

FILED

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA

CIVIL ACTION - LAW

2019 JUN -7 PM 1:54

M4 HOLDINGS, LLC, a New Jersey
limited liability company AND
BOULDERVIEW PROPERTIES, LLC,
a Pennsylvania limited liability
company,

Plaintiffs

v.

LAKE HARMONY ESTATES PROPERTY
OWNERS' ASSOCIATION, a Pennsylvania
non-profit corporation,
Defendant

No. 14-0132

(Lead Case)

M4 HOLDINGS, LLC, a New Jersey
limited liability company AND
LEDGESTONE PROPERTIES, LLC,
a Pennsylvania limited liability
company,

Plaintiffs

v.

LAKE HARMONY ESTATES PROPERTY
OWNERS' ASSOCIATION, a Pennsylvania
non-profit corporation,
Defendant

No. 14-0179

(Consolidated)

James R. Nanovic, Esquire

Counsel for Plaintiffs

Steven L. Sugarman, Esquire

Counsel for Defendant

MEMORANDUM OPINION WITH ORDER

Matika, J. - June 7, 2019

I. Introduction.

This Memorandum Opinion addresses the "Plaintiff's (sic)
Motion for Post Trial Relief" filed by Plaintiffs M4 Holdings, LLC

("M4") ("Plaintiffs' Post Trial Motion" or "Post Trial Motion"), Boulderview Properties, LLC ("Boulderview"), and Ledgestone Properties, LLC ("Ledgestone").¹

Particularly, the Court re-visits and addresses herein whether a series of e-mail correspondence among members of the Board of Directors of Defendant Lake Harmony Estates Property Owners' Association constitutes a Board of Directors meeting and whether the communications delineated in said e-mail correspondence comprise validly constituted action of the Board of Directors.^{2 3}

¹ M4, Boulderview, and Ledgestone may sometime hereinafter be referred to collectively as "Plaintiffs."

² The Board of Directors shall be referred to herein as the "Board." Lake Harmony Estates Property Owners' Association shall be referred to herein as "LHEPOA."

³ With respect thereto, Plaintiffs contend in their Post Trial Motion that:

"1. It is respectfully submitted that the Court erred when it found that the Association is permitted to enact a rule change by an email string. As noted in Plaintiff's Findings and Conclusions filed on December 19, 2017, an email string where not all members are on line at the same time is not a 'similar online communication equipment or other technology that enables all Board Member to participate in the meeting' as per the Defendant's Book of Governance..."

2. It is respectfully submitted that the Honorable Court erred when it found that the 2,500 Square Foot Rule was adopted... The record also show that there was no notice of a meeting..."

See Plaintiffs' Motion for Post Trial Relief at ¶¶1, 2.

For the reasons set forth herein, this Court holds that, in order to be valid under Pennsylvania law, a meeting of the incorporators, boards of directors, or an other body of a Pennsylvania nonprofit corporation held via a series of electronic transmissions, including but not limited to such meetings held via electronic mail, must have formal safeguards that ensure a definitive meeting start time, must preserve the concepts of "meeting" and "quorum" by the confirmation of simultaneous continuous presence and assembly of putative meeting attendees sufficient to establish and maintain a quorum throughout, must employ technology that permits putative meeting attendees to read, see, hear, or otherwise meaningfully participate in the proceedings substantially concurrently with the occurrence thereof, must have formal safeguards that ensure a definitive meeting end time, and must maintain corporate formalities.

Accordingly, in accordance with the Order that follows this Memorandum Opinion, Plaintiff's Motion for Post Trial Relief shall **GRANTED IN PART** and **DENIED IN PART**. The June 29, 2018 Decision and Verdict of this Court shall be **REVISED** and the Court concomitantly herewith shall issue a revised decision and verdict.

II. DISCUSSION.

A. The Board of Directors' Email Communication String.

On April 10, 2013, at approximately 12:30 p.m., Larry Gould, a member of the Board directed an e-mail correspondence to, *inter alia*, the six other members of the Board, which stated in part that "...I propose and (sic) amendment to our existing Rules and Regulations, effective immediately, which limits the size of all new construction, to 5 bedrooms, 3 bathrooms, and no larger than 2,500 square feet" and that "[w]e need to vote YES on this right now, effective immediately."⁴

At the time Mr. Gould sent this email, the Board membership consisted of John Conway, Russell Ferretti, Mr. Gould, Bob Haeseker, Kellie Melba, Barry Scholtz, and Jessie Smiley.

As the Email Communication String indicates, over a nearly twenty-two hour period subsequent to the time that Mr. Gould sent his April 10, 2013 12:30 p.m. email, six out of the seven Board members communicated by email with respect to Mr. Gould's proposal (the "2,500 Square Foot Rule"). The gravamen of each Board members' communication, and whether he or she responded to Mr. Gould's call for a "vote," may be summarized thusly:

⁴ See Email Communication String, Appendix I hereto, at 1 [Email dated Wednesday, April 10, 2013, 12:30 p.m.]. The Court has assembled the relevant email communications strings among the Board of Directors members into the "Email Communication String" appendix.

Larry Gould -

Initiated the 2,500 square foot proposal and twice called for a "vote;" did not render a subsequent "vote." See Email Communication String, Appendix I hereto, at 1 - 2 [Email dated Wednesday, April 10, 2013, 12:30 p.m.] ("...I propose and (sic) amendment to our existing Rules and Regulations, effective immediately, which limits the size of all new construction, to 5 bedrooms, 3 bathrooms, and no larger than 2,500 square feet" and that "[w]e need to vote YES on this right now, effective immediately."). See also Email dated Wednesday, April 10, 2013 (Stating in part that "[w]e need to vote immediately on this motion and your [Jessie Smiley's] second" and "[w]ould all Board members please vote on the motion and second to limit size of all new construction effective immediately.").

