

No. 69619-0-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

ISLAND LANDMARKS,

Appellant,

v.

MARY MATTHEWS, et al.,

Respondents.

2013 JUL 29 PM 2:07
COURT OF APPEALS
STATE OF WASHINGTON

APPELLANT'S REPLY BRIEF

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ORIGINAL

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I.
OVERVIEW

Respondents' brief makes abundantly clear that the deposed board members do not want to be accountable to anyone but themselves for the governance of a membership-based nonprofit corporation. The former board seeks to perpetuate its exclusive control by misconstruing both bylaws and statutes, and by arguing that notice of a special meeting could only have been given by the corporate secretary, whom the former president and treasurer employed and controlled.

Respondents also would have this Court believe that the appellant members are a small rogue group controlled by one individual, Ellen Kritzman. This is far from the truth. Under the leadership of the appellant board, Island Landmarks has grown to more than 130 members¹, with a number of functioning committees and a competent board of eleven community members—all dedicated to revitalizing the historic Mukai complex. CP 270. These members have complied with both bylaws and statutes to vote out the former board members and to install a new board. It is

¹ The Island Landmarks' membership, under the appellant members' leadership, grew to 70 individuals by the June 4, 2012 meeting, CP 304, and 130 members by mid-September, 2012. CP 185.

the respondents—the five members of the ousted board that had grown isolated and dysfunctional—who constitute a rogue group.

Respondents' arguments notwithstanding, the trial court misconstrued and improperly narrowed the plain language of the corporate bylaws that govern calling and giving notice of a special meeting. The judgment contravenes compulsory nonprofit statutory notice provisions. And it improperly rests on a controverted material fact. Further, the trial court improperly refused to address appellants' motion to amend their complaint.

II. **ARGUMENT**

The appellant's members complied with Island Landmarks' corporate bylaws and state law in the spring of 2012 when they revitalized the corporate membership by adding 70 new members, convened a special meeting, provided timely notice of the meeting, and exercised their voting rights to remove the respondents from their board positions. Because all of the appellants' actions were authorized by corporate bylaws and state law, the Superior Court ruling must be reversed.

A. The Superior Court Erred in Holding that the Members Improperly Gave Notice of the Special Meeting.

1. Bylaw 2.7, in Harmony with RCW 24.04.080, Allows *Either* the Secretary or Members to Notify all the Other Members of an Upcoming Special Meeting.

Respondents assert that “the role of the secretary in giving notice of a special meeting of members is mandatory, not optional, under bylaw 2.7.” (Respondents’ brief, p. 18) The trial court basically agreed, finding that: “the plaintiff had not given proper written notice of the special meeting to the secretary as required by the Bylaws of the plaintiff nonprofit corporation.” Judgment, p. 2, lines 10-12 at Appellant’s Opening Brief, Exhibit A, page 2.

However, respondents provide no basis at all for their reading of bylaw 2.7. And, in fact, the plain language of bylaw 2.7 (CP 306) makes it clear that the involvement of the secretary is *not* mandatory. The first sentence of 2.7 explicitly allows “the secretary *or persons authorized to call a meeting*” [emphasis added] to provide written notice of a special meeting.

Bylaw 2.7 imposes a duty on the secretary, not on the members. It does not obligate the members to invoke the assistance of the secretary; it only obligates the secretary to provide notice **if** a percentage of the members requests it. If the

intent of the language were to establish a single process of notification, then it would expressly state that the secretary must, in every case, notify members of a special meeting. It does not. The second part of bylaw 2.7 must be read in concert with the first part, which explicitly allows members themselves to notify other members of a special meeting.

The plain and unambiguous language of bylaw 2.7 grants “persons authorized to call a meeting” the express authority to notice a special meeting themselves. The appellant members, who joined Island Landmarks in the spring of 2012, became “persons authorized to call a meeting” by virtue of bylaw 2.5, which authorizes not less than 10% of the members to call a special meeting. The eleven members who convened the special meeting at issue here were “persons authorized to call a meeting” because they were (a) members of Island Landmarks and (b) met the 10% threshold requirement. They were therefore vested with authority—by both the bylaws and RCW 24.03.080.

