IN THE COMMISSION ON COMMON OWNERSHIP COMMUNITIES
MONTGOMERY COUNTY, MARYLAND

RAYMOND E. RAMSAY Complainant vs. BOARD OF TRUSTEES OF BEL PRE RECREATION ASSOCIATION, INC. Respondent	:	Case No. 369-0 May 18, 1998

DECISION AND ORDER

The above case came before the Commission on Common Ownership Communities for Montgomery County, Maryland for hearing on January 28, 1998 pursuant to Sections 10B-5(i), 10B-9(a), 10B-11(f), 10B-12 and 10B-13 of the Montgomery County Code 1994, as amended, on a Complaint filed by Raymond E. Ramsay dated July 31, 1997. A pre-hearing conference was conducted on Tuesday, January 6, 1998 at which the parties agreed that the following issues would be presented at the hearing:

1. Does the Board of Trustees/Directors of Bel Pre Recreation Association, Inc. have a duty to initiate amendments to the Declaration of Covenants, Restrictions, Easements, Charges and Liens recorded at Liber 3721, folio 339? If so has it breached this duty?

2. Does the Board of Trustees/Directors of Bel Pre Recreation Association, Inc. have a duty to enforce the above Declaration and the Declaration recorded at Liber 3918 Folio 266, and supplements to the foregoing, against individual residential lots? If so has it breached this duty?

3. Does Bel Pre Recreation Association, Inc. have the authority to collect admittance fees for the use of its facilities by non-resident guests of members?

4. Does Bel Pre Recreation Association, Inc. have the authority to establish, fund and accumulate reserve accounts for any purposes under its governing documents?

5. Has the Bel Pre Recreation Association, Inc. failed to comply with the quorum requirements of its governing documents, the Declaration of Covenants and/or By-laws, in particular at its annual meeting of November 1997?

6. Has Bel Pre Recreation Association, Inc. breached its duty to collect assessments from its delinquent homeowners, in particular with respect to the time frame in which it pursues delinquencies and the interest charged on delinquencies?

7. Has Bel Pre Recreation Association, Inc. acted outside the scope of its official duties and with gross negligence in failing to purchase adequate directors and officers liability insurance? Does it have the authority to contract for legal services which would be covered by directors and officers liability insurance? Does it have the authority to contract for legal services which would not be covered by directors and officers liability insurance?

A Pre-hearing Order was entered and was designated Commission Exhibit No. 2 and admitted into evidence.

At the hearing on January 28, 1998 the Complainant Raymond E. Ramsay appeared pro se. The Respondent Board of Trustees of Bel

Pre Recreational Association, Inc. appeared through counsel Steven A. Silverman, and with him was the president of the Association Steven Jennison.

Based upon the testimony and evidence of record, the panel makes the following findings of fact:

FINDING OF FACT

1. Bel Pre Recreational Association, Inc. (originally incorporated as Bel Pre Community Association, Inc.) (the Association) is a Maryland non-stock membership corporation whose members are the record owners of certain properties located in Montgomery County, Maryland as more fully identified in its documents.

2. The Association is governed by Articles of Incorporation, a Declaration of Covenants, Restrictions, Easements, Charges and Liens recorded March 20, 1968 at Liber 3721, folio 339 among the Land Records of Montgomery County, Maryland, and a series of Supplemental Declarations containing restrictive covenants and other provisions also recorded among the Land Records of Montgomery County, Maryland. The Declaration in the record, recorded at Liber 3918, folio 266 on November 12, 1969 is representative of each of the Supplemental Declarations, whose provisions are identical or substantially identical to those of this Declaration.

3. The record contains two versions of By-laws for the Association, one dated 1975 and a second undated, but with a stamp "received February 22, 1995 Office of Landlord-Tenant Affairs".

For purposes of the issues contained herein, the provisions relevant, in particular Article VIII, are identical or substantially identical.

4. Article VI, Section 1 of the Declaration of Covenants at Liber 3721, folio 339 contains the following provision regarding the duration of the Declaration of Covenants:

> Section 1. Duration. The covenants and restrictions of this Declaration shall run with and bind the land, and shall inure to the benefit of and be enforceable by the Association, or the Owner of any land subject to this Declaration, their respective legal representatives, heirs, successors, and assigns, until December 31, 1999, unless otherwise expressly limited herein, after which time said covenants shall be automatically extended for successive periods of ten (10) years each unless an instrument signed by the then-Owners of three-fourths of the Lots has been recorded, agreeing to change said covenants and restrictions in whole or in part. Provided, however, that no such agreement to change shall be effective unless made and recorded two (2) years in advance of the effective date of such change, and unless written notice of the proposed agreement is sent to every Owner at least ninety (90) days in advance of any action taken.

