

- *Elections and Meetings*: Respondent allegedly failed to hold annual meetings, elect directors to replace those whose terms were expiring, and appoint officers for those whose terms were expiring. As a consequence, according to Complainants, the directors and officers who purportedly continue in office lack authority to act as such.

- *Harassment*: Respondent allegedly harassed Complainants' tenants and family members and interfered with their right to extend to those tenants and family members the easements of enjoyment they have as owners.

- *Fiduciary Duties*: Respondent allegedly failed to perform a number of duties imposed on it by its governing documents, including keeping orderly records, managing funds, adopting budgets, performing annual audits, and preserving reserve funds.

- *Records Inspection*: Respondent allegedly failed to allow examination and copying of its books and records.

- *Use-in-Common Driveways*: Respondent is obligated, but has allegedly failed, to maintain use-in-common driveways.

Complainants also claimed that Respondent showed favoritism toward Ehsan Motazedi (a purported Director), by failing to enforce restrictions against his installation of satellite dishes. That claim was withdrawn at the hearing. Tr. II at 59.² Whether or not favoritism was intended, the Panel would have concluded that federal regulations trump restrictions against satellite dishes contained in homeowner association documents. 47 C.F.R. § 1.4000.

II. FINDINGS OF FACT

[Parties]

1. Respondent is a Maryland nonstock corporation in good corporate standing. <http://sdatcert3.resiusa.org/ucc-charter/Pages/CharterSearch/default.aspx> (last visited Jan. 5, 2015).³

2. Respondent is a homeowners association, as defined in the Maryland Homeowners Association Act, Md. Code, Real Prop. § 11B-101, and it is a common ownership community as defined in M.C. Code § 10B-2(b).

² "Tr. II" refers to the transcript of the October 30, 2014 session. "Tr. I" references the August 21 session. The December 18, 2014 session was not transcribed.

³ The Panel may take administrative notice of public records. See *Stover v. Prince George's County*, 132 Md.App. 373 (2000); *Forward v. McNeily*, 148 Md.App. 290 (2002).

3. Respondent consists of 39 single-family homes located in Potomac, Maryland (CX1 at 174). It is self-managed, having terminated its professional manager in approximately 2010.

4. Each Complainant is a Member of Respondent and a unit owner within Respondent.⁴ Specifically, Ms. Huynh and her sister own the unit at 8900 Falls Farm Drive; Ms. Yen Chan owns the unit at 8903 Falls Farm Drive; Mr. Stubs and Ms. Juang own the unit at 8921 Falls Farm Drive; and Mr. Butcher owns the unit at 12200 Falls Road.

5. Respondent's annual operating budget has historically varied between approximately \$19,000 and \$35,000. Cmpl. Ex. 13-17.

[Respondent's Governing Documents]

6. Respondent's governing documents include Articles of Incorporation (CX1 at 93); By-Laws (CX1 at 100); Declaration of Covenants, Conditions and Restrictions (CX1 at 115); a First Supplementary Declaration (CX1 at 132); a Second Supplementary Declaration (CX1 at 137); Declaration of Easement (CX1 at 141); and Procedures for Dispute Resolution (CX1 at 155).⁵

7. At the time the complaints in these cases were filed, Respondent's By-Laws and Procedures for Dispute Resolution had not been deposited with the Clerk of the Circuit Court. These documents were thereafter deposited on August 12, 2014. <http://casesearch.courts.state.md.us/inquiry/inquiryDetail.jis?caseId=329472V&detailLoc=MCCI> (last visited Jan. 5, 2015).

8. Article VII of the Articles provide that the affairs of Respondent shall be managed by a board of five Directors, who shall hold office until the election of the election of [sic] their successors for the terms hereinafter set forth. Beginning with the first annual meeting to be held on or before August 30, 1993, the Members, at the first such annual meeting, shall elect one (1) Director, for a term of three (3) years; at the second annual meeting the Members shall elect two (2) Directors for a term of three (3) years; and at the third annual meeting, the Members shall elect two (2) Directors for a term of three (3) years; and at each subsequent annual meeting the Members shall elect the applicable

⁴ For clarity, the Panel will use "Member" to refer to unit owners within Respondent and "Director" to refer to persons elected to Respondent's Board of Directors ("Board").

⁵ Respondent's governing documents are contained in CX1. Although only portions of those documents were identified by witnesses, they are all public records which may be administratively noticed by the Panel.

number of Directors to those terms then expiring in accordance with the foregoing schedule.

9. Article X, Section 2 of the Articles requires Respondent to indemnify its current and former directors "against any and all liabilities and expenses incurred in connection with their services in such capacities" to "the maximum extent permitted by Maryland law."

10. Article IV, Section 4 of Respondent's Declaration provides:

Every member of the Falls Farm Homes Corporation shall have the right to extend the rights and easements of enjoyment vested in him under this Article to each of his tenants and to each member of his family who resides with him within Falls Farm and to such other persons as may be permitted by the Corporation.

11. Section 2 of the First Supplementary Declaration provides that the private dwelling units "shall be occupied and used for private single-family residential purposes only."

12. Sections 1 through 3 of the Second Supplemental Declaration provide:

1. Developer has designated within the Fall Farm community certain Use-In-Common driveways serving two or more lots within the community, designating the same as an easement over one or more of the Private Dwelling Units served thereby.

2. In such cases, and to preserve a uniform aesthetic appearance of the overall community, such private streets or driveways, for the full length thereof and including the turn-around at the terminus thereof, shall not be considered as part of the Community Property within Falls Farm as defined in the Declaration of Covenants, Conditions and Restrictions, but shall be maintained as such as part of the general expenses of the corporation. Said maintenance shall include, but not be limited to, removal of snow and ice, mowing of grass shoulder and the roadway surface.

3. For the purpose of providing funds for the cost of said maintenance of the Use-In-Common driveways as a part of the general expenses of the Corporation, proportional lot specific assessments for such purpose have been established . . . Said proportional lot specific assessments are to be collected from the Private Dwelling Units . . . and only those Private Dwelling Units.

