

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

IN RE: PETITION FOR ARBITRATION

**LASANDRA ROMANO and
HOWARD ROSENMAN**

Petitioners,

v.

Case No. 2010-02-2497

**EMERALD PRESERVE-SUMERLIN
HOMEOWNERS ASSOCIATION, INC.**

Respondent.

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SUMMARY FINAL ORDER

On review of the petition and the answer in this case, there is no material issue of fact at issue. There are two issues of law regarding the election of the Board of Directors for Emerald Preserve-Sumerlin Homeowners Association, Inc.

Statement of the Issues

The Association has five members on its board who are to be elected to three-year staggered terms. The first post-turnover election was in 2008, which had one of the seats having a two-year term and one of the seats having a one-year term to achieve the staggering effect. The Developer appointed the remaining seat. Later in 2008, the developer's right to appoint was terminated pursuant Article VII of the Articles of Incorporation.

The first legal issue is whether appointed directors serve until the next available election or for the unexpired term of the seat to which they were appointed. The second

legal issue is whether holdover directors serve until the next available election or for a new three-year term.

Procedural History

The Petition for Arbitration was filed on April 22, 2010. On May 6, 2010 an order was issued requiring an Amended Petition to be filed. On May 20, 2010 an Amended Petition was filed. An Order Requiring Answer was issued on May 21, 2010. On June 16, 2010, Respondent filed its answer.

This Summary Final Order is based on the pleadings and exhibits filed by the parties.

Findings of Fact

1. The Board of the Association consists of five directors with staggered terms. In January 2008, after the Developer turned over control to the Association, there was an election of four members of the Board and the Developer appointed one member. Later in 2008, the Developer lost his right to appoint the fifth member of the Board.

2. Seat 1¹. In January 2008, Lisa Goulet was elected to a three-year term. Ms. Goulet resigned in October 2009 and the Board appointed Stephen Fields to the seat. In February 2010, Mr. Fields resigned and Ashley (Greer) Guggisberg was appointed by the Board.

3. Seat 2. In January 2008, Andrea Hill was elected to a one-year term. Although the Seat 2 was up for election at the 2009 meeting. An election was not held due to lack of quorum and Ms. Hill continued as a holdover director. No election was held in 2010 for the Seat 2 even though another election for Seat 4 was held.

¹ Although the Petition and the Response identify the seats as “Divisions,” this term could denote different classes of voters which could be confusing. Therefore, the seats will only be identified as Seats 1, 2, 3, 4 and 5.

4. Seat 3. In January 2008, Amanda Barkley was elected to a three-year term. Later in 2008, Ms. Barkley resigned and Mark Schultz was appointed. Subsequently, Mr. Schultz resigned and the Board appointed Stephanie Bloor.

5. Seat 4. In January 2008, Ashley Greer (Guggisberg) was elected to a two-year term. In January 2010, Patricia Hatch was elected.

6. Seat 5. In January 2008, the Developer appointed Robert Greenwood. Later in 2008, the developer's right to appoint was terminated pursuant Article VII of the Articles of Incorporation, and Mr. Greenwood resigned. Andreas Heinrich was appointed by the Board. Seat 5 was up for election at the 2009 meeting. An election was not held due to lack of quorum and Mr. Heinrich continued as a holdover director. No election was held in 2010 for the Seat 5 even though another election for Seat 4 was held.

7. Elections were held in 2008 and 2010. At the 2009 meeting, no elections occurred due to lack of quorum and the Board allowed adjournment.

8. The above can be summarized in the following table:

Seat	1 st Term Expired	2 nd Election Results	2 nd Term Expires	Current member status
1	2011	No election yet	2014	Appointed
2	2009	No quorum	2012	Holdover
3	2011	No election yet	2014	Appointed
4	2010	Election	2013	Elected
5	2009	No quorum	2012	Holdover

Conclusions of Law

Sections 720.306 and 720.311, Florida Statutes, provide that the Department shall conduct mandatory binding arbitration of election disputes between a member and a homeowners' association.

Because there is no issue of material fact in dispute after the filings provided to date by the parties, this case is appropriate for summary disposition pursuant to Rule 61B-80.114, Florida Administrative Code.

Term of Office for Appointed Replacement Board Members

The first dispute in this case is whether board members appointed by the board of directors to fill vacancies shall occupy the replacement seat only to the next annual election, or serve out the full term of the board member being replaced.

Both Seat 1 and Seat 3 Directors were appointed to replace members who were elected in 2008 for three-year terms. The terms for both Seats expire in 2011.

Respondents rely on Article VII, Section 6 of the Association Bylaws which provides that "any office may be filled by the appointment by the Board of Directors. The officer appointed to such vacancy shall serve for the remainder of the term of the officer he replaces."

