

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

**EDWIN TANOUYE**

**Complainant**

**v.**

**Case No. 19-12  
March 21, 2013**

**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 December 19, 2012, pursuant to Chapter 10B of the Montgomery County, Code. The parties did participate in mediation, but were not able to resolve this case in mediation. Based on the parties' submissions, and the evidence and argument presented by each party at the December 19, 2012 hearing, and the record herein, the Hearing Panel finds, concludes, and orders as follows.

**BACKGROUND SUMMARY**

Complainant Edwin Tanouye filed a dispute with the Commission against Respondent Decoverly I Homeowners Association on March 23, 2012, alleging that the Association's President, Donald Weinstein, acted without legal authority and in violation of the Association's By-laws, by unilaterally canceling the Annual Meeting and election scheduled for March 19, 2012, on the night of said Annual Meeting. Two Board of Director seats were to be filled at the March 19, 2012 Annual Meeting. Complainant alleges that there was a quorum of homeowners present in person and/or by proxy to conduct business at the March 19, 2012 Annual Meeting.

Complainant further alleges that the Board President cancelled the Annual Meeting because the Board President objected to Complainant's election materials (i.e. that the Complainant's election

materials were misleading), which Complainant and his supporters distributed to homeowners door-to-door.

Complainant further alleges that the meeting was cancelled in order to prevent an election result unfavorable to the Association's Board (i.e. the election of Mr. Tanouye to the Board of Directors).

Complainant requests the Commission to provide relief for the Respondent Association's failure to hold the Association's 2012 Annual Meetings; direct the Respondent to reschedule the 2012 Annual Meeting promptly; require the Association to count the proxy ballots submitted by homeowners to the Respondent's Managing Agent for the Association's 2012 Annual Meeting director elections and disallow any votes submitted after March 19, 2012 for the election of directors; remove Donald Weinstein from the Respondent Association's Board of Directors and/or enjoin him from attending the rescheduled 2012 Annual Meeting; remove all persons currently serving as directors from their director positions; require the Respondent Association to publish the Commission's Decision and Order in this case; and, deny the Respondent Association's request for an award of its attorney's fees.

The Respondent does not dispute (1) that its Board President cancelled the March 19, 2012 Annual Meeting on the night of the meeting; (2) that the election to fill the two directors seats was not held; and (3) that the proxy ballots submitted to the Respondent's Managing Agent for the election of directors were not counted. The Respondent alleges that the proxy ballot forms distributed by Complainant and his supporters to the homeowners were not in a form approved by the Board of Directors as required by the Association's By-laws, Article IV, Section 10., because the proxy ballots were "pre-marked". The Respondent further alleges that Complainant's election materials were misleading, and also alleges that some homeowners felt "intimidated" by Complainant's supporters when they were distributing Complainant's election materials door-to-door.

The Respondent Association contends that the Association's next Annual Meeting will be in March 2013, and that there will be five (5) to seven (7) director positions to be filled at the election to be held at the March 2013 Annual Meeting. The Respondent Association further contends that the proxy ballots submitted to Management for the March 19, 2012 Annual Meeting cannot be counted toward any election of directors at this time because the By-laws provide that proxies are only valid for up to 180 days. The Respondent further contends that it could not have re-scheduled the 2012 Annual

Meeting while this case was pending because to do would have violated the automatic stay provisions of Chapter 10B-(9)(e).

Mr. Tanouye appeared *pro se* at the hearing. The Association was represented by counsel.

Commission Exhibit 1 was admitted into evidence at the hearing without objection. That Exhibit is the Commission's administrative file in this matter, including the Association's governing documents.

Mr. Tanouye testified in his case in chief. Mr. Tanouye called three witnesses: homeowner Don Borman, Board member and homeowner Craig Voorhees, and homeowner Bob Zich, and offered exhibits into evidence.

The Association called two witnesses, Board President Don Weinstein, and its property manager, Steve Leskowitz of The Management Group Associates. The Association also offered Exhibits into evidence.

#### FINDINGS OF FACT

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

1. Respondent Decoverly I Homeowners Association is a homeowners association as defined in MD Code Ann., Real Prop., § 11B-101, and it is a common ownership community as defined in Mont. Cnty. Code Section 10B-2(b).
2. Complainant Edwin Tanouye's home is part of the homeowners association.
3. The Respondent uses an outside management company, The Management Group, Inc., to manage the Association.
4. By notice dated November 29, 2011, the Association's management company initially informed the Association's members of its planned meeting schedule, including that the Association's Annual Meeting was planned to be held on Monday, March 19, 2012 at 7:00 P.M. in Room 101 at the University of Phoenix, 9601 Blackwell Road, Rockville, Maryland.

