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

IN RE: PETITION FOR ARBITRATION - HOA

PLANTER'S WALK HOMEOWNERS' ASSOCIATION, INC.,
Petitioner,

v.

Fee Case No. 2005-05-3848
Rel. Case No. 2005-04-1738

HOMEOWNERS VOTING FOR RECALL,
Respondent.

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FINAL ORDER ON ATTORNEY'S FEES AND COSTS

On October 13, 2005, Planter's Walk Homeowners' Association, Inc., filed a motion for attorney's fees and costs seeking an award of $2,276.50 in attorney's fees and $361.48 in costs, a total of $2,637.98. The fees and costs were incurred in arbitration case number 2005-04-1738, in which a Summary Final Order was entered on September 14, 2005, and an Amended Summary Final Order was entered on October 13, 2005, affirming the association's decision not to certify the recall of board members Kimberly Wilcox and Eduardo Maldonado.[1]

The petitioner filed a motion for award of attorney's fees on October 13, 2005. Petitioner contends it is entitled to attorney's fees as the prevailing party pursuant to section 720.311, Florida Statutes, and rule 61B-80.123, Florida Administrative Code,

[1] The Amended Final Order was not changed other than to recognize a different unit owner representative. The earlier final order had been mailed to the originally named unit owner representative, but not the subsequently designated representative.

because it obtained the relief it requested and achieved the benefit sought in bringing the action. Petitioner cites to several cases holding that a party is a "prevailing party" if it succeeds on a significant issue in the arbitration and achieves some of the benefit sought in bringing the action. Indeed, the standard for determining whether a party is a "prevailing party" recited in every routine fees case is as follows: "A party is a 'prevailing party' if it succeeds on a significant issue in the arbitration and achieves some of the benefit sought in bringing the action. See Moritz v. Hoyt Enterprises, Inc., 604 So. 2d. 807 (Fla. 1992)." E.g. *Spyglass Condominum, Inc., I v. Love*, Arb. Case No. 2004-05-7854, Final Order on Motion for Award of Attorney's Fees (February 22, 2005). However, in a recall arbitration case, the fact that an association achieves the benefit sought in recall arbitration does not necessarily mean that the association is the "prevailing party" for purposes of an award of attorney's fees. Indeed, in the almost fifteen years that arbitrators have had jurisdiction over recall arbitration cases,[2] an association has *never* been determined to be entitled to an award of attorney's fees as the prevailing party even though its decision not to certify a recall has been affirmed by the arbitrator. This order attempts to explain some of the reasons for this result.

In a normal arbitration dispute or in a case or controversy heard in court, the person or entity bringing the case seeks relief from the person or entity named as the respondent or defendant. Recall arbitration is a totally different matter. In recall arbitration, the association has made a decision not to certify a recall agreement or a

[2] Although recall arbitration is a new requirement for homeowners' associations, condominium associations have been required to file a petition for recall arbitration when they refuse to certify a recall for nearly fifteen years. Section 720.303(10), Florida Statutes, which governs homeowners' recalls is patterned after and nearly identical to the recall section governing condominium associations, section 718.112(2)(j), Florida Statutes.

recall vote at a meeting. If not for the statutory requirement, the association would not petition for arbitration because the association would not be seeking any relief. Some of the unit owners who voted for the recall might decide to bring an action against the association if they thought the board had not properly acted on the recall, but other unit owners might not. It would be up to the individual unit owners to decide whether they wished to challenge the association's decision and be subject to fees and costs should they lose. In such an action the petitioners would be identifiable, individual unit owners seeking an order reversing the association's decision and declaring the recall certified. If the unit owners did not gain the relief they sought, the association would be the "prevailing party" in the traditional sense of the word because it would have withstood the petitioners' challenge.

However, the recall statutes, both sections 718.112(2)(j) and 720.303(10), Florida Statutes, require the association to file a petition for arbitration when it does not certify a recall. The statutes require that the *group* of unit owners voting for the recall be named as the only party respondent. The individual homeowners have no choice as to whether they wish to pursue the matter, and there is no mechanism that allows an individual unit owner to withdraw from the group of unit owners voting for recall. Indeed, the great majority of the homeowners voting for recall may agree with the reasoning of the board in rejecting the recall. However, even if all of the unit owners voting for recall agreed with the board's ultimate determination not to certify the recall, the association still would have to file a petition for arbitration seeking the arbitrator's approval of its rejection of the recall. The necessity for filing a petition is unrelated to

the stance of the actual homeowners who voted for the recall, and the petition does not seek any relief from them. Because no relief is sought from the homeowners voting for recall, and therefore the petitioner does not prevail against the respondent even though its decision not to certify the recall is affirmed by the arbitrator, the petitioner cannot be considered a "prevailing party" in the traditional sense. Indeed, it is questionable whether there is a "prevailing party" in a recall arbitration case for that reason.

