

**STATE OF FLORIDA
DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION
DIVISION OF FLORIDA CONDOMINIUMS, TIMESHARES, AND MOBILE HOMES
IN RE: PETITION FOR ARBITRATION- ELECTION DISPUTE**

Filed with
Arbitration Section

SEAMUS BRENNAN,
Petitioner,

DEC 30 2019

v.

Div. of FL Condos, Timeshares & MH
Dept. of Business & Professional Reg

Case No. 2019-01-9591

**LAKE CLARKE GARDENS CONDOMINIUM
INC.,**
Respondent.

_____ /

SUMMARY FINAL ORDER

AND

ORDER CANCELING JANUARY 7, 2020 HEARING

THIS CAUSE arises out of the February 12, 2019 election (February election) of the board of directors of Lake Clarke Gardens Condominium Association, Inc, ("Association" or "Respondent"). Petitioner, Seamus Brennan, is a member of the Association and he was one of eight (8) candidates in the February election. Petitioner asserts the Association improperly disallowed various cast ballots for multiple reasons; such as, (1) There were allegedly seven votes disallowed because the posted signature on the outer envelope transmitting the member's ballot did not match the signature the Association had on file for particular voters; (2) There were 6 votes alleged to be disallowed because the vote was submitted by means of an outer envelope that differed from the envelope originally sent by the Association to the members with the ballot for

the February election; (3) There were four votes allegedly disallowed because the voting member failed to submit the ballot with an inner envelope¹; and (4) The Petitioner alleged there were five (5) votes disallowed because ballot submitted by the voting member had a "white boarder" around the ballot which was indicative that the ballot submitted to the Association by the vote was a copy (not original) of the ballot mailed out by the Association to the Association's members in connection with the February election.²

In the February election there were four (4) board member seats open for election. After the disqualification of a total of twenty (22) votes Petitioner's vote tally of two hundred and ninety (290) put him three (3) votes less than the number of votes received by the fourth placed finisher (Ellen Varella) who had a total of two hundred and ninety-three (293) votes. Of the twenty-two (22) votes that have been disallowed by the Association from the final tally there were nineteen (19) votes that remained sealed; i.e.

¹ Bldg, #8, Apartment 303 was disallowed for this reason and, as well as, based upon the outer envelope used to return the ballot, number 1, *supra*, but has only been counted once in the total of twenty (22) votes not allowed in the Association's total vote tally of 2,287 votes for the eight (8) candidates.

² While Petitioner lists this as an alleged basis for the Association disregarding ballots, the Association in a November 8, 2019 Stipulation (November Stipulation) filed with the Division, did not identify any vote that was disregarded by the Association on the basis of the returned ballot having "white boarders" around the ballot; i.e., being different than ballot mailed to members by the Association. It appears from the November Stipulation that those ballots were, from the Association's perspective, "disregarded" because they were received by the Association in an envelope that differed from the Association's envelope which was mailed to members with the ballots. As noted *infra* affidavits submitted by Petitioner has six (6) unit owners attesting to why a different outer envelope was used and identifying the envelope submitted to the Association as their envelope.

there was no information known which candidates would have received these votes if they had been counted.³

Procedural History

On April 12, 2019, Petitioner filed his petition with the Division asserting an election dispute. By Order entered on April 17, 2019, Petitioner was ordered to file an Amended Petition to bring the petition into conformity with the specific pleading requirements set forth in DBPR ARB 6000-01. Petitioner's Amended Petition was filed on April 23, 2019. An Order Requiring Answer was issued by the undersigned on May 2, 2019. Respondent's Motion in Opposition to the Petition was filed with the Division on June 18, 2019. Respondent's Motion in Opposition was denied on July 5, 2019 and Respondent filed its Answer to the Amended Petition on July 23, 2019.

