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KNOX COUNTY
COURT OF COMMON PLEAS

2006 DEC -4 PM 2:02

MARY JO HAWKINS
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS
FOR KNOX COUNTY

KATHRYN ELLIOT PULLINS, STEPHEN ELLIOTT, and REFORM APPLE VALLEY)	CASE NO. 06IN040168
)	
Plaintiffs)	JUDGE RICHARD M. MARKUS
)	
vs.)	OPINION AND
)	FINAL JUDGEMNT
CARL F. HOLMES, DEBORAH A. ADAMS, PHILIP BENTZ, JANE E. ENGLE, ROBERT LAPRAD, EARL OWENS, DAVID PATTON, DENNIS RAWSON, JEFF HARMER, and APPLE VALLEY PROPERTY OWNERS ASSOCIATION, INC.)	
)	
Defendants)	

PROCEDURAL HISTORY

On April 3, 2006, plaintiffs Kathryn Elliott Pullins, Stephen Elliott, and Reform Apple Valley filed their Complaint in this case against the Apple Valley Property Owners Association, Inc. (AVPOA), its general manager, and eight of its nine corporate directors. On May 2, 2006, the defendants filed their Answer.

On June 27, 2006, the plaintiffs filed an Amended Complaint, which asserted seven claims for declaratory relief and/or permanent injunctions relating to (1) Kathryn Pullins' removal as an AVPOA director; (2) posting political signs on AVPOA property; (3) posting "for sale" signs on AVPOA properties; (4) using AVPOA community rooms for their meetings; (5) obtaining a right to publish their views in AVPOA's Cider Press Newsletter; (6) Kathryn Pullins' access to AVPOA financial documents; and (7) requiring AVPOA to conduct elections monitored by a CPA firm. The defendants filed their Answer to the Amended Complaint on July 13, 2006.

JM# 175

On August 11, 2006, the defendants filed a motion for summary judgment for all seven claims in the Amended Complaint. On September 5, 2006, before the defendants' summary judgment motion was ripe for decision, the court received evidence and argument for the plaintiffs' preliminary injunction motion, which related solely to Kathryn Pullins' removal as an AVPOA director. The court denied the preliminary injunction, but expressly retained that hearing evidence as part of the prospective trial pursuant to Civ. R. 65(B)(2). The court reserved any final decision on that claim until it could conduct the trial on all claims.

On September 2, 2006, with leave of court, the plaintiffs filed a Second Amended Complaint, which withdrew the second, third, fourth, and seventh claims, but continued to assert their claims regarding (a) Kathryn Pullins' removal as an AVPOA director; (b) their ability to publish their views in AVPOA's Cider Press Newsletter; and (c) Kathryn Pullins' access to financial documents. On September 26, 2006, the defendants filed their Answer to the Second Amended Complaint.

When the court granted the plaintiffs leave to file their Second Amended Complaint, it also allowed the defendants to maintain their otherwise moot summary judgment motion, without refiling it. When that motion became ripe for decision, the court granted summary judgment motion against the plaintiffs' claim of a right to publish their views in Cider Press, but denied summary judgment for the plaintiffs' remaining claims which (a) contest Kathryn Pullins' removal as an AVPOA director, and (b) enforce her alleged right to view AVPOA financial records.

On November 20 and 21, 2006, the court conducted a bench trial for those two remaining claims. In addition to the testimony and exhibits that the court received for the

hearing on the plaintiffs' motion for a preliminary injunction, the court received substantial additional oral testimony and exhibits from both sides of the controversy. Having carefully reviewed and considered all the evidence and the written and oral arguments of counsel, the court now provides its opinion and judgment for the remaining issues. The court makes all factual findings from clear and convincing evidence.

IMPROPER PARTIES

The evidence establishes that Reform Apple Valley is an unincorporated association of persons who monitor or disapprove of some AVPOA practices. It includes Scott Pullins, Kathryn Pullins, Stephen Elliott, Mrs. Stephen Elliott, and other unidentified persons. While some members of Reform Apple Valley may have standing to assert the two remaining claims, the court concludes that Reform Apple Valley failed to prove its standing for those claims.

An association lacks standing unless it shows "(1) its members would otherwise have standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." See *Tiemann v. Univ. of Cincinnati* (1998), 127 Ohio App.3d 312, 324, 712 N.E.2d 1258; *Ohio Academy of Nursing Homes, Inc. v. Barry* (1987), 37 Ohio App.3d 46, 47, 523 N.E.2d 523, 525.

While paragraphs 5-6 of the Second Amended Complaint allege standing elements, no evidence shows how the claimed relief is germane to the organization's purpose or that the association can act for the two remaining claims without the direct participation of Kathryn Pullins who is a party.

Similarly, plaintiff Stephen Elliott failed to show that he has standing to assert the

two remaining claims. Some evidence concerned Stephen Elliott's previously settled lawsuit against AVPOA to relocate a utility unit near his property, and Kathryn Pullins' involvement in the AVPOA Board's consideration of that lawsuit. However, there is no evidence that Stephen Elliott has any direct interest in the removal or Kathryn Pullins from the AVPOA Board or her requests for corporate data.

Further, the court concludes that the plaintiffs failed to allege or prove a valid claim against any of AVPOA's corporate directors personally. The Board members who voted to remove Kathryn Pullins as an AVPOA Director acted on behalf of AVPOA. The plaintiffs seek a declaratory judgment and/or an equitable order to invalidate that action. They do not seek money damages or any other relief against any director personally.

Ohio protects corporate directors from personal liability with a statutory "business judgment" rule:

R.C. 1701.59 (B) A director shall perform the director's duties as a director, including the duties as a member of any committee of the directors upon which the director may serve, in good faith, in a manner the director reasonably believes to be in or not opposed to the best interests of the corporation, and with the care that an ordinarily prudent person in a like position would use under similar circumstances. . . .