5. On or about February 6, 2012, by notice bearing the same date, the Association sent the "Notice of Annual Meeting -- Call for Candidates" (hereinafter referred to as the "Notice"), to the Association membership. The Notice stated the time, date, and place of the Annual Meeting to be Monday, March 19, 2012 at 7:00 P.M. in Room 101 at the University of Phoenix, 9601 Blackwell Road, Rockville, Maryland.
6. The sole purpose of the Annual Meeting was to elect two (2) homeowners to the Board of Directors.
7. Enclosed with the Notice was a form "Candidate Qualifications Statement" to be returned to Management by any homeowner interested in seeking election as a director to the Association's Board.
8. In order for the Annual Meeting to be held, a quorum of 25% of the homes, or 38 homes, had to be represented at the Annual Meeting, either in person or by proxy.
9. The terms of two (2) Board members, Nikolas Groshans and Rudolph Hock, were set to expire at the Annual Meeting.
10. On or about February 28, 2012, by notice bearing the same date, the Association sent the "Notice of Annual Meeting-Proxy/Ballot" (hereinafter to the "Annual Meeting Notice" to the Association membership. The Annual Meeting Notice stated the time, date, and place of the Annual Meeting to be Monday, March 19, 2012 at 7:00 P.M. in Room 101 at the University of Phoenix, 9601 Blackwell Road, Rockville, Maryland, and re-stated the quorum requirements.
11. The Annual Meeting Notice included the Candidate Statements received from homeowners seeking election to the Board, and a Proxy/Ballot to be used by the homeowners to cast their votes for the two available director seats.
12. The proxy/ballot form contained in the Notice of Annual Meeting mailing referenced above was a form approved by the Association's Board of Directors.
13. The Annual Meeting Notice also notified the homeowners that a "Meet the Candidates" night was scheduled for Monday, March 12, 2012.
14. The Annual Meeting Notice also stated that homeowners who were not able to attend the Annual Meeting could return their proxy/ballots to Management by mail or by fax by no later than 3:00 PM on Monday, March 19, 2012.
15. Four persons were running for the two available directors seats: Nikolas Groshans, an incumbent Board member whose term would expire at the Annual Meeting; Rudolph Hock, an

incumbent Board member whose term would expire at the Annual Meeting; homeowner Michael J. Riley; and the Complainant, homeowner Edwin Tanouye.

16. In connection with his campaign to be elected to the Board of Directors, Complainant and his supporters distributed election material door-to-door expressing his views concerning various Association matters, including but not limited to, the subject matter of, and the Decision and Order in, Craig Voorhees v. Decoverly I Homeowners Association, CCOC Case No. 05-11.
17. The Complainant's election materials were distributed by him and his supporters to homeowners a few days before the scheduled March 19, 2012 Annual Meeting, following the "Meet the Candidates Night" which took place on March 12, 2012.
18. The election materials distributed by the Complainant and his supporters included a copy of the proxy/ballot contained in the "Notice of Annual Meeting-Proxy/Ballot" referenced in paragraph 10, above.
19. The only difference between the proxy/ballot distributed by Complainant and his supporters and the proxy/ballot contained in the Association's Notice of Annual Meeting mailing to all the homeowners, is that Complainant marked the proxy/ballots he and his supporters were distributing door-to-door with an "X" next to two candidates – Michael Riley and Edwin Tanouye.
20. Complainant testified that he did not ask any homeowner he canvassed to sign what he viewed to be a "sample" proxy/ballot (the proxy/ballot marked with the "X" referenced in paragraph 19. Above). Complainant further testified that he asked any homeowner who he was canvassing to read his campaign materials, (which included the "sample" proxy/ballot) and to vote for him.
21. Complainant's witness Don Burman testified that the Complainant did not visit his house, and that he did not use the "sample" proxy/ballot to cast his vote for director.
22. Complainant's witness Craig Voorhees testified that he did not use the "sample" proxy/ballot to cast his vote for director or hand out any election materials.
23. Complainant's witness Bob Zich testified that he campaigned on behalf of the Complainant, that he spoke to three homeowners about the election, that he left the Complainant's election materials at the front doors of homes within the Association, and he did not ask anyone to sign the sample proxy/ballot nor tell anyone to use the sample proxy/ballot to cast his or her vote.
24. Respondent's witness, Board President Don Weinstein testified that four (4) or five (5) homeowners whom he would not identify, but whom he claimed were "single women", allegedly felt threatened by persons who were canvassing on behalf of Complainant, and that

these unidentified persons "felt forced" to sign the sample ballots, that they did sign it and that "they gave the ballot to the person at the front door". Board President Weinstein did not identify the "person at the front door" in his testimony.

