Gmail Andy Mowery <pohoaandy@gmail.com>

Notice of Candidacy for the POHOA Board of Directors

Andy Mowery <pohoaandy@gmail.com> Mon, Jan 8, 2024 at 5:13 PM
To: Poudre Overlook HOA at FtC <atftcpoudreoverlook@gmail.com>
Cc: naquetta@ricks4co.com, Brianna.Titone.House@state.co.us, "Altmann - DORA, Nick" <nick.altmann@state.co.us>, hd40aide@gmail.com, shindi@denverpost.com, David Graf <dgraf@moellergraf.com>

To the Board:

This matter has not received a response for over 1 month. There is no indication of how the matter will or will not be addressed at the meeting purportedly scheduled on Wednesday, because there is inadequate notice and no agenda.

I do not wish for a confrontation or anything less than civil on Wednesday. I do, however, sincerely and in good faith believe that I have been duly elected to the Board as the effort to ban me is legally ineffective. No response has been offered challenging the legal basis. At the very least, if you claim to be civil, a written response is due. Keeping me guessing is the exact opposite of the standards you claim to uphold.

Yes or no: Was the Amended Bylaw signed on 2/2/23 somehow retroactively effective on 1/25/23, when there is a legitimate dispute over the proper application of the Bylaws regarding my resignation in advance of any removal vote?

If you cannot answer the question, judging my persistence as a "personal attack" or :"legal threat" is merely a smokescreen to avoid admitting your interpretation (which apparently did not receive a proper legal review in advance of the decision/action) is incorrect. All you have to say is "point well taken".

Why is this so difficult for this Board?

Sincerely,

Andy

On Tue, Jan 2, 2024 at 9:07 PM Andy Mowery <pohoaandy@gmail.com> wrote:

> To the Board,
>
> There has not been an acknowledgement of this email in nearly 1 month.
>
> Active resolution of this dispute is necessary. I have offered by terms of resolution without response. It appears you are actively violating CCIOA, The Non-Profit Act, and/or the Governing Documents. The change in Bylaws cannot possibly be applied retroactively from actual effective date of 2/2/23, and the Bylaws are clear that a resignation is effective immediately.
>
> If you have counter-arguments or facts that support a different resolution, a response is overdue.
>
> I also want to make clear that if you are attempting to run out the statute of limitations clock, the case would toll from when the violation occurred, which is 12/5/23. It would not toll from the date of the attempted removal, nor would it toll from the date that the bylaw was made effective on 2/2/23. Your verbal response on 11/14/23 at the Board Meeting was unclear as to whether you were voicing your personal opinion, or if it was an action by the Board. Until the election, we don't know if you are going to enforce it to protect an open seat (what you did), or if you would allow for other candidates to simply get more votes. No other candidates (other than your husband) volunteered.
>
> Therefore, I would like to resolve this dispute before the Board takes any other votes, schedules any meetings, or attempts any other AWAMs. It is clear from today's testimony before the HOA Task Force that you have already met once and excluded me, which calls into question the legality of the action - and whether that creates personal liability since you know that no AWAM is possible unless all duly elected Directors are given an opportunity to say whether they agree to a vote or not.
>
> I've been patient thus far, but there is no more time for delays. A response is necessary.
>
> Sincerely,
>
> Andy
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> On Thu, Dec 14, 2023 at 1:59 PM Andy Mowery <pohoaandy@gmail.com> wrote:
>
> > Lora,
> >
> > I have not received a response on this thread since November 30 ,2023 - over 2 weeks. I am now inquiring about a matter of fact, which is that a Bylaw is not effective until signed. You have not yet acknowledged this fact, or provided any citation of expertise or authority to counter that factual claim.

At the meeting on 12/5, you also denied having been informed of certain facts, or having never heard about them. The problem is that there are email receipts showing you had been given notice, shown facts, and otherwise knew or should have known. I also understand Director Flanary announced a "board policy" whereby the Board would not be "pushed around" by . . . me.

As I understand from Dr. Tunna, one other "board policy" (which isn't an actual thing), is that you are willfully ignoring the content in emails sent to you. You have also stated that you have another "board policy" that requires written information to be sent to you by USPS Certified Mail in order for it to be considered by the Board. No such requirement exists in CCIOA or our governing documents, and no meeting was held in advance of a change to the policies of POHOA to make it so.

I am aware that Moeller Graf has contacted you since my last email, as it appeared willful ignorance, furthered by these made-up "board policies", was an attempt to sidestep doing the right thing in resolving this dispute. And, if the fact that the law regarding execution of the Bylaws contradicts your interpretations and actions is inconvenient to you, you don't get to further ignore it because you characterize it as being "pushed around". Homeowners are, in the current HOA governance model, the sole mechanism for enforcement of Statutes, CCRs, Bylaws, Policies, and Rules. The first step is giving notice.

In the past, by repeatedly ignoring the notice of non-compliance, various POHOA Boards then cite the number and/or length of notices to justify an accusation of "bullying", which is similar to the concept of "pushed around". Unfortunately, repetitive notices become necessary when there is no response or communication, as the non-compliance does not merely fade away for the fact that the Board ignores the notice. Also, unfortunately, CCIOA does not require a response, but merely impartial fact-finding - which is self-regulated and therefore easy to also ignore.

I have therefore let David Graf and Rep. Ricks know that there is a need, based upon this case example, for homeowners to have statutory rights to directly contact an HOA General Counsel to report non-compliance issues. He has confirmed to me that he has made contact with the Board. I believe that when a Board knowingly violates statutes or the governing documents, the status quo is unbalanced. A Board can both claim victimhood, retaliate, and effectively ignore attempts to enforce any written code. The HOA General Counsel represents the Association, not the Board itself. And, homeowners ARE the Association (Members), who should have a right of access to the services being paid for out of their assessments.

I have proposed that HOA General Counsel simply have a means of allowing anonymous reportings of non-compliance. The HOA General Counsel would have the obligation of find facts impartially - a feat very few self-regulating HOA Boards seem capable to accomplish, per years of studies of DORA records. If the HOA General Counsel finds non-compliance, they would have an obligation to publicly inform the Board AND all HOA Homeowner Members. Homeowners should not have hidden from them the record of non-compliance by the Board or any individual Directors, nor should there be this defamatory game of harassing and retaliating against the whistleblowers. But, it needs to be fully transparent to be effective, particularly as a deterrent for such non-compliant actions and behaviors.