(C)(1) A director shall not be found to have violated the director's duties under division (B) of this section unless it is proved by clear and convincing evidence that the director has not acted in good faith, in a manner the director reasonably believes to be in or not opposed to the best interests of the corporation, or with the care that an ordinarily prudent person in a like position would use under similar circumstances, in any action brought against a director,

However, the business judgment rule does not protect illegal or unauthorized actions because they are not the exercise of business judgment. See, e.g., *Geygan v. Queen City Grain Co.* (1991), 71 Ohio App.3d 185, 182, 593 N.E.2d 328, *Coukart v.*

Castalia Banking Co. (Dec. 4, 1987), Erie App. No. No. E-87-10, 1987 WL 26267 (the business judgment rule does not protect the board's contract with which requires just cause to remove an officer where the applicable statute and corporate regulations permit removal without cause).

There is no evidence that AVPOA's directors denied Kathryn Pullins access to any AVPOA financial data. Indeed, she asserts and the evidence establishes that AVPOA's general manager (defendant Harmer) has control over the requested materials and denied her access to them without any formal action by the se defendant AVPOA directors.

In this case, the plaintiffs challenge AVPOA's actions on the basis that they violate legally governing statutes, restrictive covenants, or corporate bylaws. Therefore, the court has no reason to consider or apply the business judgment rule. At the same time, the plaintiffs seek no relief from the corporate directors personally and provide no evidence to show why they should be personally liable.

For these reasons, the court dismisses all claims by Reform Apple Valley and Stephen Elliott and all claims against APVOA's corporate directors personally. The remaining parties are Kathryn Pullins, AVPOA, and Jeff Harmer. Plaintiff Pullins contests (a) her removal as an AVPOA corporate director, and (b) the denial or her access to corporate records. She properly asserts the former claim against defendant AVPOA. She properly asserts the latter claim against AVPOA and its general manager.

KATHRYN PULLINS' REMOVAL AS AN AVPOA DIRECTOR

The developer of the AVPOA planned unit development created restrictive covenants for any subsequent purchaser of the properties within the designated area. Those covenants directed the creation of AVPOA as an Ohio nonprofit corporation and required each owner to become a member/shareholder of that incorporated association (Articles I, III). By purchasing property in that area, each owner-member accepted limitations on his or her property rights. Ohio courts construe restrictive covenants in the manner that least restricts the owner's free use of the land. *Houk v. Ross* (1973), 34 Ohio St.2d 77, paragraph two of the syllabus; *Loblaw, Inc. v. Warren Plaza, Inc.* (1955), 163 Ohio St. 581, paragraph two of the syllabus; *Wood Moor Homeowners' Assn. v. Bolden* (Feb. 23, 2004), Stark Co. App. No. 2003CA00244, 2004-Ohio-843, 2004 WL 345361.

The owner-members of AVPOA approved and periodically amended bylaws for that corporation, which are valid to the extent that they comply with the underlying covenants and Ohio statutes. The governing statutes, covenants, and bylaws authorize the corporate association's board of directors to act for the corporate association and its owner-members in a specified manner. The corporate association's board of directors could approve any actions within the authority that the statutes, covenants, and bylaws granted that board. The board maintained minutes of its meetings which expressly reported any action that the board members approved. The board could not take any action without a majority vote of its members, which the board's minute should report. R.C. 1702.15.

Article V ("Covenant for Maintenance Assessments"), Section 8 of the underlying restrictive covenants provides in part:

Section 8. Duties of the Board of Directors.

The management, affairs and policies of the Association shall be vested in the Board of Directors each of whom must be a member of the Association in good standing. The number of Directors shall be not more than eighteen and not less than six. * * * .

Ohio statutes generally authorize corporate articles, regulations or bylaws to govern a directors' election, authority, and removal. R.C. 1701.59 (A) provides:

Except where the law, the articles, or the regulations require action to be authorized or taken by shareholders, all of the authority of a corporation shall be exercised by or under the direction of its directors. For their own government, the directors may adopt bylaws that are not inconsistent with the articles or the regulations.

R.C. 1702.29 (B) adds:

A director may be removed from office pursuant to any procedure therefor provided in the articles or in the regulations and such removal shall create a vacancy in the board.

With several thousand owner-members, AVPOA is apparently an "issuing public corporation "[R.C. 1701.01(Y)], for which the owner-members have authority to remove duly elected directors with staggered terms "for cause." R.C. 1701.58 (C), (D).

As amended, Article 2 of the corporate association's bylaws that have been in effect since June 17, 2000, describes and limits the association's purpose:

2.1 It adopts rules and regulations in the best interest of the Association and its members.

2.2 It owns, builds, administers, and maintains common properties.

2.3 It administers and enforces the covenants and restrictions contained in the Declaration of Restrictive Covenants and in these Bylaws.

2.5 It does all things necessary and incidental, as permitted by law and under the Articles of Incorporation, to promote the common benefit of property owners in Apple Valley.

Article 9 of those bylaws provides for the election, authority, procedure, removal, and replacement of the corporate association's directors:

9.1 Powers. The Board of Directors shall have the power to carry on the affairs of the Association. In order to carry out this power, the Board shall undertake the following:

9.1.3 Perform other acts the authority for which has been granted in these Bylaws, in the Restrictive Covenants, or by law, including the borrowing of money for Association purposes. * * * *

9.1.4 Adopt such rules and regulations relating to the use of common properties and sanctions for noncompliance therewith, as it may deem reasonably necessary in the best interests of the Association and its members. * * * Further, the Board may adopt reasonable rules of order for the conduct of Board meetings. The ruling of the President of the Board shall be final on procedural questions upon which no rules have been adopted. The Board may, by resolution, adopt Robert's Rules of Order as a guide for the conduct of all meetings.

