

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

IN RE: PETITION FOR BINDING ARBITRATION-RECALL DISPUTE

**Lake Charleston Maintenance Association,
Inc.,**

Petitioner,

v.

Case No. 2005-00-0387

**Homeowners Voting for Recall,
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-50.119, Florida Administrative Code, provides for summary disposition of a petition for recall arbitration where there are no issues of material fact in dispute. In addition, proposed Rule 61B-80.114, Florida Administrative Code, 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.

PROCEDURAL HISTORY

On December 28, 2004, Lake Charleston Maintenance Association, Inc., (“Petitioner”), by and through legal counsel, filed a recall arbitration petition with the Division. After reviewing the petition, the undersigned issued an Order Permitting Answer on January 10, 2005, which was served on counsel for Respondents via U.S. Certified Mail, return receipt requested, on or before January 16, 2005.

On January 17, 2005, counsel for Respondents submitted an Answer to Petition to the Division, denying Paragraph 12 and partially denying Paragraph 13 of the petition for recall arbitration. In addition, Respondents argue four (4) separate defenses in the Answer to Petition: 1) no letters of rescission exist; 2) no letters of rescission have been properly served upon Petitioner; 3) more than a majority of parcel owners of Lake Charleston Maintenance Association, Inc., voted in favor of the recall, thereby obligating Petitioner to certify the recall; and, 4) any letters of should have been served on the board of Lake Charleston Maintenance Association, Inc., on or before December 22, 2004. On January 19, 2005, Petitioner submitted a Reply to Answer of Respondents, responding to each of Respondents’ four separate defenses by way of admission, and admitting that no issues of material fact are in dispute.

FINDINGS OF FACT

Petitioner received a written recall agreement consisting of one thousand two hundred and fifty-four (1,254) recall ballots on December 17, 2004. There are two thousand three hundred and seventy-one (2,371) voting interests in the homeowners’ association, therefore, one thousand one hundred and eighty-six (1,186) ballots are needed for a recall. Petitioner, by way of the board of directors, held a board meeting on December 22, 2004, at which time determined not to certify the recall. On December

28, 2004, Petitioner filed a recall arbitration petition with the Division. Board members subject to the recall are David Midolo and Jane Early.

At the December 22, 2004, recall meeting, the board of directors found that of the 1,254 written recall agreements obtained, a total of 17 of the recall agreements were invalid and were, therefore, rejected by the board: 4 for submitting duplicate recall agreements; 3 for signor of recall agreement not being on the deed; and, 10 for voting members having sold their respective properties. And although a majority of votes were obtained even with the exclusion of the 17 recall agreements deemed invalid, the board refused to certify the recall based on information from the board president that some homeowners might have rescinded their recall agreements by way of written rescission, and if so, such rescissions might possibly be in the possession of David Midolo, who was not in attendance of the December 22, 2004 recall meeting. As reflected in the recall meeting minutes, the board voted unanimously not to certify the recall effort for the sole reason that the possibility of the existence of rescissions might reduce the number of valid votes to an insufficient amount required for a successful recall.

CONCLUSIONS OF LAW

Petitioner's reason for rejecting certification of the recall, as stated in the minutes, is speculative, general in nature, and without legal grounds, therefore, Petitioner improperly declined to certify the recall attempt. Pursuant to section 720.303(10)(h), Florida Statutes, minutes of the board meeting at which the board decides whether to certify the recall "must identify the parcel number and the specific reason for each such rejection" (emphasis added). The recall meeting minutes fail to provide specific names,

addresses, or any identifying information pertaining to which voters or parcel owners rescinded their recall votes. Petitioner maintains that no such rescissions are in the Petitioner's possession or exist to Petitioner's knowledge. Section 720.303(10)(b)4, Florida Statutes, further provides that "[a]ny rescission or revocation of a member's written recall ballot or agreement must be in writing and, in order to be effective, must be delivered to the association before the association is served with the written recall agreements or ballots" (emphasis added). No recall rescissions or revocations were received by the board prior to receiving the written recall agreement on December 17, 2004. Furthermore, Respondent has substantially complied with the provisions of section 720.303(10), Florida Statutes, and the rules of the Division pertaining to recall by written agreement. Thus, the recall will be certified.

Based on the foregoing, it is hereby **ORDERED**:

1. The recall of board members David Midolo and Jane Early is CERTIFIED. These individuals shall immediately step down as members of the board. As a majority of the board has been recalled,¹ and replacement candidates were not listed on the recall agreement, the vacancies shall be filled by those owners who voted for the recall. An election shall be held within fourteen (14) days of this Final Order to fill the three vacancies on the board. The homeowners voting for recall, by way of legal counsel or qualified representative (hereafter, "representative"), shall compose a ballot to consist of

¹ The written recall agreement of December 17, 2004, consisted of three directors of the board to be recalled: David Midolo, Jane Early, and Bailey Conway. Be it that the recall was originally for a majority recall, it remains a majority recall, regardless of the fact that Bailey Conway has since moved out of the homeowners' association community, is no longer a director of the board, or is no longer a member of the association. (See Sabal Point Apt. Assoc., Inc. v. Unit Owners Voting for Recall, Arb. Case No. 98-5060, Final Order Certifying Recall (December 23, 1998), whereby the arbitrator held that allowing vacancies of the board to be appointed by remaining board members for permanent replacement after a board member resigned during the recall effort, would circumvent the rules regarding recall which specifically provide that when the voting interests attempt to recall a majority of the board of directors, those voting for the recall shall also vote for replacement directors.)

at least 3, but no more than 5, candidates to replace the recalled board members and which provides for a write-in nomination. The ballots shall be distributed via U.S. Mail to the last known address only to those homeowners who participated in the recall effort because only those individuals would have originally voted for the replacement candidates in this recall effort. The ballots shall instruct the homeowners to vote for no more than 3 candidates. The 3 individuals who receive the most votes will replace the recalled board members. The ballots shall be distributed within fourteen (14) days hereof and must be returned to the representative within thirty (30) days of the date of this Final Order. The representative shall immediately tabulate the results and announce the new board members. Director(s) elected to fill the vacancies caused by the recall shall fill the vacancy for the unexpired term of the seat being filled.

2. Any and all documents and records belonging to the association in the possession of David Midolo and Jane Early shall be turned over to the remaining board members within five (5) business days of the date of this Final Order.

3. This Final Order shall become effective upon mailing by the Division to the association.

DONE AND ORDERED this 25th day of January 2005, at Tallahassee, Leon County, Florida.

Susan Wilkinson Harnden, 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

Tallahassee, Florida 32399-1030

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 to the following persons on this 25th day of January, 2005:

Jan Michael Morris, Attorney for Petitioner
PO Box 276153
Boca Raton, FL 33427

Lester Kotok, Attorney for Respondents
7615 Thornlee Drive
Lake Worth, FL 33467

Susan Wilkinson Harnden, Arbitrator