A Hearing for Case Management Conference was scheduled for August 6, 2019, but was subsequently rescheduled upon the filing of a joint motion by the parties to August 14, 2019. At the August 14, 2019 Hearing for Case Management (HCM) this arbitration was scheduled for Final Hearing on October 31, 2019. On October 21, 2019, Petitioner filed his Motion for Summary Disposition. The undersigned permitted a response from Respondent to the Motion for Summary Disposition. Respondent's

³ By Order dated December 9, 2019, the parties were directed by the undersigned to meet and follow a procedure for jointly counting the previously sealed twelve (12) ballots and to jointly report to the Division how these newly counted votes were distributed among the eight (8) candidates who were on the ballot for the February election. The parties advised the undersigned in their December 20, 2019 Stipulation (December Stipulation) there were in fact a total of nineteen (19) ballots (as opposed to 12 ballots) that were unsealed when the parties met on December 16, 2019. The parties advised further, if the newly unsealed votes were counted, Petitioner received a total of 16 new votes (84% of the recently unsealed ballots) which would have placed him in the position of having received 306 total votes or in third place as far as total votes received among the eight (8) candidates on the ballot.

response was filed with the Division on October 22, 2019. On October 24, 2019, an Order Denying Petitioner's Motion for Summary Disposition was entered.

On October 25, 2019, Petitioner filed a Motion for an Emergency Status Conference and Motion to Continue the Final Hearing scheduled for October 31, 2019. A HCM was scheduled for October 30, 2019, and Petitioner's Motion to Continue the final hearing was granted. The Final Hearing was rescheduled for January 7, 2020. The parties were also directed at the October HCM to jointly file a stipulation regarding the reason(s) stated for Respondent's disallowing twenty-two (22) ballots cast from being counted for the purpose of arriving at a final tally of the votes cast. The "Stipulation" of the parties revealed there was not total agreement between the parties regarding the exact reason certain ballots were not included in the February election's final tally. More specifically, the November Stipulation set forth the following in pertinent part⁴.

	Unit	Petitioner's Reason	Respondent's Reason
1.	Building 2- Apartment 112	Signature does not match the one on file.	No inner ballot envelope. Voted through illegal proxy.
2.	Building 26- Apartment 311	Signature does not match the one on file.	Signature does not match owner's signature on file with Respondent. Voted through illegal proxy.
3.	Building 10- Apartment 303	Signature does not match the one on file.	Signature does not match owner's signature on file with Respondent. Voted through illegal proxy.
4.	Building 10- Apartment 302	Signature does not match the one on file.	Signature does not match owner's signature on file with Respondent. Voted through illegal proxy.
5.	Building 17- Apartment 101	Signature does not match the one on file.	Signature does not match owner's signature on file with Respondent. Voted through illegal proxy.
6.	Building 15- Apartment 112	Signature does not match the one on file.	Signature does not match owner's signature on file with Respondent. Voted through illegal proxy.
7.	Building 6- Apartment 106	Signature does not match the one on file.	Signature does not match owner's signature on file with Respondent. Voted

⁴ From Joint Stipulation Following Arbitrator's October 31, 2019 Order which was filed with the Division on November 8, 2019.