9.1.5 Adopt an annual operating budget in accordance with Article 8.2 of these Bylaws and levy the annual assessment (per Article V of the Restrictive Covenants) on each lot for the following year. Upon the adoption and approval of the budget, the Board shall be bound by same. No expenditure in excess of the budget shall be made unless it is authorized by the Board.

9.1.7 The Board shall have the power to appoint officers and agents and to hire employees as may be necessary for the carrying out of Association business. Any officer or agent may be removed and replaced at any time by the Board.

9.2 Number of Directors. Effective with the annual meeting of 1984, the number of directors shall be nine, each of whom must be a member of the Association. Each director shall serve for a term of three years. However, the Board may by resolution increase the number of directors to not more than eighteen.

9.4 Election of Directors

9.4.1 In all elections of Directors, each voting member in good standing is entitled to one vote per lot in accordance with Article III, Section 2 of the Restrictive Covenants. One vote per lot may be cast for each position to be filled. The persons receiving the largest number of votes shall be elected to fill the Board vacancies.

9.4.2 Each year, between the first day of October and the fifteenth day of the following January, any member in good standing may file at the Association office during regular business hours, a statement of his or her candidacy for election as a Director of the Association, together with endorsements of his or her candidacy signed by at least fifty voting members in good standing. This shall be for the term beginning immediately following the next annual meeting of the Association. The Secretary of the Association shall cause notice of such candidacy and a brief biographical statement of each candidate to be included in the notice of such annual meeting.

9.5 Removal of Directors. A director may be removed by a vote of three-fourths of the Board of Directors present at a Board meeting in which a quorum is present for "just cause." "Just cause" shall include self-dealing, conflict of interest, or negligence in performing the responsibilities of a director. If a motion to remove a Director is made at a Board meeting, the motion shall not be acted upon until the next Board meeting. Notice of the motion shall be mailed to the Director, whose removal is sought, not less than twenty-one days prior to the meeting when the motion is to be considered.

9.6 Meetings of the Board of Directors. The Board shall meet at least quarterly. After adoption of a resolution setting forth the times of regular meetings, no notice of such meetings shall be required, or waived. Special meetings of the Board may be called by the President, or by a majority of the Board. Notice of a special meeting shall be given in writing or orally at least twenty-four hours prior to the date of said special meeting, and shall be held at such place in the State of Ohio as the call or notice of the meeting shall designate. Notice thereof may be waived by the Directors in writing.

9.7 Action Without Meeting. Unless prohibited by law, where director action is required before a meeting can be conveniently called, any action which may be taken at a meeting of the Board may be taken without a meeting if the action is consented to by a majority of the Directors entitled to vote on such action at a meeting of the Directors. Such actions shall be reported at the next Board meeting.

9.8 Quorum. A majority of the Directors shall constitute a quorum to transact business of the Board, and the act of the majority of the Directors present at any duly called meeting shall be deemed to be the act of the Board.

9.9 Vacancies. All Directors shall serve until their successors are elected. Any vacancies occurring on the Board created by the death or resignation of a Director shall be filled by the Board.

9.10 Conflict of Interest. All Directors shall endeavor to conduct themselves on Association business according to the highest ethical standards and shall strive to avoid even the slightest appearance of impropriety. In that regard, Directors shall not, either directly or indirectly, derive a personal profit or advantage from their position as Directors, in that the primary obligation of the Director is to the Association and its Members and not to himself or herself. No contract or business relationship shall be entered into between the Association and a Director or any entity in which her or his family has a significant interest, unless the material facts of the relationship and transaction are disclosed or are made known to the Board and a majority of the disinterested Directors specifically authorize the contract or business relationship. Directors shall generally abstain from discussing at a meeting, or voting upon, any matter in which they, their immediate family members or any entity in which they have a significant interest, have a personal financial interest in that outcome. No Director shall solicit personal favors or exert (direct or implied) influence on the General Manager or Association employee in order to gain business or personal favors for himself.

Each owner-member's voting right is his/her most important protection against Association assessments, expenditures, or practices which he/she disapproves. The owner-members vote to elect the board of directors and to adopt corporate bylaws which expand or restrict that board's authority. Therefore, this court should construe any provisions of the covenants and the bylaws in the manner that best protects those voting rights. See *Hurst v. Apple Valley Property Owners Association* (May 2, 1988), Knox Co. App. No. 88-CA-12., 1988 WL 48580 ("The shareholders of a corporation have the ultimate control over the trustees by exercise of their right of selection of the trustees.")

Nothing in the covenants or bylaws authorizes the board of directors to impose any additional requirements on candidates for director beyond being a "member in good standing" who files a statement of candidacy with "endorsements of his or her candidacy

signed by at least fifty voting members in good standing.” Bylaws § 9.4.2. Accordingly, this court construes the Bylaws to preclude any other requirement for that candidacy.

The board president has authority to conduct board meetings in a manner consistent with the bylaws and any rules or procedures that the board itself adopts. Except as the bylaws expressly provide or the board formally approves with additional action, neither the president nor any other officer has any greater authority than any other board member.

The Bylaws expressly authorize the board to remove a director whom the owner-members have elected, but they limit that authority to removal for “just cause” as the Bylaws define that term. Bylaws §9.5. Accordingly, this court construes the Bylaws to preclude removal for any other reason. *Inclusio unius est exclusio alterius* (“The inclusion of one is the exclusion of another”). *Martin v. Ohio Dept. of Human Serv.*, (1998), 130 Ohio App.3d 512, 522, 720 N.E.2d 576; *Dellagnese Const. Co. v. Nicholas*, (Aug. 23, 2006), Summit App. No. . 22951, 2006 WL 2422592. More specifically, neither the covenants nor the Bylaws permit a director’s removal simply because other directors believe in good faith that the removal is “in the best interests of the association.”

