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

IN RE: PETITION FOR ARBITRATION

BROOKSIDE MOBILE MANOR, INC.,

Petitioner,

v. **Case No. 2006-02-0053**

MEMBERS VOTING FOR RECALL,

Respondent.
_____/

SUMMARY FINAL ORDER ON PETITION FOR RECALL ARBITRATION

This final order is entered pursuant to rule 61B-50.119(3), Florida Administrative Code, which provides that "[a]t any time after the filing of the petition, if no disputed issues of material fact exist, the arbitrator shall summarily enter a final order awarding relief and failing to certify the recall if the arbitrator finds that no meritorious defense exits or if substantial compliance with the requirements of the rules and statutes relating to recall has not been demonstrated, and the petition is otherwise appropriate for relief."

On April 7, 2006, the petitioner, Brookside Mobile Manor, Inc., (association) filed a petition for recall arbitration with the Division of Florida Land Sales, Condominiums, and Mobile Homes (Division), and it was subsequently assigned to the undersigned arbitrator. The association filed the petition for recall arbitration pursuant to section 719.106(1)(f)3., Florida Statutes, which requires the association to file a petition for arbitration when the association does not certify a recall agreement.

In the petition for arbitration, the association states that there were 41 votes to recall Francis Murphy, 40 votes to recall Katherine Brown, 37 votes to recall Darlene Schonwise, and 42 votes to recall Edith Colovos. The petition also alleges that there are 82 voting interests in the association. Therefore, according to the petition, only one of the board members received the necessary votes to be recalled. The respondent disputed the number of recall votes each of the board members received. According to the respondent, there were 42 votes to recall Francis Murphy, 41 votes to recall Katherine Brown, 38 votes to recall Darlene Schonwise, and 43 votes to recall Edie Colovos. Further, the respondent alleged that there were 80 voting interests, not 82.[1]

The minutes of the recall board meeting are so vague that they normally would not be sufficient to support the rejection of a recall agreement. *See, e.g. Bay Vista Condo. Ass'n, Inc. v. Unit Owners Voting for Recall, Arb. Case No. 2005-04-5820, Summary Final Order, (November 16, 2005)(*stating that a ballot is being rejected for not complying with the rules governing recall is insufficient to find a ballot invalid*).* The only reasons stated in the minutes for rejection of the recall agreement was that "the recall was not handled properly" and that "the ballots were not properly prepared, nor properly handled when counted, nor properly delivered to the board for their inspection," with no facts asserting in what way they were improperly prepared or how they were delivered to the board. Clearly, the minutes are not sufficient to support the rejection of the recall agreement on any specific grounds. *See,* e.g., *The Villages of Kings Creek Condo.*

[1] The respondent contends that there are only 80 voting interests because there are legal questions involving the shareholder/lessee of Lot #336, and the shareholder/lessee of Lot #247 is deceased. Normally, legal questions involving who holds a leasehold interest would not change the number of voting interests, but in this case it is irrelevant in any case.

Ass'n, Inc. v. Unit Owners Voting for Recall, Arb. Case No. 99-1919, Final Order Certifying Recall (November 1, 2005), (To provide the specificity required, the minutes, must either list the unit identification for each ballot subject to an objection, the number of units subject to each objection, or otherwise satisfy the arbitrator that the specific objections contained in the petition for arbitration fairly reflect the basis of the board's decision).

However, where the ballots are "fatally flawed" or void *ab initio*, the insufficiency of the minutes is not an issue. The ballots in this case comply with Block A of the Division's standard ballot form. The ballot explains the purpose of the ballot, it advises the voter to place an "x" in either the "recall" or "retain" space next to each board member's name, and it lists by name the board members sought to be recalled. At that point the ballot stops. For some reason the members voting for recall eliminated Block B and Block C of the standard recall ballot form. There is absolutely nothing below the list of the names of the board members sought to be recalled.