			through illegal proxy.
8.	Building 18- Apartment 208	No inner ballot envelope.	No inner ballot envelope
9.	Building 6- Apartment 112	No inner ballot envelope.	No inner ballot envelope.
10.	Building 6- Apartment 201	No inner ballot envelope.	No inner ballot envelope.
11.	Building 8- Apartment 303- this ballot was also rejected because it did not use an outer envelope not provided by the Association.	This ballot was also rejected because it used an outer envelope not provided by the association. Also, we have no proof that unit owner voted more than once.	Unit owner voted twice.
12.	Building 20A- Apartment 103	Ballot was returned in an exterior envelope that was different than the one provided by the association.	Ballot was accepted and counted.
13.	Building 18- Unit 207	Ballot was returned in an exterior envelope that was different than the one provided by the association.	No inner ballot envelope.
14.	Building 8- Apartment 303- this ballot was also rejected because it did not use an inner envelope.	Ballot was returned in an exterior envelope that was different than the one provided by the association.	Unit owner voted twice.
15.	Building 9- Apartment 309 ⁵	Ballot was returned in an exterior envelope that was different than the one provided by the association.	Vote was counted.
16.	Building 20B- Apartment 103 (Garcia)	Ballot was returned in an exterior envelope that was different than the one provided by the association.	No inner or outer envelope. Voted through illegal proxy. Was presented to Association by non-owners who stated owner could not attend meeting due to being in a wheelchair. Owner is not in a wheelchair.
17.	Building 26- Apartment 303	Ballot was returned in an exterior envelope that was different than the one provided by the association.	No inner ballot envelope. Voted through illegal proxy.
18.	Building 16- Apartment 301	Ballot was returned in an exterior envelope that was different than the one provided by the association.	No inner ballot envelope. Voted through illegal proxy.
19.	Building 3- Apartment 206	Ballot was not the exact actual ballot sent to the unit owner.	No inner ballot envelope. Voted through illegal proxy.
20.	Building 5- Apartment 204	Ballot was not the exact actual ballot sent to the unit owner.	No inner ballot envelope. Voted through illegal proxy.
21.	Building 15- Apartment 205	Ballot was not the exact actual ballot sent to the unit owner.	No inner ballot envelope. Voted through illegal proxy.
22.	Building 20B- Apartment 108	Ballot was not the exact actual ballot sent to the unit owner.	No inner ballot envelope. Voted through illegal proxy.
23.	Building 7- Apartment 106	Ballot was not the exact actual ballot sent to the unit owner.	No inner ballot envelope.

⁵ This entry was originally recorded on the November Stipulation as "Building 8- Apartment 309" on the November Stipulation filed with the Division. However, it was subsequently amended in the parties' December Stipulation, to reflect that it should be correctly recorded as "Building 9- Apartment 309".

Pursuant to the Division's Order entered December 9, 2019, of the nineteen (19) newly counted ballots the votes there were sixteen (16) new votes received by Petitioner. The candidates who received more votes than Petitioner at the February election also received additional votes from the newly counted votes. Petitioner's vote total, including the totals from the unsealed votes, would put Petitioner in a position where he had received a sufficient number of votes to be a member of the Association's board.

Findings of Fact

- (1) Respondent is the Association responsible for the operation and maintenance of the condominium.
- (2) Petitioner owns a unit within Lake Clarke Gardens Condominium and was thereby eligible to be a candidate for the Association's board of directors.
- (3) Petitioner's name was placed upon the ballot for one(1) of (4) eligible board of directors seats for the 2019 Annual Election of Officers held on February 12, 2019.
- (4) Respondent disqualified twenty-two (22) ballots and when Respondent tabulated the total votes (absent the disqualified ballots) Petitioner fell three (3) votes short of the fourth place finisher.
- (5) The Division has jurisdiction over the subject matter and the parties to this arbitration pursuant to Section 718.1255(1)(b)1, Florida Statutes.

CONCLUSIONS OF LAW

Issue: Signature on Outer Envelope Does Not Match One on File

Respondent marked as “disregarded” six (6) outer envelopes on the basis that the signature on the outer envelope did not match the exemplar of the unit owner’s signature held by the Association.⁶ Petitioner’s submission of four (4) affidavits with the Second Motion for Summary Judgment puts to rest the issue of whether there were *bona fide* signatures on the outer envelopes for Units with respect to the ballots submitted for the following: Building 26, Apartment 311; Building 10, Apartment 303; Building 17, Apartment 101; and Building 15, Apartment 112.⁷ Respondent in its Response to Petitioner’s Second Motion for Summary Disposition asserted the affidavits in the form utilized by Petitioner did not pass muster with the form of an attestation the Division’s Notice of Final Hearing dated August 15, 2019, was requiring for a potential witness at the final hearing to submit to the Division in advance of the final hearing in those instances where a party would not have an individual present at the final hearing who was authorized to administer oaths in the State of Florida. This final hearing procedural requirement has no bearing on the adequacy of an affidavit filed by Petitioner in support of a motion for summary disposition under Rule 61B-45.030, Florida Administrative Code.