Petitioners rely on Section 617.0809(3), Florida Statutes, which provides, in pertinent part: "The term of a director elected or appointed to fill a vacancy expires at the next annual meeting at which directors are elected."

Chapter 617, Florida Statutes controls the legal existence of corporations not for profit, generally, and applies to homeowners associations when Chapter 720, Florida Statutes is silent on an issue. *Wild vs. Polo Trace Homeowners Association Inc.*, Arb.

Case 2008-06-5775, Summary Final Order (March 9, 2009). Section 720.303(1), Florida Statutes, provides that “The powers and duties of an association include those set forth in this chapter, and except as expressly limited or restricted in this chapter, those set forth in the governing documents.”

Thus, Chapters 617 and 720 expressly yield control of elections to the provisions of the governing documents. *Id.* The section of the Bylaws cited by the Respondent only refers to “officers” and not directors of the Association. However, the Articles of Incorporation specifically state In Article VII, “Any vacancy on the Board of Directors . . . shall be filled for the unexpired term of the vacated office by the remaining Directors.” Consequently, the terms of the Seat 1 and the Seat 3 do not expire until January 2011, and therefore no election was required for these seats in either 2009 or 2010.

Term of Office for Holdover Board Members

The second issue is whether holdover directors serve until the next available election or for a new three-year term.

The Respondent’s position is that the holdover director should be considered appointments to the seats and therefore the directors of those seats shall serve the entire three-year term.

The Petitioners’ position is that the Association should not have adjourned the meeting in 2009 and should have attempted to hold another meeting in 2009 to establish the proper quorum for the election.

The Association’s governing documents are silent on this issue. The Board has no affirmative obligations under Chapters 617 or 720, Florida Statutes to hold a new election

where an election failed due to lack of sufficient participation. *Drisch v. Ivy Lake Estates Association, Inc.*, Arb. Case 2008-03-9462, Summary Final Order (February 19, 2009).

However, Section 617.0806 states in part, “Each director shall hold office for the term to which he or she is elected or appointed and until his or her **successor has been elected** or appointed and qualified or until his or her earlier resignation, removal from office, or death.” (Emphasis supplied.). Holdover directors are not automatically appointed to the remaining portion of the term, they only serve a portion of the term until a replacement can be elected. *Id.*

At the January 2010 meeting, it was necessary to hold an election for the Seat 4 pursuant the Bylaws of the Association and Section 720.306(2) Florida Statutes. A quorum was achieved and an election was held for the Seat 4 only. An election for the Seat 2 and the Seat 5 was not held at the January 2010 annual meeting.

Section 720.306(2), Florida Statutes states,

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. (Emphasis supplied.)

If it is necessary to hold an election at the annual meeting, then the Association must hold an election for any seat for which the term of service has expired. *Id.* In this case, the Seat 4 was required to have an election at the January 2010 meeting. Consequently, the Association had the obligation to put on the ballot the two holdover seats, the Seat 2 and Seat 5. The successful candidates would have served the remaining two years left in the terms.

Relief Requested

Petitioner has requested that the Respondent be ordered to schedule and properly notice an election to fill the Director Seats 1, 2, 3, and 5 for the remainder of the established terms for such Seats. Based upon the foregoing, it is proper to order the Respondent to schedule and properly notice an election for the Director Seats 2 and 5 but not for Seats 1 and 3.

Additionally, the Petitioner has requested an order invalidating all acts of the Respondent's Board of Directors since 2009 that depended on the votes or action of holdover Directors.

Even though a person is not legally entitled to occupy a board seat, the board is nonetheless entitled to exercise the authority of the board until such time as the right to hold such office is judged invalid by a duly-authorized court or arbitrator. *The Residence Condominium Association, Inc. vs. Wills*, Arb. Case 01-3113, Summary Final Order (September 24, 2001). As such, the Petitioner's request to invalidate board actions must be denied.

Based upon the foregoing, it is **ORDERED**:

1. The requested relief to order the Respondents to schedule and properly notice an election to fill Director Seats 1 and 3 is **DENIED**.
2. The requested relief to order the Respondents to schedule and properly notice an election to fill Director Seats 2 and 5 is **GRANTED**. Within thirty days of the date of this order, the Association shall hold an election for Seat 2 and Seat 5. The successful candidates shall serve the remainder of the three-year term ending at the January 2012 annual meeting.

3. The requested relief to invalidate all acts of the Respondent's Board of Directors since 2009 that depended on the votes or actions of the holdover Directors is **DENIED.**

DONE AND ORDERED this 23rd day of June, 2010, at Tallahassee, Leon County, Florida.

Terri Leigh Jones, Arbitrator
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Professional Regulation
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Certificate of Service

I hereby certify that a true and correct copy of the foregoing final order has been sent by U.S. Mail to the following persons on this 23rd day of June, 2010:

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