

- (1) each call for nominations was sent to the condominium owners fewer than 45 days prior to the issuance of the notice for the annual meeting in contradiction with Real Property Article, §11-109(c)(13), of the Annotated Code of Maryland;
- (2) each notice for the annual meeting was improperly sent by the Association's management company rather than the Association board secretary;
- (3) the inclusion of language indicating that in the absence of a quorum at the annual meeting another meeting would be called for the same purpose by majority vote of owners present in person or by proxy did not properly reflect the authority granted in Real Property Article, § 11-109 (c) (8) (ii), Maryland Code Annotated;
- (4) the 2011 and 2012 annual meetings were improperly scheduled to be held on a date other than that designated in the Thayer Towers Condominium Association Bylaws at Article IV, § 2;
- (5) there were potentially some irregularities in the balloting and counting of ballots;
- (6) the prescribed agenda was not followed; and
- (7) the meeting minutes were not complete.

On the basis of the cumulative improprieties, Mr. Huber requests that the Commission determine that the board members selected at these meetings be considered "noncompliant" and without power to act as board members. He requests that the panel disqualify these "noncompliant" board members from service as Directors for five years. He also requests that Thayer Towers be required to retain for five years an independent compliance officer who will submit a legal compliance report annually to the CCOC.

Mr. Huber filed a second complaint on January 13, 2014 (Case No. 04-14) alleging the Respondent improperly conducted closed meetings over a three-year period and failed to maintain proper records of the decisions made in the closed meetings. He again requests that Thayer Towers be required to retain for five years an independent compliance officer who will submit a legal compliance report annually to the CCOC.

Respondent replied to the first complaint on October 24, 2013, admitting to some of the allegations and denying others and to the second complaint on February 25, 2014, denying all of the allegations in that complaint.

Inasmuch as the matter was not resolved through mediation, this dispute was presented to the Commission on Common Ownership Communities for consideration on April 2, 2014, and the Commission accepted jurisdiction and consolidated the cases to be heard by a single panel.

On November 26, 2014, Complainant moved to have counsel for Respondent disallowed because the Association board that reported this dispute to their insurance carrier resulting in legal representation included a majority of "noncompliant board members." The motion was forwarded to the panel on March 4, 2015 and was continued for consideration at the hearing since the issue of "compliance" of the board members would not be decided until the facts were introduced. The Complainant renewed this motion at the hearing.

At the beginning of the hearing, Respondent introduced a motion to dismiss the first complaint regarding the regularity of the annual meetings on the basis that Complainant lacked standing to raise issues of irregularity at the 2011 and 2012 annual meetings because he was a tenant, not an owner, at the time of those meetings. That motion was also continued until the end of the hearing.

A public hearing was conducted on April 9, 2015 and the record was closed at the completion of the hearing. The panel chair did not attend the hearing but thereafter certified, pursuant to Montgomery County Code section 2A-10(c), that she read a transcript of the hearing and reviewed the evidence of record. At the hearing, the parties agreed to the panel chair participating on that basis.

Findings of Fact

The record shows that the call for nominations in 2011 was dated April 11, 2011 and the notice of the meeting was dated April 29, 2011. The meeting was held on May 18, 2011 (the 3rd Wednesday of May). The call for nominations in 2012 was dated February 28, 2012 and the notice of the meeting was dated March 30, 2012. The meeting was held on April 18, 2012 (the 3rd Wednesday of April).

Real Property Article, Section 11-109(c)(13), Maryland Code Annotated, requires that a call for nominations shall be sent to unit owners not less than 45 days before the notice of an election is sent.

The Thayer Towers Condominium Association Bylaws, at Article IV, § 2, state that the annual meeting of members "shall be held on the 3rd Tuesday of April."

The Bylaws also state, at Article IV, § 4, that the secretary will provide notice of meetings. The meeting notices were sent by the management company.

