

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

FRIENDS OF THE VILLAGE OF,
CINDERBERRY, a Delaware non-profit
association,

Petitioner,

v.

Civil Action No. 5178-CC

THE VILLAGE OF CINDERBERRY
PROPERTY OWNERS ASSOCIATION,
INC., a Delaware corporation, CIRCLE J
DEVELOPERS, LLC, a Delaware
corporation, CIRCLE J
COMMUNICATIONS, LLC, THE BOARD
OF DIRECTORS OF THE VILLAGE OF
CINDERBERRY PROPERTY OWNERS
ASSOCIATION, INC., SEASCAPE
PROPERTY MGMT., INC., a Delaware
corporation, and ROBIN T. JAMES,
individually,

Respondents.

FRIENDS OF THE VILLAGE OF,
CINDERBERRY, a Delaware non-profit
Association,

Petitioner,

v.

Civil Action No. 5182-CC

CIRCLE J DEVELOPERS, LLC, a
Delaware corporation, THE VILLAGE OF
CINDERBERRY HOMEOWNERS
ASSOCIATION, INC., a Delaware
non-profit corporation, COUNCIL OF THE

Respondents.

OPINION

Date Submitted: April 1, 2010

Date Decided: May 5, 2010

John A. Sergovic, Jr. and Shannon D. Carmean, of SERGOVIC & CARMEAN,
P.A., Georgetown, Delaware, Attorneys for Petitioner.

Eric C. Howard, of WILSON, HALBROOK & BAYARD, Georgetown, Delaware,
Attorney for Respondents.

CHANDLER, Chancellor

Petitioner seeks immediate and full self-governance of its members' property-owners' and homeowners' associations. Respondents, which are many in number and which include the associations themselves, seek to maintain the status quo and to deny petitioner's request for self-governance for its members. As a result, I must determine whether the governance documents of petitioner's members' own associations, in conjunction with the Delaware Uniform Common Interest Ownership Act¹ ("DUCIOA"), *entitle* petitioner's members to immediate self-governance of those associations.

For the reasons below, I conclude that, effective immediately, petitioner's members are entitled to full self-governance of their property-owners' and homeowners' associations. Accordingly, I grant petitioner's Motions for Partial Summary Judgment. This Opinion follows a March 23, 2010 oral ruling in which I informed the parties of my ultimate conclusion (to be followed by this written explanation) and instructed them to coordinate efforts to organize governance elections at the earliest possible convenience. On April 21, 2010, I entered an Order requiring the elections to be held no later than May 15, 2010.

¹ 25 *Del. C.* §§ 81-101 to -421 (2009).

I. BACKGROUND²

A. *The Parties*

Petitioner Friends of the Village of Cinderberry (“Friends”) is a non-profit association organized under the laws of the State of Delaware. Friends is comprised of individual Unit Owners who reside in The Village of Cinderberry (“Cinderberry”), a common-interest, residential community located in Georgetown, Delaware. Cinderberry itself is not a party in the two related actions before this Court.

There are a total of eight respondents in these actions. Respondent Circle J Developers, LLC (“Circle J”) is a Delaware limited liability company, the developer of Cinderberry, and a respondent in both actions. On December 19, 2003, Circle J filed with the Recorder of Deeds in and for Sussex County, Delaware, a Declaration of Covenants, Conditions, and Restrictions for The Village of Cinderberry (“Restrictions”).³ The Restrictions anticipated the creation

² There are two separate actions before the Court: Civil Action 5178-CC and Civil Action 5182-CC. For the purposes of fluidity, and because the distinction between the actions is of no procedural import, in this Opinion I will highlight the differences between actions only when substantive import warrants I do so. Also, these actions have unfolded quite quickly, and the record is not rich in tale-telling facts, though it certainly is rich enough in facts relating to the underlying legal issues. Much of this background is adapted from the Verified Petitions (which are nearly identical to one another). As I will note below, respondents did not file formal Responses to the Petitions. There do not, however, appear to be any disputes regarding the relevant facts. Rather, the parties’ disputes relate to the meaning and applicability of Delaware law and various agreements and documents among the parties. As such, I will be very brief in my retelling of how the current dispute arose.

