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

IN RE: PETITION FOR ARBITRATION

Oakland Forest Club Condominium Association, Inc.,

Petitioner,

v. **Case No. 2006-00-0575**

Unit Owners Voting For Recall,

Respondent.
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SUMMARY FINAL ORDER

Rule 61B-50.119(3) 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 exists 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."

Procedural History

On December 23, 2005, Oakland Forest Club Condominium Association, Inc., (the association) filed a petition for recall arbitration, seeking a final order upholding the association's decision not to certify the written recall agreement served on the association on December 5, 2005. On January 5, 2006, the arbitrator entered an order permitting the respondent to answer the petition for recall arbitration. The respondent

filed its answer to the petition for recall arbitration on January 24, 2006. This order is entered accordingly.

Discussion

Oakland Forest Club Condominium Association, Inc. (the association) consists of 240 voting interests and is governed by a five member board of directors. Therefore, a minimum of 121 votes must be obtained from the unit owners in order to recall a board member. In this case, the respondent sought to recall board members Cassandra Pyle, Renee Rogers, Mary Ann Hartwell and Janet Vasquez. The copies of the recall ballots attached to the petition for recall arbitration reflect that 134 unit owners voted, via pre-marked ballots, to recall each of these board members. The recall effort fails for this reason alone, as discussed below.

The association's board of directors was served with a written recall agreement on December 8, 2005, and held its recall board meeting, as required by section 718.112(2)(j)2., Florida Statutes, and rule 61B-23.0028(3), Florida Administrative Code, on December 16, 2005. During its meeting, the board determined not to certify the written agreement for recall, rejecting 36 of the recall ballots because some were signed by non-unit owners, some were duplicate ballots and some were executed by owners of units who had no voting certificate on file with the association. The ballots that were submitted by the respondent were pre-marked, with each ballot being identical, having computer generated "**x**" marks in the recall boxes next to the names of the board members subject to the recall as well as next to all of the names of the replacement candidates listed on the lower half of the ballot.

In its answer, the respondent contends that 142 ballots, constituting the agreement to recall the board members listed above, was served on the association on December 9, 2006. The respondent maintains that the association improperly rejected 24 ballots on the basis that appropriate voting certificates were not on file with the association, asserting that the association did not enforce its voting certificate requirement during the 2005 annual election.[1] These disputed facts are not determinative of the outcome of the recall, as the written recall agreement itself was void *ab initio* in that the recall ballots that were signed and served on the board were pre-marked.

There are numerous arbitration cases which hold that pre-marked ballots, or ballots with no recall or retain spaces, do not substantially comply with rule 61B-23.0028(1), Fla. Admin. Code[2], and are therefore invalid because they do not permit the unit owner executing the ballot to indicate whether the individual board members should be recalled or retained. *See Maya Marca v. Unit Owners Voting for Recall*, Arb. Case No. 2004-05-5661, Final Order on Petition for Recall Arbitration (January 7, 2005); *Olive Glen Condominium Ass'n v. Unit Owners Voting for Recall*, Arb. Case No 02-4985, Final Order Affirming Decision Not to Certify Recall (July 3, 2002); *Laguna Club Condominium Ass'n, Inc. v. Unit Owners Voting for Recall*, Arb. Case No. 99-1355,

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[1] The respondent asserts certain actions by the board, such as its reliance on the association's management company's tally of the recall ballots and its choice of counsel, were breaches of its fiduciary duty to the association membership. However, those allegations need not be considered in this case, as board members are subject to recall without cause.

[2] Rule 61B-23.0028(1), Fla. Admin. Code, provides, that "[a]ll written agreements used for the purpose of recalling one or more members of the board of administration shall: * * *

> (b) **Provide spaces by the name of each board member sought to be recalled so that the person executing the agreement may indicate whether that individual board member should be recalled or retained.** (e.s.)

Summary Final Order (July 30, 1999); *Board of Directors of Pinebark Condominium Ass'n, Inc. v. Lopez and Other Unit Owners*, Arb. Case No. 93-0177.

A discussion as to the importance of permitting a unit owners to vote to recall or retain board members individually as required by rule 61B-23.0028(1)(b), Fla. Admin. Code, can be found in *Pine Bark* decision, cited above. Specifically, the arbitrator there found that:

> The purpose of the rule is to ensure that no duly elected board member is removed from office unless a majority of the voting interests actually want that board member recalled. If board members were allowed to be "linked" in a written recall agreement, the result could be that a competent board member...would be removed from office only because she or he was linked with [the board member the majority wanted removed]. The requirement of Rule 61B-23.0028(1)(b) ensures that no duly elected board member is removed from office solely due to this type of linkage.

Inasmuch as each of the ballots in this recall effort were pre-marked, indicating which board members were to be recalled and which were to be retained, the recall agreement is fatally flawed. By not permitting a unit owner to vote to recall one and retain the others, the written recall agreement fails to comply with rule 61B-23.0028(1)(b), Fla. Admin. Code. Accordingly, the association's decision not to certify the recall is affirmed.[3]

DONE AND ORDERED this 2nd day of February 2006, at Tallahassee, Leon County, Florida.

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Catherine Bembry, Arbitrator
Department of Business and
Professional Regulation

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[3] Based on the arbitrator's ruling as to all of the recall ballots, it is unnecessary to address the validity of the reasons stated in the petition for arbitration for the board's rejection of certain recall ballots.

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, postage prepaid, to the following persons, on this 2nd day of February, 2006.

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Catherine Bembry, Arbitrator