

MONTGOMERY COUNTY, STATE OF MARYLAND

CHARLES BRUNO

Complainant,

v.

POTOWMACK PRESERVE, INC.,

Respondent.

: COMMISSION ON COMMON
: OWNERSHIP COMMUNITIES

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: Case No. 30-12

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: Hearing date: November 1, 2012

: Record close date: November 30, 2012

: Decision Issued: August 2, 2013;

: and amended August 6, 2013

: (Panel: Burgess, Dubin, and Kabakoff)

Memorandum Decision and Order By: Ursula Koenig Burgess

AMENDED MEMORANDUM DECISION AND ORDER

On November 1, 2012, this case came before a Hearing Panel of the Commission on Common Ownership Communities for Montgomery County, Maryland (“Commission”) for a hearing pursuant to Chapter 10B of the Montgomery County Code 2004, as amended. The duly appointed Hearing Panel has considered the testimony, evidence and arguments presented and does hereby find, determine and order as follows:

BACKGROUND

On or about May 2, 2012, the Complainant, CHARLES BRUNO (“Mr. Bruno”) filed this Complaint with the Commission alleging that the Respondent, POTOWMACK PRESERVE, INC. (“Association”) was in violation of the Association’s governing documents for adopting assessments arbitrarily and unreasonably and also for failing to

give adequate notice of a meeting, properly conduct a meeting, maintain or audit books and records, and properly adopt a budget or rule (Record (“R.”) at 1-2).

On May 24, 2012 the Association, by counsel, filed a motion to dismiss the complaint (R. at 44-47) and Mr. Bruno filed a response shortly thereafter. (R. at 48-51). The parties declined mediation and on July 5, 2012, the Commission accepted jurisdiction of the case specifically over whether the Association:

- adopted assessments arbitrarily and unreasonably;
- failed to properly adopt a budget;
- failed to give proper advance notice of its budgets and meetings;
- failed to conduct audits; and
- failed to conduct open meetings. (R. at 72).

The Association did not file any additional pleadings in the case prior to the hearing, so the Motion to Dismiss has been treated as the Association’s answer.

At the hearing, the parties presented exhibits, witnesses and testimony to support their respective positions.

MOTION TO DISMISS

The Panel denied the Association’s Motion to Dismiss at the beginning of the hearing. The Association renewed its Motion to Dismiss at the end of Mr. Bruno’s case, arguing that Mr. Bruno’s requested relief did not fall within the purview of the Commission’s authority and the relief he requested at the hearing was not requested in the initial complaint. The Panel denied the Motion to Dismiss again, finding that Mr. Bruno’s amended request for relief at the hearing did not justify a dismissal of the

complaint since the Panel has the authority to order such relief as the Panel deems appropriate.

FINDINGS OF FACT

1. Potowmack Preserve, Inc. is an incorporated Maryland homeowners association within the meaning of the Maryland Homeowners Association Act, Md. Code Ann., §§ 11B-101 to 11B-117, and the Association is located in Montgomery County, Maryland.

2. Mr. Bruno owns a single family home located within the community governed by the Association.

3. The Association has governing documents which include Articles of Incorporation (R. at 11-16), a Declaration (R. at 29-41), and Bylaws (R. at 17-28).

4. Article V, Section 2 of the Association's Declaration states (R. at 33):

Purpose of Assessment. The assessments levied by the Association shall be used exclusively for the purpose of promoting the recreation, scenic enjoyment and welfare of the residents on the Property and in particular for the improvement and maintenance of the properties, services and facilities devoted to this purpose and related to the use and enjoyment of the Common Areas and Community Facilities and, to the extent herein provided, of the Dwellings situated upon the Property, including, but not limited to, the payment of taxes and insurance therefor and, repair, replacement, and additions thereto, and for the cost of labor, equipment, and materials, management and supervision thereof.

5. Mr. Bruno contends that the Board has not properly assessed the members by doing an analysis of the anticipated expenses and what amount of money should be in the Association's reserve fund.¹

6. Section 11B-112.2(c) of the Maryland Homeowners Association Act states the following:

The annual budget shall provide information on or expenditures for at least the following items:

- (1) Income;
- (2) Administration;
- (3) Maintenance;
- (4) Utilities;
- (5) General Expenses;
- (6) Reserves; and
- (7) Capital Expenses.

7. Mr. Peter Gibson, a member of the Association's Board of Directors, testified that the prior Treasurer issued very simple reports and budgets that did not have a lot of information, including information as required by the statute, but that the current Treasurer has issued more detailed reports as reflected in Respondents Exhibit #1.

8. Mr. Gibson also testified that the Treasurers over the years have had differing opinions on how much money the Association needed to have in reserve. Prior Treasurers have thought that one year's worth of expenses was adequate while others have believed that three year's worth of expenses should be held in reserves.

