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

IN RE: PETITION FOR ARBITRATION

The Fountains Association, Inc.,
Petitioner,

v. **Case No. 2005-06-3667**

Unit Owners Voting For Recall,
Respondent.
_____/

SUMMARY FINAL ORDER

This final order is entered pursuant to Rule 61B-50.119, Florida Administrative Code, which requires the arbitrator, at any time after the filing of the petition and where no disputed issues of material fact exist, to 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.

On December 6, 2005, The Fountains Association, Inc. (the association), filed a petition for recall arbitration. The unit owners who voted to recall the board members are the respondent in this action in accordance with section 718.112(2)(j)3., Florida Statutes and rule 61B-50.107(3), Fla. Admin. Code.

On November 15, 2005, the association received a written recall agreement seeking the recall of five of its board members as follows: Bill Rotchford, M.J. Guiney, Gerald Bigalke, Bill Gay and Jim Overton. There are 152 voting interests in the association. Therefore, 77 votes are necessary to recall a board member.

The association's board of directors held a meeting on November 29, 2005, at which time it determined not to certify the recall. The minutes of the board meeting indicate that the board chose not to certify the recall because it was uncertain that the all the homeowners were informed of the recall petition and it was uncertain that the owners knew what they were signing. The petition likewise alleges that the total voting membership was not notified of the recall. However, it provides new reasons not to certify the recall based upon the written agreement's failure to substantially comply with rule 61B-23.0028(1), Fla. Admin. Code, alleging that the ballots did not list replacement candidates and some of the ballots were not executed by person appointed by proxy.

The written recall agreement served on the association consists of three different types of documents.[1] The bulk of the votes are cast in the form of a petition, with a separate petition for each board member subject to recall. The agreement also included two different types of proxy forms. Seven of the proxy forms appoint the proxy holder to vote in the recall on the owner's behalf but do not actual designate a vote. The respondent agrees that these proxies should not be counted as votes. The remaining twelve proxies are signed by the unit owner and are of identical form permitting the unit owner only to elect to remove all the current board members except Doris Wilson. The parties dispute the status of these proxies.

The association does not dispute the validity of the votes cast via the petitions. However, it apparently argues that since the designated proxy holders did not sign the petition, the proxies should not be counted as votes. The respondent contends that the

[1] The Division's form written recall agreement/ballot may be found at www.myflorida.com/dbpr/lsc/arbitration/forms_and_lists/forms/recallsample.doc

disputed proxies are signed by the unit owners and cast a vote and, therefore, should in effect be considered a ballot.

Even assuming that the disputed proxies could be treated as recall ballots, they are fatally flawed as they inextricably link the board members subject to recall. There are numerous arbitration cases holding that a recall agreement is fatally flawed where the ballots fail to provide separate recall/retain lines for each person subject to the recall as required by rule 61B-23.028(1)(b), Fla. Admin. Code, so that the person executing the agreement may indicate whether that individual board member should be recalled or retained. See, for example, 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, 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. In fact ballots not containing recall and retain spaces are considered void *ab initio.* See, e.g., Greye v. Alpine Woods Ass'n, Inc. Arb. Case No. 2004-04-6686, Order on Respondent's Motions (November 8, 2004). In Pinebark, *supra.*, the arbitrator discussed the importance of permitting the unit owners to vote to recall or retain board members individually as required by rule 61B-23.0028(1)(b) as follows:

> 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.

The disputed proxies inextricably linked the board members by not permitting a unit owner to individually choose which board members to recall and retain, thus substantially failing to comply with rule 61B-23.0028(1)(b), Fla. Admin. Code, and rendering them void *ab initio*.

The respondent contends that the minutes for the board meeting at which the recall was considered are wholly insufficient. The undersigned agrees that the minutes fail to comply with the requirements of rules 61B-23.0028(4)(d) and 61B-50.105(5)(h), Fla. Admin. Code. The arbitrator further notes that none of the reasons stated in the minutes justify rejection of the recall. However, the arbitrator may review the written recall agreement to determine if it is facially valid and whether there are a sufficient number of votes in favor of recall. Sterling Condo. Assoc. v. Group of the Members of the Association Who Voted for Recall, Arb. Case No. 94-0126, Arbitration Summary Final Order (May 4, 1994). As determined above, the disputed proxies/ballots are facially flawed. Accordingly, they are rejected and, therefore, there are an insufficient number of votes to recall any of the above named board members.

Based upon the foregoing, it is ORDERED:

The association's decision not to certify the recall effort is affirmed.

DONE AND ORDERED this 18th day of January, 2006, at Tallahassee, Leon County, Florida.

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James W. Earl, Arbitrator
Arbitration Section
Department of Business and
Professional Regulation
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 copy to the following persons on this 18th day of January, 2006.

S.W. Register, Jr.
Property Services, Inc.
8641 Baypine Road
Suite 1
Jacksonville, Florida 32256
Facsimile: 904.731.7300

Lynda Aycock, Esq.[2]
Rogers Towers P A
1301 Riverplace Blvd Ste 1500
Jacksonville Florida 32207
Facsimile: 904.396.0663

Rosanne Perrine, Esq.
100 Executive Way
Suite 112
Ponte Vedra Beach, Florida 32082
Facsimile: 904.280.5194
Attorney for the Respondent

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James W. Earl, Arbitrator

[2] The petition in this matter was filed by the association's property manager, S.W. Register, Jr., who subsequently indicated that Ms. Aycock would be representing the association. As Ms. Aycock has not filed a notice of appearance or any other communication in this matter indicating that she represents the association, she is being copied as a courtesy.