In this instance the four (4) affidavits submitted by Petitioner are legally sufficient and they establish that there is no remaining issue as to the mailing envelopes

⁶ This number of envelopes marked as disregarded for the reason of a questionable unit owner’s signature is based upon the parties’ November Stipulation.

⁷ There were no affidavits submitted by Petitioner with respect to the signatures that allegedly did not match on the outer envelope for Building 2, Apartment 112 or Building 10, Apartment 303. So, two (2) outer envelopes are still at issue.

submitted by the owners of the following: Building 26, Apartment 311; Building 10, Apartment 303; Building 17, Apartment 101; and Building 15, Apartment 112. Consequently, there are four (4) votes that the undersigned finds Respondents had incorrectly excluded based upon a questionable signature on the outer envelope.

Issue: Voting Through Illegal Proxy

In Petitioner's Second Motion for Summary Disposition he argues there was no individual who cast the actual vote for an individual unit owner for particular candidates for the 2019 board of directors. Rather, Petitioner argues that what Respondent is portraying as proxy voting is merely third parties hand delivering to the Association an actual sealed ballot that had been cast by the authorized individual unit owner. Respondent, in its Response to the Second Motion for Summary Disposition presented no argument to the contrary that would be support that there was voting by proxy for the February election.

From the parties November Stipulation, there were purportedly fourteen (14) ballots that were disregarded on the grounds that it was a vote cast through an "illegal proxy vote" because someone other than the unit owner delivered the sealed vote to the Association. The undersigned finds that the mere delivery of a properly signed and sealed ballot does not constitute voting by proxy. Rule 61B-23.0021, Florida Administrative Code requires the following with respect to the delivery of a unit owner's ballot:

The envelope shall either be mailed or hand delivered to the association.

The foregoing Rule has no restriction on who does the mailing or who hand delivers the voter's envelope to the association.

The fourteen (14) votes disregarded by Respondent for this stated reason should not have been disregarded on the basis that a signed and sealed envelope was merely hand delivered to the Association.⁸

Issue: Voter returned ballot in an exterior envelope that was not the actual exterior envelope sent by the Association to the voter.

The Petitioner attached affidavits in support of Petitioner's Second Motion for Summary Disposition that explain why the voters from six (6) units did not return their ballots in the envelope provided by the Association.⁹ The uniform explanation was they did not return the original envelope to the Association because they had not received the return envelope from the Association. Each of the supporting affidavits went on to identify the actual envelope they had submitted to the Association with their executed ballot. The Association did not rebut any of these sworn affidavits in its Response to Petitioner's Second Motion for Summary Disposition.

The envelopes attached to Petitioner's Second Motion for Summary Disposition have all the requisite identifying information for an exterior return envelope as required by Rule 61B-23.0021(8), Florida Administrative Code, and there is nothing about the

⁸ The following were listed on the parties' November Stipulation, as "[V]oted through illegal proxy.": Building 2- Apartment 112; Building 26, Apartment 311; Building 10- Units 302 and 303; Building 17-Apartment 101; Building 15, Apartments 112 and 205; Building 6- Apartment 106; Building 20B-Apartment 103 and 108; Building 26- Apartment 303; Building 16-Apartment 301; Building 3- Apartment 206; and Building 5- 204.

⁹ The following were the units submitting supporting affidavits with respect to the use of a different exterior envelope to return their ballots: Building 8 - Apartment 303; Building 18 - Apartment 208; Building 6 - Apartment 201; Building 20B - Apartment 103; Building 26- Apartment- 303; and Building 16 – Apartment 301.

appearance of the exterior these envelopes that would suggest that there is something fraudulent or suspect about the ballot being transmitted by the voter to the Association. These six (6) envelopes should have been opened and the votes reflected on the ballot included in the final tally of votes for the February election.

