

UNITED STATES BANKRUPTCY COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
(Alexandria Division)

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IN RE:  GORDON PROPERTIES, L.L.C., : CASE NO. 11-01020 (RGM)
      Debtor.                       : (Chapter 11)
- - - - -x
GORDON PROPERTIES, L.L.C.         :
      Plaintiff,                   :
v.                                  : APN 09-18086-RGM
FIRST OWNERS ASSOCIATION OF      :
  FORTY-SIX HUNDRED, et al.,    :
      Defendant.                  :
- - - - -x

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Monday, July 23, 2012  
U.S. Bankruptcy Court  
Alexandria, Virginia

The above-entitled matter came on to be heard before the Honorable Robert G. Mayer, Judge, in and for the United States Bankruptcy Court for the Eastern District of Virginia, Alexandria Division, beginning at approximately 10:12 a.m.

Diversified Reporting Services, Inc.

(202) 467-9200

APPEARANCES:

For Debtor/Plaintiff:

MICHAEL L. ZUPAN, ESQ.

Mercer Trigiani

112 South Alfred Street

Alexandria, Virginia 22314

(703) 837-5012

DONALD F. KING, ESQ., TRUSTEE

For Defendant:

JENNIFER L. SARVADI, ESQ.

2318 Mill Road

Suite 1100

Alexandria, Virginia 22314

(703) 647-5944

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1 P R O C E E D I N G S

2 THE CLERK: The matter on this morning's docket is  
3 Gordon Properties, L.L.C. v. First Owners Association, Case  
4 Number 11-1020.

5 MS. SARVADI: Good morning, Your Honor, Jennifer  
6 Sarvadi on behalf of First Owners Association.

7 MR. KING: Good morning, Your Honor. Donald King  
8 for Gordon Properties.

9 MR. ZUPAN: Good morning. Michael Zupan, Mercer  
10 Trigiani for Gordon Properties.

11 THE COURT: All right. I see Mr. Repezynski,  
12 you're here today too?

13 MR. REPEZYNSKI: I am, Your Honor. And I  
14 anticipated the court only to address the court Friday. I am  
15 here, Your Honor, but I am not in a position to enter my  
16 appearance yet at this time. I think Ms. Sarvadi had  
17 intended to address the court with regard to some  
18 reservations and the hold-up on that regard, but I have not  
19 yet been retained.

20 THE COURT: All right. Very good.

21 MS. SARVADI: Your Honor, I was going to seek some  
22 direction from the court after the argument on the  
23 condominium issue. The board, as you might recall, created a  
24 special litigation committee in June, and the special  
25 litigation committee was granted certain rights and

1 responsibilities.

2           The board certainly feels, and I certainly acted in  
3 accordance with that direction, that the special litigation  
4 committee has the authority to not only make a recommendation  
5 about litigation and retention of counsel, but also to direct  
6 that counsel in the litigation. There's been a reading of  
7 the resolution that the powers granted to the committee stop  
8 at making a recommendation to the board, and don't grant the  
9 committee itself the authority to actually engage that  
10 attorney and to actually direct that attorney in the  
11 litigation.

12           And so that is part of the reason there has been a  
13 delay in the actual retention of counsel. I would be more  
14 than happy to share the resolution with the court, or we  
15 could file a motion. I don't want to delay things further,  
16 but the board in my view intended the committee to have the  
17 power, but their reading of the resolution is that they may  
18 not have actually been given that power to make those  
19 decisions, and that is the wrinkle that we find ourselves in.

20           THE COURT: Well, I understand that. You weren't  
21 here Friday and Mr. Repezyński and Mr. Reynolds, I believe,  
22 for the Gordon Properties, were present on another hearing.  
23 And I was advised that the committee, as you suggest, and Mr.  
24 Repezyński was undertaking to see if he would be employed;  
25 and he was asking whether there would be a continuance or

1 what relief might be appropriate. Of course, you weren't  
2 here, so I didn't have the benefit of your participation in  
3 that. But what I told him then and what may well have been  
4 conveyed to you is that this has been pending awhile.

5 It has gone through a number of hearings a number  
6 of days. You've been involved from the beginning, and I  
7 don't know how many hours you've put in -- 100, 200. It's  
8 probably significant. And we are down to the last 30 or 60  
9 minutes of the case. The case as you know has been severed  
10 in a number of ways. There's one appeal pending. As  
11 noticed, I've made other rulings as to who sits on the board  
12 addresses that.

13 The sanction and the attorneys fees in that order  
14 has been appealed too. And as I expressed earlier, it's  
15 important to get this case all together, and we're at the  
16 very, very last end of it. And as I've looked at it, the  
17 issues you've raised are worthy of being considered for a  
18 number of reasons. I'll discuss those later, but it's  
19 necessary to bring this to a conclusion.

20 Mr. Repezynski said he'd need some weeks to figure  
21 out what to do. And what he was trying to say Friday was  
22 well, with a change of committee, which is the special  
23 litigation committee to which you refer and to change of  
24 counsel, and this is no reflection on you, I understand, that  
25 there may be an ability to add a desire to reevaluate the

1 situation from the beginning and to see if there's any sort  
2 of possible resolution.

3 I certainly encourage that, and I'm sure that any  
4 other judge who's been involved would encourage that as well.  
5 However, this needs to be brought to a conclusion. The  
6 briefs are in. You're fully capable of pursuing this matter.  
7 There's been no motion to substitute. No one to come in.  
8 And I think delaying it is to the disadvantage of everybody  
9 involved. It's simply the best situation to bring it to a  
10 conclusion, find out who's on the board. And you can always  
11 look at it, evaluate it, decide what to do on an appeal.  
12 Resolve it, if you're able to do that. There've been efforts  
13 in the past, which, unfortunately, have not been successful.

14 But I don't think the risk holding the hearing  
15 today worth the disadvantage on what the board would like to  
16 do. I'm usually very sensitive, or I hope I'm usually  
17 sensitive to issues of representation, but I think in this  
18 instance the necessity of getting this to a conclusion over  
19 ways the association's right to replace counsel at this very,  
20 very late date.

21 MS. SARVADI: And thank you, Your Honor. And I  
22 wasn't suggesting, nor was I aware, that a request for  
23 continuance was being made last Friday. My issue is I'm  
24 trying to help the board and the committee get their new  
25 counsel engaged, because there's a difference of opinion as

1 to the scope of authority.

2 THE COURT: I understand the issue that exists  
3 there. I wouldn't release you at this point, in any event,  
4 even if new counsel made an appearance. Because I think your  
5 institutional history and knowledge of this case far exceeds  
6 anything, the value of permitting you to withdraw. Now, on  
7 appeal, that's a different issue. I've litigated many  
8 appeals, and sometimes what you see at the very end, you've  
9 wondered where in the world did that come from.

10 But, in any event, that's a different one and that  
11 would be an appropriate time. And there will be adequate  
12 time between now and the time an appeal needs to be noticed,  
13 and certainly before it would be argued for what Mr.  
14 Repezynski had suggested would be needed to be accomplished.  
15 At least, then, everybody knows what the decisions are and  
16 what the parameters are, whether they agree with them or not.  
17 They can factor them into how they perceive from that point  
18 forward.

19 So I understand your position. I appreciate it. I  
20 think it's necessary to go forward. All right. We have five  
21 briefs, as I saw them. Originally, I asked for issues on the  
22 single representative rule and then when the briefs came and  
23 as I looked at them further, I felt that the issue of the  
24 affiliated entity rule has also been raised. So I asked for  
25 further briefs. They have come in and I've reviewed them.

1 So I will go ahead and turn it over to you all for your  
2 argument. I'm not sure who wants to perceive first, if  
3 you've discussed that amongst yourselves.

4 MR. ZUPAN: We did not, but it would be our view  
5 that since the FOA is the one trying to change the results of  
6 the election that they ought to probably.

7 THE COURT: Well that's perfectly okay. All right,  
8 if you'd like, to Ms. Sarvadi.

9 ORAL ARGUMENT BY COUNSEL FOR DEFENDANT

10 MS. SARVADI: Your Honor, it is FOA's position that  
11 the rights to be seated to the board are driven by one status  
12 as a member of the association. And there are two places  
13 within the governing documents in which the definition of  
14 member or the circumstances required to become a member are  
15 set forth. One is the Declaration, Article 15. And a unit  
16 owner becomes a member automatically upon title being  
17 transferred to that unit owner.

18 Interestingly, the unit owner under the Declaration  
19 may choose to allocate the voting rights associated with the  
20 unit to the tenant, but the tenant is nowhere defined or  
21 permitted to be a member. And, that's important, because  
22 status on the board of directors is driven by membership, not  
23 by any other rights under the documents.

24 "Bylaws," Article III, Section 1, defines a member  
25 very clearly; and, a member is defined as a person, a group

1 of persons or a corporation trust or other legal entity. So,  
2 a person is an owner and a person can be a member. A group  
3 is an owner and a group may be a member. And an entity is an  
4 owner and an entity may be a member.

5 We have cited the authority in our paper, so I  
6 don't think it's really disputed that officers of a  
7 corporation, or an LLC in this case, are separate and  
8 distinct from the corporate person, that is the company. And  
9 there's nothing in the documents that suggest by being an  
10 officer or director of the company who is a member, those  
11 officers and directors independently become members. And, in  
12 fact, it's our position that they do not.

13 So then we look to the qualifications for  
14 directorship, and that's found at Article V of the "Bylaws,"  
15 Section 1. And there are two sentences in that section and  
16 they use different terminology; and, we believe they do so  
17 for a reason. "The affairs of the owner's association shall  
18 be governed by the board of directors composed of at least  
19 seven natural persons who shall, after the first meeting, be  
20 members of the association. Therefore, one has no right to  
21 attain directorship on this board unless he or she is a  
22 member."

23 Certainly, an LLC is a member, and LLC may  
24 designate a representative to represent its interests on the  
25 board. Otherwise, they would be deprived of the right of

1 representation, which is not consistent with the spirit of  
2 these documents. But, the next sentence says, "At least one  
3 of the directors, but not more than two, shall be owners of  
4 commercial units." And I think there's a difference there,  
5 Your Honor, because membership gives you the right to be on  
6 the board; but, in the spirit and the intent of the drafters  
7 not to allow one group within the community -- and by group  
8 in this instance I mean residential versus commercial -- to  
9 control the board.

10 That protection is there both for the benefit of  
11 residential owners and commercial owners; for example, if  
12 there were seven residential owners on the board, they could  
13 act in a way that was not to the advantage or to specifically  
14 disadvantage all commercial unit owners, and vice versa. So  
15 to have a diverse board that represents all members of FOA,  
16 they did so in two ways. One is you had to be a member; you  
17 had to have that interest.

18 And, second, only two owners of commercial units  
19 may be seated to the board at one time, and those provisions  
20 are very important. And none of those are certainly in  
21 dispute except as to how they should be interpreted. There's  
22 no dispute, however, that those are the rules of the language  
23 of the governing documents. Gordon Properties' position is  
24 if you look at the Condominium Act under 55-79.78(B) the  
25 language is without any limitation any director or officer

1 may act on behalf of the entity. And the argument of Gordon  
2 Properties is that "any" can mean "every."