Jessie Smiley -

Seconded Mr. Gould's "motion" on two occasions; did not render a subsequent "vote." See Email Communication String, Appendix I hereto, at 1 - 3 [Email dated Wednesday, April 10, 2013, 4:02 p.m.] ("I second Larry's approach and encourage others to do the same." See also Email dated Wednesday, April 10, 2013, 5:35 p.m.] ("I second this motion.").

John Conway -

Indicated support for the 2,500 Square Foot Rule proposal. See Email Communication String, Appendix I hereto, at 7 [Email dated Thursday, April 11, 2013, 7:09 a.m.] ("You have my support for amending the rules along the lines being proposed.").

Russell Ferretti - Indicated support for the 2,500 Square Foot Rule proposal. See Email Communication String, Appendix I hereto, at 7, 8 [Email dated Thursday, April 11, 2013, 7:39 a.m.] ("All: I also agree to amending our Rules and Regs to place limitations on the number of bedrooms, bathrooms and square footage of new construction.").

Kellie Melba - Indicated support for the 2,500 Square Foot Rule proposal. See Email Communication String, Appendix I hereto, at 8, 9 [Email dated Thursday, April 11, 2013, 9:20 a.m.] ("I agree to amend our rules and regs to place limitations on numbers of bedrooms, bathrooms, and square footage.").

Bob Haeseker - Indicated conditional support for the 2,500 Square Foot Rule proposal. See Email Communication String, Appendix I hereto, at 7 [Email dated Thursday, April 11, 2013, 11:22 a.m.] ("I also agree if it is legal to limit the size of the homes and the number of rooms and bathrooms if it corresponds with the recent court case decisions.").

Barry Scholtz did not participate in the Email Communication String.

B. The Email Communication String Did Not Constitute a Board Meeting and Lacked a Quorum.

Relevant Pennsylvania corporate law does not define the term "meeting."

No definition of "meeting" appears in the "Definitions" section that applies to all associations and the entirety of the Associations Code comprised within Title 15 of the Pennsylvania Consolidated Statutes Annotated ("Title 15"). See 15 Pa.C.S.A. §102 ["Definitions"].⁵

No definition of "meeting" appears in the "Definitions" section that applies to Pennsylvania nonprofit corporations such as LHEPOA. See 15 Pa.C.S.A. §5103 ["Definitions"]. See also 15 Pa.C.S.A. §5101(a) ["Title of subpart"] ("This subpart shall be known and may be cited as the Nonprofit Corporation Law of 1988"); 15 Pa.C.S.A. §5102(a) ["Application of subpart; General rule"] ("...this subpart shall apply to and the words 'corporation' or 'nonprofit corporation' in this subpart shall mean a domestic corporation not-for-profit. ").⁶

No definition of "meeting" appears in the "Definitions" section that applies to Pennsylvania corporations for profit

⁵ The Pennsylvania Legislature denominates Title 15 in its entirety as the "Associations Code." See 15 Pa.C.S.A. §101(a) ["Short title of title"] ("This title shall be known and may be cited as the Associations Code."); 15 Pa.C.S.A. §102 ["Definitions"] (Defining "Association" as "[a] corporation, a partnership, a limited liability company, a business trust or two or more persons associated in a common enterprise or undertaking."); 15 Pa.C.S.A. §101(b) ["Application of title"] ("Except as provided in the scope provisions of subsequent provisions of this title, this title shall apply to every association heretofore or hereafter incorporated or otherwise organized. ").

⁶ The Court shall refer to the Nonprofit Corporation Law of 1988 simply as the "Nonprofit Corporation Law."

either. See 15 Pa.C.S.A. §1103 ["Definitions"]. See also 15 Pa.C.S.A. §1101(a) ["Title of subpart"] ("This subpart shall be known and may be cited as the Business Corporation Law of 1988"); 15 Pa.C.S.A. § 1102 ["Application of subpart"] ("...this subpart shall apply to and the words 'corporation' or business corporation' in this subpart shall mean a domestic corporation for profit.").

Dictionaries readily and in common-sense fashion fill in the void left by the foregoing statutory definitional dearth. Webster's Third New International Dictionary defines a "meeting" as "an act or process of coming together." See Philip Babcock Gove, *Webster's Third New International Dictionary* at 1404 (Merriam 1981).⁷ Similarly, Black's Law Dictionary defines "meeting" as "a coming together of persons; an assembly." See Henry Campbell Black, *Black's Law Dictionary* at 1134 (West 4th Ed. 1951).

In similar fashion, no definition of the term "quorum" appears in the "Definitions" sections of 15 Pa.C.S.A. §102 ["Definitions"], 15 Pa.C.S.A. §5103 ["Definitions"], or 15 Pa.C.S.A. §1103 ["Definitions"]. Webster's Third New International Dictionary defines a "quorum" as "the number of the

⁷ The Court acknowledges the late Honorable Richard W. Webb, former Judge and President Judge of this Court, for bestowing this volume for the Court's utilization and consideration.

members of an organized body of persons (as a legislature, court, or board of directors) that when duly assembled is legally competent to transact business in the absence of the other members." See Philip Babcock Gove, *Webster's Third New International Dictionary* at 1868 (Merriam 1981). In turn, Black's Law Dictionary defines "quorum" as "a majority of the entire body." See Henry Campbell Black, *Black's Law Dictionary* at 1421. (West 4th Ed. 1951).

Webster's Third New International Dictionary defines an "assembly" *inter alia* as "a company of persons collected together in one place usu. for some common purpose (as deliberation and legislation, worship, or entertainment)" and "the act of coming together." See Philip Babcock Gove, *Webster's Third New International Dictionary* at 131 (Merriam 1981). Black's Law Dictionary defines "assembly" as "[t]he concourse or meeting together of a considerable number of persons at the same place." See Henry Campbell Black, *Black's Law Dictionary* at 149. (West 4th Ed. 1951).

