BEFORE THE
COMMISSION ON COMMON OWNERSHIP COMMUNITIES
FOR MONTGOMERY COUNTY, MARYLAND

CRAIG VOORHEES Complainant	)	
v	)	Case No. 05-11
	)	November 25, 2011
DECOVERLY I HOMEOWNERS ASSOCIATION Respondent	)	

DECISION AND ORDER

The above-captioned case came before the Commission on Common Ownership Communities for Montgomery County, Maryland for hearing on October 19, 2011, pursuant to Chapter 10B of the Montgomery County Code. Based on the parties' submissions and argument and the record herein, the Hearing Panel finds, concludes and orders as follows.

I. BACKGROUND

Complainant Craig Voorhees (Mr. Voorhees or Complainant) objects to the decision of the Board of Directors of Respondent Decoverly I Homeowners Association (HOA or Respondent) to spend $1,000 to clean up a forested lot behind some of the HOA's homes. At the time of the cleanup there was some question whether the HOA actually owned the forested lot. It later was confirmed that the lot was owned by someone else and not by the HOA.

Mr. Voorhees asked the Commission to remove from office the directors who voted for the cleanup, to order a special election to replace the removed directors, to bar the removed directors from running in that election, and to require those directors to reimburse the HOA for the $1,000 cleanup cost.

The HOA responded by asking the Panel to dismiss the complaint because Mr. Voorhees lacked standing to bring these claims. Alternatively, the HOA claimed protection under the business judgment rule and it claimed its directors and officers are immune from suit under several provisions of the Maryland Code. In light of the Panel's disposition of this case, it need not reach the question of official immunity.

Mr. Voorhees appeared pro se at the hearing. The HOA was represented by counsel.

Commission Exhibit 1 (CX1) and Commission Exhibit 2 (CX2) were admitted in evidence at the hearing without objection. Those exhibits are the Commission's administrative file in this matter, including the HOA's governing documents.

Mr. Voorhees testified in his case-in-chief. He did not call any other witnesses. He did not offer any exhibits in evidence, but he did invite the Panel to examine a larger copy of the plat of subdivision that appears in CX1 at 136.

The HOA called witnesses Steve Leskowitz (an employee of the HOA's management company) and Don Weinstein (the current President of the HOA's Board). The HOA did not offer any exhibits in evidence.

Shortly before the hearing, the HOA filed a motion to dismiss based on the claimed lack of Mr. Voorhees's standing. The Panel deferred ruling on the motion and directed that the record remain open for 10 days following conclusion of the hearing for the sole purpose of allowing Mr. Voorhees to respond to the motion. Mr. Voorhees timely filed a written response, which was made part of the record.

II. FINDINGS OF FACT

Based on the testimony and exhibits admitted in evidence at the hearing, the Panel finds the following facts:

1. The HOA is a homeowners association as defined in Md. Code, Real Prop. Section 11B-101 and it is a common ownership community as defined in Mont. Cnty. Code Section 10B-2(b).

2. The HOA consists of 150 units in Rockville, Maryland and it has an annual budget of about $180,000.

3. Mr. Voorhees's home is part of the HOA.

4. Mr. Voorhees currently serves on the HOA's Board. He has previously been the HOA's President.

5. The HOA uses an outside management company, The Management Group Associates, Inc. (MGA), to manage the HOA and maintain common areas. Mr. Leskowitz is the MGA employee who has been assigned to the HOA since 2004.

6. Of the 150 units forming the HOA, eight units (10133 to 10147 Sterling Terrace) have rear yards that abut a grassy strip and then a forested lot. The forested lot serves as a buffer to a state highway.

7. Mr. Weinstein's unit is one of the eight that abut the grassy strip.

8. Mr. Weinstein has been on the HOA's Board and been the HOA's President since 2007. At the urging of several unit owners, Mr. Weinstein ran for office by promising to give greater attention to certain landscaping matters, including the forested lot.

9. Throughout Mr. Leskowitz's tenure as the HOA's property manager, the HOA's landscaping contractor has mowed the grass behind units 10133 to 10147 Sterling Terrace, on the assumption that the grassy strip belonged to the HOA.

