

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

|                                      |   |                    |
|--------------------------------------|---|--------------------|
| <b>ELIZABETH KESSLER</b>             | ) |                    |
|                                      | ) |                    |
|                                      | ) |                    |
| Complainant                          | ) |                    |
|                                      | ) |                    |
| v.                                   | ) | Case No. 68-08     |
|                                      | ) | September 10, 2009 |
| <b>CLOVERLEAF CENTER CONDOMINIUM</b> | ) |                    |
|                                      | ) |                    |
| Respondent                           | ) |                    |
|                                      | ) |                    |

**ORDER**

This case involves a disputed board election held in October 2008. By previous orders, the Panel appointed the Maryland Homeowners Association, Inc. (MHA) and its attorney, Phillip B. Ochs, Esq., to conduct and supervise a new election. The election was held on July 22, 2009 by secret ballot pursuant to Article III, Section 4 of respondent's Bylaws, which states in part: "Members of the Board of Directors shall be elected by secret ballot."

The Panel is now informed that several unit owners have asked to inspect the proxies and absentee ballots cast during the election. MHA and its attorney have asked the Panel for a ruling on whether such inspection should be permitted.

The Bylaws provision quoted above appears to be in conflict with the Maryland Condominium Act ("Act"), Md. Code Ann., Real Prop., § 11-116(c) (West 2002, 2008 Pkt. Part), which states in part:

- (1) Except as provided in paragraph (2) of this subsection, all books and records, including insurance policies, kept by the council of unit owners shall be maintained in Maryland or within 50 miles of its borders and shall be available at some place designated by the council of unit owners within the county where the condominium is located for examination and copying by any unit owner, his mortgagee, and their respective duly authorized agents or attorneys, during normal business hours, and after reasonable notice.

(2) Books and records kept by or on behalf of a council of unit owners may be withheld from public inspection to the extent that they concern:

- (i) Personnel records;
- (ii) An individual's medical records;
- (iii) An individual's financial records;
- (iv) Records relating to business transactions that are currently in negotiation;
- (v) The written advice of legal counsel; or
- (vi) Minutes of a closed meeting of the board of directors or other governing body of the council of unit owners.

The term "books and records" is not specifically defined in the Act, and the Panel is not aware of any Maryland court decision defining the term. However, the reference to "insurance policies" in § 11-116(c)(1) and the exceptions listed in § 11-116(c)(2) indicate that the term was intended to apply broadly to all documents maintained by a condominium association, not just financial books and records. The Panel therefore concludes that proxies and absentee ballots should be considered "books and records" available for examination and copying by unit owners.

The conflict between the Bylaws and the Act must be resolved in favor of the Act. Section 11-124(e) of the Act states:

If there is any conflict among the provisions of this title, the declaration, condominium plat, bylaws, or rules adopted pursuant to § 11-111 of this title, the provisions of each shall control in the succession listed hereinbefore commencing with 'title'.

See *Garfink v. Cloisters at Charles, Inc.*, 392 Md. 374, 400 (Md. 2006). The Bylaws themselves contain a similar order of preference:

In case any part of these Bylaws conflict with the Act and/or the Declaration, the provisions of the Act and/or the Declaration as the case may be, shall control.

Bylaws, Art. XIII, Section 7.

The Panel therefore concludes that unit owners may, on proper request, examine and copy proxies and absentee ballots notwithstanding the Bylaws provision for secret ballots.

Accordingly, it is, this 10th day of September, 2009, ORDERED as follows:

1. Any unit owner within the respondent condominium association may examine and copy election materials, including proxies and absentee ballots, in accordance with Md. Code Ann., Real Prop., § 11-116.

2. To the extent any prior Panel order requires that such election materials be treated as confidential and not open to examination and copying, such order is hereby vacated.

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Charles H. Fleischer, Panel Chair  
September 10, 2009