³ The name of the declarant in the Restrictions was Circle J Venture, LLC, rather than Circle J Developers, LLC. All evidence presented in this case supports the assumption that this

of an independent association for Cinderberry: respondent The Village of Cinderberry Property Owners Association, Inc. (“POA”), which was to be created “for the purpose of providing common services; administering and enforcing covenants, conditions and restrictions contained herein; adopting and enforcing rules and regulations; and levying, collecting and disbursing the Assessments and other charges provided for herein.”⁴ The Restrictions also provide for a governing body of the POA: respondent The Board of Directors of the Village of Cinderberry Property Owners Association, Inc. (“POA Board”).⁵ The POA and the POA Board are respondents in only one action, Civil Action 5178-CC (“POA Action”).

Also on December 19, 2003, Circle J filed a Declaration Establishing a Plan for Condominium Ownership of Premises Situated in Georgetown Hundred, Sussex County, Delaware Pursuant to the Unit Property Act of the State of Delaware for The Village of Cinderberry (“Declaration”). Circle J also filed a Code of Regulations for The Village of Cinderberry (“Code”).

The intent of the Declaration was “to create a plan of condominium ownership of the Property,”⁶ with the term ‘Property’ meaning “the Land and the Buildings and all other improvements and structures thereon owned in fee simple,

distinction has no legal import here, and I will use “Circle J” when referring to the declarant of these Cinderberry governance documents.

⁴ Restrictions § 3.1.

⁵ The Restrictions refer to the POA Board in Article I (which lists definitions of terms found in the Restrictions) and Article III (which describes certain aspects of the POA and the Cinderberry Maintenance Corporation).

⁶ Declaration ¶ 1.

and all easements, rights and appurtenances belonging thereto which have been or are intended to be submitted to the provisions of the Act, and all articles of personal property intended for use in connection therewith.”⁷ The Declaration referred to a Council that would “manage the business operations and affairs of the Property on behalf of the Unit Owners.”⁸ This non-POA form of governance was described in more detail within the Code, which referenced two additional respondents in the actions now before the Court. Respondent The Village of Cinderberry Homeowners Association, Inc. (“HOA”) was tasked with “the responsibility of administering the condominium, establishing the means and methods of collecting the contributions to the Common Expenses, arranging for the management of the condominium, and performing all of the other acts that may be required to be performed by the Association of Owners, by the Unit Property Act and the Declaration.”⁹ Respondent Council of the Village of Cinderberry Homeowners Association, Inc. (“HOA Council”) was established to govern the affairs of the condominium¹⁰ and was granted the powers “necessary for the administration of the affairs of the condominium and [was authorized to] do all such acts and things as are by the Unit Property Act or by this Code of Regulations

⁷ *Id.* ¶ 2(p).

⁸ *Id.* ¶ 2(f).

⁹ Code § 2.1.

¹⁰ *Id.* § 3.1.

directed to be exercised and done by the Association of Owners.”¹¹ The HOA and the HOA Council are respondents in only one action, Civil Action 5182-CC (“HOA Action”).

There are three additional respondents beyond those I have already described. Two are common to both actions: 1) respondent Seascope Property Management, a Delaware corporation that is the property-management company engaged by the POA and the HOA; and 2) respondent Robin T. James, the Managing Member of both Circle J and Circle J Communications, a Member of the POA Board of Directors, the President of the HOA, and a member of the HOA Council. The third is respondent Circle J Communications, LLC, which is a respondent in the POA Action only. Circle J Communications is a subsidiary or is otherwise affiliated with Circle J, and it purports to be the mandatory exclusive supplier of television, internet, and telephone services to the Unit Owners in Cinderberry.

B. The Documents, Term Limits, and Powers of Attorney

As I described above, together the Restrictions, Declaration, and Code formed the POA, HOA, and these associations’ governance structures, including the POA Board and the HOA Council. Although these documents were filed simultaneously, the language of the documents appears to reflect the intent of

¹¹ *Id.* § 3.2. This section of the Code then elaborated on the powers and duties of the Council, which included powers and duties quite similar to the POA Board.