10. Prior to the cleanup, the forested lot contained leaves, fallen tree branches and a bag of cement. There was disputed testimony that residents of the HOA or of a neighboring community had also dumped soil, grass cuttings and leaves on the forested lot. The Panel makes no finding as to whether the forested lot was used as a dumping ground.

11. At a May 18, 2009 meeting, the Board adopted the following resolution:

> Item #4 in the Lancaster Landscapes proposal was regarding the area at 10133 through 10147 Sterling Terrace. Craig Voorhees suggested doing a survey to determine how much of the area behind these homes belonged to Decoverly I HOA. Bill Kidd suggested that we get a quote for the surveying of this area. Bill Kidd motioned that we obtain a price to survey the common area behind this row of homes. Nik Groshans seconded the motion and the motion was approved unanimously.

12. At its June 15, 2009 meeting, the Board adopted the following resolution:

> Board member Nancy Ray motioned to approve Item #4 on the Lancaster proposal which was for the cleanup on the rear of the 10133 through 10147 Sterling Terrace area. Bill Kidd seconded the motion. The motion was approved 5 to 1 with Craig Voorhees opposed.

13. Mr. Weinstein testified that at that same June 15 meeting, the Board was presented with a survey quote which, the Board felt, was too expensive, and the Board then decided to go ahead directly with the cleanup. Mr. Voorhees testified that he does not recall any such discussion. The Panel makes no finding as to whether such a discussion took place. None is reflected in the minutes.

14. In 2009 the HOA paid $1,000 to a landscaping company to clean up the forested lot.

15. In 2010, Mr. Voorhees obtained a quote to perform a survey for $124. The HOA proceeded to obtain the survey, including the staking of boundary lines. CX1 at 4.

16. The 2010 survey showed that the grassy strip and the forested area do not belong to the HOA, and the Panel so finds.

17. On or about May 21, 2011, after Mr. Voorhees had filed his complaint with the Commission, the HOA's insurance company offered to reimburse the HOA for the $1,000 cleanup cost if Mr. Voorhees would dismiss his complaint. Mr. Voorhees refused the offer. CX1 at 159.

III. CONCLUSIONS OF LAW

A. Jurisdiction and Standing

A party must have "standing" to pursue a claim. That is, he must be aggrieved in some way that the decision-maker can remedy. 120 West Fayette St., LLLP v. Mayor & City Council of Baltimore, 964 A.2d 662, 672-73 (Md. 2009); Peterson v. Orphan's Court for Queen Anne's Cnty., 862 A.2d 1050, 1070-71 (Md. App. 2004).

Here, Mr. Voorhees complains about the alleged misuse of his HOA dues. In the Panel's view, this gives him standing. The Commission's organic statute defines "party" to include an "owner," like Mr. Voorhees, and a "governing body," such as the HOA and its Board. Md. Cnty. Code Section 10B-8(8). Further, the Code defines "dispute" to include a disagreement involving "the authority of a governing body, under any law or association document, to ... spend association funds." Section 10B-8(4). See Greenstein v. Council of Unit Owners of Avalon Court Six Condo, Inc., __ A.3d __, 2011 WL 4495664 (Md. App. 2011) (individual condominium unit owners had standing to sue their association for negligently failing to bring a timely action against the developer for construction defects).

If an owner like Mr. Voorhees were unable to contest his association's spending authority, then, contrary to the clear language of the statute, that issue could never be litigated. [1]

In arguing that Mr. Voorhees lacks standing, the HOA conflates Mr. Voorhees's claim (whether the Board had authority to spend the $1,000 as it did) with the remedies Mr. Voorhees seeks (removing certain directors from office, ordering a special election, etc.). The Panel surely has jurisdiction to rule on the Board's spending authority

[1] The governing statute here makes this case distinguishable from the long-standing rule that federal taxpayers, as such, lack standing to challenge an allegedly improper expenditure of federal funds. *Frothingham v. Mellon*, 262 U.S. 447, 487-88 (1923). But see *Flast v. Cohen*, 392 U.S. 83 (1968).

pursuant to Mont. Cnty. Code Section 10B-8(4)(A)(iii), quoted above. Whether the Panel could award the specific relief prayed for is doubtful, but the Panel is not limited to that relief. Mont. Cnty. Code Section 10B-13(e) permits the Panel to "order the payment of damages and any other relief that the law and the facts warrant."

