

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

IN RE: PETITION FOR ARBITRATION - HOA

Ronald V. Little,

Petitioner,

v.

Case No. 2009-00-7989

**Eagles' Reserve Homeowners'
Association, Inc.,**

Respondent.

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FINAL ORDER

A telephonic final hearing was held in this matter on May 8, 2009, during which the parties presented the testimony of witnesses, tendered documents into evidence and cross-examined witnesses. On May 22, 2009, the parties filed recommended orders. This order is entered after consideration of the complete record in this matter.

Appearances

For the Petitioner:	Ronald V. Little, <i>pro se</i> 1522 Lago Vista Blvd. Palm Harbor, FL 34685
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For the Respondent:	Scott H. Jackman, Esq. Yueling E. Lee, Esq. Cole, Scott & Kissane Bridgeport Center, Suite 750 5201 West Kennedy Blvd. Tampa, FL 33609
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Findings of Fact

1. Eagle's Reserve Homeowners' Association, Inc., (the association) is the corporate entity responsible for the operation for the Eagle's Reserve community.

2. On January 13, 2009, the association held its annual election for nine seats on its board of trustees.

3. Members were permitted to vote by proxy using a proxy form provided by the association. The proxy form permitted the grantor to name a proxy holder; or, by default the secretary of the board of directors was named the proxy holder. The proxy form stated that it was for the annual membership meeting to be held on January 13, 2009. The form permitted the granting of general powers or limited powers. The limited powers directed the proxy holder to vote for specific candidates for the election of the board of trustees. The form provided spaces for the date, an address, a signature and the printed name of the grantor. The form also provided for a substitution proxy. Finally, the form stated that the proxy is revocable by the owner and is only valid for the meeting for which it is given and any lawful adjournment thereof, but in no event is the proxy valid for more than ninety days from the original meeting for which it was given.

4. The proxies accepted by the association were treated like ballots.

5. The number of votes for each candidate as determined by the association was as follows:

- a. Charles A. Badgley, 56,
- b. Henry Bluemer, 44,
- c. Peri Bluemer, 33,
- d. John Giegle, 40,
- e. Charlotte Huff, 65,
- f. William G. Hussey, 64,
- g. Ronald V. Little, 53,
- h. Cindi Maslo, 55,

- i. Todd Nelson, 69,
- j. Joseph A. Pursely, 47,
- k. Wayne M. Rettke, 67,
- l. Jack Slorah, 63,
- m. Vincent Tuccio, 74,
- n. David F. Williams, 66,
- o. V. Albanese, 40
- p. T. Maslow, 6
- q. M. Leiner, 39 and
- r. Koymanauos, 1

6. Based upon the foregoing results, Vincent Tuccio, Todd Nelson, Wayne Rettke, David F. Williams, Charlotte Huff, Jack Slorah, William Hussey, Charles A. Badgley, and Cindi Maslo were declared the winners by the association.

7. Mourad Nicola submitted two limited proxies for the property located at 1642 Arabian Lane. Mourad Nicola's proxy dated January 1, 2009 appoints John A. Donati as the proxy holder and directs him to vote for Henry Bluemer, Charlotte Huff, William G. Hussey, Todd Nelson, Wayne M. Rettke, Jack Slorah, Vincent Tuccio, David Williams and Vince Albanese. Mourad Nicola's proxy dated January 13, 2009 appoints the secretary of the board as the proxy holder and directs the secretary to vote in favor of Charlotte Huff, Ronald V. Little, Cindi Maslo, Joseph A. Pursley and Wayne M. Rettke.

8. Shadi Boulos submitted two proxies for the property located at 1644 Arabian Lane. Shadi Boulos' proxy dated January 1, 2009 appoints John A. Donati as the proxy holder and directs him to vote for Henry Bluemer, Charlotte Huff, William G. Hussey, Todd Nelson, Wayne Rettke, Jack Slorah, Vincent Tuccio, David F. Williams and Vince Albanese. Shadi Boulos' proxy dated January 13, 2009 appoints the secretary as the proxy holder and directs the secretary to vote in favor of Chalrotte Huff, Ronald V. Little, Cindi Maslo, Joseph A. Pursley and Wayne Rettke.

