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

IN RE: PETITION FOR ARBITRATION

ENNA DIEPPA,

Petitioner,

v. **Case No. 2006-01-0911**

LISETTE CONDOMINIUM ASSOCIATION, INC.,

Respondent.
/

SUMMARY FINAL ORDER

On February 21, 2006, the petitioner, Enna Dieppa, a unit owner at Lisette Condominium, filed a "Recall Arbitration Petition" that named herself as the petitioner and Lisette Condominium Association (association) as the respondent. Although the form used by the petitioner is the form to be used by a condominium association when the association has refused to certify a recall agreement and must file a petition for arbitration pursuant to section 718.112(2)(j)3., Florida Statutes, the petitioner has adopted it for her own use.

From the petition and the material attached to the petition, it appears that the petitioner was trying to file a type of "reverse recall." The petitioner alleges that a recall agreement was served on the association's board on January 19, 2006, and that the board determined not to certify the recall at a meeting held on January 30, 2006. The petition states that the names of the board members against whom the written recall agreement was directed are Rolando Gonzalez and Ana Santos and each received 19

votes.

Pursuant to section 718.112(2)(j)2., Florida Statutes, a board of administration must hold a meeting within five (5) business days of being served with a written recall agreement to determine whether the board will certify the written recall agreement or whether they will not certify the agreement. If the board certifies the agreement, the board member is removed from the board immediately. If the board does not certify the agreement, the association must file a petition for recall arbitration within five (5) business days that explains why the board did not certify the agreement. The minutes of the board meeting are to contain all the reasons the board did not certify the agreement, and they must be attached to the petition for arbitration as an exhibit. The written recall agreement must also be attached to the petition as an exhibit.

In this case, it is apparent that the board of directors of the association did not comply with the statute and the rules. Normally, if the association fails to hold a timely board meeting to consider the written recall agreement, the recall will be "deemed certified." However, if the recall is fatally flawed or void *ab initio*, the recall cannot be certified regardless of the failure of the association to comply with the statutes and rules.

In her petition for arbitration, the petitioner states that the recall was a written recall agreement to recall Mrs. Ana Santo and Mr. Rolando Gonzalez. However, the cover letter of the recall agreement attached to the petition is addressed only to Mr. Gonzalez and states that the "majority of the owners request your resignation from the board of directors." It adds,

> we are sending you this letter thru [sic] Mrs. Ana Santos, Vice-President of Lisette condo, who we know is close contact [sic] with you. If you have any objections, you have five (5) business days to respond to our request.
>
> Attached is a list with the signatures of the owners who agree with your resignation.

A page listing all 32 unit numbers and names (apparently of the owners of the units) with a line next to each unit owner's name is attached to the cover letter. There are 19 signatures on the page on the lines next to the unit owners' printed names. However, there is nothing on the page indicating that the person signing next to his or her name is voting to recall a board member. There is no heading on the page that explains the purpose of the signatures.

When a page contains a list of unit owners' signatures without any statement on that page revealing that the purpose of the signatures is to recall a specified board member, the page cannot be considered to be part of a written recall agreement, and when, as here, all of the unit owner signatures are on such a page, the "recall agreement" is void *ab initio.* The people signing the list could have thought they were voting to recall a board member or they could have thought they were signing up for Girl Scout cookies. One cannot tell from looking at the page of signatures. A cover letter stating that the attached list of signatures is for the recall of a specified board member does not suffice. As is seen in this case, it is too easy to change the purpose of the list, even when it is not intentional.

In this case, the cover letter addressed to Mr. Gonzalez, to which the signature list was attached, states that the majority of unit owners "request your resignation," and adds that attached is the "signatures of the owners who agree with your resignation." There is nothing about a recall stated in the letter. The signature list is attached only to

a “request” for Mr. Gonzalez to resign. The cover letter even advised Mr. Gonzalez that if he has “any objections,” he has “five (5) business days to respond to our request.”

By the time the petition for arbitration had been filed, the request for Mr. Gonzalez’s resignation had been transformed by petitioner into a recall agreement for the recall of Mr. Gonzalez and Mrs. Santos. The transformation of this signature list from a “request” for the “resignation” of Mr. Gonzalez into a recall agreement for the recall of Mr. Gonzalez *and* Mrs. Santos demonstrates the reason why a list of signatures on a sheet of paper containing no indication of the purpose of the list cannot be accepted as part of a valid recall agreement.

As stated previously, had the recall agreement been facially valid, the failure of the board to timely hold a meeting to discuss the agreement and vote on it (as well as the failure of the board to timely file a petition for recall arbitration), would have resulted in the petition for arbitration being granted, the recall agreement being certified, and Mr. Gonzalez being recalled from the board. However, in that the “recall agreement” was fatally flawed so that it could not be determined whether a majority of the unit owners had voted to recall Mr. Gonzalez or Mrs. Santos, the petition for arbitration must be denied, despite the failure of the board to comply with Florida statutes.

