BEFORE THE TAMIL NADU REAL ESTATE APPELLATE TRIBUNAL (TNREAT)

(Tamil Nadu, Puducherry, Andaman & Nicobar Islands)

(Under the Real Estate Regulation And Development Act 2016)

DATED 06.12.2021

Coram : Mr.Justice B.Rajendran, Chairperson
Mr.N.Balasubramanian, Judicial Member
Ms.Leena Nair, Administrative Member

Appeal No. 33 of 2021

M/s. Ozone Projects Private Limited

Rep. by its Sr. DGM ... Appellant

-Vs-

Mrs.Nirmala Ramesh .... Respondent

This appeal was taken on file on 15.03.2021 and came up for final hearing on 01.12.2021 in the presence of M/s. BFS Legal, P.V. Balasubramaniam, D. Ferdinand, K.M. Aasim Shehzad, Akhil R Bhansali and Meera.M, Counsels for the appellant. The respondent appeared through Advocates M/s. Fox Mandal & Associates, P.Jayaprakash and K.Lakshmi. Having heard the arguments of both sides through video conferencing and

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having stood over for consideration till this date and this Tribunal delivered the following:

ORDER

1. This appeal has been preferred against the order of the Adjudicating Officer in C.C.P.No.300/2019 dated 18.12.2020 by the promoter. The respondent/home buyer preferred a complaint against the appellant/promoter for the relief of delay compensation, compensation for mental agony and for costs. The appellant/promoter has also preferred a complaint against the home buyer for the relief of claiming the balance amount of sale consideration Rs.29,69,416/- together with interest @ 18% per annum for 1902 days from the complainant. After contest the Adjudicating Officer allowed the complaint C.C.P.No.300/2019 in part and directed the promoter to pay delay compensation @ Rs.15 per month from February 2014 to 7.11.2018 along with interest @ 9% per annum and awarded Rs.5,00,000/- towards compensation for mental agony and inconvenience and Rs.25,000/- towards litigation costs. The complaint of the promoter in C.C.P.No.301/2019 was also allowed in part and directed the home buyer to pay Rs.26,51,749/- towards balance sale consideration along with interest @ 9% per annum. The promoter has not preferred any appeal against the order of the Adjudicating Officer in their complaint in C.C.P.No.301/2019. Against the order in C.C.P.No.300/2019 the promoter has preferred this appeal. For easy understanding in this appeal herein after the appellant is called as promoter and the respondent is called as

home buyer. The appellant/promoter has preferred this appeal on the following main grounds:

- The home buyer having failed in making timely payments, is not entitled for any compensation as per the agreement and also as per Section 19(6) and Rule 19(2) of The Real Estate (Regulation and Development) Act, 2016 and The Tamil Nadu Real Estate (Regulation and Development) Rules, 2017 respectively.
- The order of the Adjudicating Officer is self contradictory and liable to be dismissed since the home buyer was ordered to pay the balance sale consideration with 9% interest to the promoter and the promoter is ordered to pay interest and compensation to the home buyer.
- The order of the Adjudicating Officer without assigning any legitimate reasons for awarding compensation towards mental agony and inconvenience.

2. The learned counsel for the appellant would submit that the order of the learned Adjudicating Officer is not at all a speaking order and without following the factors contemplated in Section 72 of The Real Estate (Regulation and Development) Act, 2016. Therefore this appeal has to be allowed.

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3. The learned counsel for the home buyer would submit that after considering the entire material on record the learned Adjudicating Officer has come to a correct conclusion and there is no infirmity in his findings. Therefore this appeal has to be dismissed.

4. Points for consideration:

1. Whether the plea of the promoter is that "the delay compensation awarded is against Section 19(6) of the RERA Act R/w Rule 19(2)" is sustainable?
2. Whether the plea of the promoter is that "compensation awarded under the head of mental agony and inconvenience is not according to Section 72" is sustainable?
3. Whether this appeal is deserves to be allowed or not?

Point No.1:

5. According to the appellant/promoter the home buyer is not entitled to any compensation or interest since she is a defaulter.

6. According to the home buyer up to internal painting she has paid entire balance to the promoter. After that on 29.10.2018 the promoter demanded Rs.13,04,625/- out of which the home buyer paid Rs.3,12,874/-.