13. Article III, Section 2 of Respondent's By-Laws provides in part:

Every member may delegate his rights and use and enjoyment in the Community Properties to each of his tenants and to each member of his family who resides with him within Falls Farm . . . Such member shall notify the secretary of the Corporation in writing of the name of any such person and the relationship of the Member to such person.

14. Article V, Section 1 of the By-Laws, which is similar to Article VII of the Articles, provides:

The business and affairs of the Corporation shall be managed by a Board of five (5) Directors who need not be Members of the Corporation. The initial Board of Directors shall consist of five (5) Directors who shall hold office until the election of their successors for the terms stated in the Articles of Incorporation. Beginning with the first annual meeting to be held on or before August 30, 1995, the Members, at first such annual meeting, shall elect (1) Director, for a term at three (3) years; at the second annual meeting the Members shall elect two (2) Directors for a term at three (3) years; and at the third annual meeting the Members shall elect two (2) Directors for a term of three (3) years and at each subsequent annual meeting the Members shall elect the applicable number at Directors to those terms then expiring in accordance with the foregoing schedule.

15. Article V, Section 2 of the By-Laws provides that vacancies in one or two directorships are to be filled by concurring vote of the remaining Directors.

16. Article VI of the By-Laws contains the following provisions:

Section 1. Nominations. Nominations for election to the Board of Directors shall be made by a Nominating Committee which shall be one of the standing committees of the Corporation. Nominations may also be made by written nomination signed by at least ten (10) . . . Members and presented to the Secretary of the Corporation at least thirty (30) days prior to the annual meeting. The Nominating Committee shall consist of a chairman, who shall be a member of the Board of Directors, and two (2) or more Members of the Corporation. The members of the Nominating Committee shall be appointed by Board at Directors at least sixty (60) days prior to each annual meeting of the Member[s] to serve until their successors are appointed. . . . The Nominating Committee shall make as many nominations for election to the Board of Directors as it shall in its

discretion determine, but not less than the number of vacancies that are to be filled.

Section 2. Election. All elections to the Board of Directors shall be made by secret written ballot which shall: (a) describe the vacancies to be filled; (b) set forth the names of those nominated by the Nominating Committee, or by written petition of . . . Members as provided in Section 1 hereof for such vacancies; and (c) contain space for a write-in vote by the Members for each vacancy. Such ballot shall be prepared and mailed to the Members at least fifteen (15) days in advance of the date set forth herein for a return (which shall be a date not later than the day before the annual meeting or special meeting called for elections).

Section 3. Voting. The Members or their proxies may cast, in respect to each vacancy, as many votes as they are entitled to exercise under the provisions at the Declaration of Covenants. The persons receiving the largest number of votes shall be elected. Cumulative voting is not permitted.

Section 4. Election Committee. An Election Committee which shall consist of three (3) Members shall be appointed by the Board of Directors and shall be responsible for maintaining the safekeeping of the written ballots once collected by the Secretary or such other officer of the Corporation deemed responsible therefor and shall be required to follow such verification procedures as may be adopted by the Board of Directors regarding votes cast, genuineness of signatures, validity of proxies and such other matters as will insure a fair election.

17. Article VII, Section 2 of the By-Laws requires the Board to:

(a) cause to be kept a complete record at all its acts and corporate affairs and to present a statement thereof to the Members at the annual meeting of the Members . . .

(d) prepare and adopt, at least thirty (30) days prior to the beginning of each fiscal year, an annual operating budget which identifies the expenses of the Corporation and the annual assessments and charges and any other assessments necessary to meet the obligations imposed by the Declaration. The budget shall be based on estimated expenses for the operation of the Corporation or, if available, actual expenses for the previous budget year adjusted for inflation and any surplus, and shall include a contingency fund;

(e) create and establish, in conjunction with the budget, and as a part thereof, a capital asset replacement fund, with annual appropriations thereto based on the replacement value of all Community Properties and facilities and their expected life. Such fund, including the interest earned thereon, shall not be used to finance annual operating and maintenance costs . . .

18. Article IX of the By-Laws provides in part:

Section 1. Enumeration of Officers: The officers shall be the president, a vice-president, a secretary and a treasurer and such other officers as the Board may deem appropriate to create by resolution. The president and vice-president shall be members of the Board of Directors.

Section 2. Election of Officers: The officers shall be chosen by majority vote of the Directors at the first regular meeting of the Members, and shall take office upon election.

Section 3. Term: All officers shall hold office for one (1) year, unless he or she shall sooner resign or shall be removed or otherwise disqualified to serve. Officers may be relieved of office at any time as may be determined by a majority of the Board.

19. Article XI, Section 1 of the By-Laws requires "an annual meeting of the Members held at such time and place within Montgomery County, Maryland as determined by the Board of Directors."

20. Article XIII, Section 1 of the By-Laws establishes Respondent's fiscal year as January 1 to December 31 of each year.

21. Article XIII, Section 1 of the By-Laws provides that the "books, records and papers of the Corporation shall at all times, during reasonable business hours, be subject to the inspection of any Member."

22. Article XV, Section 2 of the By-Laws provides:

At the close of each fiscal year, the books and records of the Corporation may be audited by I certified public accountant or other person acceptable to the Board of Directors, whose report will be prepared and certified in accordance with the requirements of the Board of Directors. Based upon such report, the Corporation shall furnish the Members of the Corporation with an annual financial statement including the income and disbursements of the Corporation.

23. The Procedures of Dispute Resolution specify procedures to be followed by a Member who has a dispute with Respondent including, particularly, filing notice of the dispute with Respondent within 30 days after the dispute arises. Under the Procedures, Respondent will give the disputant a hearing at a mutually convenient time, date and place to present evidence and testimony.

[Other Litigation]

24. In 2010 Respondent sued Ms. Huynh in the Circuit Court for Montgomery County in *Falls Farm Home Corp. v. Huynh*, Mont. Cir. No. 329472-V to enjoin her from operating a boarding house. The Circuit Court found that she was operating a boarding house and it issued an injunction. That decision was affirmed on appeal. See CX1 at 69; <http://casesearch.courts.state.md.us/inquiry/inquiryDetail.js?caseId=329472V&detailLoc=MCCI> (last visited Jan. 5, 2015).

