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

JEANNE SUSMAN	)	
Complainant	)	
v.	)	Case Nos. 779-O and 26-06
	)	(Consolidated)
	)	May 18, 2007
SUSSEX HOUSE CONDOMINIUM ASSOCIATION	)	
Respondent	)	

DECISION AND ORDER

The above-captioned case came before the Commission on Common Ownership Communities for Montgomery County, Maryland (the "Commission") for hearing on March 26, 2007, pursuant to Chapter 10B of the Montgomery County Code ("MC Code"). The duly appointed Hearing Panel ("Panel"), having considered the testimony and evidence of record and the stipulations of the parties, finds, concludes and orders as follows:

I. Background

A. The Parties

Complainant Jeanne Susman ("Complainant" or "Ms. Susman") is the owner of Unit 309 within a residential condominium at 4970 Battery Lane, Bethesda, Maryland (the "Condominium"). Respondent Sussex House Condominium Association ("Respondent" or the "Association") controls the Condominium's common elements.

B. Nature of These Cases

Ms. Susman filed a complaint against the Association in June 2005 alleging a number of instances of financial and other mismanagement by the Association's board of directors ("Board"). In March 2006, before her original complaint could be heard, Ms. Susman filed a second complaint alleging additional instances of mismanagement and that the Board improperly conducted an election. The Association denied any wrongdoing.

The Commission accepted jurisdiction over both complaints and, on January 10, 2007, it consolidated the two complaints for hearing. A hearing was later scheduled for March 26, 2007.

C. The Disputes

Numerous issues are apparent from the parties' prehearing filings. The parties were able to reach a written settlement on some of the issues prior to the hearing. At the hearing the parties presented the Panel with a draft settlement agreement and stipulated that items one through seven (but not the remaining items) were settled. The parties requested the Panel to recast their settlement on those issues into a consent order and the Panel agreed to do so. *See* Section IV of this Decision and Order. [1]

The parties' pre-hearing filings also indicate that unresolved issues exist with respect to the Association's failure to seek reimbursement from two Unit Owners for boiler room expenditures; access to Association records; and the Association's issuance of a parking permit. The parties did not cite these issues as contested at the hearing, the parties did not offer evidence or argument relating to them, and the parties did not mention them in their post-hearing submissions. The Panel deems these issues abandoned.

The following three disputes remain for resolution:

1. Whether the Association's 2005, 2006 and 2007 budgets complied with applicable legal requirements relating to reserves?

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[1] The Panel has authority pursuant to MC Code § 2A-10(g) and COMCOR § 10B.06.01.09(a)(3)(a) to issue a consent order.

2. Whether the Association properly budgeted for and expended Association funds in 2005 and 2006 for repair or replacement of the Association's roof, elevator doors, air handler, boiler room, and individual Unit Owners' HVAC units?

3. Whether, at the Association's annual meeting held on December 13, 2005, the Association properly elected three directors to two-year terms of office to begin in January 2006?

II. Findings of Fact

The hearing lasted more than six hours. Each party was represented by counsel. At the outset of the hearing the Panel received in evidence without objection Commission Exhibits 1a., 1b., 2 and 3. Exhibits 1a. and 1b. are the files maintained by the Commission staff in these cases. Exhibit 2 contains the parties' discovery and related filings. Exhibit 3 is the parties' draft settlement agreement which includes the seven issues on which the parties reached agreement. [2]

Prior to the hearing, the parties stipulated that in resolving their disputes, the Panel should consider the version of the Association's bylaws recorded at 7109/572 ("Bylaws"), and not an earlier recorded version of that document. The Bylaws are included in Commission Exhibit 1a., beginning at page 34. The Bylaws contain the following provisions pertinent to the disputes to be resolved:

Article II, Section 1:

> Except for those matters that the Condominium Act specifically requires to be performed by a vote of the Council of Unit Owners, the administration of the foregoing responsibilities [i.e. administering the Condominium] shall be performed by the Board of Directors.

Article III, Section 1:

> The affairs of the Condominium shall be governed by a Board of Directors composed of five (5) Unit Owners.

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[2] The Panel did not consider any provisions of the draft settlement agreement other than the seven agreed items.

Article III, Section 2:

[T]he Board shall be responsible for the following:

(a) Preparing an annual budget.