5. The Complainant has requested the Board of Trustees of the Association to initiate amendments to this Declaration pursuant to Article VI, Section 1. The Association has considered the Complainant's request, determined that amendments are not necessary or appropriate, and therefore has declined to initiate the amendment process.

6. The Association has not impeded in any way the efforts of anyone else, including the Complainant, to initiate his/her or their own amendment effort.

7. The Board of Trustees of the Association has decided not to enforce the restrictive covenants contained at Liber 3918, folio 266 by initiating legal proceedings. Some efforts are made

to enforce those covenants by proposing mediation or informal persuasion, but that is the extent of any such efforts. The Association, through its Board of Trustees focuses on the operation and maintenance of the recreational facilities and collects mandatory assessments accordingly. Though the authority to enforce covenants on residential lots exists it is not done. This practice goes back to the early days of the development set by the developer when Association management was less sophisticated. The apparent result primarily is non-conforming sheds and fences. Another result is a low annual assessment and satisfaction among most homeowners.

8. The reasons given for not enforcing the restrictive covenants at Liber 3918, folio 266 and in the other supplemental declaration are the expense in doing so, the long standing practice of the Association, according to the testimony, not to expend funds or efforts to enforce the restrictive covenants, and the absence of an affirmative vote of a majority of the Board of Trustees to engage in enforcement activities, over the same time period or longer.

9. The Declaration of Covenants recorded at Liber 3721, folio 339 provides for an annual maintenance assessment which is currently One Hundred Eighty Dollars ($180.00) per year. A statement for the assessment is sent to the unit owners on February 1 of each year. Follow up statements are sent thereafter. If payment is not made by May of each year, pool passes are withheld. By June 1, those who have not paid their assessments are

turned over to the Association's attorney for formal collection action.

10. The Association charges a Twenty Five Dollar ($25.00) late fee on delinquent accounts. It does not assess interest on late accounts as provided by Article II, Section 9 of the Declaration of Covenants at the rate of six percent (6%) per annum.

11. Article V, Section 3 of the Declaration of Covenants at Liber 3721, folio 339 provides that:

> "The Board of Trustees of the Association may, after consideration of current maintenance costs and future needs of the Association, fix the actual assessment for any year at a lessor amount [than the maximum annual assessment] provided that it shall be an affirmative obligation of the Association, and its Trustees, to fix such assessment at an amount sufficient to maintain and operate the common areas and facilities in accordance with the standards set forth in Section 2(b) of Article IV."

12. Article IV, Section 2(b) referred to above provides:

> "In order to preserve and enhance the property values and amenities of the Community, the Common Areas and all facilities now or hereafter built or installed therein shall at all times be maintained in good repair and condition and shall be operated in accordance with high standards. Further, it shall be an express affirmative obligation of the Association to keep the swimming pool, and facilities appurtenant thereto, open, adequately staffed and operating during those months and during such hours as outdoor swimming pools are normally in operation in this locality."

13. Based primarily upon the above provisions, the Association has established a reserve account from the money collected as annual assessments.

14. Both versions of the By-laws in the record provide at Article VIII, Section 5 that:

> "Section 5. The presence at a meeting of members entitled to cast one-tenth (1/10) of the eligible votes shall constitute a quorum for any action governed by these By-laws. In the event a quorum fails at any meeting, the meeting shall be reconvened within thirty (30) days and a quorum shall consist of one-twentieth (1/20) of the eligible votes."

15. Article VIII, Section 3 of the By-laws provides for written notice of any meeting of the membership.

16. The Association has applied those sections as follows: Written notice is given of a meeting; if a quorum is not present then the meeting is adjourned and immediately thereafter on the same day, usually 15 minutes thereafter, the meeting is reconvened with a quorum of one-twentieth (1/20) of the eligible votes without further written notice.

17. The Association followed the above procedure to establish a quorum at its annual meeting of November 1997, for which the quorum is questioned by the Complainant. It has also followed this procedure to establish a quorum at other annual meetings.

18. The Association collects admittance fees for non-member guests in connection with the use and enjoyment of the recreational facilities located upon the common areas of the Association, specifically for the pool and pavilion.

19. The Association's documents have no specific reference to the authority to collect or not to collect admittance fees from guests of members for use of the common areas. Paragraph THIRD, A., (3) of the Articles of Incorporation of the Association states that one of the purposes of the Association is to "fix and levy

assessments or charges for the management operation, improvements and maintenance of the aforesaid Common Areas."

20. Article XII, Section 2(e) in both sets of By-laws in the record provides that it shall be one of the duties of the Board of Trustees:

> "(e) to secure and maintain at all times such public liability, property damage, and other forms of insurance as it may deem necessary."

