

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

IN RE: PETITION FOR ARBITRATION-HOA ELECTION

**ROBERT D. WEIL, THEODORE SNYDER,
and THOMAS MONAGHAN,**

Petitioners,

v.

Case No. 2017-04-4021

**KINGS GATE HOMEOWNERS
ASSOCIATION, INC.,**

Respondent.

SUMMARY FINAL ORDER

Statement of the Issues

Is the developer of Kings Gate Homeowners Association, Inc. (the Association), required to turn over control of the Association to the members other than the developer and hold an election for the board of directors?

Relevant Procedural History

On September 1, 2017, Petitioners filed a mandatory binding arbitration petition for a homeowners' association election dispute. The petition alleges that the Association has not had an election for over 19 years. On October 10, 2017, the Association filed an answer claiming an election is not required because the developer is not required to turn over control to the residents. On December 19, 2017, a hearing for case management was held. On January 6, 2018, the Association filed a memorandum of law. This Summary Final Order is based on the pleadings and exhibits filed by the parties.

Findings of Fact

1. Kings Gate Homeowners Association, Inc. is the legal entity responsible for the maintenance and operation of the Kings Gate community.
2. Petitioners own lots in the community and are members of the Association.
3. On January 20, 1998, the Declaration of Restrictive Covenants for Kings Gate Subdivision (the Declaration) was recorded in the public records of Charlotte County, Florida.
4. According to Article 1, Section 20, of the Declaration, Victoria Estates, LTD., a New York limited partnership, and its specific designees, successors and assigns are the “Declarant” and developer of the Association.
5. Exhibit E of the Declaration is the Association’s Articles of Incorporation for the Association (Articles).
6. The current board of directors consists of three employees of the Declarant and two residents appointed by the Declarant.
7. The Association admits that it has not had an election since the recording of the Declaration.
8. It is undisputed that less than 90% of the parcels in all phases that will ultimately be operated by the Association have been conveyed to members by the Declarant.

The Original Governing Documents

9. Article 4, Sections 3-4, of the Declaration (1998) state:

Section 3. Membership. Upon acceptance of title to a Homesite and as more fully provided in the Articles and By-Laws, each Owner becomes a Class A member of the Association. Membership rights are governed by the provisions of the Articles and By-Laws. Membership shall be an appurtenance to, and may not be separated from, the ownership of a Homesite. The Declarant is the Class B member of the Association.

Section 4. Voting Rights. Voting rights in the Association are governed by the provisions of the Articles and By-Laws.

10. According to the Disclosure to the Declaration (1998), "Declarant will initially control the Association and will retain control during the period described in the Articles of Incorporation for the Association."

11. Article 2, Section 2 of the Declaration (1998) states:

Section 2. Amendment. The Declarant shall have the right, at any time until the Community Completion Date, to amend this Declaration as it, in its sole discretion, deems appropriate. After the Community Completion Date, except as provided to the contrary herein or as otherwise consented to by Declarant, this Declaration may be amended at any time, and from time to time, upon the recordation of an instrument executed by the Association upon vote of: (i) seventy-five percent (75%) of the Board; and (ii) those persons or firms entitled to vote seventy-five percent (75%) of all votes of each class of voting membership in the Association who are entitled to vote on the matter as set forth in the Articles and By-Laws. Until the Community Completion Date, the Declarant's written consent to any amendment must first be obtained. No amendment, whether before or after the Community Completion Date, shall affect the rights of Declarant or Declarant without the prior written consent of the Declarant or Declarant, which may be withheld in Declarant's or Declarant's sole discretion. No amendment shall alter the subordination provisions of this

Declaration without the prior approval of any Lender enjoying the benefit of such provisions.

Notwithstanding anything contained herein to the contrary, if the prior written approval of any governmental entity or agency having jurisdiction is required by applicable law or governmental regulation for any amendment to this Declaration then the prior written consent of such entity or agency must also be obtained.

12. Article I, Section 17 of the Declaration states:

“Community Completion Date”. The date upon which all Homesites in the Community, as ultimately planned and as fully developed, have been conveyed by Declarant to Owners, or, if earlier, the date on which the Board of Directors of the Association is controlled by the “Class A” members thereof.

13. Article V of the Articles (1998) states:

Membership

Each Lot which is subject by covenants of record to assessment by the Association shall have appurtenant thereto a membership in the Association, which membership shall be held by the person or entity, or in common by the persons or entities, owning such unit, except that no person or entity holding an interest or title to a unit as security, for performance of an obligation shall acquire the membership appurtenant to such Lot by virtue of such interest or title. In no event may any membership be severed from the Lot to which it is appurtenant.