(c) Obtaining approval from the majority of Unit Owners for any improvement exceeding $7,500 that is not specifically provided for in the budget.

(g) Keeping financial and associated records relating to the receipts and expenditures affecting the Property.

(i) Providing for upkeep and inspection of all the Common Elements and services.

(l) Making, or contracting for the making of, repairs, additions, and improvements to, or alterations of, the Property.

Article III, Section 4:

Election and Term of Office. All members of the Board of Directors shall be elected to serve for a term of one (1) year.

Article III, Section 14:

Liability of the Board of Directors. The members of the Board shall not be liable to the Unit Owners for any mistake of judgment, negligence, or otherwise, except for their own individual, willful misconduct or bad faith.

Article V, Section 1(b):

Preparation of Budget. Each year on or before the third Wednesday of October the Board shall prepare and disseminate to the Unit Owners a budget for the next calendar year containing an estimate of the total amount it considers necessary for the upkeep, repair and replacement of the

Common Elements, and any parts of the Units for which the Council is responsible. . . . Such budget shall also include what the Board considers necessary to provide working capital for the Condominium, a general operating reserve, and reserves for contingencies and replacements. The Board shall call a special meeting of the Council of Unit Owners to be held, not later than the second Wednesday of November, for the purpose of open discussion of the budget.

Article V, Section 1(d):

Reserves. The Board shall build up and maintain a reasonable fund for working capital, and reasonable reserves for operations, contingencies and replacement.

Article V, Section 5(a):

[T]he Board shall be responsible for the maintenance, repair, and replacement of the following, the cost of which shall be charged to all Unit Owners as a Common Expense:

(1) All of the Common Elements.

(2) . . . [A]ll heating and air conditioning equipment and machinery contained within an individual Unit shall be deemed a Common Elements.

Article XIII:

Section 1. Amendments. Except as otherwise provided in this Section, these Bylaws may be modified or amended either (1) by a vote of sixty-six and two-thirds percent (66 2/3%) of the Unit Owners at any regular or special meeting . . ., or (2) pursuant to a written instrument duly executed by sixty-six and two-thirds percent (66 2/3%) of the Unit Owners.

Section 2. Recording. A modification or amendment of these Bylaws shall become effective when it is recorded in the Office of the Clerk of the Circuit Court, Montgomery County, Maryland.

Complainant testified in her case-in-chief and offered in evidence 29 exhibits, each of which was admitted. Complainant served on the Board in the late 1980s and again from 2001 to 2004. She was the Board's President during a portion of her second term on the Board.

Respondent called Pauline Cooper, Patricia Bryant, and Michael Holtzman, and it offered seven exhibits, each of which was admitted. Ms. Cooper was Board Secretary in 2003, she was a director in 2004 and, later that year, President, and she has been President since 2006. Ms. Bryant has lived at the Condominium since July 2003.

Mr. Holtzman works for Comsource Management, Inc. ("CMI") and has been in property management for 35 years. He is a Certified Property Manager. Mr. Holtzman was offered as an expert witness on property management matters and he was accepted as such without objection.

The facts as established by the parties' witnesses and exhibits were mostly undisputed. The Panel finds as follows:

1. The Condominium is a six-story building, consisting of 54 residential units and common areas. The building is served by a single elevator.

2. Except for the Bylaws amendment discussed below, the Bylaws as recorded in the Montgomery County land records at 7109/572 were in force at all times pertinent to these cases. Relevant excerpts from the Bylaws are quoted above.

3. The Condominium is professionally managed. Prior to the summer of 2005 the Condominium had been managed by CFM Management Services. In the summer of 2005,
the Association replaced its existing management company with CMI. Mr. Holtzman, an employee of CMI, has been the Condominium's property manager since then.

4. In recent years, the Association has had difficulty finding candidates to serve on the Board.

5. In early 2005 the Association commissioned a repair and replacement reserve study to be performed by Property Diagnostics, Inc. A draft report (the "Reserve Study")

was submitted to the Association in April 2005 and was released to Unit Owners in late August 2005. [3]

6. With respect to the matters in dispute here, the Reserve Study:

a. estimates that the roof has a remaining life of three years;

b. estimates that the elevator has a remaining life of six years;

c. estimates that the HVAC piping has a remaining life of 20 years; and

d. states that the air handler unit "has been abandoned in the past. Management has received proposals for the repair of this unit. The repair would include the replacement of damaged coils. This is a limited repair at the cost of $7,800 and will not increase the life of the unit more than five years. Consideration should be given to replacing the air handler unit."