25. Board President Weinstein did not have any personal knowledge as to the truth of any of the statements he testified were made to him by the unidentified homeowners who allegedly felt "threatened", "intimidated" and/or "felt forced" to sign proxy/ballots and give the same to the "person at the front door".
26. The Respondent did not have any of the unidentified homeowners who allegedly felt threatened or intimidated by Complainant's canvassers, and/or allegedly signed the proxy/ballots and gave it to the unidentified canvasser, appear at this hearing to testify.
27. The Panel finds Complainant's testimony, and the testimony of his witnesses, that they did not ask any homeowner to sign the sample proxy/ballot to be credible, and finds as a matter of fact that neither the Complainant nor any of his witnesses asked any homeowner to sign the sample proxy /ballot.
28. Respondent failed to present any reliable evidence to support its allegations that persons canvassing door-to-door on behalf of the Complainant, whom the Respondent did not identify, threatened or intimidated homeowners into giving these persons signed proxy/ballots.
29. Respondent did not present any evidence that Complainant or any of his witnesses who canvassed on his behalf threatened or intimidated any homeowner, or asked any homeowner to sign the sample proxy/ballot, and/or submitted any signed proxy/ballot on behalf of any homeowner to Management.
30. The Association accepts proxy/ballots by mail, e-mail, facsimile, or by hand from another Association member.
31. In past elections for directors, candidates canvassed and/or solicited votes. The Association has no rules regulating or restricting candidates or their supporters from canvassing, distributing election materials, or soliciting votes by going door-to-door or otherwise.
32. Board President Weinstein, acting on his own and without authorization from the Association's Board of Directors, canceled the March 19, 2012 Annual Meeting on the evening of March 19, 2012 shortly before the Annual Meeting was scheduled to start.
33. Board President Weinstein canceled the March 19, 2012 Annual Meeting because he believed that Complainant's election materials were misleading and inaccurate; that the other candidates did not have an opportunity to respond to the Complainant's election materials; and because he

did not feel that there was sufficient time to convene a Board meeting to vote to cancel or postpone the 2012 Annual Meeting.

34. Neither the Board of Directors nor the homeowners who appeared for the scheduled Annual Meeting voted to cancel or adjourn the 2012 Annual Meeting.
35. The 2012 Annual Meeting was not adjourned due to the lack of a quorum.
36. The Association has not held its 2012 Annual Meeting, nor has it conducted the election for directors which was originally scheduled to be undertaken at the March 19, 2012 Annual Meeting.
37. Nicholas Groshans and Rudolf Hock, the directors whose seats were up for election at the March 19, 2012 Annual Meeting election, continue to serve as directors on the Respondent's Board of Directors during the pendency of this case.
38. Once this complaint was filed, the Respondent did not make a motion for relief from the automatic stay imposed by Section 10B-9(e) of the Montgomery County Code.

#### CONCLUSIONS OF LAW

##### Applicable Law and Governing Documents

Maryland Code Annotated, Real Property, Title 11B, Section 11B-111.3, Distribution of written information and materials subsection (c) provides that *"Except for reasonable restrictions to the time of distribution, a recorded covenants, a provision in a declaration, or a provision of the bylaws or rules of a homeowners association may not restrict a lot owner from distributing written information or materials regarding the operation of or matters relating to the operation of the homeowners association in any manner or place that the governing body distributes written information or materials"*.

Maryland Code Annotated, Corporations and Associations, Title 5., Subtitle 2, NONSTOCK CORPORATIONS, Section 5-201 provides generally that the provisions of the Maryland General Corporation Law applies to non-stock corporations unless the context of the provisions or the specific provisions of this subtitle provides otherwise.

Maryland Code Annotated, Corporations and Associations, Title 2., Subtitle 4. DIRECTORS AND OFFICERS, Section 2-405., Directors holding over, provides as follows: *"(a) In general – In case of failure to elect directors at the designated time, the directors holding over shall continue to manage the business and affairs of the corporation until their successors are elected and qualify. (b) When director deemed holding over – A director not elected annually in accordance with Section 2-501(b) of this title shall be deemed to be continuing in office and shall not be deemed to be holding over under subsection (a) of this section until after the time at which an annual meeting is required to be held under Section 2-501 (b) of this title or the charter or bylaws of the corporation"*.