As of the time of the Email Communication String - April 10 and April 11, 2013 - the Nonprofit Corporation Law quorum requirement applicable to LHEPOA stated:

"§5727. Quorum of and actions by directors

(a) **General rule.** - Unless otherwise provided in the bylaws, a majority of the directors in office shall be necessary to constitute a quorum for the transaction of business and the acts of a majority of the directors present at a meeting at which a quorum is present shall be the acts of the board of directors."

See 15 Pa.C.S.A. §5727(a) ["Quorum of and action by directors"] (As of April 10 and 11, 2013; "1972, Nov. 1, P.L. 1063, No. 271, §7727, effective in 90 days. Renumbered 1988, Dec. 21, P.L. 1444, No. 177, §103, effective Oct. 1, 1989.").⁸

The LHEPOA Bylaws, with respect to the quorum required for the Board to transact business and applicable at the time of the Email Communication String, stated that:

"7. A majority of directors *in office* is necessary to constitute a quorum for transaction of business. Unless otherwise specified in these By-Laws or required by statute, the acts of a majority of the directors present at a meeting at which a quorum is present will be the acts of the Board of Directors as a whole. Any action that normally would be taken at a meeting of the directors may be taken without a meeting *if* a majority of the directors confirms, in writing, agreement with the action taken."

⁸ Shortly after the Email Communication String occurred, the Pennsylvania Legislature amended Section 5727(a) by adding the following underlined language: "(a) **General rule.** - Unless otherwise provided in the bylaws, a majority of the director in office of a nonprofit corporation shall be necessary to constitute a quorum for the transaction of business, and the acts of a majority of the directors present and voting at a meeting in which a quorum is present shall be the acts of the board of directors." See 15 Pa.C.S.A. §5727(a) ["Quorum of and action by directors"] ("Amended 2013, July 9, P.L. 476, No. 67, §35, effective in 60 days [Sept. 9, 2013] ").

See LHEPOA Bylaws at Article VII ["Board of Directors"], §7 (emphasis in original).

Inherent and symbiotic then, in the concepts of "meeting" and "quorum," stands the requirement that individuals be together at the same place at the same time. This applies with equal force even if the "place" is cyberspace. Neither a "meeting" nor a "quorum" can be said to exist in the absence of the simultaneous continuous presence and assembly of the individuals claimed to be participating in the "meeting" or claimed to be constituting the "quorum" with respect to the "meeting."⁹

As of the time of the Email Communication String - April 10 and April 11, 2013 - Pennsylvania's Nonprofit Corporation Law, with respect to participation in corporate meetings through the use of conference telephones and similar equipment, stated:

"§5708. Use of conference telephone and similar equipment

Except as otherwise provided in the bylaws, one or more persons may participate in a meeting of the incorporators, the board of directors or an other body, or the members of a nonprofit corporation *by means of conference telephone or similar communications equipment by means of which all persons participating in the meeting can hear each other.* Participation in a meeting pursuant to this

⁹ The Court does not suggest that the concepts of "simultaneous" and "continuous" may be defeated by momentary lapses of attendance that might be engendered, for example, by items such as brief bathroom breaks taken by meeting attendees.

section shall constitute presence in person at the meeting."

See 15 Pa.C.S.A. §5708 (emphasis added) ["Use of conference telephone and similar equipment"] (As of April 10 and 11, 2013; "1972, Nov. 15, P.L. 1063, No. 271 §7709, effective in 90 days. Renumbered 1988, Dec. 21, P.L. 1444, No. 177, §103, effective Oct. 1, 1989. Reenacted and amended 1990, Dec. 19, P.L. 834, No. 198 §102, imd. effective.").¹⁰

The LHEPOA Bylaws, with respect to the use of conference telephones and similar equipment at Board meetings, expanded, at Article XX ["Miscellaneous Provisions"], §1, the permissible use of such "similar equipment" from that which ensured that "all persons participating in the meeting **can hear** each other" - as then provided for at 15 Pa.C.S.A. §5708 - to that which "enables all Board members **to participate** in the meeting." Article XX

¹⁰ Shortly after the Email Communication String occurred, the Pennsylvania Legislature amended Section 5708 by deleting the following stricken language and adding the following underlined language: "(a) Incorporators, directors and members of an other body. - Except as otherwise provided in the bylaws, one or more persons may participate in a meeting of the incorporators, the board of directors or an other body, ~~or the members of a nonprofit corporation by means of conference telephone or similar communications equipment or other electronic technology~~ by means of which all persons participating in the meeting can hear each other. Participation in a meeting pursuant to this section shall constitute presence in person at the meeting." See 15 Pa.C.S.A. §5708(a) ["Use of conference telephone ~~and similar equipment or other electronic technology~~"] ("Amended 2013, July 9, P.L. 476, No. 67, §35, effective in 60 days [Sept. 9, 2013]."

["Miscellaneous Provisions"], §1 of the LHEPOA provides in full that:

"1. One or more directors may participate in a meeting of the Board of Directors via conference telephone or similar on-line communications equipment or other technology that enables all Board members to participate in the meeting. Participation in a meeting pursuant to this section constitutes presence in person for quorum and voting purposes."

See LHEPOA Bylaws at Article XX ["Miscellaneous Provisions"], §1.

Such expansion from "can hear" to "to participate" falls within permissible Board action insofar as the then-relevant "Use of conference telephone and similar equipment" statutory guidelines delineated at 15 Pa.C.S.A. §5708 contained the prefatory language "[e]xcept as otherwise provided." *See, supra*, 15 Pa.C.S.A. §5708 ["Use of conference telephone and similar equipment"] (As of April 10 and 11, 2013; "1972, Nov. 15, P.L. 1063, No. 271 §7103, effective in 90 days. Renumbered and amended 1988, Dec. 21, P.L. 1444, No. 177, §103, effective Oct. 1, 1989. Reenacted and amended 1990, Dec. 19, P.L. 834, No. 198 §102, imd. effective."). Language to this effect permits a Board to either relax or restrict the stated rule. *See* 15 Pa.C.S.A. §5103 ["Definitions" pertinent to nonprofit corporations] (As of April 10 and 11, 2013) ("'Unless otherwise provided.' When used to introduce a rule implies that the alternative provisions

contemplated may either relax or restrict the stated rule"). See also 15 Pa.C.S.A. §5103 (applying same rule to both "unless otherwise provided" and "except as otherwise provided").