3 Inherently, however, that doesn't make sense. If  
4 you follow their position to its logical conclusion, the  
5 owner of a single unit, which happens to be a legal entity,  
6 could seat 7, 8, 12 officers. And, all of those persons up  
7 to 7 could be seated to the board subject to the exclusion of  
8 at least one, but no more than two must be commercial. So  
9 their argument is that the "without limitation, any" means  
10 all of them, which contravenes the clear intent of the  
11 drafter of the bylaws when they wanted to ensure diverse  
12 representation of the community on this board at any given  
13 time.

14 While "any" can mean "every," "any" can also mean  
15 one of a group. And I'm sure Gordon Properties' counsel did  
16 as much legal research as they could do to see if there's  
17 been any interpretation by the Supreme Court of Virginia with  
18 respect to this section. And there has not been with respect  
19 to what that means. We brought in our search further and  
20 looked for authority from the Supreme Court about the  
21 definition of "any," and we were unable to find anything to  
22 give guidance to this court. But, clearly, if their position  
23 were correct that "any" means "all," then you have no diverse  
24 representation. And the limits within the Bylaws have no  
25 effect.

1           There were other arguments raised by Gordon  
2 Properties with respect to the fact that this might have been  
3 waived by the association when they allowed multiple persons  
4 from Gordon Residential Holdings to run for election. With  
5 respect to that, we disagree with that position. If you  
6 remember, we run something of a tight timeframe last summer  
7 as the call for candidates went out to all members of FOA.  
8 When Gordon Residential nominated their candidates, I believe  
9 it was on the last day in which candidates could be nominated  
10 to run for the board.

11           At that time there was no court authority that  
12 sided with FOA or Gordon Properties or Gordon Residential on  
13 the interpretation of these bylaws. Moreover, there wasn't  
14 time to get that all done before the annual meeting. And, so  
15 rather than choose for them who their candidate could be, and  
16 rather than say none of those candidates could run, the  
17 decision was made to allow them to pursue all candidates, and  
18 as you know, the state court action was filed. So I don't  
19 believe that there's been a waiver of FOA's position on the  
20 legal question under the facts as presented.

21           It's not so terribly long and complicated an issue.  
22 The only other thing I'd like to say, Your Honor -- and again  
23 this goes to our position that directorship is tied to  
24 membership -- the votes allocated to units which are set  
25 forth in the Bylaws do run with the unit. So we are not

1 suggesting that a member, because he or it may own more than  
2 one unit, that their voting rights are somehow constrained.  
3 They certainly are not, but the voting rights are treated  
4 separately from the right to be seated to the board. And  
5 that's also reflected in the provision I cited to this court  
6 under the Declaration, because voting rights of the unit may  
7 be assigned to a tenant. But, the right to be seated to the  
8 board cannot be given to that tenant and cannot be severed.

9           There's nothing in the provisions that say that.  
10           There's also nothing in the governing documents that  
11 expressly states that one member may have multiple seats on  
12 the board. A member can have a seat. Multiple units can  
13 vote pursuant to their allocated voting rights under the  
14 governing documents. What I'd like to do at this point, Your  
15 Honor, is answer any questions you have or reserve some time  
16 to respond to Gordon Properties.

17           THE COURT: But the second issue was the affiliated  
18 entity issue.

19           MS. SARVADI: Yes, Your Honor. And third that we  
20 raise and I forgot to mention it, Your Honor, is the issue  
21 with regard to Mr. Howland. I'll turn first to the  
22 affiliated persons issue. We admit, Your Honor, there is no  
23 express terminology within the Bylaws that defines an  
24 affiliated person, or, as a result of any such definition  
25 says they cannot be seated to the board. But, I believe, as

1 again we've talked about the holistic structure that's put in  
2 place to govern this association and by Article V, Section 1,  
3 defining specifically who the director shall be, and ensuring  
4 those directors are not all similarly aligned in their  
5 financial and ownership interests, reflect an intent of the  
6 declarant to ensure a broad range of ownership.

7 I would agree that two independent entities  
8 existing, duly conducting business without any reason to  
9 believe that there was an inappropriate purpose for one,  
10 there's no provision in these Bylaws that says you cannot  
11 have each of them as members have one person seated to the  
12 board from their unit. The difference here, Your Honor --

13 THE COURT: What, one each?

14 MS. SARVADI: In other words, company ABC and DEF  
15 each happen to be owned by the same persons, but each was a  
16 validly existing, duly organized entity that ran. They could  
17 each have a member under the documents. This case is  
18 different. Up until 2008 Gordon Properties never sought to  
19 have more than one member seated to the board is what I have  
20 been advised by multiple members of the association. It  
21 wasn't until 2008 when Gordon Properties sold a unit to  
22 Gordon Residential Holdings.

23 Gordon Residential Holdings, as you know, is an  
24 LLC. It owns title to only one unit. That one unit is a  
25 studio unit rented out to a third party. The owners of

1 Gordon Properties and the owners of Gordon Residential are  
2 identical. And, it was within 90 days of the election in  
3 2008 in August of 2008 that Gordon Residential Holdings held  
4 its organizational meeting and nominated six officers to that  
5 LLC. Now, one could say there are reasons, strategically, in  
6 business why an LLC, a single-purpose LLC in this instance,  
7 might hold title to a single piece of property.

8           If you want to develop a piece of property, it  
9 makes good business sense to create the LLC to go through  
10 that business development exercise and sell those units as  
11 you develop the property. That's a valid business purpose.  
12 There's a question, I believe, that can be decided as to  
13 whether this instance was. This isn't a unit separately  
14 acquired by some third party that this LLC was dedicated to  
15 hold. This was Gordon Properties' own unit that it  
16 transferred to Gordon Residential Holdings, the only purpose  
17 for which it appears to have been done. And they've stated  
18 nothing to the contrary was to get another opportunity for a  
19 seat on the board.

20           But they weren't satisfied with one, because in  
21 2008 they also ran four candidates to the board of directors.  
22 Mr. Sells owns his own unit, individually. He has run at  
23 least two times, perhaps more, since acquiring his ownership  
24 interest. For that reason, we believe, that a board of  
25 directors could examine the issue of the relationship between

1 the parties and whether that newly created entity, under  
2 piercing the corporate veil analysis, is a lawful business  
3 organized for a proper purpose or was it an end run around  
4 the restrictions in the Bylaws that otherwise restrict the  
5 number of seats on the board of directors any one member may  
6 have.

7 That's that issue. The third issue that we raised,  
8 Your Honor, is with respect to Mr. Howland. And I do see  
9 there were two answers to the interrogatories. The first  
10 said, "Identify all of your members" -- excuse  
11 me -- "officers, the date they became an officer, and  
12 documents that relate to that fact." There were no documents  
13 identified in that response. There was a statement later,  
14 and on October 5th of 2011 there was a meeting of Gordon  
15 Properties, at which point Dennis Howland was named as an  
16 officer.

17 That document has never been produced. They  
18 advised they are looking for it, but it cannot be found.  
19 But, to the contrary, they were able to find an e-mail from  
20 Mr. Sells to Mr. Howland on October 4th, which we attached to  
21 our motion; and, in it, they said, "If elected, would you be  
22 willing to serve?" And Mr. Howland said, "Yes," to Mr.  
23 Sells. They have the resolution from Gordon Residential  
24 Holdings that was passed in August of 2008. They produced  
25 that document. It's part of both parties submissions to the

1 court or to the arbitrator with respect to Gordon  
2 Residential; but, they've not been able to produce that one  
3 document that shows Dennis Howland is an officer. But we're  
4 told that there was some meeting that day for which there's  
5 no record where he was named an officer.

6 THE COURT: Is that discovery you're referring to  
7 taken in the arbitration?

8 MS. SARVADI: Yes, Your Honor. And so while I am  
9 not going to be counsel in that arbitration, and I therefore  
10 have limited access, I was able to ascertain that that  
11 document was not found and not provided. And I don't believe  
12 that's being contested. So the other issue that has come up,  
13 and of which I wasn't aware until I was asked to get into  
14 this issue, was whether Mr. Howland can be seated to the  
15 board, given that there is a real question about his status  
16 as an officer and a representative of Gordon Properties.

17 So I believe at that point I have addressed the  
18 issues that we've brought to Your Honor's attention, but I  
19 would like to reserve a little time. Thank you, Your Honor.

20 MR. ZUPAN: Good morning, Your Honor. Michael  
21 Zupan, Mercer Trigiani on behalf of Gordon Properties.

22 THE COURT: Good morning.

23 //

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25 //

1 ORAL ARGUMENT OF COUNSEL FOR PLAINTIFF

2 MR. ZUPAN: Your Honor, it seems to me the place to  
3 start. Interestingly, it's the place that gets the least  
4 amount of attention from FOA, and that is the vote of the  
5 membership. We're not talking about directors who are  
6 appointed. Getting on the board is not an automatic option  
7 of any person running for the board. They're elected by the  
8 unit owners. We have the results of that election.

9 That election has been certified by this court and  
10 it is our position that to overturn that election there must  
11 be a very good reason. And, in our view, that very good  
12 reason has not been represented, either in the briefs or  
13 arguments here today. This election by the members, by the  
14 unit owners, in our view provides the checks and balances  
15 against some of the issues that were raised by FOA's counsel.

16 If the members of the association, if the unit  
17 owners, do not like the direction that the board is going,  
18 they do not believe that the decisions that are being made by  
19 the board are appropriate, they can elect new members. That  
20 is exactly what has happened here. Members were not  
21 satisfied with the way prior leadership was the direction  
22 that the association was going. In an election, new members  
23 were elected. Now, FOA wants this court to undermine that  
24 election and take away from the board -- and not allowed to  
25 sit on the board -- those people who were elected by the unit

1 owners.

2           There is no basis to do that. Next question  
3 presented to the court is who can the members vote for. Who  
4 are the unit owners entitled to vote for? What are the  
5 qualifications for the board? While there's no dispute over  
6 the language, it's Article V, Section 1 of the Bylaws, there  
7 is a dispute over how that's interpreted.

8           The Bylaws say that "The board is composed of at  
9 least seven natural persons who shall be members of the  
10 association. At least one of the directors, but not more  
11 than two, shall be owners of the commercial condominium  
12 units. If no commercial units have been conveyed, owners of  
13 the convertible space." Contrary to FOA's arguments, this  
14 does not say seven "different" members. It says seven  
15 members. The only condition is that it must be at least one  
16 owner of a commercial condominium, but not more than two.

17           That's important, because that shows that when the  
18 drafters wanted to impose conditions on who could serve on  
19 the board, they knew how to do it. They wanted at least one  
20 commercial condominium represented on the board and not more  
21 than two. They knew how to set those limitations. They did.  
22 It's in the documents. There's no limitation in there in  
23 this section that says, "A husband and wife who jointly own a  
24 condominium cannot each run for and serve on the board."

25           There's no language in there that says that if

1 individuals jointly own a condominium unit that they cannot  
2 run for and serve on the board if elected. In our view the  
3 business entity form of ownership is just another way of  
4 having the multiple ownership aspect of it. When you have a  
5 group of joint tenants, if they own the unit, they can each  
6 run for and serve on the board if elected. And, that's  
7 important -- "if elected." If they're not appointed by the  
8 entities, they must be elected. And, here, these individuals  
9 were elected.

