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

IN RE: PETITION FOR BINDING ARBITRATION - HOA

HOLLEY BY THE SEA IMPROVEMENT ASSOCIATION, INC.,

Petitioner,

v. **Case No. 2007-00-7012**

HOMEOWNERS VOTING FOR RECALL,

Respondent.
_____/

FINAL ORDER

Procedural History

On February 2, 2007, the Association filed a recall arbitration petition. Respondent filed its answer on February 22, 2007. A case management conference was held on March 27, 2007, during which the undersigned concluded that the Association had improperly rejected various ballots.[1] The parties were directed to file supplemental information in support of their positions. Both parties did so, and upon review of the supplemental information and the entire record in this matter, it was determined that a final hearing would need to be held to resolve certain disputed issues of fact.

Pursuant to notice, the undersigned arbitrator of the Division of Florida Land Sales, Condominiums, and Mobile Homes convened a formal hearing in this case on April 9, 2007. During the hearing, the parties presented the testimony of witnesses,

[1] The reasons have been incorporated in the Conclusions of Law below.

entered documents into evidence and cross-examined witnesses. This order is entered after consideration of the complete record in this matter.

Appearances

For the Petitioners: Raymond F. Newman, Jr., Esq.
Becker & Poliakoff, P.A.
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Ft. Walton Beach, Florida 32548-5253

For the Association: James P. Kizer, Jr.
2004 Lewis Turner Boulevard
Suite B
Fort Walton Beach, Florida 32547
Unit Owner Representative

Statement of the Issue

The issue presented by this case is whether the recall served on the Association on January 22, 2007, should have been certified.

Findings of Fact

1. Holly by the Sea Improvement Association, Inc. (the Association) is the legal entity responsible for the operation of the Holly by the Sea community (the community).

2. The Association contains 4722 voting interests. There are five seats on the Association's board of directors.

3. On January 22, 2007, the Association received a written recall agreement seeking to recall Tim Harrington, Laurie Gallop, Teresa Reilly, and Lee Gardner from the Association's board of directors.

4. On January 29, 2007, the Association held a board meeting during which it chose not to certify the recall rejecting ballots for the following reasons:

a. 21 ballots because the members were delinquent in payment of assessments for more than 90 days.

b. 515 ballots because the members were delinquent in payment of assessments for less than 90 days.

c. 5 ballots because the members were delinquent in payment of assessments for less than 90 days and because the ballots also contained an improper, invalid or impossible date.

d. One ballot because the member was delinquent in payment of assessments for less than 90 days and the homeowner's representative did not have possession of the original ballot.

e. 6 ballots because the members were delinquent in payment of assessments for less than 90 days and because the ballots contained no discernable parcel identification.

f. One ballot because the member was delinquent the payment of assessments for less than 90 days and the ballot was not signed by at least one of the owners.

g. 4 ballots because the members were delinquent in assessments for less than 90 days and because the ballots contained no date.

h. 2 ballots because the members were delinquent in payment of assessments for less than 90 days and the ballots did not contain a parcel number.

i. 2 ballots because the members were delinquent in payment of assessments for less than 90 days and the ballots contain no recall or retain mark.

j. 3 ballots because the members were delinquent in the payment of assessments for less than 90 days and because the ballots indicate that the parcels are

owned by trusts and the ballots are not signed by the trustee or other proper party and the Association has not been provided proper documentation.

k. 13 ballots because they contained improper, invalid, impossible dates.

l. 63 ballots because the owners were corporations and were signed individually without evidence of corporate authority or the representative capacity of the signatory.

m. 55 of the ballots were duplicates of other ballots.

n. 8 ballots because the homeowner's representative did not have the possession of original copies of the ballots.

o. 19 ballots because they contained no discernable parcel identification.

p. 14 ballots because they contained no date.

q. 5 ballots because they contain no parcel identification.

r. One ballot because it did not contain the signature of at least one owner and the owners are delinquent in payment of assessments for more than 90 days.

s. 2 ballots because they did not contain the signature of at least one property owner.

t. 10 ballots because they were executed by persons who did not own the property at the time the recall agreement was served on the Association.

u. 19 ballots because the ballots indicate that the parcel is owned by a trust and the ballots were not signed by the trustee or other proper party and proper trust documentation had not been provided to the Association.

v. 3 votes were rejected where they were cast on a single ballot.