9. Ashraf Said submitted two proxies for 1719 Arabian Lane. Ashraf Said's proxy dated January 1, 2009 appoints John A. Donati as the proxy holder and directs him to vote for Henry Bluemer, Charlotte Huff, William G. Hussey, Todd Nelson, Wayne Rettke, Jack Slorah, Vincent Tuccio, David F. Williams and Vince Albanese. Ashraf Said's proxy dated January 13, 2009 appoints the secretary as the proxy holder and directs the secretary to vote for Charlotte Huff, Ronald V. Little, Cindi Maslo, Joseph A. Pursley and Wayne Rettke.

10. Isis Nokola submitted two proxies for the property located at 1802 Lago Vista. Isis Nokola's proxy dated January 1, 2009 appoints John A. Donati the proxy holder and directs him to vote for Henry Bluemer, Charlotte Huff, William G. Hussey, Todd Nelson, Wayne Rettke, Jack Slorah, Vincent Tuccio, David F. Williams and Vince Albanese. Isis Nokola's proxy dated January 13, 2009 appointed the secretary as the proxy holder and directs the secretary to vote in favor of Charlotte Huff, Ronald V. Little, Cindi Maslo, Joseph A. Pursley and Wayne Rettke.

11. Bill Osburn, is the president of Rampart Properties, the management company for the association.

12. Mr. Osburn was present at the election and assisted with checking-in voters when they arrived and with the tallying of votes.

13. Mr. Osburn testified that during the vote tallying he discovered that Mourad Nicola, Shadi Bauls, Ashraf Said and Isis Nokola had each submitted two proxies with different dates. When Mr. Osburn informed the counting committee of the duplicates, John Donati was present at the counting table and contended that the earlier-dated proxies appointing him as the proxy holder should be counted. Mr. Donati was not a

member of the counting committee. Mr. Donati called Mr. Nicola on his cellphone and gave the telephone to Mr. Osburn. The person on the line told Mr. Osburn that he wanted the earlier dated proxy to count. Mr. Osburn had no means of confirming the identity of the person on the telephone.

14. The counting committee chose to count earlier dated proxies for Mourad Nicola, Shadi Bauls, Ashraf Said and Isis Nokola.

15. The association accepted a proxy from Harold Kogut that was not dated and failed to list the address for his property. The proxy appointed Todd Nelson as the proxy holder and directed him to vote for Charles A. Badgley, Henry Bluemer, John Geigle, William G. Hussey, Todd Nelson, Jack Slorah, Vincent Tuccio , David Williams and Melissa Leiner.

16. The association accepted a proxy from Bernard Mayzell which was not dated and failed to list the address for his property. The proxy appointed Todd Nelson as the proxy holder and directed him to vote for Charles A. Badgley, Henry Bluemer, John Geigle, William G. Hussey, Todd Nelson, Jack Slorah, Vincent Tuccio, David Williams and Melissa Leiner.

17. The association accepted a proxy from Robert D. Hetzel which was not dated and failed to list the address for his property. The proxy appointed the secretary as the proxy holder and directed the secretary to vote for Charles A. Badgley, Henry Bluemer, John Geigle, William G. Hussey, Todd Nelson, Jack Slorah, Vincent Tuccio, David Williams and Melissa Leinner.

18. The association accepted a proxy from Lori Hughes which was not dated and failed to list the address for her property. The proxy appointed John Geigle as the proxy

holder and directed him to vote for Charles A. Badgley, Peri Bluemer, John Giegle, William G. Hussey, Todd Nelson, Vincient Tuccio, David F. Williams, V. Albanese, and Melisa Leiner.