With respect to RCW 24.03.080, respondents argue that the broad policy of this statute “is effectuated through the more specific contractual regulatory provisions of bylaw 2.7.” (Respondents’ brief, p. 20). But “[i]t is elementary in this state that the laws of this

state... enter into and become a part of the articles of incorporation,” or in this case bylaws, “particularly... where the statute grants or restricts the powers of the corporation.” *Howe v. Washington Land Yacht Harbor, Inc.*, 77 Wn. 2d 73, 187, 459 P.2d 798 (1969) (citations omitted). Respondents fail to note that the first sentence of RCW 24.06.080 addresses notice requirements for annual or special meetings and the second sentence addresses notice requirements for regular meetings. The “special meeting” sentence, at issue here, plainly allows “persons calling the meeting”—the members—to provide notice of the upcoming meeting. The second sentence provides that notice for a regular meeting may be circumscribed by the bylaws; this specific allowance for a deviation from the statute appears frequently in the Nonprofit Act, and when it does, it is clearly by design. See, e.g., RCW 24.03.065 (1)—Members (unless so limited, enlarged, or denied...); RCW 24.03.070—Bylaws (may contain provisions not inconsistent with law); RCW 24.03.085—Voting (...unless so limited...); RCW 24.03.095 Board (bylaws may prescribe other qualifications for directors); RCW 24.03.103—Removal (...in the absence of a provision in the bylaws or articles); RCW 24.03.120—Place and Notice of Directors Meetings (...except as may be

otherwise restricted by the articles of incorporation or bylaws...); and RCW 24.03.125—Officers. These are all instances where the statute recognizes an allowance for a customized provision in the bylaws or articles. By implication, when this language is not present, the statutory language must be followed. As such, the first sentence of RCW 24.03.080 authorized the eleven appellant members, as “persons calling the meeting” to notify the other members of the planned June 4 special meeting.

Respondents’ misinterpretation of bylaw 2.7 and RCW 24.03.080 sets the stage for their assertion that their secretary was “obligated” to notice the meeting. As stated above, Mr. DeFrang was not “obligated” to send notice of the special meeting because 10% of the members did not ask him to do so. Accordingly, the respondents’ claim that the special meeting notice was faulty because Mr. DeFrang did not mail the meeting notice to the members’ addresses on the corporate records, (Respondents’ Brief, p. 16) is both misplaced and immaterial.

However, even if the members had elected to ask Mr. DeFrang for assistance, his authority would have been suspect both because he himself was not a paid member of the corporation as required by bylaw 3.3 (CP 45) which mandates that “[D]irectors

shall be members of the corporation” and also because he was not elected by the members at an annual meeting as required by bylaw 2.4. CP 305, 647².

Regardless of Mr. DeFrang's status or questionable obligation, the intent of the notice provision was met. The relevant question is whether or not members received notice of the special meeting. They did. The appellant members sent timely notice, including the date, time, place and purpose of the meeting, to all members, including the respondents³. CP 306, 315. Not one member complained that he or she did not receive notice. Only the respondents—who did indeed receive notice but elected to not attend the special meeting—have questioned the process. Whether or not Mr. DeFrang had the roster in this context is immaterial.

Invoking an imaginary worst case, respondents argue that members must rely on the secretary so that 11 different people do not designate 11 different meeting places, times, and dates.

² Respondents' declarants Ken DeFrang and Priscilla Beard concede that the respondent board failed to maintain a membership base. CP 305, 647.

³ Respondents assert that the appellant members did not send the meeting notice to all the corporate members' yet offer no citation or support for this assertion. This is simply not true Member Ellen Kritzman did mail the meeting notice to all the corporate members, including the respondents. CP 306. These were all the members that existed. There was no separate membership list maintained by the respondents as leaders of the corporation. CP 647.

(Respondents' brief, p. 18) This imagined risk of disparate individual actions, which seems ludicrously unlikely to occur, is addressed by the requirement that 10% of the members—presumably acting in concert—call the meeting. Moreover, even if members convened at 11 different meeting sites, the corporation would suffer no ill effect; it is doubtful that a quorum—30% of the total membership as required by bylaw 2.9—would be present at any of the sites to vote on any issue. CP 44.