As of the date of the public hearing on January 28, 1998, the Association had in force a Directors and Officers Liability Insurance Policy. The policy contained a designation that the nature of the entity is a "condominium". The Association represented at the hearing that this error will be corrected, since the Association is a homeowners association and not a condominium.

21. When this Complaint was filed on July 31, 1997 the Association made a claim under its then existing Directors and Officers Liability Policy for defense of this matter. That claim was denied on the basis that an action against the Association which does not seek damages as a remedy is not covered by the policy.

22. A copy of the current Directors and Officers Policy was admitted into evidence. There was no testimony to indicate that this was other than a standard, currently commercially available policy of the type commonly issued to homeowners associations in this area at this time.

CONCLUSIONS OF LAW

Based upon the above findings of fact, the panel makes the following conclusions of law as to each of the issues before it:

1. The Board of Trustees of the Association does not have an affirmative duty to initiate amendments to the Declaration of Covenants, Restrictions, Easements, Charges and Liens recorded at Liber 3721, folio 339. Testimony established that the Board of Trustees has fulfilled any duty or obligation which it has by considering the proposal to initiate such amendments and determining that amendments, at least initiated by it, are not necessary or appropriate. The Board of Trustees has not impeded in any way the efforts of anyone else to initiate such amendments. The panel is concerned that the Association has not made any significant effort to bring to the attention of its members proposals to amend the documents or discussions of possible amendments to the documents which might improve the operation of the community. The panel suggests that the Association seriously consider a newsletter which functions as a public forum for such issues.

2. The Association has the authority to enforce the above Declaration, the Declaration recorded at Liber 3918, folio 266 and other supplemental declarations. The failure to enforce restrictive covenants can lead to a piecemeal abandonment or waiver of the various provisions of the covenants if enough violations are allowed to exist. This situation in turn, could, if allowed to continue lead to a breach of fiduciary duty by the

Board of Trustees. Based upon the evidence and testimony of record the number or degree of violations existing in the community at this time is not clear and may or may not constitute an abandonment or waiver of the covenants such that the covenants could not be enforced in the future, although existing violations may have to be allowed and phased out gradually. As a consequence, the Board of Trustees' present position of not enforcing the covenants is found not to be a breach of fiduciary duty. One basis for this finding is that the community has not seen fit to protest or elect a Board which will aggressively enforce all covenant violations. As far as the panel can determine from the evidence of record, the community has <u>never</u> enforced its covenants aggressively. The presumed reason is that the community has chosen not to incur the additional costs for doing so. If and when the Association undertakes to enforce the covenants, it should develop rules and criteria which are published and communicated to the members. This conclusion is based upon the status of the evidence of record. It should not be construed to preclude a future challenge to the Board's inaction. Furthermore, the order in this case requires a survey of the members as to their position on covenant enforcement.

3. The Association, as a Maryland Corporation with the authority to exercise all powers, rights, privileges granted to non-stock corporations by the general laws of Maryland, has the general as well as the specific authority to levy charges for admittance to facilities which it owns for the guests of members.

(See Finding of Fact No. 19) The guests of members, unlike the members, do not have an easement of enjoyment which gives them the right or entitlement to enjoy the common areas.

4. At the hearing, the Complainant admitted that the authority to apply assessments to fund a reserve account exists. The panel concludes that the Association does have the authority to establish, fund and accumulate reserve accounts for the purposes under its governing documents from annual assessments. The documents specifically charge the Association with the authority to assess future needs of the Association when it establishes the assessment amounts. This charge implicitly, if not explicitly, charges the Association with the responsibility to assess the useful life of its properties and to provide for the future repair, maintenance and replacement of the same. Complainant has also suggested that the Association must follow the procedures for establishing a special assessment under Article V, Section 6, before it may draw funds from an established reserve account. However, the establishment of a special assessment and the use of an existing reserve account are two different actions governed by different provisions of the covenants. The Association does not have to obtain a vote of the members in order to use reserves which have already been established in its budget process.

5. Article VIII, Section 3 of both sets of By-laws in the record requires "written notice of any meeting of the membership". The panel concludes that this means both the first meeting

described in Article VIII, Section 5 as well as the reconvened meeting described in Article VIII, Section 5 for which a reduced quorum is provided. Additionally, Section 11B-111(2) of the Real Property Article provides that all members of a homeowners association shall be given reasonable notice of all regularly scheduled open meetings of the homeowners association. The practice described in Finding of Fact No. 16 of reconvening a meeting 15 minutes after an initial meeting is adjourned for lack of a quorum does not meet the requirements for written notice and for reasonable notice. To avail itself of the reduced quorum provisions of Article VIII, Section 5, the Association must give in the initial written notice of a meeting notice that that section will be utilized to reconvene the meeting. Additionally, it must give the date, time and place of the reconvened meeting, if one is to occur. Finally, that meeting cannot occur sooner than 48 hours after the adjourned meeting. The panel considers an interval of not less than 48 hours to be adequate to meet due process requirements. The reason for this amount of time is to enable members not in attendance to learn whether a quorum was achieved at the first meeting, and to have a reasonable opportunity to make a decision whether to attend the reconvened meeting. No additional written notice to members is necessary if the first written notice outlines the procedure to be taken, as described above. However, an opportunity to make a rational decision whether to attend the reconvened meeting must be allowed.

