

**STATE OF FLORIDA
DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION
DIVISION OF FLORIDA CONDOMINIUMS, TIMESHARES AND MOBILE HOMES**

IN RE: PETITION FOR BINDING ARBITRATION – HOA ELECTION DISPUTE

MIRIAM L. BURTOFF,

Petitioner,

v.

Case No. 2023-03-7673

**NORTH SHORE AT LAKE HART
HOMEOWNERS' ASSOCIATION, INC.,**

Respondent.

_____ /

FINAL ORDER

Issues

1. Whether the Association's board of directors properly amended the Association's By-Laws to prohibit a homeowner from being eligible to be a candidate for the election to the board if such homeowner was involved in litigation, or an administrative complaint, with the Association.
2. Whether the Association's board of directors properly amended the By-Laws to eliminate the right of homeowners to vote by proxy.
3. Whether the Association's election for the board of directors, and its board meeting following the election were properly conducted in accordance with Florida law and the valid portions of the By-Laws.

Procedural History

On July 5, 2023, Petitioner, Miriam L. Burtoff, filed a petition for binding arbitration naming North Shore At Lake Hart Homeowner's Association, Inc. (Association) as Respondent. On July 18, 2023, the Association filed a motion in opposition to the petition. On July 25, 2023, Petitioner filed a response to the Association's motion. On July 31, 2023, an order was entered denying the motion in opposition. On August 4, 2023, the Association filed its answer and defenses. On August 14, 2023, Petitioner filed a response to the answer and defenses, and a motion for summary judgment.

On August 22, 2023, the Association filed a response in opposition to Petitioner's motion for summary judgment. On September 20, 2023, a hearing for case management was held; counsel for the parties appeared, and the issues were discussed. After orders scheduling a final hearing for certain dates were entered, on November 21 and 28, 2023, the final hearing was held, and the parties introduced the testimony of witnesses and documentary evidence.

Findings of Fact

1. The Association is the legal entity responsible for the operation and maintenance of the Lake Shore at Lake Hart condominium.
2. Petitioner, Miriam Burtoff, co-owns a home in the community and is a member of the Association.
3. There are five director seats for the Association's board of directors.
4. The five directors serve for three-year terms on a staggered basis pursuant to the Association's Articles of Incorporation.

5. The original by-laws, Article III, sections 9 and 10, provided:

Section 9. Quorum. The presence at the meeting of Members to cast, or of proxies entitled to cast, fifteen percent (15) of the voting interests at a meeting of Members shall constitute a quorum for any action. . . . If, however, such quorum shall not be present or represented at any meeting, the Members entitled to vote shall have the power to adjourn the meeting from time to time, without notice other than announcement at the meeting, until a quorum shall be present or be represented.

Section 10. Proxies. At all meetings of Members, each Member may vote in person or by proxy duly appointed in writing[.]

(Emphasis added).

6. A quorum for purposes of voting and elections at all membership meetings is 15% of the voting interests present in person or by proxy at such meetings, or 154 voting interests.

7. The original bylaws contained no provision providing how members could be candidates for election to the board of directors, and no provision stating the eligibility requirements to be a candidate for election.

8. Article X of the original by-laws provided that they may be amended ". . . by the Board of Directors present, in person or by proxy, and entitled to vote at a regular or special meeting of the Board[.]"

9. An undated notice of a board meeting to be held on June 16, 2020, was in evidence, together with an agenda that was sent to the members. The agenda stated that the place for the meeting was via Zoom. On item on the agenda listed "Homeowners Comments," and at item 7e. stated "By-Laws Update." The agenda did not state that an amendment to the by-laws would be considered at the meeting or attach a copy of the proposed amendment.

10. The minutes of the June 16, 2020, board meeting stated the meeting was held by Zoom video conference and that Homeowner Comments were received. The minutes did not state what the comments were. The minutes do not state that an amendment to the by-laws was discussed by members of the board or that members were allowed to comment or ask questions about it. The minutes state only that: "John motioned to approve the amendment to the By-Laws as presented. Dave Seconded and unanimously approved."

11. The amendment adopted at the June 16, 2020, board meeting made changes to the original by-laws. (2020 Amendment). Article III, section 5 now provided that the Association "invit[ed] all eligible Members desiring to be a candidate to submit a notice of intent to be a candidate in writing within 40 days prior to the date of the annual meeting and election.

12. The 2020 Amendment retained the language quoted and underlined above about when a quorum is not achieved, the members had the power to adjourn the meeting and election until another date when a quorum could be achieved.

13. The 2020 amendment at Section 10 on Proxies retained the right of the members to vote by proxy at all members meetings without limitations.

14. Concerning eligibility to be a candidate for the board of directors, amended Section 10 now provided in part:

A person who is delinquent in the payment of any fee, fine, or other monetary obligation to the association for more than 90 days or is in litigation with the Association is not eligible for board membership.

(Emphasis added).

