

Before the
Commission on Common Ownership Communities
Montgomery County, Maryland

In the Matter of:

Leah Tavens	:	
S2201	:	
4515 Willard Avenue	:	
Chevy Chase, Maryland 20815,	:	
	:	
Complainant,	:	
	:	
v.	:	Case No. 2018-072
	:	June 22, 2018
The Willoughby Condominium	:	
of Chevy Chase	:	
c/o Michelle LaRue	:	
Whiteford, Taylor & Preston, L.L.P.	:	
Suite 700W	:	
750 Wisconsin Avenue	:	
Bethesda, Maryland 20815,	:	
	:	
Respondent.	:	

DECISION AND ORDER

The above-entitled cases having come before the Commission on Common Ownership Communities for Montgomery County, Maryland, and the Commission having considered the testimony and evidence of record, finds, determines and orders as follows:

Background

Leah Tavens (“Complainant”), a unit owner in The Willoughby Condominium, filed a complaint dated March 23, 2018, against The Willoughby (“The Willoughby” or “Respondent”) alleging that the election of members of the board of directors at the March 13, 2018 annual meeting was not properly conducted. She asked that the Commission set aside the purported results of that election and order The Willoughby to hold a new election.

The response to the complaint filed on behalf of The Willoughby agreed that there were irregularities in the election but that they were the fault of contractors and not the fault of The Willoughby. It was asserted that the final result was certified and is correct.

The Willoughby moved to lift the automatic stay that results from filing a complaint with the Commission. The Commission Committee that considers such Motions, the “Lift-Stay Panel”, declined to lift the stay, ordered all materials related to this election be delivered to Zalco Management, and expressed the opinion that the board members and officers serving prior to the election continue to serve until the case is resolved. That is the current status.

At the end of the 2018 annual meeting at The Willoughby, after the election results were tabulated, it was announced that Nancy Gordon and David Churchill were the successful candidates for the two board seats to be filled. Following the meeting after the election results had been announced, the vote tabulating contractor, Action Management, told The Willoughby General Manager, Richard Springer, that he thought there were some errors in the numbers. Mr. Springer asked Action Management to take the proxies, ballots, registration book and other election materials back to their office to assure safe handling.

Over the next couple of days Action Management recalculated the election results several times. The first recalculation reduced the vote count for Mr. Churchill and increased the vote count for Mr. Charles Ostrofsky so that Mr. Ostrofsky became a successful candidate instead of Mr. Churchill. That remained the result through the several recounts.

The election tabulations reflect that 762 ballots representing 55.0821% of the membership were counted in the original count and 804 representing 59.4081% were counted in the fourth and final tabulation performed by Action Management at their offices in the absence of any Willoughby staff or residents. Another tabulation was done by three of the candidates with the general manager. The election result was the same as the final result from Action Management. In each of these counts the percentages for each of the candidates was different.

There were explanations that were perfectly reasonable for the changes in ballot count and tabulated results. However, it is no longer possible to establish what the correct result was on March 13.

The process used by The Willoughby in distributing the proxy/ballot form, a two-sided single sheet, does not allow calculation of the ownership value of the submitted proxies without looking at the proxy itself. One side of the sheet of paper is the proxy and the other is the ballot. So, in violation of Montgomery County Code (“MCC”) § 10B-17 (f), which requires that an association not open election ballots until the time for voting closes, the proxy/ballot forms that were submitted in envelopes were opened prior to the annual meeting in order to assess the status of the quorum count.

Conclusion

There were too many errors in the records by which the complicated tabulation of the vote results in this election were calculated to be able to reperform the tabulation that should have been done on the night of the annual meeting. The tabulations that are now considered

correct could only be done after the fact with significant explanation. None of the tabulations done by Action Management after the original one immediately after voting closed on the night of the annual meeting was done in the presence of members of the The Willoughby Association.

This was a close election in a deeply divided community. It was the first time the election results have been challenged in recent years and the explanation for the alleged errors is assumed to be unique to the records prepared for this year's election.

Additionally, while envelopes were provided with the proxy/ballot, it was necessary to open those that were used prior to the annual meeting in order to assess the probability of having a quorum for the annual meeting. Therefore, the provisions of MCC § 10B-17 were violated.

The election was held on autopilot following the practice of the Association. However, at least one major error by a contractor performing services for the Association set up a situation that resulted in serious irregularities.

The Hearing Panel could not confirm results for this election. It is not the role of the Commission to recount ballots that have admittedly been modified by one or more entities changing codes or percentages purportedly to correct errors and for which the chain of custody cannot be certified. The Panel concludes that the original election process was not conducted in accordance with generally accepted standards and must be set aside. There is no finding of bad faith in this conclusion.

The Panel understands that there are costs both economic and non-economic in having to redo an election. But it is critical that the community be confident of the integrity of the process, particularly when there are serious differences of opinion within the community.

Complainant questioned the deviation from The Willoughby Bylaws, Article II, §10, requirement for a certificate to be filed by multiple owners of a unit to specify a designated voter for the unit, which has not been implemented because there has been no history of conflicting ballots being received from owners of such units. This provision establishes a process for obtaining a single vote for each unit. If a single proxy/ballot is presented for a multi-owner unit, it is reasonable to assume that this reflects the preference of the owners. To the extent that there are not incidents of multiple proxy/ballots being submitted, this has not been a problem and insisting on such certificates is potentially an impediment to voting and a bureaucratic hassle. To the extent such a problem arises, the certificate process is the solution.

ORDER

Based on the foregoing, the Panel orders the following:

1. Respondent must conduct another election for two members of the board for two-year terms in September, but not later than the end of October if such delay is necessary to conduct it responsibly.
2. This election must be managed by an independent entity that performs this service, such as the League of Women Voters in accordance with applicable laws and Association documents. Zalco Management will provide election management for The Willoughby other than the current general manager and All-PC Applications will not be used. Action Management does not offer the full range of services required for this election and their software may not be used.
3. Respondent must establish an election committee to work with the contracted supervisory entity that represents equally the factions in the community and does not include any candidates.
4. The election records from the challenged election must remain in the custody of Zalco Management until the election to be held under this order has been held and certified and the Association board decides what should be done with those records.

The foregoing was concurred in by panel members Burrows and Winegar.

Any party aggrieved by the action of the Commission may file an 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.

So Ordered, this 22nd day of June, 2018

_____/s/_____
Dinah Stevens, Panel Chairwoman