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The next two stages payment namely registration of unit payment/handover payment Rs.13,04,623/- on possession stage payment Rs.3,59,099/- alone were not paid since they were demanded in 29th October 2018 without actual handing over. Hence there is no delay on the part of the home buyer.

7. Perused both side contentions. On perusal the above said two reasons namely home buyer is a defaulter and promoter is the defaulter are the main contentions raised by both sides. Which one is true has to be analyzed? Before going to discuss the merits of the case the relevant clauses of the agreement and relevant provisions of the Act have to be looked into and the same is extracted as follows:

> ***Construction agreement dated 01.02.2012 entered between Ozone Projects Private Limited and Mrs.Nirmala Ramesh.***
>
> ***5. DELAY/DEFAULT IN PAYMENT***
>
> ***(b) In the event of delay/default by the Allottee(s) to pay the balance cost of construction as per the Payment Schedule, the Developer is entitled to terminate this Agreement by issuing a notice calling upon the Allottee(s) to pay the unpaid amounts due within 7 days from the date of such notice and if the Allottee(s) fails to pay the same, this Agreement shall be terminated at the discretion of the Developer and the Allottee(s) shall forfeit to the Developer 15% of the amount paid as liquidated damages. The balance amounts paid by the Allottee(s) shall be refunded by the Developer but without any interest or compensation of whatsoever nature only after receipt of monies pursuant to the Developer entering into a Construction Agreement with a new customer in respect of the said Residential Unit. The Allottee(s) agree(s) that upon***

termination of this Agreement the Allottee(s) will not have any other right whatsoever.

(f) Without prejudice to the aforesaid rights the Developer at their discretion may waive the breach by the Allottee(s) in not making payments as per the Payment Schedule and agree to receive the unpaid sums with interest at 18% per annum till the due payment is remitted in full. This will not cast any obligation on the Developer to receive the said amount in the said manner.

7. COMPLETION AND DELIVERY OF POSSESSION

(a) The Developer agrees to complete the construction and hand over possession of the Residential Unit as per the schedule set out in Annexure 3, with a grace period of 3 months, subject to force majeure clause and subject to the construction not being delayed or suspended due to unexpected or unavoidable circumstances, shortage of water and commodities like steel, cement and other building materials, civil commotion, riots, acts of God, orders of court, statutes, notification etc., or delay in getting electrical or water or sewer connections or excessive rain beyond the control of the Developer.

(b) The Developer shall handover possession of the Residential Unit to the Allottee(s) after the same is ready for occupation and subject to payment of all the amounts due under this Agreement. In this event of delay in handing over possession of the residential unit beyond the time period specified above, not attributable to any of the reasons stated above, the Developer shall pay to the Allottee(s)Rs.15/- (Rupees Fifteen Only) Per sq. ft Per month till such time possession of the residential unit is handed over or intimated to the Allottee, whichever is earlier, subject to the Allottee(s) having paid all the instalments as per the Payment Schedule. In the event of such delay exceeding 6 months, the Developer shall pay to the Allottee(s), interest at the rate of

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10% (ten percent) per annum, pro-rated for the further periods of such delays. The interest shall be calculated on all amounts received by the Developer from the Allottee(s), excluding the taxes and deposits. Such penalty shall be applicable only if the Allottee(s) has/have made all payments to Developer as per the Payment Schedule.

Annexure-3

Delivery Schedule

The delivery of the Residential Unit will be done in October 2013.

ANNEURE-1A

PAYMENT SCHEDULE IN THE AGREEMENT

Date of Booking: 26/12/2011	
Schedule	*Amount in Rs.*
Within 30 days from the date of Booking	*4,78,980*
Within 75 days from the date of Booking	
Within 120 days from the date of Booking	*9,22,890*
On completion of First Basement	*24,25,671*
On completion of 2nd Floor Roof	*24,25,671*
On completion of 7th Floor Roof	*24,25,671*
On completion of 12th Floor Roof	*24,25,671*
On commencement of Internal Painting	*24,25,671*
On completion of flooring	*12,12,836*
On or before Unit Handover	*7,76,989*
TOTAL	*1,55,20,050*

Section 19 and Rule 19(2) of the Real Estate (Regulation and Development) Act, 2016 and the Tamil Nadu Real Estate (Regulation and Development) Rules, 2017:-

19. Rights and duties of allottees.

(1) to (5) .. ..