15. In an undated notice posted on the Association's property, the Association set a Zoom board meeting only for January 19, 2021. The agenda at no. 4 stated "Homeowner Comments," and item no. 7, stated "By law Revision". The notice did not state what parts of the original by-laws or the 2020 Amendment would be amended, considered and voted on at the meeting.

16. The minutes of the January 19, 2021, board meeting stated

The Board of Directors and legal counsel presented a completed draft of the Second Amendment to the Bylaws of Northshore At Lake Hart HOA, Inc. for consideration. The amendment was a project that the Board had worked closely with counsel to develop and the Board felt well prepared for a vote.

The minutes further stated that a motion was made to approve the second amendment "as presented[,] " was seconded, and that all were in favor. The minutes do not state whether there was any discussion by board members prior to the vote on the amendment (the 2021 Amendment).

17. The video and testimony given at the final hearing of this meeting in January 2021, revealed that: (1) the meeting was short and was conducted by the attorney for the Board; (2) Director Gordon announced that the board was making "just a few minor changes;" and that the amendment was 9 pages long and would be sent to the members after they were passed; (2) there was no discussion among the board members about the proposed amendment; and (3) members asked the board to read the amendments but their questions were not answered; a member asked that the meeting be adjourned and be rescheduled after a copy of the proposed amendment had been delivered to the members but the question was not answered.

18. The 2021 Amendment made changes to the 2020 Amendment. First, Section 9, Quorum, deleted the underlined language above from the original bylaws and the 2020 Amendment which gave the members the power to vote to adjourn the members meeting and reschedule it if a quorum was not met.

19. Second, the 2021 Amendment to Section 10, Proxies, now provided:

A proxy given for a meeting which is adjourned due to lack of a quorum and rescheduled to a date and time certain under the preceding section (Quorum), shall be good at the subsequent meeting. . . . Proxies are not for voting in Board Elections and can only be used for Quorum. . . .

(Emphasis added).

20. Third, the 2021 Amendment at Section 10 was amended to add that a homeowner who is in litigation or any administrative complaint with the Association "is not eligible for board membership or to serve on a committee in any capacity at any time." (Emphasis added).

21. Fourth, the 2021 Amendment provided that "[t]he election ballots shall be handled by an impartial committee . . . whose members do not include any of the following, their spouses or family members: 1. Current board members; (2) Officers; and (3) Candidates for the board." (Emphasis added).

22. On March 15, 2023, the Association sent the homeowners a first notice that an election for the board of directors would be held on May 2, 2023, on the tennis court next to the Community Center. The election was for one seat open on the board for a 3-year term. The notice stated that owners who wished to be candidates must submit an intent to be candidate form by March 31, 2023. The notice stated:

Due to space limitations in the Clubhouse resulting in the meeting being held outside on the tennis courts, residents are encouraged to attend virtually, if possible.

(Emphasis in bold in original). The notice stated that the Association recommended that homeowners bring their own water or other liquid refreshment. It did not recommend bringing chairs.

23. On March 29, 2023, Petitioner delivered to the Association her notice of intent to be a candidate for the election of the one open seat on the board.

24. Homeowners Dr. Greg Mathison and Thomas W. Garland also submitted notices of intent to be a candidate for the election of the one open seat on the board.

25. On April 4, 2023, the Association sent a letter to Dr. Mathison to inform him that he was not eligible to be a candidate for this election because he was involved in litigation with the Association. On that date, Dr. Mathison was not involved in litigation with the Association.

26. On April 5, 2023, counsel for the Association sent a letter to Petitioner regarding her notice of intent to be a candidate for the board at the May 2023 election. It stated: "We regret to inform you that pursuant to the bylaws, you are not eligible to be a candidate for this election because you are currently involved in litigation against the Association." On that date, Petitioner was not involved in litigation with the Association.

27. On April 5, 2023, the Association sent a letter to Mr. Garland informing him that pursuant to the bylaws he was not eligible to be a candidate for the upcoming election because he was currently involved in litigation with the Association. On that date, Mr. Garland was not involved in litigation with the Association.

28. On April 6, 2023, the Association delivered to the members a second notice for the May 2, 2023, meeting of the membership and election of directors. It stated in part:

Enclosed you will find (i) an agenda, (ii) a proxy, (iii) a yellow ballot, (iv) a yellow ballot envelope and (v) a return mail envelope. If you are not attending the meeting in person your proxy will be used for determining quorum at the Annual Meeting and for voting on all matters at the Annual Meeting other than for the election of directors.

(Emphasis added). The second notice repeated the underlined language above in the first notice that the meeting was being held on the tennis courts due to space limitations in the Clubhouse. The enclosed ballot contained the names of four candidates for the board election but did not list the names of Petitioner, Mr. Mattison or Mr. Garland.

29. On April 28, 2023, a notice to the members announced a board meeting to be held by Zoom conference only at 5:45 p.m. on May 2, 2023. The agenda listed two items were for homeowners comments. The Sherrif's Deputies had been instructed by the Association's manager, Ms. Laurie Bihailo (Ms. Bihailo), not to permit any homeowners to enter the building.