Circle J to condominium-ize the entirety of Cinderberry, bring the entirety of Cinderberry within Delaware’s Unit Property Act,¹² and establish the Declaration and the Code as the governance documents of Cinderberry—all notwithstanding the fact that the Restrictions had empowered the POA to play a significant, if not leading, governance role in Cinderberry,¹³ and notwithstanding the fact that the Declaration itself subjects Unit Owners to the provisions of *all three* documents.¹⁴ The specifics of how the terms and spheres of these documents may overlap with one another, however, do not appear to be relevant to the resolution of the questions before me. The pertinent issue is whether each document provides for *who* is to govern the corresponding association, and for *how long* those individuals are to govern.

The Restrictions mention neither the procedures by which POA Board elections are to occur nor the term limits of POA Board members. The Declaration and the Code, however, do outline details and requirements relating to the HOA

¹² 25 Del. C. §§ 2201-2246 (2009).

¹³ This conclusion is supported by respondents’ own briefing. See Respts.’ Answering Br. (POA Action) 2 (“One hundred percent (100%) of the property that is subject to the restrictive covenants upon which petitioner relies in this matter has also been submitted to the Unit Property Act pursuant to the Declaration governing the Village of Cinderberry Condominium. Thus, the manner of determining and assessing 100% of the costs of maintenance and repair of the common elements is dictated by the provisions of the Declaration and Code of Regulations governing the condominium, not the [POA] restrictions.”).

¹⁴ See Declaration ¶ 16 (stating that “[a]ll present and future Unit Owners, lessees, mortgages, tenants and occupants of Units shall be subject to and shall comply with the provisions of the Master Restrictions as contained in the *Declaration of Covenants, Conditions, and Restrictions for the Village of Cinderberry* encumbering Phases A and B; this Declaration; the Code of Regulations and the rules and regulations, as they may be amended from time to time.”) (emphasis added).

Council and HOA Council members. The Declaration states that “[t]he names of the first members of the [HOA] Council, to serve until their successors are chosen and qualified pursuant to the Code of Regulations, are: (a) Robin T. James (b) Barry G. Joseph (c) Deborah Moore.” The corresponding sections of the Code are § 2.2 and § 3.1. Section 2.2, *as originally entered*, reads as follows:

The Developer shall notify the Owners of the existing Units on or before one year from the date the first Unit is sold and settled, and the first annual meeting of the Association of Owners shall be held within thirty (30) days thereafter on a call issued by the Developer. At such meeting the persons designated by the Developer shall resign as members of the Council, and all of the Owners, and the Developer, shall elect a new Council which shall consist of five (5) members, three (3) of said members to be designated by the Developer for so long as Units in the additional phases are planned to be annexed, or until December 31, 2032, whichever shall first occur. Thereafter, the annual meetings of the Association of Owners shall be held in April of each succeeding year at the time and place determined by the Council. At such annual meetings the Council shall be elected by ballot of the Owners in accordance with the requirements in Section 4 of Article III of this Code of Regulations. The Association Owners may transact such other business at such meetings as may properly come before them.¹⁵

Section 3.1, *as originally entered*, reads:

The affairs of the condominium shall be governed by a Board of Directors known as the Council. Until the first annual meeting called by the Developer is held, the Council shall consist of three (3) persons named in the Declaration, or such other persons, as shall have been designated by the Developer. Thereafter, the Council shall be composed of five (5) persons, all of whom shall be designees of the Developer, Owners or spouses of Owners, or mortgagees (or designees of mortgagees) of Units or Delaware residents. Two (2) of

¹⁵ Code § 2.2.

the five (5) members shall be elected at the first annual meeting, and three (3) shall be appointed by the Developer. All five (5) members shall be elected no later than: (a) the date the Developer declares that The Village of Cinderberry shall no longer be subject to expansion; (b) four (4) months after seventy-five percent (75%) of the Units have been conveyed to Unit purchasers; or (c) five (5) years after the first Unit is conveyed, provided, however, the effective date the Developer designates withdrawal shall be at a special or regular meeting where successor Council members shall be elected. The Developer shall have the right in its sole discretion to replace such Council members as may be so selected and designated by it, and to select and designate their successors. The Developer, Circle J Venture, LLC, or persons designated by it, shall remain and have three (3) seats on the Council, until: (a) the date the Developer declares that The Village of Cinderberry shall no longer be subject to expansion; (b) four (4) months after seventy-five percent (75%) of the Units have been conveyed to Unit purchasers; or (c) five (5) years after the first Unit is conveyed, whichever shall first occur.¹⁶