25. In the boarding house injunction litigation referenced above, the Circuit Court entered judgment against the defendants (Ms. Huynh and her sister) for \$25,645.78 in attorney's fees. A writ of garnishment was applied for and issued shortly thereafter garnishing Ms. Huynh's wages. The judgment was later paid in full. Cmpl. Ex. 4, 5, 6.⁶

26. Ms. Huynh has been involved in other litigation against Respondent and/or the Motazedis: a criminal assault charge against Mr. Motazedi in June 2012 in *State v. Motazedi*, Mont. Cnty. Dist. Ct. No. 4D00280144; a peace order petition against Mr. Motazedi in May 2010 in Case No. 0601SP014622010; a suit against Respondent for defamation and emotional distress in *Huynh v. Falls Farm Home Corp.*, Mont. Cir. No. 353620-V; a claim for personal injury and property damage against Mina Motazedi in *Huynh v. Motazedi*, Mont. Cir. No. 387262-V. <http://casesearch.courts.state.md.us/inquiry/processDisclaimer.js> (last visited Jan. 5, 2015). And, according to testimony at the hearing, she filed at least one civil rights complaint against Respondent.

27. Ms. Huynh filed the peace order petition against Mr. Motazedi on May 6, 2010, which was the same day as a hearing in the boarding house injunction litigation. -

[Meetings and Elections]

28. Respondent held annual Members' meetings and Board elections in 2008, 2010, 2012 and 2014. It apparently did not hold an annual meeting of its Members in 2009. Respondent Ans. to Interrog. No. 6 (Cmpl. Ex. 3). Although the record contains documentation of meetings on May 9, 2011 and December 16, 2013 (Rspt. Ex. 1-3), it is unclear whether these were intended as Board meetings or an annual Members' meeting. In any event it appears that no Directors were actually elected at those meetings.

⁶ "Cmpl. Ex. ___" and "Rspt. Ex. ___" refer to Complainants' and Respondent's respective exhibits admitted at the hearing.

29. Mr. O'Neill testified, and the Panel so finds, that Respondent has faced repeated difficulties in assembling a quorum of Members at an annual meeting to elect Directors. As a consequence, some Directors continued to serve as such past the expiration dates of their three-year terms.

30. An annual meeting of the Members was held on August 18, 2014, at which four Directors – namely, Steve Robinson, Nancy Gopstein, Tom O'Neill and Ehsan Motazedi – were elected to three-year terms. Jim Thompson, who was elected to a three-year term in March 2012, is the fifth Director.

31. Appendix A to this Decision contains a chart showing Respondent's Directors elected or appointed since 2008, based on Cmplt. Ex 3, Rspt. Ex. 9, and witness testimony.

32. Of the four Directors elected in August 2014, Messrs. Robinson and O'Neill received one more vote each than did Ms. Gopstein and Mr. Motazedi. Rspt. Ex. 2 & 9.

33. The Board of Directors does not hold quarterly meetings. When it does meet, it routinely does so by telephone. For example, the appointment of Directors to fill unexpired terms (see Appendix A), were made during closed, telephone meetings.

[Harassment]

34. Mr. Motazedi and Ms. Huynh are next-door neighbors.

35. Mr. Motazedi has two surveillance cameras attached to the outside of his home. Ms. Huynh testified that one of those cameras is pointed at her home. Mr. Motazedi denied that either camera is pointed at the Huynh home. Ms. Huynh's testimony is supported by other evidence that Mr. Motazedi has monitored persons coming and going from Ms. Huynh's house. Cmplt Ex. 26. The Panel finds Ms. Huynh's testimony in this regard more credible and concludes that one of Mr. Motazedi's cameras captures at least a portion of Ms. Huynh's property.⁷

⁷ Article VI, Section 1, of the Respondent's Declaration (CX1 at 125-126) requires approval of all exterior changes to homes. This requirement would seem to apply to exterior-mounted cameras. There was no evidence as to whether Mr. Motazedi applied for or obtained Respondent's approval for his cameras. The Panel makes no findings on whether the cameras are a violation of the Declaration, but does place Respondent on notice of a possible issue regarding them.

36. Mr. Motazedi and Ms. Huynh have been feuding beginning when Mr. Motazedi provided evidence in support of Respondent's suit against Ms. Huynh to enjoin her operating a boarding house. See Cmplt. Ex. 26. The feud has escalated to shouting matches, vulgar name-calling, derogatory signage, floodlights aimed at the other's home, and multiple lawsuits. Ms. Huynh is responsible for a considerable portion of this unneighborly behavior.

37. The only evidence of Board involvement in the Huynh-Motazedi feud is that the Board reimbursed Mr. Motazedi for legal fees of \$1110.00 in defending the peace order petition Ms. Huynh brought against him. CX1 at 81; Rspt. Ex. 5. Mr. O'Neill testified, and the Panel finds, that the Board authorized reimbursement because it believed that Mr. Motazedi would not have been sued but for his participation as Director in the boarding house injunction litigation.

38. Mr. David Nolle testified that he is a retired State Department employee who was engaged as a part-time consultant to the Department after retirement. Since it was not convenient for him to commute from home, he needed to find a rental closer to the Department's office in the District of Columbia. Tr. II at 90-94.

39. Searching on Craig's List, Mr. Nolle found a room available for rent at Ms. Huynh's home. He signed a one-year lease with Ms. Huynh and actually occupied a room at her home on a part-time basis between April 2013 and January 2014. Tr. II at 106.

40. Complainants offered in evidence an affidavit by Mr. Motazedi prepared in connection with the boarding house injunction litigation. The affidavit includes the following:

Since April [2013] I have seen different people move into the Defendants' house and move out; for example: . . . There was an older white haired gentleman who drove a Subaru Station Wagon with Maryland license tags. He would come on a Sunday and stay until Wednesday. He started staying at 8900 Falls Farm Dive in June 2013. He has not been there since late August.

