforcement right.

C. "No Impact" Status of Business

Ms. McClure contends that her business is a "no-impact home-based business" permitted under State law. [3]

Md. Code, Real Prop. § 11B-111.1(a) (4) defines a "no-impact home-based business" as a business that

> (i) Is consistent with the residential character of the dwelling unit;
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> (ii) Is subordinate to the use of the dwelling unit for residential purposes and requires no external modifications that detract from the residential appearance of the dwelling unit;
>
> (iii) Uses no equipment or process that creates noise, vibration, glare, fumes, odors, or electrical or electronic interference detectable by neighbors or that causes an increase of common expenses that can be solely and directly attributable to a no-impact home-based business; and
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> (iv) Does not involve use, storage, or disposal of any grouping or classification of materials that the United States Secretary of Transportation or the State or any local governing body designates as a hazardous material.

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[2] The HOA's failure to enforce the Declaration against Ms. McClure for a number of years does not itself give rise to an estoppel, because there was no evidence Ms. McClure changed her position to her detriment in reliance on lack of enforcement.

[3] Ms. McClure also cites the County's zoning law, which permits no-impact businesses as a matter of right in residential zones. However, unlike the State's Real Property article, nothing in the County's zoning law purports to trump homeowner association documents. Thus the Declaration can prohibit what might otherwise be permitted for local zoning purposes.

Md. Code, Real Prop. § 11B-111.1(c) provides that, subject to certain exceptions,

> a recorded covenant or restriction, a provision in a declaration, or a provision of the bylaws or rules of a homeowners association that prohibits or restricts commercial or business activity in general, but does not expressly apply to ... no-impact home-based businesses, may not be construed to prohibit or restrict ... [t]he establishment and operation of ... no-impact home-based businesses.

The statute also prohibits enforcement of an explicit provision against a no-impact home-based business unless the prohibition "is approved by a simple majority of the total eligible voters of the homeowners association, not including the developer." § 11B-111.1(d)(2).

In its supplemental brief, the HOA contends that the business is not a no-impact business because it fails to satisfy two of the four statutory requirements: that it is not "consistent with the residential character of the dwelling unit," and that is uses "equipment or process that creates ... glare ... detectable by neighbors."

As to the first requirement, the HOA cites the several-month period in 2010 when Ms. McClure was working on a Census Bureau contract, during which she used outside workers, cars were parked in the neighborhood, and excessive trash was generated. As to the second requirement, the HOA cites neighbor complaints about bright light emitted through the garage windows.

The HOA also contends that the HOA Declaration does expressly prohibit no-impact businesses in that it requires that lots be used "for residential purposes exclusively."

In contrast, Ms. McClure contends that her business satisfies all four elements in the statutory definition of a no-impact business. Although she does not discuss the impact of the Census Bureau contract, evidence at the hearing indicated that the contract lasted only several months. Ms. McClure does not discuss the glare issue.

Ms. McClure also contends that (assuming the business satisfies the no-impact definition) the Declaration does not explicitly prohibit such a business and, even if it did, the prohibition was imposed by the developer, not "by a simple majority of the total eligible voters of the homeowners association, not including the developer," as required by the statute.

The Panel agrees with Ms. McClure on the second issue – that the Declaration does not explicitly prohibit no-impact businesses and, assuming it did, it was not the result of a vote by a majority of the homeowners. See Op. Atty. Gen. No. 91-021, 1991

WL 626518 (May 29, 1991), dealing with the voting requirement as applied to family day care homes under an earlier version of § 11B-111.1. However, the Panel agrees with the HOA on the first, threshold issue – that the business does not fall within the definition of a no-impact business in the first place. If the business is not a no-impact business, then it does not matter whether the Declaration explicitly prohibits no-impact businesses and whether any such explicit prohibition was properly adopted.

In the Panel's view, the very nature of the business makes it possible, if not likely, that from time to time outside workers may be needed, additional cars may be parked in the neighborhood, delivery trucks will come and go, and excessive trash will be generated. The fact that the business may not be causing a negative impact on the neighborhood at a particular time does not mean that the business is "consistent with the residential character of the dwelling unit." Furthermore, even as it operates today, the business creates glare beyond the confines of Ms. McClure's home, which itself has given rise to complaint.

D. Filing Fee

The HOA requests that it be awarded its $50 filing fee. Mont. Cnty. Code § 10B-13(d) authorizes the Panel "to require the losing party in a dispute to pay all or part of the filing fee." As the prevailing party, the HOA is entitled to such an award.

E. Attorneys' Fees

Each party requested an award of attorneys' fees, stipulated at $2,000.

Mont. Cnty. Code § 10B-13(d) authorizes the Panel to award attorneys' fees, among other reasons, "if an association document so requires and the award is reasonable under the circumstances. The Declaration (an HOA document) contains the following provision regarding attorneys' fees:

> The Owner of any Lot who violates or permits the violation of any covenants herein contained agrees to reimburse the Association, the Declarant and/or any Owners bringing legal proceedings to enforce special covenants for all costs and expenses which may result from said violations, including but not limited to, court costs and reasonable attorneys' fees.

CX1 at 65. There is no comparable provision for awarding attorneys' fees to an owner-respondent. [4]

[4] The County Code also authorizes a fee award for bad faith or frivolous litigation, for unreasonable refusal to mediate, or for delaying or hindering the dispute resolution

The Panel will award the HOA $2,000 in attorneys' fees in accordance with the parties' stipulation. The Panel concludes that the amount is reasonable under the circumstances and consistent with prior Commission awards.

IV. ORDER

Accordingly, it is, this 20th day of October, 2011, ORDERED as follows:

1. Within 60 days after the date of this Order, Ms. McClure must cease operating her mailing business at her home on Highland Manor Court in Gaithersburg, Maryland.

2. Within 60 days after the date of this Order, Ms. McClure must pay the HOA $2050.00, representing the HOA's $50.00 filing fee and the HOA's $2,000.00 attorneys' fees.

Panel members Ralph Caudle and Bruce Fonoroff concur in this Decision and Order.

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

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Charles H. Fleischer, Panel Chair

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process without good cause. There is no basis of record for a fee award on these grounds.