Effective October 15, 2007, these sections were amended. Circle J relied on two Irrevocable Powers of Attorney (“IPOAs”) granted to it by each Unit Owner—at the time he or she joined Cinderberry, it seems—to forge critical changes in Sections 2.2 and 3.1. The amended Section 2.2 reads as follows, with the key amended language in bold:

The Developer shall notify the Owners of the existing Units on or before one year from the date **all of the Units shall have been sold and settled by Declarant to the first Unit Owners other than Declarant**, and the first annual meeting of the Association of Owners shall be held within thirty (30) days thereafter on a call issued by the Developer. At such meeting the persons designated by the Developer shall resign as members of the Council, and all of the Owners, and the Developer, shall elect a new Council which shall consist of five (5) members, three (3) of said members to be designated by the

¹⁶ Code § 3.1.

Developer for so long as Units in the additional phases are planned to be annexed, or until December 31, 2032, whichever shall first occur. Thereafter, the annual meetings of the Association of Owners shall be held in April of each succeeding year at the time and place determined by the Council. At such annual meetings the Council shall be elected by ballot of the Owners in accordance with the requirements in Section 4 of Article III of this Code of Regulations. The Association Owners may transact such other business at such meetings as my properly come before them.¹⁷

And the amended Section 3.1 reads, with the key amended language in bold:

The affairs of the condominium shall be governed by a Board of Directors known as the Council. Until the first annual meeting called by the Developer is held, the Council shall consist of three (3) persons named in the Declaration, or such other persons, as shall have been designated by the Developer. Thereafter, the Council shall be composed of five (5) persons, all of whom shall be designees of the Developer, Owners or spouses of Owners, or mortgagees (or designees of mortgagees) of Units or Delaware residents. Two (2) of the five (5) members shall be elected at the first annual meeting, and three (3) shall be appointed by the Developer. All five (5) members shall be elected no later than: (a) the date the Developer declares that The Village of Cinderberry shall no longer be subject to expansion; (b) four (4) months after **one hundred percent (100%)** of the Units have been conveyed to Unit purchasers; or (c) **ten (10)** years after the first Unit is conveyed, provided, however, the effective date the Developer designates withdrawal shall be at a special or regular meeting where successor Council members shall be elected. The Developer shall have the right in its sole discretion to replace such Council members as may be so selected and designated by it, and to select and designate their successors. The Developer, Circle J Venture, LLC, or persons designated by it, shall remain and have three (3) seats on the Council, until: (a) the date the Developer declares that The Village of Cinderberry shall no longer be subject to expansion; (b) four (4) months after **one hundred percent (100%)** of

¹⁷ Amended Code § 2.2 (emphasis added).

the Units have been conveyed to Unit purchasers; or (c) **ten (10)** years after the first Unit is conveyed, whichever shall first occur.¹⁸

These amendments were entered because “the Developer desire[d] to correct certain typographical and technical errors made in the original Code of Regulations,”¹⁹ and the amendments were made “pursuant to the Irrevocable Power of Attorney Coupled with Interest....”²⁰ I note here that the two different IPOAs that the Unit Owners had granted Circle J were primarily “for the purpose of adding Additional Properties and for the purpose of reallocating voting rights appurtenant [sic], construction of roads, installation of utilities, including, telephone, cable television, sewer, water, [and] electric,”²¹ and “for the purpose of constructing additional condominium units and for the purpose of reallocation of the percentage interests of the common elements and for the purpose of reallocating voting rights appurtenant to each of the condominium units, construction of roads, installation of utilities, including, telephone, cable television, sewer, water, [and] electric....”²² The latter IPOA also was intended to enable Circle J “to execute, acknowledge, deliver, and record any instruments as may be required to amend the Code of Regulations of The Village of Cinderberry....”²³

¹⁸ Amended Code § 3.1 (emphasis added).

¹⁹ Pet. (HOA Action) Ex. 12.

²⁰ *Id.*

²¹ Pet. (HOA Action) Ex. 10.

²² Pet. (HOA Action) Ex. 11.