Cmplt. Ex. 26.

41. Mr. Nolle testified that he was the "older white haired gentleman" referred to in the Motazedi affidavit. Tr. II at 94.

42. Mr. Nolle testified, and the Panel so finds, that he was "treated like family" at Ms. Huynh's home and that no one interfered with his using community facilities. However, he was "sensitive" to Mr. Motazedi's cameras and didn't like people spying on him. Tr. II at 114.

43. There was no other evidence that any of Complainants' tenants and family members have been denied benefits of living in the Falls Farm community.

[Fiduciary Duties]

44. Respondent has not previously had its books and records audited. Mr. O'Neill acknowledged this and testified that the Board has arranged to have Respondent's finances audited for 2014.

45. A Member's driveway was scratched, apparently by a snow plow or other heavy equipment being used by one of Respondent's contractors. When the Member complained, Mr. O'Neill purchased several cans of driveway sealant and, using his own squeegee, personally sealed the Member's driveway to cover over the scratch. Mr. O'Neill sought and obtained reimbursement from Respondent in the amount of \$132.46 for the cans of sealant. Cmpl. Ex. 18. Mr. O'Neill incurred this cost prior to obtaining Board approval.

46. Mr. O'Neill authorized one of Respondent's contractors to prune trees that were in the common area but whose limbs extended into a Member's yard. Mr. O'Neill negotiated an agreement with the Member to split the \$550.00 cost between the Member and Respondent. Cmpl. Ex. 18. Mr. O'Neill incurred this cost prior to obtaining Board approval.

47. The Board authorized hiring the law firm of Rees Broome to draft revisions to Respondent's By-Laws at a cost of \$3,487.50. Cmpl. Ex. 19. There is no evidence the authorization was approved at an open meeting of the Board.

48. The Board authorized reimbursement to Mr. Motazedi in the amount of \$1,110.00 for legal fees incurred in defending a peace order petition brought by Ms. Huynh. CX1 at 81; Rspt. Ex. 5. There is no evidence the authorization was approved at an open meeting of the Board.

49. The appeal of the boarding house injunction suit was argued before the Maryland Court of Special Appeals on February 2, 2012. Following the argument, Mr. O'Neill treated himself, Respondent's attorney, and two others to lunch at an Annapolis restaurant at the total cost of \$72.83, using Respondent's debit card. CX1 at 145.

[Use of Reserve Funds]

50. Cmpl. Ex. 13-17 and 25 contain the only financial information for Respondent provided to the Panel. That information is insufficient to determine the

amount of reserve funds maintained by Respondent and how those funds were used. Specifically:

a. Cmplt. Ex. 27 (a 2009 operating budget) shows a budgeted reserve contribution of \$4,000 and a 9-month actual contribution of \$3,000. It also shows reserve interest for nine months of \$290, suggesting that reserves might approximate some \$19,000 (assuming a 2% annual interest rate), but there is no indication of the amount actually held in reserve.

b. Cmplt. Ex. 15 (a 2010 operating budget) shows an actual contribution to reserves of \$3,333 for 10 months, but again no indication of the amount then held in reserve. The exhibit contains the following footnote: "Legal expenses are over budget due to an ongoing legal issue. The board may decide to book some of these costs to reserve expenses.

c. Cmplt. Ex. 13 (an income statement as of August 28, 2011) shows a budgeted reserve contribution of \$3,327.00 but no actual contribution as of that date.

d. Cmplt. Ex. 14 (an income statement for the period July 2010-September 2011 and a balance sheet as of September 30, 2011) shows total cash on deposit of \$9,005.75, of which \$3,949.90 is in a "deposit account" and \$5,055.85 is in an "expense account." The exhibit does not indicate whether any of these amounts is a reserve fund. The exhibit does not show any contribution to reserves during the 15-month period covered by the income statement.

e. The proposed budget for 2012 (Cmplt. Ex. 16) budgets a \$5,183.00 reserve contribution, but there is no evidence whether that contribution was actually made.

f. A statement purporting to show expenses for 2013 (Cmplt. Ex. 17, p.1) does not show any reserve contribution, although it does show a bank balance of \$42,400.

g. A draft expense budget for 2014 (Cmplt. Ex. 17, p. 2) does not show any reserve contribution.

51. Respondent paid some \$75,341.74 in legal fees to attorney Joseph McBride during the period 2009-2014. The payments were related to litigation involving Ms. Huynh, including prosecuting the boarding house injunction litigation; defending an appeal of that case; defending Mr. Motazedi in the peace order petition; and defending Respondent in this case. Rspt. Ex. 5.

52. Of the \$75,341.74 paid to Mr. McBride, Ms. Huynh was ordered to and did reimburse \$25,645.78 to Respondent. Cmplt. Ex. 4, 5, 6. Thus the net legal fees Respondent incurred in connection with litigation involving Ms. Huynh was just under \$50,000.

53. The Panel finds that some of the \$50,000 in legal expenses were funded by diverting reserve funds, either through payment out of existing reserves or failing to make reserve contributions. The Panel is unable to quantify those funding sources from the evidence presented.

[Records Inspection]

54. Several Complainants requested access to Respondent's books and records at various times. CX1 at 47; Cmplt. Ex. 20; Rspt. Ex. 4.

55. In answer to their requests, Respondent produced at least six boxes of documents at a meeting of the Board, but gave Complainants only 5 minutes to examine them because the room where the meeting was being held had been rented only for a limited time. Complainants did not attempt to examine the documents at the time. Tr. II at 12.

56. Respondent also offered to allow Complainants time to inspect the boxed documents, but demanded a payment of \$700 simply for inspecting the records. Respondent's justification was that a room would have to be rented for the examination process and two individuals would have to be hired to monitor the process to assure the security of the documents. Tr. II at 11-12; CX1 at 47.

57. Later, Mr. O'Neill personally scanned seven boxes of documents and provided Complainants with a compact disc and thumb drives containing most but not all the requested documents, all without charge to Complainants.