If notice could be given only by the corporate secretary, an incumbent board would always be free to take a self-serving, self-perpetuating action to thwart the will of the members, as occurred here when the ousted board, upon learning of their removal by the members, purported to “amend” the bylaws to deprive members of voting rights. CP 61-69. It is presumably to prevent a runaway board from seizing permanent control of a non-profit corporation that RCW 24.03.080 extends the ability to give notice of a special meeting to “persons calling the meeting.”

The only plausible reading of bylaw 2.7, the only reading supported by the statute and public policy considerations, is that 10% or more of the members are entitled to call a special meeting and may choose to give notice themselves.

2. Appellant members were indeed “members” of Island Landmarks, the respondents’ protestations to the contrary.

The respondents assert that appellants were not authorized to give notice of a special meeting because “they are not members” as “no membership applications were completed and provided to the corporation.” Respondents’ brief, p. 13. At issue here is the language of bylaw 2.2 which provides that membership is “open to all persons who have an interest in promoting historic preservation or architecture, landscape and heritage of Vashon and Maury Islands situated in King County, Washington.” CP 43. **All seventy** of the appellant members who joined Island Landmarks in 2012 completed membership application forms,⁴ expressing their interest in “historic preservation or architecture, landscape and heritage” on the islands, and paid \$25 membership fees that were deposited into the Island Landmarks account. CP 305-306. Accordingly, the appellant members properly fulfilled all the membership application requirements as set out in the bylaw.

Respondents’ contention, that the members were not authorized to notice the meeting because the membership applications were not “provided” to the corporation, is misplaced.

⁴ The membership enrollment form language directly tracks that of bylaw 2.2. CP 313.

First, respondents cite no authority, and no provision of the bylaws or state law, that allows them to limit membership in the corporation for any reason, let alone because the applications were not timely provided to them. The plain language of bylaw section 2.2 is consistent with state law; RCW 24.03.065 provides that a corporation may have members and if it does, the qualification and rights of the members must be set forth in the articles of incorporation or the bylaws. The bylaws have no restriction on membership; joining is a matter of self-selection, and all qualifications are explicitly stated in bylaw section 2.2. The bylaw provision does not make membership contingent upon receipt of information by the secretary or treasurer, as respondents assert.

Second, respondents' claim that they did not have the names and addresses of the new members is disingenuous. Although the bylaws do not require it, membership information was provided to the treasurer when each \$25 membership check, containing the new member's name and address, was deposited into the Island Landmarks bank account. After the vote, Mr. Happy wrote to all the new members, informing them that their memberships were null and void, and enclosing checks to refund

their membership dues. CP 185, 197-198. He knew who the new members were, and where to find them.

Third, the new members did not try to keep their names or addresses secret. Member Ellen Kritzman tried to give Mr. DeFrang the membership roster; he would not accept it because he did not want to have to report this to Ms. Matthews—his employer. CP 306.

Respondents' argument that the seventy individuals who adhered to the requirements of bylaw 2.2 in the spring of 2012, by signing a pledge to Island Landmarks and paying \$25 in dues, were "not members" is a thinly-veiled attempt to perpetuate their own personal control of the corporation in contravention of the Nonprofit Act of the State of Washington and the Island Landmarks bylaws.

3. The new Island Landmarks members had voting rights.

Respondents assert that even if the seventy individuals who joined Island Landmarks in the spring of 2012 are considered members, they are not "members entitled to vote." They reason that the bylaws do not "specifically define what is necessary for a member to be entitled to vote," (Respondents' Brief, p. 14), yet fail to reference bylaw 2.3 which outlines the "Voting Rights" of the

members entitled to vote. CP 43. The respondents suggest that the corporation has two classes of members: those with voting rights and those without. This is not so. RCW 24.03.065 states unequivocally that:

If the corporation has one or more classes of members, the designation of the class or classes, the manner of election or appointment and the qualifications and rights of the members of each class must be set forth in the articles of incorporation or the bylaws.

