

**Before the
Commission on Common Ownership Communities
January 6, 1995**

In the Matter of	x	
George Williams, Owner	x	
5301 Westbard Circle, #205	x	
Bethesda, Maryland 20816	x	
	x	
Complainant	x	
	x	Case 259-O
vs.	x	
	x	
Frances Kaplan, President	x	
Board of Directors	x	
Kenwood Place Condominium, Inc.	x	
	x	
Respondent	x	

DECISION AND ORDER

The above-captioned case having come before the Commission on Common Ownership Communities for Montgomery County, Maryland, pursuant to Sections 10B-5(i), 10B-9(a), 10B-10, 10B-11(e), 10B-12, and 10B-13 of the Montgomery County Code, 1994, as amended, and the Commission having considered the testimony and evidence of record, it is therefore this 6th day of January, 1995, found, determined and ordered as follows:

STATEMENT OF THE CASE

and

SUMMARY OF LEGAL ARGUMENTS OF THE PARTIES

On January 19, 1994, George Williams, owner of 5301 Westbard Circle, #205, Bethesda, Maryland 20816, (henceforth "Williams" or "Complainant"), filed a complaint with the Office of Common Ownership Communities. The complaint arises out of the conduct of the election of the Board of Directors of the Kenwood Place Condominium Association, Inc. (henceforth "Respondent" or "Kenwood"), which was held at its annual meeting on October 25, 1993.

The Complainant alleged that the ballot package used by Kenwood at its 1993 election was:

- a) not a valid absentee ballot as required by Section 10B-17(c) of the Montgomery County Code, 1994, as amended;
- b) not a valid directed proxy as required by 10B-17(d) of the Montgomery County Code, or as provided in Section 11-109(c)(11) of the Real Property Article, Annotated Code of Maryland, 1988, as amended; and,
- c) in violation of Robert's Rules of Order, which are made applicable by Section 3.11 of the bylaws of the Respondent.

Specifically, Williams asserts that the envelopes which contained the ballot were not signed and did not bear the identification of dwelling units on them as required by Section 10B-17(c) of the Montgomery County Code, and that owing to the disclosure of percentage interests on each respective ballot, the requirement of open balloting stated in Robert's Rules of Order is violated because six unit owners have unique interests which are known, while the rest of the unit owners have similar percentage interests which keep their identity secret.

Finally, at the public hearing Williams amended his complaint, without objection by Respondent, to allege that the ballot package used by Respondent at the October 1994 election was invalid and that certain election materials used by Kenwood suggested a preference among candidates for the Board of Directors in violation of section 10B-17(b) of the Montgomery County Code. These materials are included in the record as Commission's Exhibit C-6a through C-6f (henceforth the "Election Materials Claim").

For relief, Complainant requests: (1) that the October 25, 1993 and the October 24, 1994 elections be declared void and of no force or effect, and that the Respondent be directed to conduct a new election in compliance with the applicable State and County laws, (2) that this Commission approve directed proxy forms and non-directed proxy forms as suggested by Section 10B-17(d) of the Montgomery County Code, and (3) that the Commission require *inter alia* that all ballots be signed.

Respondent contends that, following Sections 3.12 and 3.13 of its Bylaws, it does not use absentee ballots, so Section 10B-17(c) of the Montgomery County Code and Robert's Rules of Order cited by Complainant, are inapplicable. Even if its ballot package were deemed to be an absentee ballot, Respondent asserts that Section 11-122(b) of the Maryland Condominium Act preempts local law and specifically governs the use of proxies in the election of condominium officers and board members. Applying the Real Property Act Sections 11-109(c)(10) and (11) of the Maryland Annotated Code, Respondent asserts that a proxy is always "directed", meaning that a person holding a proxy voting for a candidate designated by the absent unit owner who appointed him is authorized and directed to cast the vote belonging to that unit owner in the manner designated by that owner. In this context, Respondent asserts that a directed proxy cannot also be an absentee ballot.

Respondent acknowledges that as to a very few residents, it is possible to trace particular votes to those members, due to their unique percentage interest, but Respondent chooses to maintain the ballot secrecy of the large majority of its members even though it is not enjoyed by all its members. Respondent asserts this practice violates no applicable bylaw or statute.

With respect to the Election Materials Claim, which is based on documents dated prior to the October 1994 election, Respondent asserts that these documents were either not prepared with Kenwood funds or disseminated by Kenwood as required by the ordinance, and that in any event, none suggests a preference among candidates.

