

Before the
Commission on Common Ownership Communities
Montgomery County, Maryland

In the matter of:

Vernard McBeth	x	
13108 Lake Geneva Way	x	
Germantown, Maryland 20874,	x	
Complainant,	x	
	x	
v.	x	Case No. 52-12
	x	
Fountain Hills Community Association	x	
c/o Thomas Schild, Esq.	x	
Suite 500	x	
401 N. Washington St.	x	
Rockville, Maryland 20850,	x	
Respondent,	x	
	x	
and	x	
	x	
Steven Muse	x	
18804 Porterfield Way	x	
Germantown, Maryland 20874,	x	
Complainant,	x	
	x	
v.	x	Case No. 67-12
	x	
Fountain Hills Community Association,	x	Consolidated
Respondent.	x	May 1, 2014

DECISION AND ORDER

Background

On August 2, 2012, Vernard McBeth filed a complaint with the Office of Consumer Protection against the Fountain Hills Community Association, Inc. (the "Association" or "Respondent") complaining of five issues. The Commission on Common Ownership Communities accepted jurisdiction of four of these issues on November 7, 2012 (Case 52-12). Those issues are: failing to properly conduct an election in that a nomination from the floor was permitted in the absence of the nominee; conducting closed meetings including one at which it was alleged that the Board of Directors removed Mr. McBeth and Mr.

Muse from the enforcement committee; failing to maintain complete and accurate minutes; and failing to repair damage it caused to his property.

Respondent filed an answer to the complaint stating that the community does not have a rule requiring a nominee to be present to accept nomination at an annual meeting; that it did not hold closed meetings by email; that complete and accurate minutes are maintained; and that it made timely repairs to Complainant's lot but that the grass failed to grow due to lack of watering during the summer and that it will reseed at a more appropriate time.

Due to disagreements about discovery and in an effort to more efficiently move this case forward a prehearing conference was held on February 28, 2013.

On November 16, 2012, Steven Muse filed a complaint with the Office of Consumer Protection against Fountain Hills Community Association, Inc. complaining of six issues. The Commission on Common Ownership Communities accepted jurisdiction of five of these issues on April 3, 2013 (Case No. 67-12). Those issues are: improperly holding closed meetings by email; improperly conducting an election in permitting nomination from the floor of a candidate who was not present; denying Complainant access to the community records; improperly denying Complainant pool passes; and improperly enforcing a rule against Complainant.

Respondent filed an answer to the complaint stating that it did not hold closed meetings by email; the community does not have a rule requiring a nominee to be present to accept nomination at an annual meeting; the community records are available for inspection; and the problem with Complainant's pool passes was resolved in June 2012.

In April 2013 Mr. McBeth and the Association met to negotiate their differences. The Association proposed an agreement but Mr. McBeth did not sign it at the time and the Association thought he was still trying to negotiate changes. The Association withdrew the proposed agreement before Mr. McBeth signed it.

The cases were consolidated by order of the Commission Chair on May 29, 2013 to be considered by a single panel since several issues were common to both cases.

All motions not previously addressed or addressed in this Decision and Order are denied.

Hearings in the matter were held on October 3, 2013 and March 27, 2014. An off the record conference with the panel and parties was held on January 9, 2014.

Findings of Fact

The allegations in the filings in these cases contend that the community had a house rule requiring candidates for the Board to be present at the annual meeting to be eligible for election. No specific facts or evidence on this allegation were introduced. But there was agreement by the parties that there is no provision in the Association Declaration, Bylaws or rules and regulations enacting such a requirement. That those attending any annual meeting may have acceded to this requirement at a

particular meeting does not replace the formality of adopting a rule to mandate it. Thus, there was no violation of Association documents or rules in electing to the Board a candidate who was not present at an annual meeting on that ground alone.

Article XI of the Association Bylaws provides to the Board of Directors the authority to appoint such committees as they deem appropriate to carry out their responsibilities. In the absence of language providing otherwise this also gives the Board the authority to eliminate any such committee and to remove those it has appointed. Both Complainants have agreed that the Board has this authority.

At the hearings both Complainants introduced a number of strings of email messages from and to Board members which they had gotten from members of the community, which were entered into evidence without objection from the Association. These messages were introduced in support of their allegation that the Board was meeting in closed session by email.

One set of messages related to settlement of collection litigation. Such discussion is exempt from the open meeting requirement of the Maryland Homeowners Association Act under Section 11B-111 of the Real Property Article, but is subject to certain formalities required by the Act. A meeting, that is a discussion in which action is taken by the Board, by email is by definition a closed meeting, and under the provisions of the open meeting requirements there must be a statement of the enumerated exception to the open meeting requirement, a recorded vote by each member of the Board on the authority by which the meeting was closed and a record of the time and place of the meeting. This record is to be included in the minutes of the next Board meeting. Thus, this meeting would have been legally complete and correct if there had been a resolution stating the statutory authority at the outset of the request for a decision on the proposed settlement with instructions to the Board members to vote on the resolution as well as the proposed settlement.

