

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

**In the matter of**

|                                |   |                       |
|--------------------------------|---|-----------------------|
| Carl Brown                     | X |                       |
| #404                           | X |                       |
| 9900 Georgia Avenue            |   | X                     |
| Silver Spring, Maryland 20902, | X |                       |
| <b>Complainant</b>             |   | X                     |
|                                | X |                       |
| v.                             | X | <b>Case No. 35-11</b> |
|                                | X | December 16, 2011     |
|                                | X |                       |
| Americana Finnmark Condominium |   | X                     |
| Association                    | X |                       |
| 9900 Georgia Avenue            |   | X                     |
| Silver Spring, Maryland 20902  | X |                       |
| <b>Respondent</b>              | X |                       |

**DECISION AND ORDER**

The above-captioned case came before the Commission on Common Ownership Communities for Montgomery County (“CCOC”). Pursuant to Chapter 10B of the Montgomery County Code, 1994, as amended, and the duly authorized Hearing Panel (“the Panel”) having considered the testimony and evidence of record, finds, determines, and orders as follows:

**BACKGROUND**

Carl Brown (“the Complainant”), owner of Unit 404, 9900 Georgia Avenue, Silver Spring, a unit in the property known generally as the Americana Finnmark Condominium, filed a Complaint (“the Complaint”) with the CCOC against the Americana Finnmark Condominium Association (“the Association”) on July 12, 2011. The Complaint alleged that the Association failed to properly conduct an election.

The Complaint alleged that five persons ran for positions on the Association’s Board of Directors. Article V, Section 1 of the bylaws of the Association requires a Board of Directors (“the Board”) composed of three (3) and not more than nine (9) natural persons. The Complainant asserted that, at the June 15, 2011 annual election, there were two persons remaining on the Board. Although five persons then ran for the Board and received votes, including the Complainant, only three of the five persons were recognized to sit on the Board.

The Complainant contended that the Board erred in determining that they would retain a five (5) person Board, that it was within the Association's members' province to establish the number of Directors (although between three and nine as directed by Article V, Section 1) and that the fact that the membership cast votes for five separate individual Board candidates constituted membership's determination that these five directors were to be elected to set the Board at seven<sup>1</sup>.

In support of his complaint, the Complainant cited *Brown v. Americana Finnmark Condominium Association* (CCOC Case No. 42-09), decided June 30, 2010 ("Case 42-09"). Case 42-09 concerned the 2009 election of the Association's Board. Prior to that election, the Board had been faced with the prospect of having one candidate for the Board and three vacancies. The Board decided to ask the ownership to reduce the number of Board members from seven to five. The Complainant in Case 42-09, who is the same Complainant in the case at bar, argued that this was, in effect, an amendment to the bylaws requiring a two-thirds majority vote by the members, and since less than two-thirds of the membership voted in favor of the reduction, the action was improper. The CCOC found that there was no provision in the Association's documents or law that required amendment of the bylaws in order to change the choice of the number of director positions from one to another between three and nine. The CCOC further found that "[i]n the absence of a mandated process, the decision of a majority of the ownership is a reasonable means to make such a choice."

## DISCUSSION

Prior to the hearing the Panel issued a prehearing Order which requested that the parties address certain issues, including whether: (i) the right to determine the size of the Board was confined only to the general membership or also to the Board of Directors and (ii) the determination of the size of the Board in 2009 was binding indefinitely or if a new vote of the membership was required prior to each subsequent election. The parties were urged to provide legal support for their positions.

The Complainant argued that the right to determine the size of the Board was within the sole province of the Association's membership. The Complainant contended that in case 42-09 the CCOC held that membership must determine the number of Board positions before each election. However, the Panel does not believe that Case 42-09 mandates that the Association must determine how many Board members are required; the CCOC merely upheld the Board's decision that membership **could** determine the matter. In response to the Panel's prehearing order, the Association pointed to Article V

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<sup>1</sup> The Complaint also alleged that the integrity of the election was compromised when the President of the Board, who was running for a second term, appointed her roommate as inspector to count the votes. However, at the hearing, the Complainant testified that he was abandoning this claim.

section 3 of the bylaws, which states, in pertinent part, that the Board “may do all such acts and things as are not by law or these By-Laws directed to be exercised and done by members.” This is consistent with the Annotated Code of Maryland, Corporations and Association’s Article, Section 2-402 (c) (2), which states that the bylaws may “[a]uthorize a majority of the entire board of directors to alter within specified limits the number of directors set by the charter or the bylaws, but the action may not affect the tenure of office of any director.” Further, the Association argued that there are ten sections in the bylaws that direct acts and things to be done by the membership and but none of these sections direct membership to determine the size of the Board.