²³ *Id.*

In summary, as required by Cinderberry’s governance documents, Circle J and the Unit Owners developed a system in which Circle J is or was to turn governance of the HOA over to Unit Owners at some point in time, although that point likely was pushed back by the amendments Circle J itself made to the governance documents of Cinderberry.²⁴ The POA, however, does not appear to be a governance mechanism that requires Circle J to turn governance control over to the Unit Owners at any specific time—at least not on the basis of the terms contained within the POA’s governance documents.

C. Village Leadership, Village Mutiny

Several years have passed since Cinderberry took root, and Circle J has retained control over the POA and HOA throughout. To date, there have been no elections in which Unit Owners have had the opportunity to exercise their right as Unit Owners to elect the governing bodies of their associations. Also to date, “the [POA] organized pursuant to the [R]estrictions and the [HOA] organized pursuant to the Declaration have allocated the expenses of the Village of Cinderberry between the [HOA] and the [POA] on a largely arbitrary basis.”²⁵ For example, “[s]ome expenses were allocated to the [HOA] (administrative type) and some expenses (non-administrative) were allocated to the [POA]. However, nothing

²⁴ The exact impact of the amendments to the Code is uncertain, given its dependency on which of the three “whichever shall first occur” options does occur first.

²⁵ Respts.’ Answering Br. (POA Action) 2.

whatsoever in the [R]estrictions provide that certain types of expenses belong with the [POA], while others are expenses of the condominium and belong with the [HOA].”²⁶ Thus, Circle J has maintained control over the finances, accounting, and provision of services for Cinderberry, juggling expenses between the POA and HOA as it—and not Cinderberry’s Unit Owners—has seen fit.

By letter dated October 28, 2009, petitioner’s counsel advised Circle J that Circle J has breached its duty of good faith and loyalty owed to the Unit Owners (all of whom are members of the POA and HOA) and that Circle J has further violated Delaware law by failing to hold an annual meeting of the POA and HOA to elect the governing bodies of those associations.²⁷ On November 13, 2009, petitioner received a response from an attorney writing on behalf of respondents.²⁸ The November 13 letter: 1) expressed respondents’ disagreement with petitioner’s assertion that respondents had acted in violation of any agreement or Delaware law; 2) noted the validity and enforceability of the amendments Circle J made to the Code; and 3) took issue with the anonymity behind petitioner’s name, which does not indicate which of the Unit Owners seek relief from this Court and whether those who do even form a majority of Cinderberry’s Unit Owners, as well as the

²⁶ *Id.*

²⁷ Pet. (POA Action) 6; Pet. (HOA Action) 7.

²⁸ Pet. (POA Action) 7; Pet. (HOA Action) 8.

potential illegality of the name, on propriety grounds, given respondents' proprietary rights in the name "The Village of Cinderberry."²⁹

On November 16, 2009, respondents circulated a letter to Cinderberry's Unit Owners. Respondents wrote that "[t]his informational letter comes in the form of a warning that there is a group of homeowners hiding under the cloak of anonymity going door to door and soliciting monies for a purported legal fund."³⁰ The letter also stated that Unit Owners "already contribute to a legal fund within [their] POA dues and no other contribution is necessary," that "[t]he very name under which this group has chosen to operate, 'The friends [sic] of the Village of Cinderberry' [sic] is illegal and has been addressed by our attorney," and that "[t]he intent of this group is mutiny."³¹

On December 11, 2009, the POA Board and the HOA Council levied assessments and adopted new annual budgets for the POA and HOA, effective January 1, 2010.³²

D. Procedural History

On December 31, 2009, petitioner filed its Petition in the POA Action, and on January 4, 2010, Petitioner filed its Petition in the HOA Action. The Petitions assert several counts, including: i) violation of 8 *Del. C.* § 215(d) by Circle J and

²⁹ Pet. (POA Action) Ex. 4; Pet. (HOA Action) Ex. 7.

³⁰ Pet. (POA Action) Ex. 5; Pet. (HOA Action) Ex. 8.

³¹ Pet. (POA Action) Ex. 5; Pet. (HOA Action) Ex. 8.

³² Pet. (POA Action) 6; Pet. (HOA Action) 7.