(6) Every allottee, who has entered into an agreement for sale to take an apartment, plot or building as the case may be, under section 13, shall be responsible to make necessary payments in the manner and within the time as specified in the said agreement for sale and shall pay at the proper time and place, the share of the registration charges, municipal taxes, water and electricity charges, maintenance charges, ground rent, and other charges, if any.

(7) The allottee shall be liable to pay interest, at such rate as may be prescribed, for any delay in payment towards any amount or charges to be paid under sub-section (6).

(8) to (11) .. ..

The Tamil Nadu Real Estate (Regulation and Development) Rules, 2017:-

19. Timelines for refund.-

(1) .. ..

(2) In case of termination of the agreement as per the terms recorded therein, such refund and/or penalty and/or compensation shall be made by the party-in-breach to the other party simultaneous to the execution of appropriate cancellation agreement and registration, if required. If the defaulting party fails to come forward for execution of registration agreement, the Authority shall have the right to execute such agreement on behalf of the defaulting party.

The entitling allottee shall get full refund at any time if the builder has not followed the time schedule. The builder shall not keep 10% of the booked value of the property. If the allottee defaults in making timely payment as per terms of the agreement, the allottee shall not have the right of claiming any interest or compensation from the promoter.

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8. As per the agreement between the parties dated 1.2.2012, the promoter has agreed to hand over possession in October 2013 with grace period of 3 months which ended in January 2014. The undivided share of land was registered on 17.8.2016. The promoter has delivered the possession of the dwelling unit to the home buyer on 7.11.2018. These are the admitted facts of both parties.

9. As per the compensation claim petition filed by the home buyer as Form 'N' before the Adjudicating Officer, the home buyer admitted the amount payable to the promoter is only Rs.23,38,875/-. The above said amount was not admitted by the learned Adjudicating Officer and fixed the due from the home buyer to the promoter in C.C.P.No.301/2019 a sum of Rs.26,51,749/- and the same was not challenged by both the home buyer and promoter hence the above said Rs.26,51,749/- can be construed as an admitted amount due from the home buyer to the promoter.

10. According to the home buyer the promoter has delayed for delivery of apartment for 69 months. The due date for delivery of apartment in February 2014 and actual delivery was in November 2018. Therefore the delay of delivery by promoter to the home buyer is 57 months. The learned Adjudicating Officer has also fixed the delay as 57 months. It was also not

challenged by both sides. So, the admitted delay of delivery of apartment is 57 months by the promoter.

11. The home buyer made payments for the demand made by the promoter as per the construction agreement is as follows:

PAYMENTS MADE BY HOME BUYER ON DEMAND MADE BY PROMOTER

Due/Pay Dt	Due Amt	Rct Amt
27-Dec-11	5,00,000	-
27-Dec-11	-	4,00,000
27-Dec-11	-	1,00,000
11-Jan-12	18,29,688	-
11-Jan-12	-	4,50,000
11-Jan-12	-	3,71,661
11-Jan-12	-	4,50,000
11-Jan-12	-	50,000
26-Jan-12	23,29,688	-
15-Feb-12	-	5,08,027
1-Mar-12	-	23,29,688
11-Mar-12	23,29,688	-
22-Mar-12	-	23,29,688
25-Apr-12	23,73,475	-
24-May-12	-	23,66,206
6-Jul-13	24,44,775	-
2-Aug-13	-	4,74,418
16-Dec-13	-	19,77,626
11-Feb-14	24,44,775	-
10-Mar-14	-	15,00,000
10-Mar-14	-	9,44,775
23-Apr-14	24,44,775	-
31-May-14	-	24,44,775
2-Jul-14	-	24,44,775
5-Jul-14	24,44,775	-
29-Oct-14	24,45,904	-
20-Jan-16	-	24,44,775

17-Aug-16	***13,04,625***	-
30-Oct-19	***13,04,623***	-
30-Oct-19	***3,59,039***	-

