



Case No. 707-O raises issues primarily concerning a special meeting, the validity of a 2004 election and the request for production of books and records. Case No. 725-O focused primarily on utilization of reserve funds, authorized repairs, budgets, alleged accounting errors and alleged improper conversion of a part of the Common Elements.

The Association is represented by Julie Dymowski of the law firm of Whiteford, Taylor & Preston, LLP.

This case was heard on four separate evenings by the Panel. The Panel reflects in this opinion that they were troubled by the Complainant's lengthy, repetitive accusations, expansive testimony, and difficulty with formulating questions and correlating evidence in support of the issues in the complaint. The panel believes the voluminous record supports the repetitive testimony and unnecessary escalation of issues raised that took up so much time and resources. The amount of time expended to address these important issues was well beyond excessive as the Chair's own time records reflect over seventy-five (75) hours devoted to this case.

The Panel was also troubled by the demeanor of many of the Board of Directors. Certain Board members displayed arrogance and rudeness toward Complainant in her efforts as a homeowner and Board member to acquire information related to the issues stated in the complaint. This continued through the course of the hearing and was apparent by the demeanor and interaction of the witnesses. Communications from the Board of Directors to the Complainant were often rude, evasive, and contradictory. The record also supports a pattern of exclusion when Complainant served as a member of the Board of Directors. This clearly added to the escalation of the case.

There is a diminished credibility of the Board of Directors by their handling of this matter. Despite their acknowledgement of errors, there continues to be careless handling of procedures by the Board of Directors and the management agent. For example, the Board's use of a website to communicate with unit owners was selective and unreliable, resulting in misunderstandings of Board actions. But there is also diminished credibility of the Complainant as a result of many of her misstatements, which were a significant portion of her arguments in this matter and which have a direct effect on the Panel in weighing the parties' credibility.

In her complaints, the Complainant alleges numerous violations by the Association. Although the documentation was enormous and the testimony repetitive, there was very little actual factual evidence in dispute. A more serious problem was the lack of trust and communication, and the dysfunctional behavior of the parties that added to the problem. There were disturbing ignorance of proper procedures and/or errors acknowledged by the Board of Directors and their management agent.<sup>1</sup> The dispute has been pending since early 2004 and has unfortunately continued and remains a decisive issue before the community.

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<sup>1</sup> Hearing at pg. 12 of the June 9<sup>th</sup> hearing.

Example

## II. ISSUES

The Complainant raised a myriad of issues which are addressed below. There were numerous other outstanding broad allegations for which there was no evidence to prove those issues.

In an effort to articulate the real legal issues in this case, the Panel has broken down and restated the issues within each of the cases by issue and addresses those in order.

a. Case No. 707-O

1. (Special Meeting) Did the Complainant give proper notice to the Board of Directors of a request for a special meeting in accordance with the applicable law?<sup>2</sup> Was the Association legally obligated to call a special meeting based upon the documentation and evidence before the Commission?

2. (Validity of Election) Was the June 23, 2004 election valid or was it invalidated by certain acts alleged by the Complainant?

3. (Books and Records) Was there a failure to provide certain documents as requested by the Complainant and was this failure a violation of applicable law?

b. Case No. 725-O

1. (Conversion of Common Element Space) Can the General Common Elements be converted to Limited Common Elements? Did the Board of Directors act with reasonable business judgment when considering alternatives for use of a general common element that was being used for storage?

2. (Financial) Was the Board of Directors or its management agent negligent in the handling of the reserve funds or other finances? Was the Association's action

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Q. And pertaining to the election. Are you aware that the Maryland Condominium Act, paragraph 1110913 (Sic – really should be 11-109) its on page 22, requires a time line for election in condominiums.

A. Yes.

Q. And why didn't you comply with the requirements of the time line?

A. At the time I thought we were complying. Obviously we didn't, and that was totally unintentional.

<sup>2</sup> Interestingly enough, the sole purpose of the petition in question provided on page 36 of Commission Ex. 1, was to discuss the use of the common elements. Although the Board took some preliminary actions on this particular issue, it never made a final decision on it (nor did it have to) and this is discussed in detail as Issue 1 in Case #725-0.

concerning handling of the reserve funds or other finances appropriate and proper? Was the Board of Directors guilty of embezzlement or fraud?

### **III. SUMMARY OF WITNESSES AND EXHIBITS**

The Summary of Witnesses and Exhibits were significant. These exhibits were identified and introduced into the record as follows:

Commission Exhibit 1 – Red Volume I prepared by OCOC staff.