Robin James;³³ ii) breach of Cinderberry's governance documents by the POA Board, HOA Council, and Robin James;³⁴ iii) breach of the fiduciary duty of loyalty and good faith by Circle J and Robin James;³⁵ iv) breach of 25 *Del. C.* § 81-315(a)(2) by the POA Board and Robin James;³⁶ and v) breach or anticipatory breach of 25 *Del. C.* § 81-324 by the HOA Council and Robin James.³⁷

On January 4, 2010, petitioner filed Motions for Preliminary Injunctive Relief. These motions sought to enjoin respondents from implementing the 2010 budgets, which the POA Board and HOA Council had adopted on December 11, 2009, so that appropriate elections could occur and properly elected leaders could prepare and present budgets to the POA and HOA. On January 8, 2010 and before a busload—literally—of Cinderberry residents, I heard oral arguments on this request for preliminary injunctive relief. I denied preliminary injunctive relief, principally on the grounds that the irreparable harm asserted by petitioner had already occurred—that is, the 2010 budget had already been adopted, and any change I ordered thereto would, in many ways, be tantamount to granting final relief. I did instruct respondents, however, not to enter into new contracts for 2010 except on an emergency basis, and that respondents were to pay invoices for

³³ Pet. (POA Action) 7-11; Pet. (HOA Action) 13-15.

³⁴ Pet. (POA Action) 11-15; Pet. (HOA Action) 15-18.

³⁵ Pet. (POA Action) 15-17; Pet. (HOA Action) 18-20.

³⁶ Pet. (POA Action) 18-20.

³⁷ Pet. (HOA Action) 22-24.

Cinderberry only as those invoices come due, and no sooner.³⁸ I also instructed the parties to provide me with briefing on the applicability of the Delaware Uniform Common Interest Ownership Act to Cinderberry and the related claims before this Court.

As mentioned earlier, on March 23, 2010, I instructed the parties to begin efforts to hold elections for both the POA and HOA as soon as practicable. I also instructed petitioner to file a formal motion with the Court, and respondents to file with the Office of the Recorder of Deeds in Sussex County documentation reverting the Code from its amended version to the original one, reversing the October 15, 2007 amendments. On April 1, 2010, petitioner submitted Motions for Partial Summary Judgment, which related only to petitioner's claims regarding Unit Owners' rights to elect the POA Board and the HOA Council. This Opinion

³⁸ The specific reasoning for this component of my ruling is not related to the narrow issues now before the Court on petitioner's Motions for Partial Summary Judgment, nor, accordingly, have I given much flavor of that reasoning in this Opinion. Here, I simply note petitioner's assertions that "Circle J and its principal, Mr. James, have maintained autocratic control of the POA [and HOA] for their benefit, or the benefit of related entities, to the detriment of the Unit Owners...." Pet'r's Opening Br. (POA Action) 5. The purported benefits relate to the relationship between Circle J, Robin James, Circle J Communications, and Seascape Property Management. *See, e.g.*, Pet. (POA Action) 8 ("Mr. James, acting through his appointed and controlled Board of Directors of the Association or POA, has entered into suspect contracts with affiliated entities without soliciting bids from disinterested companies for his benefit or for the benefit of entities he controls or with which he is affiliated, and to the detriment of the Unit Owners who are members of the Association and of the petitioner. For example, cable TV and internet service was and is provided by a communications subsidiary of Circle J, or its affiliated entity, the Respondent Circle J Communications, the managing member of which is Mr. James."). Thus, I believed it most appropriate for my January 8, 2010 Oral Ruling to include a prohibition on respondents from entering into any new contracts, or accelerating any payments due under existing contracts.

provides more detail of the legal reasoning underlying my March 23 Oral Ruling and the April 21 Order directing elections to be held by May 15, 2010.

II. ANALYSIS

To prevail on a Motion for Summary Judgment, the moving party must show that there is no material fact in dispute and that it is entitled to judgment as a matter of law.³⁹ Petitioner has moved for partial summary judgment. I am not aware of factual disputes relating to the questions before me, let alone to any other element of these two actions. Accordingly, my decision will involve interpreting the various agreements, documents, and laws relevant to the question of whether Cinderberry's Unit Owners are entitled to immediate elections for the leadership of their property-owners' and home-owners' associations.

A. *The POA Action*

In their answering brief, respondents "concede that 8 *Del. C.* § 215 and 25 *Del. C.* § 81-303(c) [a provision of the DUCIOA] provide that control of the Village of Cinderberry Property Owners Association, Inc. must at this point be turned over to the property owners."⁴⁰ Respondents also write that "[t]o the extent that [the] Petition seeks the relief of the Court requiring that a meeting of members be convened at which time to elect new directors, Respondents do not oppose that

³⁹ Ch. Ct. R. 56.