30. The May 2, 2023, annual meeting and board election was held on the Association's tennis courts beginning at 5:00 p.m. and ended at 6:24 p.m. The video of the meeting and election showed that there was a table in front of the Clubhouse where the Association conducted the meeting. Seated at the table were Ms. Bihailo, the manager, Tanner Mews, CAM, director Lisa Solsick, and the board's attorney. The testimony was that these people opened and counted the ballots to see if a quorum had been achieved. The testimony was that there was no shade, no seating, and the temperature approached 95 degrees Fahrenheit.

One homeowner who attended the meeting and election testified that no homeowners were permitted inside the Clubhouse during the meeting. One homeowner testified that some homeowners asked questions to the people at the table, but that no

answers were given. Another homeowner testified that after the ballots were opened, the people at the table went into the Clubhouse for a period of time and then a director came out and announced to the homeowners that there was no quorum. The testimony was that some homeowners tried to enter the Clubhouse for the noticed board meeting after the election but Sherrif's deputies blocked the door, and told them that the meeting was closed. Ms. Bialo testified that without the boxes and equipment that she stored in the Clubhouse there was room for a total of 88 people to stand and 30-40 people to sit and that there were 30-40 chairs in the room. Another homeowner testified that he tried to take his daughter to the Clubhouse bathroom through the door on the side but that a person blocked the door. There was a picture in evidence showing a person in front of the side door leading to the bathroom with his hand stretched out open in the "stop" position. In response to questions by the arbitrator, Ms. Biahlo was asked if the by-laws authorized meetings by Zoom conference only or permitted closed meetings of the board and she answered "no."

31. At the final hearing, Ms. Bihailo testified that after she became the management company's manager for the Association in March 2022, she had moved boxes and equipment into the Clubhouse where board meetings and elections were held, and that besides her and the board members, the room would accommodate only an additional 10 people. At the hearing, Ms. Bihailo testified that the membership meeting and election on May 2, 2023, had to take place on the tennis courts because the Association could not have rented the elementary school auditorium across the street from the tennis courts with large seating capacity for the election because someone had told her that it could only be rented until 6:00 p.m. The Orange County

Facilities Handbook which applied to rentals of school property was in evidence. It provides that private interest or Non-Government entities would be Priority 5 Scheduling and listed the rental rates for the auditorium for such user groups: (1) \$75.00 per hour for the auditorium of the elementary school; (2) utility fees of \$11.00; supply fees of \$7.00; microphone \$25.00; (3) supply fee for each rental based on the room(s) reserved; (4) a custodian at \$40.00 an hour; and (5) 6.5% sales tax. There is no provision in the Handbook limiting the hours of rental until 6:00 p.m. Testimony at the hearing was that 400 - 500 people could be in the auditorium. Mr. Garland testified that he pays the school across the street to rent space for his Cub Scout troop meetings and the school has permitted him to pay extra to rent the space after 6:00 p.m.

32. In the Association's May Special Legal Edition, dated May 25, 2023, the results of the annual meeting and election, were announced:

The HOA annual meeting, called to order on May 2, did not result in an election because a quorum was not met. A quorum is a minimum participation requirement established in our bylaws. As a general matter of parliamentary procedure, when an assembly does not achieve a quorum, it may not proceed and a motion to adjourn brings it to an end.

(Emphasis added). The newsletter stated that because no quorum was reached, Mr. Snyder, whose seat was up for the election, would remain in his seat for another full 3-year term.

33. After stating that a quorum is established by 15% of the members present at the meeting or having delivered a properly completed proxy form, the newsletter then stated: "In this instance, that meant that 154 homeowners were required to attend the meeting in person (or deliver valid proxies). That number fell short by at least 20." The announcement then stated that the election was only for one position; that the

incumbent, Paul Snyder, was running for reelection; that three other qualified candidates ran for the seat; but that "[b]ecause of the lack of a quorum, Mr. Snyder will remain in his seat for another full term."

34. The minutes of the Board meeting on May 2, 2023, held immediately after the election in the Clubhouse and noticed for Zoom conference only, stated nothing about the election, the quorum, or the results, except:

Prior to the 5:45 pm meeting start time, 39 homeowners had registered allowing management to verify homeownership. During the meeting, 10 homeowners logged in to attend the meeting. No homeowners commented.

Conclusions of Law

The arbitrator has subject matter jurisdiction of the election dispute. Section 720.311(1), Florida Statutes provides that " . . . the department shall conduct binding arbitration of election disputes between a member and association in accordance with ss. 718.1255 and rules adopted by the division." Rule 61B-80.103(2), Florida Administrative Code provides:

Election disputes include a controversy relating to the conduct of a regular, special, or runoff election; the qualifications of candidates for the board; the filing of a vacancy caused by any reason other than the recall of one or more directors of the board; and other disputes regarding an association election.

In this case, the dispute concerns: (1) the conduct of the election; (2) the qualifications of candidates for the board; and (3) other disputes regarding an election. The arbitrator also has personal jurisdiction of the parties. This final order is entered after a two-day final hearing at which witnesses testified, were cross-examined and documents were entered in evidence.

