Before the

Commission on Common Ownership Communities
Montgomery County, Maryland

In the matter of		
Jo Ann Fiscina	x	
c/o Corinne Rosen, Esq.	x	
P.O. Box 493	x	
Rockville, MD 20848,	x	
Complainant,	x	
	x	
v.	x	Case No. 71-06
	x	**January 30, 2008**
Devonshire East Homeowners	x	
Association	x	
c/o Jeffrey Van Grack, Esq.	x	
Lerch, Early & Brewer	x	
Suite 460	x	
3 Bethesda Metro Center	x	
Bethesda, MD 20814,	x	
Respondent.	x	

DECISION ON RESPONDENT'S MOTIONS

Respondent Devonshire East Homeowners Association has argued that the Commission was without jurisdiction on issues in this case from the time of their response to the complaint based on their view that Complainant had failed to exhaust the remedies available in the Association documents and that some of the remedies requested by the Complainant are beyond the authority of the Commission. Following the completion of Complainant's case in chief, Respondent renewed those arguments and also now advocates dismissal of claims in the case on the theories of mootness, laches, failure to state a claim for which relief can be granted, and failure to satisfy the Complainant's burden of proof.

The first claim Respondent addresses is that the proxies used to elect directors during the past several annual membership meetings have been general rather than directed proxies. The evidence is clear and undisputed that the proxy form that has been used at Devonshire East annual membership meetings has included, as an option for homeowners to check, the language "[t]o cast my vote during the election for the Board of Directors…". Respondent takes the position that this language complies with the requirement of Chapter 10B of the Montgomery County Code, at 10B-17 (d), that "a proxy that is not appointed to vote as directed must be appointed only to meet a quorum or vote on matters other than an election for a governing body." Respondent argues that

the proxy language used meets the Code requirement as a matter of law and that the opinions of counsel from Shelah Lynn (Ex. R-15) and Elizabeth Hileman (Ex. R-16, Ex. R-17) support this view.

The County Code requirement was passed in 1990. Ms Lynn's advice dated May 13, 1999 does not refer to the County Code but instead is focused on an issue, related to nomination of candidates for the Board of Directors as the process is prescribed in the Association documents, that has not been raised in this case. Ms Lynn's guidance is silent on the issue of whether the proposed proxy form constitutes a general or directed proxy.

Ms Hileman's letters, dated November 2 and November 8, 2006, are identical except that the November 8 letter has an additional paragraph at the end of the letter. This paragraph was added to caution the Association against taking any action to address the proxy issue since the Complaint had been filed with the Montgomery County Commission on Common Ownership Communities (CCOC). In her letter Ms Hileman reviewed Commission case decisions and did not find any interpreting the relevant Code language; she reviewed the *Common Ownership Community Manual & Resource Guide* (2005) prepared by the CCOC and quotes the description of "Directed Proxies":

> Directed proxies bind the proxy holder to specific terms, allowing the proxy giver to control the vote. The directed proxy is, in effect, an absentee ballot, which means that the proxy holder is little more than a courier who is entrusted with recording a vote. p. 37

Ms Hileman recognized that the language of the Association proxy could lead homeowners to believe and rely on the belief that they had directed the proxy holder to vote for candidates for director on their behalf but she also indicated that "it is more common that a directed proxy contain names of candidates." She found nothing in the language of the statute that made the proxy used by the Association clearly invalid. However, she recommended that the form of proxy be reviewed for future elections or that a special meeting be held in the near future with a ballot. This letter is clearly not a firm opinion concluding that the proxy used by the Association complied with the County Code.

Complainant has stated a claim regarding the form of proxy used in the annual membership meeting relating to the election of directors on which relief may be granted. A proposed draft proxy form has been introduced in the record (C-69) that may be used at future Association membership meetings, but that is not enough to make this issue moot, particularly in light of Respondent's continued argument that the proxy form used in the past complies with the County Code. Ms Hileman's letter to the Board of Directors, which is not written as an "opinion letter," indicates that in her view a proxy that would meet the requirements of the County Code would include the names of the candidates. This letter does not offer a conclusion that supports Respondents on this issue.