Respondent's Exhibit 1 included an explanation of how the figures for budgets were

¹ The Commission declined to accept jurisdiction to determine if the Association was in violation of its governing documents or Maryland law for failing to conduct a reserve study since there is no requirement by law or under the governing documents that a reserve study be performed.

computed for the expenses, largely to pay the expenditures for common area trees, which has been for as little as \$900.00 (2009) and for as much as \$8950 (2010).

9. Article IV, Section 4 of the Bylaws states: (R. at 19).

Notice of Meetings. At least ten (10) but not more than sixty (60) days prior to each Annual or Special Meeting of the members of the Corporation, it shall be the duty of the Secretary to send notice thereof by ordinary mail, postage prepaid, to each Member at his address as it appears on the books of the Corporation. Such notice shall set forth a time, place and purpose of the meeting. Notice may also be accomplished by delivery of the same to the member at his residence.

10. Mr. Bruno contends that notice of meetings of the membership has not been sent in compliance with this provision.

11. Mr. Gibson testified that notice of membership meetings were hand-delivered to individual mailboxes, but that he wasn't sure if that was done at least thirty (30) days in advance of the meeting. He testified that he did not know that the Association's governing documents and Maryland law had specific requirements for how owners were to be notified about membership meetings, but assured the Hearing Panel that the notices would be sent in compliance in the future.

12. Section 11B-11 of the Real Property Article of the Maryland Code states, in pertinent part:

Except as provided in this title, and notwithstanding anything contained in any of the documents of the homeowners association:

(1) Subject to the provisions of paragraph (4) of this section, all meetings of the homeowners association, including meetings of the board of directors or other governing body of the homeowners association or a

committee of the homeowners association, shall be open to all members of the homeowners association or their agents;

(2) All members of the homeowners association shall be given reasonable notice of all regularly scheduled open meetings of the homeowners association;

13. Mr. Bruno contends that notice of all Board meeting has not been provided to the owners. He provided the Hearing Panel with a list of meeting dates that were announced on the listserv (R. at 57) and testified that there were other Board meetings held which were not announced. Since his wife was a member of the Board of Directors, he had personal knowledge of these other meetings.

14. In addition, Mr. Bruno presented evidence of email threads showing that Board members were conducting business. (See Complainant's Exhibit #). In at least one of those threads, a Board member indicated that the topic would be better discussed at the regular Board meeting. Article VI, Section 6 of the Bylaws states:

Any action by the Board of Directors required or permitted to be taken at any meeting may be taken without a meeting if all of the members of the Board shall individually or collectively consent in writing to such action. Such written consent or consents shall be filed with the minutes or the proceedings of the Board. (R. at 24)

15. Mr. Gibson testified that members are notified of Board meetings pursuant to an electronic listserv and that no other notification was sent, so if owners did not have email addresses on record with the Association, they received no notice at all. He testified that the Board has met 4 or 5 times each year since 2010, but when confronted with the list of dates that were on the listserv (R. at 57) which show that only one Board

meeting per year was announced, Mr. Gibson testified that he could not confirm that members received notice of all Board meetings.

16. Section 11B-112.2 of the Real Property Article of the Maryland Code states, in pertinent part:

(b)(1) The board of directors or other governing body of the homeowners association shall cause to be prepared and submitted to the lot owners an annual proposed budget at least 30 days before its adoption.

(d)(2)(i). Notice of the meeting at which a proposed budget will be considered shall be sent to each lot owner.

(ii). Notice under subparagraph (i) of this paragraph may be sent by electronic transmission, by posting on the homeowner association's home page, or by including the notice in the homeowner association's newsletter.

17. Mr. Bruno contends, and Mr. Gibson freely admitted at the hearing, that budgets have not been sent out to owners 30 days in advance of the Board meeting where the budget was being considered. Mr. Gibson advised the Hearing Panel that the proposed budget is available to owners who attend the meeting.

18. Article VIII, Section 3 of the Bylaws states (R. at 26):

Audit. At the close of each fiscal year the books and records of the Corporation may be audited by a 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. Based upon such report, the Corporation shall furnish its Members with an annual financial statement, including the income and disbursements [sic] Directors the Corporation.

19. Mr. Bruno contends that an audit should be done and no audits have ever been done, to his knowledge.

20. The Association argued at the hearing and in its Motion to Dismiss that no audit was required to be done and that the Board had made a “business decision” to not obtain one. (R. at 46). Notably, Mr. Gibson did admit at the hearing that “it looks like [the Association] needs it.”

CONCLUSION OF LAW

As a threshold matter, the panel finds that the Commission has jurisdiction to hear this dispute under Section 10B-8(4)(B)(i)-(v) of the Montgomery County Code.

The Hearing Panel finds, as a matter of law, that the Association has violated its governing documents in numerous areas over the years, including repeated failures to send notice of Association and Board meetings, by conducting Board business outside of a meeting without the unanimous consent of all Board members, and by failure to follow the proper procedures to adopt a budget.