7. The Reserve Study did not address Unit Owners' individual HVAC units.

8. Upon the Association's engagement of CMI, Mr. Holtzman made the following recommendations:

a. That the elevator doors be replaced. Mr. Holtzman testified that this was a safety issue. His testimony and Rspndt. Ex. 6 showed that the doors were original equipment (35 years old), and that parts were no longer available. Other Association witnesses testified that elevator service had been an ongoing problem, that passengers had become stuck, that upper floor residents were reluctant to invite guests because of uncertain elevator service, and that older, upper floor residents were at risk while climbing stairs carrying groceries. Complainant testified that she was unaware of any need to replace the doors.

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[3] The draft report was admitted in evidence as Cmplt. Ex. 13. That exhibit bears the handwritten notation "Released 8/31/05 for $15.00." The Panel assumes that the draft report became the final report without change.

b. That the air handler be made functional and that it be turned on. The basis for this recommendation is that without the air handler, there is an imbalance in interior and exterior humidity, resulting in sweating pipes and moisture damage to the Condominium's common elements. Complainant offered no evidence to dispute this testimony.

c. That the boiler room pipes be tamped. Mr. Holtzman testified that the piping had been mounted directly on the ceiling of the boiler room, resulting in vibration and noise. Other Association witnesses testified that nearby Unit Owners had complained about the noise. Complainant's papers include a claim that this was not a proper common area expense because only two nearby Unit Owners benefited from the work. As noted above, Complainant did not pursue this claim at the hearing. In any event, the Panel finds that the boiler room pipes are part of the common area to be maintained by the Association.

d. That the roof be replaced. Mr. Holtzman testified that the roof was sagging and leaking. Other Association witnesses testified that roof leaks had caused significant interior damage to units on the sixth floor and to common areas. Although Complainant disputed the need for a roof replacement, her only evidence was the Reserve Study statement that the roof had an estimated life of three years.

9. In August 2005 the Board authorized CMI to contract for replacement of elevator doors at a cost of $14,000. Cmplt. Ex. 23.

10. In October 2005 the Board authorized payment of $1,480 for tamping boiler room pipes to eliminate vibration and noise. Cmplt. Ex. 23.

11. In October 2005 the Board authorized CMI to contract for replacement of the roof at a cost of approximately $117,000. Cmplt. Ex. 16.

12. In November 2005, the Board authorized repair of the air handler. According to Complainant's testimony, the total cost was $8,000. Documents contained within Cmplt. Ex. 23 indicate that the total cost exceeded $10,000.

13. Each of the above four expenditures was documented by a Request for Transfer of Funds "to the 80000 account." Cmplt. Ex. 23. [4]

14. The Board decided that each of the work items described above – elevator door replacement, boiler room vibration tamping, air handler repairs, and roof replacement – was necessary for the well-being of the Condominium and the Unit Owners generally. [5]

15. None of the expenditures for the four work items was specifically identified in the Association's 2005 or 2006 budgets (*see* Cmplt. Ex. 14 and 15), or specifically approved by a majority of Unit Owners.

16. During the past several years, the Association has been repairing or replacing the HVAC units in individual Condominium units on an on-going basis, as required by Art. V, Sec. 5(a) of the Bylaws. According to a number of Complainant's exhibits, replacement costs range roughly between $3,300 and $3,600 each. Funds to cover these replacements were transferred to the 80000 account.

17. Funds for repair or replacement of HVAC units in individual Condominium units have not been specifically identified in Association budgets or specifically approved by a majority of Unit Owners.

18. Complainant's exhibits included sample budgets showing beginning reserve balances, contributions to reserves, itemized lists of capital expenditures, and projected ending reserve balances. *E.g.*, Cmplt. Ex. 29. Claimant testified that in her view the Board's budgets should include information similar to the sample budgets. Mr. Holtzman testified that in his opinion the budget format used by the Association was adequate,

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[4] The Panel understands the term "account" in this context to mean a line item on the Association's chart of accounts for financial accounting purposes. The 2005 budget as admitted in evidence (Cmplt. Ex. 14) does not show an 80000 account, although it does contain line items beginning with 70010 for reserves. In the 2006 and 2007 budgets (Cmplt. Ex. 15 and 24), the 80000 account is titled "Transfer from Reserves."