Ms Hileman reviewed sources of potential interpretation of the County Code requirement for a proxy appointed to vote as directed. She did not, and nor has Respondent, offered case law or other legal authority to support his conclusion that the language on the Association proxy meets the intention of the County Code requirement that it be "appointed to vote as directed." This question may be further addressed in the parties' legal briefs. It does not seem likely in light of what appears to be a complete factual record that there is any other useful evidence or testimony on this claim. This claim is not dismissed based on any of the theories proposed by Respondent.

The second issue addressed by Respondent relates to a resolution passed by the Board at the Board meeting held on May 18, 2006 (Ex. C-58) which says:

> The Board of Directors recognized that the Community has appropriately indicated that on-going activities of the Board and Association committees need to function more effectively and more openly, but has not indicated any desire to thwart on-going activities by unduly dwelling on the past;
>
> WHEREAS, the previous Boards and committees over the last 18 years have approved architectural change requests and other community regulations without, what might be alleged to be, sufficient formal documentation and/or for which formal documentation no longer exists; and
>
> WHEREAS, there is no indication or even any credible allegation that any such past action of any Board member or committee member was taken other than in good faith.
>
> NOW THEREFORE, it is hereby:
>
> **That the Board adopts, ratifies and confirms all architectural change or other community regulatory actions taken and things done in good faith by the current or past Directors, officers of this Association and committee members, in the usual course of business to date, including all actions taken by such individuals in good faith and in the reasonable belief that such actions were or would be in the best interests of this Association, including all actions by Directors and committee members at all meetings, whether or not such meetings were properly called or open, and whether or not such actions were otherwise irregular.**

Respondent moves that "[t]he Panel Should Grant Summary Judgment on all Claims Related to the Adoption of any Rule or Approval Granted by the Board or a Committee or any action taken Prior to May 18, 2007 [sic] as those actions have been Properly Ratified by the Current Board of Directors." In support of this motion Respondent offers a quotation from *Picard v. Sugar Valley Lakes Homes Association,* 37 Kan. App.2d 210, 151 P.3d 850 (Kan. App. 2007), a decision from the Court of Appeals

of Kansas, for the principle that whenever a corporation has the power to do an act it has the power to ratify and make valid an attempted effort to do that act though it may have been done "ever so defectively, informally or even fraudulently in the first instance." 151 P.3d at 853-4.

The *Picard* case and an unreported 2006 decision by the Maryland Circuit Court, Montgomery County, *Bennett v. Damascus Community Bank*, No. 267722-V, 2006 WL 2458718, clearly confirm the power of a corporate Board to ratify a single discrete described act which was within its power. That is not sufficient legal support to dismiss Complainant's concerns, related to governance and records of the Association, of a resolution that purports to ratify any act taken by a Board or committee of the Association over a period of 18 years for which the Association may or may not have records and for which the Directors voting on the resolution have no factual description.

The parties are invited to provide case law and other legal authority regarding the requirements for corporate ratification and the appropriate basis and extent of such actions. This issue is not dismissed.

Next, Respondent moves for dismissal of an issue regarding a letter written by the President and distributed just prior to the 2006 annual meeting. This issue is raised in the Complaint as one of several concerns about the conduct of the 2006 annual membership meeting and not as an independent count or claim. Attached to the "Notice of Annual Meeting" distributed by the management company (Ex. C-20), along with the proxy form and meeting agenda, is a letter from Stephen C. Shaffer, President. In that letter Mr. Shaffer says:

> During the meeting, you will also have the opportunity to make an imprint on your Board of Directors. One of the sitting members of the Board is up for reelection and others may be seeking a spot on the Board. A strong experienced Board is very important as we make the decisions about how to maintain our community. Your vote is important and I urge you to exercise your right by showing your confidence in your Board of Directors and community.

Mr. Shaffer testified that he had intended to encourage members of the community to attend the annual meeting. Whether this language seems to be intended to support the incumbent member of the Board may be in the mind of the reader. In light of the intensity of disagreement in the community the language was probably ill-advised and in the future such letters should be written in a way that is not as easily subject to misunderstanding. Since this issue was raised as one of several related to the conduct of the annual meeting in 2006, it cannot be independently dismissed. The panel does not anticipate granting a remedy related to this letter alone.