19. The association disqualified the proxy for 1590 Lago Vista that was signed by John H. Thompson on the basis that Mr. Thompson was not the owner of the property. The proxy appointed the secretary as the proxy holder and directed the secretary to vote for Charlotte Huff, Ronald V. Little, Cindi Maslo, Joseph A. Pursley and Wayne M. Rettke. The association's voter registration sheet indicates that William Picciurro is the owner of the property. However, online records maintained by the Pinellas County Property Appraiser dated January 27, 2009 indicate that Mr. Thompson owns the property, having acquired it in June 2007. The association was aware that Mr. Thompson owned the property having sent him an "intent to lien" letter dated February 25, 2008.

20. The association accepted a proxy for 1784 Arabian Lane which appointed John Geigle as the proxy holder and directed him to vote for Charles A. Badgely, Henry Bluemer, John Geigle, William G. Hussey, Todd Nelson, Vincent Tuccio, David Williams, Albanese and Melisa Leiner. The date, signature and printed name lines are blank. However, there is the date "1/13/09" and a signature at the bottom of the page.

21. The association accepted a proxy for 1640 Lago Vista Boulevard signed by Mary Ross appointing the secretary as the proxy holder and directing the secretary to vote for Henry Bluemer, Peri Bluemer, John Geigle, and Vincent Tuccio. Online records maintained by the Pinellas County Property Appraiser indicate that the property is owned by Jeffrey Ross. The association's voter registration sheet identifies Jeffrey

Ross as the only owner of the property. No evidence was presented that Mary Ross is an owner of the property. Mr. Osburn testified that it was presumed that Mary Ross is Jeffrey Ross' wife and, therefore, the proxy was accepted.

22. Page four of the voter registration sheet lists seven properties owned by John Geigle and/or Kevin Geigle. For these properties, there is a line drawn through the column designating that the voter was given a ballot. However, there are also check marks in the column indicating that there was a proxy vote for these properties.

23. Mr. Osburn testified that John Geigle was initially given ballots, but returned them and decided to vote using the proxies that had been turned in for the properties.

24. David Williams testified that he observed Mr. Geigle at the election and Mr. Geigle did not cast ballots in addition to the proxies for the property.

Conclusions of Law

The undersigned has jurisdiction over this dispute and the parties pursuant to section 720.311 and 718.1255, Florida Statutes.

Conflicting Proxies

Section 720.306(8), Fla. Stat. states:

PROXY VOTING.--The members have the right, unless otherwise provided in this subsection or in the governing documents, to vote in person or by proxy. To be valid, a proxy must be dated, must state the date, time, and place of the meeting for which it was given, and must be signed by the authorized person who executed the proxy. A proxy is effective only for the specific meeting for which it was originally given, as the meeting may lawfully be adjourned and reconvened from time to time, and automatically expires 90 days after the date of the meeting for which it was originally given. A proxy is revocable at any time at the pleasure of the person who executes it. If the proxy form expressly so provides, any proxy holder may appoint, in writing, a substitute to act in his or her place.

The association's governing documents do not prohibit voting by proxy. Therefore, the members may vote by proxy.

Mourad Nicola, Shadi Boulos, Ashraf Said and Isis Nokola executed two limited proxies each, the first one dated January 1, 2009 and the second dated January 13, 2009. The proxies appointed different proxy holders and directed the proxy holders to vote in a different fashion. The association accepted the proxy dated January 1, 2009.

Where proxies issued by the same person conflict, the proxy with the later date supersedes the earlier one. 18A Am. Jur. 2d Corporations § 927. Therefore, the proxies dated January 13, 2009 should have been accepted by the association and the January 1, 2009 proxies should have been rejected.

The association accepted the January 1, 2009 proxies after Mr. Donati allegedly telephoned Mourad Nicola and Mr. Osburn spoke to him. Mr. Osborn had no means of confirming the identity of the person on the telephone. Even if Mourad Nicola's identity had been confirmed, his appearance by telephone was inappropriate because pursuant to § 720.306(8), Fla. Stat., the only way a member may vote is in person or by proxy. Moreover, Mr. Osburn's telephone conversation with one of the proxy grantors does not explain why the association decided to accept the earlier proxies for the other three members when there were later dated proxies that were clear on their face.