I. The Election and Following Board Meeting Were Improperly Conducted.

A. Relevant Statutory Authorities.

Section 720.306, Florida Statutes (2023) provides in part:

(2) ANNUAL MEETING. - The association shall hold a meeting of its members annually for the transaction of any and all proper business at a time, date, and place stated in, or fixed in accordance with the bylaws. The election of directors, if one is required to be held, must be held at, or in conjunction with, the annual meeting or as provided in the governing documents....

(6) RIGHT TO SPEAK. - Members and parcel owners have the right to attend all membership meetings and to speak at any meeting with reference to all items opened to discussion or included on the agenda. . . . [A] member and a parcel owner have the right to speak for at least 3 minutes on any item. The association may adopt written reasonable rules governing the frequency, duration, and other manner of member and parcel owner statements, which rules must be consistent with this subsection. . . .

(9) ELECTIONS AND BOARD VACANCIES. - (a) Elections of directors must be conducted in accordance with the procedures set forth in the governing documents. Except as provided in paragraph (b), all members are eligible to serve on the board of directors[.]

(b) A person who is delinquent in the payment of any fine, or other monetary obligation to the association . . . may not seek election to the board A person who has been convicted of any felony in this state or in a United States District or Territorial Court, or has been convicted of any offence in another jurisdiction which would be considered a felony if committed in this state, may not seek election to the board and is not eligible for board membership unless such felon's civil rights have been restored for at least 5 years as of the date on which such person seeks election to the board.

(Emphasis added).

B. The Association's By-Laws.

Article III, Section 3 of the by-laws gives the board of directors discretion in setting the time, date, and place for the annual meeting. It then stated: "Each

subsequent regular annual meeting of the Members shall be held within twelve (12) months of the previous annual meeting."¹

The original by-laws contained no provisions for eligibility of a member to seek election to the board of directors. However, the 2020 amendment to the by-laws in Article III, section 10, stated that a person who was "in litigation with the Association is not eligible for board membership." A second amendment to the by-laws that was adopted at the board of director's meeting on January 19, 2021, at Article III, section 10, stated that a person who "is involved in litigation or any administrative complaint with the Association is not eligible for board membership[.]" (Emphasis added).

In *Kornegay v. Hollowbrook Homeowners Association, Inc.*, Arb. Case No. 2016-00-4202, Summary Final Order (July 22, 2016), the association's by-laws, like those here, contained an amendment that added an additional reason why a candidate could not be eligible to seek election to the board if "he or she has filed litigation against the Association creating a conflict of interest between himself/herself and the Association."

The arbitrator concluded:

An Association may only bar candidates from seeking election for the reasons provided for by the statute and may not provide for additional disqualifications Therefore, the reasons stated by the Committee were not valid reasons to exclude Mr. Kornegay and Mr. Hall as candidates, and they were improperly disqualified by the Committee. Accordingly, the election was fatally flawed.²

(Emphasis added). For this reason, the arbitrator ruled that a new election be held.

¹ The annual meetings and board elections were held as follows: August 14, 2018; October 22, 2019; December 2, 9, 2020; March 16, 2021; and April 13, 2022. Thus, the Association did not comply with the by-laws concerning the dates of those elections.

² (Citing *Jerry Moore Florida Operations, LLC v. The Park Homeowners Association, Inc.*, Arb. Case No. 2015-03-1417, Summary Final Order (December 21, 2015)(by-laws residency requirement for nominees found invalid)).

In this case, the Association improperly precluded Petitioner, Greg Mathison, and Thomas Garland from being eligible to seek election because of the amended bylaws that precluded members involved in litigation with the Association from being eligible to seek election to the board.³ Because these by-law amendments on eligibility were not in compliance with the two eligibility requirements in section 720.306(9)(b), they are invalid, and a new election shall be required.⁴

C. By-Law Amendment Prohibiting Voting By Proxy.

Petitioner also asserted that the election was flawed because the 2021 Amendment prohibited members from voting by proxy. The original by-laws did not contain such a prohibition, but the second amendment at Article III, section 10, provided in part: "Proxies are not for voting in Board Elections and can only be used for Quorum."

Section 720.306(8), Florida Statutes, provides that "[t]he members have the right, unless otherwise provided in this subsection or in the governing documents, to vote in person or by proxy." This subsection was interpreted in *Romano v. Emerald Preserve-Summerlin Homeowners Association, Inc.*, Arb. Case No. 2010-06-2551, Summary Final Order (July 27, 2011). In *Romano*, the board of directors voted to amend the election procedures in the by-laws "to eliminate proxy voting and allowed only the use of limited proxies to deliver an absentee ballot." The amendment also provided that in the event no quorum is reached at the annual meeting, holdover directors are automatically

³ The record evidence showed that none of these three candidates were in fact involved in litigation with the Association.