Therefore, I am asking you, once again, to respond to the fact that the Bylaw created in an attempt to ban my participation in elections was only effective on 2/2/23, and that it could not possibly be retroactively applied to an alleged removal action on 1/25/23. The attempt to ban me failed, and it appears I have self-nominated and self-voted for an uncontested open seat.

I would like resolution to this dispute without further delay. I have requested a hearing, and there has been no response. And, as far as I can tell, any attempt to execute that Bylaw would require notice that I did not receive, and some due process for hearing/appeal of such a decision. The facts are fairly clear for what would amount to a summary judgment, but if you need me to follow those steps, I am prepared to do so.

Please do not delay any further.

Sincerely,

Andy

On Thu, Dec 7, 2023 at 11:37 AM Andy Mowery <pohoaandy@gmail.com> wrote:

> Lora,
>
> Having received no response, I have published the following article: https://poudreoverlook.com/vindicated-board-willfully-ignored-attorney-advice-enforcing-ban-on-mowery/
>
> If you have any corrections on facts, please let me know. I welcome your comments on the website, and would publish a rebuttal if you choose to compose one. The blog is committed to fair and honest reporting, and the publishing of opposing opinions.
>
> In the interim, my demand for resolution of this dispute remains open. The facts demonstrate wanton and willful actions that the Business Judgment Rule does not defend, and opens the discussion about the application of CRS 7-128-109 to these deliberate actions that are a failure of fiduciary duty to the association. You have created legal liability when you had more reasonable choices for your political objectives.
>
> I challenge your notion that the members have a duty to the association, or the powers to enforce the new amended bylaw independent of the board. I challenge the notion that the amended bylaw can or should be applied to me, or any notion that I was removed vs. resigned. It is time to set the record straight in a public manner. And, I genuinely believe that my candidacy for an open seat on the Board cannot be blocked with any of these actions, and therefore I should be considered elected to the Board as of 12/5/23.
>
> Please respond in a timely manner.
>
> Sincerely,

Andy

On Wed, Dec 6, 2023 at 5:22 PM Andy Mowery <pohoaandy@gmail.com> wrote:

Lora,

I am just learning that John Tunna and all of the rest of you on the Board were given explicit information on 2/2/23 informing you BEFORE YOU EMAILED THE COMMUNITY that the Amended Bylaws were not effective until signed on that very same day. There can be no dispute as Ms. Gilbert (who is also quoted in the HOALeader.com article I've cited) answers the question directly.

It raises the question about wanton and willful actions in advance of last night's meeting (including telling me verbally on 11/14/23 that I was banned), as well as a refusal to accept my self-nomination which you received more than 30 days in advance of the meeting (and acknowledged receipt on 11/30/23).

You cannot use the excuse of leaving the decision up to the owners intent to justify blocking my nomination and vote. No one else volunteered, and the seat remains open. There is no legal reason justifying this decision. You also fail to understand that Poudre Overlook HOA is a non-profit corporation (The Association), and that there is no legal advice to the Board exclusive to the Members. There is only one entity, and you are the fiduciaries. You have failed in your role to protect the interests of the Association by creating a legal liability in a wanton and willful manner. Because there is written evidence of wanton and willful action, individual indemnity has the potential to be pierced per my understanding of the relevant sections of Colorado State Law and case law.

My resolution to the disputed matter is:

1. Post this email between John and Ms. Gilbert on the website accompanied with a statement from the entire Board recognizing that the Amended Bylaw was not effective until 2/2/23
2. Post a statement making clear that it is not possible for the Amended Bylaw to be retroactively applied to actions on 1/25/23, regardless of opinions on my resignation. It must be plainly stated taht I am not banned from service as a Director.
3. Send an email and mailed USPS letter to all homeowners declaring that an error was made by the Board in attempting to block my self-nomination, and due to the seat being open at the meeting, i am therefore legally added to the Board.

It would be nice if an apology was issued for withholding these relevant facts from the members for 11 months to cement negative opinions and stereotypes which has caused me emotional distress to the defamatory nature of the statements made, including those opinions included in the Annual Meeting Minutes, as well as comments at last night's meeting portraying my resignation as "out of order" or in any way any form of wrongdoing.

If these actions are taken, I will consider the dispute resolved and no further action would be taken.

If I do not receive this by 9am on Thursday December 7, 2023, I will be publishing this email at www.poudreoverlook.com and emailing the associated email list with this information, along with this demand for dispute resolution that remains without substantive written response.

Sincerely,

Andy

---------- Forwarded message ---------
From: <j.tunna@icloud.com>
Date: Wed, Dec 6, 2023 at 3:44 PM
Subject: FW: Today's Presentation
To: Poudre Overlook HOA at FtC <atftcpoudreoverlook@gmail.com>
Cc: <pohoaandy@gmail.com>

Dear POHOA Board,

I am writing about a statement I made at yesterday’s meeting that was challenged by another member in the audience. In February this year I attended and on-line training course given by Altitude Community Law on the subject of HOA governing documents. I raised a question about when documents become effective and followed up by email with the specific question below on bylaws. You can see the response agrees with my statement yesterday.

Of course, this is just one lawyer’s opinion and others may differ. I suggest you put this question to our attorney to see what he thinks.

Regards,

John

From: Elina B. Gilbert <EGilbert@altitude.law>
Sent: Thursday, February 2, 2023 5:03 PM
To: 'John Tunna' <j.tunna@icloud.com>
Subject: RE: Today's Presentation

John, the affective day is when the amendment gets signed and dated (which should occur after it obtains the requisite approval).

Elina B. Gilbert :: *Shareholder in Charge of Practice*
555 Zang Street, Suite 100, Lakewood, CO 80228-1011
Direct 303.991.2010 :: Main 303.432.9999 :: Fax 303.991.2047
egilbert@altitude.law :: **www.altitude.law**
Links ::

Fellow of the College of Community Association Lawyers

From: John Tunna <j.tunna@icloud.com>
Sent: Thursday, February 2, 2023 3:51 PM
To: Elina B. Gilbert <EGilbert@altitude.law>
Subject: Re: Today's Presentation

Hi Elina,

Thanks. My question is about bylaw amendments. We recently voted to approve one at a special members' meeting. We are now sending out a notice to all members. So is the effective date the date of the meeting or when the notice goes out?

I appreciate your help.