6. With regard to the assessment procedures followed by the

Association, the documents state that a delinquency "shall" bear interest from the date of delinquency at the rate of six percent (6%) per annum. Therefore the panel finds that the Association must charge the six percent (6%) delinquency amount. The twenty five dollars ($25.00) late fee may be a cost of collection. The panel strongly recommends that the Association adopt a written collection policy specifying all costs and send it to every member.

7. With the amendment of the clerical mistake on the face of the current Directors and Officers Liability Policy, the Association has acted reasonably to obtain a currently commercially available directors and officers liability insurance policy of the type commonly issued to homeowners associations in this area at this time. There was no evidence that directors and officers liability insurance which would cover the defense of an action such as the present one is reasonably available.

8. The Complainant made a request prior to the hearing that the panel decide that the Association has no authority to retain the services of an attorney to defend this matter using funds collected by the Association from its annual assessments. The panel denies the Complainant's request. The Association faces a number of complicated legal issues, including this case, apart from its collection matters and matters covered by its Directors and Officers Liability Policy for which it reasonably needs the advise of competent counsel. It could not obtain that advice without paying for it. The authority to hire and pay for counsel

is one which reasonably and naturally flows from the charge to implement the purpose clause for which the assessments are collected and it is necessary in order to implement those purposes. Volunteer Board members, while they have competence in many areas, are normally not trained to represent the Association in legal matters before administrative agencies, and there are legal constraints which prevent their representing the Association, for the most part, before courts. Volunteer Board members should not be expected to or be called upon to handle such responsibilities.

9. Since the panel has found that the Association has not breached any duty to enforce the restrictive covenants, it naturally follows that there has been no legally compensable damage or loss resulting from the position which the Board of Trustees has taken on behalf of the Association. As a consequence, there is no need for a second hearing on an issue of damages.

10. There is no sufficient basis to award attorney's fees to the Respondent, against the Complainant. The panel believes that the complaint was filed in good faith. The complainant made every effort to present his issues fairly and concisely.

The following is a suggestion of the panel, and not an order by the panel directed to any of the parties. The panel suggests that a professional study of Bel Pre Recreation Association, Inc.'s operations could be helpful in preparing and publishing operational and financial policies for the organization. The dissemination of such policies should provide the community with

a clearer picture of the benefits and responsibilities of membership.

ORDER

The Commission orders, based upon the record, as follows:

1. Pursuant to Conclusion of Law No. 2 the Association shall initiate a survey of the members within sixty (60) days from the date of this order. The survey shall be designed to advise the members of the position of the Association with regard to covenant enforcement, namely that it does not initiate litigation or administrative proceedings to enforce covenants, and to question the members as to whether they prefer the Association to continue with this approach, or whether they prefer the Association to become more active in covenant enforcement. The members shall be advised that more aggressive covenant enforcement will naturally result in higher assessments. After the survey results are received, the Association shall conduct an open meeting at which the results are discussed and at which members may make comments. Thereafter, the Board shall exercise its discretion to take such further action as may be appropriate;

2. The Association shall immediately initiate the procedures outlined in Conclusion of Law No. 5 with respect to notice and quorum;

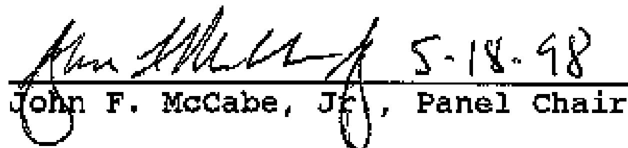
3. From the date of this order forward, the Association shall assess interest at the rate of 6% per annum from the date of delinquency, in all delinquencies not paid within thirty (30) days after the delinquency date, as more fully provided in the documents.

4. The Complaint is denied in all other respects.

Panel members John F. McCabe, Jr., Pat E. Huson, and Robert O. Goodman concur with respect to Conclusions of Law No.'s 1, 3, 4, 5, 6, 7, 9, and 10. The vote with respect to Conclusions of Law 2 and 8 was two in favor and one against. The dissenting voter on paragraph 2 would conclude that the failure to enforce the covenants constitutes, at this time, a breach of fiduciary duty.

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 pursuant to Title 7, Chapter 200 of the Maryland Rules of Procedure.

Respectfully submitted,



John F. McCabe, Jr., Panel Chair