⁴ At the election on April 12, 2022, based on the invalid by-law amendment, the Association precluded four otherwise qualified candidates from being candidates for that election as well which was improper. As explained *infra*, the Association's board elections in 2017, 2018, and 2019, were fatally flawed and a new election for all 5 seats on the board was ordered by an arbitrator on June 5, 2020.

given a new three year term. At the board meeting where the amendment was adopted, "[t]he board excluded the homeowners in the audience from the discussion completely."

The Association in *Romano* argued that since the by-laws are part of its governing documents, it may eliminate the right to vote by proxy. The arbitrator rejected this argument and stated as follows:

[T]his contention ignores the different functions of the three types of governing documents. Bylaws are defined by Section 617.0141, Florida Statutes as: the code or codes of rules adopted for the regulation or management of the corporation. Pursuant to Section 617.0206, Florida Statutes, the bylaws may: "contain any provision for the regulation and management of the affairs of the corporation not inconsistent with law or the articles of incorporation." Section 617.0202(2)(b), Florida Statutes provides that the Articles of Corporation may include: (a)ny provision not inconsistent with law, regarding the regulation of the internal affairs of the corporation, including, without limitation, any provision with respect to the relative rights or interests of the members as among themselves or in the property of the corporation. (Emphasis added). . . .

The ability to vote by proxy has been defined as a "right" by Section 720.306(8), Florida Statutes. Eliminating a right of the members is not regulation or management of the affairs of the corporation. The bylaws of the Association may prescribe the procedures on how the members may exercise their rights, but it may not abolish those rights. Compare Karmatz v. Gulf Harbors Woodlands Ass'n, Inc., Arb. Case No. 2005-06-3659, Summary Final Order (July 31, 2005)(Eliminating cumulative voting by amendment to the bylaws is valid because it did not alter the proportionate voting interest of each member. The bylaw merely altered the procedure or manner of casting a vote and did not intrude on the members voting rights). Any elimination of the right to vote by proxy must be achieved through amendment of the declaration or the articles of incorporation by a vote of the required proportion of the entire membership. . . .

(Emphasis added). The arbitrator concluded that the bylaw amendment that eliminated the members' right to vote by proxy was invalid and ruled that a new special election was required.

Romano has been followed in other Division cases. In *Sweigart v. Deer Run Property Owners' Association, Inc.*, Arb. Case No. 2016-03-1927, Summary Final Order

(December 23, 2016), section 2.06 of the bylaws required proxies for elections to be filed with secretary at least 90 days before meeting. For the 2015 election the association did not enforce the 90 day requirement and the notice permitted proxies to be accepted up to the night of the election. The notice for the 2016 election notice warned members that proxies must be submitted 90 days before the election. Petitioners argued that the Association was estopped from enforcing the pertinent bylaw because it had failed to do so in the past. The arbitrator concluded that the homeowners could have reasonably relied on the fact that they were allowed to submit their proxies up to the night of the election meeting. Because section 720.306(8) provided them with a right to vote by proxy, the arbitrator concluded that the homeowners were detrimentally precluded of the right to submit proxies up to the night of the election by relying on the Association's previous non-enforcement of the 90 day rule. The arbitrator concluded that bylaws section 2.06 was unenforceable because it impeded the homeowners' right to vote by proxy, and cited and restated the holding in *Romano* that the bylaws may prescribe the procedures on how members can exercise their rights, but it may not abolish those rights.⁵ In this case, like in *Romano*, the 2021 amendment to the by-laws prohibiting voting by proxy is invalid. Therefore, this conclusion is also another basis for ordering a new election.

⁵ See also, *Williams v. Four Seasons At Orlando Homeowners Association, Inc.*, Arb. Case No. 2023-01-7792, Summary Final Order (June 29, 2023)(developer-controlled board passed bylaw amendment eliminating use of proxies for voting but later rescinded it; even without rescission, amendment adopted prior to subject election was invalid because it precluded use of proxies to vote at upcoming election, citing *Romano*);

D. The Election, The Board Meeting Following The Election and The Board Meeting on January 19, 2021, Were Improperly Conducted.

Section 720.306(2) requires an association to hold the annual membership meeting and board election annually, at a time, and place stated in the by-laws. The original by-laws provide the board with the discretion to determine the place to hold the annual meeting and election. However, such discretion must be exercised reasonably and not be abused. The first notice of the election stated that the election would occur on the tennis courts next to the Association's community center beginning at 5:00 p.m. The first and second notice of the election stated in part that: "Due to space limitations in the Clubhouse resulting in the meeting being held outside on the tennis courts, residents are encouraged to attend virtually, if possible."

Testimony at the final hearing established that the following people were seated at the table in front of the Clubhouse to open and count the ballots: the CAM, the manager, the attorney and one board member. However, the 2021 Amendment provided:

The election ballots and envelopes shall be handled by an impartial committee . . . For purposed of this rule, "impartial" shall mean a committee whose members do not include any of the following, their spouses or family members: 1. Current board members; 2. Officers; and (3) Candidates for the board

Therefore, the opening and counting of the ballots at the election to determine whether there was a quorum was not done by an impartial committee; but was done by two employees of the management company, one current board member, and the board's

attorney.⁶ Several past elections, including this one, were determined not to have obtained a quorum. The Association's failure to use an impartial committee to open and count the ballots at this election constitutes a serious election irregularity and is another reason why a new election must be held.