Regards,

John

> On Feb 2, 2023, at 3:34 PM, Elina B. Gilbert <EGilbert@altitude.law> wrote:

Good afternoon, John. The Bylaws become affective when they are signed and dated.

Elina B. Gilbert :: *Shareholder in Charge of Practice*
555 Zang Street, Suite 100, Lakewood, CO 80228-1011
Direct 303.991.2010 :: Main 303.432.9999 :: Fax 303.991.2047
egilbert@altitude.law :: www.altitude.law
Links ::

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Fellow of the College of Community Association Lawyers

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From: j.tunna@icloud.com <j.tunna@icloud.com>
Sent: Thursday, February 2, 2023 1:01 PM
To: Elina B. Gilbert <EGilbert@altitude.law>
Subject: Today's Presentation

Hi Elina,

I learned a lot from your presentation today. Thanks for partly answering my question online about the effective date of documents. You didn't mention bylaws. When is an amended bylaw effective? Is it when a quorum of members present at a meeting vote to approve the amendment or when all members in the association have been notified by mail?

Regards,

John

On Wed, Dec 6, 2023 at 11:24 AM Andy Mowery <pohoaandy@gmail.com> wrote:

> Lora,
>
> Last night, you punted the decision on whether or not I'm banned back to the owners. You said that you were honoring their intent, even if the Bylaws were not being followed.
>
> Because you also raised the issue that sometimes your verbal utterances are a ruling, and sometimes they are just you voicing your opinion, I need to know the position of the Board on the matter - in writing. It is not up to the homeowners, unless you would like to

demonstrate that the HOA attorney has advised that it is.

You also stated that you did not receive notice of my candidacy - which is clearly false. You responded to this email thread on 11/30/23. Why did you promote that falsehood at the meeting?

I believe the action, which blocked my participation as a Director, gives me a claim upon which declaratory relief may be granted by a court. I am kindly requesting an appeal of your OR the homeowner's decision and a hearing. After John Tunna proffered the fact that he got attorney advice while serving, and you, instead relied upon Gloria Jones for legal advice, it is plainly obvious that the Board and/or Homeowners are not getting sound legal advice.

Therefore, in advance of any hearing on this appeal, I would suggest that the Board seek actual legal advice on whether the amendment to the bylaws was effective on 1/25/23 or 2/2/23. The matter may affect future changes to bylaws or CCRs. I also believe that the issue of whether the resignation is effective on 1/25/23 has relevance in the future, so that matter needs to be settled with sound legal advice. I will not accept any attempt to apply individual assessments for such legal advice to myself particularly as John Tunna has made it clear that he was given such advice (and obviously shared it with the board, as would be his duty) to the other members. If you need to hear it from a different source, that is on you. There is no attorney that will support this interpretation, as far as I can tell.

I have also contacted Rep. Ricks office today to consider adding this to the legislative agenda for 2024. Other HOAs play this game of trying to change the rules at meetings affecting elections or the effectiveness of director election/removals at the same meeting. Another of these issues arose in Fort Collins just last night. Its clear that CCIOA must be more specific to avoid your interpretations having actual effect.

Sincerely,

Andy

On Tue, Dec 5, 2023 at 1:56 PM Andy Mowery <pohoaandy@gmail.com> wrote:

> Lora,
>
> After speaking with John Tunna this morning, he raised one additional issue I have not thus far: Your meeting minutes do not record the fact that the Board voted 3-1 to accept my resignation when it was first proposed that my resignation was out of order. This followed your initial ruling that the motion to have a removal vote was "moot". If you recall, he was the party who took notes (intended to be for the Meeting minutes), and, of course, there is the actual recording of these events.
>
> We both believe that a deliberate attempt to create a legal record that is false is problematic for a number of reasons. However, the deliberate attempt to include an OPINION that the resignation was out of order, and then a FALSE statement that no appeal was ever made is contradicted by:
>
> 1. The fact that the decision was reviewed by the Board, and a vote was taken in favor of "accepting" the resignation.
> 2. The Bylaws are plainly written and clear on the matter: Any resignation is effective immediately. There is no "acceptance process", therefore, absolutely no possible "appeal" of any such attempt to avoid accepting it.
>
> For your review:
>
> A. You said the vote on the motion to remove was moot, saying you could not proceed "in good conscience"
>
> https://youtu.be/6vok8CdWY4U?t=277
>
> B. In response to an attempt to refuse to accept the resignation, you said "Because Andy IS resigned" (my emphasis):
>
> https://youtu.be/6vok8CdWY4U?t=327
>
> C. Director Flanary was asked if he refuses to accept the resignation: "It's his privilege"
>
> https://youtu.be/6vok8CdWY4U?t=342
>
> D. Director Tunna: "I don't refuse it"
>
> https://youtu.be/6vok8CdWY4U?t=342
>
> E. President Ballweber: "So, it's accepted. We move on to the next item of business."
>
> https://youtu.be/6vok8CdWY4U?t=483
>
> F. After a homeowner commented that the resignation was not at the beginning of the meeting, but in the middle of a motion, President Ballweber then changed her mind, and arrived at the conclusion that the Resignation is "out of order"
>
> https://youtu.be/6vok8CdWY4U?t=543
>
> The problem is that a resignation is a privileged motion, which means it can be made at any time. And, the Bylaws are clear about the

immediacy of the resignation - it is not dependent on any sequence in Robert's Rules. And, as for an appeal, towards the end of the video segment, I clearly state that the Bylaws should be reviewed as an appeal to the last ruling, which followed a series of statements by the Chair that the resignation was tendered, "accepted", and made the motion to remove "moot".

As I have previously written, the power to "bar" (not "ban") a member from serving has been reserved to a court of law per the Non-Profit Act 7-128-109. For the Association to allow the creation of a Bylaw that has no conditions for its application, it then may, in fact, tread on the CCRs. The reason: It DISQUALIFIES a member from consideration in an election.

> Section9: Board Limitations. The Board may not act on behalf of the Association to amend this Declaration, to terminate the Common Interest Community, or to elect members of the Board or determine their qualifications, powers, and duties or terms of office of Board members, but the Board may fill vacancies in its membership for the unexpired portion of any term.

Therefore, the application of the Bylaw itself may have created an internal conflict as it appears to determine a qualification for the board - having never been removed, particularly when the removal was without any stated cause, and by all appearances is a political action.

We now know that the Board has taken certain actions without review of the HOA General Counsel, and per my discussion with John Tunna today, it would appear that this entire approach to find some way - any way - to bar my participation may be on shaky legal ground.