The Montgomery County Code, Chapter 10B, Section 10B-17(d) provides that *"Any proxy or power of attorney valid under state law may be used at an Association meeting...if a proxy or power of attorney form must be approved before it is cast, the approving authority must not unreasonably withhold its consent"*.

The Association's Bylaws, Article IV., MEETINGS OF MEMBERS, Section 2., Annual Meetings, provides in pertinent part that *"the annual meetings of the members shall be held during the same month as of each succeeding year. At such meeting there shall be elected by ballot of the members a Board of Directors in accordance with the requirements of Article V of these By-Laws. The members may also transact such other business as may properly come before them"*.

The Association's Bylaws, Article IV., Section 7., Adjourned Meetings, provides that *"If any meetings of members cannot be organized because a quorum has not attended, the members who are present, either in person or by proxy, may adjourn and reconvene the meeting in accordance with the provisions and requirements of Section 5-206 of the Corporations and Associations Article, Annotated Code of Maryland (1985 Repl. Vol.), as from time to time amended"*.

The Association's Bylaws, Article IV., Section 10., Proxies, provides that *"A member may appoint any other member or Declarant or the Management Agent as his proxy. Any proxy must be in writing and must be filed with the Secretary in form approved by the Board of Directors before the appointed time of each meeting. Unless limited by its terms, any proxy shall continue until revoked by a written notice of revocation filed with the Secretary or by the death of the member; provided, however, that no*

*proxy shall be effective for a period in excess of one hundred eighty (180) days unless granted to a mortgagee or lessee of the Lot to which votes are appurtenant".*

The Association's Bylaws, Article V., BOARD OF DIRECTORS: SELECTION: TERM OF OFFICE, Section 2., Term of Office, provides in pertinent part that "...and at each annual meeting, thereafter, the members shall elect a director to each vacancy for a term of three (3) years".

The Association's Bylaws, Article V., Section 3., Removal, provides in pertinent part that "After the first annual meeting of the members, any director may be removed from the Board, with or without cause, by a majority vote of the members of the Association...In the event of death, resignation, or removal of a director, his successor shall be selected by the remaining members of the Board and shall serve for the unexpired term of his predecessor".

Section 10B-9A of the Montgomery County Code provides that "At any time after a dispute is filed under Section 10B-9, a community association may submit a request to lift the automatic stay required under Section 10B-9(e . . . "

#### Findings, Conclusions, and Remedies

Based on the testimonial and documentary evidence presented, the findings of fact herein, the applicable law, and the Association's governing documents, the Hearing Panel concludes as follows:

Complainant (and his supporters) was within his rights to distribute his election materials, including but not limited to distributing a sample proxy/ballot, door-to-door to other homeowners. The other candidates also could have done the same. There is no law, or provision in the governing documents which prohibited any candidate from canvassing and distributing election materials three (3) days (or any number of days) before the election.

Moreover, the determination that a candidate's election materials are "misleading" or inaccurate" is generally subjective. A Board President's belief that a candidate's election materials are "misleading" or "inaccurate" in some manner, or that their distribution shortly before a contested director election is not "fair" to other candidates, does not empower the Board President to cancel the

Association's Annual Meeting and/or to cancel or postpone director elections required to be held thereat. By way of analogy, the President of United States cannot postpone a presidential election because his opponent airs a last minute attack ad replete with "misleading" and/or "inaccurate" content.

The Bylaws, Article IV, Section 7, state that if any meeting of the general membership cannot proceed due to lack of a quorum, *"the members who are present, either in person or by proxy, may, adjourn and reconvene the meeting. . . ."* By its very terms, this Bylaw requires an adjournment of a general meeting to be subject to a vote of the members present. Standard parliamentary procedure only allows the president to declare an adjournment *"when the assembly so votes."* ROBERT'S RULES OF ORDER at p.434 ((10<sup>th</sup> ed. 2000). Moreover, the adjournment was out of order: *"In a mass meeting, unless a time for another meeting has already been set . . . a motion to adjourn is not in order while business is pending."* ROBERT'S RULES OF ORDER at p. 534 (10<sup>th</sup> ed. 2000). Here, crucial business was pending. If the president believed that there were serious flaws in the election procedure, he should have called for a motion to adjourn and for a vote upon the motion.