Section 9.5 also requires the board to mail that director notice of the removal motion at least twenty-one days before the meeting when the board will consider that motion. Nothing in the Bylaws defines the content of the motion or the related notice. Therefore, this court construes the Bylaws to conform with “fundamental justice” requirements that (a) the notice shall advise the director of the alleged “just cause” grounds for removal, and (b) the director shall have a reasonable opportunity to prepare for and respond to those alleged grounds. See, *Bay v. Anderson Hills, Inc.* (1984), 19

Ohio App.3d 136, 137, 483 N.E.2d 491; *Normali v. Cleveland Association of Life Underwriters* (1974), 39 Ohio App.2d 25, 28, 315 N.E.2d 482. *Kitchen v. Lake Lorelei Property Owners' Assn., Inc.* (June 10, 2002), Brown App. Nos. CA2001-10-016, CA2001-10-018, 2002-Ohio-2797.

Indeed, director Pullins had a substantial property right in her office because it related to her elected office for a term of years and derived from her ownership of real property. Therefore, she may well be entitled to "due process" which requires reasonable notice of charges, a reasonable opportunity to prepare a response and to respond, and an impartial tribunal. See *Armstrong v. Manzo* (1965), 380 U.S. 545; *Mullane v. Central Hanover Tr. Co.* (1950), 339 U.S. 306.

Section 9.5 defines the term "just cause" to "include self-dealing, conflict of interest, or negligence in performing the responsibilities of a director." "Self-dealing" is essentially synonymous with "conflict of interest." In this context, it means a director's participation in a corporate transaction in which he or she has a personal financial interest. *United States v. Skeddle* (N.D. Ohio, 1996), 940 F.Supp. 1146.

Section 9.10 defines the term "conflict of interest." It begins with precatory language that directors should "endeavor to conduct themselves on Association business according to the highest ethical standards and shall strive to avoid even the slightest appearance of impropriety." It then confines a "conflict of interest" to situations in which directors --

- (a) derive "a personal profit or advantage" from their position as directors;

- (b) cause or permit the Association to enter into a “contract or business relationship” with that director or “any entity in which the director’s family has a significant interest,” without disclosing that situation to the board, or
- (c) discuss at a board meeting or vote on “any matter in which they, their immediate family members or any entity in which they have a significant interest, have a personal financial interest in that outcome.” (underlining emphasis added)

This court construes the bylaws to preclude removal for a “conflict of interest” by any other definition. See *Martin and Dellagnese, supra* at p. 11.

“Negligence,” of course, is a failure to exercise the care that a reasonably careful director would exercise in performing that duty as a director. The defendants do not claim and there is no credible evidence that director Pullins failed to exercise sufficient care in performing her duties as a director. Rather, they contend that she participated in a “conflict of interest” relating to her father’s lawsuit, or that her activities outside her services as a director adversely affected the board or the corporation.

The evidence establishes that AVPOA’s Board of Directors routinely conducted two meetings each month, one of which it termed a “work session” and one of which it termed a “regular meeting.” Nothing in the corporation’s Bylaws authorizes different types or forms of boards meetings. The board gave the AVPOA owner-members notice in the Cider Press and elsewhere of the scheduled time for its “regular meetings” but not for its “work sessions.”

At its “work sessions,” the board voted on some matters and discussed other matters on which it would vote at the next regular meeting. The board periodically

conducted an “executive session” immediately after a “regular meeting,” with no Bylaws or recorded board vote to define the subjects for executive sessions and no meeting minutes that explain why an executive session was necessary or appropriate. The board excluded from all “work sessions” and “executive sessions” all owner-members who were not board members.¹

In June 2005, the AVPOA owner-members elected Kathryn Pullins to a three year term as a member of the AVPOA Board of Directors, which began on June 28, 2005.

At a “work session” on March 9, 2006, the board discussed a motion to remove director Pullins as a board member and decided to delay a vote on that matter until its next meeting. The board had never discussed that subject at a previous meeting. She was not present at the March 9 meeting, neither she nor anyone else received notice that the board would discuss that subject then, and the board excluded any non-board members from that work session meeting.

At an “executive session” following a regular board meeting on March 14, 2006, the board further discussed her removal and voted to send her notice that it would decide that matter at a “work session” on April 6, 2006. It had not discussed that subject in its “regular meeting” on March 14, when a substantial number of non-board members were present. She was not present at the March 14 regular meeting or the following executive session, neither she nor any non-board member received notice that the board would discuss that subject then, and the board excluded any non-board members from that executive session.

¹ This court has significant doubt that the governing statutes, covenants, and bylaws authorize the board to routinely conduct secretive proceedings, for which the owner-members receive no notice and from which the board excludes all non-board members. However, the court need not decide whether the secretive meetings on March 9, March 14, or April 6 were valid, because the removal vote was otherwise invalid.

When the board concluded that March 14 executive session, it had not agreed upon or determined any specific "just cause" for her removal. Minutes for that executive session do not report any specific allegation or finding of "just cause" for her removal.

On March 15, 2006, AVPOA's general manager (Jeff Harmer) mailed director Pullins a letter which stated:

The purpose of this letter is to inform you that the AVPOA board voted unanimously on March 14, 2006, to remove you as a director for "just cause" pursuant to Section 9.5 of the AVPOA Bylaws. You have not less than 21 days to submit any information on your behalf relevant to this issue before it is voted on at the next board meeting, which is currently anticipated to be scheduled for April 6, 2006, at 6:30 p.m. In the alternative, if you would prefer to voluntarily resign instead, the Board of Directors will accept that resignation and take no further action.

Director Pullins received no further communication from anyone before April 6 with any more specific reason for her removal, the procedure by which she should "submit any information on [her] behalf relevant to this issue," or the nature of any procedure by which the board would decide it.