In one of the first cases to address the issue of an award of attorney's fees in a recall arbitration case, *Greenglades Condominium Association "II", Inc v. Coletti*, Arb. Case No. 93-0282, Order on Motion for Attorney's Fees and Costs (February 25, 1994), the arbitrator discussed the purpose of recall arbitration and the legislative intent as follows:

> The Legislature clearly intended that the alternative resolution procedures of Section 718.1255 provide the unit owner with the opportunity to assert a right or a defense without "the high cost...of circuit court litigation faced by unit owners." Further, in the Legislative findings set forth in Section 718.1255(3)(a), the Legislature pointedly observed that:
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> > The Legislature finds that unit owners are frequently at a disadvantage when litigating against an association. Specifically, a condominium association, with its statutory assessment authority, is often more able to bear the costs and expenses of litigation than the unit owner who must rely on his own financial resources to satisfy the costs of litigation against the association.
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> In recall situations, the board of directors of the association determines whether to certify or not to certify an attempted recall. If the board does not certify the recall, the board must file a petition for arbitration.
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> > The petition must contain all relevant facts which support the board's decision so it can be determined as expeditiously as possible whether the board's action was justified. Basically, Section 718.112(2)(k)3. requires that a board's decision not to certify a recall agreement be approved by an arbitrator. The board has the burden of seeking this approval by timely

filing a petition for arbitration which provides justification for its action.

Forestbrook V Condominium Association, Inc. v. Anne MacKenzie, Case No. 92-0117 (DBR Arb., August 18, 1992).

This is a unique situation. It is the equivalent of requiring the party who wins in trial court to appeal the decision. Nevertheless, the Legislature obviously decided that this was a burden every association would have to bear in every recall case to decrease the likelihood of a board acting in bad faith when considering whether to certify a recall agreement or dispute a recall vote. If the board disputes the recall vote, the unit owners who voted to recall the board members have no choice as to whether they wish to pursue the matter. The Legislature has determined that the board must seek review of its own action. In that the recalling unit owners have no voice in whether the arbitration is brought and in that a petition for recall arbitration never seeks relief against the recalling unit owners, but rather seeks approval of the board's action, it is questionable whether attorney's fees and costs should ever be awarded to an association in a recall arbitration proceeding.

It is also doubtful that the Legislature ever intended for any unit owner to become liable for the attorney's fees and cost of recall arbitration simply because that unit owner exercised his or her right to vote to recall a member of the board of directors. Clearly, the Legislature intended that members of the board should be supported by a majority of the unit owners and that if a member of the board loses that support for any reason, the unit owners have the right to have him replaced. To facilitate the removal of board members that are no longer supported by the majority of the unit owners, Section 718.112(2)(k) specifically provides that the board member can be removed from office "with or without cause." If only those unit owners voting to recall a board member, or signing a recall petition, had to pay the arbitration costs and attorney's fees, it would most certainly have a chilling effect on the free exercise of the unit owner's vote in a recall election, which is contrary to the Legislative intent implicit in Section 718.122(2)(k), Florida Statutes.

Although the *Greenglades* case cited above was issued prior to the amendment of section 718.1255 in 1997, and thus during the time when the award of attorney's fees and costs to the prevailing party pursuant to section 718.1255 was discretionary,[3] the

[3] Section 718.1255(4)(c), Florida Statutes (1995) provided that, "The prevailing party may be awarded the costs of the arbitration, reasonable attorney's fees, or both, in any amount determined in the discretion of the arbitrator." Section 718.1255 was amended in 1997 when provisions for mediation were added to the section. After the amendment, section 718.1255(4)(k) provided that "[t]he prevailing party in an

reasons why fees were not awarded in *Greenglades* still applies to the request of fees in this case.

First, as stated, in a recall case there is no traditional "prevailing party," even though the association may prevail in the general sense of the word. When an association files a recall petition it seeks nothing from the respondent; when it "prevails" it gains nothing from the respondent.

