

OCT 12 2006

LITCHFORD &amp; CHRISTURNE, P.A.

STATE OF FLORIDA  
DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION  
DIVISION OF FLORIDA LAND SALES, CONDOMINIUMS, AND MOBILE HOMES

IN RE: PETITION FOR ARBITRATION

Jon Zuch,  
Petitioner,

v.

Case No. 2006-02-3767

Lake Place Condominium  
Association, Inc.,  
Respondent.

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**SUMMARY FINAL ORDER**

This Summary Final Order is entered as there are no disputed issues of material fact.

**Statement of Issue**

Whether the recall by written agreement served on the Association on April 20, 2006, was void *ab initio* and as a result the Association was not required to hold meeting a to consider the recall and file a recall arbitration petition?

**Findings of Fact**

1. Lake Place Condominium Association, Inc. (the "Association") is the Florida not-for-profit corporation responsible for operation of two condominiums, Lake Place, A Condominium ("Lake Place I") and Lake Place II, A Condominium ("Lake Place II").
2. When the Association was originally formed, it was only responsible for the operation of Lake Place I which was developed prior to Lake Place II. The Association's articles of incorporation and bylaws were amended in 1993 when

Lake Place II was developed in order to provide that the Association is responsible for the operation of both Lake Place I and Lake Place II, two separate condominiums.

3. Lake Place I consists of 46 units and Lake Place II consists of 44 units.
4. On April 20, 2006, the Association was served with 26 recall ballots signed by the owners of Lake Place I units, seeking the removal of Sandra Reynolds, Linda Trujillo and Regina Gregory from the Association's board of directors.<sup>1</sup>
5. On April 28, 2006, the Petitioner filed this petition.
6. Section 5.2 of the declaration of condominium for Lake Place I and section 15.9 of the declaration, for Lake Place II provide that the articles of incorporation and bylaws of the Association will control unit owner votes.
7. Section 5.1 of the Amended and Restated Articles of Incorporation (Articles of Incorporation) for the Association provides, in pertinent part:

Membership. The members of the Association shall consist of all the record title holders of the Lake Place, a Condominium and Lake Place II, a Condominium....

8. Section 5.3 of article of the Articles of Incorporation provides, in pertinent part:

Voting. On all matters upon which the membership shall be entitled to vote, there shall be only one vote for each Unit, which vote shall be exercised or cast in the manner provided by the Declarations or By-laws....

9. Section 3.5d. of the Association's amended and restated bylaws ("bylaws") states:

Provided, however, that where votes are to be taken which relate solely to the operation of either of the Condominiums individually, such as to waive reserves or financial reporting requirements,

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<sup>1</sup> The Petitioner contends that there were 27 votes in favor of the recall whereas the Association contends that there were 26 votes. This discrepancy is immaterial.

membership shall be treated as having two classes, with one class attributable to each of the Condominiums. As noted in Article 4.1. of the By-Laws, the membership each condominium shall elect and have the right recall members of the Board elected from their own condominium.

10. Section 4.1 of the bylaws guarantees both condominiums representation on Association's board of directors, providing that a certain number of the directors must be from each condominium.

11. Section 4.3(b) of the bylaws provides:

(b) Any Director elected by the members may be removed by the concurrence of a majority of the votes of the members at a special meeting of members called for that purpose or by written agreement signed by a majority of the owners of all Units. The vacancy in the Board of Directors so created shall be filled by the members at the same meeting, or by the Board of Directors, in the case of removal by written agreement unless said agreement also designates a new Director to take the place of the one removed. The conveyance of all Units owned by a Director in the Condominium shall constitute the resignation of such Director.

13. Section 4.3(c) of the bylaws provides:

(c) In any action to fill vacancies or remove directors, if a Director from Lake Place II is removed or a vacancy is created for such a position, the replacement Director shall also be from Lake Place II. The same shall apply to the replacement of vacant positions previously occupied by a Director from Lake Place I. This is intended to preserve the same ratio of directors provided for in Section 4.1 of these Bylaws. For clarification, all members of the Association can vote to remove or recall a Director, but any vacancies shall only be filled by a person from the same condominium as the person who previously occupied the vacant position.

### Conclusions of Law

1. The undersigned has jurisdiction over the parties and subject matter of this dispute, pursuant to rule 61B-50.105(3), Fla. Admin. Code, and 718.1255, Florida Statutes.
2. There are two condominiums; however, both condominiums are managed by a single Association. Therefore, the Association's articles of incorporation and bylaws control unit owner votes for both condominiums.
3. Section 718.112(2)(j), Florida Statutes, clearly provides that where the board of directors of an association is served with a recall it must hold it must hold meeting within five business days to consider the recall and if it fails to certify the recall it must file a recall arbitration petition with the division within five business days. The Association has failed to do so in the instant matter. Rather, the Association contends that it was not required to do so because the recall agreement was void *ab initio* in that the total number of recall ballots served on it is insufficient to recall any of the directors. In support of its argument, the Association contends that its bylaws require that a majority of the unit owners from both Lake Place I and Lake Place II vote in favor of the recall. The Petitioner, on the other hand, contends that a board member from a Lake Place I may only be recalled by the unit owners from Lake Place I and, therefore, only a majority of members of Lake Place I are necessary to recall the directors subject to the written recall in the instant matter.
4. Section 4.1 of the bylaws establishes that seats on the board of directors will be segregated between the condominiums with each condominium assured representation on the Association's board of directors. Section 3.5d. of the

bylaws provides that the membership of each condominium shall elect and have the right to recall members of the Board elected from their own condominium. However, section 4.3 of the bylaws provides that any Director elected by the members may be removed by written agreement signed by a majority of the owner of units; however, the replacement director must be an owner from same condominium as the recalled director.