A pre-hearing conference and public hearing were conducted on Wednesday, October 26, 1994, from 6:45 p.m. until 11:15 p.m., in the third floor Hearing Room of the Council Office Building, 100 Maryland Avenue, Rockville, Maryland. The panel took the case under advisement.

STIPULATIONS AND FINDINGS OF FACT

I. Stipulations and Law of the Case

After a lengthy pre-hearing conference, the parties went on the record at the hearing to stipulate to the following:

1) Amendment of William's complaint without objection from Respondent, to include the claim described above, concerning election materials related to the October 24, 1994 election of directors. Respondent did not move to postpone hearing on this matter and agreed to litigate it at the hearing.

2) In this connection, the Panel accepted into evidence Exhibit 6a, which is a series of documents and correspondence dated in October 1994, each of which relate to the election described above.

3) Amendment of William's complaint to include the October 1994 annual election. Mr. Williams adopted by reference the same arguments and claims described above with respect to the October, 1993 election to apply to the 1994 election. Respondent consented to this amendment to the complaint and agreed to litigate the issue without a postponement.

4) In connection with this amendment, the Commission accepted into evidence, as Exhibit C-1, and both parties stipulated that such exhibit is an authentic, accurate and complete sample ballot package related to the October 1994 election of directors.

5) After thorough discussion of the matter, Complainant agreed on the record, voluntarily and knowingly, to waive, forego and surrender any claim or challenge before this Commission to the validity of the proxies and ballots and to the validity, authority and enforceability of the annual election held by Respondent on October 24, 1994. Complainant acknowledged on the record that in proceeding on this subject matter, *viz*, the October 1994 election, that he would be precluded from raising these claims or issues before this Commission in a later proceeding. The Panel advised Complainant that if the issues pertaining to the October 1994 election were not raised and decided in this proceeding, Complainant would run the risk that if he presented these claims in a later proceeding, then the Commission may decline jurisdiction of that case on the grounds that such a dispute is essentially identical to a prior dispute between the same parties. The Panel duly noted its jurisdiction to adjudicate the new claim under section 10B-9 of the Montgomery County Code. Complainant reserved any claims or rights he has as to other conduct of the Board not related to the October, 1994 election.

II. Findings of Fact

1) Complainant as an owner of 5301 Westbard Circle, #205, Bethesda, Maryland was a member of the Kenwood Place Condominium Association, Inc. at the time of the two elections discussed herein.

2) Respondent is the Board of Directors, Kenwood Place Condominium Association, Inc., which is organized under Maryland law.

- 3) Respondent conducted an election on October 25, 1993 at which three (3) board members were elected.
- 4) The ballot package for the 1993 election, including the Respondent's cover letter dated September 9, 1993, is Commission's Exhibits 1g through 1r.
- 5) Respondent conducted an election on October 24, 1994 at which two (2) board members were elected.
- 6) The ballot packages for the 1994 election of Kenwood, including the Respondent's cover letter, dated October 1, 1994, is Commission's Exhibit C1, as stated above.
- 7) The election materials, Commission's Exhibit 6a, are accurate, authentic and complete copies of what they purport to be.
- 8) Complainant testified that he had no proof that the results of either election were affected by the technical errors which he asserts occurred, and that to the best of his knowledge, the results of each election would not have changed if these errors were corrected.
- 9) The relevant provisions of State law with respect to the ballot package used by Kenwood are the Real Property Article, Section 11-109(c)(8), (10) and (11), of the Maryland Condominium Act, Annotated Code of Maryland, which are stated below:

§ 11-109. Council of unit owners.

(c) Meeting of council of unit owners or board of directors — Notice, quorum and procedural requirements.

(8) At meetings of the council of unit owners, each unit owner shall be entitled to cast the number of votes appurtenant to his unit. Unit owners may vote by proxy, but, the proxy is effective only for a maximum period of 180 days following its issuance, unless granted to a lessee or mortgagee.

(10) A proxy who is not appointed to vote as directed by a unit owner may only be appointed for purposes of meeting quorums and to vote for matters of business before the council of unit owners, other than an election of officers and members of the board of directors.

(11) Only a unit owner voting in person or a proxy voting for candidates designated by a unit owner may vote for officers and members of the board of directors.

10) The relevant provisions of the Montgomery County Code are Sections 10B-17(c) and (d) which are stated below:

10B-17. Voting procedures.