[5] Neither party provided the Panel with actual minutes of Board or Unit Owner meetings. The Panel was left to infer what happened at meetings based on testimony and on notices of meetings and correspondence contained in the record.

although he thought that CMI might be able to include information similar to that shown in the sample budget if required to do so.

19. Complainant testified that her annual assessment between 2005 and 2006 increased by more than 30%. This is borne out by Cmplt. Ex. 24, which shows actual (aggregate) assessment income for 2005 at $291,910 and budgeted 2006 (aggregate) assessment income of $381,685, a 30.8% increase. Complainant attributed this increase to a deficit resulting from unbudgeted reserve fund expenditures.

20. On November 16, 2005, the Association's Board adopted a resolution to amend the Bylaws to provide for staggered terms for directors. Mr. Holtzman consulted with outside counsel on the resolution.

21. The Board believed that staggered terms for directors would promote continuity and improve governance of the Condominium.

22. The Association held an annual meeting of the Unit Owners on December 13, 2005, at which time four directors were elected to begin serving in January 2006. Although the Bylaws call for a Board of five directors, only four persons were interested in serving at that time. The resolution to amend the Bylaws apparently did not come up at the December 13 annual meeting.

23. On December 19, 2005, Mr. Holtzman, on behalf of the Association, mailed a notice to the Unit Owners (Cmplt. Ex. 2) informing them of the Board resolution to amend the Bylaws; enclosing a copy of the resolution and a proxy to vote in favor of the resolution; and notifying them that the proposed amendment would be presented to the Unit Owners on January 25, 2006.

24. According to an agenda admitted as Cmplt. Ex. 5, the Board held a regular, monthly meeting on January 25, 2006. It is unclear from the record whether this meeting was also a special meeting of the Unit Owners. [6] In any event, according to the evidence a number of Unit Owners attended the meeting and a vote was taken on the resolution to amend the Bylaws, but the two-thirds vote required by Art. XIII, Sec. 1 of the Bylaws and § 11-104(e)(2) of the Maryland Condominium Act was not achieved.

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[6] Meeting minutes would have been helpful here, as well.

25. Over the next several months, written proxies in favor of the resolution were received, such that, by April 25, 2006, the requisite two-thirds vote had been achieved.

26. On November 14, 2006, the Association recorded an amendment to the Bylaws among the Montgomery County land records (the "Amendment", Cmplt. Ex. 12). The Amendment is dated January 26, 2006, it bears a notary's acknowledgment dated January 26, 2006, and it contains a certification of the Association's Secretary that the Amendment was "approved by the affirmative vote of sixty-six and two-thirds percent (66 2/3%) of the Unit Owners at the at the [sic] regular meeting of the condominium held on January 25, 2006."

27. The Amendment contains the following substantive provision:

> 3. Commencing with the scheduled regular meeting of the Unit Owners held on January 25, 2006, the term of office for Directors shall be staggered from one (1) year to two (2) years as follows:
>
> (a) The three candidates receiving the highest number of percentage votes shall serve a term of two (2) years;
>
> (b) The two candidates receiving the next highest number of percentage votes shall serve a term of one (1) year; and
>
> (c) The effective date of this amendment shall be January 26, 2006 with an approval affirmative vote by the Unit Owners pursuant to Article XIII, Section 1 of the Bylaws.

28. The Amendment was drafted with the assistance of outside counsel to the Association.

29. Mr. Holtzman testified that in his opinion the Amendment should be given retroactive effect, such that three of the directors elected in December 2005 were properly elected to two-year terms. Complainant disputes this opinion. She claims that the Amendment did not become effective until it was recorded in November 2006.

30. The Association held an annual meeting of Unit Owners on December 12, 2006. At that meeting the Board took the position that, pursuant to the Amendment, three

of the directors elected on December 13, 2005, had been elected to two-year terms; that those three directors would continue in office through 2007; and that there were only two vacant director positions to be voted on.

31. At the December 12, 2006, annual meeting, two directors were elected.

At the conclusion of the hearing, closing arguments were waived. The record was kept open to May 1 to allow the parties to submit written post-hearing memoranda in lieu of closing arguments. The parties each submitted post-hearing memoranda, which the Panel has considered in reaching its findings and conclusions.