The annual membership meeting had been held before in the Clubhouse and that in addition to the members of the board, the manager, and Association counsel, there was room in the Clubhouse for approximately forty (40) homeowners to attend and be seated at the meeting. The manager testified that the reason for not holding the election in the Clubhouse was because after she became a manager on March 2022, she moved boxes and equipment from another location to the board room, and that in addition to her, the attorney and board members, there was only room in the Clubhouse for approximately ten (10) members, including the board, manager and attorney, to attend. The board meeting in the Clubhouse following the election was noticed for Zoom conference only and members were not permitted to attend in person although some tried to enter the Clubhouse to observe the meeting but were precluded from doing so by the Sheriff's deputies who had been instructed by Ms. Bihailo not to let anyone in.

Annual membership meetings and board elections are very important in a homeowners association and the statute requires that members may attend and speak at such meetings. Here, the Association did not permit any members to be present inside the Clubhouse during the election and the board meeting following the election even though there was space for approximately 30-40 members to be seated. This is

⁶ The Association's manager, CAM, and attorney were all hired by the board of directors and owed their loyalty to the board - not to the members. Thus, they were not "impartial" and should not have been opening and counting the ballots.

another serious election process irregularity that requires a new election. Some homeowners should have been allowed to be inside the Clubhouse during the election and following board meeting to observe whatever was occurring in it with the board members, manager, and attorney. Moreover, the Association could have removed the boxes and equipment in the Clubhouse and placed them somewhere else temporarily to permit more members to be there during the election and following board meeting.

The testimony about what occurred at the meeting and election on the tennis courts is described in the Findings of Fact *supra*. Among other things, the fact that homeowners had to stand on the tennis courts in the hot sun, with the temperature approximately 95 degrees Fahrenheit, without shade and chairs that were stored in the Clubhouse, for approximately one and a half hours while the ballots were being opened was unreasonable and unnecessary. As stated in Finding of Fact 31, *supra*, the Association could have inexpensively rented the auditorium in the elementary school across the road from the tennis courts where members could attend in an air-conditioned space that could hold hundreds of people and such rental would not have had to be limited in time only to no later than 6:00 p.m.

For all the reasons discussed above, the arbitrator concludes that the election process in this case was not fairly and properly conducted in accordance with the requirements of Florida law and the valid portions of the by-laws. Moreover, the notice that the board meeting following the election would be held by Zoom conference only was also improper.⁷ While the notice and agenda for the board meeting provided for

⁷ In *Leuven v. Dockside At Ventura Condominium Association, Inc.*, Arb. Case No. 2023-05-5852, Summary Final Order (November 29, 2023), the arbitrator concluded that meetings held by zoom conference only are improper. Although the rules and

"Homeowner Comments", no members were allowed to enter the Clubhouse to attend the board meeting in person and make comments.

E. The Board Meeting on January 19, 2021

Rule 61B-80.103(2), Florida Administrative Code provides that election disputes, among other things, includes "other disputes regarding an association election." This meeting took place a little over two years before the election on May 2, 2023. Nevertheless, that meeting was part of the election process for the May election because at the meeting, the board adopted an amendment to the bylaws that precluded members from seeking election to the board if they were involved in litigation, or involved in any administrative complaint with the Association, and prohibited members from voting by proxy. Therefore, the 2021 Amendment affected members' voting rights because they were not permitted to vote at the May 2, 2023, election for members who submitted notices of intent to be a candidate but were improperly precluded by the Association from doing so. This Amendment also affected members' voting rights by eliminating their right to vote by proxy. Therefore, the election dispute in this case includes the impropriety of the board meeting on January 19, 2021. The arbitrator concludes that such meeting was not properly conducted.

Section 720.306(6), Florida Statutes, requires that "[m]embers have the right to attend all membership meetings and to speak at any meeting with reference to all items opened to discussion or included on the agenda." The agenda in the notice included at

caselaw applicable to condominium cases do not control in cases involving homeowners associations, they do provide persuasive authority to evaluate the fairness of elections See, e.g., *Kesterson v. New Floresta Homeowners' Association, Inc.*, Arb. Case No. 2022-01-8181, Summary Final Order (August 8, 2022) at note 2. The manager, Ms. Bihailo, testified that since she became the manager in March 2022, the Association used Zoom meetings for all meetings.

no. 4 "Homeowners Comments." While the notice stated that the board meeting would be by Zoom conference only, the testimony and video introduced showed that members were present and attempted to speak by asking questions, but their questions were ignored and not answered. This agenda provided that homeowner comments would be part of the meeting. Several members asked the board to read the specific amendments, or reconvene the meeting, provide a copy of the amendment to the members, and then reschedule the meeting. The board refused to answer the questions. Therefore, it was improper for the Board to ignore and not answer members' questions on an issue as important as revisions to the by-laws affecting the election process. The arbitrator concludes that the board's ignoring and refusing to answer questions of members about the 2021 Amendment, resulted in the meeting being improperly conducted which made the Amendment invalid and ultimately resulted in an unfair and improper election process in this case because otherwise qualified homeowners were improperly not permitted to be candidates for the election on May 2, 2023, and members were not permitted to vote by proxy.