⁴⁰ Respts.' Answering Br. (POA Action) 2.

request.”⁴¹ I thus grant petitioner’s Motion for Partial Summary Judgment in the POA Action.

B. The HOA Action

Unfortunately, the parties remain in vehement disagreement about the issue of holding HOA elections. My analysis of this issue and the relevant agreements and Delaware laws will begin with a brief examination of the DUCIOA—a statute which no Delaware court appears to have had the opportunity to examine—and continue with an examination of the relevant HOA governance documents.

1. The Delaware Uniform Common Interest Ownership Act

The parties make much of the spirit and intent of the DUCIOA. They also examine many of its provisions. Although I am tempted to join them in a thorough inquiry of the DUCIOA—particularly given that this case appears to be the first time a Delaware court has been faced with an issue relating to the DUCIOA—or even examine their assertions point by point and reach conclusions on the meaning of various provisions of the DUCIOA, I will refrain from doing so, as even a brief reading of the DUCIOA reveals that to the extent it is a condominium, Cinderberry is exempt from the reach of the DUCIOA, as argued by petitioner.

Petitioner analyzes the ways in which the Delaware General Assembly intended various sections of the DUCIOA to apply to preexisting common-interest

⁴¹ *Id.*

communities (that is, those whose existence predated the DUCIOA), as well as the ways in which the DUCIOA enables preexisting common-interest communities to adjust their governance documents so as to resolve conflicts with the terms of the DUCIOA. I will not join petitioner in this analysis, or reach ultimate conclusions on the accuracy of petitioner's analysis, other than one: I conclude that it is respondents' interpretation of 25 *Del. C.* § 81-119, and not petitioner's, that is correct. That is to say, in a matter involving a condominium, § 81-119 clearly resolves conflicts between: 1) a preexisting common-interest community's governance documents and 2) the DUCIOA, *in favor of the community's governance documents*:

With respect to condominiums and cooperatives, such existing provisions of those declarations, bylaws, codes of regulations, declaration plans, plats or plans, and subsequent amendments thereto adopted subsequent to the effective date of this chapter [September 30, 2009] in strict accordance with those existing provisions, and not in conflict with the Unit Property Act [Chapter 22 of this title], shall be controlling in the event of any express conflict between those existing provisions (as duly amended) and the provisions of this chapter.⁴²

Thus, the Delaware General Assembly clearly provided a carve-out for condominiums and cooperatives, such that the governance documents of these forms of common-interest communities control when conflicts arise between those documents and the DUCIOA. Petitioner cannot, therefore, turn to the DUCIOA as

⁴² 25 *Del. C.* § 81-119 (2009).

a means of establishing the Unit Owners' entitlement (immediate or otherwise) to elections for the HOA Council, if in fact Cinderberry's governance documents specifically did not provide for such entitlement.

2. Amendments to Cinderberry's Governance Documents

I conclude that Circle J's October 15, 2007 amendments to Cinderberry's governance documents were invalid uses of the IPOAs granted to Circle J by the Unit Owners. The intent of the IPOAs was to enable Circle J to continue with construction and expansion of Cinderberry, from both an administrative and a service perspective (that is, reallocation of ownership interests and percentages, and construction and servicing of roads and utilities). The intent was *not* to confer upon Circle J unilateral and unchecked authority to lengthen the window of time in which Cinderberry was its domain and the Unit Owners were its subjects. I am disheartened when those to whom IPOAs are granted abuse the authority contained therein.⁴³ That is what has occurred here, and not simply correction of a typographical error (contrary to respondents' characterization). I believe it is a drastic abuse of power for Circle J to have amended the Code such that Circle J would retain control over the HOA beyond the term limits agreed upon at the time Unit Owners became members of Cinderberry. Petitioner now appears before this

⁴³ See, e.g., *Kuroda v. SPJS Holdings, L.L.C.*, 2010 WL 925853 (Del. Ch. Mar. 16, 2010) (finding that a power-of-attorney clause was "nothing more than boilerplate language authorizing defendants to sign [plaintiff's] name to whatever documents or agreements are required by the day-to-day operations of the business....[documents] which could not ... include a major agreement that would impose upon [plaintiff] new rights and obligations....").