10 The Declaration and the Bylaws, under Virginia law,  
11 they form the agreement of the parties. I cited the cases of  
12 White v. Boundary Channel and Sully Station. That's the  
13 agreement of the parties. The agreement of the parties here  
14 must be seven natural persons who shall be members of the  
15 association and under Virginia law the same cases. The court  
16 construes the governing documents as the contract between the  
17 parties, and they construe that as you would any other  
18 contract, given the plain and ordinary meaning to the words  
19 and examining the words that are actually used to convey the  
20 intent of the drafters. And, here, the intent of the  
21 drafters was that you had to have seven natural persons who  
22 must be members.

23 The only limitation is that at least one, but no  
24 more than two, commercial unit owners. So you look at the  
25 next question is who is the unit owner that can be a member?

1 And that question is answered in Section 55-79.78(B) of the  
2 Condominium Act. Now, Ms. Sarvadi already told the court  
3 that under the Bylaws -- I think was Article III, Section  
4 1-- member is a unit owner. Member is a unit owner, then we  
5 look at 55-79.78(B) of the Condominium Act, and it says when  
6 the condominium instruments provide that "Any officer or  
7 officers must be unit owners," which these documents do.

8 THE COURT: I thought we were talking about  
9 directors?

10 MR. ZUPAN: Well, we are talking about directors.

11 THE COURT: The section you just cited deals with  
12 officers.

13 MR. ZUPAN: Well, we also have to be a member to be  
14 a director. And who is a member? A member is --

15 THE COURT: Okay. I understand that, but what  
16 section of the Condominium Act gives the same privilege to  
17 directors as it does to officers?

18 MR. ZUPAN: I think it's the same section, because  
19 it talks about who's the unit owner in this context. Who's  
20 the unit owner in the context of corporate ownership?

21 THE COURT: Well, it limits it, though, and it  
22 directs it only to officers.

23 MR. ZUPAN: I'm not sure if I'm understanding what  
24 you're asking for. It clearly says the term "unit owner" in  
25 such context shall include any officer -- without limitation

1 any officer or director of a business unit owner. Did I  
2 answer the court's --

3 THE COURT: No.

4 MR. ZUPAN: Oh. Okay. May I ask you to --

5 THE COURT: Section 55-79.78, the section itself  
6 without regard to the subsections, is titled, and it says  
7 "Officers." It doesn't say "directors." And then in the  
8 text of the section, particularly in B, it says "If an  
9 officer is required to be a member, then an officer or  
10 director of the entity" -- Gordon Properties -- "is deemed to  
11 be a unit owner and can therefore serve as an officer." It  
12 doesn't say anything about serving as a director.

13 MR. ZUPAN: Oh. It would be our position, Your  
14 Honor, that characteristic is the same, because it defines  
15 who a unit owner is in a business entity context. It says  
16 that in the context of to be an officer of the association  
17 you can be a member of a corporate entity. And who can be  
18 that? It can be without limitation any officer, director,  
19 partner in or trustee of such person. So it is a very broad  
20 definition of who is the unit owner.

21 The unit owner is any officer or director without  
22 limitation of that unit owner. And it's our position that  
23 that same applies when you're looking for who is the -- for  
24 purposes of who may run for the board of directors. You look  
25 at who is the unit owner who can act as the unit owner, and

1 this provision provides that when the unit owner in the  
2 officer context, it can be any officer or director. Same is  
3 true for who can be elected to the board.

4 The way I looked at it and the way we believe is  
5 the appropriate way to look at it is it's just another form  
6 of joint ownership, just as if you had several persons owning  
7 a unit that they could each run for, and if elected, serve on  
8 the board. Well, to keep that consistent when those multiple  
9 owners own it by a corporate or business entity form, the Act  
10 and the documents also allow those multiple owners to the  
11 form of they're being officers in the entity to also run for  
12 and serve on the board. And I think that's --

13 THE COURT: Officers or directors of the entity.

14 MR. ZUPAN: Yes. I apologize. If you look at  
15 55-79.77(C), that to me supports this argument. And that is  
16 when you have joint ownership. It's under the "Voting"  
17 section of the Condominium Act. When you have joint  
18 ownership, it says, "If only one such person is present at  
19 the meeting, that person shall be entitled to cast the votes  
20 pertaining to that unit." To me that says each one of those  
21 persons, if they all show up, that has to be unanimous. You  
22 only get one vote. But any one of the persons, any one of  
23 those persons can come and vote.

24 So that again supports that any one of those  
25 persons constitutes the unit owner, constitutes the member,

1 and they can vote on behalf of that joint ownership. They're  
2 all there. It's got to be unanimous, but any one of them can  
3 act independently as the unit owner, as the member, and vote  
4 the value for that particular unit.

5 THE COURT: Well, your premise is that an entity is  
6 just a different form of joint ownership. Is that right?

7 MR. ZUPAN: Similar; it's similar to or analogous  
8 to, yes.

9 THE COURT: And, but for that premise you would not  
10 prevail here?

11 MR. ZUPAN: I don't think I agree with the court.

12 THE COURT: What other places do you have other  
13 than your assumption and predicate that they're still bound  
14 to -- its essence is an entity presumably with multiple  
15 owners. Maybe not. Maybe only a single owner is simply only  
16 another form of joint ownership.

17 MR. ZUPAN: No. I wouldn't say it's another form  
18 of joint ownership, and I apologize. My view is it's similar  
19 to, analogous to, because in the entity context it allows the  
20 officers to serve as opposed to the owners. I believe it  
21 allows both, but the officers can serve on the board. And I  
22 don't think the documents don't specifically go back and  
23 start talking about, you know, going into to try to divvy out  
24 who's the owners.

25 Because if it's a corporation and you're selling

1 shares, it's a different issue. So the statute talks about  
2 officers, directors, partners in -- depending on the type of  
3 entity ownership that you're dealing with. Those are the  
4 folks that are allowed to serve on the board, to run for the  
5 board. And I think in this particular context the actions of  
6 the association already addresses. They admit that it's  
7 appropriate for multiple members, multiple officers of an  
8 entity, to run for the board.

9           The officers of Gordon Residential submitted their  
10 applications, and I did take a little issue with the  
11 categorization or the reference to Gordon Properties, Gordon  
12 Residential, nominating individuals. Each of these  
13 individuals submitted a petition to run for the board. We've  
14 submitted to the court all those petitions. Each of those  
15 petitions was for an individual running for office, and each  
16 of those petitions was signed by three other unit owners, who  
17 are not part of Gordon Properties, Gordon Residential, or Mr.  
18 Sells. They were signed by separate individuals.

19           So each of those petitions for nomination was a  
20 separate, individual petition for nomination to run for the  
21 board. They were all accepted on behalf of Gordon  
22 Properties. They were put on the proxy statement. They were  
23 put on the ballot. There was nothing in the proxy statement  
24 or the ballot that said that there was any limitation on  
25 their ability to run for the office or on their ability to

1 serve, if elected.

2           The election was held, and now post-election FOA  
3 wants to come in and ask the court to say that there is some  
4 limitation on their ability to serve, now that they have been  
5 elected. And there's nothing in the documents that imposes  
6 that limitation. There's nothing in the documents that says  
7 that a candidate who ran for the board, who was appropriately  
8 ran for the board, who was elected by the membership to serve  
9 on the board is somehow then disqualified because some other  
10 officer of the same entity owner also ran for the board and  
11 was elected.

12           There's nothing in the documents that disqualifies  
13 those individuals. They each have a right to run for the  
14 board. They each have the right to serve, if elected.  
15 There's nothing in the documents that comes back and says  
16 only one of those officers and directors, without limitation  
17 is --

18           THE COURT: But you say there's nothing that  
19 prohibits it, and they say there's nothing that allows it.

20           MR. ZUPAN: Well, and in that circumstance I  
21 believe that Gordon Properties and the entities that are  
22 running for and seeking to serve on the board have the much  
23 better argument there. If there are limitations on the  
24 ability to serve, if there are limitations on the ability to  
25 act, those limitations in our view must be in the governing

1 documents or in the statute. They made the qualifications  
2 here. There are seven natural persons.

3 THE COURT: I thought that the Build America v.  
4 Gilliam established the proposition that unless there is  
5 statutory authority granted to the association, the  
6 association may not do it. In other words, a condominium  
7 association is an entity of limited authority, and it's the  
8 only authority it can execute is that which is granted by  
9 statute. And where in the statute is there permission to do  
10 what you're suggesting should be done?

11 MR. ZUPAN: Your Honor, I would suggest that that  
12 part and that language in the Gilliam Case is not applicable  
13 to this, because we're not talking here about what authority  
14 the board has to act. We're talking about what are the  
15 authorities to become a member of the board.

16 THE COURT: The essence of Gilliam is that  
17 condominiums are creatures of statute, and you are correct  
18 that in that case it was what the board could do. But, the  
19 entire condominium is a creature of statute.

20 MR. ZUPAN: Yes, sir.

21 THE COURT: And without the statute, there is no  
22 condominium.

23 MR. ZUPAN: Absolutely. It's a condominium  
24 association didn't exist. You couldn't have the rights and  
25 condominium property rights prior to the enactment of the

1 statute. And so we look at it. It's a combination of the  
2 Act, the statutory Act, and the documents, the condominium  
3 instruments. They formed the governing law for this  
4 organization, and in this case under the Act the drafters are  
5 given great leeway in how to draft the documents. They are  
6 given broad authority to draft the documents in the manner  
7 they think best for the association. And the association has  
8 opportunities, thereafter, to amend those documents and  
9 change things if the membership, the unit owners, decide  
10 after they -- a sufficient number of purchasing units -- they  
11 decide that the condominium instruments don't reflect how  
12 they want their organization to be governed. They have the  
13 opportunity to amend those documents.

14 So we're governed by the Act and the documents. As  
15 this is not an authority to act, if you want to place limits  
16 on people's rights, if you want to place limits on  
17 organization's rights -- if you want to say that a husband  
18 and wife cannot run and cannot serve on the board at the same  
19 time -- if you say that joint owners cannot serve on the  
20 board at the same time, those limitations need to be in the  
21 documents.

22 If you want to say that only one, only one officer  
23 of an entity owner can serve on the board at a given time,  
24 those restrictions must be in the documents. For the very  
25 same reason, there is a restriction in these documents. In

1 these documents, it says, "Must be one, but no more than two  
2 owners of commercial units can serve on the board." So there  
3 was a recognition by the draft of these documents as to how  
4 to put limits and what limits were appropriate on this board.  
5 That's the only limit that they put on this board. They did  
6 not limit only one. These documents don't limit only one  
7 person on the board per unit, only one officer of the entity  
8 owner as designated by the board, or only one officer of the  
9 entity owner as designated by the entity owner.

10 Those restrictions aren't in the documents. The  
11 only restriction in the documents is the limit on commercial  
12 unit owners. And, so, for the association to say to take  
13 away the rights -- and we're dealing with the rights of  
14 several persons here -- you're dealing with the rights of the  
15 unit owners, the membership of the association to elect the  
16 board of their choice. You're dealing with the rights of  
17 those persons affiliated with the entity unit owner to run  
18 for the board and serve, if elected; and, we're dealing with  
19 the rights of the unit association to elect the board of  
20 their choice.

