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OUR REFERENCE NO.:  
058128-00001

January 17, 2018

Board of Directors  
Milolii Beach Club Association II  
P. O. Box 511  
Kealahou, HI 96750

Re: Legal Opinion re Milolii Board of Directors Elections and use of Proxy

Dear Members of the Board:

We have been informed that an owner, who also happens to be a member of the Board of Directors, has stated that the current Board of Directors is invalid because the proxy form used by the Association in its elections held in 2014, 2015, 2016 and 2017 did not comply with the statutory requirements. Based upon the allegation, the Board is seeking a legal opinion as to the current status of the Board and any steps that need to be taken to cure, if necessary, any defect in the prior voting.

The Milolii Beach Club Association II is Hawaii non-profit corporation and is governed by both Hawaii Revised Statutes 421J-1 et. seq., the homeowner association statute, and 414D-1 et. seq., the non-profit corporation statute.

**Hawaii Revised Statute §414D-113 states, in part, as follows:**

" Proxies. (a) Unless the articles or bylaws prohibit or limit proxy voting, a member may appoint a proxy to vote or otherwise act for the member by signing an appointment form either personally or by an attorney-in-fact.

**Hawaii Revised Statutes 421J-1 states, in part, as follows:**

"To be valid, a proxy shall:

(1) Be delivered to the secretary of the association or the managing agent, if any, no later than 4:30 p.m. on the second business day prior to the date of the meeting to which it pertains; and

(2) Contain at least the name of the association, the date of the meeting of the association, the printed name and signature of the person or persons giving the proxy, the unit or units for which the proxy is given, and the date that the proxy is given...

(d) If a proxy is a standard proxy form authorized by the association, the proxy shall contain boxes wherein the owner may indicate that the proxy is given:

(1) For quorum purposes only;

(2) To the individual whose name is printed on a line next to this box;

(3) To the board of directors as a whole and that the vote be made on the basis of the preference of the majority of the directors present at the meeting; or

(4) To those directors present at the meeting and the vote to be shared with each board member receiving an equal percentage;

provided that if the proxy is returned with no box or more than one of the boxes in paragraphs (1) through (4) checked, the proxy shall be counted for quorum purposes only."

It is our understanding that the proxy in 2013 fully complied with the statutory requirements as set forth above. We also understand that the proxy forms that were sent out to the membership for their voting in the years 2014, 2015, 2016 and 2017 inadvertently failed to include the box for members of the Association to give their proxy to the members of the Board of Directors present at the meeting **"with the vote to be shared with each board member receiving an equal percentage."** (This was completely understandable because the Bylaws actually state that in Article II, Section 3 that "When the Board of Directors is named as the proxy holder, the vote shall be made on the basis of the preference of the majority of the Board." With that restriction it was understandable that the person sending out the proxies would only include that provision in the official proxy form. The person sending out the proxy was simply following the guidelines in the Bylaws. The other three boxes were correctly included in the proxy form. Unfortunately, the statute for proxies does not say something to the effect of, "except as otherwise provided in the Bylaws the proxies shall be as follows", it simply mandates that which should be included in the proxy. In other words all of the requirements of the form of the proxy in the statute were mandatory, regardless of the language in the Bylaws and needed to be included.

The statutes are very clear that in order for a proxy to be valid it must comply with the statutory requirements. If it does not, it is an invalid proxy. All of the proxies returned for use in the 2014- 2017 elections failed, even if inadvertently, to include all of the statutory requirements, therefore **all** proxies utilized for those elections are deemed invalid. This may have affected

whether or not the Association even had a quorum for purposes of conducting a meeting, but there is at least an argument that an invalid proxy can be used for determining a quorum. Since all proxies were invalid it is not enough to attempt to determine if the proxy voting would have impacted the outcome of the election since it is quite possible a quorum was improperly announced.

If the proxies were invalid, then the election which took place was also invalid. If the election was invalid then the newly elected Board as of 2014 was not elected. If the newly elected 2014 Board was not elected then the old board remained as Board members.

The Milolii Beach Club Association II's Bylaws state, in part, as follows:

**"Each director shall hold office until such director's successor shall have been elected and shall qualify or until such director's death, or until such director shall resign or shall have been removed in the manner herein provided".**

This means that that the seven members of the Board elected in 2013, being :

Leon Wolske  
Vicki Swift  
Carl Ramsey  
Uwe Gunnersen  
Terri Richards  
Teresa Grabham  
Rob Varney

would otherwise be your current Board because they would hold office until their successor shall be elected and qualified. I understand that Teresa Grabham and Rob Varney resigned in 2013, and their resignations were accepted. The two vacancies were filled by the properly elected Board in August, 2013. These were Leslie Cooney and Daniel Harris. I understand that Leslie later resigned and left the island. Vicki Swift resigned in 2014. Based upon the foregoing, Leon Wolske, Carl Ramsey, Uwe Gunnersen, Terri Richards and Daniel Harris are the current Board members.

They are the only ones that are authorized to conduct the next annual meeting. They should probably meet and choose the officers for the Association to serve out the remaining term until the next valid election, including the person to chair the annual meeting.

Case Law:

A case in Virginia regarding an invalid election resulted in the following decision by the Court:

Virginia: A trial court ruled that a newly elected board of directors was elected

improperly and that the previous board was now the "holdover board...empowered to act pending election and qualification of a successor board."

It is our opinion, based upon the information that has been provided, that a court in the State of Hawaii would rule similarly to the Virginia Court and determine that the previous Board, in this case, the 2013 Board, that was elected correctly, is a "holdover board ... empowered to act pending election and qualification of a successor board."

Since we have not seen minutes or other records of any votes taken by the Board through the course of their deliberations in 2014 - 2017 we are not in a position to determine if any specific actions or votes were somehow valid because of the specific action taken and therefore can only opine that the Boards, as elected using the invalid proxies, were not properly elected.

Should you have any questions or require clarification of these matters, please do not hesitate to contact me. Thank you.

Sincerely,  
  
Robert D. Triantos

RDT/mnr