III. Conclusions of Law and Discussion

A. Reserve Budgets Generally

Although the Board, not the Unit Owners, has final say over the Association's annual budget (Bylaws, Art. III , Sec. 2(a) and Art. V, Sec. 1(b)), the Maryland Condominium Act at § 11-109.2(a) requires submission of an annual proposed budget to the Unit Owners. So does MC Code § 10-B18. Condominium Act § 11-109.2(b) requires the annual budget to "provide for at least the following items: . . . (6) Reserves; and (7) Capital items." The Association's Bylaws amplify this requirement:

> Each year on or before the third Wednesday of October the Board shall prepare and disseminate to the Unit Owners a budget for the next calendar year containing an estimate of the total amount it considers necessary for the upkeep, repair and replacement of the Common Elements, and any parts of the Units for which the Council is responsible. . . . Such budget shall also include what the Board considers necessary to provide working capital for the Condominium, a general operating reserve, and reserves for contingencies and replacements. The Board shall call a special meeting of the Council of Unit Owners to be held, not later than the second Wednesday of November, for the purpose of open discussion of the budget.

Bylaws, Art. V, Sec. 1(b).

The Association's budget for 2005 (Cmplt. Ex. 14), prepared in October 2004 by its prior management company, shows a net surplus from operations of $50,364, which is

to be contributed to reserves. No expenditures from reserves are budgeted. In fact, the Association spent substantial sums during 2005 which it accounted for as reserve expenditures. *See* Cmplt. Ex. 15.

The Association's 2006 budget (Cmplt. Ex. 15), prepared in November 2005 by its new management company, shows a net surplus from operations of $75,000, which is to be contributed to reserves. Again, no reserve expenditures are budgeted, although substantial reserve expenditures were made in 2006, as shown by Cmplt. Ex. 24.

The Association's 2007 budget (Cmplt. Ex. 24), prepared in November 2006, shows a net surplus from operations of $75,000, which is to be contributed to reserves. Again, no reserve expenditures are budgeted.

The Association explains the discrepancy between the 2005 and 2006 reserve budgets (showing no projected expenditures) and year-end financials for those years (showing substantial reserve expenditures) by saying that the "Board did not plan to make these expenditures so they did not include these expenditures in the prior year's budget." Rspndt. Post-Hearing State. at 4. This explanation is less than convincing. For example, one of the (unbudgeted) expenditures actually paid during 2006 was $117,735 for the roof replacement (Cmplt. Ex. 24). But the contract for the roof replacement was signed in October 2005 (Cmplt. Ex. 16) and clearly could have been anticipated and included in the 2006 budget. Rather, it appears to the Panel that the Association has had a policy of budgeting for *contributions* to reserves, but of not budgeting for *expenditures* from reserves. [7]

The issue before the Panel is whether the Condominium Act, the MC Code or the Bylaws *requires* the Association to budget for specific reserve expenditures, or instead whether they permit the Association simply to allocate a gross amount to reserves and draw on that amount as needed.

The Condominium Act at § 11-109.2(b) requires that the annual budget include reserves and capital items, but nothing in the Act expressly requires the budget to include an itemized list of anticipated expenditures from those accounts. Section 11-109.2(d)

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[7] Compare Cmplt. Ex. 29 – one of Complainant's sample budgets – which contains separate entries for a starting reserve balance, a contribution to reserves during the budget period, specific reserve expenditures anticipated during the budget period, and a projected ending reserve.

requires that the budget be formally amended to authorize non-emergency expenditures that would result in an increase of more than 15% of unit owner assessments; significantly, however, the 15% trigger is tied to assessments, not expenditures.

MC Code § 10B-18 contains requirements similar to the Condominium Act, again without expressly requiring that anticipated reserve expenditures be itemized.

Finally, the Bylaws state that the budget "shall also include what the Board considers necessary to provide working capital for the Condominium, a general operating reserve, and reserves for contingencies and replacements." This seems to contemplate no more than that gross amounts be set aside.

In short, the Panel does not read the Condominium Act, the MC Code, or the Bylaws as mandating anything more than reserve and capital accounts. Under the business judgment rule, discussed below, the Panel is not free to dictate more detailed requirements to the Association.

