

**STATE OF FLORIDA
DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION
DIVISION OF FLORIDA CONDOMINIUMS, TESHARES AND MOBILE HOMES**

Filed with
Arbitration Section

IN RE: PETITION FOR RECALL ARBITRATION

SUNBROOK CONDOMINIUM ASSOCIATION, INC.,

SEP - 1 2017

Petitioner,

Div. of FL Condos, Timeshares & MH
Dept. of Business & Professional Reg

v.

Case No. 2017-03-8121

UNIT OWNERS VOTING FOR RECALL,

Respondent.

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FINAL ORDER OF DISMISSAL

On July 25, 2017, Sunbrook Condominium Association, Inc. (the Association) filed a petition for recall arbitration. The petition alleges that the Association received a written recall agreement on July 14, 2017. The petition further states that the Association determined not to certify the recall at a board meeting held on July 19, 2017.

On August 2, 2017, Respondent filed a motion to disqualify the Association's attorney. The undersigned lacks authority to disqualify an attorney from representing a party.

On August 22, 2017, Respondent filed motions for clarification, to dismiss the petition and to stay the arbitration petition. A telephonic case management conference was held in this matter on August 31, 2017.

Respondents motion for clarification argues that Rule 61B-23.0028(3), Florida Administrative Code, (the Rule) is in direct conflict with section 718.112(2)(j), Florida Statutes, as recently amended, effective July 1, 2017. The Rule requires an association

to file a recall arbitration petition where the board fails to certify the recall at a board meeting called for the purpose of determining whether to certify the recall. The Rule's language, for the most part, paralleled the language of the statute prior to its amendment. Effective July 1, 2017, the statute was amended to eliminate the requirement that the Association file a recall petition. However, as amended, the statute continues to reference a petition that has been filed by an association. Fla. Stat. 718.112(2)(j)4. & 7.

The Rule also provides that any board member sought to be recalled continues to serve on the board until a final order regarding the validity of the recall is mailed by the arbitrator. Respondent argues that this provision conflicts with section 718.112(2)(j)2., Florida Statutes, because, as recently amended, the statute now provides that a board member is recalled immediately and any challenge to the recall must be brought by a recalled board member.

The recent amendments to section 718.112(2)(j), Florida Statutes, have clearly created conflicts with Rule 61B-23.0028(3), Florida Administrative Code. However, in *The Dunes at WPB, LLP v. The Villas at Emerald Dunes Condo. Ass'n*, Arb. Case No. 2015-05-2907, Summary Final Order (June 21, 2016), the undersigned found that he lacked jurisdiction to declare that an administrative rule which conflicted with a statute was invalid as follows:

Rule 61B-23.003(7)(f), Florida Administrative Code, conflicts with section 718.301, Florida Statutes, and the general intent of Chapter 718. However, in *State, Dept. of Adm., Div. of Personnel v. State Dept. of Adm.*, 326 So. 2d 187 (Fla. 1st DCA 1976), the Court held that the power to adjudicate a rule as unconstitutional is a judicial power rather than a quasi-judicial power, and such adjudication may not be made by an administrative agency or officer. Although there is some confusion as to the nature of an arbitrator appointed pursuant to section 718.1255, Florida

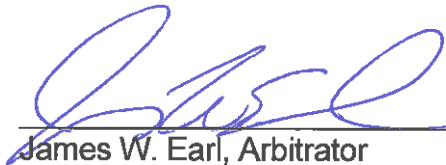
Statutes, it is clear that the legislature intends an arbitrator to function as quasi-judicial hearing officer in the same manner as an administrative law judge. Thus, the undersigned may not find that Rule 61B-23.003(7)(f), Florida Administrative Code, exceeds the constitutional authority of the Division, and therefore, hold that the rule is invalid.

Therefore, this matter must be dismissed due to lack of jurisdiction.

Based upon the foregoing, it is ORDERED:

Arbitration case number 2017-03-8121 is dismissed. The parties are free to seek relief in a court of competent jurisdiction.

DONE AND ORDERED this 1st day of September, 2017, at Tallahassee, Leon County, Florida.



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Arbitration Section
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Certificate of Service

I hereby certify that a true and correct copy of the foregoing final order of dismissal has been sent by U.S. Mail and email to the following persons on this 1st day of September 2017:

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James W. Earl, Arbitrator