As a policy matter, the Court believes this expansion to be appropriate and consistent with (1) the reference to both "can hear" and "[p]articipation" found at past and present iterations of 15 Pa.C.S.A. §5708, with respect to the use of "conference telephone[]," "similar equipment," and "electronic technology" to facilitate nonprofit corporation board of directors meeting participation, (2) the reference to "[i]f a meeting of members is held by means of the Internet or other electronic communications technology in a fashion pursuant to which the members have the opportunity to read or hear the proceedings substantially concurrently with their occurrence, vote on matters submitted to the members, pose questions to the directors and members of any other body, make appropriate motions and comment on the business of the meeting, the meeting need not be held at a particular geographic location" found at 15 Pa.C.S.A. §5704, with respect to meetings of members [as opposed to boards of directors] of nonprofit corporations, and (3) consideration of potential variance in the sensory abilities of meeting participants and the goal of facilitating verifiable participation accessibility.

Based on the foregoing, the Court accepts the conceptual propriety of meetings of incorporators, boards of directors, or an other body of a Pennsylvania nonprofit corporation held via a series of electronic transmissions, including but not limited to meetings held via electronic mail, so long as (1) such meetings have formal safeguards that ensure a definitive meeting start time, (2) the concepts of "meeting" and "quorum" stand maintained by the confirmation of simultaneous continuous presence and assembly of putative meeting attendees sufficient to establish and maintain a quorum throughout, (3) that technology employed permits meeting attendees to read, see, hear, or otherwise meaningfully participate in the proceedings substantially concurrently with the occurrence thereof, (4) formal safeguards exist that ensure a definitive meeting end time, and (5) corporate formalities remain maintained.¹¹

¹¹ With respect to confirmation of attendance and definitive start and end times of meetings, abundant technology remains widely available - for example in the virtual business meeting, virtual continuing legal education, and virtual learning contexts - to track readily the electronic presence of putative attendees of meetings and events conducted electronically. The Court remains mindful of potential concerns with verification of electronic attendance and whether an individual might simply click an "in attendance" button and promptly wander away from a computer screen. The Court views this, however, as an issue of attentiveness as opposed to attendance. The Court has not uncovered any legislative or judicial pronouncements pertaining to the Associations Code that implicate the attentiveness of meeting attendees - whether such meetings be attended in person or attended through the technological assistance.

In the instant matter, no party to this matter presented evidence that members of the Board maintained a simultaneous continuous presence and assembly sufficient to maintain a quorum throughout the Email Communication String. The Court accordingly finds that the Email Communication String did not constitute a meeting and that the Board did not adopt the 2,500 Square Foot Rule. While technological advances may facilitate participation in a Board or other corporate meeting, a "meeting" must exist in which to participate and a "quorum" must exist throughout the "meeting."

C. The Lack of Corporate Formalities with Respect to Notice and Voting the Email Communication String.

The Pennsylvania Legislature, in formulating various sections within the Associations Code, has not hesitated to consider and acknowledge statutory and judicial formulations provided by other jurisdictions - particularly Delaware.¹² In the absence of edifying Pennsylvania statutory and judicial formulations, this Court shall employ a similar lack of hesitation herein.

¹² See, e.g., 15 Pa.C.S.A. §1502, Committee Comment - 1988 ["General Powers" of Domestic Business Corporations]; 15 Pa.C.S.A. §1571, Source Note - 1988 and Committee Comment - 2001 ["Application and effect of subchapter" with respect to "Dissenters Rights" for Domestic Business Corporations] 15 Pa.C.S.A. §1572, Source Note - 1988 and Committee Comment - 2001 ["Definitions" with respect to "Dissenters Rights" for Domestic Business Corporations]; 15 Pa.C.S.A. §1907, Committee Comment - 2013 ["Purpose of fundamental transactions" of Domestic Business Corporations].

Delaware judicial pronouncements provide useful guidance as to the importance of maintaining corporate formalities even in those circumstance in which individual Board members can be said to be assembled in the same place at the same time. "The mere fact that directors are gathered together does not a meeting make." See *Fogel v. U.S. Energy Systems, Inc.*, C.A. No. 3271-CC, 2007 WL 4438978, at *2 (Del.Ch. Dec. 13, 2007) citing *Box v. Box*, C.A. 14238, 1996 WL 73575, at *14-15 (Del.Ch., 1996) ("concluding that no meeting occurred even though directors were communicating with one another about company business").¹³ A meeting requires a formal call to meeting and "simply polling board members does not constitute a valid meeting or effective corporate action." See *Fogel v. U.S. Energy Systems, Inc.* at *2 citing *Schroder v. Scotten, Dillon Co.*, 229 A.2d 431, 439 (Del.Ch. 1972). See also *In re Bigmar, Inc.*, C.A. No. 19289-NC, 2002 WL 550469 (Del.Ch. Apr 5, 2002) (insufficient evidence that purported meeting occurred).

In short, a corporate meeting requires not only (1) that those directors assembled together be in the same place at the same time - even if cyber space provides the meeting place - but also (2) that sufficient compliance with corporate formalities exist so as

¹³ *Fogel v. U.S. Energy Systems, Inc.*, C.A. No. 3271-CC, 2007 WL 4438978 (Del.Ch. Dec. 13, 2007) has been overruled on other grounds by *Klaassen v. Allegro Development Corp.*, 106 A.3d 1035 (Del.Supr. 2014).

to ensure that the assembly of directors does not constitute a mere ad hoc gathering.