58. Although Complainants have not been provided with all the documents they have requested, they have received all documents reasonably available to Respondent.

[Use-In-Common Driveways]

59. Of the 39 units within the Falls Farm community, there are five use-in-common (joint) driveways. One such driveway is shared by five units, another is shared by two units, another is also shared by two units, one is shared by four units, and one is shared by three units. Thus, 16 Members share their driveways with one or more other Members and are therefore subject to the use-in-common provisions of Respondent's governing documents. Cmplt. Ex. 25, p. 1.

60. As it is authorized to do, Respondent charged those 16 Members approximately \$148 more per year than the other 23 units in 2008 (and a similar amount

proposed for 2009) for the added cost of maintaining the use-in-common driveways. Cmplt. Ex. 25, p. 3. There is no evidence whether that differential continued in later years.

61. Complainant Butcher is one of the 16 Members who was charged extra. Mr. Butcher testified, and the Panel so finds, that Respondent does not routinely clear snow from his use-in-common driveway. Tr. II at 74.

62. Mr. Butcher claimed that Directors who are among the 16 do have their driveways maintained by Respondent. However, Mr. Butcher was unable to testify as to such alleged favoritism of his personal knowledge. Tr. II at 78.

63. Mr. O'Neill testified that the Board was uncertain whether the term "use-in-common driveways" includes driveways shared by only two units. The Board is now investigating the question and, in the meantime, agreed to maintain all shared driveways.

III. CONCLUSIONS OF LAW

A. Exhaustion of Remedies

Respondent filed a motion to dismiss the complaints in these cases based on Complainants' alleged failure to exhaust procedures available to them under Respondent's governing documents. Specifically, Respondent cites its Procedures for Dispute Resolution (CX1 at 155). Complainants argued that those procedures applied only to architectural disputes and that, in any event, they documented their complaints numerous times.

The Panel deferred ruling on the motion until the merits hearing. At the hearing the Panel denied the motion. The Panel now explains why.

The Panel concludes that the Procedures for Dispute Resolution, by its terms, is not limited to architectural matters and (subject to the discussion that follows) is potentially applicable here.

The Maryland Homeowners Association Act, Md. Code, Real Prop. § 11B-113(a), designates the clerk of each circuit court as a "homeowners association depository." Section 11B-112(c) requires homeowners associations to deposit in the depository current copies of certain "disclosures" specified in other sections of the title, including bylaws and rules.⁸ Section 11B-112(c) also provides that if the association fails to deposit any required disclosures, then the undeposited disclosures "shall be unenforceable until the time they are deposited."

⁸ Maryland law does not include in the deposit requirement a homeowners association's articles of incorporation, declaration, and recorded covenants and restrictions, presumably because those documents are already matters of public record.

In this case, Respondent's governing documents, including its By-Laws and Procedures for Dispute Resolution, were first filed on August 12, 2014, after the complaints were filed with the Commission and after Respondent filed its motion to dismiss. The Procedures for Dispute Resolution were not enforceable by Respondent at the time the disputes arose, so that Complainants had no obligation to comply with those Procedures before complaining to the Commission.

The Commission's organic statute has its own exhaustion requirement. M.C. Code § 10B-9(b) provides that a party "must not file a dispute with the Commission until the party makes a good faith attempt to exhaust all procedures or remedies provided in the association documents." In the absence of enforceable association procedures or remedies, a complainant is expected to "have given written notice to the board of directors of the dispute and a reasonable opportunity to respond" before filing the dispute with the Commission. Commission Statement of Policy (Apr. 1, 2009). Each of the four complaints in this case certified that the Complainant gave written notice of the disputes to Respondent and specified the dates of those notices. See CX1 at 14, 18, 22 and 26. In response to the motion to dismiss, Complainants submitted a letter (CX1 at 174) reiterating compliance with this notice requirement. The Panel concludes, therefore, that Complainants satisfied the expectations announced in the Commission's Statement of Policy.

The Panel's conclusion that the Procedures for Dispute Resolution were unenforceable by Respondent raises another issue: Whether Complainants can rely (as they do in part) on Respondent's late-filed By-Laws in charging Respondent with various breaches of duty? Because the Maryland Homeowners Association Act imposes the deposit requirement on the homeowners association, not on individual unit owners, the Panel concludes that Respondent is precluded from asserting unenforceability of the By-Laws based on Respondent's own failure to timely deposit that document. See *Mohr v. Universal C.I.T. Credit Corp.*, 216 Md. 197, 206 (Md. 1958) (issue presented is whether a party's "indifference, carelessness, breach of duty or other conduct, had created an estoppel precluding him from asserting a defense he might otherwise have had").

B. Meetings and Elections

Complainants argue that a small cabal of Members has illegally clung to office in order to favor themselves at the expense of other Members. Claimants point to unrequited expressions of interest in holding office by several Members outside the cabal. E.g., CX1 at 147-149.

For sure, Respondent has been less than punctilious in holding meetings and conducting elections in accordance with its governing documents and applicable law. For example, annual Member meetings for election of Directors have been skipped several times, resulting in Directors holding over past their term expiration dates. Respondent's Board meets informally by telephone instead of quarterly at open meetings. Informality in appointing officers and successor Directors has created unnecessary confusion as to who is on the Board and who can speak and act for Respondent. The staggering of Directors' terms contemplated by Respondent's governing documents has effectively been abandoned, despite a requirement for staggered terms in M.C. Code § 10B-17(g)(2).

The Board has begun to address these issues by successfully conducting an election in August 2014. At least for the time being, it is clear who the five Directors are. The Panel's Order will compel ongoing compliance with meeting and election requirements.