5. At initial glance it may appear that the recall provisions of sections 3.5d. and 4 of the bylaws are inherently inconsistent. Bylaws should be construed so as to give every part effect. See *Hennessee v. Eden Owner's Assoc., Inc.*, Arb. Case No. 94-2069, Summary Final Order (September 20, 1994). Therefore, a reasonable interpretation of section 4.3, would be that any reference to the "members" or "owner of units" indicates the unit owners eligible to vote for recall of a director pursuant to section 3.5.d.
6. This interpretation is further supported by sections 718.301(2)(j) and 718.103(30), Florida Statutes. Pursuant to section 718.103(30), Florida Statutes, in a multicondominium association, as to matters related to a specific condominium, the voting interests are limited to the unit owners in that condominium. Clearly, this provision would apply to the election or recall of members of the board of directors designated to represent an individual condominium. Thus, where section 718.301(2)(j), Florida Statutes, provides for recall by a majority of the voting interests, in a multicondominium association such as the Respondent, only unit owners from a condominium have the right to vote to recall a director elected from their condominium. Additionally, rule 61B-

0026(3), Fla. Admin Code, provides that the class of unit owners entitled to elect members to the board shall constitute all the voting interests that may recall or remove such members.

7. Moreover, the provisions of section 718.112(2)(j), Florida Statutes, are controlling and supersede a previously adopted bylaw. See *Oceanview Park Condo. Ass'n v. Unit Owners Voting for Recall*, Arb. Case No 01-3115, Final Order on Recall Arbitration (June 18, 2001). Therefore, if the bylaws were interpreted as requiring or permitting the unit owners from both condominiums to vote to recall the directors elected by a single condominium, the bylaw would conflict and with the statute and would fail.
8. Based upon the foregoing the undersigned concludes that in order to recall members of the Association's board of directors from Lake Place I, a vote of the majority of the owners of Lake Place I is required. Therefore, the written recall agreement is not void *ab initio*<sup>2</sup> and the Association should have held a meeting to consider the recall and filed a recall arbitration petition. Since the Association failed to do so, in accordance with section 718.112(2)(j), Florida Statutes, the recall is deemed certified.
9. The Association argues that the Association's bylaws may not have been properly adopted in 1993. Such a challenge would be barred by the statute of limitations which is four or five years. See *Kosse v. Shorewalk Condo. Ass'n*, Arb. Case No. 2005-00-1164, Summary Final Order (January 30, 2006)(challenge of a 1993 amendment to the declaration barred by the statute of limitations).

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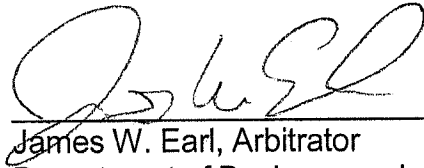
<sup>2</sup> The recall ballots attached to the petition are identical to the Division's form ballot and are facially valid.

10. The Association contends that the Arbitrator lacks jurisdiction over this matter, arguing that the Division lacks specific statutory authority to promulgate rule 61B-50.105(3), Fla. Admin. Code. An arbitration proceeding is not the proper forum to challenge the promulgation of a rule.
11. Moreover, as acknowledged by the Association, rule 61B-50.105(3), Fla. Admin. Code, is the codification of long established arbitration precedent which has permitted unit owners to file arbitration petitions in accordance with section 718.1255(1), Florida Statutes, challenging an association's failure to hold a meeting or file recall petition pursuant to section 718.112(2)(j), Florida Statutes, since such disputes allege that the association failed to properly conduct elections or hold meetings. Therefore, the undersigned has jurisdiction over the type of dispute alleged by the Petitioner, commonly known as a "reverse recall." Such proceedings are subject to chapter 61B-45 of the Florida Administrative Code, the rules of procedure for regular arbitration cases. Although it may not be clear from prior arbitration cases, in such cases the arbitrator is not granting relief as to the recall but is determining whether the Association failed to hold a meeting to consider the recall or failed to file a recall arbitration petition as required by the statute. However, upon a finding that an association has failed to comply with the statute and that it has no justification for doing so, the recall is deemed effective by operation of law. Therefore, it would be superfluous to order the Association to conduct a meeting or file a petition; rather, the arbitrator will confirm that the recall is deemed effective by operation of law.

Based upon the foregoing, it is ORDERED:

The Association has violated section 718.112(2)(j), Florida Statutes, by failing to timely hold a board meeting to consider the recall and by failing to file a recall arbitration petition. Therefore, the recall of Sandra Reynolds, Linda Trujillo and Regina Gregory is deemed EFFECTIVE immediately and they are REMOVED as directors. In accordance with section 718.112(2)(j), Florida Statutes, Sandra Reynolds, Linda Trujillo and Regina Gregory are required to immediately deliver to the board any and all records of the association in their possession and the replacement candidates Leonard Colodny, Calvin Cooper, and Jon Zuch shall immediately take office and shall fill the board seats for the unexpired terms of the recalled directors.

DONE AND ORDERED this 9<sup>th</sup> day of October 2006, at Tallahassee, Leon County, Florida.



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

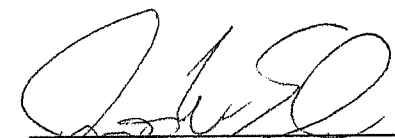


**Certificate of Service**

I hereby certify that a true and correct copy of the foregoing summary final order has been sent by U.S. Mail and facsimile to the following persons on this 9<sup>th</sup> day of October 2006:

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James W. Earl, Arbitrator