Neither Island Landmarks' bylaws nor its articles of incorporation create different classes of members, some of whom have voting rights and some of whom do not. Therefore, under the statute, all members are voting members. In addition, bylaw 2.3 plainly affords each member the absolute right to vote on any matter submitted to him or her, and explicitly grants the right to elect the directors of the corporation. CP 43.

Respondents also claim that the new members were not entitled to vote because they were not of record. Again, however, the bylaws do not circumscribe the right to vote in any way. And again, there was a record: The members' names and addresses appeared on their dues checks, CP 185, and members presented a roster to the deposed secretary, but he refused to accept it.

CP 306. Respondents' cannot bar new members' from voting—and effectively perpetuate their own control of the organization—by asserting that the new members were not “members of record” when the deposed board secretary refused to accept the record. *East Lake Water Association v. Rogers*, 52 Wn. App. 425, 430, 761 P. 2d 627 (1988).

Respondents' effort to strip members of their voting rights is without authority. The members voted in a new board on June 4, 2012, and this vote must be upheld.

4. The appellants were “persons authorized” to convene the June 4 special meeting.

The respondents also attempt to obviate the vote of the June 4, 2012 special meeting by asserting that the eleven new members who convened the special meeting pursuant to bylaw 2.5 were not “persons authorized to call the meeting.” Respondents' brief, p. 13.

Bylaw 2.5 gives members the right to convene a “special meeting” and plainly allows “... **not less than ten percent of the members entitled to vote at such meeting**” to convene a “special” meeting of the members for any purpose. CP 44. Despite this clear language, respondents curiously argue that: “...pursuant

to bylaw 2.5, the only 'persons' authorized to call a special meeting are the President and any two members of the board.”

Respondents' Brief, p. 14. Respondents ignore the plain and unambiguous language of the bylaw that authorized the eleven members to convene the June 4 special meeting.

RCW 24.03.075 confirms this interpretation. It provides that:

Special meetings of the members may be called by the president or by the board of directors.
Special meetings of the members may also be called by other officers or persons or number or proportion of members as provided in the articles of incorporation or the bylaws...
[emphasis supplied]

The statute gives added authority to the eleven Island Landmarks members who convened the special meeting.

5. Bylaw 2.6 gives members the right to designate the place of meeting.

Bylaw 2.6 provides that: “All meetings of members shall be held...at such place...designated... by the members entitled to call a meeting of members...” CP 45. Relying on this bylaw, the members designated the Vashon-Maury Land Trust building as the venue for the June 4 special meeting.

Respondents argue that because bylaw 2.6 does not expressly allow the members to designate the date or time of a meeting, only “the secretary must make this designation.”

Respondents' brief, p. 19. Respondents offer no support for this strained interpretation. Instead, bylaw 2.6 harmonizes with bylaw 2.7 in that 2.6 specifically addresses the location while the first sentence of 2.7 specifically allows members to designate the date and time, as well as the place of a special meeting.

6. Bylaw 2.11 allowed the members to utilize proxy voting at the June 4, 2012 special meeting.

Bylaw 2.11 states:

A member may vote by proxy executed in writing by the member or by his or her attorney-in fact. Such proxy shall be filed with the Secretary of the Corporation before or at the time of this meeting.

CP 45. Respondents assert that proxy votes were not properly filed with the secretary at the time of the meeting. (Respondents' brief, p. 22-23). Secretary DeFrang refused to attend the meeting.

CP 306-307. Had he attended, he would have received the proxy votes. Respondents' claim that the appellant should have deposited the proxies "with Mr. DeFrang at any time before the meeting convened" is ludicrous, because the proxy votes only became known at the time of the meeting. Respondents cannot deny the outcome of the vote, given their failure to participate in the process. *East Lake Water Assn., id.*

In any event, the legitimacy of proxy votes was immaterial. A quorum of the membership attended in person, and a majority of those present voted to replace the old board. Proxy votes did not determine the outcome of the vote to remove the respondents.