14. Article VI of the Articles (1998) states:

Voting Rights

The Association shall have two classes of voting membership:

Class A. Class A members shall be all Owners with the exception of the Declarant and shall be entitled to one vote for each Lot owned. When more than one (1) person holds an interest in any Lot, all such persons shall be members. The

vote for such Lot shall be exercised as they among themselves determine, but in no event shall more than one vote be cast with respect to any Lot.

Class B. Class B member(s) shall be the Declarant (as defined in the Declaration), and shall be entitled to three and six tenths (3.6) votes for each Lot owned. The Class "B" membership shall cease and be converted to Class "A" membership on the happening of any of the following events, whichever occurs earlier:

(a) When the total votes outstanding in the Class "A" membership equal the total votes in the Class "B" membership; or

(b) Fifteen (15) years from the date of filing of the Declaration; or

(c) At such time as the Class "B" member voluntarily relinquishes its right to vote.

15. Article VII of the Articles (1998) states, in pertinent part:

BOARD OF DIRECTORS

The affairs and property of this Association shall be managed and governed by a Board of Directors composed of not less than three (3) nor more than nine (9) members, and in the future the number will be determined from time to time in accordance with the provisions of the By-Laws of the Association. The number of Directors on the Board of Directors shall be an odd number.

...

At the first annual meeting and at each succeeding meeting until such time as the Class B membership lapses, the Declarant shall appoint three (3) directors, each for a term of one (1) year.

At the first annual meeting after the Class B membership ceases to exist, the members shall elect two (2) directors for a term of one (1) year, two (2) directors for a term of two (2) years, and a fifth (5th) director for a term of three (3) years.

The candidate receiving the largest number of votes shall serve as director for three (3) years; the two candidates receiving the second and third largest vote shall serve as directors for two (2) years; and the two candidates receiving the fourth and fifth largest vote shall serve as directors for one (1) year. At each annual meeting thereafter the members shall elect the appropriate number of directors for a term of three (3) years.

16. Article XIII of the Articles (1998) states:

Amendments

Proposals for the alteration, amendment or rescission of these Articles of Incorporation may be made by a majority of the Board of Directors or twenty-five percent (25%) of the voting member. Amendment of these Articles of Incorporation shall require the assent of not less than seventy-five percent (75%) of the total number of votes of the membership, except that the Board of Directors may amend these Articles of Incorporation without the assent of the membership to correct any ambiguities, scrivener's errors or conflicts appearing within these Articles of Incorporation.

17. Article V, Section 1, of the Association's By-laws (1998) states:

Section 1. Number and Term. The number of Directors which shall constitute the whole Board shall not be less than three (3) nor more than nine (9) members, but shall be such number as the Board shall from time to time determine. An initial Board consisting of three (3) Directors shall be designated by the Developer to serve until the first annual meeting of the Association. At the first annual meeting after the Class B membership ceases, and at all subsequent annual meetings thereafter, the Members shall vote for and elect such number of Directors as is designated by the Board to serve as specified in the Articles of Incorporation and until their successors have been duly elected and qualified. All Directors must be Members of the Association or authorized representatives, officers or employees of the Declarant, or corporate members of the Association.

2006 Amendments

18. On December 29, 2006, the Association recorded the following amendment to its Declaration (2006 Declaration Amendment), in pertinent part:

This Second Amendment to the Declaration of Restrictive Covenants Kings Gate Subdivision is made by VICTORIA ESTATES, LTD., a New York limited partnership (the "Declarant"), with the joinder of NB/85 ASSOCIATES, a New York general partnership ("NB/85"), KINGSGATE ASSOCIATES II, LTD., a Florida limited partnership ("Kingsgate II"), and WR-I ASSOCIATES LTD., a Florida limited partnership ("WR-I") and further joined by KINGS GATE HOMEOWNERS ASSOCIATION, INC., a Florida not-for-profit corporation (the "Association").

STATEMENT OF PURPOSE AND INTENT

WHEREAS, On January 20, 1998, Declarant recorded the Declaration of Restrictive Covenants Kings Gate Subdivision (the "Declaration") in Official Records Book 1584, Page 1067 of the Public Records of Charlotte County, Florida.