12. As per the above particulars the last payment made by the home buyer was on 20.1.2016. Before handing over the last demand made by the promoter was on 29.10.2014 for a sum of Rs.24,45,904/-. For the above said demand the home buyer paid on 20.1.2016 a sum of Rs.24,44,775/- with balance due of Rs.1,129/-. Except the due amount of Rs.1,129/- no other balance from the home buyer as per the typed set of papers page No.152 of the promoter. According to the home buyer in Form N prayer column she has admitted the delayed payment of only 78 days. According to the promoter on 20.01.2016 payment the delay was 445 days. The statement of account produced by the appellant/promoter in page No.152 of the typed set the delay shown in 9th column as for every payment calculated as 12 + 17 + 1 2 + 8 + 26 + 24 + 133 + 24 + 35 + 445 and + 1166 totally 1902 days. The last delay mentioned as 1166 days. After 20.01.2016 the home buyer has not paid any amount to the promoter and possession was also not handed over till 7.11.2018. The promoter has calculated the delay of 1166 days as on 17.8.2016 and on that date also the promoter has not handed over the possession and after two years the possession was handed over so the above said delay 1166 days claimed by the promoter is not admissible. As per agreement the promoter has to deliver in January 2014. Even though the promoter has not delivered the apartment the home buyer has made

payments in 10.03.2014 paid Rs.24,44,775/- and on 31.5.2014 paid Rs.24,44,775/- on 7.7.2014 paid Rs.24,44,775/-. Then after two years again the home buyer paid Rs.24,44,775/- on 20.01.2016 balance only Rs.1,129/-. After that the home buyer has not paid anything. Regarding construction period is concerned the home buyer paid regularly with meager delay. While analyzing the delay table produced by the promoter at page No.152 of typed set till May 2014 the home buyer was regularly paying with small delay of 12 days, 17 days, 8 days, 26 days, and 24 days and lastly 35 days and the highest delay is 133 days paid continuously. After the due date the home buyer lost the hope of getting over of possession but the home buyer has paid to the tune of Rs.1.90 crores she is not able to get possession and with further hope she paid another sum of Rs.24,44,775/- and reduced the balance due to Rs.1,129/- and thereafter has not paid any amount due to frustration and came forward with the complaint. As per the construction agreement clause 5 (b) and (f) as stated supra the promoter is entitled to terminate the agreement and waive the breach by agreeing to receive the unpaid sums with interest at 18% per annum. But the promoter has not demanded 18% interest during the payment made by the home buyer as per the typed set page No.152 and demanded 10% interest for 104 days delay for a sum of Rs.70,778/- as per the typed set page No.154. Now the learned Adjudicating Officer has fixed the total due from the home buyer to the promoter a sum of Rs.26,51,749/- with interest @ 9% per annum from the date of handing over of the apartment till date of payment. The promoter has not challenged that order by way of an appeal and accepted the same. So the delay payment made by the home

buyer along with 9% interest is satisfied by the promoter and the claim of the promoter has come to an end. Now let us discuss about the plea of the promoter regarding compensation.

13. The only contention on the side of the appellant/promoter is that the defaulter is not entitled for any compensation or interest. In the construction agreement clause No.7(b), as stated supra, it has been agreed between the parties that in the event of delay in handing over of residential unit beyond the time period specified above, not attributable to any of the reasons stated above, the developer shall pay to the allottee Rs.15 per sq. ft. per month till such time possession of the residential unit is handed over or intimated to the allottee, whichever is earlier, subject to the allottee having paid all the installments as per the payment schedule. In the event of such delay exceeding 6 months the developer shall pay to the allottee interest @ 10% per annum prorated for the further periods of such delays. In this case in hand admittedly, 57 months delay was caused by the promoter for handing over. As per the above terms of the agreement for the delay of 6 months period the promoter is liable to pay Rs.15 per sq. ft. per month and more than 6 months the promoter is liable to pay interest @ 10% per annum. The learned Adjudicating Officer has awarded compensation on the basis of the 6 months delay period for the entire 57 months delay. The home buyer has also accepted the same and she has not challenged the same for the second part of the delay period under clause 7(b) i.e., @ 10% interest. The learned