21 So, if you're going to restrict those rights, those  
22 restrictions need to be in the document that this Virginia  
23 Court has said, this is the contract between the parties.  
24 These are the rules and the governing documents that apply to  
25 this organization; and, under these governing documents,

1 their only restriction is one, but no more than two  
2 commercial unit owners. There are no restrictions on the  
3 number of husbands and wives who could run and serve, if  
4 elected. There are no restrictions that say an entity unit  
5 owner is only entitled to one member on the board; and  
6 that's, I think, one of the fundamental distinctions between  
7 our position and FOA.

8           The documents form the contract. They set the  
9 limitations. They set the requirements. There are none  
10 here. If there were intended to be additional limitations  
11 beyond the one, but no more than two corporate owners, those  
12 restrictions also must be in the documents. You can't take  
13 the rights away from these various entities after the  
14 election based on restrictions that don't appear in the  
15 documents.

16           And we would also point out to the court that the  
17 number of candidates having these options contrary to the  
18 FOA's position, having an increased number of candidates  
19 available to serve is actually to the benefit to the  
20 association. Have an increased candidate pool for the  
21 members to elect gives the members better options to select  
22 their board and actually provides a benefit, rather than a  
23 detriment, to the association. And this comes back to where  
24 we believe it's appropriate. It's the vote of the membership  
25 that controls.

1           If the members don't want more than one husband and  
2 wife on the board, they don't want more than one joint owner  
3 on the board. If they don't want more than one officer of an  
4 entity owner on the board, they don't elect those; but, if  
5 they do elect them, that's their right to elect. That's  
6 their choice to elect. What the association is trying to do  
7 is basically undermine and take away the vote. They're  
8 trying to use an after-the-fact vote to take away the vote of  
9 the membership that they can't do on the front end. And so  
10 they are directly asking this court to disregard the vote of  
11 the membership and see the board that was not elected by this  
12 membership. And their position also, as I mentioned, ignores  
13 the rights of the candidates.

14           Each of these people was entitled to run and  
15 entitled to serve, if elected. There's nothing in the  
16 documents that takes that right away from them after the  
17 election has occurred. There's nothing that -- it would have  
18 been very easy for the drafters to add the language, which  
19 FOA now wants this court to impose in the documents. It  
20 already said if there was one, but not more than two  
21 commercial owners can serve on the board. They could just  
22 have easily said for any entity owner only one person can sit  
23 on the board.

24           They chose not to do that. This is even more true  
25 when you talk about Gordon Properties, because Gordon

1 Properties owns 39 units in this condominium. As we pointed  
2 out to the court, in the nomination for Lindsay Wilson, her  
3 nomination petition was as the owner of unit 328. The  
4 write-in votes for Mr. Howland were as the owner of unit 331,  
5 separate units, separate candidates. The membership voted.  
6 They're entitled to vote for both those people. Both those  
7 people were entitled to run. There's nothing in the  
8 documents that says they are disqualified, once elected. And  
9 our view of the way it should work is that the vote of the  
10 membership controls, that the candidates are entitled to run.

11 If the membership so elects them, they are entitled  
12 to sit on the board. And I would point out here Gordon  
13 Properties and Gordon Residential, as they group them, they  
14 only own 19% of the condominium. So if everybody  
15 participates in the election, they don't have the wherewithal  
16 to elect members on their own -- other entities, other  
17 parties, other owners have to vote for those entities.

18 THE COURT: They have to have a leg up.

19 MR. ZUPAN: Oh. They do have a leg up. That's the  
20 right of being an owner, just as somebody owns a bigger unit  
21 in this condominium, they have a little bit of a leg up on  
22 somebody who owns a smaller condominium. Our vote, their  
23 percentage vote's a little bit bigger.

24 THE COURT: And, in fact, they're a leg up in this  
25 case is almost assured that 19% of the association quorum

1 being barely over 50, they accounted for something like 35 to  
2 39% of the votes cast.

3 MR. ZUPAN: But that's because 49% of the members  
4 chose not to exercise their right to vote. I don't think  
5 it's appropriate to take action against Gordon Properties,  
6 because 49% of the First Owners Association chose not to  
7 participate in the election. They were entitled to be there.  
8 They all had notice of the election. They had notice of the  
9 annual meeting. They were entitled to be there and vote as  
10 they deemed appropriate. They chose not to participate.

11 I don't think it's appropriate to use their  
12 non-participation to the detriment as a reason to deny Gordon  
13 Properties and the individuals who are officers of Gordon  
14 Properties who are elected, their right to sit on the board.  
15 There may be a leg up, as you said, but if everybody  
16 participated, it was certainly not a sufficient leg up to  
17 just a point there's still a vote.

18 The membership has voted. There's nothing in the  
19 documents that says that those elected aren't entitled to  
20 serve. I think we talked about --- it was raised in the  
21 affiliated parties -- it seems to me that based on FOA's  
22 papers that that is no longer an issue. They admit in their  
23 documents that there's nothing in the Condominium Act or in  
24 the Declaration and Bylaws that addresses the affiliated  
25 parties, that puts any limitations on the affiliated parties,

1 even defines what an affiliated party is that that would  
2 somehow serve as some disqualification.

3           So I believe that it seems to me that that issue  
4 has been resolved that there is no prohibition against  
5 affiliated parties. Clearly, they are separate legal  
6 entities: Gordon Properties, Gordon Residential, Mr. Sells,  
7 are each separate individuals or entities. They each pay  
8 their assessments. They each have their independent right to  
9 vote related to their units. And there's nothing in the  
10 documents or in the condominium instruments, or in the  
11 Condominium Act, that precludes -- either defines  
12 "references" or disqualifies "affiliated" parties from  
13 serving on the board. That seemed to me to be no longer an  
14 issue in this case.

15           Lastly, with respect to Mr. Howland, who has  
16 already been seated on the board, that again -- that issue  
17 and his qualifications to serve on the board -- that has  
18 already been in our view decided by this court. There was a  
19 lengthy -- as I understand it. I was not participating in  
20 all his actions, but there as a lengthy process regarding the  
21 election and the results of the election, and objections to  
22 the election and objections to the election administrator's  
23 report.

24           At no time during that process, at no time during  
25 the vote on the evening of the election, was an issue raised

1 with Mr. Howland's candidacy. At no time during the whole  
2 process of verifying the elections and multiple objections to  
3 the administrator's report, hearings on the issues, at no  
4 time was any issue raised as to Mr. Howland being an officer  
5 of the association. He's already been seated on the board.  
6 To raise that, now, we think comes too late and is also  
7 factually not supported.

8 We submitted the interrogatory and document  
9 responses, both of which were under oath by Mr. Sells that  
10 the document -- they had a document. They had a meeting on  
11 the 5th of October. Mr. Howland was appointed as an officer.  
12 This is the same date as election when they got done and all  
13 the activities of the election, when they went back and  
14 reviewed their papers, they were unable to locate that  
15 specific paper from October the 5th, 2011, wherein Gordon  
16 Properties appointed Mr. Howland as an officer.

17 There's no dispute that that action was taken.  
18 There's no contradictory statements that that action was  
19 taken. The evidence before the court under oath is  
20 uncontradicted that he was appointed as an officer, that the  
21 paper documenting that has been lost. So that's just  
22 uncontradicted, and it's already been decided by this court.  
23 He's already been seated on the board.

24 That issue I think is also an issue that has been  
25 resolved and no longer need be addressed by this court. In

1 summary, Your Honor, it is Gordon Properties' position that  
2 any limitations on the rights of the owners to run for  
3 office, to serve, if elected, must be in the condominium  
4 instruments or in the Act. If the limitations aren't in the  
5 Act, aren't in the documents, then they're entitled to run.  
6 And if the vote of the membership has already been verified,  
7 there's nothing in the instruments or in the Act that  
8 disqualifies those elected from serving.

9           And it is our position that if the court is going  
10 to take the extraordinary step of disqualifying those  
11 elected, those criteria for disqualification must be set  
12 forth somewhere. They're not set forth in either the  
13 Condominium Act or the documents. The parties submitted that  
14 officers are entitled to run. There's nothing in the  
15 documents that if entitled to run and elected, you're then  
16 somehow disqualified.

17           Those disqualifications must be in the document  
18 somewhere, just like the limitation on commercial condominium  
19 unit owners being on the board is in the documents; and the  
20 other limitations that are to be imposed on the candidates  
21 must be in the documents. They're not here. Therefore, we  
22 would ask that all those individuals who received the highest  
23 number of votes in the election on October 11, 2011 be seated  
24 as directors of the board, and that that election be  
25 verified, as there's no basis for post-election

1 disqualification of any of those individuals.

2 THE COURT: Thank you very much.

3 REBUTTAL

4 MS. SARVADI: I will try to be brief. It's not  
5 about disqualifications. It's about qualifications and the  
6 rights to be seated to the board. And the right is that of a  
7 member; it's not of an officer of a member. They are not  
8 members in and of themselves, and they've cited no authority  
9 for that position.

10 Their position as you've pointed out stems from a  
11 provision of the Condominium Act that deals with the rights  
12 and powers of a person who might be an officer. And you  
13 raised an interesting question, and it drove me, Your Honor,  
14 to look at the Bylaws. And it's very interesting. The  
15 Bylaws, Article VI, Section 1, talks about the designation of  
16 those officers of the association, and it's very clear. The  
17 president and the vice president must be members; but, other  
18 officers need not be members.

19 Again, recognizing a distinction between the rights  
20 of a member to govern this association and those of people  
21 who are not, and these officers of Gordon Properties and  
22 Gordon Residential of themselves are not members. They only  
23 may act on behalf of a member. The other side also cites the  
24 voting language and cites the Code, the Condominium Act, with  
25 respect to voting powers of a unit. It's correct that the

1 Condominium Act says if there's more than one owner, either  
2 of them may show up and act on behalf of the unit. If they  
3 both show up, they have to be in agreement. Their decision  
4 has to be unanimous. That's consistent with --

5 THE COURT: Well, only if someone objects.

6 MS. SARVADI: If someone objects, in the Bylaws,  
7 it's consistent in the Bylaws. But what that shows is that  
8 it's still the one vote that's to be exercised. It doesn't  
9 create additional votes. They don't have the right to split  
10 it. They don't have the right to apportion their strength of  
11 the vote amongst different people if they don't have consent.  
12 And I believe that that is consistent with the logic that  
13 flows when a member is a non-natural person.

14 Any of those six officers, if, according to the  
15 company, they're allowed to execute a deed, which is the  
16 provision that they relied upon says, which might be  
17 different than just being an officer. But, if they have  
18 three, any of those persons could be elected and could be  
19 seated, but they can't all get seated at the same time and  
20 create three positions of power where only one right exists.

21 With respect to the Mr. Howland issue, with all  
22 respect to opposing counsel -- and he's not counsel in this  
23 case, so the timing is a little confusing. Mr. Howland  
24 didn't become an issue until the night of the election. So  
25 to say that there's some improper motive by dealing with this

1 post-election I believe is misstated, because FOA did seek  
2 the direction of the Circuit Court on Gordon Residential, who  
3 had nominated the multiple candidates in advance.