The Panel's Order will not, however, attempt to invalidate prior Board actions or punish Respondent for past failures. *First*, Directors whose terms have expired continue to hold office "until election of their successors." Art. of Inc., Art. VII; *see also* Section 2-405, Corporations & Associations Article of the Code of Maryland. *Second*, given the small size of the Falls Farm community and the modest amount of its budget, Respondent's officials might think it reasonable (if ill advised) to skip corporate and business formalities. *Third*, there has been no proof of self-dealing by its officials beyond a trivial \$72.83 lunch for four. That lunch is small compensation for the aggravation Respondent's officials have endured in enforcing the "private single-family residential purposes only" restriction in Section 2 of the First Supplementary Declaration. *Fourth*, Respondent has undoubtedly faced difficulty in getting volunteers to run for office. *Finally*, it is not clear that the Panel could fashion a remedy for past failures that would make sense and be in the Falls Farm community's interest.

The Panel is well aware of the difficulties many common ownership communities – particularly self-managed ones – face in obtaining quorums for meetings and finding volunteers to serve as directors and officers. The difficulties are increased where, as here, the community is plagued by on-going disputes and litigation. While the Panel can order elections to be held and parties to abide by governing documents, the Panel has no power to force individuals to run for office, or to stop them from suing those who do volunteer.

As a practical matter, the effectiveness of any Panel order depends in some measure on the good faith and cooperation of the parties involved. The Panel urges Complainants and Respondent, and the other Members who have not directly participated in this case, to demonstrate just such good faith and cooperation. The alternative is continuing rancor within the Falls Farm community and more legal fees. If the

community remains dysfunctional and combative, the ultimate sanction is appointment of a receiver – a costly remedy that would place community governance in the hands of a stranger. Md. Code, Real Prop. § 11B-111.5.

C. Harassment

The record reflects a multi-year history of antagonism between Ms. Huynh and Respondent's Board, and between Ms. Huynh and the Motazedis. Ms. Huynh claims she has been harassed by the Board, citing litigation against her in which she was enjoined from operating a boarding house and in which she suffered an award of attorney's fees and a wage garnishment. CX1 at 69, Cmplt. Ex. 4, 5 & 6. She further testified that Respondent complained to the Montgomery County Housing Code Enforcement about her operating a boarding house. And she points to cameras installed on Mr. Motazedi's house, one of which is aimed at her property. See Cmplt. Ex. 28. The alleged harassment has interfered with her tenants' and family members' enjoying the benefits of living in the Falls Farm community, according to Ms. Huynh.

As to the boarding house injunction litigation and related complaints, Mr. Nolle's testimony that he was Ms. Huynh's tenant confirms that Ms. Huynh was not abiding by the "private single-family residential purposes only" restriction in Respondent's governing documents. More important, the Circuit Court found that Ms. Huynh was in fact running a boarding house and it enjoined her from doing so. That decision was affirmed on appeal to the Court of Special Appeals and is now final. The Panel is bound by the Circuit Court's decision and cannot allow Ms. Huynh to attack the decision indirectly by characterizing Respondent's successful legal action as harassment. M.C. Code § 10B-13(e) (a hearing panel "must apply state and County laws and all relevant caselaw to the facts of the dispute").

Ms. Huynh also bases her harassment claim on Mr. Motazedi's conduct toward her. Given Ms. Huynh's own active participation in unneighborly behavior, she is not in a position to complain. *Janelins v. Button*, 102 Md.App. 30, 38 (1994) (raising, without deciding, question whether parties' agreement to fight is a defense to suit for battery).

Additional reasons support this conclusion. "Harassment" is not included within the types of disputes over which the Commission has jurisdiction. M.C. Code § 10B-8(4) (defining "dispute"). Another Commission panel has held that the Commission has no jurisdiction over a claim of intentional infliction of emotional distress. *Glenn v. Park Bradford Condo.*, CCOC No. 29-11 (2012). And even if harassment were subject to adjudication by the Commission, Mr. Motazedi's conduct would be relevant only if authorized or ratified by the Board, since the Commission has no jurisdiction to resolve claims between individual unit owners. M.C. Code § 10B-8(4).

Complainants cite Respondent's payment of Mr. Motazedi's legal fees as evidence of Board authorization or ratification. But that payment was limited to his successful defense of Ms. Huynh's peace order petition and does not signal approval of the out-of-court conduct of which he stands accused. See *Global Indem. Co. v. Victill Corp.*, 208 Md. 573 (1956) (corporate employer not liable for assault that it did not authorize or ratify).

To the extent Complainants' claim Respondent interfered with their right to extend to family members and tenants the easements of enjoyment they have as owners, there was a complete failure of evidence. See Mr. Nolle's testimony (Tr. II at 114) that he was not impeded in any way in enjoying community facilities.

D. Fiduciary Duties

1. Annual Audits

The By-Laws do not *require* an annual audit, but provide only that at the close of each fiscal year, the books and records "*may* be audited by a certified public accountant or other person acceptable to the Board." By-Laws, Art. XV, Sec. 2 (emphasis added).

Although obtaining an audit is discretionary, the Board has committed to an audit for fiscal year 2014. The Panel will include that commitment in its Order and will require the Board to distribute the results of the audit to all Members. As to subsequent years, Respondent may determine, in the exercise of its discretion, whether to obtain an audit. For any fiscal year in which no audit is obtained, Respondent will be ordered to provide unaudited financial statements in reasonable detail to the Members.

2. Driveway Sealant

Md. Code, Corp. & Asso. § 2-405.1(a) requires a corporate director to perform his duties "(1) [i]n good faith; (2) [i]n a manner he reasonably believes to be in the best interests of the corporation; and (3) [w]ith the care that an ordinarily prudent person in a like position would use under similar circumstances." A director who acts according to these standards "has no liability by reason of being or having been a director." Md. Code, Cts. & Jud. Proc. § 5-417. The Panel concludes that Mr. O'Neill acted reasonably and in good faith in resolving an issue that could have cost Respondent additional time and effort or involved Respondent in a dispute with one of its contractors.

The Board's decision to reimburse Mr. O'Neill for the cost of the sealant is protected by the business judgment rule. *Black v. Fox Hills North Community Ass'n, Inc.*, 599 A.2d 1228, 1231 (Md. App. 1992); M.C. Code § 10B-8(4) (excluding from the

definition of "dispute" a "disagreement that only involves . . . the judgment or discretion of a governing body in taking or deciding not to take any legally authorized action").