Regardless, what is absolutely missing from the account recorded in the draft Meeting Minutes is the sequence of RULINGS OF THE CHAIR (multiple instances), the VOTE of the Board, and then when those efforts failed, the attempt to rule the resignation "out of order", without consideration of the supremacy of the Bylaws to any section of Robert's Rules of Order.

The Bylaws are abundantly clear:

> 6. Resignation of Directors.
>
> (a) A director may resign at any time by giving written notice of resignation to the Association.
>
> (b) A resignation of a director is effective when the notice is received by the Association unless the notice specifies a later effective date.
>
> (c) A director who resigns may deliver to the Colorado Secretary of State for filing a statement to that effect.

Section 6(a) is clear. "A director may resign at ***any time***"

There is no qualification that it cannot be tendered after some other motion has been made.

If there was any question as to the timing of effectiveness, 6(b) addresses this explicitly: "Is effective when the notice is received by the Association".

The video is clear. It's written, verbalized, and in every sense "received" prior to any removal vote. And, more than a week before the actual Bylaw is actually changed.

The Meeting Minutes do not record these facts, nor is there any reference to the Bylaws - only the OPINION that it is "out of order", as if that determines the effectiveness. The minutes must be amended.

Sincerely,

Andy

On Mon, Dec 4, 2023 at 5:50 PM Andy Mowery <pohoaandy@gmail.com> wrote:

> Lora,
>
> I did not receive a substantive response to my email.
>
> The meeting minutes have substantial errors that need to be amended. I am writing in advance of the meeting to ensure that these amendments are carefully considered.
>
> 1. In the 5th paragraph describing the passage of a change to the Bylaws, you are attempting to document that Director (John) Tunna's comments "may be considered dilatory".

A. The motion by Bill Tuminello did not have specific language to be approved by members (the minutes do not record this fact). The motion merely described an intention or desired outcome.
B. The lack of any specific language resulted in John Tunna raising a Subsidiary Motion to form a Committee for the purpose of creating or clarifying the language of the Bylaw, since no language was given with the notice, and no one came to the meeting with any language prepared.
C. The Chair attempted to rule that John's motion was "dilatory", which was challenged and appealed by members, including myself.
D. The Chair did not allow, properly, for John's motion to be placed on the floor, nor for the appeal to the members to rule on John's motion.
E. Bill's motion to vote on the Previous Question was, in fact, out of order.
F. The fact that even upon voting, there was no actual language for the amendment - and that it was not written until 1 week later, demonstrates that John's motion was not diliatory, but rather had basis in sound reason; considering of specific language, and more importantly, actual standards, merits, or cause for application of the bylaw banning a homeowner from participation on the Board as would be required under CRS 7-128-109.
G. The Petitioners had not allowed full participation of all homeowners in forming the language of the Bylaw amendment prior to or at the meeting.
H. The Chair did not allow non-Petitioners participation in the formation of the language of the amendment either.
I. Therefore, John's Subsidary Motion had good faith, sound basis, and good reason for consideration.
J. The meeting minutes fail to address these facts and circumstances.
K. The minutes should record the fact that John's right to make the motion was legitimate (but the Chair unfairly blocked it without allowing an appeal), and should also note that the vote did not approve the actual language of the amendment, but rather it became a de facto vote to have the Board write the language at a later date.
L. It is noted that the meeting minutes include no actual language of the amendment either, but a vague description of intention.

2. The 6th Paragraph does not record the following:
A. Mowery had his hand raised prior to the motion being made.
B. A resignation is a Privileged Motion.
C. The POHOA Bylaws state that the effect of a resignation is immediate.
D. The minutes do not record the attempt to refuse to accept the resignation - by the Board (including a vote that is not recorded), as well as contemplation of a vote by members to refuse the acceptance of the resignation.
E. The minutes falsely claim that the ruling was not appealed. Mowery clearly states that he appeals the ruling with the Bylaws, and was ignored. It's on video recording which you have had available since January.

I am making, in advance of the meeting, a motion to amend the minutes. Again, I am making a good faith effort to resolve the dispute without using up meeting time, and have received no response to the presentation of these facts (including statements in prior emails to this one). I do not wish for my motion to be ruled "dilatory", or any other parliamentary trick to avoid the issue.

More importantly, these meeting minutes document a failure to follow the Bylaws (the resignation effect is immediate, see prior citations), which would then create potential claims upon which relief may be granted, and therefore potential legal liability and cost.

Meanwhile, I have yet to receive, in writing, any plainly written statement from the Board that the Amended Bylaw approved on 2/2/23 has actually been applied to me. I only have the verbal response from you, casually stated as I was leaving the meeting room on 11/14/23.

Unfortunately, this raises another issue: According to your "board policy" (which isn't a thing), you claim that you yourself do not vote on any board matters UNLESS it is to break a tie vote between the other directors (of which there are only 2). If you verbalized the opinion that I am banned solely because of some failure to appeal (which is objectively false because of the video recording), then you would be acting out of compliance with your policy.

If it were true that THE BOARD has made this determination, then there must be a vote either at an Open Meeting, or with an AWAM. There has been no evidence whatsoever of any such vote, it has never been on any agenda, and there is no indication that you have some special power in this circumstance to make this determination unilaterally as Chair, President, or with any other individual power bestowed to an individual Director or Officer. And, neither the existing CCRs or Bylaws, and not even the Amended Bylaw, bestows upon the President or Chair, the authority to make such a determination individually.

Therefore, it appears that you are attempting to avoid creating the claim upon which relief may be granted by dodging the direct question, and simply making it appear as though the Amended Bylaw has been retroactively applied to me, and therefore my candidacy is therefore blocked at tomorrow night's meeting. I would most certainly raise the issue of zero written notification of the Amended Bylaw being applied, made effective, or in any form directed to me as there is absolutely no written notice. And, most certainly not written notice sent via USPS, which is again your other "board policy" which you claimed you could not grain waiver.

Simply put, the meeting minutes are a second attempt to appease the Petitioners without taking the actual necessary action to make it legal. In that sense, it is clearly defamatory as it has no actual legitimate purpose. Even an omission of fact may be considered defamatory.

Therefore, I would like to resolve this dispute by agreeing upon amended language for these meeting minutes in advance of the meeting, and having a vote upon such amendments at the meeting.

Please respond without further delay.