A written recall agreement that on its face reflects that it is not signed by a majority of the voting interests of the association is ineffective to recall a board member and cannot be certified. Therefore, even if an association fails to timely have a board meeting or fails to timely file for arbitration after refusing to certify the agreement, acts that normally would result in automatic certification of the recall agreement, the recall of a board member cannot be certified if less than a majority of the voting interests have

signed the recall agreement. *See, e.g. Grand Vista Condominium Ass'n, Inc*. v. *Unit Owners Voting for Recall,* Arb. Case No. 00-1214, Recall Arbitration Final Order (September 27, 2000)(where it is clearly evident that the recall agreement was not signed by a majority of the voting interests, procedural errors committed by the association will not cause the recall to be certified); *Fosca Condominium Ass'n, Inc. v. Unit Owners Voting for Recall,* Arb. Case No. 93-0373, Summary Final Order (December 29, 1993)(recall would not be certified, despite failure of board to include in its minutes the reasons for not certifying the recall, where less than a majority of the voting interests voted in favor of the recall).

The basic requirement for a successful recall is that a majority of the voting interests vote to recall that board member. The purpose of all of the other rules and statutory requirements is to safeguard the integrity of the process, *i.e*., to ensure that the recall agreement actually reflects the will of the majority of the unit owners and to ensure that a board cannot not thwart a valid recall effort supported by the majority of the unit owners. In this case, the failure of the association to follow the proper procedures and properly conduct the recall board meeting cannot result in certification of the recall because it is not clear from the agreement that a majority of the unit owners sought the recall of any board member.

Also attached to the petition were the minutes of the meeting of January 30, 2006, the purpose of which, according to the petitioner, was a board meeting to review and discuss the written recall agreement. However, from the minutes, it appeared to be a unit owner meeting to elect a new board, which would have been invalid. The minutes of the meeting indicate that Mr. Gonzalez and Mrs. Santos had resigned and that the

unit owners proceeded to elect a new board and officers. However, it is obvious that Mr. Gonzalez and Mrs. Santos did not resign. From looking at all the materials attached to the petition, most of which are irrelevant, it appears that there may be a language problem and that the word "recall" has been used interchangeably with the word "resignation." Therefore, at the meeting, it may be that the unit owners simply declared that Mr. Gonzalez and Mrs. Santos had been recalled (which was translated as they had "resigned") due to the board's failure to hold a timely meeting. Of course, because the recall agreement was void *ab initio,* Mr. Gonzalez had not been recalled by operation of statute, and there was no conceivable basis for determining that Mrs. Santos had been recalled.

Therefore, based on the foregoing, it is

ORDERED:

The petition for arbitration is DENIED. Since the "recall agreement" was void *ab initio*, the recall of Rolando Gonzalez and Ana Santos is NOT CERTIFIED, even though the board failed to hold a timely meeting to vote on the recall agreement and failed to file a petition for recall arbitration. The arbitrator is aware that the "recall agreement" was called a request for the resignation of Mr. Gonzalez, but an association should err on the side of caution when deciding whether a petition is or isn't a recall agreement.

Should the petitioner or other unit owners wish to attempt another recall, enclosed is a sample ballot approved by the Division and a copy of rule 61B-23.0028, Florida Administrative Code, which should be read very carefully and followed by both unit owners seeking to recall a board member and the board of administration. If

respondent and petitioner have access to the internet, they can go to the following website and get information concerning recall procedures:

http://www.myflorida.com/dbpr/lsc/arbitration/recallprocedures.pdf

DONE AND ORDERED this 7th day of March, 2006, at Tallahassee, Leon County, Florida.

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

Certificate of Service

I hereby certify that a true and correct copy of the foregoing final order has been sent by U.S. Mail and facsimile copy to the following persons on this 6th day of March, 2006:

Enna Dieppa
1990 Marseille Drive, #305
Miami Beach, Florida 33141
Petitioner

Alberto Zuniga
1990 Marseille Drive, #305
Miami Beach, Florida 33141
Unit Owner Representative

Ana Santos
1990 Marseille Drive, #400
Miami Beach, Florida 33141
Association's Representative

_____
Diane A. Grubbs, Arbitrator

Right to Appeal

As provided by section 718.1255, F.S., a party who is adversely affected by this final order may, within 30 days of the entry and mailing of this final order, file a complaint for a trial de novo in a court of competent jurisdiction in the circuit in which the condominium is located. **This order does not constitute final agency action and cannot be appealed to a district court of appeal.**