Another set of messages related to the removal of the Complainants from the Enforcement Committee. Several members of the Board used language suggesting that they were discussing a resolution. No email message supported a conclusion that the Board had resolved the issue in their email messages. Additionally, the minutes of the Board meeting following the email messages indicate that one proposed solution was presented as a resolution then withdrawn before another solution was presented and a vote was taken. The minutes are evidence that the informal discussion of Board members of an upcoming issue in email messages, despite the language used in the messages, did not constitute a closed meeting but a preliminary discussion.

The open meetings statutory requirement applicable to Homeowners Associations set forth in the Real Property Article of the Maryland Code at 11B-111, requires that meetings of the board of directors or other governing body of the homeowners association or a committee of the homeowners association must be open to all members of the homeowners association. An open meeting requires notice to all members of the Association. While notice for an open meeting is not defined in this section of the statute it is generally accepted to include a statement of the time, place and agenda for the meeting. The statute enumerates specific exceptions to the open meeting requirement and a protocol

for holding a closed meeting. This includes a statement of the statutory exception under which the meeting was closed and a record of the vote on the authority to close the meeting. Since the statute requires that committee meetings be open, all members of the Association must be notified of all such meetings unless they are closed in accordance with the statutory requirements. If a committee meeting does not result in an action but only a recommendation to the Board there may be no requirement for minutes of such a meeting other than the resolution for closing the meeting.

The record in this case shows that during the past several years the Fountain Hill Community Association Board has been sloppy about compliance with the statutory requirements for holding open meetings or holding closed meetings. There have been a variety of instances in which this has happened, none of them sufficient in the context of each instance to invalidate the action.

In addition to those issues delineated above, the minutes of the May 2, 2013 Board meeting reflect the appointment of a three person subcommittee on the budget. The subcommittee met in closed session. There is no record of a resolution on the authority to do so. The subcommittee reported back to the Board at an open meeting at which action was taken on the budget.

Further, there was discussion at the final hearing session about one or more recent closed Board meetings to discuss an approach to choosing a new management company to replace the current company which has apparently chosen not to continue managing for this Association. There was no resolution to meet in closed session and it appeared that there would not have been authority to do so. One value to the statutory provision that all closed sessions be preceded by a resolution citing the authority for closing the meeting is that Board members need to consider whether there is authority to do so.

The Complainants alleged that Board minutes were incomplete, were changed by Board members, or were otherwise inaccurate. Mr. McBeth alleged that meeting minutes did not include discussion of the reasons for actions taken. Both Mr. Muse and Mr. McBeth had served on the Board (Mr. Muse is currently on the Board). But during a time they were not on the Board they wanted the Board to amend the minutes to reflect their suggested changes to description of discussions. There was no testimony that the minutes did not adequately reflect the business of the Board meetings. Minutes are required to be a record of actions taken but are not required to include a record of discussion of the reasons for the actions. Adoption of Board meeting minutes is wholly within the discretion and authority of the members of the Board. Mr. McBeth also argued that the Board met by email discussion. The instance of a Board meeting by email is discussed above. Email discussion among Board members does not constitute a meeting unless an action is taken usually evidenced by a vote to take or authorize a Board action which requires a vote.

Mr. McBeth alleged that the meeting minutes for the Board meeting held on November 4, 2010 are incomplete because they should include an addendum that the Board had voted at that meeting to attach to the meeting minutes. However, the meeting minutes of the November 4 meeting were adopted at the March 3, 2011 meeting as corrected, and include in the body of the minutes a summary of the contents of the addendum instead of attaching the addendum. Both Mr. McBeth and Mr. Muse

were Board members and present for that action. Mr. Muse voted to approve the minutes and Mr. McBeth abstained.

Between the 2012 and 2013 pool seasons, Mr. Suter, who was then president of the Board, reviewed the records supporting the issuing of pool passes. Several Association families had received pool passes the previous year, under a new computerized system for issuing them, for whom he could not find applications. The application includes indemnity language that the Board considered important to be signed by a member of each family. One of the families for whom Mr. Suter could not find an application was the Muse family. The family was informed prior to the beginning of the pool season that their application was missing and asked to provide a new application. It appears that the relationship between these two men was distrustful and tense. Mr. Muse declined to submit a new application. The family's pool privileges were suspended pending receipt of a new application. Mr. Muse asked to have the requirement waived. Mr. Suter polled the Board by email for a fast answer on this request. The Board declined to waive the requirement by email. Mr. Suter testified that he made an executive decision to deny Mr. Muse's request based on the result of the Board poll. The Muse family was not permitted to use the pool at the beginning of the season and ultimately submitted a new application.

In September 2012, the Muse family received a notice of a violation of the Fountain Hills rules regarding a trash can in public view. Mr. Muse requested a hearing in accordance with the community Violation Enforcement Procedure. The Board did not provide the requested hearing in accordance with the Procedure. No testimony was entered into evidence on this issue as any impact of the violation notice has expired.