The Complainant contended that if membership could not determine the size of the Board then membership could not effectively determine who sat on the Board, as required by the bylaws. The Panel does not agree with this contention. The bylaws prescribe that the number of Board members is to be between three and nine natural persons, and this can only be changed by the membership amending the bylaws. Indeed, although the Board had the authority to establish a finite number of sitting Board members within the range allotted by the bylaws, it appears that the Board allowed membership to have a voice in this matter in 2009 and adopted their position.

It is significant that the decision of how many Board members were to serve was a prospective matter that took effect prior to the election, and not a matter of the Board reducing the number of directors after the election. The Complainant questioned Stephanie Archer, a Board member from 2008 through the present, about the reasons for the Board’s 2009 recommendation that the number of Board members be reduced from seven to five. Ms. Archer explained that Board was not receiving strong candidates for the then open positions and felt that by reducing the number of available positions and not just trying to “fill a seat,” more committed candidates would be secured.

There is nothing in the Association’s governing documents or law indicating that an annual revisiting of the 2009 determination is required or in order. The record did not indicate that either membership or the Board sought after 2009 to increase the number of Board members who would be serving; if there is such a desire in the future then there are mechanisms in place to accommodate a vote on whether such a change is to be adopted.

### **FINDINGS OF FACT**

The Complainant is the owner of Unit 404, 9900 Georgia Avenue, Silver Spring, a unit in the property known generally as the Americana Finnmark Condominium. Article V, Section 1 of the bylaws of the Association requires a Board of Directors composed of three (3) and not more than nine (9) natural persons

In 2009 the Board asked ownership to reduce the number of Board members from seven to five. This was done because the Board was not receiving strong candidates for the then open positions and felt that, by reducing the number of available positions

more committed candidates would be secured. This was approved by a majority of the ownership in person or by proxy at the Association's June 2009 annual meeting.

The Complainant then filed a Complaint with the CCOC, alleging that the Association's action in reducing the number of directors was, in effect, an amendment to the bylaws requiring a two-thirds majority vote by membership, and since less than two-thirds of the membership voted in favor of the reduction, the action was improper. In *Brown v. Americana Finnmark Condominium Association* (CCOC Case No. 42-09), decided June 30, 2010 ("Case 42-09") the CCOC denied the Complainant's request for relief and approved the Association's action, finding that there was no provision in the Association's documents or law that required amendment of the bylaws to change the choice of the number of director positions from one to another between three and nine and that, in the absence of a mandated process, the decision of a majority of the ownership is a reasonable means to make such a choice."

At the time of the Association's June 15, 2011 annual election, there were two persons remaining on the Board. Although five persons then ran for the Board and received votes, including the Complainant, only three of the five persons were recognized to sit on the Board. The record did not indicate that either membership or the Board sought, after 2009, to increase the number of Board members who would be serving.

On July 12, 2011, the Complainant filed this Complaint with the CCOC against the Association, alleging that the Board erred in determining that they would retain a five (5) person Board, that it was within the Association's members' province to establish the number of Directors (although between three and nine as directed by Article V, Section 1) and that memberships' votes for five separate individual Board candidates constituted memberships' determination that these five directors were to be elected to set the Board at seven<sup>2</sup>

Article V section 3 of the bylaws states, in pertinent part, that the Board may do all such acts and things as are not by law or the bylaws directed to be exercised and done by members.

### **CONCLUSIONS OF LAW**

Based evidence contained in the record, the Panel finds that the Association properly determined that five (5) directors were to serve on the Board and further that three (3) vacancies were to be filled at the June, 2011 election at issue. The Panel finds that these vacancies were properly filled and, accordingly, finds for the Respondent Association.

**ORDER**

Based upon the foregoing Findings of Fact and Conclusions of Law, it is this 16<sup>th</sup> day of December 2011:

**ORDERED**, that the Complainant's request for relief is DENIED.

Panel members Farrar and Zajic concur in the above findings and Order.

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 of the date of this Order pursuant to the Maryland Rules of Procedure governing administrative appeals.

Mitchell I. Alkon, Panel Chairman  
Commission on Common Ownership  
Communities