(c) Absentee ballots. Any unsigned absentee ballot, to be valid, must be:

- (1) received in a signed, sealed envelope, bearing the identification of the dwelling unit and proportional voting percent, if any, on the outside; and
- (2) opened only at a meeting at which all candidates or their delegates have a reasonable opportunity to attend.
- (d) Proxy or power of attorney. Any proxy or power of attorney valid under state law is valid at any association meeting. However, 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. If a proxy form must be approved before it is used, the approving authority must not unreasonably withhold its approval.

11) Webster's definition of an absentee ballot is as follows:

"a ballot submitted in advance of an election or by mail by a voter who is unable to be present at the polls." (Ninth New Collegiate Dictionary Revision Webster, Inc. Springfield, MA 1985.)

12) The 1993 Official Proxy Designation of Kenwood states in part:

"The proxy designee shall have full authority to vote on any and all matters properly coming before the Council of Unit Owners at the meeting, except the election of members of the Board of Directors and other matters included on the ballot. The undersigned has directed his/her vote in the proper ballot contained in the attached sealed envelope." (Emphasis is the original)

Virtually identical language is found in the 1994 Official Designation of Proxy Holders.

CONCLUSIONS OF LAW

1. Section 11-122 of the Real Property Article, Annotated Code of Maryland, does not as contended by Kenwood, preempt local law with respect to the regulation of condominiums. See Rockville Grosvenor, Inc. v. Montgomery County, 289 Md. 74, 422 A.2nd. 353 (1980), which specifically holds that certain sections of a County law dealing with condominiums are valid 289 Md. 74 at 104 and quotes with approval Section 11-141, which characterizes the Horizontal Property Act as "supplemental" to local enactments 289 Md. 74 at 92-93. Section 11-222 (a) is a "special rule" directed at zoning and building laws, which is simply not applicable to the subject local enactment, Section 10B-17 of the Montgomery County Code, 1994, as amended, which concerns voting procedures. Rockville Grosvenor 289 Md. 74 at 91.

2. Williams is correct that the bylaws of Kenwood adopted Robert's Rules of Order to govern the conduct of all meetings of the Council of Unit Owners (Liber 6384 Folio 768), when such rules do not conflict with the Declaration, the Bylaws, the Condominium Act as amended, and Chapter 54 (sic) of the Codes of Montgomery County Maryland. Assuming without deciding whether Robert's Rules conflict with these laws and documents, we cannot reach the conclusion that the Council of Unit Owners in adopting Section 3.11 intended that Robert's Rules should also govern voting procedures and the conduct of annual elections. The Respondent's Bylaws provide in detail for the procedures to be followed for election of a new board at the annual meeting (3.04), including the voting procedures (3.11) and proxy procedures (3.12). None of the

provisions which specifically and directly govern the conduct of elections and meeting procedures require or even refer to Robert's Rules of Order.

3. We conclude that the ballot package is an absentee ballot in its plain and ordinary meaning and is a directed proxy ballot as that term is used by Kenwood in so far as it pertains to election of officers. With respect to any matters properly coming before the Council of Unit Owners at the meeting which are not on the ballot, we conclude the ballot is a non-directed proxy. We conclude that the term directed proxy ballot as used by Kenwood is substantially equivalent to the term absentee ballot as used in 10B-17(c).

4. We conclude that the County law concerning absentee ballots does not conflict with Section 11-109 (c)(8), (10) and (11) of the Real Property Article, Maryland Annotated Code. Section 10B-17(d) provides in terms that a proxy voted under State law is valid at an association meeting. Like the State law, the County law provides that a non-directed proxy may not be used in an election for a governing body. Section 10B-17 dealing with the procedures and contents relating to an absentee elaborates and clarifies the proper use of a proxy in an election, which is contemplated and authorized in the State law.

5. The envelope used by Kenwood for its 1993 and 1994 ballot package is not signed and does not identify the dwelling unit on its exterior surface. We find that this practice is not consistent with the requirement as to the outside envelope stated in Section 10B-17(c) of the County Code. We conclude that the ballot package used by Kenwood in each of these two elections materially and substantially complies with the quoted requirements of County and State law, and that material compliance with the absentee ballot requirement, as distinct from strict technical compliance, is sufficient on these facts and circumstances. Moreover, no evidence has been provided which demonstrates that any prejudice to the electoral process or its result has occurred or that any unit owner who participated in the election was materially harmed as a result of these technical omissions. We express no opinion as to whether these omissions by Respondent may indicate another conclusion based on other facts and circumstances

6. The directed proxy ballot used herein conforms to applicable State law and materially complies with the applicable requirements of County law.