With particular relevance to this case, the Court notes that (1) no evidence of advance notice of the Email Communication String exists, (2) the Email Communication String indicates that the Board cast insufficient "votes" to constitute valid Board action with respect to the 2,500 Square Foot Rule proposal, and (3) the Board did not take action by written agreement with respect to the 2,500 square foot proposal.

1. Lack of Notice with Respect to the Email Communication String.

With respect to notice, the Nonprofit Corporation Law, at 15 Pa.C.S.A. §5703(b) states, and stated at the time of the Email Communication String, that:

"§5703. Place and notice of meetings of board of directors or other body

(b) **Notice.** - Regular meetings of the board of directors or other body may be held upon such notice, if any, as the bylaws may prescribe. Unless otherwise provided in the bylaws, written notice of every special meeting of the board of directors or other body shall be given to each director or member of such other body at least five days before the day named for the meeting. Neither the business to be transacted at, nor the purpose of, any regular or special meeting of the board or other body need be specified in the notice of the meeting.

See 15 Pa.C.S.A. §5703(b). The LHEPOA Bylaws, in turn state that "[w]ritten or oral notice of every meeting of the Board of Directors will be given to each Director." See LHEPOA Bylaws at Article VII ["Board of Directors"], §6.

Even if the Email Communication String could be characterized as a "meeting," no evidence that notice of such a "meeting" had been given. Similarly, no evidence exists in this matter that any Board member provided a written waiver of notice of such a "meeting." See 15 Pa.C.S.A. §5705 ["Waiver of notice"]. While the Nonprofit Corporation Law in certain instances does permit waiver of notice of a corporate meeting by virtue of attendance at such a meeting, the Court finds that participation in a series of electronic transmissions, including but not limited to meetings held via electronic mail, cannot constitute a waiver of meeting notice if such transmissions do not otherwise constitute a "meeting" pursuant to the criteria delineated *supra*.¹⁴ In the instant matter, in the absence of a "meeting," no waiver of meeting notice occurred.

¹⁴ See 15 Pa.C.S.A. §5705(b) ["Waiver by attendance"] ("Attendance of a person at any meeting shall constitute a waiver of notice of the meeting except where a person attends a meeting for the express purpose of objecting, at the beginning of the meeting, to the transaction of any business because the meeting was not lawfully called or convened.").

2. Even Had It Constituted a Valid Board Meeting, the Email Communication String Did Not Result in an Affirmative Vote for Approval of the 2,500 Square Foot Rule.

Examination of the Email Communication String indicates that, even had the Email Communication String constituted a "meeting," the Board cast insufficient "votes" to render valid Board action with respect to the motion for the 2,500 Square Foot Rule. Only three of the six Board members that participated in the Email Communication String - less than the required majority of participants therein - cast an unconditional affirmative "vote."

As set forth at length *supra*, the LHEPOA Bylaws provide that "[u]nless otherwise specified in these By-Laws or required by statute, the acts of a majority of the directors present at a meeting at which a quorum is present will be the acts of the Board of Directors as a whole." See LHEPOA Bylaws at Article VII ["Board of Directors"], §7.

Also as delineated *supra*, only three of the six directors - John Conway, Russell Ferretti, and Kellie Melba - can be said to have voted for the 2,500 Square Foot Rule proposal set forth by Larry Gould. The remaining Board members did not vote for the 2,500 Square Foot Rule proposal.

Larry Gould moved for the 2,500 Square Foot Rule proposal and twice implored other Board members to vote, but did not cast a

"vote." Similarly, Jessie Smiley twice seconded the motion for the 2,500 Square Foot Rule but never cast a "vote" for the proposal. Bob Haeseker indicated only conditional agreement with the motion for the 2,500 Square Foot Rule, which this Court finds would not constitute an affirmative "vote" had the Email Communication String actually constituted a "meeting." Barry Scholtz did not participate in the Email Communication String.

3. The Board did not Take Action by Written Agreement with Respect to the 2,500 square foot Proposal.

Even if all six Email Communication String participants can be said to have provided written agreement with the 2,500 Square Foot Rule proposal through their participation in the Email Communication String and an accompanying trail of readily printable written e-mails, such writings would not constitute valid Board approval in this matter.

The LHEPOA Bylaws state in part that "[a]ny action that normally would be taken at a meeting of the directors may be taken without a meeting *if* a majority of directors confirms, in writing, agreement with the action taken." See LHEPOA Bylaws at Article VII ["Board of Directors"], §7 (emphasis in original).

As of the time of the Email Communication String - April 10 and April 11, 2013 - the Nonprofit Corporation Law provision governing Board action by written consent in lieu of a meeting, 15

Pa.C.S.A. §5727(b), required such consents to be written, signed, filed with the corporate secretary, and unanimous.

With respect to written consents, Section 5727(b) stated:

"§5727. Quorum of and actions by directors

(b) Action by written consent. - Unless otherwise restricted in the bylaws, any action which may be taken at a meeting of the directors may be taken without a meeting, if a consent or consents in writing setting forth the action so taken shall be signed by all of the directors in office and shall be filed with the secretary of the corporation."

See 15 Pa.C.S.A. §5727(b) ["Quorum of and action by directors"] (As of April 10 and 11, 2013; "1972, Nov. 1, P.L. 1063, No. 271, §7727, effective in 90 days. Renumbered 1988, Dec. 21, P.L. 1444, No. 177, §103, effective Oct. 1, 1989.").¹⁵

Moreover, Section 5727(b) did not permit its requirements to be relaxed in any fashion insofar as it contained the prefatory language "[u]nless otherwise restricted." See 15 Pa.C.S.A.

¹⁵ Shortly after the Email Communication String occurred, the Pennsylvania Legislature amended Section 5727(b) by deleting the following stricken language and adding the following underlined language: "(b) **Action by written consent.** - Unless otherwise restricted in the bylaws, any action ~~which may~~ required or permitted to be taken approved at a meeting of the directors may be ~~taken~~ approved without a meeting, if a consent or consents ~~in writing setting forth the action so taken shall be signed~~ to the action in record form are signed, before, on or after the effective sate of the action by all of the directors in office and shall be on the date the last consent is signed. The consent or consents must be filed with the secretary of the corporation." See 15 Pa.C.S.A. §5727(a) ["Quorum of and action by directors"] ("Amended 2013, July 9, P.L. 476, No. 67, §35, effective in 60 days [Sept. 9, 2013].").

