

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

Richard L. Berman
Complainant

v.

CCOC # 53-16
February 3, 2017

New Mark Commons Homes Association, Inc.
Respondent

DECISION AND ORDER

This case came before the Commission of Common Ownership Communities for Montgomery County, Maryland (“CCOC”), pursuant to Sections 10B-8, 10B-12, and 10B-13 of the Montgomery County Code (2016), and the duly appointed hearing panel having considered the testimony and other evidence of record, it is therefore, this 3rd day of February, 2017 found, determined and ordered as follows.

BACKGROUND

On June 6, 2016, Richard L. Berman (herein the “Complainant”) filed a dispute with the CCOC in which the Complainant alleges that the Respondent, the New Mark Commons Homes Association (“NMCHA” or the “Association”) has been unlawfully charging members of the Association a storm water management fee (“SWM Fee”) for over 4 years. In particular, the Complainant alleges that the Association has charged the town house owners a SWM Fee approximately three times as much as the detached home owners living in the Association. The Complainant asks that NMCHA refund the overcharges to the members of the town homes, and that the Association cease billing the unauthorized SWM Fee in the future.

On July 11, 2016, NMCHA responded to the complaint, and on August 3, 2016, the CCOC accepted jurisdiction. In its response, the Association acknowledges that its Board of Directors approved passing the SWM Fee on to its members in the 2011 fiscal year, which is the first time it received a bill for the SWM Fee from the City of Rockville. The Association also acknowledges that it has been charging the town house owners a higher SWM Fee than members of the single family homes, on the basis that the fee is based on impervious surfaces in the community, and that the higher SWM Fee is passed thru to the town house owners because it is based on the amount of impervious surfaces on the common area parking areas that are exclusively used by them.

FINDINGS OF FACTS

The Complainant owns a town house located at 172 New Mark Esplanade, Rockville, Maryland, which is within the Respondent Homeowner Association. The Respondent Association contains 384 homes, of which 198 are townhomes and 186 are single family detached homes. The Association is governed by a Declaration of Covenants which was recorded in the Land Records for Montgomery County, Maryland on October 26, 1967.

The Declaration for the Association imposes an annual maintenance assessment on each of the owners of a living unit within the Association, which assessment is to pay for the common areas and community facilities owned by the Association. The amount of the annual assessment varies depending on which membership class the home is in. In particular, the maximum initial assessments for each class of membership is set forth in Article VI, Section 3 of the Declaration, which imposes the following assessments on each class of membership:

Membership Series	Maximum Initial Assessment	Type of Unit
A-1	\$170.00	2 BR Townhome
A-2	\$180.00	3 BR Townhome
A-3	\$190.00	3 BR SF Unit
A-4	\$200.00	4 BR SF Unit
A-5	\$210.00	5 BR SF Unit

These were the amounts of the initial assessments for calendar year 1967. After that, the amount can be increased by the Board of Directors, without a vote of the membership, under the provisions of Article VI, Section 5(a) and (b) of the Declaration. Under those provisions, the Board can increase the maximum assessment for any Class A membership, based on two alternative methods:

- a) by the percentage of increase, if any, of the total assessment for land and improvements for any living unit to which such membership is appurtenant; and
- b) by the percentage of increase, if any, of the United States Department of Labor Cost of Living Index for the Washington, D.C., Metropolitan Area during the preceding year.

However, unless the Board elects to raise the assessments in accordance with subsection (a), any dues increase must be proportionate to the class of membership that the home is in. In particular, Art. VI, Section 7 of the Declaration states, in relevant part:

Except as provided in paragraph (a) of Section 5 of this Article, any increase in the maximum annual assessment and/or any special assessment must be fixed in accordance with the proportion established for initial assessments in Section 3 of this Article.