At 8:04 p.m. on the evening of April 5, 2005, Scott Pullins (director Pullins' attorney-husband) sent AVPOA's counsel an email message:

Please have your office email or fax to mine any evidence or materials that will be presented concerning the grounds for removal of Kathryn Elliott Pullins. I will expect to receive it tomorrow. Thank you.

At 3:23 p.m, approximately three hours before the April 6 Board meeting, the Board's counsel sent Scott Pullins an email message:

Scott, you (as Kathryn Pullins' counsel) and Mrs. Pullins will be permitted to attend the Board meeting this evening as it relates to the motion for removal. Please be advised that the Board will not permit recording of the meeting other than by stenographic means. Thank you for your cooperation.

Nothing in the record shows that the Board authorized its counsel to send that message. She received no earlier notification (a) that she could attend the April 6 meeting, (b) that she could bring her husband or anyone else as counsel, (c) that anyone could record those proceedings in any manner, or (d) that anyone would present any charges or any supporting information before she would respond.

At some time between March 14 and April 6, AVPOA director Patton endeavored to compose grounds for director Pullins' removal. He sent a draft of that document to AVPOA's general manager on the afternoon on April 6, which he further edited during and after the April 6 meeting. At no time before the April 6 meeting did he send any draft of that document to director Pullins, anyone who might act on her behalf, or any other AVPOA board member.

At or about 6:30 p.m. on April 6, six members of the AVPOA board, its counsel, and its general manager assembled for the "work session" which would act on director Pullins' removal. The board gave no notice of this "work session" or its subject to AVPOA's owner-members, and would have excluded them if they came. Director Pullins and her attorney-husband arrived shortly before then with a videocamera and two licensed and armed security guards, asserting that a January altercation with the board's president and anonymous telephone calls caused them to fear for their safety. Their videotape showed some of the circumstances that followed.

Although the board had voted two years earlier to exclude firearms from all AVPOA common areas, it had never taken any active steps to enforce that policy. However, on this occasion AVPOA's general manager with at least silent approval of some board members insisted that the armed guards could not accompany director Pullins

at the meeting. By arrangements with AVPOA's general manager, two armed deputy sheriffs were present to serve the board with the complaint and summons for this lawsuit to enjoin director Pullins' removal. She did not enter the building or participate in that meeting.

This court finds as a matter of fact that both sides used this confrontation as a pretext to avoid a meaningful consideration of any alleged removal grounds. AVPOA's board and its general manager preferred to act on director Pullins' removal without facing anticipated acrimony from her and her husband. Director Pullins preferred to challenge the removal process with her pending lawsuit, rather than giving that process any further credibility by participating in it. Either party could have resolved the issue by some further good faith accommodation.

After voting to reaffirm its policy to prohibit firearms on any AVPOA common areas, the six board members who were present and two board members who participated by telephone voted for director Pullins' removal.² Board member Patton continued to edit his prior draft of the removal grounds during the meeting and after it concluded. The minutes for that executive session contain the exact language for the removal motion as board member Patton ultimately revised it after the meeting concluded. The evidence seemingly denies that the board actually voted to approve that specific language.

The board's minutes for the April 6 work session report the following action after preliminary "whereas" clauses regarding the board's procedures:

A MOTION WAS MADE BY DAVE PATTON AND SECONDED BY EARL OWENS TO PROCEED [SIC] WITH THE BOARD'S

² No evidence showed that any covenants, bylaws, or formal board action permitted board members to vote on a removal motion by telephone. However, this court need not determine whether that procedure was effective because it finds that her removal was otherwise invalid.

**EARLIER MOTION TO REMOVE KATHRYN ELLIOTT
PULLINS FROM THE BOARD OF DIRECTORS IMMEDIATELY.**

AN ASSOCIATION'S BOARD OF DIRECTORS OWES A FIDUCIARY DUTY TO THE ASSOCIATION. THIS INCLUDES LOYALTY, HONESTY, AND A DUTY OF CARE. A BOARD OF DIRECTORS OWES A DUTY OF CONFIDENTIALITY TO THE ASSOCIATION AND THE MEMBER [SIC] THAT THEY REPRESENT. BOARD MEMBERS MAY, AT TIMES, BE HELD PERSONALLY LIABLE FOR THE VIOLATION OF THESE DUTIES.

ON JUNE 25, 2005, MRS. PULLINS SIGNED AN OATH OF OFFICE AND A BOARD OF DIRECTOR'S CODE OF CONDUCT CERTIFYING THAT SHE WOULD ABIDE BY THIS CODE OF CONDUCT.

THE FOLLOWING ARE SOME OF THE ITEMS THAT HAVE LED THIS BOARD TO CAUSE MRS. PULLINS REMOVAL FOR "JUST CAUSE"

- **A CONFLICT OF INTEREST AROSE WHEN MRS. PULLINS' FATHER, STEVE ELLIOTT, REPRESENTED BY HER HUSBAND, SCOTT PULLINS, FILED SUIT AGAINST THE ASSOCIATION ON AUGUST 23, 2005. ON SEPTEMBER 1, 2005, AFTER THE CONCLUSION OF THE BOARD SESSION, THE BOARD OF DIRECTORS ATTEMPTED TO CONDUCT AN EXECUTIVE SESSION TO DISCUSS THE LEGAL MATTERS PENDING AND REQUESTED THAT SHE BE EXCUSED FROM THE DISCUSSION OF THIS MATTER AS A RESULT OF THE OBVIOUS CONFLICT OF INTEREST. MRS. PULLINS REFUSED TO REMOVE HERSELF FROM DISCUSSION OF THAT MATTER.**
- **ITEM #5 OF THE CODE OF CONDUCT STATES THAT "BOARD MEETINGS WILL BE CONDUCTED IN A PROFESSIONAL AND BUSINESS-LIKE MANNER. PERSONAL ATTACKS AGAINST PROPERTY OWNERS, BOARD MEMBERS, MANAGEMENT, OR GUESTS ARE NOT CONSISTENT WITH THE BEST INTEREST OF THE COMMUNITY AND WILL NOT BE TOLERATED." ON JANUARY 10, 2006, DURING A REGULAR OPEN BOARD MEETING AND DURING A DISCUSSION WITH PROPERTY OWNER CEA, MRS. PULLINS CLEARLY VIOLATED THIS 5TH ITEM OF THE CODE OF CONDUCT BY CONDUCTING HERSELF IN AN UNPROFESSIONAL MANNER.**
- **ITEM #10 OF THE CODE OF CONDUCT STATES THAT, "BOARD MEMBERS SHALL NOT ENGAGE IN DEFAMATION, BY ANY MEANS, OF ANY MEMBER OF THE BOARD, ANY STAFF MEMBER OR ANY**