Issue: Voter returned ballot without securing their ballot within an interior envelope.

From the parties' November Stipulation, there are as many as thirteen (13) ballots returned to the Association where the voter did not secure their ballot within an inner envelope prior to submitting it to the Respondent in an outer envelope. It is evident that the procedure of utilizing an inner envelope with no identifying information is for the purpose of maintaining the secrecy of the vote. However, that secrecy may be waived by the voter. See *Burnaman v. South Oaks Homeowners Ass'n of Melbourne, Inc.*, Arb. Case No. 08-02-1169, Final Order (January 6, 2009); *Alvarez v. Club Atlantis Condominium Association, Inc.*, Arb. Case No. 92-0305, Final Order (March 25, 1993). In this instance, as many as thirteen (13) voters either knowingly or unknowingly waived the right to keep their vote secret. However, the fact that there has been a waiver as to the secrecy of the ballot does not create a basis for the Association disenfranchising those voters. These thirteen (13) voters should not have had their votes disregarded for failure to utilize an interior envelope.

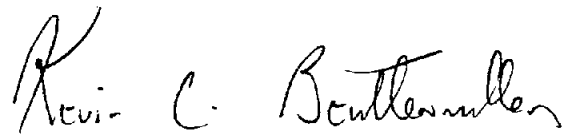
Given the number of irregularities in the Association's tabulation of votes for the February election as discussed herein coupled with the fact that there was a definite increase in votes that Petitioner would have received given the number of votes favorable to Petitioner in the ballots unsealed pursuant to the Division's Order of December 9, 2019, it is necessary to immediately remedy the situation. There is more

than sufficient evidence presented that the February election failed to meet the standard of permitting a full, fair, and free expression of the voter's will. See *Garcia v. Sorbert Community Association, Inc.*, Arb Case No. 13-01-7653, Summary Final Order (November 5, 2013) (*citing with approval, Boardman v. Esteve*, 323 So. 2d 259, 265 (Fla. 1959)). Petitioner must immediately be recognized as a member of the Association's board of directors in the fourth and final seat that was open at the time of the February election; i.e., seat now held by Ellen Varella.

Accordingly, based upon the forgoing tabulation errors, it is **ORDERED**:

- (1) Petitioner's Second Motion for Summary Disposition is **GRANTED**.
- (2) Petitioner shall immediately be seated as a director on the Association's board of directors in lieu of current director, Ellen Varella, and he shall complete the remainder of the term for that seat on the board of directors.
- (3) Director, Ellen Varella, shall, within five (5) business days of the date of this Final Order, return to the Association's board of directors all Association records and property.
- (4) The Petitioner is deemed to be the prevailing party in this arbitration.

DONE AND ORDERED this 30th day of December, 2019 at Tallahassee, Leon County, Florida.



Kevin C. Beuttenmuller, Arbitrator
Division of Florida Condominiums,
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Trial de novo and Attorney's Fees

This decision shall be binding on the parties unless a complaint for trial *de novo* is filed within 30 days in accordance with Section 718.1255(4)(k), Florida Statutes and Rule 61B-45.043, Florida Administrative Code. As provided by Section 718.1255, Florida Statutes, the prevailing party in this proceeding is entitled to have the other party pay reasonable costs and attorney's fees. Any such request must be filed in accordance with Rule 61B-45.048, Florida Administrative Code.

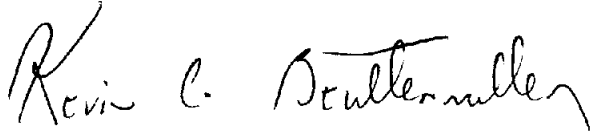
Certificate of Service

I hereby certify that a true and correct copy of the foregoing Summary Final Order has been sent by U.S. Mail, postage prepaid and e-mail, to the following persons on this 30th day of December, 2019:

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