Court seeking a remedy for this abuse, a means of undoing the amendments to the Code so that Unit Owners can govern their own associations. This situation is a modern example of a classic thought,⁴⁴ and I believe an individual who abuses governance power granted to him should not inappropriately remain in a position superior to those he or she seeks to govern illegitimately. Accordingly, I hold the October 15, 2007 amendments to the Code to be invalid, and that the operative terms of Cinderberry’s governance documents are those present in the Code prior to those invalid amendments.

3. Cracking the Code

All parties to these actions agree that there are internal inconsistencies within the Code. Specifically, Sections 2.2 and 3.1 of the Code—in their original terms, which are the operative terms—are in conflict in regards to the timing of the turnover in HOA Council control from Circle J to the Unit Owners. Section 2.2 entitles Circle J to designate three members of the five-member HOA Council “for so long as Units in the additional phases are planned to be annexed, or until December 21, 2032, whichever shall first occur.”⁴⁵ Section 3.1 states that Circle J is entitled to designate three members of the five-member HOA Council until “(a)

⁴⁴ See DAN T. COENEN, *THE STORY OF THE FEDERALIST: HOW HAMILTON AND MADISON RECONCEIVED AMERICA* 98 (2007) (explaining that under our republican form of government, “judges would discharge a distinctively republican function,” and that “[j]udicial review did not find its justification in protecting aristocrats, landowners, merchants, or any other set of interest-holders. Rather, its logic lay in a rejection of the notion that ‘representatives of the people are superior to the people themselves.’”) (quoting *THE FEDERALIST* NO. 78 (Alexander Hamilton)).

⁴⁵ Code § 2.2.

the date [Circle J] declares that ... Cinderberry shall no longer be subject to expansion; (b) four [] months after seventy-five percent [] of the Units have been conveyed to Unit purchasers; or (c) five [] years after the first Unit is conveyed, whichever shall first occur.⁴⁶ Thus, Section 3.1 imposes a different standard than Section 2.2 imposes, and I must determine which provision controls.

In the spirit of a different line of Delaware law,⁴⁷ I find in favor of the franchise. That is, Section 3.1 controls, and the Unit Owners should have the right to vote for the entirety of the HOA Council. Although not strictly a set of by-laws, the Code is a governance document that outlines operative rules-of-the-road for the running of Cinderberry, rules to be followed by Circle J until it transitions out of its position of power, and then to be followed by the Unit Owners, at least until a point at which they may amend the Code and veer off in a different direction. Sections 2.2 (under “Article II: Association of Owners”) and 3.1 (under “Article III: Council) directly conflict, and from the record before me, there is no extrinsic evidence—nor could there be, I suspect—that indicates the timeframe by which parties to this agreement intended the transition of control to occur, and that would assist me in interpreting this internal conflict from the perspective of contract law. The section of the Code that relates directly to the composition of the HOA

⁴⁶ Code § 3.1.

⁴⁷ See *Blasius Industries, Inc. v. Atlas Corp.*, 564 A.2d 651, 669 (Del. Ch. 1988) (“My conclusion is based in part on a general policy against disenfranchisement.”).

Council is Section 3.1, and it therefore is a much more relevant section—as compared to Section 2.2, which speaks about requirements relating to annual meetings in general—to someone who is seeking to examine who will be leading the community he or she is about to join, and for how long and under what terms he or she will be led by those people. Because I conclude that Section 3.1 controls over Section 2.2, Circle J no longer is entitled to designate three members of the HOA Council, given the language of Section 3.1(b) and given the undisputed fact that more than sixty days have passed since seventy-five percent of the Units have been conveyed to the Unit purchasers. Control now transfers to the Unit Owners, who are entitled to hold elections for HOA Council, pursuant to the operative terms of Cinderberry’s governance documents.

III. CONCLUSION

For all the above reasons, I grant petitioner’s Motions for Partial Summary Judgment. The Unit Owners of Cinderberry joined their village with the understanding that at some point in time, as determined by very specific guidelines, they would be entitled to vote for the leadership of the associations that collect resident dues and provide resident services. That time has passed; their time has come.

IT IS SO ORDERED.