Commission Exhibit 2 – Red Volume II prepared by OCOC staff.

Commission Exhibit 3 – Red Volume III prepared by OCOC staff.

Commission Exhibit 4 – Red Volume IV prepared by OCOC staff.

Commission Exhibit 5 – Red Volume V prepared by OCOC staff.

Commission Exhibit 6 – This document was created by Panel Chair as a result of documents that were provided by Complainant to the Panel at the November 1 hearing of items which may or may not have been forwarded to OCOC.

#### Other Exhibits.

Exhibit 1 – Certified letter returned (not opened);

Exhibit 2 – Copy of check from Complainant to Rock Creek for \$10.00;

Exhibit 3 – Chart of Events before Election;

Exhibit 4 – Copies of certified mail to Josh Winston that was not picked up;

Exhibit 5 – Phases of the election process (chart);

Exhibit 6 – List of Complainants 13 attempts to inspect the Insurance Policy for 2004;

Exhibit 7 – List of Complainants 51 attempts to inspect the association records;

Exhibit 8 – E-mail Thursday, May 13, 2004;

Exhibit 9 – Subpoena for 5 people, Ann Spudis, David Burka, Josh Winston, Jack Spadero and Deborah Herman;

Exhibit 10 – E-mail from Ann Spudis, Saturday, May 1, 2004;

- Exhibit 11 – June 15,2004 letter to Complainant from Joshua Winston;
- Exhibit 12 – E-mail from Tom Carrington to Complainant, May 26, 2004.
- Exhibit 13A – 13E – Unopened Certified letters;
- Exhibit 14 – Election results;
- Exhibit 15 – February 22, 2005;
- Exhibit 16 – Package in manila file submitted by Complainant received at Hearing on June 9, 2005;
- Exhibit 17 – Pictures of work being done as alleged by Exhibit 16;
- Exhibit 18 – 2003 Financial Statement prepared by Deborah L. Herman; and
- Exhibit 19 – 2004 Financial Statement prepared by Deborah L. Herman.

Witnesses

1. Ingeborg Conradt – (Opening Statement and Testimony in Case #707, Transcript of May 3, 2005 at pp. 12-75; Opening statement on Case No.: 725-O, Pg. 12 – Pg. 16; Direct Pg. 17 – Pg 54).
2. Ann Spudis (Vol. 1 – Pg 78-95)
3. Joshua Winston (Vol. 1 – Pg 95 – 133) (Vol. 2 – Pg. 34 – 45)
4. Jack Spadero (Vol. 3 – Pg 10 – 18)
5. Brian Marchionini (Vol. 3 – Pg 18 – 37 and Pg 81 – 88)
6. Lourdes Grindal Miller (Vol. 3 – Pg. 89 – 92)
7. David Burka (Vol. 2 - Pg. 11 – 24 and Pg. 46 - 64)
8. Gresham Fulgham – Testimony provided on November 1, 2005.<sup>3</sup>
9. Deborah Herman, CPA (Association Auditor) – Testimony provided on November 1, 2005.

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<sup>3</sup> The transcript of the final hearing was never provided to the Panel although Complainant ordered a copy and attempted to include this cost of \$307.00 as an expense for reimbursement. She also included the earlier transcript expenses that exceeded \$1,000.00.

#### IV. FINDINGS OF FACT

At the onset, the panel would note that the Complainant was given numerous opportunities to call other witnesses including calling or subpoenaing other Unit Owners as witnesses who could corroborate or confirm the action of the Board of Directors and other activities in these complaints. Despite an initial listing of witnesses that included other individual unit owners, not a single other unit owner was called; and the lack of corroboration of the Complainant's serious allegations raises serious doubts as to the validity of her long ongoing list of complaints. It would be logical that if the concerns raised by Complainant had merit as she alleged, that at least one other unit owner would be brought before the Commission to support and/or corroborate any of the numerous shotgun allegations in the entire case.

a. Case No. 707-O

1. (Special Meeting) Complainant never testified that she sent a letter requesting a special meeting by regular mail or hand delivery. Rather this letter was sent by certified mail to Mr. Winston, president of the Board of Directors, which he testified was never picked up. Complainant had numerous opportunities to either hand deliver her letter requesting a special meeting to the President and/or advise the Board of Directors, in various meetings she had with them, of her desire to hold a special meeting. Instead, she decided to remain silent, relying on a certified mailing that was never picked up, as evidenced by the fact that Complainant never received a signed green card certifying that her letter had been received.<sup>4</sup> Despite the failure to receive the signed certified mailing or other response, Complainant unilaterally called a special meeting using condominium stationary which intentionally created inaccurate information which created unnecessary and inappropriate confusion throughout the Community. The Complainant's efforts went to the extent of unilaterally preparing a detailed agenda (pg. 138 – of Commission Exhibit 1) without any discussion, knowledge or consultation with the remainder of the Board. The reason for the Association not calling the meeting was misunderstood by the Complainant.