II. Remedy

A. Background.

This is not the first arbitration proceeding concerning Respondent. In *Baker et. al., v. Northshore At Lake Hart Homeowners, Inc.*, Arb. Case No. 2019-05-9547, Summary Final Order (May 15, 2020, (Final Order), Petitioners filed a petition for binding arbitration of an election dispute against the Association on October 22, 2019. In the findings of fact, the arbitrator stated that on June 23, 2014, the Association held an election for all five seats on the five-member board of directors with two seats open

for a three-year term. The finding noted that it was a re-set election pursuant to a settlement agreement in *Pinna v. North Shore at Lake Hart Ass'n, Inc.*, Arb. Case No. 2013-04-9559, Final Order of Dismissal Based on Mediated Settlement Agreement (April 21, 2014).⁸ The findings of fact in *Baker* further stated that Petitioners contended that all 5 board seats should have been up for the election scheduled for October 22, 2019. In the final order, the arbitrator concluded that at least three elections in 2017, 2018 and 2019, were noticed and conducted improperly because the Association's governing documents did not provide for the nomination procedure used for years by the Association.

The arbitrator ruled that because of this history, an election for all 5 seats on the board was required re-setting new (3) year staggered terms as was done on at the election on June 2014.⁹ On May 26, 2020, the Association filed a motion for rehearing. It did not argue the merits of the summary final order; rather, it argued that the arbitrator exceeded his authority by recognizing the same election flaw that occurred in the elections in 2017, and 2018, because the time to challenge those elections had passed. On June 5, 2020, the arbitrator denied the motion citing Rule 61B-80.121(6) where an arbitrator is given the authority to grant any other remedy or relief that is just and

⁸ The petition in *Pinna* is not on the Division's data base. However, the Association's motion for leave to amend its answer and attached amended answer denied the petition's allegation that there had been no valid election in the 5-year period before the election scheduled for July 22, 2013, stating that a valid election was held on June 24, 2008. This sheds light on the long, tortured history of the Association's conduct regarding board elections.

⁹ The issue and ruling in *Baker* about nominations from the floor are not involved in the present election dispute. It is cited to provide light on the Association's history of improper elections.

equitable or appropriate in a given case.¹⁰ On that date, the final order was binding with no right for the filing of a trial de novo or any other appeal or court filing. Three days later, on June 16, 2020, the existing directors held a board meeting and adopted the 2020 Amendment.

The Association in *Baker* then improperly refused to schedule the new election as ordered notwithstanding that the order was both final and binding. Unlike decisions concerning elections in condominium cases, where a party has the right to file for a trial de novo in state court, no party may file for trial de novo in an arbitration proceeding concerning a final order in a homeowners dispute. *Compare* 720.311(1)(binding arbitration of election disputes); *with* section 718.1255(4)(k)(all disputes non-binding and subject to trial de novo). Disregarding the statutory requirement for binding arbitration, on July 6, 2020, the Association improperly filed a petition in the 5th District Court of Appeals concerning the merits of the Summary Final Order. Five months later, on November 9, 2020, the district court dismissed the petition for lack of jurisdiction.¹¹

On July 17, 2020, four of the petitioners in *Baker* filed a compliance action in circuit court requesting enforcement of the summary final order for a new election which the Association had refused to comply with and for appointment of a receiver to oversee

¹⁰ The arbitrator agrees for the same reason based on the Rule that it is proper for the arbitrator to review and rule on the propriety of the board meeting on January 19, 2021, and also to discuss board elections and meetings in other years.

¹¹ In *Baker v. Northshore At Lake Hart Homeowners Association, Inc.*, Fee Case No. 2020-02-8514, and Related Fee Case No. 2021-00-0546, Final Order On Motion for Attorney's Fees and Costs (March 3, 2021), the arbitrator awarded attorney's fees for both the underlying case and the appellate proceeding in the amount of \$8,130.00 and costs in the amount of \$200.00. According to Petitioner in this case, the Association has never paid the fees and costs.

the ordered election and administer the Association's affairs until a new board is seated. Two and a half years later, on February 18, 2022, the circuit court issued an order denying Petitioners' joint motion for summary judgment on the enforcement count. The court found that there were disputed issues of material fact which preclude summary judgment; that the issue of enforcing the Summary Final Order creates a question of whether the complaint is now moot because of subsequent elections and resignations; that the motion did not address the Association's 6 affirmative defenses; and that petitioner's request for appointment of a receiver was outside the scope of the relief afforded by the Summary Final Order.¹² Since the date of the order, over 9 months later, the case is inexplicably still pending.¹³

