



HELLMUTH & JOHNSON PLLC

ATTORNEYS AT LAW

MEMORANDUM

TO: Members of The Jonathan Association

FROM: David G. Hellmuth, Esq. *DGH*
Association Legal Counsel

RE: Review of Annual Meeting Video Tape and Chaska Herald Audio Recording
of Annual Meeting
Our File No.: 13237.0001 (General Legal Matters)

CC: Nate Bostrom, Former President, The Jonathan Association
Kirk Gassen, Gassen Company Property Management

DATE: February 27, 2012

This memorandum follows my meeting with Nate Bostrom, former President of the Jonathan Association (the "Association") on Wednesday, February 22, 2012, the day following the Association's annual meeting, held on Tuesday, February 21, 2012 (the "Annual Meeting"). This memorandum also follows my review of the Annual Meeting Video Recording (the "Video") and the Audio Recording (the "Audio") provided to the Chaska Herald. This recording is still available on the newspaper's website.

This Memorandum outlines my opinion as to the legal actions that occurred at the Annual Meeting, based on my discussions with Mr. Bostrom and my review of the Video and Audio recordings, as well as my experience and knowledge of Minnesota law. This memorandum will also document that I received telephone calls from the Association's property manager while the annual meeting was in progress, and that I recommended that the annual meeting be adjourned due to some unusual actions that were occurring at the meeting.

Adjournment Issue

It is my understanding that Mr. Bostrom attempted to adjourn the annual meeting, while the meeting was still in progress. However, there was no proper motion for adjournment. As such, the attempt at adjournment was improper and invalid. The attempted motion was not seconded and no vote was taken. Accordingly, the meeting continued.

As the meeting continued, certain valid actions were taken prior to actual adjournment. Other actions, which were not valid, were also taken prior to actual adjournment. My opinion with respect to these actions and the current state of governance affairs for the Association, is as follows:

1. **Motion for Removal of Certain Board Members.** At approximately the 30:30 minute point of the Audio recording, a motion was made by Jason Holt to remove certain members of the Board of Directors. The motion was seconded by Julie Pint and passed by an appropriate vote of the members still present. The removed directors are, as follows:
 - a. Nate Bostrom;
 - b. David Snodgrass;
 - c. Linda Frey;
 - d. Mark Perry;
 - e. Matt Poppler;
 - f. Kristin Alcindor;
 - g. Nancy Dilks; and
 - h. Kelli Snapp

Interestingly, Brandon Maves was not initially removed from the Board of Directors. I actually listened to Audio 3-4 times to confirm that Mr. Maves was never mentioned and never removed from the Board of Directors during the initial motion. In fact, Julie Pint, who seconded the motion and called the question, restated the above names prior to the vote on the motion. Neither Mr. Holt nor Ms. Pint mentioned Brandon Maves' name as part of their motion to remove certain directors. This fact is very significant, as Mr. Maves would, as sole remaining director, be the only person having authority to appoint directors.

2. **Current Board Status and Attempted Invalid Election.** After the motion to remove certain Board members was validly completed, the members made a motion to conduct an election to replace the removed directors. In my opinion, this motion was improper and constituted an *ultra vires* act of the Corporation, as it is directly contrary to the Association's Bylaws. *Ultra vires* is a Latin phrase meaning literally "beyond the powers", although its standard legal translation and substitute is "beyond power". In corporate law, *ultra vires* describes acts attempted by a corporation (or, its' members) that are beyond the scope of powers granted by the corporation's objects clause, articles of incorporation or in a clause in its Bylaws. Acts attempted by a corporation, or its members, that are beyond the scope of its charter are void or voidable. Furthermore, an *ultra vires* transaction cannot be ratified by shareholders, even if they wish it to be ratified.

- a. Article V, Section 3 of the Association's Bylaws provides, as follows:

"Any Director may be removed from the Board, with or without cause, by a majority vote of the members of the Association voting thereat at a duly called meeting of the Association. **In the event of death, resignation or removal of a Director, his or her successor shall be selected by the remaining members of the Board and shall serve for the unexpired term of his or her predecessor.**"

(Emphasis Added.)

The Minnesota Nonprofit Corporation Act, Chapter 317A of Minnesota Statutes (the "Act") also contains removal provisions for non-profit Board members. Section 317A.223 of the Act specifically provides that "The provisions of this section apply unless a different method of removal is provided for in the articles or bylaws." (*Emphasis added*). Based on the foregoing language, the Act defers to the methodology contained in the Association's Bylaws.

- b. Upon removal of eight (8) of the nine (9) serving directors at the meeting, the remaining director "shall" select the successors, who serve for the remaining terms of the removed directors. Since Mr. Maves was not initially removed, he was the only one authorized to appoint directors to fulfill the terms.

Based on the foregoing, it is my opinion that Brandon Maves was the sole remaining director and still serving on the Board at the time of the attempted, improper election motion. As such, he was the only person who had the authority to appoint directors to serve on the Board. At the end of the meeting, Mr. Maves was removed by motion. However, the earlier "election" was clearly defective, as an ultra vires action.

Recommendation: Recalling of Annual Meeting To Fill Vacant Seats.

At the annual meeting, three (3) director terms were set to expire. Due to the manner in which action was taken, the members moved improperly to elect seven (7) directors. Since the members did not have authority to fill unexpired vacancies of removed directors, the procedure was improper. Further, it is now impossible to determine who "received the most votes", if we are seeking to determine who should fill the vacancies created by the ends of three (3) director terms.

My recommendation is that the Association re-notice and re-call an annual meeting, at which, vacant directors positions can be properly considered and filled in accordance with Minnesota law and the Association's governing documents.

For the reasons noted above, I believe that the approach taken by the members after the adjournment attempt was procedurally defect, as they did not have the authority to elect directors while a director (Brandon Maves) was still serving on the board.