B. Appellants' Motion for Partial Summary Judgment was not "moot and premature."

Respondents argue that once the trial court granted their Motion for Summary Judgment, the appellants' Motion for Summary Judgment became moot as the case was over. Respondents' brief, p 24. In fact, appellant's motion was neither moot nor premature. Respondents fail to acknowledge that the trial court judge reviewed both parties' motions and ruled on both, as she explicitly stated: "So let's take the motions on summary judgment and on the governance questions, if you will." RP 4. She entered an Order Denying Plaintiff's Motion for Partial Summary Judgment Regarding Governance, outlining all the documents she considered. CP 464-465. Appellant's motion was not moot.

Further, respondents assert that appellant's motion was premature as the court had not ruled on the Second Amended Complaint. This argument must also fail. Appellant's motion for summary judgment was based on allegations contained in the

original complaint, as well as supporting declarations as required by Civil Rule 56. The trial court judge considered all the documents in the record; the judgment was not based solely on the Amended Complaint.

C. **The Superior Court Improperly Dismissed the Case Without Ruling on Appellant's Motion to Amend the Complaint.**

Respondents contend that because the appellants did not raise the issue of the amended complaint at the November 1, 2012 hearing, they are precluded from raising it now. They neglect to mention that at the outset of the November 1, 2012 hearing, the trial court judge stated:

With respect to amendment of the complaint, I'm not addressing that this time. So let's take the motions on summary judgment and on the governance questions, if you will.

RP 4. The trial court judge clearly limited the hearing to the cross motions for summary judgment, and made it clear that she was not willing to discuss the amendment of the complaint. The dismissal of the case without addressing the Motion to Amend the Complaint was erroneous. See Appellant's Opening Brief, pp 35-38.

To support their faulty argument, respondents cite a case that involved a real estate dispute and a factual claim that arose

after the end of discovery plus two trial delays. This is not such a case. This Court can and should consider the trial court's error as this would neither surprise nor prejudice respondents. The courts have made it clear that in most cases, the interest of justice will outweigh technical adherence to the rules. Indeed, RAP 1.2(a) states:

These rules will be liberally interpreted to promote justice and facilitate the decision of cases on the merits. Cases and issues will not be determined on the basis of compliance or noncompliance with these rules except in compelling circumstances where justice demands, subject to the restrictions in rule 18.8(b).

In *State v. Olson*, 126 Wn.2d 315 (1995), the court states that:

The clear language of this rule . . . compels us to find that a technical violation of the rules . . . should normally be overlooked and the case should be decided on the merits. This result is particularly warranted where the violation is minor and results in no prejudice to the other party and no more than a minimal inconvenience to the appellate court.

Respondents also assert that the appellant lacks standing to invoke RCW 24.03.1031. Respondent's Brief, p. 26. This statute, entitled "Judicial removal of directors," states:

1) The superior court of the county where a corporation's principal office, or, if none in this state, its registered office, is located may remove a director of the corporation from office In a

proceeding **commenced by the corporation** if the court finds that (a) the director engaged in fraudulent or dishonest conduct with respect to the corporation, and (b) removal is in the best interest of the corporation. (2) The court that removes a director may bar the director from reelection for a period prescribed by the court. [emphasis supplied]

The plain language of this statute provides that removal of a director may be commenced by the “corporation.” Here, the appellant is Island Landmarks—most certainly the “corporation.” Respondents’ claim that the appellant members have attempted to take this action as individuals is wrong, in light of Island Landmarks’ contention that the newly elected board speaks for the corporation. Acting as the corporation, the appellant Island Landmarks has clear authority under this statute to commence a proceeding.

D. The Superior Court Improperly Granted Respondents’ Motion for Summary Judgment Even Though There was a Material Factual Dispute about Secretary DeFrang’s Refusal to Accept the Membership Roster.

Respondents’ assert that there is no dispute about “any of the facts set out in the Respondent’s Statement of Case.”

Respondents’ brief, p. 6. This is not true.