§5727(b) (As of April 10 and 11, 2013). This language permits a Board to adopt Bylaws that contain more restrictive provisions, but not more relaxed provisions. See 15 Pa.C.S.A. §5103 ["Definitions' pertinent to nonprofit corporations] ("'**Unless otherwise restricted.**' When used to introduce a rule implies that the alternative provisions contemplated may further restrict, but may not relax, the stated rule.").

Accordingly, the Article VII, §7 language of the LHEPOA Bylaws pertaining to Board action by written consent in lieu of a meeting at all time relevant hereto has been invalid and inoperative insofar as it does not require that such written consents be signed by a Board member so consenting, does not require such consents to be filed with the corporate secretary, and permits Board action by less than unanimous written consent.

III. CONCLUSION.

For the foregoing reasons, the Court enters the following order and files an Amended Decision and Verdict:¹⁶

¹⁶ The Revised Decision and Verdict changes certain of the paragraphs set forth in the "Findings of Fact" and "Conclusions of Law" portion of the Decision and Verdict filed in this matter on June 29, 2018. Particularly, Paragraphs 15 - 17, 20, 29, and 32 of the "Findings of Facts" and Paragraphs 18 - 24 and 30 - 33 of the "Conclusions of Law" have been revised.

FILED

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA
CIVIL ACTION - LAW

2019 JUN -7 PM 1:54

CARBON COUNTY
PROTHONOTARY

M4 HOLDINGS, LLC, a New Jersey	:	
limited liability company AND	:	
BOULDERVIEW PROPERTIES, LLC,	:	
a Pennsylvania limited liability	:	
company,	:	
Plaintiffs	:	
	:	
v.	:	No. 14-0132
	:	
LAKE HARMONY ESTATES PROPERTY	:	(Lead Case)
OWNERS' ASSOCIATION, a Pennsylvania	:	
non-profit corporation,	:	
Defendant	:	

M4 HOLDINGS, LLC, a New Jersey	:	
limited liability company AND	:	
LEDGESTONE PROPERTIES, LLC,	:	
a Pennsylvania limited liability	:	
company,	:	
Plaintiffs	:	
	:	
v.	:	No. 14-0179
	:	
LAKE HARMONY ESTATES PROPERTY	:	(Consolidated)
OWNERS' ASSOCIATION, a Pennsylvania	:	
non-profit corporation,	:	
Defendant	:	

James R. Nanovic, Esquire	Counsel for Plaintiffs
Steven L. Sugarman, Esquire	Counsel for Defendant

ORDER OF COURT

AND NOW, this 7TH day of June, 2019, upon consideration
of

- the July 9, 2018 "Plaintiff's (sic) Motion for Post
Trial Relief,"

- the October 2, 2018 "Plaintiffs Brief in Support of Plaintiffs Motion for Post Trial Relief (sic),"

- the October 1, 2018 "Defendant, Lake Harmony Estates Property Owners' Association's Memorandum of Law in Opposition to Plaintiffs' Motion for Post-Trial Relief,"

and upon consideration of the August 30, 2018 oral argument, thereon and upon comprehensive review of this matter, it is hereby **ORDERED and DECREED** that Plaintiff's (sic) Motion for Post Trial Relief is **GRANTED IN PART** and **DENIED IN PART**.

1. The June 29, 2018 Decision and Verdict is **UPHELD** as between Plaintiffs Boulderview Properties, LLC and Ledgestone Properties, LLC, and Defendant Lake Harmony Estates Property Owners' Association, and the post-trial motions related thereto are **DENIED** insofar as said plaintiffs had no ownership interest in the subject properties as of April 10 and 11, 2013;

2. The June 29, 2018 Decision and Verdict is **REVERSED** as between Plaintiff M4 Holdings, LLC and Defendant Lake Harmony Estates Property Owners' Association and the post-trial motions denominated as "1" and "2" in Plaintiff's (sic) Motion for Post Trial Relief is **GRANTED**. In all other respects the post trial motions are **DENIED**.

3. This Court has issued a Revised Decision and Verdict.

BY THE COURT:


Joseph J. Matika, J.

APPENDIX I

"EMAIL COMMUNICATION STRING"

From: OSAOSAOSA@aol.com [mailto:OSAOSAOSA@aol.com]
Sent: Wednesday, April 10, 2013 12:30 PM
To: Scott Matthews; bscholtz@sscdistributors.com; dedepeg@verizon.net; jess5291@comcast.net; john.conaway@comcast.net; ktmelba@gmail.com; russferretti@optionline.net
Cc: dhervath@newmanwilliams.com
Subject: Re: ROFR

Hello Scott,

... This ROFR is for 2 lots, 2 adjacent lots on Skye Drive. The purchaser is M4 Holdings, a/k/a Jim Millspaugh. It is readily apparent that he will be desiring to build 2 large commercial rentals on these lots. We have been talking about placing controls on such buildings for five months now; five months! In light of this fact, I propose and (sic) amendment to our existing Rules and Regulations, effectively immediately, which limits the size of all new construction, to 5 bedrooms, 3 bathrooms, and no larger than 2500 square feet.

We need to vote YES on this right now, effective immediately.