B. Appropriate Remedy In This Case.

Rule 61B-80.121(6) provides that the arbitrator is given the authority to grant any other remedy or relief that is just and equitable or appropriate in a given case. The arbitrator agrees with the order denying motion for rehearing in *Baker* that ruled pursuant to the rule he could consider the propriety of past elections. Because of the history of the Association's improper conduct of elections and board meetings, the arbitrator concludes, like the arbitrator in *Baker*, that a re-set election for all 5 board seats is just, equitable and appropriate. See also, *Cece v. Cedar Island Homeowners Association, Inc.*, Arb. Case No. 2020-02-0005, Summary Final Order (October 2,

¹² With respect, the arbitrator believes the circuit court's reason for denying the motion based on the summary final order presenting a question whether subsequent elections and director resignations mooted the court case was incorrect. That would only be true if subsequent elections were for all 5 board seats, but no subsequent election has been held for all five board seats.

¹³ The last docket entry was on November 22, 2022, when the Association filed a response to Plaintiffs' motion to strike affirmative defenses.

2020)(in election dispute, citing Rule 61B-80.121(6), the appropriate remedy was to require a re-set election and reestablish the staggered terms with all subsequent terms being for two years). It is therefore,

ORDERED AND ADJUDGED that this Final Order is binding on the parties pursuant to section 720.311(1), Florida Statutes. Pursuant to Rule 61B-80.121(5), Florida Administrative Code, the Final Order may not be appealed to the District Court of Appeal, and the only judicial proceeding permitted is if a party sues in state court to enforce the Final Order. It is further,


ORDERED AND ADJUDGED that (1) within 30 days from receipt of this Final Order the Association shall post a notice of a special election for all five (5) director seats with staggered terms for such seats in the place in the community where notices are routinely posted; (2) the Association shall also deliver such notice to all members by email or by U.S. Mail if a member does not have an email address on file with the Association; and (3) the special election shall take place either in the Clubhouse with all boxes, equipment and other stored items removed so that 30-40 members may attend in person; or in the elementary school auditorium across the street from the Association property by renting such auditorium; (4) the board shall appoint an impartial committee in accordance with the 2021 Amendment to open and count the ballots; and (5) the arbitrator appoints Aneel Maharaj, Senior Management Analyst 1 / Supervisor, Office of the Florida Condominium Ombudsman, (954) 202-3234, to select an election monitor for the new election beginning with the first notice through the organizational board meeting following the election. It is further,

ORDERED AND ADJUDGED that all eligible members except those identified as not being eligible in section 720.306(9)(b), Florida Statutes, shall be permitted to timely submit a notice of intent to be a candidate in the special election and their names shall be on the ballot for the election. It is further,

ORDERED AND ADJUDGED that (1) all board of directors meetings shall be held in the Clubhouse and members may personally attend in addition to such meetings being held by Zoom conference. The Association shall remove all boxes, equipment, and other stored items in the Clubhouse so that 30-40 members may attend board meetings. The notices for all board meetings shall be posted on the community property but shall also be delivered to all members by email or by U.S. Mail if a member does not have an email address on file with the Association. At such board meetings, members shall be allowed to make comments and/or ask questions of the board which questions shall be answered by the board in compliance with section 720.303(1), Florida Statutes. It is further,

ORDERED AND ADJUDGED that the Association shall post a copy of this Final Order for a period of thirty (30) days from the date of receipt of this order in the place where notices are routinely posted and the order shall immediately be delivered to all members either by email or by U.S. Mail for those members who either do not have email or have not consented to receive notices by email. After such delivery has been accomplished, the Association shall file a notice of compliance with this requirement in this case.

DONE AND ORDERED this 15th day of December, 2023, at Tallahassee, Leon County, Florida.


Keith E. Hope, Arbitrator
Office of the General Counsel
Condominium Arbitration and
Mediation Program
Department of Business &
Professional Regulation
2601 Blair Stone Road
Tallahassee, FL 32399-1030
Telephone: (850) 414-6867
Facsimile: (850) 487-0870

Attorney's Fees and Costs

The prevailing party may file a motion for attorney's fees and costs in accordance with Rule 61B-80.123, Florida Administrative Code.

Certificate of Service

I HEREBY CERTIFY that on December 15, 2023, a copy of the foregoing was served by U.S. Mail and email to:

Bruce D. Burtoff, Esq.
9732 Mountain Lake Dr.
Orlando, FL 32832
burtoff809@aol.com
Attorney for Petitioner

Ryan D. Poliakoff, Esq.
Poliakoff Baker, LLP
400 South Dixie Highway
Suite 420
Boca Raton, FL 33432
rpoliakoff@pbattorneys.com
Attorney for Petitioner

Jennifer A. Englert, Esq.
The Orlando Law Group, PL
12301 Lake Underhill Road
Suite 213
Orlando, FL 32828
jenglert@theorlandolawgroup.com
Attorney for Respondent


Keith E. Hope