

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

BLK

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

V.

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

### ORDER GRANTING PRELIMINARY INJUNCTION

THIS MATTER having come before the Court for hearing on the Plaintiff's Motion for Preliminary Injunction, 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. Currently, five of the directors have been appointed and not elected and there are two vacancies.
3. AAFPO's annual meeting is scheduled for June 26, 2021. At the annual meeting, the members are set to elect three (3) new directors. Those receiving the plurality of the votes cast shall be elected. The election is governed by AAFPO's Election Committee.
4. The plaintiffs contend that at the annual meeting the election should be for the five appointed directors and the two vacant director seats.
5. In support of their position, the plaintiffs indicate that By-Laws of AAFPO require appointed positions to serve until the next election of directors. *See By-Laws of AAFPO Article 6 Section 5.*
6. The defendant contends that the By-Laws are in conflict with NMSA 1978 §55-8-19(B), which reads, "[a] director elected or appointed to fill a vacancy shall be elected or appointed for the unexpired term of his predecessor in office." The defendant concedes that many of

the other sections of the "Nonprofit Corporation Act" defer to the articles of incorporation or the by-laws, however, this section specifically does not defer to the governing documents.

7. Consequently, the defendants have taken the position that three directors were appointed to terms that were not set to expire during this upcoming annual election and are, therefore, not up for election.
8. The plaintiffs counter that NMSA 1978 §55-8-18(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."
9. NMSA 1978 §55-8-18(B) defers to the by-laws and NMSA 1978 §55-8-19(B) does not. The majority of the Nonprofit Corporation Act defers to the by-laws so long as they are not inconsistent with articles of incorporation or with the laws of New Mexico. In fact the previous section of NMSA 1978 §55-8-19 specifically defers to the by-laws. *See* NMSA 1978 §55-8-19(A) ("unless the articles of incorporation or the bylaws provide that a vacancy or directorship so created shall be filled in some other manner, in which case such provision shall control.")
10. There is a presumption that legislature knew existing law and did not intend inconsistency. The court has the responsibility of construing statutes or sections of the statute harmoniously when possible.
11. 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.
12. The conflict between the two sections of the Nonprofit Corporation Act can be interpreted and harmonized.
13. The Court found some guidance in attorney general's opinions regarding NMSA 1978 §10-3-3 vacancy in county office.
14. NMSA 1978 §10-3-3 reads, "it is the duty of the board of county commissioners of the county where such vacancy has occurred to fill the vacancy by appointment, and the appointee shall be entitled to hold the office until the end of the unexpired term of office." *See* 2012 Op. Att'y Gen. No. 12-04 and 2012 Op. Att'y Gen. Term of Office for Sheriff Appointed to Fill Vacancy.
15. In both opinions regarding a similar statute, that attorney general opined that the county official must run in the next election.
16. Applying this principle to current situation, if a director is appointed to fill a vacancy in the first year of a previously elected director's three year term and is allowed to finish the original three year term, the voting members would effectively be denied their right to select their director for three years.

17. 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 §55-8-18(B), and the AAFPO's By-Laws.
18. The staggering of newly elected directors is made more difficult by this interpretation and because AAFPO does not have any set positions, divisions or placeholders for the election of directors. This is an issue that can be resolved internally by the AAFPO Board and within the confines of Nonprofit Corporations Act.
19. It is the Board's duty to fill a vacant position within a reasonable time. Although not specifically specified in the Nonprofit Corporation Act or the By-Laws, NMSA 1978 §53-8-19(B), does provide some guidance that supports vacant positions being on the election ballot because a director can be elected to fill a vacancy.
20. The object of the preliminary injunction is to preserve the status quo pending the litigation of the merits.
21. The court has considered allowing the election to take place with only three directors on the ballot, but has determined that could be detrimental to all parties should the plaintiffs ultimately prevail in this litigation.
22. Based on the Court's initial interpretation harmonizing the Nonprofit Corporation Act's conflicting subsections, a preliminary injunction will be granted and shall prohibit the election on June 26, 2021 from taking place, unless, all appointed directors and vacant director positions are on the ballot.
23. The exception should only be contemplated should the defendant intend to defer to the Court's preliminary analysis and the parties agree in a written agreement. Otherwise, no election will take place on June 26, 2021.
24. The issues determined above *should not* be considered a final declaratory judgment or a final determination regarding a permanent injunction. The above analysis was necessary in making a determination for preliminary injunction only. There is a significant difference between a preliminary and a permanent injunction that may warrant different considerations by the Court.

IT IS THEREFORE ORDERED that for the reasons stated above the preliminary injunction is GRANTED.

IT IS FURTHER ORDERED that the preliminary injunction may be lifted upon written agreement between the parties as prescribed above.

IT IS FURTHER ORDERED that the parties shall file witness lists and exchange all relevant discovery within two (2) weeks of the issuance. This matter will be set for a hearing on the permanent injunction and declaratory judgment within the next four to six weeks.

*Emilio Chavez* 6/4/21  
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 Gomez-Cordova*

Date: June 4, 2021

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