Mr. Muse had complained that he was not able to get access to community records. The Association through the community manager, Mr. Collins, and Mr. Wilson of the management company, have over the past several years exchanged messages about appointments for Mr. Muse to examine community records. According to Mr. Muse he has made appointments and been unable to look at records. According to Mr. Collins, Mr. Muse has not provided sufficient information about what records he wants to look at and only recent records are kept at the management company offices so older records need to be retrieved from an archive facility. According to Mr. Collins' testimony there has been at least one occasion when Mr. Muse came to the management company office and looked at some records.

During the summer of 2012, the Association had concrete repair/replacement work done. Mr. McBeth's lawn was damaged in the course of the concrete work and he requested that the damaged lawn be repaired. The August 2, 2012 minutes reflect that the concrete contractor will reseed the grassy areas that were not done in the fall. The community manager, Mr. Collins, testified that the concrete contractor had reseeded the damaged area of Mr. McBeth's lawn twice. In neither case did the grass return to a satisfactory state. The landscape contractor then put sod down. There was agreement that Mr. McBeth's lawn is still in poor condition.

Conclusions of Law

1. Fountain Hills does not have a properly adopted community rule requiring that a candidate for the Board be present at the annual meeting. There was no violation of community documents or rules in electing a candidate for the Board who was not present at the annual meeting.

2. No evidence or testimony was introduced in this matter that demonstrated any instance of incomplete or inaccurate minutes.

3. The Fountain Hills Board has on a number of occasions and in a variety of ways failed to comply with the open meetings requirements of Maryland Homeowners Association Act under Md. Code Ann., Real Prop. § 11B-111.

4. While the effort to repair the condition of Mr. McBeth's lawn is not resolved, requiring an association to repair damage to private property that is not part of its responsibility to maintain the common elements is beyond the jurisdiction of the Commission.

ORDER

In view of the foregoing, and based on the evidence of record, for the reasons set forth above, the Commission finds and orders:

1. The Fountain Hills Condominium Association Board of Directors must review the open meeting requirements of the Maryland Homeowners Association Act and conform its practices to the requirements thereof.

2. If there are more Association records that Mr. Muse wants to view, he must let the management company know what specific kinds of records he wishes to review and provide a range of dates for those records in writing. If the description of records is not clear to the management company, management company personnel must promptly cooperate with Mr. Muse in clarifying the identification of the requested records. Mr. Muse and the management company personnel must cooperate with each other in arranging an appointment for Mr. Muse to review these records after they have been identified in writing.

The foregoing was concurred in by panel members Zajic, Stone and Stevens.

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

Before the
Commission on Common Ownership Communities
January 3, 2013

In the Matters of

Vernard McBeth
13108 Lake Geneva Way
Germantown, Maryland 20874
Complainant

vs.

Case No. 52-12

Fountain Hills Community Association
c/o Thomas Schild, Esq.
401 N. Washington St., #500
Rockville, Maryland 20850
Respondent

and

Steven Muse
18804 Porterfield Way
Germantown, Maryland 20874

v.

Case No. 67-12

Fountain Hills Community Association
c/o Thomas Schild, Esq.
401 N. Washington St. #500
Rockville, Maryland 20850

**Order Permitting Respondent to Hold Closed Meetings Without the Presence of the
Complainant Steven Muse**

The Respondent has moved for an order that allows its board of directors to hold closed meetings to discuss this case without allowing the Complainant, Steven Muse, to be present. Mr. Muse is also a member of the board of directors, and he is an adverse party to the Respondent.

The "open meetings" statute of the Homeowners Association Act, Section 11B-111, does not apply to this situation. That law provides that all meetings of an association's board of directors are open to all members of the association, with certain

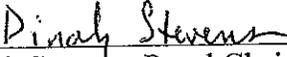
limited exceptions. One of those exceptions is "consultation with legal counsel on legal matters;" another exception is "consultation with staff personnel, consultants, attorneys, *board members*, or other persons in connection with pending or potential litigation or other legal matters." It is beyond dispute that any discussions of the board of directors concerning these consolidated cases are "legal matters" within the meaning of the law. The Respondent's board is clearly entitled to close its meetings for such purposes.

The question before us now, however, is not whether the board can exclude the general membership of the association from such meetings but whether it can exclude a member of the board itself from such meetings. We hold that it can.

There is an inherent conflict of interest between an association and any director who is involved in litigation with his own association. Each party has the right to prepare its case and to map its strategy in private. To allow a director to attend the discussions of an association of its own case against him is to give him an unfair and perhaps decisive advantage, for the association has no corresponding right to participate in that director's preparation of his case. Furthermore, it would violate the confidentiality of an attorney's advice to his client were a hostile director to be able to hear the discussions of his association with its attorney.

One purpose of a closed meeting is to allow directors to discuss sensitive issues frankly and thoroughly. The presence of a person who has adverse legal claims to the association's will tend to inhibit such discussions because the other directors and the consultants and attorneys will be reluctant to express themselves for fear that their positions will be used against them or will help the adverse party prepare his rebuttal to them.

For these reasons, we grant the motion, and we hereby ORDER that the Complainant, Steven Muse, may be barred by Respondent from attending any meetings of the board of directors that are called for the purpose of discussing either or both of these consolidated cases.



Dinah Stevens, Panel Chair

Date Mailed and emailed: January 8, 2014.