Although Mr. O'Neill acted reasonably and in good faith, and although Respondent had the legal right to reimburse him, Mr. O'Neill acted without prior Board authorization. Such conduct could, in the future, create costly legal problems for Respondent, and the Panel urges Directors and officers to seek prior Board authorization before incurring expenses on Respondent's behalf.

3. Tree Pruning

Under Maryland law, the owner of a healthy tree is not liable for encroachment of tree branches or roots on a neighbor's property. It is up to the neighbor suffering the encroachment, if he wishes, to trim branches and roots to the property line. *Melnick v. C.S.X. Corp.*, 540 A.2d 1133, 1135 (Md. 1986). See *Buckhultz v. Maryland Midland Ry., Inc.*, 688 F. Supp. 1061, 1062 (D. Md. 1988).

In this case, Mr. O'Neill (acting on behalf of the Board) agreed to pay a portion of the cost for trimming a tree in Respondent's common area whose branches were encroaching on a Member's property. The Panel concludes that Mr. O'Neill acted in good faith and in what he perceived as Respondent's best interests. Further the amount at issue -- \$225 -- is modest. For those reasons, the Panel will not penalize Respondent. Respondent should however be mindful of Maryland law as described above, and of the warning about incurring expenses without authorization, when dealing with future issues of this nature.

4. Rees Broome Legal Fees

The Rees Broome firm is well regarded in the field of community association law, and it was reasonable for Respondent to engage that firm to draft revisions of Respondent's By-Laws. Respondent's action is therefore protected by the business judgment rule. Actual adoption of the revisions must be in accordance with the amendment provisions of the By-Laws.

As with other Board actions, the decision should have been made at an open meeting, with Members given an opportunity to raise questions or voice support or objections.

5. Motazedi Reimbursement

Md. Code, Corp. & Asso. § 2-418 permits a corporation to indemnify "any director

made a party to any proceeding by reason of service in that capacity” with limited exceptions not relevant here. Respondent’s Articles of Incorporation in turn requires Respondent to indemnify Directors “against any and all liabilities and expenses incurred in connection with their services in such capacities” to “the maximum extent permitted by Maryland law.” Art. X, Sec. 2.

Respondent reasonably believed that the peace order petition brought against Mr. Motazedí was directly related to his supporting Respondent’s position in the boarding house injunction litigation. Respondent therefore acted in accordance with Maryland law and its own governing documents in reimbursing Mr. Motazedí for legal fees.

Again, the decision should have been made at an open meeting.

6. Annapolis Lunch

Charging a \$72.83 lunch to Respondent may not reflect the best judgment, given the acrimony among the parties involved here, but the Panel will deny any relief to Complainants. *Echard v. Kraft*, 159 Md.App. 110, 120 (2004) (“The law does not concern itself with trifles”).

E. Use of Reserve Funds

Although the Maryland Homeowners Association Act contemplates that homeowners associations will budget for reserves and capital expenses, Md. Code, Real Prop. § 11B-112.2, it does not require that any particular amount be reserved, nor does it prohibit use of capital or reserves to cover operating expenses.

Respondent’s governing documents are more specific and restrictive. They require Respondent to

create and establish, in conjunction with the budget, and as a part thereof, a capital asset replacement fund, with annual appropriations thereto based on the replacement value of all Community Properties and facilities and their expected life. Such fund, including the interest earned thereon, shall not be used to finance annual operating and maintenance costs.

By-Laws, Art. VII, Sec. 2(e).

The evidence now before the Panel is insufficient to determine the current amount, if any, in Respondent’s capital asset replacement fund. Although the Panel has found that Respondent diverted some of those funds to cover legal expenses, the Panel is unable to quantify the amount of the diversion. For that reason, the Panel’s order will focus on future prophylactic measures rather than on past events.

F. Records Inspection

The Maryland Homeowners Association Act, Md. Code, Real Prop. § 11B-101, governs the availability of association records. Specifically, § 11B-112(b)(1) allows associations to impose a “reasonable charge” to “review or copy” books and records. Section 12(b)(2) limits the amount that may be charged for *copying* to the amount authorized under Title 7 Subtitle 2 of the Courts Article. But § 12(b)(2) does not further address charges for *reviewing*.

The Courts Article, Md. Code, Cts. & Jud. Proc. § 7-202(a)(1), in turn requires the State Court Administrator to determine the amount of all court costs and charges for the circuit courts (with approval of the Board of Public Works). According to the State Court Administrator’s website, “[a] clerk shall collect a fee of 50 cents per page for each copy that the clerk makes.” <http://www.courts.state.md.us/circuit/feeschedule.htm> (last visited Jan. 5, 2015).

In this case, Respondent sought to charge Complainants \$700 simply for examining records. Respondent’s justification was that a room would have to be rented in which to conduct the examination (Respondent does not own any buildings) and two individuals would have to be hired to monitor the process to assure the security of the documents. Tr. II at 11-12; CX1 at 47. Later, however, Respondent produced electronic copies of all available books and records without charge.

One possible reading of Md. Code, Real Prop. § 11B-112(b)(1) is that whereas *copying* charges are specifically limited to 50 cents per page, charges for *reviewing* books and records need only be reasonable. That was the reading given to an identical provision in the Maryland Condominium Act (Md. Code, Real Prop., § 11-116(b)), in *Saunders v. Greencastle Manor Two Condo. Ass’n*, CCOC No. 03-12 (2013).

In the Panel’s view, Complainants’ request for documents is moot, since all documents available to Respondent have been produced. To the extent requested documents have not been produced, there is no evidence that such documents actually exist and are available to Respondent. In short, any failure of production is not due to willful withholding, but due to the change from professional management to self-management and to disarray in Respondent’s record-keeping procedures.

Given the conclusion that Complainant’s request for documents is moot, the Panel need not reach the question whether a \$700 charge (or any charge) for reviewing or inspecting books and records is permitted.