Sincerely,

Andy

PS I am notifying you in writing, as I did in October, I am self-nominating for either/both of the open Director seats - to be abundantly clear.

On Thu, Nov 30, 2023 at 11:08 AM Poudre Overlook HOA at FtC <atftcpoudreoverlook@gmail.com> wrote:

Your email has been received. Thank you.
Poudre Overlook HOA of Fort Collins
Board of Directors

On Wed, Nov 29, 2023 at 4:29 PM Andy Mowery <pohoaandy@gmail.com> wrote:

Lora,

I have not received a response to the last email. I have, however, received your notice about the Annual Homeowner's Meeting which includes Meeting Minutes attempting to document a failure to appeal a decision.

Here is the video recording of the relevant section of the meeting: https://www.youtube.com/watch?v=6vok8CdWY4U&t=141s

Below is an AI transcript (provided by Glasp).

The problem with your attempt to record my resignation as "out of order" and without appeal is:

- A resignation is a Privileged Motion - such motions can be offered at any time, per Robert's Rules
- The POHOA Bylaws state a resignation is effective the moment the Association is given notice - there is no procedural requirement, nor any mechanism for "acceptance"
- I raised the issue of the fact that Bylaws trumping any attempt at procedural maneuvers to refuse acceptance or disqualify the resignation. See the transcript. That is literally an appeal.

Therefore, I am notifying you in writing that I dispute the attempt to record these inaccuracies in the Meeting Minutes. I also dispute the effectiveness of attempting to apply a Bylaw retroactively to a removal action that was actually the part of the meeting that was "out of order". You literally ruled correctly at first (calling the vote "moot"), but then allowed members to conspire a way to overcome the resignation and have the vote anyways. What you allowed to occur is an embarrassment to the Association.

I am demanding a hearing prior to the meeting on 12/5/23, or some other means of resolving the dispute. As you have offered in the past, resolving the matter in writing is acceptable.

If, on the other hand, you can point out where in the video you believe I "failed" to appeal, or when an opportunity to voice an appeal (you are repeatedly shouting me down and interrupting me) would occur. I'd like the exact time-stamp where such an opportunity occurred. At the meeting, Director Jones stated that in order for the resignation to be effective and not out of order, it would have had to have been made at the beginning of the meeting. This is false per the Bylaws and Robert's Rules. And, examination of the recordings of the rest of the meeting demonstrate that you earlier got angry at both Director Tunna and myself for attempting to speak on the earlier motion. There was literally no other opportunity - and if you LOOK at the video, I had my hand raised to signal an attempt to present a privileged motion (since you got angry if we verbalized such motions, which is allowed in RONR).

I believe that should you not provide the opportunity to resolve this dispute in a timely manner (prior to the meeting on 12/5), I would be left with no other option than to pursue Declaratory Relief under Rule 57, which allows for such relief to be obtained through Small Claims Court. The issue at hand is enforcement of the Bylaws (requiring acceptance of a resignation upon notice), which you demonstrably failed to do (see the video). Declaratory relief would include amending the proposed Meeting Minutes (if approved), notice to all members of the incorrect action taken, and other actions to rectify the attempt to apply the 3-year Ban Bylaw retroactively. I am told the changes in HB22-1137 make the venue appropriate, and that the objective facts make this a candidate for Summary Judgment.

I would also like to remind you that at the meeting proceeding 1/25/23, ***you verbalized a demand that I resign***. It appears that ***my actions were responsive to the demand***, not simply a maneuver to avoid the effect of changing the Bylaws.

And, even if it was, you acknowledge both at the meeting and in the Meeting Minutes that such a maneuver was legitimate and possible. You appear to argue that the sole reason my resignation is ineffective is the timing, and whether it was "out of order". Neither appears to be true per the Bylaws or simple understanding of Robert's Rules (Resignations are a Privileged Motion). Your case is further complicated by the effective date of the Bylaw change (2/2/23), and the lack of retroactive application language within the Bylaw - which was voted upon without actual agreed-upon language at the meeting!

My resignation letter, which I simply wished to read at the open meeting as all other resignors had done previously, noted the dysfunction of your communication style as the reason. The dysfunction continues in this dispute, reinforcing my point. I was ready to let Dr. Tunna attempt to bring similar agendas and points of view to represent me - as a means of overcoming the dysfunction. But, you managed to frustrate him too - and there is absolutely no way to heap blame upon him as you did me.I knew that if my letter took more than 2 minutes to read (even though on 5/25, many directors were given > 5 minutes to read their letter), you might disrupt my reading. This is why I gave notice to John in advance of the meeting, and asked him to help me shorten the letter to avoid you preventing me from finishing under the guise of some unwritten "board rule".

Therefore, our shared agenda and POV remains unrepresented on the Board. I am compelled to contest the open seats as a result of this.

Please, let's resolve this to avoid any use of time at the 12/5 meeting.