In 2010, the Association began receiving SWM Fee bills from the City of Rockville. This fee, sometimes referred to as a "rainwater tax", is included in the tax bill for each of the parcels of real estate owned by the Association, and is based on the amount of impervious surfaces (i.e. roofs, sidewalks, parking areas) on each. In 2016, the Association was charged a total of \$7,981.25 for the 23 parcels owned by the Association. This charge included \$4,134.40 for the 6 NMCHA parcels which contain the town house parking lots, and \$3,465.60 for the other 17 parcels owned by NMCHA.

When the Association learned of this charge, the Board of Directors decided at its Board meeting on December 2, 2010 that it would pass the fee on to its members by charging the SWM Fee for the 6 parcels that contained the townhouse parking lots to the 198 townhouse owners, and that the balance of the fee would be passed on to the owners of all 384 homes in the Association. As a result, the following SWM Fees have been passed on to the members as follows:

Year	Town House Units	Single Family Detached Units
2011	\$44.00	\$13.00
2012	\$36.00	\$11.00
2013	\$46.00	\$13.00
2014	\$55.00	\$15.00
2015	\$61.00	\$17.00
2016	\$64.00	\$18.00
Total	\$306.00	\$87.00

This fee is included in the semi-annual bill that is sent to each of the members of the Association. The Complainant's bill for the first half of 2016 contained the following:

Description	Amount
Total Dues and fees for 2016 = \$1,090.00	
First semiannual operating budget	\$402.50
First semiannual reserve fund allocation	\$108.50
First semiannual CCOC fee	\$1.50
First semiannual SWM fee	\$31.00

The fee for the reserve fund was first adopted in 1986, when the Board decided it needed additional monies to establish and maintain a reserve fund. The fee was initially established as \$66.00 for the detached single family homes and \$88.00 for the town houses. Since then, the fee has periodically increased in accordance with the Consumer Price Index ("CPI"). No challenge to this fee has been brought.

The record was not clear when the fee for the CCOC was first established. Nevertheless, in 2016 the Association was billed a \$3.00 CCOC fee for each unit in the Association, and this fee was passed thru to members in the exact amount of the fee that was assessed to the Association. No challenge to this fee has been brought.

The panel heard testimony from Jim Denny, the administrator for the Association, who was hired to manage the Association in April of 2002. Mr. Denny testified that when he first learned of the SWM Fee on impervious surfaces in 2010, he prepared an analysis to determine which parcels contain the most impervious surfaces. After determining that the parking lots contain the most impervious surfaces, he recommended that the Board charge the fee associated with them to the town houses because the parking lots are in the streets where the town homes are located and are used primarily by the owners of the town homes.

Mr. Denny also acknowledged that since he was hired, the Association has always used the CPI to determine the rate of increase in the Assessments.

The panel also heard testimony from John Hansman, the President of the Association. Mr. Hansman testified that since he was elected to the Board in 2008, the Board has always used the CPI to determine the rate of increase in the Assessments. However, he claimed that the Board could have raised the assessments much higher under the provisions in Art. VI, Section 5(a) of the Declaration. Under that Section, as discussed above, the Association can raise the assessments based on the increase in the value of the living units in NMCHA from the date of sale through the present. Mr. Hansman presented a calculation showing that the annual assessment under this method could have increased from 1967 to 2011 between 1,743% and 2,708%, whereas the actual increase had only been between 425% and 509%. However, he acknowledged that he never presented these figures to the Board, and that the Board did not use these figures in raising the annual assessments or calculating the SWM Fee that was passed thru to Members of the Association.

The Respondent sought legal fees from the Complainant, and submitted an invoice for the legal fees incurred in this matter. The Complainant requested that his \$50.00 filing fee be refunded by the Respondent.

CONCLUSIONS OF LAW

Based upon a preponderance of the evidence, including testimony and documents admitted into evidence, and after a full and fair consideration of the evidence of record, including all legal arguments made by the parties, the Commission concludes that:

1. In accordance with Article VI, Section 2 of the Declaration of Covenants for NMCHA, the annual assessments levied by the Association are to be used to maintain the common areas and community facilities on the property owned by the Association, "including the payment of taxes and insurance thereof and, repair, replacement, and additions thereto, and for the cost of labor, equipment, and materials, management and supervision thereof."
2. The SWM Fee that was charged to the Association by Rockville City beginning in 2010 was imposed directly on the common areas owned by the Association and is in the nature of a tax that must be paid by the Association to maintain the

common areas. As such, under the provisions of Article VI, Section 2 of the Declaration, the SWM Fee must be included in the total expenses that are used by the Association in calculating the annual assessments that are levied on each of the Class A Members of the Association.