WHEREAS, pursuant to Article 2. Section 2 of the Declaration, the Declarant may amend the Declaration in its sole discretion until such time as the "Community Completion Date," as that term is defined in the Declaration, has been reached.

WHEREAS, the Community Completion Date has not been reached as of the date of this Amendment.

WHEREAS, The Declarant desires to further amend the Declaration in certain respects and to evidence such amendments by this writing.

STATEMENT OF AMENDMENTS

In accordance with the authority granted to Declarant under Article 2, Section 2 of the Declaration, the Declarant amends the Declaration as follows:

...

8. The Articles of Incorporation of the Association, attached as Exhibit "E" to the Declaration, are amended to delete Article VI, regarding Class "B" membership and shall be replaced with language regarding when Class "B" membership shall cease to exist. Such amendments to the Articles are evidence by the First Amendment to the Articles of Incorporation attached as Exhibit "A".

19. Exhibit A of the 2006 Declaration Amendment states, in pertinent part:

Pursuant to the authority provided under Florida Statute Section 617.1002, this First Amendment to the Articles of Incorporation amends the Articles of Incorporation as adopted by a majority of the Board of Directors of said Association on [blank]. The Articles of Incorporation of the Association are amended as follows:

The second section of Article VI, Voting Rights, regarding Class B Members, is deleted and inserting in lieu thereof the following:

Class B. Class B member(s) shall be the Declarant (as defined in the Declaration), and shall be entitled to three and six tenths (3.6) votes for each Lot owned. The Class "B" membership shall cease and be converted to Class "A" membership on the happening of any of the, following events, whichever occurs earlier:

(a) Three months after ninety percent (90%) of the Homesites or Lots in all phases of the community that will ultimately be operated by the Association have been conveyed to Class "A" members; or

(b) Fifteen (15) years from the-date of filing of the Declaration; or

(c) At such time as the Class "B" member voluntarily relinquishes its right to vote.

2009 Amendments

20. On May 18, 2009, the Association recorded the following amendment to its Declaration (2009 Declaration Amendment), in pertinent part:

THIS AMENDMENT is made this 13th day of April, 2009, to the Declaration of Restrictive Covenants Kings Gate Subdivision ("Declaration") by VICTORIA ESTATES, LTD., a New York limited partnership (the "Declarant"), with the joinder of NB/85 ASSOCIATES, a New York general partnership ("NB/85"). KINGSGATE ASSOCIATES II. LTD., a Florida limited partnership ("Kingsgate 11"). WR-I ASSOCIATES LTD., a Florida limited partnership ("WR-I"), KGE-I DEVELOPMENT, LLC, a Florida limited liability company, and KINGS GATE HOMES, LLC, a Florida limited liability company.

WHEREAS, On January 20, 1998. Declarant recorded the Declaration of Restrictive Covenants. Kings Gate Subdivision (the "Declaration") in Official Records Book 1584, Page 1067 of the Public Records of Charlotte County, Florida; and

WHEREAS, pursuant to Article 2. Section 2 of the Declaration, the Declarant may amend the Declaration in its sole discretion until such time as the "Community Completion Date," as that term is defined in the Declaration, has been reached; and

WHEREAS, The Community Completion Date has not been reached as of the date of this Amendment; and

WHEREAS, The Declarant desires to further amend the Declaration in certain respects and to evidence such amendments by this writing.

NOW, THEREFORE, the Declaration is amended as follows:

1. The Articles of Incorporation of the Association, attached as Exhibit "E" to the Declaration, are amended regarding Class "B" membership. Such amendments to the Articles are evidenced by the Amendment to the Articles of Incorporation attached as Exhibit "A".

21. Exhibit A of the 2009 Declaration Amendment states, in pertinent part:

This Amendment to the Articles of Incorporation of Kings Gate Homeowners Association, Inc., amends the Articles of Incorporation as adopted by the Board of Directors of said Association. The Articles of Incorporation of the Association are amended as follows:

(NOTE: Underlined language is added and ~~cross-through~~ language is deleted).

Article VI, of the Articles of incorporation shall be amended as follows (all other provisions of Article VI shall remain the same):

Class B. Class B member(s) shall be the Declarant (as defined in the Declaration), and shall be entitled to three and six tenths (3.6) votes for each Lot owned. The Class "B" membership shall cease and be converted to Class "A" membership on the happening of any of the following events, whichever occurs earlier:

(a) Three months after ninety percent (90%) of the Homesites or Lots in all phases of the community that will ultimately be operated by the Association have been conveyed to Class "A" members; or

~~(b) Fifteen (15) years from the date of filing of the Declaration;~~
or

(c) At such time as the Class "B" member voluntarily relinquishes its right to vote.