There are nine board members, so the recall of four board members would not constitute a recall of the majority of the board and there would be no need to elect replacement candidates. Therefore, Block B was not necessary. However, the ballot also did not "provide a space for the person executing the written agreement to state his name, identify his unit, and indicate the date the agreement written agreement is signed," in violation of rule 61B-75.008(1)(d), Florida Administrative Code. The ballot did not "provide a signature line for the person executing the written agreement to affirm that he is authorized in the manner required by the cooperative documents to cast the vote for that unit," in violation of rule 61B-75.008(1)(e), Florida Administrative Code, and

the ballot did not "[d]esignate a representative" to tally the votes, serve the board with the written agreement, and represent the members voting for recall in the arbitration proceeding, in violation of rule 61B-75.008(1)(f), Florida Administrative Code. This information would have been on the ballot had not Block C of the recall ballot form been eliminated.

Rule 61B-75.008(2), Florida Administrative Code, states that "[s]ubstantial compliance with the provisions of section (1) of this rule shall be required for an effective recall of a board member or members." Although the failure to name a representative on the ballot by itself will not cause a recall to fail, the failure to identify the person who voted, to identify his unit number, to provide the date the ballot was signed, and to have a voter's signature verifying that he is authorized to vote for that unit renders the ballot fatally flawed. Without this information, there is no way for the board to identify the person marking the ballot. Because there is no way to determine who marked the ballots, the board cannot determine whether any of the ballots are valid. Thus, the recall attempt cannot be effective because the ballots do not substantially comply with rule 61B-75.008(1), Florida Administrative Code.

There is no doubt that the recalling members thought they were properly conducting the recall. They were attempting to have a secret recall vote. As an exhibit to the answer, the respondent submitted the outer envelopes that originally contained the ballots. On the outer envelope in which a ballot was submitted, the member voting wrote his or her name and lot number and signed his or her name. The outer envelope stated:

> This is the "Outer" envelope for your ballot. This envelope will end up containing your "completed ballot," which must be sealed inside the *blank*

> "Inner" envelope provided. Do not sign or mark anything on the blank "Inner" envelope (it will be handled "publicly" to maintain a secret" ballot).

Below that statement were spaces for the "Unit #", the year, the name of the shareholder and the signature of the shareholder.

Because the ballot submitted with the outer and inner envelopes appeared to be more like a ballot cast at a unit owner meeting than part of a written recall agreement, a case management conference was held on May 3, 2006, to allow the members' representative to state whether the ballots were cast at a unit owner meeting or whether they were actually intended to be a written recall agreement. The representative verified that the ballots were not cast at a meeting, but were indeed intended to be a written recall agreement. The representative also verified that only the ballots and not the outer envelopes were provided to the board as the recall agreement. [2]

In this case the recall agreement failed to meet several important requirements of rule 61B-75.008(1), Fla. Admin. Code. Although a written recall agreement can fail to comply with one or two of the less vital rule requirements and still be considered in substantial compliance with the rule, a valid recall agreement can never be considered valid if it does not even contain the name of the person signing the agreement or his signature. Thus, the recall agreement was not in substantial compliance with rule 61B-75.008(1), Fla. Admin. Code, and the board correctly determined not to certify the

[2] Even if the envelopes had also been submitted as part of the written recall agreement, it is questionable whether the recall could have been certified. Without the ballots being in the envelopes and without the envelope stating the purpose of the ballot, the board would have no way of knowing that the person who signed the envelope actually completed a recall ballot and could not know which ballots belonged to which envelopes. Thus, if the person signing the envelope was not a shareholder, the board would be unable to determine which of the ballots was invalid.

recall.[3]

Based on the foregoing, it is

ORDERED:

The decision of the board not to certify the recall of board members Edith Colovos, Katherine Brown, Frances Murphy, and Darlene Schonwise hereby APPROVED and AFFIRMED.

DONE AND ENTERED this 17th day of May, 2006, at Tallahassee, Leon County, Florida.

_____
Diane A. Grubbs, Arbitrator
Dep't of Business and Professional Regulation
Arbitration Section
1940 North Monroe Street
Tallahassee, Florida 32399-1029

[3] If the respondent attempts another recall, the respondent should check the Department's website for information on how to proceed and use the recall ballot form, with all of the sections, to ensure compliance with the rule. The form can be obtained at the website, myflorida.com/dbpr/lsc/arbitration/index.shtml, or by calling (850) 414-6867.

Certificate of Service

I hereby certify that a true and correct copy of the foregoing final order has been sent by U.S. Mail to the following persons on this 2nd day of May, 2006:

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_____
Diane A. Grubbs, Arbitrator