Minutes from May 18, 2011 indicate that there was no quorum (2 board members and 12 residents were present). The minutes note that not enough residents were present at the meeting and "[b]y state law, Thayer Towers will hold a sub-annual meeting and this will be the quorum." There were no minutes in the record for the April 18, 2012 meeting. The notices of the subsequent meetings in each case indicate that there was a vote taken at those meetings to hold the subsequent meeting. It would have been better, since even in the absence of a quorum the appropriate vote to hold a subsequent meeting was held and thus an action was taken, to note in the minutes that a vote occurred. Mr. Huber questions whether the vote was actually taken or the statement simply included in the notice of the subsequent meeting. In the absence of evidence to the contrary, it is assumed that the vote that was reported was taken.

The meeting notices did properly invoke the statutory approach to the lack of a quorum. The record supports that the notice and subsequent meetings were conducted appropriately. Mr. Huber has questioned whether the Bylaws permit the reduced quorum and majority in

accordance with the provisions of the Real Property Article, § 11-109(c)(8)(iv). The Bylaws provide at Article IV, § 7 that an express provision of the Horizontal Property Act (now the Maryland Condominium Act) to vary the Bylaw vote requirements shall control. The provision of the statute permitting action by a majority of unit owners present in person or by proxy at a subsequent meeting held due to the absence of a quorum at the initial meeting provides the express variation allowed in the Bylaws.

Mr. Huber suggests that accepting faxed ballots is in conflict with Montgomery County Code, § 10B-17, which prohibits counting votes before the time for voting closes. If a member chooses to fax a ballot or proxy with directed ballot to the management company it is not prohibited. Submitting a ballot that is not confidential is not counting ballots. Only unsigned absentee ballots must be in sealed marked envelopes in order to verify the membership of the voter and keep their identity confidential. Mr. Huber also suggests, without sufficient detail, that there was some confusion about who the candidates were in 2011 and 2012. However, there is no indication in the record that there was competition for the board seats or that anyone was defeated.

The record in this case does not have annual meeting minutes from the re-scheduled annual membership meeting in 2011. The minutes from the rescheduled 2012 annual meeting and the subsequent annual meeting in 2013 support Mr. Huber's allegation that the agenda required in the Bylaws at Article IV, § 10 was not followed.

Mr. Huber was a tenant at Thayer Towers from 2008 until he bought his unit in July 2012, and was not a member of the Association at the time of the annual member meetings in 2011 and 2012. While he didn't have standing to vote at those annual meetings, he argues that if the board members elected at those meetings who were still serving when he purchased his unit were not validly elected then the harm of invalid elections continued.

Mr. Huber's complaint regarding the propriety of the manner in which closed meetings were held is extensive. His complaints seem to focus on the lack of required motion to close the meeting or hold the executive session in which the specific exemption would be stated with the board vote for the closed meeting and the inclusion in the following board meeting minutes of a description of the executive session. The Real Property Article, § 11-109.1, Maryland Code Annotated, sets forth the approved purposes for holding a closed session and requires a statement of the statutory authority for closing the meeting to be included in the minutes of the next meeting of the board of directors. He has included in the record minutes of a number of closed meetings and those of the following board meeting in which there is no reference to the closed meeting.

The requirements for a closed or executive session board meeting are set out in the Real Property Article, § 11-109.1, Maryland Code Annotated. Approved purposes for closing a meeting are enumerated, as is the required process. The record in this case does not include the required vote to close meetings including the specific enumerated purpose for doing so and

the minutes of the following open board meetings do not reflect the purpose, authority and as required.

Mr. Huber objected specifically to meetings at which a legal settlement and individual owner assessment accounts, including associated fees, were discussed, both of which are within the enumerated purposes for closing meetings. Mr. Huber also objected to a closed meeting, held while he was a member of the Board and of which he was not notified, relating to the Association management of this dispute that resulted in notification to the Association insurance carrier of the dispute. Another panel of the Commission has ruled that when a board member is an adversarial party to his Association in litigation the rest of the board may meet in the absence of the opposing party to confer on the litigation. *McBeth & Muse v. Fountain Hills Community Association*, ##52 & 67-12. To the extent it is discernable from the record, the meetings that were closed were within the statutorily enumerated purposes.