4 So that's one issue. Number two, there's a  
5 suggestion that we're disregarding the will of the people,  
6 and I understand the court's rulings with respect to the  
7 proxies that were challenged by Gordon Properties. This  
8 court has ruled they had no effect. They would not be  
9 counted. But, for Gordon Properties to say that the  
10 membership who chose to participate, the 51% who chose to  
11 participate, chose them to have six seats, which is the  
12 position between Gordon Residential and Gordon Properties  
13 they advocate. It's not, because the initial results before  
14 those proxies were discounted gave them three -- not six.

15 So if we're going to talk about the will of the  
16 people, and I understand this court's rulings, we need to  
17 talk about their full representation. And my final point is  
18 one attempt to be simple about it, but not trite. A business  
19 entity under the LLC Act, that entity is vested with all  
20 rights of a natural person. And we've cited that authority  
21 to you, but they don't get more rights, and that's what  
22 they're trying to do.

23 Unless the court has any questions for me, I have  
24 nothing further.

25 THE COURT: Thank you for your knowledge.

1 MR. ZUPAN: I would briefly respond to one point,  
2 Your Honor.

3 THE COURT: All right. Go ahead.

4 MR. ZUPAN: I appreciate that. I appreciate the  
5 court's indulgence. Under Section 55-79.78 it says that "The  
6 condominium unit's owner provide that any officer or officers  
7 must be unit owners, then notwithstanding the provisions that  
8 determine unit owner shall in such context be without  
9 limitation, any director or officer. Under these documents  
10 the president and the vice president must be unit owners.

11 The principal officers of the owner's association  
12 shall be a president and a vice president, and a secretary  
13 and treasurer, all of whom shall be elected by the board of  
14 directors. The president and vice president shall be members  
15 of the owner's association." So the president and the vice  
16 president must be an owner of the association under this Act.  
17 To qualify for that position they are without limitation any  
18 director, officer, partner and/or trustee of the association.

19 So when you read these two together, it's not just  
20 a situation where it applies only to officers as opposed to  
21 members, because under these documents and under the Act,  
22 because the Act says when the documents require that an  
23 officer be a unit owner here, the officer has to be unit  
24 owner. So, to qualify for the position, you have to be a  
25 unit owner. And what is a unit owner? A unit owner -- you

1 have to be a member. A member is a unit owner. Who is a  
2 unit owner? A unit owner is without limitation any director,  
3 officer, trustee.

4 That's very broad language in the Act -- "any,  
5 without limitation." FOA argues it doesn't say "all." It  
6 doesn't say "any and all." It does say "any, without  
7 limitation, director, officer." And so to be a president or  
8 vice president of the association, you have to be a member.  
9 To be a member, you have to be a unit owner. To be a unit  
10 owner, who is the unit owner without limitation any officer,  
11 director, member of a business entity.

12 And so I believe that that provision does directly  
13 apply. It does provide a very expansive definition of who's  
14 involved. With respect to Mr. Howland, I think that issue's  
15 been decided as far as his ability to serve on the board.  
16 He's already been seated. That issue's been determined, and  
17 we would ask that all the other unit owners, all the other  
18 individuals who have been elected by the membership as  
19 verified by this court be allowed to serve as elected. Thank  
20 you.

21 THE COURT: All right. Thank you.

22 Ms. Sarvadi, do you have anything else you want?

23 MS. SARVADI: I do, Your Honor. The point that I  
24 was raising with the provision about officers is that this  
25 board that is currently in power controlled by the floor

1 related to Gordon Properties persons designated an officer,  
2 the treasurer, who's not a board member. So there is a  
3 difference between the ability of one to be on the board,  
4 which is restricted to membership, but they may appoint for  
5 those other than the president and vice president.

6 THE COURT: Well, the treasurer is not a member of  
7 the board of directors.

8 MS. SARVADI: Correct, and she was not the woman  
9 who's been appointed by Gordon Properties. It was a  
10 unanimous vote of the board -- 5 -- and 2 were not present,  
11 but a unanimous vote of the board to appoint her as the  
12 treasurer. She's not a director. So it's not the same  
13 issue. And also with respect to Mr. Howland, the answers to  
14 interrogatories, which Gordon Properties did attach to their  
15 opposition, were signed by Mr. Sells in June of this year.

16 If the court recalls the trial on the election  
17 occurred in February, so, yes, there was a trial, and Mr.  
18 Howland's role as an officer wasn't contested. They were  
19 given to some extent the benefit of the doubt, but that issue  
20 was being argued in the arbitration, and so we don't believe  
21 it's been waived. Thank you.

22 THE COURT: All right. Thank you.

23 Let me take a look at the briefs. I'll return in a  
24 few moments.

25 [Recess.]

1 THE COURT: Thank you for your presentations this  
2 morning and your participation in the trial. It's been a  
3 lengthy trial with a lot of work, and I know that you've put  
4 a lot of effort into it, and I appreciate that.

5 OPINION

6 THE COURT: The issues that we're faced with today  
7 are these. The first is whether an entity which is the sole  
8 owner of a condominium unit may have more than one  
9 representative on the board of directors at one time, when  
10 membership on the board is limited to stated in Article V,  
11 Section 1, "Natural persons who shall be members of the  
12 owners association."

13 The second is does the answer change when the  
14 entity owns more than one condominium unit, although each  
15 unit is solely owned by that entity. These two questions I  
16 call the single representative rule. And the third question  
17 is can related entities or entities related to individuals  
18 collectively have more than one representative on the board  
19 at one time and that of course would depend in part on the  
20 outcome of the first two questions. This we call the related  
21 entity rule.

22 In this case we're dealing with an entity, Gordon  
23 Properties, as an LLC. I think residential holdings is a  
24 corporation or an LLC. I can't remember it directly, LLC.  
25 And I use the definition as I discuss this further: an entity

1 is entity is any owner other than a natural person. So if I  
2 say entity, it's not a natural person. That is to say a  
3 corporation, partnership, LLC, business, trust, whatever.

4 A representative, as I'll use the term today, is a  
5 representative of the entity who is in fact a natural person.  
6 It is also understood that membership on the board of  
7 directors is limited to seven natural persons who are members  
8 of the owners' association. In this case Gordon Property  
9 owns 39 units. Court and residential holdings owns one unit,  
10 and Bryan Sells owns one unit. Each unit is solely owned by  
11 one of the two entities or Bryan Sells individually.

12 The resolution of these issues is not controlled by  
13 the policy resolution that we've discussed in the past, but  
14 is inherent in and is controlled independently of the policy  
15 resolution by the Condominium Act or the association's  
16 Declaration and the association's Bylaws, that is, the  
17 condominium documents. Now, I understand that there may have  
18 been some action taken with respect to the policy resolution.  
19 It may have been revoked ore repealed at the October 2011  
20 annual meeting, or later by the new board of directors after  
21 it convened.

22 The extent and validity of the policy resolution,  
23 whether it is extant or not, is not before the court. Relief  
24 was granted from the automatic stay so that it could be  
25 presented to an arbitrator, or, actually to the circuit court

1 and it then went to an arbitrator by a demand arbitration. I  
2 granted relief as to the enforced building against  
3 residential holdings, because it appeared to be a state law  
4 question that did not affect the outcome of the 2011  
5 election. Now, there was an agreement in the Circuit Court  
6 enjoined residential holdings from enforcing the related  
7 entity rule as to the 2011 election, and residential holdings  
8 agreed, I think, independently of the injunction, but in any  
9 event that there would be only one representative would  
10 serve, if elected.

11 At that time, Gordon Properties was running only  
12 one representative. There's a ruling in the Alexandria  
13 Circuit Court, immediately before the annual meeting with  
14 respect to the number of representatives that an entity could  
15 have on the board of directors at one time. And the Circuit  
16 Court enjoined more than one representative of residential  
17 holdings from serving at that time.

18 At that point, residential holdings was the only  
19 one who was before the court. Relief from stay hadn't been  
20 granted yet as to Gordon Properties, if I recall correctly  
21 the timing. Gordon Properties did not appear to be similarly  
22 enjoined, but thereafter sponsored a write-in candidate, Mr.  
23 Howland, I believe, who, if elected, would place two  
24 representatives on the board of directors, simultaneously, a  
25 result that the Circuit Court denied to Residential Holdings.

1 Now, how do these two rules affect the outcome of  
2 the election? If an entity can have more than one  
3 representative seated simultaneously, it could name as many  
4 representatives as are seats on the board of directors, in  
5 this case seven. And if all seven were elected, every member  
6 of the board of directors would be a designated  
7 representative of that entity. There are certain restrictions  
8 in these documents as to the commercial units, but not as to  
9 residential.

10 The related entity rule would limit in this case  
11 Gordon Properties residential holdings and Bryan Sells to one  
12 representative on the board of directors, rather than one  
13 each. That would be three, if all three are elected. If  
14 they only ran one per unit, that would be the result if  
15 elected. So you have two different rules, and they do make a  
16 difference in this case.

17 Gordon Properties holds about 19% of the total vote  
18 in the association. The quorum requirement here is 50%,  
19 which turns out to have been improvidently probably to have  
20 been issued, although I understand in 1976 when these were  
21 drafted and there was less experience, there were different  
22 concerns for that. It has been difficult to obtain that  
23 quorum, and there was a quorum of about 55% at this  
24 particular meeting.

25 Clearly, with a total of 19% of the vote, Gordon

1 Properties was in a strong position to influence, more than  
2 any other individual owner of the outcome of the election;  
3 and, in fact, it had the ability to cast about 30 plus  
4 percent of the total votes at that meeting, but the seven  
5 winning candidates being the ones with the highest number of  
6 votes. So it put them in a very strong position to determine  
7 the outcome in one way or the other, particularly depending  
8 upon the outcome of these two rules.

9 The outcome placed Bryan Sells, one representative  
10 of residential holdings, and two representatives of Gordon  
11 Property on the board, unless one of these other rules  
12 applies. If neither rule applies, Gordon Properties would  
13 have four representatives on the seven-person board. If the  
14 single representative rule applies, it will have three on the  
15 board of directors. If the affiliated entity rule applies, it  
16 will have, perhaps, only one representative on the board. In  
17 fact, it would be just one.

18 My order seated four representatives, because I was  
19 under the impression that time that these rules arose only  
20 under the policy resolution. Ms. Sarvadi agreed or argued  
21 that they arose under the Condominium Act when I announced  
22 the decision. That's not something I had focused in on  
23 earlier. My initial feelings was the association had not  
24 previously raised it in that form, and that it would be  
25 waived because the trial was over and the announcement of the

1 decision had been made.

2 I suggested that if she felt differently, that it  
3 had been raised, if she could file a motion to reconsider,  
4 and I would certainly timely consider that. As I was doing  
5 the final orders and upon further reflection it occurred to  
6 me without regard to whether it was fully raised, it is  
7 important to the outcome of the election. And since it's  
8 under judicial supervision, I have the obligation to apply  
9 the proper rules to determine who wins and who does not.

10 And I had not considered those in there, and it was  
11 necessary to take a look to see if those rules should be  
12 applied and if they should be applied, how they might modify  
13 this. So this is a matter that was raised by me, sua sponte  
14 by me, because I had not focused on these earlier in these  
15 situations. We first scheduled argument on the single  
16 representative rules when the briefs came in that looked to  
17 me like there was argument further that could be argued with  
18 respect to the related entity rule, and so I asked for  
19 further briefing, and that's how we got here today.