2. (Validity of Election) The facts do not warrant invalidation of the 2004 Board of Director election. The responsibilities of the Secretary for handling elections defined in Article VI, Section 6 of the Bylaws, were delegated to the management agent. Inconsistent procedures and the failure to comply with certain requirements for handling proxies and ballots resulted in Complainant's apparent confusion and mistrust of the results. However, her complaints are moot as there was a subsequent election in 2005.

3. (Books and Records) The Complainant submitted requests for documents to the Board of Directors and other agents. Some of the requested documents were provided promptly, but the many of the responses to requests were delayed, displayed a reluctance to comply, and were subject to arbitrary requirements. However, Complainant was eventually provided copies of all requested documents with the exception of the 2004 insurance policy which the Respondent did not have in its possession.

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<sup>4</sup> The Complainant had numerous opportunities to hand deliver the petition but never complied with the delivery requirement as even a back up method, but rather relied totally on a never picked up certified mail, which falls below the required notice.

b. Case No.: 725-O

1. (Conversion of Common Element Space) The Complainant's allegation that the Board of Directors authorized work that required unit owner approval is without merit and not substantiated by the evidence. The inconsistent process for soliciting bids and approving contracts by the Board of Directors contributed to perceived irregularities and confusion about the work as repairs or improvements.

The Complainant's allegation that the Board of Directors intended to approve the build-out/conversion of the basement spaces that are designated common elements was premature and inconsistent with the evidence. The evidence suggests an interest by the Board of Directors to consider looking into the process of transferring a small portion of the common element spaces to become part of a Unit, but no formal approval to undertake such actions was ever given. The transfer plan was proposed to the Board of Directors by Mr. Marchionini, a unit owner. The initiative by Mr. Marchionini to commission a plan for the construction of these spaces was incorrectly construed by Complainant as the equivalent of the Board's approval for the project. This was far from the actual events. The Board of Directors' decision to consider the sale of what appears to be common area space requires open discussion with owners as the law and the Maryland Condominium Act impose strict restrictions of the disposition of common elements. The Board correctly obtained an opinion from Counsel, who advised the Board of what were the necessary actions for the conversion of the common elements. The Complainant mistakenly construed the initiative taken by a member of the Board of Directors to commission a plan for the conversion of these common element spaces and to request additional information as approval for the project. However, Unit Owner approval is not required for the preliminary steps taken.

2. (Financials) The Complainant's allegation of mismanagement of funds and fraud were not supported by the facts. Testimony from a qualified independent auditor revealed no discrepancies. However, the irregular distribution of all financial documents by the Management Agent to all Board members and a limited understanding of general accounting practices contributed to a misunderstanding of financial reports and disbursement of funds by the Complainant. Respondent's failure to comply with accurate recording of reserve funds as established in the Bylaws also resulted in suspicion of unaccounted funds but was explained through both the testimony of the property manager and professional auditor.

**V. CONCLUSION OF LAW AND DISCUSSION**

a. Burden of Proof

As the moving party, the Complainant has the burden of proof. The burden of proof requires that the moving party present and prove each and every element of its case by a preponderance of evidence. With the exception of those minor violations acknowledged by the Association, the Complainant failed to meet this burden on any of the remaining contested issues.

b. Case No. 707-O

1. (Special Meeting) Article IV, Section 3 of the Bylaws for the Association provides a process in order which a special meeting may be called. “It shall be the duty of the President to call a special meeting of the unit owners as directed by resolution of the Board of Directors or upon a petition signed by unit owners representing at least twenty-five percent of the total votes of the unit owners, having been presented to the Secretary.” In this case, the Secretary was the Complainant and she never “presented” any petition to the Board of Directors. Her unilaterally calling of a Special Meeting and using the Association’s stationery was poor judgment and made a bad situation worse. As stated above, her options to call such a special meeting were numerous, but she did not want to communicate in any fashion despite many other options.