RESIDENT OF THE COMMUNITY.” YOUR INVOLVEMENT AND AFFILIATION WITH REFORMAPPLEVALLEY.COM, AND THE DIRECT STATEMENTS WITH RESPECT TO THE CURRENT MANAGEMENT OF APPLE VALLEY BEING SCANDALOUS AND CORRUPT CLEARLY VIOLATE THIS ITEM #10.

- **YOU HAVE ALSO, BY THE PUBLISHED MATERIALS ON REFORMAPPLEVALLEY.COM, MADE DEFAMATORY COMMENTS ABOUT GENERAL MANAGER JEFF HARMER. THIS IS ALSO IN DIRECT VIOLATION OF ITEM #10 OF THE CODE OF CONDUCT.**
- **ITEM #7 OF THE CODE OF CONDUCT STATES, “MEMBERS OF THE BOARD SHALL NOT USE THEIR POSITION ON THE BOARD FOR PERSONAL GAIN. NO BOARD MEMBER SHALL WILLINGLY MISREPRESENT FACTS FOR THE SOLE PURPOSE OF ADVANCING A PERSONAL CAUSE OR INFLUENCING THE COMMUNITY TO ADVANCE A PERSONAL ISSUE.” IN A STATEMENT PUBLISHED ON REFORMAPPLEVALLEY.COM REGARDING THE DIRECTORS AND OFFICER INSURANCE, THERE WERE CLEAR MISSTATEMENTS MADE OF FACTS RELEVANT TO THIS MATTER.**

THESE ITEMS ARE NOT INTENDED TO BE ALL INCLUSIVE BUT SIMPLY ILLUSTRATIVE OF A COURSE OF ACTION WHOLLY INCONSISTENT WITH THE INTERESTS OF THE ASSOCIATION AND THE DUTIES OF A BOARD MEMBER.
(upper case, bold face, and underlining in original)

The minutes for that matter conclude with a roll call vote in which all board members voted to approve that action, and a direction that:

A Corporate Resolution will be drafted and attached to these minutes. Corporate Secretary Jeff Harner will send a letter to Kathryn Elliott Pullins by first-class mail and by certified mail informing her that she is no longer a member of the Board of Directors.

In reviewing all the evidence and applicable legal principles, this Court concludes that the board’s removal of director Pullins was invalid because (a) the board’s procedure were fundamentally defective by failing to give her notice of specific grounds which the board would consider as “just cause” for her removal with a reasonable opportunity to prepare her response and to respond to those charges, and (b) the ultimately stated

grounds do not comply with removal grounds authorized by the underlying statutes, covenants, and bylaws, and (c) many of the ultimately stated grounds lack any evidentiary support.

Regarding the procedures that the AVPOA board used to remove director Pullins, overwhelming evidence demonstrates that the board did not determine the proposed grounds for removal, let alone give her notice of those alleged grounds, before the meeting on April 6. She received no reasonable notice of the grounds for her removal, no reasonable opportunity to prepare a response or to respond to those charges, and no reasonable hearing on those charges. Indeed, at least one board member testified that she had decided to remove director Pullins by the end of 2005, before most of the allegedly improper conduct, because she found director Pullins uncooperative.

Regarding the grounds for removal, they must comply with Section 9.5 of the corporation's bylaws and provide sufficient objective specificity for response. Alleged grounds lack necessary specificity when they assert: "The following are some of the items that have led this board to cause Mrs. Pullins removal for "just cause;" or "These items are not intended to be all inclusive but simply illustrative of a course of action wholly inconsistent with the interests of the association and the duties of a board member."

For the more specifically stated grounds, the "conflict of interest" allegation in the first "bullet" paragraph is the only asserted "just cause" within the definition in Bylaws Section 9.5: "self-dealing, conflict of interest, or negligence in performing the responsibilities of a director" (see page 9, *supra*). However, the evidence clearly

demonstrates that director Pullins did not cause or permit any “conflict of interest” within the definitions in Bylaws Section 9.10 at the stated times (see page 10, *supra*).

On August 23, 2005, Scott Pullins (director Pullins’ attorney-husband) filed a lawsuit on behalf of Stephen Elliott (director Pullins’ father). In that lawsuit, Mr. Elliott sought to require AVPOA to relocate a utility unit near his property for esthetic reasons. No one claims and no evidence showed that Mr. Elliott sought monetary damages, or that he or director Pullins would “have a personal financial interest in that outcome.” At most, attorney Scott Pullins might recover compensation for his professional services in that lawsuit.

Moreover, the evidence demonstrates (a) neither Scott Pullins nor Stephen Elliott consulted with director Pullins about that lawsuit, (b) every board member knew that Stephen Elliott was her father and that Scott Pullins was her husband, and (c) she never voted on any matter relating to that lawsuit.