Appellants tried to work with Secretary DeFrang in advance of the special meeting. Ms. Kritzman offered him the membership list and he declined to accept it, stating he “would let it go” so that

he wouldn't be "obligated to report this to Matthews." CP 306. The secretary's role is key to respondents' arguments. The Superior Court judge expressed confusion about his refusal to accept the membership list—which was clearly a material fact—when she stated that his role was "too ambiguous." Appellant's Opening Brief, p. 28. Even the respondents recognize the trial court's "consternation" and "confusion" over Mr. DeFrang's failure to cooperate with the members. (Respondents' brief, pp 7-8.) Once a disputed material fact surfaces, a case can no longer be resolved by summary judgment.

Summary judgment is proper if the pleadings and evidence, viewed in a light most favorable to the nonmoving party, show there is no genuine issue of material fact. *Landberg v. Carlson*, 108 Wash. App. 749, 33 P.3rd 40, *rev. denied*, 146 Wash. 2d 1008, 51 P.3rd 86 (2002). See appellant's opening brief, pages, 28 to 31 for the full text of the transcript as well as supporting argument. The Court's admitted confusion about Secretary DeFrang's statement provides clear evidence of a factual dispute. Because there was a genuine issue of material fact, summary judgment was not appropriate.

Finally, respondents assert that because the appellant failed

to assign error to the Superior Court's finding that the case involved no genuine issue of material facts, this issue is waived.

(Respondents' Brief, p. 8.) RAP 10.3(a)(4) is at issue here; it requires an appellant to advance a short, concise statement of each error together with a statement of the issues pertaining to each error. The appellant complied with the rule as its assignments of error assert that the trial court erred in granting respondents' motion for summary judgment on the basis that the members improperly gave notice of the special meeting. (Opening Brief, p. 4.) Within this broad assignment, appellant advances a number of challenges to the court's ruling, including that there is a controverted factual dispute regarding the significance of Secretary DeFrang's refusal to accept the membership roster. Opening Brief, pp. 28-31.

As stated above, RAP 1.2 requires the appellate rules to be liberally interpreted to promote justice and to facilitate the decision of cases on the merits. A technical violation of the rules will be overlooked, so that cases can be decided on the merits. *State v. Olson, supra*; *Goehle v. Fred Hutchinson Cancer Research Ctr.*, 100 Wn.App. 609, 613, 1 P.3d 579 (2000). The Washington appellate courts review the merits of an appeal when the appellate

brief sets forth the challenged ruling and the nature of the challenge is “perfectly clear.” *Id.* at 614. Here, the appellant made it perfectly clear which rulings it is challenging. The appellee has suffered no prejudice, evidenced by its ability to respond to the arguments made by the appellant. The assignments of error are adequate.

III. CONCLUSION

This lawsuit pits 130 Island Landmarks members who are committed to revitalizing the historic Mukai house and garden as a publicly-owned and operated community resource against five people—most of whom live out of state—who refuse to relinquish their personal control over a Washington nonprofit corporation that owns a local historic landmark property. The appellant members lawfully removed the respondents as directors of the corporation. As the Superior Court erred in holding that only the corporate secretary could notify members of a special meeting, appellant respectfully requests this Court to vacate the Superior Court dismissal of the case and deny respondents’ motion for summary judgment.

Appellant further asks this Court to grant its motion for partial summary judgment on the basis that the members lawfully removed

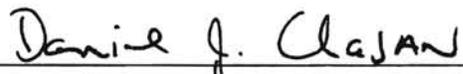
the former board and duly elected the appellant board to govern the corporation and in turn revitalize the Mukai landmark.

In the alternative, Appellant asks this Court to grant its motion to amend the complaint under RCW 24.03.1031 for removal of the directors and remand the case for further proceedings.

Respectfully submitted this 29th day of July 2013.



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CERTIFICATE OF SERVICE

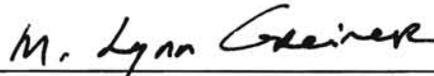
The undersigned hereby certifies on this 29th day of July, 2013, I caused the foregoing APPELLANT'S REPLY BRIEF to be served via the methods listed below on the following:

VIA EMAIL AND U.S. MAIL

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Executed this 29th day of July, 2013, at Seattle, Washington.



M. Lynn Greiner, WSBA No. 13341