Second, the individual homeowners voting to recall the board members are not individual parties to the recall arbitration. Section 720.310(10)(d), Florida Statutes, just as section 718.112(2)(j)3., Florida Statutes, provides that the homeowners' association members (unit owners in section 718.112(2)(j), Fla. Stat.) who voted for recall at the recall meeting or executed the written agreement "shall constitute one party under the petition for arbitration." "Homeowners Voting for Recall" is the designated respondent in this case. The individuals voting for the recall are not separate parties to the proceeding.

Petitioner contends that the homeowners comprising the respondent, i.e. thehomeowners who voted for the recall, are jointly and severally liable for petitioner's costs and attorney's fees, citing to several cases including *The Imperial at Brickell Condominium Ass'n, Inc v. Glottman*, Arb. Case No. 02-4984, Final Order Awarding

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arbitration proceeding shall be awarded the costs of the arbitration and reasonable attorney's fees incurred in the arbitration proceeding as well as the costs and reasonable attorney's fees incurred in preparing for and attending mediation." Subsequently, it was determined that the attorney's fees provision in section 718.1255 no longer applied to recall arbitration because the fee's provision was substantive and because the rule allowing attorney's fees in recall cases had been repealed. *See International Park Condominium II Ass'n, Inc. v. Unit Owners Seeking Recall*, Arb. Case Nos. 99-1884; 99-1614, Summary Final Order in Case No. 99-1884 (December 9, 1999); *Board of Directors of Greentree Condo. Ass'n v. Unit Owners Signing Written Agreement*, Arb. Case No. 98-3479, Final Order on Motion to Tax Petitioner's Costs and Attorney's Fees (March 13, 1998).

Attorney's Fees and Costs (June 24, 2002); and *Ashley Oaks Condominium Ass'n, Inc. v. Phillips*, Arb. Case No. 02-4894, Final Order Awarding Attorney's Fees and Costs (June 11, 2002). In each of the cases cited that the arbitrator could find, the respondents were declared jointly and severally liable for the attorney's fees and costs awarded. In each of the cases cited the unit owners jointly and severally liable for attorney's fees were individually named as the respondents, the association sought relief against them, and the association gained the relief it sought against them.

In this case, the respondent is the group, Homeowners Voting for Recall. There is only one respondent as mandated by section 720.303(10)(d), Florida Statutes. Section 720.303(10)(d), Florida Statutes, states that if the board does not certify the recall, the board shall, within 5 business days, file a petition for arbitration and that "the members who voted at the meeting or who executed the agreement in writing shall constitute one party under the petition for arbitration." The respondent has a representative who is supposed to be designated in the recall agreement or at the recall meeting.[4] Only the representative may answer the petition for arbitration or participate in the arbitration proceeding. In *Robbins Rest Homeowners Association, Inc., v. Homeowners Voting for Recall*, Arb. Case No. 2005-06-2675, Final Order on Petition for Recall Arbitration (January 19, 2006), a footnote explained the status of the individual homeowners as follows:

> Although rule 61B-80.106(2), Fla. Admin. Code, states that "every homeowner who voted in favor of recall and who did not revoke his or her vote prior to service on the board of the recall agreements shall be deemed to be a party in the recall arbitration proceeding," the

[4] However, occasionally a representative is not designated and the order allowing an answer to the petition is simply posted on the condominium or association property and directed to whoever may be the representative. If someone responds, that person is the representative.

> homeowners are not parties to the arbitration proceeding individually. The homeowners, as a group, have a representative who is served with the pleadings and is authorized to respond on behalf of the group. The homeowners are not considered individual parties. None of the homeowners voting for recall may file an individual response to the petition, none may file a motion or any other paper with the arbitrator, and none can confess error or withdraw their individual ballot.

Since the individual homeowners are not parties named and served with the petition for recall arbitration, are not allowed to participate in the arbitration proceeding individually, and, perhaps most important, are not allowed to withdraw from the respondent or choose to opt out of the proceedings, it might be considered a denial of basic due process to find that they, individually, are subject to paying attorney's fees as non-prevailing parties. *See e.g. Mathews v. Eldridge*, 424 U.S. 319, 333; 96 S.Ct. 893, 902 (1976)(procedural due process imposes constraints on governmental decisions that deprive individuals of property interests; the fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner).