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.

The Association avers that Section 720.307, Florida Statutes, which prescribes turnover requirements for homeowners associations, does not apply to the Association. Section 720.307(5), Florida Statutes (2017), provides that this section does not apply to a homeowners association in existence before the enactment of the provision. However,

the first version of this act was enacted in 1995, with the effective date of July 1, 1995. The Association was created after the effective date.

However, in *Cohn v. The Grand Condo. Ass'n, Inc.*, 62 So. 3d 1120 (Fla. 2011), the Florida Supreme Court ruled that changes in the Florida Statutes may not be constitutionally applied retroactively to an existing condominium where the condominium's declaration lacks language that it was created pursuant to Chapter 718, Florida Statutes, as amended from time to time, and where the statutory change would result in a change in the distribution of voting rights. Although the Association is a homeowners' association created pursuant s. 617.301, *et. seq*, Florida Statutes, the holding in *Cohn* would still control because the same constitutional issue of impairment of the members' contract would apply.¹

As no such language appears in the Declaration, the turnover and voting rights of the Declarant and the members would be regulated by the statutory law as it existed on January 20, 1998 when the Declaration was recorded in the public records of Charlotte County, Florida.² Section 617.307, Florida Statutes (1997) states, in pertinent part:

617.307 Transition of homeowners' association control in a community.--With respect to homeowners' associations as defined in s. 617.301:

(1) Members other than the developer are entitled to elect at least a majority of the members of the board of directors of the homeowners' association when the earlier of the following events occurs:

¹ In 2000, the regulation of homeowners' associations was moved from Chapter 617 to Chapter 720, Florida Statutes.

² It is important to note that the arbitrator is not finding Section 720.307, Florida Statutes (2017) is facially unconstitutional. The arbitrator is following direction from the Florida Supreme Court to apply the law that was in effect at the time of the Declaration's recording.

(a) Three months after 90 percent of the parcels in all phases of the community that will ultimately be operated by the homeowners' association have been conveyed to members; or

(b) Such other percentage of the parcels has been conveyed to members, or such other date or event has occurred, as is set forth in the governing documents in order to comply with the requirements of any governmentally chartered entity with regard to the mortgage financing of parcels.

For purposes of this section, the term "members other than the developer" shall not include builders, contractors, or others who purchase a parcel for the purpose of constructing improvements thereon for resale.

(2) The developer is entitled to elect at least one member of the board of directors of the homeowners' association as long as the developer holds for sale in the ordinary course of business at least 5 percent of the parcels in all phases of the community. After the developer relinquishes control of the homeowners' association, the developer may exercise the right to vote any developer-owned voting interests in the same manner as any other member, except for purposes of reacquiring control of the homeowners' association or selecting the majority of the members of the board of directors.

(Emphasis supplied).

The process for the Declarant to turn over control is found in the 1998 governing documents in the Articles. One of the triggering events in the 1998 Articles is fifteen (15) years from the filing of the Declaration. Consequently, pursuant to the 1998 Articles, turnover should have occurred at least by January 28, 2013.³

³ Most likely turnover would have occurred at an earlier date or the 2006 Declaration Amendment would have been unnecessary. The 1998 Articles provided turnover would occur when the lots owned by the members would equal the unsold lots owned by the Declarant multiplied by 3.6, which is less than the 90% threshold in the purported amendment.

The Association alleges that the Articles were properly amended in 2009 to delete the requirement that turnover was to occur in 2013.⁴ Pursuant to Article II, Section 2 of the Declaration, the Declarant may amend the Declaration in its sole discretion until the turnover to the members. The Association argues that since the Articles were attached to the Declaration as Exhibit E, the Declarant has sole discretion to amend the Articles.

However, s. 617.301(6), Florida Statutes (1997), states:

- (6) "Governing documents" means:
 - (a) The recorded declaration of covenants for a community, and all duly adopted and recorded amendments, supplements, and recorded exhibits thereto; and
 - (b) The articles of incorporation and bylaws of the homeowners' association, and any duly adopted amendments thereto.

