

STATE OF NEW MEXICO
COUNTY OF COLFAX
EIGHTH JUDICIAL DISTRICT COURT
PRESIDING JUDGE: EMILIO J. CHAVEZ
No. D-809-CV-2021-00066

RICHARD E. CLARK, JR., ET. AL,
Plaintiffs,

v.

BOARD OF DIRECTORS OF ASSOCIATION OF ANGEL FIRE PROPERTY OWNERS,
INC. Defendant.

DECLARATORY JUDGMENT AND ORDER GRANTING PERMANENT INJUNCTION

THIS MATTER having come before the Court for hearing on the Plaintiff's Motion for Permanent Injunction and Declaratory Judgment, the Court having reviewed the pleadings, exhibits and being otherwise fully advised in the premises,

FINDS:

1. The Court has jurisdiction over the parties and the subject matter.
2. The petitioners/plaintiffs are all members of the Association of Angel Fire Property Owners ("AAFPO") and have standing to bring this action.
3. AAFPO is governed by nine elected or appointed Board of Directors and a non-voting representative from Angel Fire Resort.
4. The court granted the preliminary injunction by attempting to harmonize NMSA 1978 §53-8-18(B) and NMSA 1978 §53-8-19(B).
5. The facts, exhibits, evidence, and law regarding the declaratory judgment and permanent injunction still require the court to undergo an interpretation that harmonizes the two statutory sections of the Nonprofit Corporations Act.
6. NMSA 1978 §53-8-18(B) provides that following the first election of directors, "directors shall be elected or appointed in the manner and for the terms provided in the articles of incorporation or the by-laws."
7. NMSA 1978 §53-8-19(B) reads, "[a] director elected or appointed to fill a vacancy shall be elected or appointed for the unexpired term of his predecessor in office."
8. NMSA 1978 §12-2A-10(A) reads, "[i]f statutes appear to conflict, they must be construed, if possible, to give effect to each." *See also State v. Rue*, 1963-NMSC-090, 72 N.M. 212, 382 P.2d 697.

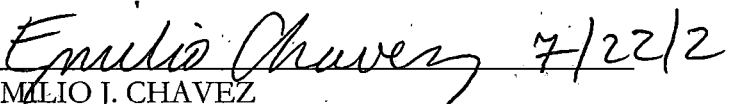
9. The conflict between the two sections of the Nonprofit Corporation Act can be interpreted and harmonized.
10. For the preliminary injunction, the court found that upon a vacancy, the unexpired term is until the next election, regardless of the remaining term that the resigned director held. This is supported by the general deferral of the Nonprofit Corporations Act to the by-laws, NMSA 1978 §53-8-18(B), and AAFPO's By-Laws. However, this determination regarding the unexpired term is modified below.
11. The defendant suggests that this interpretation would render NMSA 1978 §53-8-19(B) unnecessary or moot. The defendant's argument has support in statute and the New Mexico Constitution.
12. However, the inverse would also be true for NMSA 1978 §53-8-18(B), if there was a strict application of the defendant's interpretation of NMSA 1978 §53-8-19(B).
13. The purpose of NMSA 1978 §53-8-19(B) is to clarify that the term of an appointed director is not a new term, but the unexpired term. This subsection, similar to other sections, defers to the by-laws because the by-laws can fix the term of office. *See* NMSA 1978 §53-8-18(B) ("In the absence of a provision fixing the term of office, the term of office of a director shall be one year.")
14. The Nonprofit Corporations Act generally defers to the articles of incorporation and the by-laws.
15. AAFPO's by-laws Article VI Section 5 Vacancies reads, "[i]n the event of death, resignation or removal of an elected director, his successor shall be selected by the remaining elected directors and shall serve until the next election of directors."
16. The two subsections can be cogently harmonize by giving deference to the by-laws.
17. Upon a vacancy for death, resignation or removal, the appointed director's must run in the next general election as specified in the by-laws. This interpretation does not run contrary to NMSA 1978 §53-8-19(B) because the specific successor director's remaining term would not be a new three year term, but for the remainder of the unexpired term of the predecessor in office.
18. As indicated above, the provision in NMSA 1978 §53-8-19(B) is not meaningless. Even applied in combination with NMSA §53-8-18(B), the provision would provide uniformity, consistency, historical knowledge by maintaining a staggering of directors. Additionally, nothing in the by-laws contradicts the statute or law, as the elected term would be for the unexpired term of the predecessor in office.
19. This issue is only made complicated because AAFPO's articles of incorporation and by-laws do not set positions, divisions, or some form of placeholder for the appointed or elected directors and, historically, AAFPO's elections have been by plurality and not by candidates running for a particular director position.

20. The problem of undefined director positions must be resolved to adhere to NMSA 1978 §53-8-19(B). AAFPO must ensure that positions that are the ballot due to vacancy, not the expiration of a term, are for the remainder of the unexpired term of the predecessor in office.
21. All AAFPO directors that have been appointed or expired positions should be up for election at the next general election.
22. The plaintiff requested that the court define how the election should take place. The court has held that appointed directors must run in the next election and that the elected directors would be for the unexpired term of their predecessors in office. The mechanism for accomplishing this election will have to be determined by following AAFPO's by-laws and the Nonprofit Corporation Act. The court does not have that authority within the confines of this dispute to provide further guidance regarding the election.

IT IS THEREFORE ORDERED that for the reasons stated above the permanent injunction is GRANTED in so much as the election cannot proceed without all appointed directors' positions on the ballot.

IT IS FURTHER ORDERED that the declaratory judgment is GRANTED as indicated above.

IT IS FURTHER ORDERED that the election can take place with all appointed or expired director positions being placed on the ballot. The appointed positions that have an unexpired term shall not be elected to a new three year term, but to the unexpired term of their predecessor in office.


EMILIO J. CHAVEZ
DISTRICT JUDGE

CERTIFICATE OF SERVICE

I, the undersigned Employee of the District Court of Colfax County, New Mexico, do hereby certify that I served a copy of this document to all parties listed.

By: Veronica Ponce-Cordova

Date: July 22, 2021

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