G. Use-In-Common Driveways

Respondent's governing documents define "use-in-common driveways" as driveways serving two or more lots. Second Suppl. Decl. (CX1 at 137). In the Panel's view, there is no ambiguity in this definition: each of the 16 Members who shares a driveway with one or more other Members, and who is being charged extra for maintenance of those driveways, is entitled to have his or her driveway maintained by Respondent.

The Panel concludes that Complainants have not produced evidence of alleged favoritism toward Directors regarding Respondent's maintenance or failure to maintain use-in-common driveways. The Panel also concludes, however, that Respondent has failed to maintain at least some of the 16 use-in-common driveways and the Panel will order Respondent to do so.

IV. ORDER

Accordingly, it is by the Panel, this 29th day of January, 2015, ORDERED as follows:

1. Of the four directors elected in August 2014, Messrs. Robinson and O'Neill will be deemed to have been elected to three-year terms and Ms. Gopstein and Mr. Motazedi will be deemed to have been elected to two-year terms. Mr. Thompson's term will expire at the annual meeting of Members held in 2015 in accordance with this Order. Thereafter, each Director will be elected to a three-year term.
2. Respondent must hold at least one meeting of Members each year to elect a Director to replace each Director whose term is expiring. In conducting elections, Respondent must comply in all material respects with the provisions of Respondent's governing documents prescribing nomination and election procedures.
3. Promptly following issuance of this Order, the Board must fix a date for the 2015 annual meeting of Members, such date to be no later than August 30, 2015, and the Board must provide written notice of such meeting to all Members. Subsequent annual meetings of the Members must be held at approximately 12-month intervals thereafter.
4. Respondent's Board of Directors must hold at least four regular meetings in each 12-month period. The first such meeting must be held immediately following, and at the same location as, the annual meeting of Members. During the first such meeting, the Board must appoint officers for one-year terms; fix dates for each of the three remaining quarterly meetings; and designate a time and place for each of those three meetings.

5. The Board must distribute copies of its meeting schedule to the Members promptly following the Board's first meeting. The Board must give reasonable advance notice to the Members of any change in a meeting date, time or place.

6. All meetings of the Board must be open to all Members unless the meeting is closed in accordance with Md. Code, Real Prop. § 11B-111. The Board must not hold meetings or conduct business via telephone or email.

7. The Board must distribute to Members copies of a proposed agenda for each Board meeting reasonably in advance of the meeting.

8. The Board must cause written minutes to be prepared fairly reflecting the business conducted at all meetings of the Members and the Board. The Board must maintain a minute book containing original, signed minutes of each meeting.

9. At least 60 days prior to the beginning of each fiscal year, the Board must prepare a proposed budget for such fiscal year and distribute copies of the proposed budget to the Members. At least 30 days prior to the beginning of each fiscal year, the Board must adopt a budget at an open meeting of the Board. The budget must contain at least the items listed in Md. Code, Real Prop. § 11B-112.2.

10. The Board must obtain an audit of Respondent's books and records for fiscal year 2014 (January 1 – December 31, 2014) by a certified public accountant or other person acceptable to the Board as soon as practical following the date of this Order. The Board must distribute copies of the audit report to the Members promptly following receipt of the audit report.

11. For any fiscal year in which no audit is obtained, the Board must prepare unaudited financial statements promptly following the close of said fiscal year and distribute copies thereof to the Members. The financial statements must be in reasonable detail and must include a comparison of actual revenues and expenses with budgeted revenues and expenses.

12. The Board must create and maintain a capital asset replacement fund, designated as such, with annual appropriations thereto based on the replacement value of all-property owned or maintained by Respondent. Such fund, including income earned thereon, must not be used to finance annual operating and maintenance costs.

Withdrawals from the fund may be made only upon a vote of the Directors at an open meeting of the Board or upon a vote of the Members at a meeting of the Members.

13. At its next quarterly meeting, the Board must authorize its officers to investigate, and report back to the Board on, the need for and cost of a reserve study to determine the amount of the annual appropriations to replace all property owned or maintained by Respondent.

14. Respondent must maintain all five use-in-common driveways serving a total of 16 Members for the full length thereof and including the turn-around at the terminus thereof, such maintenance to include, but not be limited to, removal of snow and ice, mowing of grass shoulder and the roadway surface.

15. Complainants' request for payment of their filing fees is DENIED.

16. All parties' requests for payment of attorney's fees are DENIED.

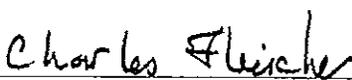
17. All other relief requested in the complaints is DENIED.

18. Respondent must distribute copies of this Order to all Members within 30 days after issuance of this Order.

19. Nothing in this Order precludes Respondent from amending its governing documents in accordance with the provisions of those documents and applicable law. In the event a properly adopted amendment is in conflict with this Order, the amendment will govern.

Panel members Aimee Winegar and Elayne Kabakoff concur in this Decision and Order.

This is a final Order intended to dispose of all issues in these consolidated cases. 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.



Charles H. Fleischer, Panel Chair

APPENDIX A

	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
Ashcraft	Elected May 2008 to 3-yr term			Appointed to fill 4-yr term		Term expired Apr 2013			Term expires Aug 2016*	
Gopstein							Elected Aug 2014 to 3-yr term		Term expires Aug 2016*	
Mahafar			Elected Apr 2010 to 3-yr term		Resigned Feb 2012					
McCarthy					Elected Mar 2012 to 3-yr term	Resigned Aug 2013				
Morozzi			Elected Apr 2010 to 3-yr term			Term expires Apr 2015	Elected Aug 2014 to 3-yr term		Term expires Aug 2016*	
O'Neill	Elected May 2008 to 3-yr term			Term expired May 2011		Appointed to fill McCarthy term	Elected Aug 2014 to 3-yr term			Term expires Aug 2017
Robinson							Elected Aug 2014 to 3-yr term			Term expires Aug 2017
Thompson								Term expires Mar 2015		
Yang			Elected Apr 2010 to 3-yr term	Resigned				Term expires Mar 2015		

* The Panel is ordering that these Directors' terms expire in two years in order to re-establish staggered terms of Directors.