2. (Election) The Maryland Condominium Act (“Act”), the Montgomery County Code and the Association’s Bylaws require certain procedures for an election and require the notice of the annual meeting be sent within a designated period. The Act requires 10-90 days (Section 11-109 (c)(4)) and the Bylaws require 15-90 days (Article IV, Section 3). In the case at bar the notice of the annual meeting was sent on May 28, 2001, for an annual meeting that was to be held on June 23, 2001. However, the ballot was deficient in its compliance with the requirements of Chapter 10B of the Montgomery County Code. The evidence showed that the Association acknowledged the error. Moreover, there was no showing of damage to the Complainant as a result of the error. Finally, there was a valid election in 2005 and the events leading up to the 2004 election are thus moot.

3. (Books and Records) Section 11-116 of the Act provides that books and records “shall be maintained in Maryland or within 50 miles of its borders and shall be available at some place designated by the council of unit owners within the county where the condominium is located for examination and copying by any unit owner, his mortgagee, and their respective duly authorized agents or attorneys, during normal business hours, and after reasonable notice”. The evidence was clear that although the Respondents made it very difficult to obtain these documents, they were ultimately provided to the Complainant.

## VI. SANCTIONS

This is the most difficult portion of the decision, as both Parties must bear responsibility for these proceedings and the burdensome and lengthy hearings. The Panel struggled with the clean hands doctrine in light of the fact that both the Board of Directors and Complainant seemed to do as much as possible to annoy the other and both have violated the clean hand doctrine.

The Panel believes that the Board of Directors must comply with the applicable law and hold elections and other actions consistent with the law. This would include but not be limited to

complying with the reserve funds requirements pursuant to Article VIII, Section 4 of the Bylaws, holding proper elections and otherwise operating in accordance with all applicable laws.

The Panel strongly suggests that the Board of Directors and Complainant arrange for some related educational orientation or counseling to assist in improving their communication skills and understanding their role as a Board of Directors, such as enrolling in the ABC course offered by the Community Association. Institute (“CAI”).

After the evidence was closed, both parties submitted requests to be reimbursed for various costs and fees that were allegedly incurred by each party. There was no evidence or testimony to support these claims and the authority required under the Montgomery County Code was not met by either party. Additionally, there were a number of expenses submitted by Complainant that would not qualify under any circumstances and the request for reimbursement is denied. The fact that the Complainant submitted fees to an accountant, but did not produce any testimony from any of these individuals only raises additional doubt as to her claims. The reimbursement for her copies of transcripts is also suspect. The Panel understands that the Complainant made a conscious decision to handle this case pro se, but assistance by counsel would have been of great assistance to everyone. In a correspondence to the Panel Chair dated July 16, 2005, Complainant indicated she wanted to consult a lawyer, but she did not hire one to assist her in this matter.

The Panel has devoted significant time to this case and in an effort to be fair and to get the message to the parties has determined that each party is at fault and if permitted would require both parties to make payments to a local charity.

## **VII. LAW**

To discuss all of the applicable law that would apply in this case would require significantly more effort by the Panel. The Panel does recognize that the actions by any Board of Directors are subject to the “business judgment” rule as articulated by the Maryland Court of Special Appeals in the case of Black v. Fox Hills North Community Association, Inc. 90 Md.App. 75, 599 A.2<sup>d</sup> 1228 (1991). In that case the Court of Special Appeals held that the business judgment rule precludes judicial review of legitimate business decisions of private organizations, absent fraud or bad faith. The Complainant did not prove any fraud and there was no bad faith to the decisions made here.

## **VIII. COMPLAINANT REQUESTS**

All of the Complainant’s issues are addressed throughout this opinion, yet the Complainant makes a handful of specific requests, the majority of which are out of the power of this Panel and are not justified or warranted by the evidence presented. However, in an effort to properly respond to each of these requests the Panel has answered her specific requests as follows:

- “I request that the election of June 22, 2005, be invalidated. Also, I request that the Commission order our Association to have its next election carried out and supervised by the League of Women Voters at the cost of the Association.” – NO/MOOT
- “5% of unit owners had requested a Special Audit. It was put on hold till the end of the year. I hereby request that a thorough Special Audit be performed by a reputable auditing company, named by the Commission, and that I will be allowed to be involved in a pre-audit conference and throughout the process of the audit itself.” – NO. (The Panel is still unclear as to what a Special Audit is and the lack of professional testimony to determine what a Special Audit made this request impossible to be carried out). Additionally, the Complainant’s desire to “be allowed to be involved in a pre-audit conference and throughout the process of the audit itself” would be most inappropriate.
- “I request that Delbe Real Estate Company and all board members be ordered to fully cooperate with the auditors”. – NO the Commission does not have this power, but Delbe Real Estate Company and Board members must cooperate with auditors as chosen by the Board of Directors.
- “Also, according to the Maryland Condominium Act § 11-116(c) all books and records of the Association should be available within the county where the condominium is located for examination and copying<sup>5</sup>; however, all of our books and records are kept in Washington, D.C. I hereby request that arrangements be made to fulfill the requirements of the Act”. – NO/MOOT
- “Mr. Burka and Mr. Winston, should not be allowed to hold an office in any Community Association again or should not be allowed to manage one.”. NO
- “Please, take steps to protect our Association from these two men.” – NO
- “Either order that a Special Audit be performed by the CPA of a trustworthy Accounting Firm at the cost of Delbe Real Estate, or hand the consolidated Case over to the District Attorney for investigation.” – NO.
- “Write a letter to all our unit owners informing them about your decision in order to restore my good reputation.” – NO, but the Panel has determined that a copy of this Opinion shall be sent to each owner with a cover letter approved by the Panel.
- “Because they acted in bad faith, Mr. Burka and Mr. Winston must reimburse our Association for all their legal expenses.” – NO.
- “They must also reimburse me for all of my expenses incurred in bringing this Case to the Commission. My expenses amount to over \$3,000.00. I will submit a specified list of my expenses to the Commission within this week.” NO.

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<sup>5</sup> The Complainant has misstated the law. Section 11-116 requires the “every record, including insurance policies, kept by the Council of Unit Owners shall be maintained in Maryland or within 50 miles of its borders.

## **X. CONCLUSION**

As previously articulated, the case was an unfortunate dispute between an unhappy unit owner and an arrogant Board of Directors. We find ourselves in a similar position to the Maryland Court of Special Appeals in the case of Campbell v. Lake Hallowell Homeowners Association, 157 Md. App. 504, 852 A.2<sup>d</sup> 1029, (2003), wherein the Court stated they were in the middle of what may be the litigation equivalent of road rage, and “the sheer ferocity with which they have been pursued, and the inconsequential nature of what has been sought offers us little hope that we are wrong in this assessment.” To this end, although the Board of Directors did not necessarily have “clean hands”, we find in favor of the Rock Creek Apartment Condominium Two, Inc. on each of every issues presented for our consideration.

Nonetheless, the Panel feels compelled to state, as emphatically as possible, that this dispute has been caused in significant part by the ignorance of both the Complainant and the Respondent Board of Directors of proper procedures for the management of a common ownership community. The Panel strongly recommends that both parties seek training from a qualified organization, and encourages the membership to support the use of Association funds for the training of its Board of Directors. The Panel also reminds the parties, and the members of the Association, that much useful information is freely available from the Commission’s own website at <http://www.montgomerycountymd.gov/ccoc>.

## **RULING ON MOTION FOR RECONSIDERATION**

After the Panel issued its original Decision and Order on February 3, 2006, the Complainant filed a motion on February 6, 2006, requesting that certain factual corrections be made. The Panel granted the motion, and after consideration of Respondent’s reply thereto, the Panel agreed to reissue this Decision and Order incorporating the changes it felt necessary. This Decision and Order replaces and supersedes the February 3, 2006 Decision and Order.

## **ORDER**

Based on the foregoing Findings of Fact and Conclusions of Law, it is this 22nd day of February, 2006, by the Montgomery County Commission on Common Ownership Communities:

ORDERED, that the relief requested by the Complainant be, and the same hereby is, DENIED; and it is further

ORDERED, that the Respondent shall send a copy of this Decision and Order to every unit owner within 60 days from the date of this decision, together with a cover letter which it shall submit for approval to the Panel, said cover letter to be submitted within 30 days from the date of this Decision and Order; and it is further

ORDERED, that the Respondent shall establish and publish clear procedures for holding elections, voting in elections and all actions and decisions undertaken by the Board of Directors in behalf of the community; and it is further

ORDERED, that the Board of Directors shall require its Management agent to regularly provide statements pertaining to finances and disbursement of funds to the Board of Directors, and the Board of Directors shall maintain up-to-date statements of the Association's finances and expenditures.

Any party aggrieved by this action of the Commission may file an administrative appeal with the Circuit Court of Montgomery County, Maryland, within thirty (30) days from the date of this Decision and Order, pursuant to the Maryland Rules of Procedure governing administrative appeals.

Commissioners Jeffrey Kivitz and Antoinette Negro concur in this decision.

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Jeffrey Van Grack, Panel Chair