Adjudicating Officer in paragraph No.8(g) has found that the agreement between the parties were entered duly prior to the commencement of The Tamil Nadu Real Estate (Regulation and Development) Rules, 2017 commencement date 26.06.2017. Therefore, as per Rule 4(1) of the explanation of the TNRERA Rules the agreement already entered between the promoter and allottee shall not be affected therefore it was found that the complainant is entitled for compensation only as per the terms agreed by her under the agreement. The learned Adjudicating Officer has not invoked the provisions of the RERA Act in awarding the interest and compensation. Hence Section 19(6) of the RERA Act and Rule 19(2) of the RERA Rules are not applicable to the facts of this case in hand. Moreover, the learned Adjudicating Officer invoked construction agreement clause 7(b) part 1 only namely for the 6 months delay period for the entire 57 months delay and avoided to invoke 7(b) part 2 namely more than 6 months delay interest @ 10% the default clause.

14. Even though the parties have agreed two kinds of default clause in the agreement the learned Adjudicating Officer adopted the one clause of default @ Rs.15 per sq. ft. per month only. Another default clause interest @ 10% per annum was not adopted. In the 6 months default clause there is a pre condition 'subject to payment of all the amounts due under this agreement'. The home buyer paid the amount as per the payment schedule as stated supra with small delay up to the due date of delivery i.e., January

2014 and after that also the home buyer paid on 20.01.2016 cleared the entire balance as per the schedule except Rs.1,129/-. On 29.10.2018 also the home buyer paid Rs.3,12,874/- after that she has not paid anything and approached the Regulatory Authority. The delay of one day or 1000 days it can be considered only as a delay and considered as a reasonable delay as contemplated in the construction agreement clause 7(b). In the construction agreement itself in clause 7(b) both parties were agreed for two types of delay compensation namely 'Rs. 15/- per sq. ft per month and interest @ 10%'. The parties have agreed to themselves that for smaller period of delay up to 6 months they have agreed for compensation @ Rs.15/- and more than 6 months they agreed for 10% interest at the higher rate. The intention of the parties reveals that for smaller delay mild approach and for larger delay severe approach in the construction agreement clause 7(b). So the learned Adjudicating Officer has followed the intention of the parties and adopted the agreement of the parties and fixed the compensation by mild approach for the entire delay period of 57 months @ Rs.15 /- per sq. ft. per month, since the home buyer is also in default of payments for few days and justified the delay of both parties. The delay of 57 months in handing over possession, after payment of more than a sum of Rs.1 crore 90 thousand, on the due date i.e. in January 2014, the promoter cannot be relieved without paying any compensation as per the agreement. Therefore this Tribunal comes to a conclusion that the learned Adjudicating Officer has come to a correct conclusion and there is no infirmity to interfere with the finding. The point No.1 is answered accordingly.

Point No.2:

15. The homebuyer claimed a sum of Rs.50,00,000/- towards mental agony and inconvenience. The promoter denied the same on the ground that the home buyer is a defaulter hence not entitled to any compensation under Section 19(6) of the Act and Rule 19(2) of the Rules. After contest Rs.5,00,000- was awarded as compensation under the head of mental agony and inconvenience. Now in this appeal the promoter has raised the same plea along with the allegation that while awarding compensation Section 72 was not properly appreciated. How far the plea of the promoter is sustainable has to be analyzed. Before going to discuss the merits Section 72 of the Act has to be looked into and the same is as follows:

> ***72. Factors to be taken into account by the adjudicating officer.***
>
> ***While adjudging the quantum of compensation or interest, as the case may be, under section 71, the adjudicating officer shall have due regard to the following factors, namely:—***
>
> ***(a) the amount of disproportionate gain or unfair advantage, wherever quantifiable, made as a result of the default;***
>
> ***(b) the amount of loss caused as a result of the default;***
>
> ***(c) the repetitive nature of the default;***
>
> ***(d) such other factors which the adjudicating officer considers necessary to the case in furtherance of justice.***

16. According to Section 72 there are four factors have to be taken into account by the Adjudicating Officer while adjudicating the quantum of compensation. Out of the four factors the 2nd one is relevant to this case in

hand is concerned the same factor is the amount of loss caused as a result of the default'.