4. During the January 22, 2007, board meeting, the board also took action to suspend the voting rights of the members who were delinquent in assessments as described above.

Conclusions of Law[2]

The undersigned has jurisdiction over the parties and subject matter of this dispute, pursuant to sections 720.311(1) and 718.1255, Florida Statutes. Section 720.303(10)(a)(1), Florida Statutes, provides that any member of the board of directors may be recalled and removed from office by a majority of the voting interests. In the instant matter, a minimum of 2,362 votes is needed to recall a director.

The Association contends that it consists of 4,752 members. It bases this number on records maintained by the property appraiser less persons in its records such as spouses, children and renters. However, Respondent established that prior owner votes and budgets have been based upon 4,722 members. The discrepancy apparently may be explained in part because it is not clear whether the number of parcels listed in the property records includes wetland mitigation parcels which would not be considered voting interests. Moreover, pursuant to section 3 of article of 3 of the Association's declaration of protective property rights and restrictions (declaration), where more than one lot is used as a single building site, the entire building site will be treated a single lot, with the owner entitled to a single vote. This has apparently been done with numerous parcels.

The Association objected to numerous ballots because the members were delinquent in paying assessments to the Association. The condominium's controlling

[2] For clarity, the Conclusions of Law contains some findings of fact.

documents provide that a member's voting rights may be suspended for failure to pay assessments. However, the members voting in favor of the recall are deemed to have cast their votes when the written recall agreement was served on the Association. The Association did not take action to suspend voting rights until after it had received the written recall agreement. Therefore, since at the time the written recall agreement was served on the Association, the owners voting rights had not been suspended, their ballots should not have been rejected on this basis.[3]

The undersigned finds that the Association improperly rejected ballots because they lacked parcel identification or the parcel identification was not discernable. Likewise, the Association improperly rejected ballots on the basis that the ballots lacked dates or contained impossible dates[4]. *See Lakeforest at St. Lucie Homeowners' Assoc., Inc. v. Homeowners Voting for Recall*, HOA Arb. Case No. 2004-05-5982, Summary Final Order (January 31, 2005); *also see Seapointe Terrace Condo. Assoc., Inc. v. Unit Owners Voting for Recall*, Arb. Case No. 01-3656, Final Order Certifying Recall (September 20, 2001).

The Association rejected ballots because Respondent did not have original copies of the ballots in its possession. Section 720.303(10)(b)1., Florida Statutes, permits the owners to serve a copy of the written recall agreement on the Association. Copies will be accepted unless it is demonstrated that they are inaccurate. The Association has not done so in this case. Therefore, copies of the ballots will be accepted.

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[3] The Association rejected various ballots for multiple reasons. If all the reasons are found invalid by this order, then such ballots are deemed valid.

[4] The dates on some ballots are numerically impossible. It appears that such cases are the result of scrivenors'error s where the signatory simply transposed numbers.

The Association also rejected two ballots because they were delinquent in payment of assessments and because the ballots did not contain a recall mark. The undersigned finds that one of these ballots (association ballot number 2340) was improperly rejected as it was properly marked.

The Association rejected a ballot because the owner cast three votes for three parcels he owned on the single ballot. The ballot is accepted and will count as three votes.

The Association rejected 63 ballots because the ballots state that the owner is a corporation and they were signed individually without evidence of corporate authority or the representative capacity of the signatory. Respondent has established that as to 53 of these ballots, the signatory was the proper corporate representative at the time the ballot was signed.

Respondent contends that four ballots signed by Reverend John F. Kelly for parcels owned by the Diocese of Pensacola-Tallahassee should be accepted. Respondent offered a letter dated March 28, 2007, from the Bishop of the diocese authorizing Reverend Kelly to sign the ballots. However, Respondent has not established that the signatory was authorized to sign the ballots at the time they were served on the board. Therefore, these ballots will not be accepted.

The Association rejected 22 ballots because the ballots indicate that the parcels are owned in trust, but there was no indication that the signatory was authorized to sign the ballot on behalf of the trust. Respondent has established that 9 of the ballots were signed by the authorized trustees. Therefore, these ballots are accepted.