LARRY

From: jess5291@comcast.net [mail to: jess5291@comcast.net]
Sent: Wednesday, April 10, 2013 4:02 PM
To: OSAOSAOSA@aol.com
Cc: dhervath@newmanwilliams.com ; Scott Matthews; bscholtz@sscdistributors.com; dedepeg@verizon.net; john conaway; ktmelba@gmail.com; russferretti@optionline.net
Subject: Re: ROFR

I assume that Larry just made a motion to limit new construction to 5 bedrooms, 3 bathrooms, and no larger than 2500 square feet. We as the board are allowed to propose this amendment under our existing Rules and Regulations. We do not need a membership vote because it will be inserted in the Rules and Regulations section. I second Larry's approach and encourage others to do the same. Nothing is changing anytime soon with restructuring our documents. Spring is here and there are going to be

more property transactions. We need to protect the community from more RFOR's (sic) like this one here from M4 Holdings. I would encourage all board members to NOT sign off on this RFOR (sic) for lots 713 and 714.

Jessie

From: OSAOSAOSA@aol.com
To: jess5291@comcast.net
Cc: dhorvath@newmanwilliams.com, "Scott Matthews"
<Scott.Matthews@kadiehl.com>, bscholtz@sscdistributors.com,
dedepeg@verizon.net, "john conaway" <john.conaway@comcast.net>,
ktmelba@gmail.com, russferretti@optionline.net
Sent: Wednesday, April 10, 2013 4:42:21 PM
Subject: Re: ROFR

Hello Jessie,
Thank you. We need to immediately vote on this motion and your second.
Would all Board members please vote on the motion and second to limit
size of all new construction effective immediately.
LARRY

From: OSAOSAOSA@aol.com
Sent: Wednesday, April 10, 2013 4:53 PM
To: Scott Matthews; bscholtz@sscdistributors.com; dedepeg@verizon.net;
jess5291@comcast.net; john.conaway@comcast.net; ktmelba@gmail.com;
russferretti@optionline.net
Cc: David Horvath
Subject: Re: ROFR

Hello to all,

The purchase price for the 2 lots (713 and 714 Skye Drive) to be purchased
by M \$ (sic) Holdings (Jim Millspaugh) is listed at \$1.00. I therefore
motion that we exercise our right of first refusal and purchase the 2
lots for the Association for \$1.00. I also motion that we time this to
be just under the 30 day time frame that we have to respond, as to allow
us the advantage of time, and to have time work for us, for a change.
DAVE - please provide your legal input on this as soon as possible.
Thank you.
LARRY

PS - PLEASE would all Board Members vote on the motion to restrict the
size of new construction.

From: jess5291@comcast.net
Sent: Wednesday, April 10, 2013 5:35 PM
To: OSAOSAOSA@aol.com
Cc: dhervath@newmanwilliams.com; Scott Matthews;
bscholtz@sscdistributors.com; dedepg@verizon.net; john conaway;
ktmelba@gmail.com; russferretti@optionline.net
Subject: Re: ROFR

Follow Up Flag: Follow up
Flag Status: Blue
I second this motion.

Jessie

From: john.conaway@comcast.net
Sent: Wednesday, April 10, 2013 6:26 PM
To: OSAOSAOSA@aol.com
Cc: dhervath@newmanwilliams.com; Scott Matthews;
bscholtz@sscdistributors.com; dedepg@verizon.net; ktmelba@gmail.com;
russferretti@optionline.net; jess5291@comcast.net
Subject: Re: RFOR (sic)

Follow Up Flag: Follow Up
Flag Status: Blue

I support exercising our ROFR for lots 713 and 714 on Skye Drive.

I also support sending out the newly updated memo to the membership regarding 316 Birch.

As for updating our rules and regulations regarding building sized, I thought we had already been advised that this approach would not be enforceable. Unless I am somehow mistaken, I cannot support this course of action that is likely to attract litigation similar to the complaint that was recently resolved. We have already established that our best and only protection against these large commercial rental properties is to update our bylaws and to aggressively enforce our existing rules regarding behavioral problems associated with these properties.

In my opinion, the efforts taken by some members of the previous board to push back against these properties was heroic. To pick another fight now, however, knowing what we now know, and on the heels of a recent

settlement, would be something else. I am as anxious as anyone to solve this problem, but we have a plan and should stick with it.

That being said, I would gladly reconsider if my initial premise is inaccurate.

From: Kellie Melba [ktmelba@gmail.com]
Sent: Wednesday, April 10, 2013 10:14 PM
To: john.conaway@comcast.net
Cc: OSAOSAOSA@aol.com; dhervath@newmanwilliams.com ; Scott Matthews;
bscholtz@sscdistributors.com; dedepeg@verizon.net;
russferretti@optionline.net; jess5291@comcast.net
Subject: Re: RFOR (sic)

Follow Up Flag: Follow up

Flag Status: Blue

I support exercising our ROFR for 713 and 714 Skye Drive as well.

In regards to limiting # of bedrooms/bathrooms and house size I was also under the impression that was something we couldn't easily change. I will be interested in hearing if that is not the case.

Kellie

From: Kellie Melba [ktmelba@gmail.com]
Sent: Wednesday, April 10, 2013 10:28 PM
To: john.conaway@comcast.net
Cc: OSAOSAOSA@aol.com; dhervath@newmanwilliams.com ; Scott Matthews;
bscholtz@sscdistributors.com; dedepeg@verizon.net;
russferretti@optionline.net; jess5291@comcast.net
Subject: Re: RFOR (sic)

The more I think about this, the more upset I get. I truly believe that we need to get our bylaws updated ASAP. Maybe if Sugarman can't we find someone who can. It was my understanding that we had to have new bylaws presented at a semiannual meeting. Maybe we need to push our semi-annual meeting back to June (as long as it is still spring) and we could have something to present to the membership then?