Even though the Association's Articles are attached as an exhibit to the Declaration, it is a separate and distinct governing document. In order to legally amend the articles of incorporation, one must comply with s. 617.1002, Florida Statutes (1997), which states, in pertinent part,

"[u]nless the articles of incorporation provide an alternative procedure, amendments to the articles of incorporation must be made in the following manner . . ."⁵

(Emphasis supplied).

The statute does not allow the Articles to be amended by a Declaration or any other method. Articles of Incorporation must be amended by the procedures set forth in

⁴ The Association also alleges that the Articles were also properly amended in 2006 to change the sales threshold for turnover.

⁵ This language has been unchanged since 1997.

the statute or as set forth in the Articles themselves. Additionally, the 1998 Articles did provide a procedure to amend the Articles. Under the Article XIII of the Articles (1998):

Amendment of these Articles of Incorporation shall require the assent of not less than seventy-five percent (75%) of the total number of votes of the membership, except that the Board of Directors may amend these Articles of Incorporation without the assent of the membership to correct any ambiguities, scrivener's errors or conflicts appearing within these Articles of Incorporation.

Moreover, s. 617.1006, Florida Statutes (1997), required:

The articles of amendment must be executed by the corporation as provided in s. 617.01201 and must set forth:

- (1) The name of the corporation;
- (2) The text of each amendment adopted;
- (3) If there are members entitled to vote on a proposed amendment, the date of the adoption of the amendment by the members and a statement that the number of votes cast for the amendment was sufficient for approval; and
- (4) If there are no members or if members are not entitled to vote on a proposed amendment, a statement of such fact and the date of the adoption of the amendment by the board of directors.

The purported amendments are substantive changes and not a correction of any ambiguity, scrivener's error or conflicts within the Articles. The form of the amendment does not indicate that a vote of the members occurred or provide a statement that the members were not entitled to vote on the proposed amendment.

Both the alleged 2006 and 2009 amendments to the Articles are invalid as they do not comply with Chapter 617, Florida Statutes (1997), and Article XIII of the Articles (1998). Therefore, the 2006 and 2009 purported amendments are void *ab initio*, and the

Declarant should have turned over control to the members no later than January 28, 2013.

Consequently, the Association shall be required to hold a turnover election. Pursuant to s. 617.307, Florida Statutes (1997), the Declarant may exercise the right to vote any developer-owned voting interests in the same manner as any other member, except for purposes of reacquiring control of the Association or selecting the majority of the members of the board of directors. Thus, the Declarant may only vote for two candidates out of the five director board.⁶

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

1. Petitioners' request for relief is **GRANTED**.
2. No later than June 15, 2018, the Association shall conduct the turnover election.
3. The Association shall mail the Notice of Election consistent with the Association's governing documents, providing adequate notice thereunder to meet the June 15, 2018, or earlier election date.⁷
4. The Notice of Election shall include the following statement which shall be printed in bold, all capital letters, 12 point font size, in a format identical to the following:

IN ORDER TO COMPLY WITH THE APRIL 13, 2018, SUMMARY FINAL ORDER,
CASE NO. 2017-04-4021, ENTERED BY THE ARBITRATION SECTION OF THE
DIVISION OF CONDOMINIUMS, TIMESHARES AND MOBILE HOMES, FLORIDA

⁶ This restriction also applies to builders, contractors, or others who purchase a parcel for the purpose of constructing improvements thereon for resale.

⁷ Pursuant to s. 720.306(1), Florida Statutes a quorum is 30% of the total voting interest unless a lower number is provided in the bylaws and s. 720.306(5), Florida Statutes requires a minimum of 14 days-notice for a member meeting.

DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, A TURNOVER
ELCETION MUST BE HELD COMMENCING WITH THE ENCLOSED NOTICE OF
ELECTION. A COPY OF THE SUMMARY FINAL ORDER MAY BE OBTAINED FROM
THE ASSOCIATION OR BY CALLING 850-414-6867.

DONE AND ORDERED this 13th day of April, 2018, at Tallahassee, Leon County,
Florida.

Terri Leigh Jones, Arbitrator
Department of Business and
Professional Regulation
Arbitration Section
2601 Blair Stone Road
Building B, 4th Floor
Tallahassee, Florida 32399-1030
Tele: (850) 414-6867 / Fax: (850) 487-0870

Certificate of Service

I hereby certify that a true and correct copy of the foregoing final order has been
sent by U.S. Mail and email to the following persons on this 13th day of April, 2018:

Robert D. Weil
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Petitioner

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Terri Leigh Jones, Arbitrator