Discussion

Mr. Huber was not a member of the Thayer Towers Condominium Association at the time of the 2011 and 2012 annual meetings. He waited more than a year after the later of those meetings and after he bought a unit to dispute the validity of those meetings. He has raised a number of procedural irregularities in this dispute. There is nothing in the record in this case to indicate that any other member of the Association had any concern about the process or conduct of the meetings.

There is nothing in the record to show that the Association secretary delegated the responsibility of sending out the required notices for the meetings, but it is a common practice that the management company does send the notices and there is no legal impediment to this delegation of responsibility. It is unfortunate that the management company did not send the call for nominations out in accordance with the statutory requirement and they should have done so. But there is also no indication that anyone was harmed by the somewhat late call. The notices of the meeting were sent in the proper time period.

Thayer Towers Condominium Association appears to have had for the past 30 years or so an unusual practice of conducting the annual membership meeting as an adjunct to the monthly board meeting. Clearly, there has been a consistent problem in getting a quorum for these meetings. The notice of the meetings indicates that there will be reports on issues of interest to the community which are not reflected in the minutes but there is no need to do so. The minutes reflect only the election results. It is not clear whether the casual approach to the annual meeting contributes to the lack of participation or the lack of participation contributes to the casual approach.

Mr. Huber has pointed out that the Association Bylaws, at Article IV, § 7, require a vote of 51% of the "total value of the condominium project" in order to take action. If the Association ever got a quorum for an annual meeting on the date on which it is originally

scheduled they would need to have a 51% vote of the total membership to elect a board member or take other action. The Association may want to consider an amendment to this provision to allow action to be taken by 51% of those present in person or by proxy instead of the total membership, as long as the attendance constitutes a quorum.

Mr. Huber is clearly very interested in the governance of the Association and has raised some important issues. He has also worried about some that are technical and do not affect the quality of management. He served on the board for about two and a half years and was for short periods both secretary and treasurer. But he also did not attend many board meetings, apparently submitting his views in memos and other messages rather than participating with the rest of the board. He has been critical of many of the Association practices but lacking in sufficient information and perspective to offer practical suggestions.

Conclusions of Law

The Association cannot change the date of the annual meeting set forth in the Bylaws without amending the Bylaws to reflect the change.

However, this disparity with legal standards as well as the other, relatively minor variations from legal standards, are not, in the absence of allegations of actual harm to the community or to a member seeking to run for the board or for other action that should have been taken at the annual meetings, sufficient to invalidate the meetings that were held or the actions taken at those meetings. For these reasons, we also find that the directors elected in 2011 and 2012 were properly elected.

Formal or informal delegation to the management company of the responsibility to send members notices of meetings does not create a legal infirmity in the notice. The notices should be sent in accordance with the statutory requirements.

The minutes of closed or executive sessions of the board do not reflect compliance with the procedural statutory requirements. Nor do the minutes of the following open board meetings reflect a record of those meetings. To the extent the business conducted at those meetings is in the record it appears to fall within enumerated exceptions to the open meetings requirements.

Respondent's motion to dismiss due to lack of standing fails to recognize that several of the issues raised by Complainant are continuing violations that affect him as a member and affect the ongoing governance of the Association.

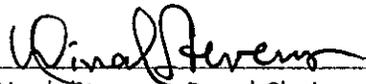
ORDER

Based on the evidence of record, for the reasons set forth above:

1. The Thayer Towers Board of Directors must hold the annual meeting of members on the date designated in the Bylaws until such time as the Bylaws are amended to change the date. When the meeting is held, the Board must follow the agenda set forth in the Bylaws.
2. The Board must assure that required notices for the annual meeting of members are sent in accordance with the statutory and Bylaws schedule for such notices.
3. The Board must call any closed or executive sessions with the appropriate resolution and vote, which must be reflected in the minutes of the following open board meeting.
4. Complainant's motion to disallow counsel is denied.
5. Respondent's motion to dismiss is denied.

The foregoing is concurred in by Commissioners Molloy and Winegar.

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.



Dinah Stevens, Panel Chairwoman