The Panel therefore concludes that it has jurisdiction to rule on Mr. Voorhees's claim, apart from whether it could award the relief Mr. Voorhees is seeking.

B. Board's Authority

The HOA's governing documents charge the HOA and its Board with maintaining the common areas belonging to the HOA:

> [T]he specific purposes for which it [the HOA] is formed are to provide for or assure the maintenance, preservation and architectural control of the Property subject to the Declaration of Covenants, Conditions, Restrictions, Decoverly Homeowners Association ....

Articles of Incorporation, Art. IV (CX1 at 52).

> (b) The "Property" shall mean and refer to all real property in Article II hereof and such additions thereto as may be made pursuant to the provisions of Article II.
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> * * *
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> (d) "Common Areas" and "Community Facilities" shall mean and refer to all real property owned or leased by the Association or otherwise available to the Association for the benefit, use and enjoyment of its members.

Declaration of Covenants, Conditions and Restrictions ("Declaration"), Art. I, Sec. 1 (CX1 at 59).

> Section 1. Property Subject to Declaration. The real property which is, and shall be held, conveyed, hypothecated or encumbered, sold, leased, rented, used, occupied and improved subject to this Declaration is located in Montgomery County, Maryland, and is more particularly described on "EXHIBIT A" attached hereto and by this reference made a part hereof.

Declaration, Art. II (CX1 at 60).

The assessments which the HOA levies against the unit owners are to cover the HOA's annual expenses, including "the cost of all operating expenses of the common areas and community facilities" and "the cost of necessary management and

administration of the common areas and community facilities." Declaration, Art. V, Sec. 1 (CX1 at 64). Similarly, the management agent engaged by the Board "shall perform such duties and services as the Board of Directors shall authorize in writing, including, without limitation ... to provide for the care, upkeep, maintenance and surveillance of the common areas and community facilities." Declaration, Art. IX, Sec. 1 (CX1 at 80).

Finally, the HOA's Bylaws also impose on the Board the duty to "cause the Common Area to be maintained." CX1 at 109-110.

Nothing in the HOA's governing documents authorizes the Board to expend funds on property outside the HOA. The Panel therefore concludes that the Board lacked authority to spend HOA funds to clean up the forested lot.

C. Business Judgment Rule

The business judgment rule, if applicable, would bar the Commission from interfering with the HOA's decision unless the HOA acted fraudulently, dishonestly, arbitrarily, or in bad faith. Tackney v. U.S. Naval Academy Alumni Ass'n, Inc., 971 A.2d 309 (Md. 2009); NAACP v. Golding, 679 A.2d 554, 558 (Md. 1996); Black v. Fox Hills North Community Ass'n., Inc., 599 A.2d 1228, 1231 (Md. App. 1992). The business judgment rule is even incorporated into the County Code provision establishing the Commission's dispute resolution jurisdiction. Mont. Cnty. Code Section 10B-8(5) (excluding from the definition of "dispute" a "disagreement that only involves ... the exercise of a governing body's judgment or discretion in taking or deciding not to take any legally authorized action").

Mr. Voorhees attacks the good faith and honesty of HOA President Weinstein (who voted for the cleanup), saying he was conflicted because his home is one of the eight nearest the forested lot. There is no merit to that claim. Any direct benefit Mr. Weinstein received was shared with seven other owners and was shared indirectly with the remaining 142 homes comprising the HOA. Moreover, as President, Mr. Weinstein could hardly conceal where he lived or conceal his interest in getting the cleanup work done. To the contrary, Mr. Weinstein campaigned for a Board slot in part by promising to give greater attention to landscaping matters, including the forested lot.

Even if Mr. Weinstein had recused himself from voting on the cleanup motion (no one, including Mr. Voorhees, asked him to do so), there still would have been sufficient votes to pass the motion. In short, the conflict (if there was any) was both known to the Board and was not decisive to the Board's vote.