7. With respect to the inequality between the six voters whose percentage interests are unique and the others whose interests are not unique, Kenwood acknowledges this inconsistency but prefers to protect the ballot secrecy of all voters to the extent practicable, consistent with the requirement of stating the percentage interest. Mr. Williams is correct that neither the State law nor the County law require that these proxies be secret. Nor do the bylaws of Kenwood. Since the policy and practice of the Association does not offend the cited laws and organic instruments of Respondent, and since none of the six holders of unique interests have come forward to prove inequality or prejudice which arises from the policy, this is not a matter to be adjudicated by the Commission. Complainant's appropriate relief would be with the applicable committees and Board of the Association.

8. Complainant has requested the panel to approve the form of proxy to be used, citing Section 10B-17(d). This ordinance provides in pertinent part:

"If a proxy form must be approved before it is used, the approving authority must not unreasonably withhold its approval."

Complainant construes this provision to apply to the Commission. We interpret this provision to refer to the Board of Respondent or to an appropriate committee of the Respondent, which is responsible for the conduct of the Kenwood elections.

9. In light of the conclusions stated herein concerning the validity of the ballot package, it is not necessary, assuming we had authority to do so, to require that all ballots be signed.

10. With respect to the Election Materials Claim, which relates to the period preceding the 1994 election, Section 10B-17(b) provides:

- (b) Election materials. All election materials prepared with funds of the association:
 - (1) must list candidates in alphabetical order; and
 - (2) must not suggest a preference among candidates.

Complainant alleges that six documents listed below were: (1) election materials, (2) prepared with funds of the Association which, (3) suggested a preference among the candidates.

Specifically, the materials are:

- a) Designated proxy prepared by Complainant;
- b) Letter, dated October 7, 1994, from Amy Russell, V.P. of Respondent to the Owners;
- c) Letter, dated October 8, 1994, from Complainant to the Association Board of Directors;
- d) Letter, dated October 17, 1994, from Steven Silverman, Esquire to Complainant
- e) Letter titled First Endorsement, typed on the end of item (e) above, dated October 19, 1994, from Complainant to the Owners in the Association; and,
- f) Letter, dated October 21, 1994, from Frances Kaplan, President of the Board, to the Association Unit Owners.

Taken together, we find that these documents were: (a) not prepared with funds of Kenwood, (b) though distributed within 30 days of the October 24, 1994 election, these documents do not suggest a preference among candidates and therefore, they do not constitute Election Materials, or (c) were distributed by the Complainant, not the Respondent. For these reasons, we conclude that these Materials do not, singly or collectively, suggest a preference among candidates, and that no violation of Section 10B-17, Montgomery County Code, 1994, as amended, has occurred.

ORDER

In view of the foregoing, and based on the evidence of record, the Commission orders and resolves that:

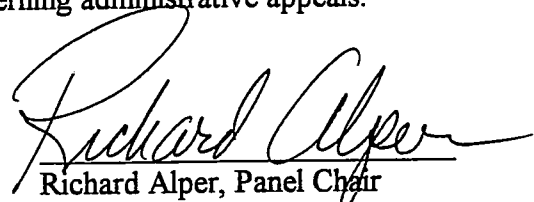
1. The ballot package for the 1993 Kenwood election is valid, binding and legally authorized. The results of the 1993 Kenwood election are not invalid based on the ballot package used by Respondent.

2. The ballot package for the 1994 Kenwood election is valid, binding and legally authorized. The results of the 1994 Kenwood election are not invalid based on the ballot package used by Respondent.

3. The Commission declines to act as an approving authority or advisory body for proxy forms of any kind, in the context of this adjudication. It is recommended and directed that Kenwood review and consider the omissions in its directed proxy in light of this opinion and the cited ordinance. The Board may wish to consider the use of a second outside envelope to be used over the existing envelope in order to strictly comply with the requirements of Chapter 10B-17 of Montgomery County Code, 1994, as amended.

The foregoing was concurred in by panel members Fox, Blumberg and Alper.

Any party aggrieved by the action of the Commission may file an administrative appeal to the Circuit Court of Montgomery County, Maryland, within thirty (30) days from the date of this Order, pursuant to the Maryland Rules of Procedure governing administrative appeals.



Richard Alper, Panel Chair
Commission on Common
Ownership Communities