17. In point No.1 it was decided that the promoter has delayed for 57 months in handing over of possession to the home buyer. As an due date of handing over of possession i.e. in January 2014 the home buyer has paid more than Rs.1,90,00,000/- to the promoter. Subsequent to that up to January 2018 the home buyer has paid entire construction costs Rs.2.15 crores and the balance only Rs.26,51,779/- with regard to the amount due to painting amount part Registration amount and handing over stage payment. Though the home buyer had paid Rs.2.15 crores to the promoter the home buyer was not able to get possession of the dwelling unit. The home buyer invested her entire hard earned money for her dream home at Anna Nagar and she was waiting for the handing over possession by the promoter from January 2014 to January 2018. After that she lost hope and stopped the payment due to frustration since she had poured all the monies to the promoter and without any return. Due to the payment by home buyer she ought to have paid interest to the bank as EMI. After investment for the home without handing over the apartment, the home buyer had paid rent, interest and EMI from her own pocket it caused further loss to the home buyer. Due to the said loss certainly the home buyer would suffer mental agony and it cannot be measured in terms of money. The delay is not a negligible delay and caused delay of 57 months. All the 57 months the home buyer is liable to pay interest for loan and she has to pay rent for her

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accommodation and it also amounts to loss since if possession is handed over certainly payment of rent would have been avoided. Therefore the loss was caused due to the default on the part of the promoter.

18. The home buyer fixed her loss as Rs.50,00,000/- and claim the same as compensation. The learned Adjudicating officer after considering the loss by way of rent and interest and considered the long delay of 57 months fixed the lump sum compensation as Rs.5,00,000/- as reasonable.

19. The Honble Supreme Court has guided in fixing compensation by way of two principles which is reported in

(2003) 7 SCC 197

Divisional Controller, KSRTC vs Mahadeva Shetty and another

> ***It has be to be borne in mind that the compensation is not expected to be a wind fall for the victim. Statutory provisions clearly indicate the compensation must be "just" and it cannot be a bonanza; not a source of profit but the same should not be a pittance. The Courts and Tribunals have a duty to weigh the various factors and quantify the amount of compensation, which should be just. What would be "just" compensation is a vexed question. Every method or mode adopted for assessing compensation has to be considered in the background of "just" compensation which is the pivotal consideration. Though by use of the expression "which appears to it to be just" a side discretion is vested on the Tribunal, the determination has to be rational, to be done by a judicious approach and not the outcome of whims, wild guesses and arbitrariness. The expression "just" denotes equitability, fairness and reasonableness, and non-arbitrary. If it is not so it cannot be just.***

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a) Compensation is not a windfall to the victim

b) Compensation is not a profit to the victim

and the compensation should be just and reasonable.

20. By following the above principles the compensation awarded by the learned Adjudicating Officer is just and reasonable and as per Section 72 of the RERA Act also the awarded compensation is just and reasonable. Hence the plea of the appellant regarding compensation without following Section 72 of the Act is not sustainable. Point No.2 is answered accordingly.

Point No.3:

21. In point Nos.1 and 2 it was decided that the pleas of the appellant are not sustainable. From the above discussion this Tribunal comes to a conclusion that the grounds put forth by the appellant/promoter are not sufficient to set aside the order of the learned Adjudicating Officer. Hence the appeal fails.

22. Further, the learned Adjudicating Officer has passed a common order in the compensation claim petitions filed by the home buyer and as well as the promoter namely C.C.P.Nos.300/2019 and 301/2019. When the appellant/promoter accepted the finding of the one part and challenged the finding of another part is not acceptable. The findings of the learned

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Adjudicating Officer in both the complaints are one and the same and passed the common order hence challenging the part of the common order is unknown to law. The point No.3 is answered accordingly.

23. In the result, this appeal is dismissed and the order of the Adjudicating Officer in C.C.P.No.300 and 301 of 2019 as common order dated 18.12.2020 is confirmed. No costs.

Connected Miscellaneous applications are closed.

This Order is directly dictated to the Stenographer and typed in the computer by her, corrected and pronounced by us in the open court on 06th Day of December 2021.

Sd/- xxxx
CHAIRPERSON

Sd/- xxxx
ADMN. MEMBER

Sd/- xxxx
JUDL. MEMBER

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