Sincerely,

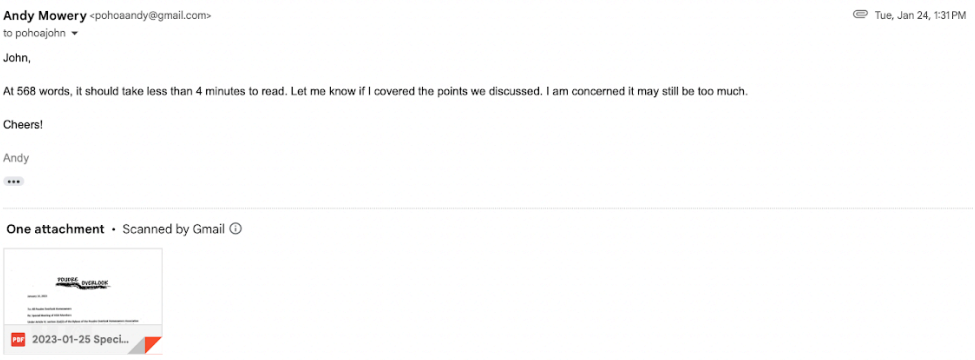
And

IMG 6679 - YouTube
https://www.youtube.com/watch?v=6vok8CdWY4U

Transcript:
(00:02) we have a quorum of wait a minute there's 57. 59. 60 well they should only be fit behind well let's hope we're invoked and they can do this at the end at the end meeting right now um it's clear that the amendment has the request to amend the bylaws has passed um we will now move to uh could we hear the vote yeah well it's
(01:05) 37-22 but there's a question as to um whether we have uh we have only have 59 ballots that have been handed out well there's one blank ballot that was turned in yeah yeah but there was a blank ballot so we'll get that sorted out but for right now all right the next item on the agenda is the vote to remove Andrew Mowry from the board of directors is there a motion the second time is there a second
(02:14) group so it is moved and seconded to vote to remove Andrew Mowry from the board of directors um not yet because the person that makes the motion has the first right to speak clay do you wish to make any statements well I think the resignation of the previous board of women who are doing an excellent job cause of the actions of one member of the HOA thinks all that needs to be spoken Andy members of the board and Association I have made the difficult decision to resign from the board of directives when I joined the board last December I hope
(03:19) to improve the community however the dysfunction and lack of communication with this award is greater than my ability to overcome at this time even simple matters are not properly deliberated or voted upon and many decisions are made by individual directors I cannot agree to speak with one voice on matters when we do not deliberate or vote I've always believed that admitting what you are wrong is not a sign of weakness but rather a sign of strength I've always believed that leading by example is in facts and evidence
(03:49) encouraging open and honest communication promoting continuous learning and Improvement and showing empathy and respect for opposing points of view the keys to overcoming the dictatorial attitudes that have caused so much Discord in our community I believe this community deserves better and I cannot in good conscious can continue to serve as directors when some of my colleagues cannot uphold the principles that we have all agreed to follow he's therefore I respectfully resign my position as director of pure
(04:18) Overlook HOA wish you the best as the board and will return to roles of influence as a homeowner and serving on any committees where I'm welcome if conditions change I may once again volunteer for service as a director thank you for your opportunity to serve all right with Andy's resignation oh I'm sorry yes voted off he could get back on again so I think you need to refuse to resignation and we're still having a proposal I oh I cannot increase conscious do that um is there a so with Andy's resignation that makes
(05:16) the um vote yes why why uh because Andy is resigning yeah but why oh let me okay let me ask Walker do you refuse to accept his resignation John do you refuse I'm asking any questions John I I don't refuse them hi I understand what his actions are because he wants to be able to run again was it December yeah you're putting words in my mouth that's not true well you're putting words all right let's but the logic the logic of his action would dictate that he has a desire to
(06:21) run in December which he doesn't resign that is three years that seems to be obvious um please stop okay I'm trying desperately to conduct a respectful meeting here so let's so since there are two three that that will accept the resignation correct my vote really won't matter except he's got he would he still has a vote right because we haven't accepted so we're in this acceptance mode this is ridiculous but you're still on the board correct but it's ridiculous so where I'll vote even if we were to try
(07:17) to okay great so it's currently for weatherington if we're so concerned about this amendment that we just put we voted for we both off of the director he can't get back on for three years he is resigning he is not getting voted up so we're really worried about wording and getting a committee to get it right no I mean it's it's what Bob said might it make some sense doesn't it well but we've had two people that will accept the resignation he accepts his resignation so it's yeah
(08:04) so it isn't accepted so we move on to the next item of business yes um a motion was placed on the floor to address the amendment or not the amendment but the removal of the director and the resignation was submitted in the middle of that discussion and the resignation did not come at the beginning of this meeting it came after the amendment asked so I think there was a motion to address the vote and that probably should be carried through I hear yeah uh your acceptance of the resignation was in the middle of you're

(09:00) right ***the resignation was basically out of order um all right so we are voting what removing Andy that was the motion is that the board member I think he addresses correctly we have the three motions in front of us that was what the special meeting is all about in the middle of it so the book the idea is that the motion was made and seconded to vote to remove Andrew Mallory from the board and he offered his resignation which was out of order***
(10:05) can I ask a question when was it in order at any point prior in this meeting you already you already cut me off once and speaking about a different issue which John by the way actually finished my sentence for me so when was the proper time for me to raise this you could have done it before the meeting you could have done it after the after the vote I mean there's you could have done it a lot at a lot what are the ***what did the bylaws say about the proper time to submit a resignation you can submit it at any time including in the middle***
(10:41) of a meeting or you know this is so frustrating listening to these kids argue over this the fact is if you if you can stand up and do this why can't you stand up and volunteer to get on the board if one of you just one of you people would have stood up and said I like to be on the board we wouldn't be having this discussion right now you'd be on the board all right all right all right all right all right all right all right stop so stop let us vote I got one this is precisely why I resigned can't do anything right literally (11:40) literally literally the exact same way this is this is literally the problem kind of black thank you right now

On Wed, Nov 15, 2023 at 5:09 PM Andy Mowery <pohoaandy@gmail.com> wrote:

> Lora,
>
> At last night's meeting, you made contradictory statements regarding my eligibility as a candidate for the 2 open Board seats. At first, you disclaimed responsibility by saying it was the "owner's decision", but then later said that you yourself determined I was out of order, and in some unexplained manner, failed to appeal the decision (it is unclear whether you are referring to your own decisions - allowing the vote to remove to proceed, or attempting to not accept my resignation, etc, or whether you mean the vote of the owners - which I don't think any process for appeal actually exists in the bylaws). Your comments conflict with one another, and do not reflect the objective facts about the meeting, Robert's Rules, or the Bylaws.
>
> I would like to remind you that the meeting was recorded, so there is no dispute as to what occurred, and that has been publicly available to you for over 9 months. I would also like to remind you that I raised the issue at the March Board Meeting, at which time you said something different, again.
>
> I do not find any support for your opinion that any sort of appeal is necessary. However, I will run through the relevant facts to refresh your memory. If you wish to label this as an appeal, you are free to do so.
>
> 1. According to Robert's Rules 12th Edition Section 46 "Resignation and Removal of Officers" it states that if an director/officer tenders a resignation the resignation is a privileged motion and takes precedence over the motion to remove.
>
> It is clear that I raised my hand and otherwise attempted to speak (several times) prior to the motion to make a privileged motion, but you would not allow me to speak. I physically handed the letter as soon as you would allow it, which wasn't a decision made by the owners. There was an earlier dispute with Director Tunna in which you did not seem to comprehend that a privileged motion is NOT out of order, and because you became loud and angry, both Director Tunna and I simply waited to be called upon after the confrontation.
>
> However, ***the actual tendering of my resignation to the Board occurs no later than 131pm on Tuesday January 24 by email***, a full day prior to the meeting. Director John Tunna can attest to his knowledge of my resignation prior to the meeting, therefore, the hair splitting over the timing at the meeting is likely to be irrelevant. The question was whether you would cut me off at 2 minutes, or attempt some other means of preventing me from turning in the resignation over Robert's Rules or time constraints - which was apparently a valid concern. You have already been sent a copy of this draft version in prior correspondence.
>
> 
> **Andy Mowery** <pohoaandy@gmail.com> Tue, Jan 24, 1:31 PM
> to pohoajohn
>
> John,
>
> At 568 words, it should take less than 4 minutes to read. Let me know if I covered the points we discussed. I am concerned it may still be too much.
>
> Cheers!
>
> Andy
>
> ...
>
> **One attachment** • Scanned by Gmail
>
> 2023-01-25 Speci...
>
> 2. Even if, for some reason, you find that a means to justify the decision to proceed with the vote of removal, which you actually reversed at the meeting (calling it "moot" and not allowing the vote to go forward), the POHOA Bylaws supersede Robert's Rules of Order - even according to your own past statements and judgement.