20 One thing I would mention at the beginning, and  
21 it's quote appropriate when we're dealing with condominium  
22 associations, they've always been viewed as many democracies  
23 and the language of democracy and the rhetoric has always  
24 been with the condominiums, very local government, you might  
25 say. And it not surprisingly runs throughout this case in

1 the briefs and in the argument today.

2           Fortunately, I think it's all been within bounds,  
3 reasonable bounds, in the discussion of both the aspirations  
4 and fears inherent in Democracy. Without intending to  
5 disparage Democracy, which I would not do, I would refer to  
6 Winston Churchill, because I think it focuses a little bit on  
7 what we're doing here. He is reputed to have said that  
8 Democracy is the worst form of a government ever devised by  
9 mankind, except for all the others. And I don't think he was  
10 intending to denigrate Democracy there. He, heroically,  
11 defended it as we all recall.

12           I think, though, he was extolling its greatness,  
13 but at the same time recognizing its limitations, and in fact  
14 some of its weaknesses. And, here, the parties do the same.  
15 Gordon Properties is more inclined to wax eloquently on the  
16 virtues of freely elected directors, the benefit of the  
17 association for having the best directors out there, to the  
18 members being able to vote for whom they see fit, and the  
19 candidates to freely participate in the Democratic process.  
20 And they praise the unfettered ability of members to elect  
21 the best candidates as they see fit.

22           The association on the other hand has the tendency  
23 to sound the alarm and the fear of the subversion of the  
24 Democratic process by a minority seizing control of the  
25 association and imposing its will for its benefit, not the

1 will of the members or for the benefit of the association and  
2 its members. Of course, the rhetoric itself does not  
3 materially assist me in the resolution of the case.

4           Gordon Properties takes Churchill's praise of  
5 Democracy to the best form ever devised and says that running  
6 for an election of the board should be an unfettered right.  
7 But, in fact, we know it's not an unfettered right to run for  
8 the board or in fact if elected to serve. These rights are  
9 constrained by the Condominium Act and the Condominium  
10 documents. Directors must be members. Non members do not  
11 have a right to serve on the board of directors. Members do  
12 not have a right to vote for non members to sit on the board  
13 of directors.

14           Directors must be natural persons. At least one  
15 director must own a commercial unit, but not more than two.  
16 So there are restrictions. It is not an unfettered  
17 situation. On the other hand, Churchill's acknowledgment of  
18 the imperfections of Democracy raises the association's fear  
19 of minority ruling with an iron fist. Of course, this is  
20 nothing new. It was the argument presented during the  
21 ratification of 8 to the Constitution, Madison addressed in  
22 the 10th Federalist Paper. He argued, oh, this isn't going  
23 to happen, because we have a large republic and there are  
24 many differing factions.

25           But today we call them, I suppose, special

1 interests that would divide shift and align, and then a  
2 minority would never have effective control over the  
3 government. So the argument -- neither of these arguments  
4 are new. The Virginia General Assembly recognized the  
5 potential, though, of this problem, and addressed it in part  
6 in Section 55-79.77(E), which says that "If 50% or more of  
7 the votes in the Unit Owners Association appertained to 25%  
8 or less of the units, then in any case where a majority vote  
9 is required by the condominium instruments or by this  
10 chapter, the requirement for such a majority shall be deemed  
11 to include in addition to the specified majority of the votes  
12 assent by the unit owners of a like majority of the units.

13 So, at first, it's a little confusing. Basically,  
14 you've got to get a majority of the votes and a majority of  
15 the number of units from weighted voting to adding to that  
16 one unit one vote principles. But there they faced it. They  
17 limited the particular application to particular  
18 circumstances.

19 The rhetoric, of course, is always heartrending and  
20 raises wonderful, patriotic feelings, but condominiums are  
21 different from public, governmental electoral processes and  
22 private corporate governance, here, the condominium. They're  
23 not identical. In the public, it's a one-vote -- one  
24 person/one vote -- and the condominium, that's not the case.  
25 It's all weighted; almost all condominiums are weighted, not

1 necessarily, but the Code as written by the General Assembly  
2 allows it. And most condominiums invoke it. There's  
3 weighted voting.

4 Larger units get more votes, more weighted votes.  
5 They pay of course for that and more condominium fees. So it  
6 goes hand-in-hand. Every unit -- not every number -- gets to  
7 vote. Now, that means if a person owns more than one unit,  
8 he gets to vote more than once. That's not true in a public  
9 election for governmental positions. So we have both the  
10 aspirations and the fears that are discussed, and once you  
11 can name something, doesn't give me the outcome and the  
12 resolution.

13 So, appealing to bias, prejudice, fears, judicial  
14 decisions are based on the facts and the circumstances -- not  
15 those issues. I'm not deaf to the values expressed, the  
16 principles underlying the hopes and fears are well  
17 articulated. They're informative. They provide familiar and  
18 comfortable framework, but they are no substitute for the  
19 analysis that we must undertake.

20 Now, turning to the first issue, which is a single  
21 representative rule, the rule, if there is one, arises in  
22 this case under the Virginia Condominium Act or the  
23 Association's Declaration and Bylaws. I can find no Virginia  
24 case law deciding this point of law, and so my rule is to try  
25 to determine what the Virginia Supreme Court would do if it

1 faced the same issue.

2 I think it would start with the Condominium Act,  
3 and Section 55-79.73(A) says that the Bylaws are recorded to  
4 be with the Declaration, which they were. Section  
5 55-79.73(B) says that the Bylaws shall provide or may  
6 provide, and if so for an executive organ which we call the  
7 board of directors. Here, the Bylaws do provide for that in  
8 Article V, Section 1, that says "The affairs of the  
9 Association shall be governed by the board of directors."  
10 And then it goes on, which is the language we're concerned  
11 with.

12 "Composed of at least seven natural persons who  
13 shall be members of the Association, at least one of the  
14 directors, but not more than two, shall be owners of  
15 commercial condominium units." So the question becomes who  
16 is a member, and we look to the Bylaws, Article III, Section  
17 1 has been cited here today. "Every person, group of  
18 persons, corporation, trust or other legal entity, or a  
19 combination thereof, which owns a condominium unit, shall be  
20 a member of the owners association, provided, however, that  
21 any person, group of persons, corporation, trust or other  
22 legal entity or combination which holds such interest solely  
23 as security shall not be a member.

24 Every member shall remain a member until such time  
25 as his ownership ceases for any reason, at which time his

1 membership shall automatically cease." So, what we have in  
2 Bylaws, Article V, Section 1 are two qualifications. You  
3 must be a natural person; you must be a member. But Article  
4 III, Section 1 says a member is the entity that owns the  
5 unit. Now, very straightforward construction would say that  
6 an entity cannot sit on the board of directors. It is not a  
7 natural person; nor can it appoint a representative, because  
8 a representative is not a member. It is the entity that is  
9 the member.

10 Of course, the shareholder of a corporation or a  
11 member of an LLC can't serve under any circumstances.  
12 They're not an officer or director of any of the like. But,  
13 we know that that rule of excluding an entity just isn't  
14 right, because that's not what we've done; not only in this  
15 condominium, but generally. And, certainly, in this  
16 condominium, as Ms. Sarvadi started out saying, there's no  
17 contest that Gordon Properties can't sit on the board of  
18 directors. And that's certainly been the whole case.

19 If that argument had been made that they couldn't,  
20 we would have resolved this much earlier had they been  
21 correct about that interpretation, because it would have no  
22 longer have been an issue about whether a delinquency  
23 occurred, because it wouldn't have been able to sit in any  
24 event, whether there was delinquency or no delinquency. So  
25 from the practice of the Association consistent

1 interpretation, we know that Gordon Properties and  
2 Residential and every other entity that is the owner can sit.

3 Well, this is resolved by the Condominium Act, but  
4 not the documents. It's 55-79.78(B), what appears to be  
5 resolved. It says, "If the condominium instruments provide  
6 that any officer or officers must be unit owners, then  
7 notwithstanding the provisions of Section 50, the term 'unit  
8 owner' shall in such context, unless the condominium  
9 instruments otherwise provide" -- which they do not -- "be  
10 deemed to include without limitation any director, officer or  
11 partner, et cetera, which either alone or in conjunction with  
12 another person or persons is a unit owner."

13 It goes on to say that "If the officer becomes  
14 disassociated or ceases to be such an officer of the entity,  
15 he disqualifies himself from office and ceases to be an  
16 officer." I don't think there's any doubt that although LLCs  
17 are not mentioned in Section 78(B) that they are included,  
18 Virginia Code, Section 1-231, I believe, defines a person.  
19 And it says, "Whenever the term 'person' is used, or wherever  
20 'person' is defined to include both the corporation and a  
21 partnership, it shall also include a business trust and LLC."  
22 So an LLC is by terms of Virginia Code included.

23 The equivalent positions of an LLC are managers and  
24 managing members. So, in this case, both Gordon Properties  
25 and residential holdings, any officer or director also is

1 considered a unit owner, and that would be a manager unless  
2 they have officers and a managing member. One thing I do  
3 not, although 79.78(B) refers to 79.50, 50 then refers to  
4 79.41, which defines "unit owner" as one or more persons who  
5 owns a condominium; and, "person" means a natural person,  
6 corporation, partner, association or entity capable of  
7 holding legal title.

8           What I note where a representative ceases to be an  
9 officer/director of the entity is the representational  
10 connection between the officer and director and the entity is  
11 severed. And once that happens, his right to be deemed a  
12 member and sit on the board automatically is severed as well.  
13 So it's the representational capacity between the director  
14 and the entity. That is what is important.

15           So we are back to the qualifications of a natural  
16 person and membership, which includes the officer or  
17 director, which I include -- a member, manager or a member in  
18 an LLC. But they are derived, and derivative from the entity  
19 that is the owner. But that's as far as they go. They don't  
20 say every director or every officer. They don't say only one  
21 director or one officer.

22           There is the use of the word "any" in 78(B), but  
23 none of those answer the question. And what is the best  
24 estimate of what did the Virginia Supreme Court do? The  
25 Bylaws are subject to the Condominium Act, and a Condominium

1 only has those acts, those rights and powers deriving from  
2 the Act, because they're all creatures of statute. It is a  
3 contract. The Bylaws and Declaration are contract that need  
4 to be construed.

5           The Condominium Act, the Declaration, the Bylaws,  
6 do not specifically address this. Roberts Rules of Order are  
7 not helpful. The Corporation Act is not helpful. Mainly,  
8 corporations don't have a membership requirement on sitting  
9 on the board of directors, which means they don't have to be  
10 shareholders of the entity. The condominium, it seems to me,  
11 there are a number of issues. It's a financial transaction.  
12 It's an investment is one. It's frequently used as a home,  
13 so it's not just a straight financial investment, although  
14 that may be rented out.

15           So, in addition to the purchase price in the  
16 financing, there's a continual responsibility for condominium  
17 fees, which go to maintenance upkeep, operation of the  
18 condominium and benefit the unit as well as the association.  
19 There's also the element of regulating use, especially the  
20 common elements, the parking, the use of the facilities, the  
21 swimming pool, if there's one there. And, the idea of the  
22 Condominium Act is that all owners have the ability and the  
23 right to participate in reaching those decisions.

