

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

IN RE: PETITION FOR BINDING ARBITRATION - HOA

Avalon Master Homeowner
Association, Inc.,
Petitioner,

v.

Case No. 2005-05-2493

Unit Owners of Avalon Master
Homeowner Association, Inc.,
Respondent.

_____ /

Unit Owners of Avalon Master
Homeowner Association, Inc.
Petitioner,

v.

Case No. 2005-05-2614

Avalon Master Homeowner
Association, Inc.,
Respondent.

_____ /

SUMMARY FINAL ORDER

This final order is entered pursuant to section 720.311(1), Florida Statutes, which requires recall disputes filed with the Division to be conducted in accordance with the provisions of sections 718.112(2)(j) and 718.1255, Florida Statutes, and the rules adopted by the Division. Rule 61B-80.114, Florida Administrative Code, provides for

summary disposition of a petition for recall arbitration where there are no issues of material fact in dispute.

PROCEDURAL HISTORY

On October 5, 2005, the unit owners of Avalon Master Homeowner Association, Inc. filed a petition for recall arbitration naming Avalon Master Homeowner Association, Inc. as the respondent. On October 10, 2005, the association, Avalon Master Homeowner Association, Inc., filed a petition for recall arbitration naming the unit owners of Avalon Master Homeowner Association, Inc. as the responding party.¹ On October 20, 2005, the undersigned arbitrator issued an order consolidating the aforementioned recall cases and an order allowing each party to file a response to the allegations presented in the petition filed by the other party. In their petition for recall arbitration, the unit owners allege that the association failed to duly notice the recall meeting which occurred on October 5, 2005, in that the association failed to utilize its usual practice for noticing meetings where large wooden signs are placed throughout the community informing the members of the intended meeting. Further, because the board of directors failed to identify the parcel number and specific reason for rejecting that parcel's recall

¹ On November 3, 2005, the undersigned issued a summary final order regarding the association's first petition for recall arbitration, case number 2005-05-0316, affirming the board's decision to reject the recall attempt. That case was not consolidated with the two cases addressed in this order.

ballot at the recall meeting, the unit owners argue that the minutes for the recall meeting do not include this information and such is a violation of section 720.303, Florida Statutes. The recall petition filed by the association alleges that at its recall meeting, the board reviewed the recall ballots and determined to reject the recall attempt based on numerous deficiencies with the ballots.

On November 11, 2005, the unit owners filed an answer to the association's petition disputing many of the recall ballots that were rejected by the association. On November 16, 2005, the association filed a motion to strike the unit owners' petition and a motion to abate the preceding based on an upcoming election. The association's motion to strike the petition filed by the homeowners is denied in light of the rulings herein. However, the association's motion to abate the arbitration proceeding due to the association's annual meeting/election to be conducted on November 29, 2005, was granted to allow for the election to be conducted as the election would operate to moot the recall results for those board members subject to the recall effort. The unit owners filed a preliminary status report on November 22, 2005, arguing that the annual meeting/election was not noticed properly, among other disputes. On December 5, 2005, the unit owners filed a second status report alleging some of the same disputes raised in their preliminary status report and advising the arbitrator that because the annual meeting lacked quorum, the election was not held. The association filed its status report on December 8, 2005, confirming that "there was not a quorum present as the annual meeting and the election did not occur." The association also argued that because the unit owners were presented with an election opportunity to remove

incumbent directors and because the owners did not avail themselves of this opportunity, the owners have “manifested their intent to allow the directors subject to the recall attempt to remain on the present Board of Directors.” Supplemental information attached to the unit owners’ status report alleges that the owners have rescheduled the annual meeting/election for January 22, 2006; however, the association’s status report does not confirm the rescheduled election.

DISCUSSION

The association argues that dismissal of the recall is appropriate because the owners were provided with the opportunity to unseat an incumbent board member and failed to avail themselves of this opportunity, citing Clipper Bay Condominium Association, Inc. v. Unit Owners Voting in Favor of Recall, Arb. Case No. 96-0151, Summary Final Order (June, 11, 1996) as authority. The association contends that the owners manifested their intent to allow the directors subject to the recall to remain on the board of directors. Typically, where a regular election is held during the pendency of a recall arbitration proceeding, the recall is rendered moot, and the individuals elected at the election are the new board members. See Board of Directors of Ludlum Lake Townhouses Section One Association, Inc. v. Unit Owners Voting for Recall, Arb. Case No. 96-0201, Final Order Dismissing Petition for Arbitration (July 1996). However, in this case, the owners were not actually permitted to vote in the November election due to a lack of quorum and the annual meeting/election was adjourned without taking votes for the election. In such a situation, it cannot be said that the owners were provided with an opportunity to vote in the election, as it did not occur. Further, the

association did not indicate that the meeting/election would be adjourned and conducted on another date.² Because a recall is only moot when an election actually occurs, this proceeding will go forward and the issuance of this summary final order is proper.