If the only issue here were whether the forested lot needed to be cleaned up, the Panel would have no difficulty invoking the business judgment rule and deferring to the

Board's judgment. But the business judgment rule applies only when the governing body is acting within the scope of its discretion, not when it lacks authority to act. Mont. Cnty. Code Section 10B-8(5) (the action or inaction at issue must be "legally authorized;" Ridgley Condo. Ass'n v. Smyrnioudis, 681 A.2d 494, 499 (Md. 1996) (condominium board's action to bar commercial unit owners and customers from using common lobby was an unauthorized change in property rights, not a permitted use restriction).

Here, the HOA Board lacked authority to expend funds to improve land belonging to another and its entering on that land was likely a trespass. Thus, the Board's action was not within its discretion and the business judgment rule provides no protection.

The business judgment rule also appears to be inapplicable when a common ownership community acts negligently. In Greenstein v. Council of Unit Owners of Avalon Court Six Condo, Inc., while the Court of Special Appeals did not explicitly discuss the business judgment rule, it allowed the condominium unit owners' negligence suit against the condominium association to go forward. Here, the HOA's Board knew, when it decided to authorize the cleanup, that there was a question whether the HOA owned the forested lot. The Board acted without resolving that question, even though there was no urgency and even though the Board had other options, such as determining record ownership and requesting the owner to do the cleanup, or asking the County to enforce its illegal dumping rules.

D. Remedy

The Panel concludes that the HOA's Board acted negligently and that an appropriate remedy would be to order the HOA to refund to the 150 unit owners, or credit their accounts with, each owner's share of the $1,000 ($6.67 per unit). This might seem like a hollow remedy, since unit owner assessments are typically the only source of a homeowner association's revenue and the unit owners will, in effect, be paying themselves. A similar remedy was, however, contemplated in Greenstein v. Council of Unit Owners of Avalon Court Six Condo., Inc., where the unit owners were allowed to sue their condominium association based on the increase in their monthly assessments to cover $1 million in repair costs that should have been the developer's responsibility. Moreover, if, as appears to be the case, a third-party insurer is involved, the remedy may not be hollow at all.

As an alternative or additional remedy, the Panel could order the HOA not to expend its funds in the future to maintain the forested lot. There was no evidence, however, that the HOA intends to do so. To the contrary, with a survey in hand showing the forested lot to be outside the HOA, and with a Commission ruling that the HOA lacks authority to improve land it does not own, the HOA is unlikely to repeat the expenditure. In the absence of a substantial risk of irreparable future harm, the Panel cannot order relief in the nature of a permanent injunction. El Bey v. Moorish Science Temple of America, Inc., 765 A.2d 132, 141 (Md. 2001) ("To grant a permanent injunction, there must be evidence adduced that the party seeking the injunction will suffer irreparable harm without its issuance").

As stated above, the relief sought by Mr. Voorhees – including removal of certain directors from office and barring them from running in a special election to replace them – is likely outside the Panel's authority. In any event, the Panel does not believe that such relief is appropriate here.

E. Costs

In May, 2011, long before the hearing in this matter, the HOA's insurer offered to reimburse $1,000 to the HOA in exchange for dismissal of the complaint. That amounted to make-whole relief for the HOA. The Panel concludes that in refusing to dismiss and in pressing his claim, Mr. Voorhees was no longer acting in good faith and with good cause. His sole objective at that point seems to have been personal vindication and embarrassing and punishing his fellow Board members, regardless of the benefit or cost to the HOA. Accordingly, pursuant to Section 10B-13(d) of the Montgomery County Code, the Panel will deny Mr. Voorhees's request for his $50.00 filing fee. [2]

IV. ORDER

Accordingly, it is, this 25th day of November, 2011, ORDERED as follows:

1. Respondent's motion to dismiss the complaint is DENIED.

2. Within 30 days from the date of this Order, Respondent must refund to its 150 unit owners each owner's share of $1,000 ($6.67 per unit). Respondent may, at its option, make the refund by crediting each unit owner's account financial account with Respondent.

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[2] In the absence of a request by any party, the Panel did not consider an award of attorney's fees.

3. Within 30 days from the date of this Order, Respondent must provide a copy of this Decision and Order to each unit owner, by personal delivery, regular mail, or electronically.

4. Complainant's request for an award of his filing fee is DENIED.

Panel members Allen Farrar and Helen Whelan concur in this Decision and Order.

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.

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Charles H. Fleischer, Panel Chair