The Bylaws In Article IV Section 6(b) are sufficiently clear and plainly written that the resignation is effective upon receipt by the Association. Whether Director John Tunna's receipt of the notice and letter, or my laying it on the table on January 25th prior to the vote is used, the resignation is effective at that moment. There is no use of Robert's Rules of Order that supersedes that fact, nor is there any process for refusing to accept a resignation (attempted at the meeting for considerable time), nor is there any mechanism for any sort of appealing of your decision described in the Bylaws.

3. Even if, for some other reason, you refuse to accept that the Bylaws supersede and the resignation is immediate either on January 24 or 25, the Bylaw vote at the meeting does not go into legal effect until an Action Without A Meeting Vote on February 2, more than a week later. The Bylaw has no such language that describes retroactive effect on any Director who was subjected to a vote that had no other purpose than embarrassment and humiliation. Director Tunna confirmed this to me at the time, and expected you to do the same at the March meeting.

FIRST AMENDMENT TO THE BYLAWS
OF
POUDRE OVERLOOK HOMEOWNERS ASSOCIATION OF FORT COLLINS
(a Nonprofit Corporation)

PURSUANT TO a vote by Members of the Association present at a meeting on January 25, 2023, and in accordance with Article XVI of the Association's Bylaws, the Bylaws of the Association are amended to include the clause "Directors that have been removed from the Board by a vote of the Members may not be elected or serve on the Board for three calendar years following the date of removal."

NOTICE of his amendment was sent by first class U.S. mail to all members of the Association on 3 February 2023.

DATED this second day of February 2023

Lora R Ballweber

Lora R Ballweber, President

4. The POHOA Board has not issued any written statement giving notice or actually applying the Bylaw to me. The only response to prior inquiries was to table the issue until the next "owners meeting". It was not until last night that you informally blurted out "yes" to the question of whether or not you considered me banned. I am unclear as to whether that is your personal view, or whether that is an action of the Board (I see no record of a vote on the matter). You did send out a notice to the community, but Dr. Tunna pointed out that it was merely an attempt to record actions taken by the owners, not any Board decision on whether to apply the decision as a matter of law. I don't believe that is up to the owners at all, but I'm willing to review any citations you may have.

I believe a reasonable resolution to the matter is for the Board to consider these facts, and to issue a written statement on the matter making it clear whether or not you are attempting to retroactively apply the new Bylaw that was not legally put into effect until 2/2/23. If you have a citation or case law indicating such a maneuver is legally possible, please provide without further delay.

I believe it was proper to allow the issue to be raised during New Business or Open Comment at last night's Regular Board Meeting. Instead, you treated me with disrespect as you angrily demanded I leave the room. This issue deserves attention and closure after months of delays. I believe that I only have a statute of limitations through 1/15/24 if it were necessary to seek Declaratory relief in Small Claims Court (apparently now available as an option due to HB22-1137) to settle the matter. And, since the meeting for which elections consider new candidates is on December 5, irreparable harm could occur by that date if you intend to enforce this ban up until and through the meeting.

I do not wish to use litigation to settle the matter, and this is not by any means a legal threat. It merely maps out the available options for dispute resolution. I presume that you would decline mediation given how I was treated last night.

I therefore suggest that instead of winging it (as you did with the two policies passed last night) and avoiding an actual legal review, that you use your free 30 minutes from the HOA General Counsel (the plan you are paying for, according to Dr. Tunna's recollection) to submit a simple question verifying the legal effective date of 2/2/23, and whether or not this amended bylaw could possibly be retroactively applied to a Director who submitted a written resignation on 1/24/23 or 1/25/23. If you do not get legal support from a practicing HOA attorney, then I would simply ask that you publicly announce the attempt to ban

me to be ineffective legally.

I will not accept that your need to consult an attorney to understand plainly written facts is any justification for assigning legal expenses to me personally. You are free to judge the facts and arrive at the correct conclusion, as Dr. Tunna has, on your own. Please do not create legal expense for the fact I've made this inquiry. You will need to judge whether you need an attorney to make counter arguments or present new facts that address the points raised. As you have already done with policies, you can just look it up on your own if you choose.

I hope we can settle this dispute of interpretations amicably without further delay. Please acknowledge receipt of this email. I am copying members of the HOA Homeowners Rights Task Force. Legislators, and DORA with this email as I believe this behavior rises to the level of consideration in reviewing changes to CCIOA. I believe the right to bar a member from participation should be limited to CRS 7-128-109, which requires a quorum and court order. I do not believe the Bylaws should be used to usurp such powers from the courts to avoid fair and reasonable due process.

Sincerely,

Andy

On Sat, Nov 4, 2023 at 8:22 PM Andy Mowery <pohoaandy@gmail.com> wrote:

To the Board:

I have not received a reply or confirmation of receipt of this email. I hope that this will be addressed within the agenda of the November 14 Board Meeting. I have waited 3 weeks for a reply without follow-up.

I am also writing with an update regarding new requirements for those who serve on the Board, as well as the potential for those who serve as paid contractors. This information has been published since February, and according to DORA, it appears that it may apply to Directors in 2024. Below is a legal review of the new requirements, with the source cited. Those who plan to serve should be made aware in advance of these new requirements. This appears to also affect our accounting contractor. An excerpt is below.

Those planning to run for the board should know, in advance, of these new requirements, as the issue of privacy has been raised in the past for some serving as volunteers, or even contractors. Attempts to know, see, or understand the contracts we have with homeowners for certain functions has been met with obfuscation.