The association's petition indicates that it was served with four hundred twenty-nine (429) recall ballots on September 26, 2005, seeking to recall board members Arthur Kobb, Kerry V. Turner, Karen V. Nixon, Jeanette Daniels, Judith T. Morris and Desmond Butcher from the board of directors. As the association consists of seven hundred twenty-four (724) voting interests, three hundred sixty-three (363) valid recall ballots are required to recall a member(s) of the board of directors. The association conducted its recall meeting on October 3, 2005, and the minutes from that meeting indicate that recall ballots were rejected for the following reasons:

- Twenty-four (24) ballots were photocopied and pre-marked;
- Twelve (12) ballots were signed by non-owners of the respective parcel;
- Fourteen (14) ballots were duplicates;
- Sixty-seven (67) ballots were altered; and,
- Seven (7) ballots were illegible.

In the owners' answer, they dispute most of the association's reasons for failing to certify the recall effort. Regarding the sixty-seven (67) alleged altered ballots, the owners' answer alleges that sixty-four (64) of these ballots were not altered in any

² A supplement attached to the owners' status report indicates that a majority of owners voted to hold an adjourned meeting/election on January 22, 2006.

manner and were erroneously rejected. Attached to their answer are the original ballots for the sixty-four ballots that the owners argue were improperly rejected. When comparing the original ballots to the photocopied ballots attached to the association's petition, there is no evidence or indication that the original ballots had been altered in any manner. The voting blocks of the original ballots do not appear to have been altered or changed and the signature portion of the ballots also appears unaltered. Because the minutes from the October 3rd recall meeting fail to specify how any of the identified ballots were altered, it is difficult to determine precisely why these ballots were rejected. The only portion of the ballot that may have been "altered" is that it appears that the boxes under the recall column may have been traced over as they appear darker than the boxes under the retain column. While this was most likely done either before or after the recall ballot was executed, the intent of the owner's vote and the signatory section of the ballot were not affected by this act.³ Thus, this is not a meritorious reason for rejecting recall ballots. Pursuant to rule 61B-81.003(4), Florida Administrative Code, the minutes of the board meeting wherein the board determines to reject a recall must identify the specific reasons for failing to certify it. The minutes fail to provide any specific details regarding the "altered" ballots which would indicate to the arbitrator precisely how the ballots were altered. In The Village of Kings Creek Condominium Association, Inc. v. Unit Owners Voting for Recall, Arb. Case No. 99-1919, Final Order Certifying Recall (November 1, 1999), the arbitrator explained:

³ The name of the owner representative could have been added to the recall ballot after the ballot was signed, but this is not a justifiable reason for rejecting a recall ballot.

To provide the specificity required, the board at its meeting and in its minutes, must either list the unit identification for each unit 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.

The minutes in this case fail to satisfy these standards. If an association's arguments for failing to certify a recall are not required to be included in the minutes, every board of directors could reject a recall effort and rely on its attorney to develop the basis thereafter upon a studied analysis. See Caribbean Condominium Management Association, Inc. v. Kennedy, Arb. Case No. 93-0175, Order Striking Allegations from Petition for Recall Arbitration (September 21, 1993). Both the recall petition and the minutes in this case indicate that sixty-seven ballots were rejected for being "altered." However, no further details specifically explaining how the ballots were altered or changed were provided. Because the minutes fail to specify how these ballots were altered, the minutes are not in compliance with rule 61B-81.003(4), Florida Administrative Code. As such, the association impermissibly rejected these ballots.

The board also rejected 57 additional ballots for other reasons; however, it is not necessary to address the merits of those reasons based on the rulings set forth below. Even if those 57 ballots were properly rejected by the board, when subtracting the 57 ballots from the 429 recall ballots served on the board of directors and subtracting the 3 ballots not disputed by the owners as altered ballots, the owners are still left with 369 votes to recall the named board members. As this is sufficient to recall a member or members of the board of directors, the recall is hereby certified.

It is therefore ORDERED: The recall of board members Arthur Kobb, Kerry V. Turner, Karen V. Nixon, Jeanette Daniels, Judith T. Morris and Desmond Butcher is certified. These individuals shall step down as board members effective as of the date of this order and shall immediately return all property and records belonging to the association to a remaining board member or a replacement board member. The replacement board members shall consist of: Bernard Dorsett, Conrad Brown, Loretta Pringle Miller, Francis O'Brien, Doug Johnson and Margaret Gibson.

DONE AND ORDERED this 20th day of December 2005, at Tallahassee, Leon County, Florida.

Melissa Mnookin, Arbitrator
Homeowners' Association Mediation and
Arbitration Program
Division of Florida Land Sales, Condominiums,
and Mobile Homes
Dept. of Business & Professional Regulation
1940 North Monroe Street
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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 by facsimile to the following persons on this 20th day of December 2005:

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