

# WEST-WATT LAW, PLC

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May 21, 2024

Viewpointe II Townhomes Association, Inc.  
Members  
Via Community Board Posting

Re: Board of Directors Election Process

Dear Association Members:

Mr. Dan Deppen has requested assistance from this law firm regarding the procedures of the Board of Directors of Viewpointe II Townhomes Association, Inc. ("Viewpointe") in conducting Board elections. For the past seven elections, the Board has chosen to appoint three directors on its own, without the necessity of Viewpointe members voting to approve those appointments. On a five-member Board, this deprives Viewpointe members of any real voice in the acts of the community's Board of Directors.

The Board justifies this antidemocratic procedure by reference to the last paragraph of Section 4.02 of the Bylaws of Viewpointe II Townhomes Association, Inc. That paragraph reads as follows:

Upon the sale of all of the dwelling units by Declarant, and for the purpose of maintaining continuity in the administration of the affairs of the Association, at least two (2) members of the Board who have previously served a one (1) year term on the Board of Directors shall remain as members of the Board for the following term. The Board by majority approval shall determine which two (2) members of the Board shall remain on the Board for the following term and these Board members shall not be voted upon at the next regular annual meeting but shall automatically become a member of the Board elected at such regular annual meeting.

This paragraph applies “upon the sale of all of the dwelling units by Declarant,” a requirement that was filled many years, if not decades, ago. The procedures allowing the Board to choose its own members applied only to the term following the sale of all dwelling units by Declarant, and is no longer in force. The Bylaws require all seats on the Board of Directors to be filled by election.

The cited paragraph states that allowing the Board to select its own members is “for the purpose of maintaining continuity in the administration of the affairs of the Association.” While it is likely that this continuity refers to continuity with the management of the Association by the Declarant during Declarant control, this does raise a possible ambiguity. The Association’s bylaws “constitute a contract between the members and the organization, and among the members themselves.” *Rowland v. Union Hills Country Club*, 157 Ariz. 301, 757 P.2d 105 (Ariz. App. 1988). Interpretation of the bylaws therefore follows contract principles. Those principles state that in the case of ambiguity in a contract, extrinsic evidence is allowed to determine the parties’ intent; if the contract remains unclear after this consideration, a secondary rule of construction requires the disputed contract provision to be construed against the drafter. Courts do not resort to this secondary rule “unless other interpretive guides fail to elucidate a clause’s meaning.” *First Am. Title v. Action Acquisitions*, 218 Ariz. 394, f 8, 187 P.3d 1107, 1110 (2008).

The ambiguity present here regards the question of whether the ability for the Board to appoint its own members was to be available perpetually, or only once, after Declarant had sold all dwelling units and no longer was involved in the management of the Association. Because the Bylaws were adopted in the late 1970s, there is no extrinsic evidence available of the intent of the drafters. Therefore the provision must be interpreted against the drafter – the Association. Mr. Deppen’s view is that the self-selection procedures for Board members was a temporary measure after the end of Declarant control. This view must prevail.

It is also worth noting that there is no available signed copy of the Bylaws. If the Bylaws were never properly adopted, then they do not control elections, and Arizona law applies, requiring that members of the Association elect all Board members. A.R.S. § 10-3804(A).

Mr. Deppen is concerned about Viewpointe’s lack of democratic elections. He urges the Members to take heed and get involved to stop this unlawful practice. If the Board persists in naming directors to the

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Board without holding elections to those seats, the Members will continue to lose control of their right to choose the people who will make decisions for the Association. Those decisions are especially important now, as the Board is considering changes to the Association's bylaws that could have significant impacts long into the future.

Thank you for your attention to this important matter.

Sincerely,



Daniel G. Barker  
Attorney

*DGB/lv*  
*Enclosures as stated above*  
*cc: Client*