Related to the issue of the letter written by the President and distributed by the management company with the Notice of Meeting is the issue of the members of the Board canvassing the community and collecting proxies. Respondent is correct that such

conduct does not violate any rule or principle of community governance. This was another issue raised as an element that Complainant raised as objectionable in the conduct of the 2006 annual meeting. Complainant was also concerned that the Board members were collecting proxies with the limited direction that the proxy holder vote for candidates for director before the candidates' statements had been circulated. However, the panel does not anticipate granting a remedy related to the canvassing by members of the Board alone.

Complainant has alleged that the Board has failed to take and keep minutes of meetings. Respondent moves to dismiss this claim as moot. Respondent has not demonstrated that it is moot. Even if Respondent demonstrates that the Board and its committees, if any, are now taking minutes, it does not preclude the panel from confirming in a final order in this case that meeting minutes are required records and that they must be retained.

In her complaint, Ms Fiscina alleges that Annual Meetings have not been held regularly at the same time every year in accordance with the requirement of the Bylaws at Article III, § 1, "Annual Meetings":

> The first annual meeting of the members shall be held within twelve (12) months from the date of filing of the Articles of Incorporation of the Association, and each subsequent regular meeting of the members shall be held on the same day of the same month of each year thereafter or such other reasonably similar date as may be selected by the Board of Directors....

Evidence in the record establishes that the dates of the annual meetings for the past several years have been May 25, 1999 (Ex. C-4), May 16, 2000 (Ex. C-5), July 23, 2001 (Ex. C-6), August 23, 2002 (Ex.C-8), May 27, 2004 (C-9), January 18, 2006 (Ex. C-13), and September 28, 2006.

Respondent's Motion on this claim is flippant, without substance, and disrespectful of the panel and the Commission hearing process. Respondent has not addressed the Bylaw requirement and is cursorily dismissing any possible legitimacy of this claim rather than addressing it. No basis for dismissing this claim is presented and the claim is not dismissed.

The next claim that Respondent moves to dismiss is one that Complainant describes as "Directors – Terms of Office" and Respondent describes as "Holdover Directors." Ms Fiscina is complaining about irregular scheduling of the annual meetings and that on at least one occasion a Board member whose term had expired simply remained on the Board for an extra year without being reelected.

Despite the sloppiness in governance practices demonstrated by the Devonshire East Homeowners Association Board of Directors, the Corporations and Associations Article of the Maryland Code at § 2-405 does expressly permit directors to serve until

their successors are elected and qualify. The panel will not order a remedy regarding the Directors serving longer than the terms for which they were elected. However, this is an element of a larger claim in the Complaint and the larger claim is not dismissed.

Respondent next moves for dismissal of the claim that between 1999 and 2004 the number of positions on the Board of Directors was changed from seven to five without a vote by the members in accordance with the Association Bylaws at Article IV, § 1, which says *in pari materia*:

> ...the Board shall consist of an uneven number of not less than three (3) nor more than seven (7) members who shall be elected by the members of the Association. ...the number of Directors shall be determined by a vote of the members at the annual meeting of the members and the number of Directors may be changed by a vote of the members at a subsequent annual or special meeting of the members; provided, however, that (a) the the limitations of this Section shall continue to apply; and (b) no such change shall operate to curtail or extend the term of any incumbent Director.

Minutes from Board meetings in 1998 and 1999 (Ex. C-1, Ex. C-2) indicate that there were seven members of the Board at that time. Testimony of Ahmed Motawie, President of Liberty Management, the management company for the Association for approximately 15 years, was that he has no record of a membership vote to change the number of Board of Director positions. There is no other evidence in the record that the Association has conducted such a vote.

Respondent would have the Commission panel require Complainant to make a motion at an annual meeting or a special meeting to exhaust her remedies under Montgomery County Code §10B-9(b) before accepting jurisdiction on this claim, and while it is not clearly stated, probably on some number of other claims in the Complaint. It is the conclusion of this panel that Respondent in this case is arguing that there should be no jurisdiction pending one or more extraordinary remedies which appear to be beyond the intent of the Code section that requires "a good faith attempt to exhaust all procedures or remedies provided in the association documents." The claim she has made, on this issue as well as others, is to enforce the provisions of the governing documents that the Board has failed to follow. There is a long history of effort by this Complainant to communicate her concerns to the Board and to effect change. She had a very difficult time getting records and has indicated that a number of the records necessary to establish the facts in this case were not available to her until the case was filed and discovery began. Meetings of members have been held on an irregular schedule and apparently in some cases there has not been adequate time to do the normal business of the meeting. There should be no surprises to the Board in the issues raised here and there is no reason to believe the Board would have seriously addressed the issues without this litigation.