There is an open question as to whether the use of proxies extend the reach of "control" to such individuals. The authority to remove Directors appears to be relevant to the analysis, and therefore related to the original request. The legal analysis recommends consultation with legal counsel for more information.

I believe this may be a topic discussed within the HOA Task Force, which just began meeting in October, and may be the subject of legislation in the 2024 session. Homeowner Advocates have not taken a position on the matter, but I can relay that I have participated in discussions where advocacy points towards limiting these requirements by statute to avoid reducing the pool of potential volunteers for HOA Directors. I sense we may have agreement on this approach to this issue, and I'm available to discuss if you choose.

Note that at the bottom of the excerpt, the subject of substantial control by management companies is discussed, and in our past, when we have abdicated control or decision-making, it would likely meet the new requirements. Whether or not hiring an accountant or bookkeeper, particularly when they exerted substantial control in the past while serving as a Director, is again something that should be reviewed by an HOA general counsel.

Sincerely,

Andy

> Under the Final Rule, a "beneficial owner" means, "any individual who, directly or indirectly, either exercises substantial control over such reporting company or owns or controls at least 25 percent of the ownership interests of such reporting company."[10] The Final Rule looks only to the "individual" and requires reporting companies to look through non-natural persons to derive the individuals who own or control them.
>
> Also, the definition of "beneficial owner" includes any person who "exercises substantial control." The Final Rule provides[11] that, "An individual exercises substantial control over a reporting company if the individual:

(A) Serves as a senior officer of the reporting company;

(B) **Has authority over the appointment or removal of any senior officer or a majority of the board of directors (or similar body)**;

(C) Directs, determines, or has substantial influence over important decisions made by the reporting company, including decisions regarding:

(1) The nature, scope, and attributes of the business of the reporting company, including the sale, lease, mortgage, or other transfer of any principal assets of the reporting company;

(2) The reorganization, dissolution, or merger of the reporting company;

(3) Major expenditures or investments, issuances of any equity, incurrence of any significant debt, or approval of the operating budget of the reporting company;

[10] 31 CFR § 1010.380(d).
[11] 31 CFR § 1010.380(d)(1)(i).

(4) The selection or termination of business lines or ventures, or geographic focus, of the reporting company;

(5) Compensation schemes and incentive programs for senior officers;

(6) The entry into or termination, or the fulfillment or non-fulfillment, of significant contracts;

(7) Amendments of any substantial governance documents of the reporting company, including the articles of incorporation or similar formation documents, bylaws, and significant policies or procedures; or

(D) Has any other form of substantial control over the reporting company."

The Final Rule's definition is non-exclusive and requires the reporting company to include any individual who "has any other form of substantial control." As a result, many reporting companies will need to engage counsel to consider whether particular corporate governance arrangement bring individuals within the ambit of "substantial control" and thereby render them into beneficial owners.

The Final Rule also clarifies[12] that an individual may exercise "substantial control" over a reporting company, directly or indirectly, including as a trustee of a trust or similar arrangement, through:

(A) Board representation;

(B) Ownership or control of a majority of the voting power or voting rights of the reporting company;

(C) Rights associated with any financing arrangement or interest in a company;

(D) Control over one or more intermediary entities that separately or collectively exercise substantial control over a reporting company;

(E) Arrangements or financial or business relationships, whether formal or informal, with other individuals or entities acting as nominees; or

(F) any other contract, arrangement, understanding, relationship, or otherwise.

This guidance is non-exclusive and **requires a reporting company to consider "any other contract, arrangement, understanding, relationship or otherwise" that might cause an individual to exercise "substantial control" in an indirect manner.** The Final Rule establishes a facts and circumstances test that cannot be circumvented through a formalistic arrangement if there is an unwritten or covert "understanding, relationship or otherwise" that gives an individual indirect "substantial control."

For Homeowner Associations that are governed by a board of directors, each director would be expected to exercise "substantial influence over important decisions" by virtue of their vote. Any

senior officer of the HOA would also be a beneficial owner under the language in the Final Rule.

[12] 31 CFR § 1010.380(d)(1)(ii).

HOAs that are managed by an external management company should consider whether that management company exercise any "other form of substantial control" by virtue of their management contracts. A management company that exercised substantial control could be deemed to have substantial control, thereby requiring the management company to go through a similar analysis to determine those individuals that are beneficial owners of the management company. **To avoid being deemed to have substantial control, management companies should review their management companies to ensure that they do not have the discretion required to exercise independent decision-making.** A management company whose actions were entirely subject to the board of directors would likely take the position that it lacked substantial control.

Source: https://passle-net.s3.amazonaws.com/Passle/5fe0c4f453548a10fc881e09/MediaLibrary/Document/2023-02-14-17-36-54-610-TE_HTeichmanJWilsonHOACTALawAlert_021423.pdf

On Sat, Oct 14, 2023 at 11:39 AM Andy Mowery <pohoaandy@gmail.com> wrote:

To the Board:

I am writing to ensure that your Annual Homeowners Meeting Notice will include candidates for the two open seats for the POHOA Board of Directors. I intend to self-nominate.

I resigned from the Board on January 25, 2023 (see attached letter), and submitted my resignation at the meeting in writing, and read the letter aloud.

In spite of this, President Ballweber attempted to refuse acceptance of the resignation, which is contrary to our Bylaws Article IV Section 6(b), and subsequently held a vote to "remove" me.

6. Resignation of Directors.

(a) A director may resign at any time by giving written notice of resignation to the Association.

(b) A resignation of a director is effective when the notice is received by the Association unless the notice specifies a later effective date.

(c) A director who resigns may deliver to the Colorado Secretary of State for filing a statement to that effect.

I believe that the vote held was out of order and violated the POHOA Bylaws.

After the meeting, the POHOA Board sent out a communication to homeowners that appears to indicate the Board intends to ban/bar me from participating as a POHOA Director because of the improper vote. No subsequent communication has been sent to clear up the matter.

I therefore demand that prior to the Annual Homeowners Meeting to be held on November 14, 2023, the POHOA Board communicates in writing to all homeowners that I am not disqualified from running for the Board because I resigned and that the removal vote was invalid or ineffective after review of the Bylaws.

As a candidate, I expect an equal amount of time to speak at the meeting in support of my candidacy, and do not wish to have a disruptive meeting regarding any dispute over proper application of the Bylaws. The matter should be settled in advance of the meeting.

Sincerely,

Andy