Proxies With No Date or Address

The association accepted proxies from Harold Kogut, Bernard Mayzell, Robert Hetzel and Lori Hughes which were not dated and failed to state the address of the property owned by the member. The failure to include the date the proxy was executed is not critical in the current case. The proxies contain sufficient information to determine

if they are valid. The proxies state the date of the meeting for which they were given. Therefore, whether they had expired may be determined.¹

The failure to provide the address is not critical either. The address and membership status can be readily determined from the voter registration sheet using the person's name.

Non-Owner Proxy

Mary Ross does not own the property located at 1640 Lago Vista Boulevard. Jeffrey Ross owns the property. The association's voter registration sheet identifies Jeffrey Ross as the only owner of the property. Mr. Osburn testified that it was presumed that Mary Ross is Jeffrey Ross' wife and, therefore, the proxy was accepted.

Section 1.16 of the association's declaration of covenants and restrictions (the declaration) defines owner to mean the fee simple title holder of any lot, whether one or more persons or entities. Section 5.1 of the declaration provides that every record owner of a lot or dwelling unit shall be a member of the association, and other than the developer, no person except an owner is entitled to membership in the association. Section 3.1 of the association's bylaws provides that the trustees shall be elected by a majority of the members present at the annual meeting.

In order to vote for a trustee, the voter must be a member of the association by owning a lot or dwelling unit. Mary Ross signed a proxy that indicated that it was for a property she did not own. Therefore, the proxy should be rejected. Even if Mr. Osburn's presumption that Mary Ross was Jeffrey Ross' wife is true, it would not validate her vote as she still would not be an owner.

¹ Under another set of facts the date the proxy was signed could be critical. For example, if there were conflicting ballots submitted for the property, the date each ballot was signed would be critical.

Multiple Votes by John Geigle

The petitioner contends that John Geigle was permitted two votes for each property he owned, in that he submitted proxies for the property and ballots. The testimony presented at the final hearing does not support this conclusion.

1590 Lago Vista Proxy

The association rejected the proxy submitted for 1590 Lago Vista signed by John H. Thompson on the basis that Mr. Thompson was not the owner. Documentation entered into evidence by the petitioner establishes that Mr. Thompson has owned the property since June 2007. Moreover, the association was aware, at least as early as February 25, 2008, that Mr. Thompson owned the property having sent him an “intent to lien” letter on that date. Therefore, his proxy should not have been rejected.

1784 Arabian Lane Proxy

The petitioner contends that the proxy submitted for 1784 Arabian Lane that was accepted by the association should be rejected because it is not dated, does not contain a printed name and is signed at the bottom of the page outside the signature block. The petitioner also argues that the signature is illegible.

The voter registration list indicates that 1784 Arabian Lane is owned by Nick Kashis. As noted above, the lack of a date is not a fatal flaw under the circumstances of this case. Likewise, neither is the failure to include a printed name.

As with many signatures, the signature is illegible. However, this does not make the proxy invalid. The burden is on the petitioner to establish that Mr. Kashis did not sign the proxy. The petitioner has not proven that Mr. Kashis did not sign the proxy. Therefore, the undersigned finds no basis to invalidate the proxy.

Election Results

The association's official vote tabulation was as follows:

<u>Candidate</u>	<u>Votes</u>
Vincent Tuccio	74
Todd Nelson	69
Wayne M. Rettke	67
David F. Williams	66
Charlotte Huff	65
William G. Hussey	64
Jack Slorah	63
Charles A. Badgley	56
Cindi Maslo	55
Ronald V. Little	53
Joseph A. Pursely	47
Henry Bluemer	44
John Giegle	40
V. Albanese	40
M. Liener	39
Peri Bluemer	33
T. Maslow	6
Koymanauos	1

Taking into account the proxies that the association improperly accepted and rejected the election results are as follows:

<u>Candidate</u>	<u>Votes</u>
Wayne M. Rettke	68
Charlotte Huff	66
Todd Nelson	65
David F. Williams	62
William G. Hussey	60
Cindi Maslo	60
Jack Slorah	59
Vincent Tuccio	58
Ronald V. Little	58
Charles A. Badgley	56
Joseph A. Pursely	52
Henry Bluemer	39
John Giegle	39
M. Liener	39

V. Albanese	36
Peri Bluemer	34
T. Maslow	6
Koymanauos	1

Ronald Little should have been elected to the board of trustees and Charles A. Badgley should not have been elected. This is the only change in the membership of the board.