While the Association asserted at the hearing that although the Board failed to comply with all of the requirements in the governing documents, its actions were not done maliciously; rather, it was a function of it being a small community association with a very small budget. The Hearing Panel was extremely troubled with the Board's failures, particularly since the Association specifically agreed to properly notify members of meetings as a result of mediation in 2008. (See R. at 56). While the Hearing Panel understands the financial restraints that smaller community associations endure, the governing documents creating the Association were drafted with the size of the community association in mind. The Hearing Panel found that the Association's Board of

Directors has engaged in long-standing behavior showing a complete lack of interest or understanding of the governing documents or Maryland law governing community associations. Accordingly, the Hearing Panel has two goals with this order. The first is to correct the erroneous actions taken by the Board of Directors and second, to ensure that the Board of Directors learns the proper procedures for the governance of the Association so that these errors are not repeated.

Notably, the Hearing Panel did not find any merit in Mr. Bruno's argument that the assessments were adopted arbitrarily and unreasonably. It appears that the Board has engaged in extremely conservative budgeting, ensuring that there is an adequate amount in reserves for a catastrophe. In addition, it appears that the budgeting detail has improved over the years and the Hearing Panel believes that the budget, as set forth in Respondents #1 shows that the Board is making a meaningful attempt to set a reasonable budget.

Finally, in our original Decision and Order, we overlooked the fact that the Complainant had requested reimbursement of his filing fee of \$50.00. We conclude that under the facts of this case he is entitled to that refund, and we hereby amend our original Decision and Order accordingly. This Amended Decision replaces the original Decision.

ORDER

1. Within 30 days from the effective date of this Order, the Respondent must put together an amended proposed budget for 2013 that satisfies the following requirements:
 - A. The budget must include, at a minimum, all of the information required by Section 1B-112.2 of the Maryland Homeowners Association Act.

B. The budget must be mailed via first class mail to all owners at their address of record with the Association. A member of the Board of Directors must certify that the budget was sent out in this manner and that certification must be filed with the minutes of the Board meetings where the revised budget is reviewed and/or adopted.

C. The Board must schedule a Board meeting at least 30 days after the date that the proposed amended budget is mailed to owners. The notice of the meeting must be sent to all owners by first class mail or by hand-delivery to every home unless the owner has filed a form consenting to receipt of the budget via email in accordance subsection 3 of this Order. A member of the Board of Directors must certify that the meeting notice was sent out in this manner and that certification must be filed with the minutes of the Board meetings where the revised budget is reviewed and/or adopted.

2. All actions taken by the Board of Directors in 2012 outside of meetings or at any Board meetings other than the January 30, 2012 meeting must be affirmed at an open Board meeting to be valid.

A. Within 45 days from the effective date of this Order, the Respondent must schedule a Board meeting and all of the actions taken by the Board outside of meetings or at any Board meetings other than the January 30, 2012 must be on the agenda for that Board meeting.

B. Notice of that Board meeting must be provided to owners at least ten (10) calendar days in advance of the meeting.

C. The meeting notice must include the agenda items which will be discussed at the meeting.

D. Notice of the Board meeting must be sent by first class mail or hand-delivered to owners unless owners have provided consent to receive notice of meetings electronically as described in subsection 3 of this Order. A member of the Board of Directors must certify that the notice was sent out in this manner and that certification must be filed with the minutes of the Board meeting which was noticed.

3. Within 45 days from the effective date of this Order, the Association must send out a form for owners to complete where they can consent to receive meeting notices and proposed budgets via electronic mail. No notices may be sent to owners electronically unless and until the owner provides consent via this form.

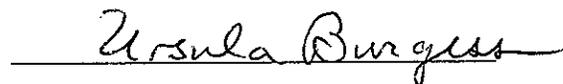
4. No later than December 31, 2013,, the Respondent must require at least 4 of the members of its board of directors to take at least 4 hours of training on the proper management of community associations that is directed towards new Board members. One suggested class is the Essentials of Community Association Volunteer Leadership, offered by the Community Associations Institute (“CAI”). The class is offered by the two local chapters of CAI – the Washington Metro and Chesapeake Chapters and information regarding the class may be obtained from their websites: *www.caidc.org* and *www.caimdches.org*. Similar training might be offered by the Commission. If no training is offered by the end of 2013 the Respondent must enroll its directors in the next available training in 2014.

- A. The expense, if any, for this training must be paid by the Association.
 - B. Respondent must provide proof of attendance of the classes must be provided to the Commission by December 31, 2013.
5. Within 30 days after the date of this Amended Decision and Order, the Respondent must reimburse the Complainant the sum of \$50.00 to cover the cost of the filing fees in this matter.

Commissioners Dubin and Kabakoff concur in this opinion.

The Montgomery County Code provides that any violation of this Decision and Order is a Class A violation of the County Code and subject to enforcement action by Montgomery County and fines of up to \$500.00 per day.

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



Ursula Koenig Burgess, Panel Chair
August 6, 2013