On September 1, 2005, directors Pullins attended an AVPOA board “work session.” Here again, owner-members who were not board members received no notice of this meeting and would be excluded. According to trial testimony, the board president (Carl Holmes) proposed an “executive session” at the end of the “work session” to discuss the Elliott lawsuit. No minutes reflect any discussion about that subject, any attempt to consider it at the work session or a subsequent executive session, or any request or reason for an executive session

Oral testimony showed that the board president then requested director Pullins to leave the room for that potential discussion. She declined and produced a written legal memorandum her attorney-husband prepared regarding her authority as a director to

participate in such discussions. Accompanied by the AVPOA general manager and its legal counsel, the board president then went into another room to discuss that lawsuit. The board had previously delegated to those three persons authority to negotiate legal claims like the Elliott lawsuit. Ultimately, those three persons reached a settlement for the Elliott lawsuit without any further board discussion or vote. No board member complained to director Pullins about her conduct in that incident at any time after September 1, 2005.

At most, director Pullins expressed her views about an owner-member's non-financial claim to some other board members, who were fully aware of the family relationships, when no formal board meeting was in progress. These circumstances do not create or demonstrate a "conflict of interest" within the meaning of Sections 9.5 or 9.10 of the AVPOA Bylaws.

The remaining grounds for director Pullins' removal lack clarity, and no credible evidence supported them. There was no credible evidence that anything director Pullins said or did on January 10, 2006, violated any duty she had, let alone constituted "just cause" for her removal within the definition in Section 9.5 of the Bylaws. At most, the evidence showed that (a) owner-member Cea was displeased with some unknown comment director Pullins made at the AVPOA annual meeting then, (b) some unidentified persons in the audience booed director Pullins, and (c) Scott Pullins had a minor physical altercation with board president Holmes after the meeting when he and director Pullins complained that Holmes failed to discourage discourtesy to director Pullins.

Similarly, no credible evidence supported any of the charges that director Pullins made an inappropriate statement on the web site for Reform Apple Valley. Though she acknowledged her membership in that rather loosely structured unincorporated association, she denied and no evidence showed her participation in drafting or approving any language there which criticized any AVPOA personnel. She did agree that she drafted a statement regarding her unsuccessful efforts to obtain a copy of the boards' liability insurance policy, which Scott Pullins posted on that web site. However, no evidence showed what part of her statement, if any, was inaccurate or that it was an unfair report of her experience..

Therefore, this court concludes that the AVPOA board's removal of director Pullins was unlawful and invalid. The court's judgment will include appropriate equitable relief to remedy that action.

DIRECTOR PULLINS' ACCESS TO AVPOA RECORDS

In Count Three of the Second Amended Complaint, plaintiff Pullins seeks "permanent injunctions disallowing the AVPOA from denying access to Members of the Board of Directors of requested corporate documents and records." However, the evidence relates only to her requests for two types of corporate records. At the trial, she complained that the AVPOA general manager declined to provide her with (a) the salaries or compensation of any AVPOA employees other than himself, and (b) AVPOA's Officers and Directors Liability Insurance Policy.

For non-profit corporation, R.C. 1702.15 provides:

Each corporation shall keep correct and complete books and records of account, together with minutes of the proceedings of its incorporators, members, directors, and committees of the directors or members. Subject to limitations prescribed in the articles or the regulations upon the right of

members of a corporation to examine the books and records, all books and records of a corporation, including the membership records prescribed by section 1702.13 of the Revised Code, may be examined by any member or director or the agent or attorney of either, for any reasonable and proper purpose and at any reasonable time. (underlining emphasis added)

Thus, any member of a nonprofit corporation is entitled to examine the corporation's records for any reasonable and proper purpose and at any reasonable time unless the articles or regulations provide otherwise. *American Hungarian Federation v. Nadas* (1987), 35 Ohio App.3d 72. "It is not necessary that there should be any particular dispute to entitle a shareholder to exercise the right of inspection. Nothing more is required than that, acting in good faith for the protection of the interests of the corporation and his own interests, he desires to ascertain the condition of the corporation's business." *Lake v. Buckeye Steel Castings Co.* (1965), 2 Ohio St.2d 101, 104.

When a written demand is made stating that a specific purpose that on its face is not improper or unreasonable, "the corporation has the burden of proving the contrary in order to excuse its failure to comply with that demand." *Id.*, paragraph two of the syllabus; *Carlson v. Rabkin* (2003), 152 Ohio App.3d 672, 687, 789 N.E.2d 1122, 2003 _Ohio_ 2071.

As a matter of law, the corporations' records of its employees' salaries or compensation and its copy of its liability insurance policies are part of its "books and records." This Court finds nothing in the underlying restrictive covenants or the AVPOA Bylaws that restricts any member's statutory right to inspect any salary or compensation records or any insurance policy, in good faith at any reasonable time and for any

reasonable purpose, including the protection of the corporation's interests and the member's own interests.

Indeed, Article 12, Section 12.1 of the Bylaws directs:

The Board shall make available to the members at the Annual Meeting, and at other times, financial statements of the Association's income and expenses as of the closing date of the prior fiscal year.

Article 12, Section 12.6 adds

Inspection of Records. The membership register or duplicate membership register, the books of accounts, and minutes of the proceedings of the Members' meeting and the Board meeting and the written notes and records of committees, if any, shall be open to inspection upon the written demand of any Voting Member at any reasonable time for a purpose reasonably related to his or her interests as a Member. None of the above will be available to non-members of the Association without Voting Member written approval or Board action. Voting Members may request and receive copies of any of these items in accordance with procedures and costs established by the Board. These records available for inspection shall not include documents relating to legal or personnel issues, or executive minutes of the Board. (underlining emphasis added)

The defendants rely on the last sentence in Section 12.7 as restricting a member's access to the a corporate employee's salary or compensation. This Court does not construe "legal and personnel issues" to include a corporate employee's compensation. Rather, "personnel issues" relate to hiring, firing, or disciplining an employee. Likewise, this court does not construe liability insurance policies as "documents relating to legal or personnel issues."