3. In accordance with Article VI, Section 3 of the Declaration of Covenants for NMCHA, the initial assessments for the various Class A memberships are established at a fixed amount which cannot increase above the amounts allowed in Article VI, Section 5 of the Declaration. Under Article VI, Section 5(a), the assessments may only be increased by the Board in an amount equivalent to the percentage of increase in the total assessment for land and improvements for each living unit, and under Section 5(b), the assessments may only be increased by the Board by the percentage of increase in the CPI. The Board has never used the method allowed in Section 5(a), and its attempt to utilize that provision to authorize it to impose a disproportionate pass thru of the SWM Fee to the owners of the town homes is unauthorized and must end.
4. The only method that the Board of the Association has used to increase the annual assessments has been the increase in the CPI, which is authorized under Article VI, Section 5(b). However, under the provisions of Article VI, Section 7 of the Declaration, any such increases must be proportionate to the amount of the initial assessment levied on each Class A membership,
5. There is no authority in the Declaration of Covenants for NMCHA to include the SWM Fee as a "pass thru" fee on the annual bills provided to members of the Association. Nor is there authority in the Declaration for the fees or costs to own and maintain any specific portion of the common areas to be charged to the properties that adjoin those common areas. Therefore, this fee is ultra vires, and may not be billed in this manner. Instead, the SWM Fee for the common areas must be included in the total expenses of the Association, the same way that any other taxes, fees or charges are included in calculating the annual assessments charged to members of the Association.
6. By improperly imposing a pass thru SWM Fee to the town house owners in an amount that exceeds the amount charged to the single family homeowners, the Association overcharged the town house owners by \$219.00 from 2011 through 2016. This fee is calculated by subtracting the amount charged to the owners of the single family detached homes (\$87.00) from the amount charged to the owners of the town homes (\$306.00). The 2017 budget was not adopted at the time of the hearing in this matter, so the panel is not aware of the amount of the SWM Fee for 2017.

ORDER

In view of the foregoing and based on the evidence of record, and for the reasons stated above, the Commission orders:

1. The Respondent, within 90 days of the date from this Order, must reimburse the town house owners the amount by which they were overcharged for the SWM Fee from 2011 thru the present. This amount totals \$219.00 for any town house owner who owned a town house in the Association from 2011 until 2016. For anyone who acquired ownership of a town house after 2011, the amount to be refunded will be equal to the difference between the amount charged to the owners of the single family detached homes and the amount charged to the owners of the town homes for the years they owned their town home. In addition, the difference between any SWM Fee charged to the owners of the single family detached homes and the amount charged to the owners of town homes in 2017 will be refunded to the owners of the town homes.
2. A copy of this decision and order must be forwarded to the owner of each town house that receives a refund of the SWM Fee.
3. The Respondent must not charge a separate SWM Fee to any member of the Association in 2017 or in any future year.
4. The Respondent must include the amount of any SWM Fees it receives on its tax bill as a line item in any future budgets prepared by the Association, and the amount must be included in the total annual expenses of the Association, and treated the same as any other taxes, fees or charges that are included in calculating the annual assessments charged to members of the Association.
5. With the exception of the filing fee, each party will bear its own costs, including legal fees.
6. The Respondent must refund the \$50.00 filing fee to the Complainant.

The foregoing was concurred in by panel members Gardner, Zajic and Majerle.

Any party aggrieved by this 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 under the Maryland Rules governing administrative appeals.

Respectfully submitted,

By: David C. Gardner
David C. Gardner, Panel Chairperson
Commission on Common Ownership Communities