Fla. Admin. Code R. Rule 61B-23.0021(10)

The petitioner alleges that the voting committee counted the ballots outside the presence of the membership in violation of Fla. Admin. Code R. 61B-23.0021(10).² This rule addresses elections in condominium associations created pursuant to chapter 718, Florida Statutes. The association in the instant matter is a homeowners' association created under chapter 720, Florida Statutes.

The petitioner argues that the rule should be applied to the association, relying upon *Parker v. East Linden Homeowners Ass'n, Inc.*, Arb. Case No. 2007-04-5781, Summary Final Order (October 1, 2007). In *Parker* the arbitrator concluded that, although the rules and case law applicable to condominiums do not control homeowners' associations, they do provide persuasive authority to evaluate the fairness of homeowner association elections.

The undersigned agrees that the condominium rules are persuasive authority. However, the fact that a homeowner association's election fails to comply with the rule does not necessarily mean that the election is invalid.³

² The rule, in pertinent part, provides that ballots shall be handled by an impartial committee and shall be opened in the presence of the unit owners in attendance.

³ However, a showing that the homeowners' association election complied with the condominium election rules would be highly persuasive evidence that election was valid.

Even assuming that the association counted the ballots outside the presence of the members, in order to be entitled to any relief, the petitioner must prove that such action resulted in substantial irregularities in the election, which petitioner has not proven. It might be argued that by permitting Mr. Donati, who was not a member of the counting committee, to be present during the counting of the ballots affected the fairness of the election because he was able to lobby in favor of the validity of proxies. Any impact on the fairness of the election due to Mr. Donati's interaction with the counting committee has been addressed by the above ruling on the conflicting proxies.

New Allegations Not Asserted in the Petition

The petitioner has raised new allegations in his recommended order that were not raised in the petition. For example, petitioner alleges that John Geigle altered a limited proxy issued by Lori Hughes that appointed him as the proxy holder in order to vote for additional candidates. Any allegations raised in the petitioner's recommended order that were not raised in the petition are improperly raised and will not be considered.

Petitioner's Requested Relief

As relief, the petitioner requests that the arbitrator order the association to seat him as a director and remove Charles Badgley from the board. The petitioner also requests that the arbitrator declare any actions taken by the board after the date of the election null and void, including, but not limited to, the election of officers and any on-going litigation. Additionally, the petitioner requests that the arbitrator order the association to seat Joe Pursley as a director and remove William Hussey from the board.

As determined above, the petitioner should have been elected to the board instead of Mr. Badgley. Therefore, the petitioner should be seated on the board and Mr. Badgley should be removed.

The petitioner has not proven that Mr. Pursley should have been elected to the board. Therefore, the petitioner's related request for relief is denied.

The petitioner seeks extraordinary relief by requesting that the arbitrator declare any actions taken by the board since the election null and void. Even if it were assumed that the arbitrator has such authority, the petitioner has not established a sufficient basis for granting such extraordinary relief. Therefore, this request is denied.

Based upon the foregoing, it is ORDERED:

1. Charles Badgley is removed from the association's board of trustees effective upon the date of the entry of this order. Mr. Badgley shall immediately return all association records and property in his possession to the board.

2. The petitioner, Ronald V. Little shall take office effective upon the date of the entry of this order and shall take the seat occupied by Mr. Badgely for the remainder of the term of the seat.

DONE AND ORDERED this 1st day of July, 2009, at Tallahassee, Leon County, Florida.

James W. Earl, Arbitrator
Department of Business and
Professional Regulation
Arbitration Section
1940 North Monroe Street
Tallahassee, Florida 32399-1029

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 to the following persons on this 1st day of July, 2009:

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