Alternatively, Respondent argues that Complainant has failed to meet her burden of providing evidence that there was not a proper reduction in Board positions.

Respondent's argument fails. Complainant has through evidence and testimony supported her allegation that there has been a reduction in Board positions and that it was not in accordance with the Association Bylaws by a preponderance of the evidence. Respondent may now introduce evidence to shift the preponderance in their favor. This claim is not dismissed.

Next, Respondent argues that the Maryland Homeowners Association Act, Title 11B of the Real Property Article, at § 11B-111, "differentiates between closed and non-noticed Board meetings." The statute states, *in pari materia*:

> Except as provided in this title, and notwithstanding anything contained in any of the documents of the homeowners association:
>
> (1) Subject to the provisions of paragraph (4) of this section, all meetings of the homeowners association, including meetings of the board of directors or other governing body of the homeowners association or a committee of the homeowners association, shall be open to all members of the homeowners association or their agents;
>
> (2) All members of the homeowners association shall be given reasonable notice of all regularly scheduled open meetings of the homeowners association:

The panel does not agree with the Respondent's interpretation of the statutory language since it would serve to make the requirement of the law meaningless. However, it is not necessary to reach this interpretation of the statute because the Association Bylaws at Article VI "Meetings of Directors," § 1. "Regular and Special Meetings" states:

> All meetings of the Board of Directors or any committee created by the Board of Directors shall be held only at regularly scheduled and established dates or periods at such time and place as shall have been made known to all members in accordance with the procedures established in Article III, Section 3 of these Bylaws.[1] All such meetings shall be open to all owners and occupants of units of the Association, their guests and any representative of the news media and be held at places and times convenient to the greatest number of members. Meetings of the Board of Directors may be held in closed session only in accordance with Article III, Section 9, of the Bylaws.[2]

Not only do the Bylaws require, except for specified purposes, all meetings of the Board of Directors and of any committee created by the Board to be open with notice

[1] Article III, § 3, "Notice of Meetings" includes specific requirements for adequate notice of meetings.

[2] Article III, § 9, "Open Meetings" requires that all membership meetings be open to all owners and occupants of units in the Association, their guests and representatives of the media except under enumerated circumstances.

given to members of the Association, but they also require all meetings to be regularly scheduled which means that under the statute reasonable notice must be given.

Respondent's theory of open non-noticed meetings is counter to their argument that the issue of open meetings is moot since it indicates that Respondent does not accept the responsibility for providing adequate notice to the Association members of Board and committee meetings. Further, the record indicates that the Board has been casual about doing Association business at meetings that were scheduled, for which notice was provided, and which are actually held in an open forum.

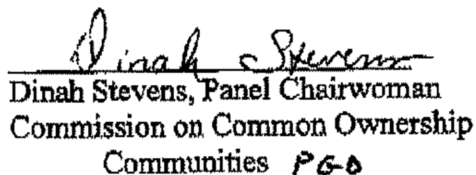
In light of the difficulty Ms Fiscina has had in getting records and the responsibility of the Board to maintain records, Ms Fiscina has introduced sufficient credible evidence of inadequacy of meeting notices to shift the burden to the Respondent. The claim is not dismissed.

The last five issues in Respondent's motion document, numbered 10, 11, 12, 12, and 7, are not sufficiently related to Complainant's claims or set forth in sufficient detail to clearly describe the result being requested from the panel. The panel declines to act on these issues in response to the Motions filed.

This panel finds that no remedy is available for Directors' canvassing and for Directors continuing in office until a successor is elected and qualifies and that no remedy will be granted with regard to Mr. Shaffer's 2006 letter.

The panel orders that this decision be distributed by the Board to every unit owner in the Devonshire East Homeowners Association within ten (10) days of issuance.

This decision is concurred in by Commissioners Staci Gelfound and Vicki Vergagni. This is an interlocutory decision and therefore may not be appealed prior to issuance of a final decision in this matter.



Dinah Stevens, Panel Chairwoman
Commission on Common Ownership
Communities PG-D