Petitioner requests attorney's fees pursuant to section 720.311, Florida Statutes, which provides, in part, that "[t]he fees paid to the department shall become a recoverable cost in the arbitration proceeding, and the prevailing party in an arbitration proceeding shall recover its reasonable costs and attorney's fees in an amount found reasonable by the arbitrator." The statute does not say who should pay these costs and fees, but if the sentence were considered to apply to recall arbitration cases, the only party that could be found liable for the fees, without violating basic principles of due process, would be the respondent, an entity that has no existence other than to serve as the respondent in a recall arbitration case.

However, section 720.311, Florida Statutes, also states that "[a]ny recall dispute filed with the department pursuant to s.720.303(10) shall be conducted by the department in accordance with the provisions of ss. 718.112(2)(j) and 718.1255 and the rules adopted by the division." The Legislature is presumed to know how recall arbitration cases have been handled pursuant to the provisions of sections 718.122(2)(j) and 718.1255 for well over ten years. The Legislature has expressed an intention that homeowners' association recall cases should be conducted in the same manner as condominium recall cases. Since attorney's fees have *never* been awarded against the respondent or the individual unit owners in a condominium recall case, it is doubtful that the Legislature intended to require an individual unit owner who simply cast a vote to recall a board member to be liable for the attorney's fees and costs in a homeowners' recall case.[5]

More likely, the attorney's fees provision in section 720.311, Florida Statutes, was intended as requiring the award of fees and costs to the prevailing party in arbitration cases generally, without necessarily intending to allow for the award of attorney's fees in recall cases brought by the association, especially since, in the preceding sentences, the Legislature specifically mandated that those cases were to be handled in the same way as condominium recall cases. Further, awarding fees against the respondent in a recall case would be meaningless, as a practical matter, since as mandated by the Legislature, the respondent is singular entity that does not exist outside of the recall case.

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[5] If the Legislature intended such a result, it is likely that the Legislature would have required some notice to the homeowner that a vote to recall a board member might result in the homeowner being responsible for the payment of the association's attorney's fees, which could run into the thousands of dollars.

In summary, it is determined that the attorney's fees provision of section 720.311, Florida Statutes, does not apply to recall arbitration cases brought by the association in accordance with section 720.303(10), Florida Statutes, because section 720.311 also specifically provides that recall arbitration cases are to be conducted in the same manner as condominium recall cases, and no fees are awarded to the association in condominium recall cases when the association's decision is affirmed.

Further, if fees were awarded, they would have to be awarded against the only respondent in the case as mandated by section 720.303(10)(d), Florida Statutes, the group of members voting for recall—a non-existent entity for any purpose other then serving as the respondent in the recall arbitration case. Since awarding fees against a non-existent entity would serve no purpose, it supports the determination that fees were not intended to be awarded in recall arbitration cases. Attorney's fees and costs cannot be awarded against the individual homeowners who voted for the recall because they are not individual parties to the arbitration proceeding, and due process concerns would not allow attorney's fees to be awarded against persons who are not parties to the case.[6]

Finally, the statutory scheme suggests that the Legislature intended that homeowners as well as unit owners should be able to recall a board member simply because the majority of members want that board member recalled. If a person voting for recall knew he was subjecting himself to liability for the association's attorney's fees (under respondent's theory liability for the total amount of attorney's fees and costs),

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[6] Additionally, the individuals who went to the meeting and voted in favor of the recall are sometimes unknown, as in this case. How would the association discover, conclusively, which individuals attended the meeting and which of those voted for the recall? Especially when no records are kept of the individual votes.

many association members would never vote to recall any board members simply because they could not afford to do so. Obviously, that would defeat legislative intent suggested by sections 720.303(10) and 718.112(2)(j), Florida Statutes, which is to ensure that the majority of a community can remove any board members they no longer support. To hold that the mere act of voting to recall a board member subjects the homeowner to liability for the association's attorney's fees and costs would be contrary to that legislative goal.

As stated in *Greenglades,* it appears that the Legislature intended that the costs and fees expended by an association in connection with a recall arbitration case would be "a burden every association would have to bear in every recall case to decrease the likelihood of a board acting in bad faith when considering whether to certify a recall agreement or dispute a recall vote."

Based on the foregoing, it is

ORDERED:

The Petitioner's Motion for Award of Costs and Fees is DENIED.

DONE AND ORDERED this 20th day of February, 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

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 20th day of February, 2006:

Robert C. Chilton, Esq.
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Attorney for Petitioner

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Representative for Respondent

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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.**