Furthermore, the Hearing Panel finds no evidence to support Respondent's allegations that Complainant and/or his supporters or any other person actually used one of the Complainant's sample proxy/ballots to cast a vote for directors.

However, even if any homeowner did in fact submit Complainant's sample proxy/ballot to Management to vote with, we find that but for the marking of an "X" next to the names of two candidates on the proxy/ballot, the proxy/ballot was identical to the form approved by the Board of Directors. A homeowner casting a proxy/ballot would mark it in a similar fashion to designate the candidates of his or her choice.

We find that the sample proxy/ballot distributed by Complainant with his election materials is valid under State law and thus complies with Montgomery County Code, Section 10B-17(d). We therefore find Respondent's position that the proxies distributed by the Complainant to the community were not in a form approved by the Board of Directors to be without merit, and further find that even if Complainant's sample proxy/ballot could be deemed to be not in a form approved by the Association, it

would have been unreasonable for the Board of Directors to withhold their consent to use Complainant's sample proxy/ballot to vote.

Moreover, even if we assume that there were questionable proxy/ballots submitted to Management for the director election at the March 19, 2012 election of directors, the proper procedure would have been to proceed with the Annual Meeting and the director election. If any proxy/ballots cast were questionable, the Association could have simply postponed the final voting tally until the Association could make a determination as to the validity of such questionable proxy/ballots. Any candidate unhappy with the final outcome could then challenge the determination and/or contest the election.

As a practical matter, the Association cannot turn back the clock and hold its Annual Meeting for year 2012. Pursuant to the Associations Bylaws, the Annual Meeting for year 2013 must be held in March 2013. However, the proxy/ballots submitted to Management to be cast for the election of directors cannot lawfully be cast in the election for directors at the 2013 Annual Meeting. The Association's Bylaws provide that the proxy/ballots expire after 180 days. At the latest, the proxies involved in this dispute expired September 19, 2012, before the Commission could first schedule this dispute for a hearing.

The Respondent argued that the automatic stay prevented it from calling an election before the proxies were due to expire. The panel is not impressed with this argument, because the Respondent could have, but did not, make a motion for relief from the automatic stay, although Chapter 10B had been amended in 2010 specifically to allow for expedited treatment of such motions. In any event, it is not at all clear that the automatic stay provisions of Section 10B-9(e) would have prevented an election, since the Complainant had filed his complaint to force the Respondent to hold an election using the existing proxies, not to prevent it from doing so.

Since the 2012 Annual Meeting and director election were in fact canceled, albeit unlawfully, under Maryland's corporate statutes the directors whose seats were to be filled at the election can lawfully continue to hold office until their successors are elected.

The Panel does not have the legal authority to remove the Association's Board President or any other director or officer from office. Section 10B-8(4) defines a "dispute" as any disagreement between two or more parties that involves "the authority of the governing body, under any law or association document" to take a specified action or "the failure of the governing body" to take a required action. Consequently, the Commission has jurisdiction only over the official actions (or failures to act when required) of an association's governing body and not over the actions of the individual members of its board of directors. *See also*, Section 2-405.1(c), Corporations & Associations Article, Code of Maryland (directors are immune from personal liability if they act in good faith, in the best interests of the association, and with due care). In this case, the president was clearly acting on behalf of, and with the consent of, the board of directors. However, the Association's members have the legal authority to remove directors, with or without cause, pursuant to the Association's Bylaws.

The Panel finds that the Complainant's case was meritorious, and denies Respondent's request for attorney's fees.

#### ORDER

Accordingly, it is, this 21<sup>st</sup> day of March 2013, ORDERED:

1. That within 30 days after the date of this Order the Respondent must hold its Annual Meeting for year 2013 and hold its election for directors pursuant to its Bylaws;
2. That within 15 days after 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;
3. That Respondent's request for attorney's fees is DENIED;
4. That the Respondent shall pay the Complainant the sum of \$50.00 (fifty dollars) within 30 days after the date of this Order as reimbursement for his costs in this matter; and
5. That the Panel strongly encourages the Respondent to consult with its attorney to develop fair and proper written procedures for the conduct of its annual meetings, and to consider hiring an impartial third party, such as the League of Women Voters, to conduct its next annual meeting.

Panel Members Helen M. Whelan and Janet Wilson concur in this Decision and Order.

Any part 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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Corinne G. Rosen, Panel Chair