That is not to say that a more detailed reserve budget would be superfluous. To the contrary, the Panel believes that the format of Complainant's sample budget (*see* footnote 7) would provide useful information to Unit Owners without imposing significant additional burdens on the Association or its professional management company.

The Panel is mindful that the Association has both changed management companies and obtained a detailed reserve study since its 2005 budget was prepared. In addition, ordering paragraph 7 of Section IV of this Decision and Order requires the Association to perform reserve studies on an as-needed basis and to "utilize the information provided in the reserve study to project replacement reserve contributions *and expenses*" (emphasis added). The Panel therefore concludes that it need not further address any past inadequacies in the Association's reserve budgeting process.

B. Disputed Expenditures

The Association is obligated to maintain, repair and replace common areas. Condominium Act § 11-108.1. Here, that obligation has generally been delegated to the Board. Bylaws, Art. II, Sec. 1, and Art. III, Sec. 2.

That does not mean, however, that the Board may authorize expenditures without limit or without following mandated procedures. Condominium Act § 11-109.2(d) prohibits non-emergency expenditures that would result in a more than 15% increase in Unit Owner assessments without a formal amendment to the budget. And MC Code § 10B-18's requirement for submission of a proposed budget at least implicitly requires the Board to keep within the budget once it has been approved (again excepting emergency expenditures).

The expenditures at issue here – elevator door replacement, boiler room vibration tamping, air handler repairs, roof replacement, and individual HVAC units – were unbudgeted and, at least in the aggregate, they appear to have triggered a 30% increase in Unit Owner Assessments. On the other hand, there was substantial expert and other testimony that the underlying conditions which necessitated the expenditures presented legitimate safety, health and property damage concerns. Complainant presented no competing expert. Her reliance on the Reserve Study was not persuasive, since the Reserve Study only provided *estimates* of remaining life of the items involved. The Reserve Study did not and it could not rule out possible roof leaks, malfunctioning elevator doors, etc. Nor could the Reserve Study rule out the possibility that replacement, rather than repair, of a common element would be more prudent and economical, even though the common element's estimated remaining life had not yet expired.

At least insofar as Condominium Act and MC Code restrictions are concerned, the Panel is not in a position to second-guess the Board's decisions that the disputed expenditures were necessary. *Black v. Fox Hills North Community Ass'n, Inc*., 599 A.2d 1228 (Md.App.1992) ("business judgment rule . . . requires the presence of fraud or lack of good faith in the conduct of a corporation's internal affairs before the decisions of a board of directors can be questioned"); MC Code § 10B-8(4) (for purposes of the Commission's jurisdiction, a "dispute" is defined to exclude "any disagreement that only involves . . . the judgment or discretion of a governing body in taking or deciding not to take any legally authorized action"). [8]

[8] In the absence of minutes making clear the basis for the Board's actions, the Panel infers that the Board intended to exercise its emergency expenditure authority. Good practice suggests that when a board exercises emergency powers it should so indicate in the minutes and include in the minutes the factual basis for doing so.

The Bylaws present a more difficult issue. Art. III, Sec. 2(c) requires the Board to obtain approval from a majority of Unit Owners "for any *improvement* exceeding $7,500 that is not *specifically* provided for in the budget" (emphasis added). Unlike the Condominium Act and the MC Code, there is no exception in the Bylaws for emergency expenditures. [9] Based on this provision, Complainant argued that since the disputed expenditures were not line items in the Association's budget, they should not have been made without Unit Owner approval. The Association responded that none of the disputed expenditures was an "improvement" within the meaning of Art. III, Sec. 2(c).

Just what the Bylaws mean by "improvement" is unclear. The Panel concludes, however, that it need not determine the meaning because, even if the expenditures in excess of $7,500 were improvements subject to Unit Owner approval, no remedy is appropriate here. The work clearly cannot be undone. Nor can individual Board members who voted for the expenditures be ordered to reimburse the Association. *See* Bylaws, Art. III, Sec. 14, which immunizes Board members from liability "for any mistake of judgment, negligence, or otherwise, except for their own individual, willful misconduct or bad faith." *See also* Md. Code, Cts.& Jud. Proc. § 5-406. While the Panel could order the Board not to commit future violations of this type, the Consent Order portion of this Decision and Order already addresses future conduct and it contains an exception for emergency expenditures, making the threat of future violations unlikely. [10]

Accordingly, the Panel will not order any further relief with respect to the expenditure dispute.

