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VIA U.S. MAIL AND EMAIL

June 9, 2023

John F. Bisson, Esq.
Cronin Bisson & Zalinsky, P.C.
722 Chestnut Street
Manchester, NH 03104

Re: Totem Pole Park Condominium Association, Freedom, NH

Dear Attorney Bisson:

Thank you for taking the time to speak with me recently about my client's, John Cummings, concerns relating to governance issues involving the Board of Directors ("Board") of the Totem Pole Park Condominium Association ("Association"). Mr. Cummings is a Unit Owner at the park and previously served as an Officer of the Association. He has spent a significant amount of time researching the issues and trying to work with the Board to ensure they comply with the law. He is not the only Unit Owner concerned about these issues.

We have reviewed the Condominium Declaration and Bylaws (the "Condominium Documents") and relevant sections of NH RSA 356-B, the New Hampshire Condominium Act (the "Act"), with respect to a few specific issues; namely (1) Directed Proxies; (2) Amendments to voting articles after the meeting notice and agenda have been published; and (3) the Board's compliance with the Act and Condominium Documents.

Voting NH RSA 356-B:39 - Directed Proxies:

Under N.H. RSA § 356-B:39(IV)(a), the votes appertaining to any unit may be cast pursuant to a proxy or proxies duly executed by or on behalf of the Unit Owner. The statute makes no mention of "directed proxies", but does reference "undirected proxies" and when those are and are not allowed. As we discussed, a directed proxy means the proxy holder has a right to vote on behalf of the Unit Owner, but the Unit Owner selects the specific issues that they want the proxy to vote on.

Under various forms of statutory interpretation, directed proxies are allowed under New Hampshire law. Under textualist forms of interpretation, what is stated in the statute is just as important as what is not stated. Given the fact that the statute explicitly describes limitations on undirected proxies, but does not mention any limitations on directed proxies, a textual interpretation of the statute dictates that if the legislature wanted to restrict the use of directed proxies, they would have said so as they did with undirected proxies. Moreover, according to

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Merriam-Webster Dictionary, “proxy” is defined as a person authorized to act on behalf of another. This means that a proxy acts as an agent on behalf of the Unit Owner, which suggests that the Unit Owner should be allowed to direct the proxy to vote in a certain manner.

From a purposivism interpretation, the purpose of the statute is to allow Unit Owners to elect a proxy to vote on their behalf at meetings. Restricting how a proxy is directed (or not directed) runs counter to the statute’s purpose, especially considering there is no language supporting such an inference.

Finally, looking to legislative intent, the legislature amended the specific section of the statute as recently as 2018, when it added language to restrict the casting of undirected proxies. Importantly, the legislature chose not to add any language restricting the use of directed proxies. This further supports the inference that the legislature intends for Unit Owners to be able to vote by directed proxy.

You acknowledged during our call that directed proxies are allowed under NH law, but they can present practical problems when substantive changes to voting articles are proposed at the meeting. You explained that the Board’s concern with allowing directed proxies has to do with the Board and Unit Owners wanting to introduce new amendments and make changes to the Bylaws and Voting articles at the annual/special meetings outside the scope of the Unit Owners’ notice of the meeting. In essence, if a directed proxy is present for such amendments, they are unable to vote on measures because they have not been directed by the Unit Owner on how to vote where the amendment was not included in the Unit Owners’ notification of the meeting.

RSA 356-B:37 – Meetings and Bylaws Section 2-900 and 10-100:

The Bylaws do not allow for introductions of such measures on a whim while the meeting is underway. Section 2-900 states that petitions must be included on the agenda for the next annual meeting. Additionally, Section 10-100 states that the Bylaws can only be amended if a copy of the proposed amendment has been included in the written notice of the meeting. There is nothing in the Bylaws or the Act that allows the Board to introduce new amendments during the meeting or to direct the form of proxies. Therefore, where the Board cannot introduce new amendments on a whim like this, there is no reason why the Board cannot allow directed proxies from the Unit Owners, and they are in fact, required to allow directed proxies based on the interpretation of the Act (as set forth above).

Furthermore, under N.H. RSA 356-B:37(I), meetings of the Unit Owners' association shall be held in accordance with the provisions of the condominium instruments at least once each year after the formation of the association. The Bylaws shall specify an officer who shall, at least 21 days in advance of any annual or regularly scheduled meeting, and at least 7 days in advance of any other meeting, provide to each unit owner notice of the time, place, and purpose or purposes of such meeting in conformity with RSA 356-B:37-a (emphasis added).

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To ensure compliance with RSA 356-B:37, the secretary or other duly authorized officer of the unit owners' association, who shall also be a member of the board of directors of the unit owners' association, shall prepare an affidavit which shall be accompanied by a list of the addresses of all unit owners currently on file with the association and shall attest that notice of the association meeting was provided to all unit owners on that list in a manner conforming to RSA 356-B:37-a (emphasis added).

I understand the Board may be hesitant about allowing directed proxy voting because it creates practical challenges, however, with careful planning and proper execution, directed proxy voting will benefit the entire Association. When the Board is faced with practical challenges, it cannot act in such a way that contravenes or otherwise conflicts with the express language of the Condominium Documents or the Act. We have some solutions for the practical challenges and would appreciate an opportunity to discuss them with you and the Board. One possible solution would be to have a deliberative session before the annual meeting.

I would like to arrange a meeting or call with parties and counsel to discuss the issues further. I am hopeful we can find a solution that recognizes the Unit Owners' voting rights and assures the Board complies with the law. If we cannot find a solution, my client's only effective means of redress will be to initiate litigation against the Association and seek costs and attorneys' fees under NH RSA 356-B:15.

Please let me know your/your client's availability for a meeting. We expect the Board will acknowledge Unit Owners' right to vote by directed proxy. Proxy voting can be an excellent way to ensure a quorum is reached. Instead of having to reschedule a meeting, the Association can move forward with important issues. Furthermore, owners will appreciate that their voices will be heard.

We look forward to working with you and hope that we can find a solution that will be agreeable to all.

Sincerely,



Laura B. Dodge

LBD:ds

cc: John J. Cummings