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

IN RE: PETITION FOR ARBITRATION

Forest Ridge Village Condominium Association, Inc.,

Petitioner,

v. Case No. 2005-06-0936

Unit Owners Voting For Recall,

Respondent.
_____/

SUMMARY FINAL ORDER

On November 29, 2005, Forest Ridge Village Condominium Association, Inc. (the association) filed a petition for recall arbitration. The group of unit owners who voted in favor of the recall is the respondent in this matter.

On November 9, 2005, the association's registered agent received a written recall agreement seeking the recall of six of the seven members of the association's board of directors: Steve Jordan, Rob Jameson, Tom Van Delinder, Linda Box-Right, Mark Osterele, and Caroll Wilson. The association's board of directors held a meeting on November 18, 2005, in order to consider the recall. The board rejected the recall finding that it failed to achieve a majority of the voting interests in favor of recall. Specifically, the association asserts that the association consists of 128 voting interests and the recall agreement only contained 57 ballots. The minutes of the board meeting indicated it did not find any of the ballots defective, but simply found that there were an insufficient number of votes cast for recall of the above-named directors.

On December 15, 2005, the respondent filed an answer to the petition. The respondent contends that there 104 voting interests in the association, not 128, therefore, 53 valid votes in favor a recall are needed to recall a board member.

Thus, the only issue is whether there are 128 or 104 total voting interests. If there are 128 voting interests, the recall fails and if there are 104 voting interests, the recall should be certified.

It is undisputed that the association owns 24 unbuilt units (the unbuilt units) that it acquired in July 1990. The respondent asserts that, ever since the association has owned the units, it has based all elections, budgets, and financial operations on the presumption that the condominium consists of 104 voting/owner interests, the number of completed units. The respondent argues that these unit owners have relied upon there being 104 voting/owner interests in past association votes, and in calculating association expenses, including maintenance, taxes, and insurance of the common elements. Therefore, the respondent argues that the association should be estopped from asserting that there are 128 voting interests in order to defeat the present recall effort.

On January 9, 2006, pursuant to an order issued by the undersigned, the association filed a response to the answer. In its response, the association does not dispute that in past unit owner votes conducted by the association it was presumed that there were 104 voting interests. However, the association argues that such prior conduct should not preclude the association from asserting that there are 128 voting interests in order to defeat the current recall.

The association also indicates that when the current board of directors took office in August 2005, it directed the association's legal counsel to research the legal status of

the unbuilt units. On September 29, 2005, legal counsel provided the association with the results of a title search and advised the association in writing by letter dated November 14, 2005, that there are 128 voting interests in the association including the 24 unbuilt units owned by the association. The association indicates that subsequent to receiving this information the association has been taking actions to treat the unbuilt units in the same fashion as the other units. For example, the association notes that the association's 2006 budget adopted on December 3, 2005, is based upon 128 units.

It is not disputed that since the time the association acquired the unbuilt units, they have not been included in calculating the number of voting interests in the association. The association has conducted elections for its board of directors and conducted votes for the approval of material alterations to the common elements based up the association consisting of 104 voting interests. Likewise, until the 2006 budget, which was adopted after the recall agreement was rejected, the assessment of the association's expenses was based upon 104 interests.

The arbitrator in *Sea Isle Condo. Ass'n. v. Unit Owners Voting for Recall*, Arb. Case No. 2005-02-4102, Summary Final Order (July 21, 2005) considered an analogous situation. In *Sea Isle* the association owned a unit that it used as its office and that, prior to the recall in dispute, had never been treated as a voting interest in the association and had never been treated as any other unit for other association business. The arbitrator concluded that the association could not ignore its historical treatment of the association-owned unit and treat it as a voting interest for the purpose of defeating a recall by using it to determine that a majority of the voting interests had not voted in favor of the recall.

The undersigned agrees with the conclusion reached in *Sea Isle* and finds it applicable to the instant matter. Here, the association has, for over twenty years, failed to treat the unbuilt units it owns the same as the other units and has never considered them to be voting interests in past unit owner votes. Therefore, the association should not be permitted to consider them as voting interests to defeat the recall in the instant matter.