C. Election

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[9] By agreement of the parties, the Consent Order portion of this Decision and Order incorporates the concept of emergency expenditures. See ordering paragraph 1 of Section IV: "[E]mergency maintenance, replacement(s) and/or repair(s) that in the Association's reasonable judgment cannot await the Unit Owner's approval process need not be approved by the Unit Owners."

[10] In response to a Panel question during the hearing, Complainant was not able to identify the specific remedy she was seeking regarding the disputed expenditures. Counsel for Complainant stated that the question may have taken Complainant by surprise, but Complainant's post-hearing submission did not contain a requested remedy specifically addressing the expenditures.

Counsel for Complainant stated during opening argument and he confirmed in response to a question by the Panel and in his post-hearing submission that Complainant was not contesting the validity of the Amendment or the manner in which is was adopted, but only its retroactive application to the directors elected in December 2005. Accordingly, the validity of the procedure by which the Amendment was adopted is not before the Panel; the Panel assumes, without deciding, that the Bylaws were duly amended.

The effective date of the Amendment and its purported retroactive effect *are* before the Panel. The undisputed facts show that the Amendment did not achieve the requisite two-thirds approval until April 2006, and the Amendment was not recorded until November 2006. Although the Board had adopted a resolution to provide for staggered terms in November 2005, that resolution could be no more than a recommendation, since only the Unit Owners can amend the Bylaws. Art. XIII, Sec. 1.

Section 11-104(e)(5) of the Condominium Act provides that an amendment to the bylaws "shall be entitled to be recorded if accompanied by a certificate . . . that the amendment was approved by Unit Owners having the requisite percentage of votes and *shall be effective on recordation*" (emphasis added). Art. XIII, Sec. 2 of the Bylaws says the same thing. Clearly, then, the Amendment was not in effect at the time of the disputed, December 13, 2005 election.

The Association argued that the Amendment, by its terms, had retroactive effect. The Amendment states that staggered terms shall "[c]ommenc[e] with the scheduled regular meeting of the Unit Owners held on January 25, 2006" and "[t]he effective date of this amendment shall be January 26, 2006." The Panel concludes, however, that these provisions are not sufficient to have the Amendment apply to the December 13, 2005, election. First, the Amendment itself does not purport to reach back to December 13, 2005, but only January 25 or January 26, 2006. Second, the Condominium Act and the Bylaws both state that amendments take effect when they are recorded. Nothing in the Act, the Bylaws, or any authority cited to the Panel allows a bylaws amendment to have retroactive effect. [11]

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[11] In *Bennett v. Damascus Community Bank*, 2006 WL 2458718 *9 (Cir. Ct. Mont. Cnty. Md. No. 267722, decided Apr. 6, 2006), the Circuit Court ruled that a corporation's board may retroactively ratify a prior, defective action, provided the prior action was within the board's *de jure* authority. Here, however, the Unit Owners were not asked to ratify a prior, defective action; they were simply voting on an amendment to the Bylaws.

The Panel therefore concludes that, consistent with the Bylaws as they were then in force, the directors who were elected on December 13, 2005, were elected to one-year terms, expiring in December 2006. Thus there were five vacancies, not two, to be filled at the December 12, 2006, annual meeting. Since only two directors were then elected, there remain three vacancies yet to be filled. These vacancies should be filled at a special meeting of the Unit Owners pursuant to Art. III, Sec. 6 of the Bylaws.

Since the Amendment *was* effective at the time of the December 2006 elections, the two directors then elected were elected to two-year terms expiring in December 2008. This is consistent with the Annual Meeting Notice for the December 12, 2006 meeting (Cmplt. Ex. 4), which said: "Pursuant to Article III, Section 4 as amended, two (2) candidates may now be elected to serve two (2) year terms."