24           The decisions of the board of directors affect  
25 their investment, their ongoing obligations and their use and

1 enjoyment of the real estate. If we go back to the original  
2 proposition and say without the additional language of  
3 officers and directors of an entity being able to be  
4 considered members, you end up with entities not being able  
5 to participate in management. They're not a natural person  
6 and their representatives are not the members. And this  
7 would impair their investment, their ongoing expenses, their  
8 use and enjoyment of the real estate, either by themselves,  
9 if they use it in the case of commercial spaces and office,  
10 or by a lessee if they lease it. And it gives a more  
11 favorable treatment to a unit owner who's a natural person  
12 than a unit owner that's an entity.

13 So I think that the purpose of putting 55-77.78(B)  
14 in the Code was to recognize that without it there isn't any  
15 quality based on the nature of the holdship of the real  
16 estate. And what it does is it puts entities on the same  
17 level as natural persons. It gives them the same rights and  
18 privileges as a natural person by allowing their officers or  
19 directors to serve on the board of directors of the  
20 association.

21 Of course, the entities are subject to the same  
22 burdens as a natural person's, but I think that the essence  
23 of Section 78(B) is to treat all owners, without regard to  
24 the form of ownership equally. And equality is a two-way  
25 street. While it gives the entity equality and it gives them

1 the same rights as a natural person, it doesn't give them  
2 more rights than a natural person would have.

3 So the question is what kind of a natural person  
4 who owns a condominium unit in his or her own individual name  
5 do with respect to serving on the board. I'm not  
6 addressing -- I make a note -- of a situation where I have a  
7 joint tenancy. These units are all owned by one entity, so  
8 it's the same as one individual, natural person owning the  
9 entire unit. There are no concurrent ownerships involved in  
10 this case.

11 Well, a natural person could only occupy one seat  
12 on the board of directors at a time; and, no matter how many  
13 votes he gets, he's only elected once. And he occupies that  
14 one seat and he has only one vote when the votes are taken on  
15 the board of directors. So the equality rule says an entity  
16 should be similarly restricted. So while every officer and  
17 director of an entity may be eligible to serve and to run for  
18 the association's board of directors as his entity's  
19 representative, that does not entitle them all to serve  
20 simultaneously.

21 Each of them can be nominated, but only one of  
22 them -- the one with the most votes -- can serve. And it  
23 provides an equality that would otherwise be missing and it  
24 prevents the quality granted from giving them an entity a leg  
25 up by offering or holding more than one directorship, which

1 is something a natural person cannot do. Does this change if  
2 an entity owns more than one unit, each unit being owned by  
3 the entity itself without a co-owner? That is no concurrent  
4 ownerships there -- no concurrent estates.

5 I'd follow the same analysis. It is to afford the  
6 entity's equality with natural persons, and what happens when  
7 a natural person owns multiple units in his or her own  
8 individual name. Again, the winner is the one who receives  
9 the most votes without regard to the number of units owned.  
10 He or she can only occupy one seat on the board of directors.  
11 Now, he may be able to vote twice because he's got two units  
12 and he gets a vote with each unit, but he can only be elected  
13 once and, the same result with an entity.

14 An entity that owns 39 units is going to get to  
15 vote 39 times, although the voting on each of those will  
16 weigh differently. The store-front unit has a much heavier  
17 weighting than the others, but they can still only seat one  
18 director. It doesn't matter where the director says he is  
19 being nominated from. Now, the question is which officer or  
20 director is elected.

21 No one has pointed to any provision in the  
22 Condominium Act, Bylaws, or Declaration that would say which  
23 director if the entity it is. Does it have to be a  
24 president? Does it have to be someone who can sign deeds?  
25 Does it have to be someone with real authority? Can it be a

1 second vice president or a third assistant secretary whose  
2 sole duty is to sit on the board of directors?

3 I think it can be any of those. It can be an  
4 officer created by the entity solely for the purpose with  
5 sole responsibility to represent it by sitting on the board  
6 of directors. It need not have any real authority to run the  
7 organization, to execute deeds, mortgages or anything of that  
8 nature. That's a situation between the entity and the  
9 director. It's their responsibility to figure that out, and  
10 it has nothing to do with any of the third parties that are  
11 out there.

12 Now, interestingly, when you refer to Section  
13 77(C), that deals with voting at an annual meeting and it  
14 deals with a situation in part where there's concurrent  
15 ownership, that is more than one person owns it. Whoever  
16 gets up and votes controls, unless the other one gets up and  
17 says "I disagree," in which case the vote won't be counted.  
18 However, it also puts a restriction on an entity to have  
19 someone there who can execute deeds; so, it's a different  
20 restriction on voting at an annual meeting as opposed to  
21 holding the seat on a board of directors.

22 You don't have to be able to execute deeds to sit  
23 on the board. Now, it is interesting when we looked at it  
24 this morning. Section 78(B) addresses officers only. It  
25 does not address directors; and, there is a difference

1 between an officer and director. It's longstanding  
2 distinction and corporate law. The directors are sitting as  
3 a board to manage overall the corporate affairs, the officers  
4 are the line officers who actually make the day-to-day  
5 decisions.

6           There are many situations, I suppose, where the  
7 difference is not significant or is clouded. But they are  
8 words that are used separately. The Condominium Act uses  
9 both of them as does the Bylaws. So does Section 78(B),  
10 which allows officers of an entity to be officers of the  
11 association by its omission of directors prevent an entity  
12 from having a director, one of its officers is a director of  
13 the association. I don't think so.

14           One way of looking at it is the language itself.  
15 It says, "If any of the officers must be a member, then we  
16 will construe all officers and directors to be unit owners,  
17 so that they're deemed to be a unit owner and can sit." And  
18 so the predicate to invoke that "deemed to be" is that if any  
19 officer must be a unit owner. And, in fact, these documents  
20 require the president to be a unit owner. So on that very  
21 narrow reading, you could say this provision is invoked for  
22 these documents, which I think is a logical reading.

23           I would actually go further and say that all  
24 directors are covered, even in an association where the  
25 office or director for the association is covered even where

1 that provision would not be invoked, because the officers  
2 themselves would not be unit owners. I think it's simply an  
3 application of the equality principle to entities. It is  
4 certainly consistent with the past practice of this  
5 association, and I think it applies to all directors,  
6 although the statute infers it rather than states it  
7 directly. I see no logical reason to draw a distinction  
8 between officers and directors in these instances.

9 Now, there is an objection to the qualifications.  
10 Mr. Howland -- is he an officer or a director. Was he at the  
11 applicable time? And on that I have to say that we held an  
12 evidentiary hearing and no evidence was presented, and the  
13 objection was not raised. That evidence was closed and I  
14 took it under advisement and reached a ruling. It's too late  
15 to consider things outside the record. They're not subject  
16 to examination, cross-examination and all the things that go  
17 with it.

18 There is a dispute between the parties as to what  
19 it all means, what these papers that had been attended to the  
20 briefs mean. Was Mr. Howland, in fact, a director at the  
21 applicable time? There's a missing document. Those are  
22 factual issues that would have to be decided. They were not  
23 pled. They were not argued. The evidence wasn't presented.  
24 And I'm not going to consider them at this point. I consider  
25 any objection to his qualifications as a director to have

1 been waived or if it's raised to say there's insufficient  
2 evidence to show that he's not qualified.

3 I think the burden is on those who seek  
4 disqualification rather than to show that every candidate  
5 must prove he is in fact qualified in the circumstances in  
6 which presented with this case. The discovery was not in  
7 this case, was in the arbitration. Now, the last is the  
8 affiliated rule, entity rule. I again start with the  
9 Condominium Act, the Declaration and the Bylaws, and there's  
10 simply no provision that remotely comes close to restricting  
11 membership on the board of directors to one representative of  
12 a group of affiliated entities. And I don't see the logic of  
13 extending the single representative rule to the affiliated  
14 entities rule.

15 Again, if I look at natural persons, simply because  
16 mom owns one unit and a son or daughter owns another, there's  
17 no disqualification of mom, son or daughter. They can  
18 all -- each has his own investment. Each has his own  
19 obligation for current expenditures. Each has his right to  
20 use and enjoyment. They own two units. They're separate.  
21 They're certainly related, but I don't think that says, well,  
22 only one family member can sit on the board of directors when  
23 different family members own different units. And I think  
24 that's the same with entities.

25 You may have two, separate entities that are

1 legally separate entities, and they can each have their own  
2 designated representative on the board of directors. We  
3 frequently refer to the relationship between corporations as  
4 a brother-sister corporation, a parent subsidiary, and I  
5 don't see any difference in a natural relationship than what  
6 we tend to refer to them in those considerations.

7           There is in addition no guidance anywhere as to  
8 what relatedness would be. If there are two entities and one  
9 common member of them, one who owns five percent in both of  
10 them, is that a related entity? What about twenty-five  
11 percent or ninety percent? What if it's five percent in one  
12 and fifty percent in the other; getting into all sorts of  
13 questions to which there is no guidance? What if they're two  
14 different units owned by two different LLCs, and each LLC the  
15 membership is not natural people, but again a corporation or  
16 an LLC? How far down, how much overlap do you need to have a  
17 related entity situation?

18           So I don't think there is a related entity rule.  
19 Now, let me mention a couple of things that have come up.  
20 One is I'm not addressing the co-tenancy situation, tenancy  
21 by the entirety or joint tenants, or tenants in common. All  
22 units here are single-owner, and I'm not expressing an  
23 opinion on whether if a unit is co-owned by two natural  
24 people, be they related by marriage or otherwise, what their  
25 particular rights would be. Certainly, they are members.

1 They're voting issues under 77(C), and under Article VI,  
2 Section 6 of the Bylaws. So I'm not addressing can both  
3 husband and wife serve at the same time.

4 That's not before me, and I don't have to reach it.  
5 I can see good arguments both ways. Each is a member in  
6 their individual right, and that may be enough to answer that  
7 question. But, there are interesting things that arise out  
8 of that. I don't find the analogy to say that an entity is  
9 analogous to a joint tenancy to be helpful. They're not.  
10 It's an analogy that really falls flat for me.

11 An entity is a separate entity and distinct from  
12 the owners of that entity. And, while I understand that it's  
13 an analogy, I just don't see the connections that would allow  
14 us to jump from a tenancy in common with three people to say,  
15 well, then three directors can also serve. In one instance  
16 you're dealing with a single owner, the entity, who has his  
17 equal rights; and, in the other, which I'm not ruling on that  
18 they could have three seats or that they could each run, may  
19 derive from different circumstances. But, the analogy just  
20 doesn't seem to me to be particularly helpful.

21 Now, that's not to say with respect to the related  
22 entity rule. And I think this is what Ms. Sarvadi was  
23 raising more than anything else, is that there may be an  
24 instance in some association under some circumstances where a  
25 unit owner who owns more than one unit tries to manipulate

1 the association in an impermissible way by changing the  
2 nature of ownership, requiring different units in an effort  
3 to achieve something indirectly that cannot be achieved  
4 directly, for example, or for improper motives or improper  
5 conduct, and is in essence manipulating improperly the  
6 system.