The Association has brought to the Arbitrator's attention that four ballots that were rejected because the parcels were thought to be owned by Joseph F. Dunn

Revocable Trust and were not signed by the trustee, were in fact transferred by quit claim deed to Joseph F. Dunn and Lynn P. Dunn, as husband and wife, prior to service of the recall agreement on the Association. The ballots were signed by Ms. Dunn. Therefore, these ballots will be accepted.

The Association claims that the written recall agreement served on it consisted of 2,451 ballots whereas Respondent claims the written recall agreement contained 2,510 ballots. The Association contends that the recall agreement contained 55 duplicative ballots and Respondent claims that the agreement served on board did not contain any redundant ballots.

The recall in this matter was a monumental undertaking. Respondent's efforts involved approximately 300 persons dedicated to seeking signed ballots. Respondent, by mail or hand delivery, sent out approximately 4,700 ballots collecting ballots for a few months thereafter.

Respondent used a detailed computer spread sheet data base to process the ballots. Using this system, Respondent was able to track the status of ballots by owner name, address, parcel number, or a tracking number stamped on each ballot. This allowed Respondent to determine which owners had returned ballots and to account for any redundancies.

Respondent used the above system to determine that it had collected 2,510 ballots. The day prior to delivering the ballots to the Association, the recall organizers counted the photocopies three times, checking the ballots against the data base in order to confirm that the copy of the recall agreement contained all the ballots.

Respondent claims that the copy of the written recall agreement served on it along with the petition did not contain 123 ballots it served on the Association as part of

the agreement. Respondent entered into evidence copies of the 123 ballots. The Association contends that the 123 ballots contain 8 ballots that were in the original group served on the Association. It is plausible that copies of the 8 redundant ballots may not have been included with the copy of the petition provided to Respondent, thus resulting in the conclusion that 123 ballots were missing instead of 115.

The Association alleges that the recall agreement it received only contained 2,396 unique ballots because there were 55 duplicate ballots. This appears to account for the difference in numbers.

The Association notes that on January 25, 2007, representatives of the Association met with Mr. Kizer, the owner representative at his office in order to review the original copies of the ballots during which the Association counted 2,477 ballots. However, the undersigned accepts Mr. Kizer's explanation that he accidentally failed to bring all the ballots to the meeting and offered to make to them available.

The Association presented testimony that it was served with 2,451 ballots. However, the minutes of the board meeting at which the recall was considered indicate that the written recall agreement consisted of 2,455 ballots.

This recall effort required both the recall organizers and the Association to process an extraordinary number of ballots. Over a matter of a few months the owners delivered nearly 5,000 ballots and tracked the return of at least 2,510 ballots. Likewise, the Association was not presented with an easy task. When the Association was served with the written recall agreement, it had only five days in which to process and review all the ballots and to hold a meeting in order to determine whether to certify the recall. Then it had only an additional five days in which to prepare and file a petition for recall arbitration.

Respondent has established that it implemented a detailed tracking system with double and triple redundancy at points to confirm the total number of ballots it served on the Association. The Association has not provided any testimony that it used a similarly reliable system when it received the agreement and immediately started photocopying it.

The undersigned does not find that anyone intentionally tampered with the recall effort. However, it is clear that Respondent's method of accounting for the ballots was superior to that of the Association's. This leads to the conclusion that any ballots missing from Respondent's final count of the ballots served on the Association and the Association's number is more likely due to a processing error by the Association. Therefore, the undersigned accepts Respondent's claim that the written recall agreement attached to the petition does not contain all the ballots initially served on the Association.

Based upon the foregoing, it is clear that there were enough votes to recall all of the named directors. Therefore, the recall should be certified and the replacement candidates receiving the most votes should be seated on the board.

Wherefore, is ORDERED:

1. The recall of Tim Harrington, Laurie Gallop, Teresa Reilly, and Lee Gardner is hereby CERTIFIED and they are REMOVED as directors effective as of the date of this order. Within five (5) full business days from the effective date of this order, Tim Harrington, Laurie Gallop, Teresa Reilly, and Lee Gardner 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-81.003(3)(a)3., Fla. Admin. Code, replacement candidates James Tierney, Priestly

Parker, Leigh Anne Limousin and Cathy Huckestein shall take office as replacement directors effective the date of this order and shall fill the board seat for the unexpired term of the recalled director.

3. The newly seated board shall determine the specific seat each replacement board member will fill.

DONE AND ORDERED this 10th day of May, 2007, 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 10th day of May, 2007:

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