Kellie

From: OSAOSAOSA@aol.com
Sent: Wednesday, April 11, 2013 2:42 AM
To: john.conaway@comcast.net;
Cc: bscholtz@sscdistributors; dedepeg@verizon.net; ktmelba@gmail.com;
russferretti@optionline.net; jess5291@comcast.net; Scott Matthews;
Subject: Re: RFOR (sic)

Follow Up Flag: Follow up
Flag Status: Blue

Hello John,

Good on the ROFR. The plan is to wait 25 days from the date we received the request. This will give us more lead time, and be in a favorable position to achieve our goals while effectively delaying the purchaser. I called David Horvath today and he did not call me back; I emailed him as well and could not reach him. I did however, reach Sandy Mulhern from Sugarman & Associates. I spent 40 minutes on the telephone with him, and he stated to me, unequivocally, that we should pass this rule immediately, effective immediately, and put it on our web site. Then, we should include it with the Resale certificate. He stated that we, as the Board of Directors, have the power to place this Rules and Regulation in effect. We can implement this exact rule, with the 5 bedroom, 3 bathroom, 2500 square foot limitations. He stated that this is a very important first step in beginning the process to immediately curtail the building of larger properties. He stressed the urgency to pass this right away, so that it does not look like we are acting much after the notification of sale for 713 and 714 Skye Drive. We need to do this now in regards to the lawsuit, we were sued because no such Rule and Regulation was in effect. Had we had that verbiage already placed in our BOG, we probably would not have been sued. Sandy is confident that this is the correct, immediate first step, as am I. We need to do something right now, while we continue to fine tune our BOG, by laws, and security patrol protocols. Believe me, this is the valuable first (sic) step in a line of steps to regain control of our precious community. I will forward his confidential email to you as well. Right now, we need a yes vote from the Board to implement this new Rule and Regulation, put it on the web site, and include it in all Resale certificates.

LARRY

From: OSAOSAOSA@aol.com
Sent: Wednesday, April 11, 2013 2:49 AM
To: ktmelba@gmail.com; john.conaway@comcast.net;

Cc: dhorvath@newmanwilliams.com; Scott Matthews
bscholtz@sscdistributors; dedepeg@verizon.net;
russferretti@optionline.net; jess5291@comcast.net;
Subject: Re: RFOR (sic)

Follow Up Flag: Follow up
Flag Status: Blue

Hello Kelly,

We can amend our Rules and Regulations at any time by Board vote. Sandy from Sugarman has confirmed this, and affirmed that this is an important first step in putting up an immediate block to the new construction of large homes. The key is to having something in our BOG, and that is the starting point to stop the madness of these large properties. Once this is in, it makes it much harder for anyone to have a case against it. Unfortunately, we had nothing before, and hence, the lawsuit. Take a look at Sugarman's email to me earlier today, after our lengthy discussion about this. This is an important first step in making sure that rules are in place to prevent this.

LARRY

From: OSAOSA@aol.com
Sent: Wednesday, April 11, 2013 2:51:48 AM
To: ktmelba@gmail.com, "John Conaway" <john.conaway@comcast.net>
Cc: "Scott Matthews" Scott.Matthews@kadihl.com,
bscholtz@sscdistributors.com, dedepeg@verizon.net,
russferretti@optionline.net, jess5291@comcast.net
Subject: Re: RFOR (sic)

Hello Kellie,

Don't be upset. Sugarman can do this for us. Furthermore, they feel that we have a solid base BOG, good rules and regulations, and we can expand upon that, along with a by law change to strengthen everything. They favor this approach as opposed to a complete re-write. You will see that within the next few weeks, this project will take off like fire. You will see.

LARRY

On Thu, Apr 11, 2013 at 7:09 AM, john.conaway@comcast.net wrote:

Ok Larry. Good job. You have my support for amending the rules along the lines being proposed.

Can you explain why we didn't take this step months ago? Am I dreaming?

From: RUSSELL FERRETTI [russferretti@optionline.net]
Sent: Thursday, April 11, 2013 7:39 AM
To: John Conaway
Cc: Larry Gould; Scott Matthews; Barry Scholtz; Bob & Peg Haeseker;
Jessica Smiley; Kellie Melba; David Horvath
Subject: RFOR

Follow Up Flag: Follow up

Flag Status: Blue

All: I also agree to amending our Rules and Regs to place limitations on the number of bedrooms, bathrooms and square footage of new construction. Larry and I discussed this by phone last night. The Sugarman advice on this matter provides us with the legal evaluation to know we are on firm ground with this new rule.

From: Jessica Stull [jess5291@comcast.net]
Sent: Thursday, April 11, 2013 9:04 AM
To: RUSSELL FERRETTI
Cc: John Conaway; Larry Gould; Scott Matthews; Barry Scholtz; Bob & Peg Haeseker; Kellie Melba; David Horvath
Subject: Re: RFOR (sic)

Follow Up Flag: Follow up

Flag Status: Blue

Thank you for taking the initiative on this so important matter. Because of your efforts, we are finally breaking through the obstacles that have been holding us stagnate for much too long. I appreciate your passion and motivation.

Jessie

From: ktmelba@gmail.com on behalf of Kellie Melba
[kellie@scottmelba.com]
Sent: Thursday, April 11, 2013 9:20 AM

To: RUSSELL FERRETTI
Cc: John Conaway; Larry Gould; Scott Matthews; Barry Scholtz; Bob & Peg Haeseker; Jessica Smiley; David Horvath
Subject: Re: RFOR

Follow Up Flag: Follow up
Flag Status: Blue

Larry - Thanks for the additional info from Sugarman. Feel better about everything. I agree to amend out rules and regs to place limitations on numbers of bedrooms, bathrooms, and square footage as well.

Kellie

From: Peggy Haeseker [dedepeg@verizon.net]
Sent: Thursday April 11, 2013 11:22 AM
To: OSAOSAOSA@aol.com; Scott Matthews; bscholtz@sscdistributors.com; jess5291@comcast.net; john.conaway@comcast.net; ktmelba@gmail.com; russferretti@optionline.net
Cc: dhervath@newmanwilliams.com
Subject: Re: ROFR

Follow Up Flag: Follow up
Flag Status: Blue

--- Original Message --- I approve larry's suggestion to buy the property 713 and 714 at the sale price of a 1.00 per lot if that is the selling price under the right of first refusal. I also agree if it is legal to limit the size of the homes and the number of rooms and bathrooms if it corresponds with the recent court case decisions.

bob