7 I think that a court of equity can grasp hold of  
8 that and can prevent inequitable conduct, but that was not  
9 requested in this case, and the evidence was not presented in  
10 this particular case. There is some dispute hearings as to  
11 who acquired what unit when, but the motives and the reasons  
12 for it were not put in issue and were not litigated. So  
13 while it may be an equitable remedy in certain circumstances,  
14 that's not one that would be raised or was asked for in this  
15 particular case.

16 Now, there was some discussion of who nominated the  
17 various candidates. I don't put any wait in that. The  
18 qualifications to sit on the board are unrelated to who  
19 nominates the candidates, or from which unit the nominations  
20 come or which unit the candidate owns. The only requirement  
21 is that the candidate be a natural person and a member of the  
22 association with the extension as we've discussed.

23 Ms. Wilson is a manger or managing member of Gordon  
24 Properties and is entitled to be a candidate; and, if elected  
25 subject to our prior discussion, to serve. It doesn't matter

1 who nominated her or which unit she purportedly represents of  
2 the many that Gordon Property owns, she qualifies and as an  
3 officer or director, with respect to all the units, but she  
4 gains no respective rights or privileges because of the  
5 multiple ownership of Gordon Properties, which is in fact the  
6 unit owner.

7           It's not an issue of candidacy. All candidates are  
8 eligible to run. Candidates with the highest number of votes  
9 may not be elected. For example, commercial unit owners are  
10 limited to two seats on the board of directors and there must  
11 be at least one. What happens if five commercial unit owners  
12 ran and they topped out of the top five vote getters? Three  
13 of them aren't going to be seated, because there is a  
14 restriction in the documents that is there.

15           What happens if none of them place in the top  
16 seven? Someone who is a residential is going not to be one  
17 of the top seven candidates is not going to be seated because  
18 there has to be one that is a commercial unit owner. So the  
19 candidacy doesn't tell you that even though you're a  
20 legitimate candidate, doesn't say that you will necessarily  
21 be seated if you get the most votes. The circumstances do  
22 not. These documents say that that may not necessarily be  
23 true.

24           What about someone who is both a commercial unit  
25 owner and a residential unit owner? I think Dr. Pepper falls

1 in that category. I don't know how he owns this unit. His  
2 name doesn't appear on the ballot twice. He's not voted once  
3 as a commercial unit owner, and once as a residential unit  
4 owner. He is simply a candidate for the board of directors,  
5 and the people can vote. The members can vote for him as  
6 they see fit.

7 Now, if there are two other people who are  
8 commercial unit owners that win, get more votes than he, he  
9 may still sit on the board of directors, because he is a  
10 residential unit owner. He's qualified two ways; and,  
11 whichever way he can qualify, he's not going to be qualified  
12 because he's disqualified for one. He still has a  
13 qualification for one or the other. And, you can look and  
14 say, well, what happens in a situation like this.

15 He is number three in the commercial, so he doesn't  
16 get enough voters to be a commercial unit owner, but he is  
17 low enough that he doesn't get a residential. This is if you  
18 put his name and said we'll go vote for him and commercial  
19 list, and we go vote for him in a residential list and  
20 separate the two elections out. Well, he could come in third  
21 in the commercial, and eighth or tenth in the residential,  
22 and not win either seat. But, if you combined his vote, he  
23 may well win and be seated.

24 So, the practice here has been to have one, if  
25 you're nominated, it doesn't matter where you come from,

1 which type of unit you have. If you get the highest votes  
2 and you're qualified, you're able to serve; but, you might  
3 not serve, depending on the way the votes come out, even  
4 though you may have more votes than someone else.

5           There, of course, the usual arguments of  
6 extrapolation -- what happens if a single entity owns  
7 ninety-five percent of the unit and no one else wants to run  
8 for the board or something like that -- and the idea is that  
9 this could lead to some sort of paralysis. Well, this could  
10 be the case in every condominium, and is, when the declarant  
11 is initially in control. And the Condominium Act addresses  
12 that as to the documents.

13           Once they're sold, though, that's typically not the  
14 case that is there. But, if it is, this extrapolation  
15 argument, one answer is if you own ninety-five percent of the  
16 condominium, you could amend the documents, I would think.  
17 You're not going to lead to paralysis. And, the other is in  
18 the right circumstances a court of equity will step in to  
19 make sure that all the rights of all the people are there.  
20 But, generally speaking, arguments of extrapolation to the  
21 extreme will resort to the slippery slope, or other boogeyman  
22 arguments, don't impress me a great deal. They are worth of  
23 thinking and they're good hypotheticals, but they're not  
24 generally determinative.

25           Every officer or director of an entity that owns a

1 condominium unit may run for the board, but only one such  
2 officer or director may be elected and seated. The result is  
3 not different if the entity owns more than one unit.  
4 Affiliated entities are not restricted to one director unless  
5 there's a specific equitable relief and equitable  
6 circumstances, which is not the case here.

7 Here, my initial ruling did not take into account  
8 these rules and Mr. Howland was the second director from  
9 Gordon Properties and based on these rulings he is not  
10 eligible to sit. The next one down is Ms. Moore or E. Moore.  
11 I think Ms. Moore. And I understand she is an individual in  
12 her own right.

13 MS. SARVADI: Yes, Your Honor, correct.

14 THE COURT: So she will replace Mr. Howland on the  
15 board. The actions of the board of directors taken in  
16 reliance on the previous order of this court are not impaired  
17 by this modification or change, and will otherwise remain  
18 valid and effective, if they're otherwise valid and  
19 effective.

20 All right. Are there any other issues in this case  
21 that need to be attended to? I think that's it.

22 MR. KING: If Your Honor will hear me on just a  
23 couple housekeeping matters?

24 THE COURT: I'll be glad to do that, because we  
25 would like to clean the house and enter a final order.

1 MR. KING: Relating to the other issues, you're  
2 talking about the adversary proceeding?

3 THE COURT: Adversary; there are issues in the main  
4 case.

5 MR. KING: And, actually, that's what I'm  
6 addressing, the status hearing tomorrow, Your Honor.

7 THE COURT: Yes, sir.

8 MR. KING: And that really relates to condominium  
9 services and the status of the plan. I'm essentially asking  
10 the court to adjourn that status hearing for expediency, more  
11 than anything, but the parties have requested mediation.  
12 It's not presently going forward, because we're waiting for  
13 FOA to announce its new counsel. We're hopeful that's going  
14 to be shortly. But since there's no counsel involved that  
15 can address those issues --

16 THE COURT: I think they're good reason to continue  
17 that. The association is a principal creditor. I still have  
18 one decision to make in the assessment issue, and I think  
19 that until counsel comes aboard, depending on who that may  
20 be, we should adjourn that. I don't think we will accomplish  
21 much tomorrow, so there's no good reason to come back. How  
22 far out do you want that put?

23 MR. KING: I would say the end of August, Your  
24 Honor.

25 MS. SARVADI: I think 30 days is reasonable for the

1 association to conduct its affairs.

2 THE COURT: I've got an August 14th date and then  
3 I've got September the 11th date.

4 MR. KING: I would ask for the 11th, Your Honor.

5 THE COURT: Okay. Mr. Repezynski is nodding yes.  
6 All right. We will continue that to the status hearing  
7 scheduled for tomorrow to September 11th at 11:00.

8 MR. KING: And then, lastly, Your Honor, with  
9 respect to the order from today, in light of the change I  
10 would ask that the court in its order eliminated the  
11 restrictions and limitations of board action that were in the  
12 original order that were premised upon the fact that Gordon  
13 Properties held four seats. They're now going to hold three.

14 If the board in its infinite wisdom decides to  
15 engage related counsel, I think they should be entitled to do  
16 so now. I don't know that they will, but I think there's no  
17 longer a reason for those limitations. Otherwise, you  
18 restrict the ability of the board to act by a majority vote,  
19 Your Honor.

20 MS. SARVADI: I have no idea what the next board is  
21 going to do and who will be representing or guiding them in  
22 those decisions, Your Honor. I think that the restriction  
23 was put in place because you assumed that the Gordon  
24 Residential or properties related persons had control and  
25 could select their new counsel of their own choosing. I

1 think that restriction made sense.

2 I don't think it's necessarily required at this  
3 point, but I see no harm in pushing that issue off to give  
4 them time to sort themselves out. This is obviously a major  
5 term of events, and I don't know what position the new board  
6 would want to take with respect to that restriction. I have  
7 a copy of the order if it's helpful to the court.

8 THE COURT: I need to look at the order, yeah.

9 MS. SARVADI: I'm advised by Mr. Repezynski that he  
10 believes the association, since it's an oral motion, might  
11 want to look at the issue and respond more thoughtfully than  
12 my initial reaction.

13 THE COURT: I understand. Well, paragraph 7 dealt  
14 with the failure to discontinue dismiss, fail or defend.

15 MS. SARVADI: I believe he probably meant paragraph  
16 8, Your Honor.

17 THE COURT: Well, he did. I'm going through those,  
18 and that one I was directly in response to what I believe was  
19 Judge Ellis's concern early on and his stay of certifying the  
20 election with the fear that there might be a denial of a right  
21 of appeal. If I were wrong, it didn't appeal. Then I'm  
22 always right and you never had the opportunity to see that I  
23 was wrong.

24 So I didn't prevent that. I just said without  
25 approval of this court on such notice, and I think that that

1 permits the new board to come forward and present whatever  
2 reason it wants to do that. And I think it's adequately  
3 protected and we have preserved the ability to appeal, which  
4 I think is important and derived, essentially, from Judge  
5 Ellis's treatment of the matter and I know something with  
6 which I agree. And, number 8, what I will do, so the issue  
7 can remain alive and we get a final order, is to modify that  
8 and say as I did in paragraph 7, "without approval of this  
9 court and on such notice as the court may require." So that,  
10 if the new board, when it's organized decides that's what  
11 they would like to do, I would be glad to hear it and any  
12 contest with it. I'm not prepared to eliminate it at this  
13 time.

14 The purpose of that was to preserve the integrity  
15 of the process, and I think even though it may not be a  
16 majority of the court, the appearance is equally important  
17 still today. But I will modify that to say except upon  
18 further order of the court or something of that nature, so  
19 that you can come back in and address that, and that will  
20 give the new time for the board to organize counsel and  
21 evaluate it further without being stuck on a short fuse for  
22 reconsideration or something like that.

23 MR. KING: Thank you, Your Honor.

24 THE COURT: Does that get you to where you need to  
25 be on that?

1 MR. KING: I think so, Your Honor.

2 THE COURT: Okay. All right. I don't think it  
3 changes substance unless I hear about it later, and I'll  
4 leave that open to do that. Are there any other  
5 housekeepings?

6 MR. KING: Is the court going to prepare the order?

7 THE COURT: I will prepare the order on that. All  
8 right. Did you need your copy back?

9 MS. SARVADI: No, Your Honor. I don't.

10 THE COURT: All right. I'll keep that. With that,  
11 thank you very much, and we will adjourn.

12 MR. KING: Thank you, Your Honor.

13 MS. SARVADI: Thank you.

14 (Whereupon, at 12:53 p.m., the hearing in the  
15 above-entitled matter was adjourned.)

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