More importantly, Mrs. Pullins sought this information as an AVPOA Director as well as an AVPOA member. As the duly elected representative of AVPOA members, who is serving on its governing board, she should have access to any AVPOA data or information. She has a fiduciary duty to seek and review any corporate records that she deems necessary to perform her duties as a director. Other directors may reasonably rely

on the reports of the AVPOA general manager or other AVPOA, if those reports satisfy them. R.C. 1702.30 (B)(1). Every director has a fiduciary duty not to use that information in a manner that harms the association. See *Georgetown of Highlands Condominium Owners Ass'n v. Yelsky* (Nov. 21, 1991), Cuyahoga App. No. 59410, 1991 WL 244471. No credible evidence showed that director Pullins sought the requested materials for an improper purpose.

No evidence shows that AVPOA's membership or its Board of Directors ever voted to restrict disclosure of any of the requested materials. The general manager testified that he declined to provide the requested materials because (a) the board's president advised him not to do so, or (b) his assistant told him that was a board policy when he first became general manager approximately seven years ago.

The defendants argue that director Pullins could have moved the Board to approve her access to that data. The defendants have not shown why she needed Board approval. She had the members' approval when they elected her to the Board. Indeed, without express provisions in the underlying covenants or the Bylaws, the Board may lack authority to preclude her access to such data. See R.C. 1702.30 (A):

Except where the law, the articles, or the regulations require that action be otherwise authorized or taken, all of the authority of a corporation shall be exercised by or under the direction of its directors. For their own government, the directors may adopt bylaws that are not inconsistent with the articles or the regulations.

AVPOA's Board, its Officers, and its General Manager must remember that the members own and control the AVPOA. The members select directors to act for them, subject to the members' right to overrule or replace the directors. The directors select officers to assist them, subject to the Board's right to overrule or replace the officers.

The officers and the board select a general manager (who may in turn select corporate employees), subject to the Board's right to overrule or replace any employee.

From all the evidence, this court finds that AVPOA's general manager improperly denied director Pullins access to (1) corporate records which contain salaries and compensation for AVPOA employees and (2) AVPOA's copy of its Officers and Directors Liability Insurance Policy. Accordingly the court's judgment will provide applicable equitable relief.

ATTORNEY FEES

Plaintiffs' counsel contends that they should recover their reasonable attorney fees for his professional services in this matter. However, the defendants correctly argue that there is no legal basis for that remedy. See, *Pegan v. Crawmer*, 79 Ohio St. 3d 155, 1997-Ohio-176, 679 N.E.2d 1129 (1997); *Krasny-Kaplan Corp. v. Flo-Tork, Inc.* (1993), 66 Ohio St. 3d 75, 1993-Ohio-11, 609 N.E.2d 152; *Vance v. Roedersheimer* (1992), 64 Ohio St. 3d 552, 1992-Ohio-24, 597 N.E.2d 153.

Moreover, if this court has discretion to permit that recovery, it declines to grant that relief, in part because the plaintiffs' attorney was himself responsible for some events that caused this controversy. Indeed, it appears that AVPOA's board really sought to remove Scott Pullins and his influence from the board when they attempted to remove Kathryn Pullins as a director. He would be well advised to permit his wife to perform her duties as a duly elected AVPOA director without his intervention.

Finally, the plaintiffs presented no evidence to show the amount of any legal fees or expenses they incurred or the reasonable value of any related services. Without that evidence the court cannot grant recovery for attorney fees in any case.. *Villella v. Waikem*

Motors, Inc. (1989), 45 Ohio St.3d 36, 41; *Whitaker v. Kear* (1997), 123 Ohio App.3d 413, 424.

GENERAL COMMENTS

When director Pullins returns to her position as an AVPOA director, this Court strongly encourages all participants to seek good faith attention to their respective duties without rancor or acrimony. Perhaps they should remember the words of our fifteenth president in the course of this nation's worst conflict: "with malice toward none, with charity for all." They all have a common duty to the AVPOA owner-members, which outranks any personal disagreements or personality discord.

FINAL JUDGMENT

For the reasons stated in the foregoing opinion, this court:

1. Adjudicates and declares that the purported removal of Kathryn Pullins as a Director from the Board of Directors of the Apple Valley Property Owners Association, Inc. on April 6, 2006, was invalid.
2. Orders that the Apple Valley Property Owners Association, Inc. shall forthwith, and in any event no later than December 31, 2006, reinstate Kathryn Pullins as a Director on the Board of Directors of the Apple Valley Property Owners Association, Inc., subject to her continuing rights, duties, and responsibilities in that office, all for the remainder of the three year term to which the owner-members elected her as extended by any time between April 6, 2006, and the date of her reinstatement on that board.
3. Orders that the Apple Valley Property Owners Association, Inc. and Jeff Harmer shall forthwith, and in any event no later than December 31, 2006, make available to Kathryn Pullins any and all financial records of the Apple Valley Property Owners Association, Inc. she requests by December 15, 2006, including but not limited to any records of its employees' salaries or compensation and its copy of any Officers and Directors Liability Insurance Policy.
4. Orders that no party for this case shall recover any attorney fees or litigation expenses from an adverse party.
5. Orders that a defendant's failure to comply with paragraphs two or three of this judgment on or before December 31, 2006, shall be punishable as civil contempt by a charge of \$200.00 per day until that defendant has fully complied.

6. Enters final judgment in this matter with court costs chargeable to the defendants pursuant to Civ. R. 54(D).

Richard M. Markus

Judge Richard M. Markus, Retired Judge Recalled to Service pursuant to Ohio Constitution, Art. IV, §6(C) and R.C. 141.16 and assigned to the Knox County Common Pleas Court for this matter

Close Code C

THIS IS A FINAL APPELABLE ORDER

THE CLERK SHALL MAIL TIME STAMPED COPIES OF THIS OPINION AND FINAL JUDGMENT TO ALL COUNSEL AND THE ASSIGNED JUDGE