The undersigned notes that the association has determined that the unbuilt units should be treated the same as the other units, as demonstrated by the 2006 budget adopted on December 3, 2005. However, this was after the association was served with the recall agreement. In fact, the association received the recall agreement prior to receiving the report from its legal counsel advising that the association consisted of 128 units. Therefore, it cannot be argued that this placed the respondent on notice, as to the pending recall, that the association was intending to treat the unbuilt units the same as the other units.

The association's historical treatment of its units is distinguishable from the case where a unit owner simply abstains from voting. A unit owner does not conduct unit owner votes, the association does. Thus, the association is in the unique position of determining whether a sufficient number of the voting interests voted in favor of a proposed issue for it to pass.

The association argues that the defense of estoppel may not be asserted where the prior acts of the board were contrary to law or public policy. The respondent relies upon *The Palm Club Ass'n v. Callahan*, Arbitration Case No. 98-3994, Summary Final Order (January 19, 1999) and *The Palm Club Ass'n v. Bcchino*, Arbitration Case No. 98-3993, Summary Final Order (January 15, 1999). Both of the *Palm Club* cases involved

unit owners making material alterations to the common elements, pursuant to a consent agreement with the association. The arbitrator found that the defenses of waiver and estoppel could not be asserted where the condominium documents and statutes clearly require that such changes be approved by the members of the association and, therefore, any approval by the association exceeded its authority. Thus, reliance on any approval by the association was unreasonable.

In the instant case the legal status of the units are not as clear. Paragrpah E. of the declaration of condominium indicates that the developer is constructing the 128 units described in the attachment to the declaration. Paragraph G.2. of the declaration of condominium provides that each dwelling unit owns an equal 1/128 interest in the condominium. However, in 1990, when the association purchased the unbuilt units, the declaration was amended to provide as follows:

> 3(a) Specific Powers of Association to purchase and own those unbuilt 24 unit known as Phase V.
>
> The Association is granted the specific power to acquire ownership of the 24 unbuilt residential units that comprise building Q, R, S, and T described in the Declaration of Condominium. The association will not be required to complete construction of the 24 units. The association is granted the power, through its board of directors, to manage these properties as it deems prudent.

Considering the broad delegation of authority contained in the above amendment and the historical treatment of the unbuilt units by the association, it would be reasonable for the unit owners to conclude that the unbuilt units were not to be treated the same as the other units.

Finally, the legislative intent and public policy for allowing unit owners to recall board members is to permit the unit owners to have control of their association in order to protect their interests. Allowing the association to suddenly claim that there are now

128 voting interests in order to defeat the recall, contrary to its lengthy historical conduct of prior unit owner votes, would be inconsistent with the intended purpose of permitting unit owners to control their association by recall of its board members. Therefore, since there were 57 valid ballots in favor of recall, the recall should have been certified.

Based upon the foregoing it is ORDERED:

1. The recall of Steve Jordan, Rob Jameson, Tom Van Delinder, Linda Box-Right, Mark Osterele and Coral Wilson is hereby CERTIFIED and they are REMOVED as directors effective as of the date of the mailing of this order. Within five(5) full business days from the effective date of this recall, Steve Jordan, Rob Jameson, Tom Van Delinder, Linda Box-Right, Mark Osterele, and Coral Wilson shall deliver to the board any and all records of the association in their possession.

2. As a majority of the board has been recalled pursuant to rule 61B-23.0028, Fla. Admin. Code, replacement candidates Von Holcomb, Jackie Maire, Gerry Guthrie, John Kornya, Rob Kuehl, and Virginia Teed shall take office as replacement directors effective upon the mailing of this order and shall, in accordance with rule 61B-23.00028((3)(a)3., Florida Administrative Code, fill the board seats for the unexpired terms of the seats being filled.

DONE AND ORDERED this 22nd day of March, 2006, at Tallahassee, Leon County, Florida.

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 22nd day of March 2006:

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