The Panel considered whether to require the Association to re-record the Amendment to correct the Certification of Secretary to recite that the requisite number of votes was obtained on April 25, 2006, not on January 25, 2006, as certified. The Panel concludes that such re-recording is unnecessary. Correction of the date would have no effect on the disputed election since the Panel has already concluded that the Amendment did not become effective until it was recorded on November 14, 2006. Whether the requisite votes were obtained in January 2006 or April 2006 is therefore irrelevant to the election dispute. In addition, the Condominium Act at § 11-104(e)(5) provides that the Secretary's certification "shall be *conclusive evidence* of approval" (emphasis added). [12]

One consequence of the Panel's decision is that, following the December 12, 2006 election, the Board consisted of only two validly elected directors, not the five who presumably have purported to act. [13] That calls into question the validity of all Board actions taken between the defective December 2006 election and the special election being ordered by the Panel. The Panel stresses that nothing in its decision precludes the

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[12] A showing of fraud might be sufficient to overcome the conclusive effect of the Secretary's certification. See *Black v. Fox Hills North Community Ass'n, Inc*. The Panel concludes, however, that the Association and its officers acted in good faith here to improve the Association's governance, obtaining advice both from its management company and from outside counsel.

[13] Unlike some bylaws, these Bylaws do not say that a director's term of office continues until his or her successor is elected.

Board, or the Unit Owners themselves, from ratifying any actions taken during that period. *See Bennett v. Damascus Community Bank*, cited in footnote 11, above.

C. Other Matters

Neither party requested an award of attorney's fees or presented any evidence as to the amount of fees. Accordingly, the Panel does not award any fees.

Complainant requested that each of her two $50 filing fees be refunded. The Panel will order a refund of only one of her filing fees, as the Complainant did not prevail on all issues.

IV. Consent Order

Based upon the consent of the parties, it is by the Panel, this 18th day of May, 2007, ORDERED as follows:

1. The Association is prohibited from spending in excess of $7,500 on any individual improvement unless the expenditure is provided for in the Association's approved budget, or unless the expenditure is approved by the Association's Unit Owners pursuant to Art. III, Section 2(c) of the Association's Bylaws; provided, however, that emergency maintenance, replacement(s) and/or repair(s) that in the Association's reasonable judgment cannot await the Unit Owner approval process need not be approved by the Unit Owners.

2. The Association will carry workers' compensation insurance, as and to the extent required by Md. Code, Lab. & Empl. § 9-101 *et seq.*, and Art. III, Section 2 of the Association's Bylaws, and the Association will include the cost thereof in the Association's annual budget; provided, however, that the cost need not be included as an explicit line item.

3. As required by Art. V, Section 1(b) of the Association's Bylaws, the Association will hold a special meeting in November of each year at which the primary topic of discussion will be the annual budget. Prior to each such meeting the Association's Board will draft and distribute a special notice informing the Association's

Unit Owners of this meeting. The meeting will be held prior to the meeting at which the Board approves the budget.

4. When a matter comes before the Association's Board of Directors that solely involves a director's individual unit, such director will recuse himself or herself from voting on that matter.

5. Until such time as the Association's Bylaws are amended as provided in Md. Code, Real Property § 11-114(g)(2)(iii), to impose responsibility on a Unit Owner to pay the Association's insurance deductible for damage or destruction originating in or from the Unit Owner's unit (not to exceed $1,000), the Association will not require a Unit Owner to pay the first $1,000 deductible.

6. The Association's Board of Directors will allot time during each Board of Directors' meeting to answer Unit Owners' questions; provided, however, that the Board may impose an aggregate time limit of fifteen (15) minutes for all Unit Owners' questions.

7. Except as otherwise required by law, the Association will have a reserve study performed on an as-needed basis and the Association will utilize the information provided in the reserve study to project replacement reserve contributions and expenses.

8. Nothing in this Consent Order prohibits the Association from modifying its governing documents in accordance with law and the procedures specified in such governing documents and from enforcing and complying with its governing documents as thus modified.

V. Order on Disputed Issues

Based the foregoing findings and conclusions, it is by the Panel this 18th day of May, 2007, further ORDERED as follows:

1. Within 60 days after issuance of this Order, the Association must conduct a special meeting of Unit Owners pursuant to Article III, Section 6, of the Bylaws for the purpose of filling three vacancies on its Board of Directors.

2. All further relief to Complainant is denied.

3. Each party will bear her or its own costs, including attorney's fees.

4. Of the Complainant's $100 in filing fees, the Respondent shall refund $50.00 within 30 days after the date of this Decision and Order.

Panel members Antoinette Negro and Jeffrey Kivitz concur in this decision.

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