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

Lakeforest at St. Lucie West Homeowners' Association, Inc.,

Petitioner,

v. **Case No. 2004-05-5982**

Homeowners Voting for Recall,

Respondent.

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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.

PROCEDURAL HISTORY

On November 12, 2004, Lakeforest at St. Lucie West Homeowners' Association, Inc. ("Petitioner"), by and through legal counsel, filed a recall arbitration petition with the Division. On December 16, 2004, Division Arbitrator, Melissa Mnookin, issued an Order Permitting Answer, which was served on Respondents via U.S. Certified Mail, return receipt requested, on December 28, 2004. On January 7, 2005, Respondents timely

submitted an Answer to Petition to the Division, generally denying all allegations contained in the petition. On December 16, 2004, Division Arbitrator, Melissa Mnookin, also issued an Order to Show Cause, thereby requiring Respondents to show good cause in writing as to why a final order affirming the board's decision not to certify the recall effort should not be entered by the Division. As of the date of this Order, Respondents have not filed a response to the Order to Show Cause.

DISCUSSION

Respondents are seeking to recall board members Steven Frazer and Jim Marlow. The written recall was served on counsel to Petitioner on October 25, 2004, and again on October 29, 2004, by courier and by certified mail, respectively.[1] The board conducted a meeting to consider the recall on November 5, 2004. Although the written recall agreement contained a sufficient amount of votes to represent a majority of the voting interests for each director sought to be recalled, the board rejected the recall effort. The minutes of the recall meeting specify five (5) separate reasons[2] the

[1] Respondents re-served the recall agreement on Petitioner's attorney on October 29, 2004, due to attorney for Petitioner refusing to accept hand service by way of courier on October 25, 2004. However, arbitration case law supports the proposition that hand-delivery by someone other than a process server is sufficient, as the purpose of requiring service on the association is to provide the board with notice that a recall has been attempted. (See Marine Colony Condominium Association, Inc. v. Unit Owners Voting for Recall, Arb. Case No. 98-5148, Summary Final Order Certifying Recall (November 20, 1998), and Board of Administration of the Hialeah Club Villas Condo. Assn. Inc. v. Group of Members of Assn. Who Executed a Written Agreement to Recall Members of the Board of Directors, Arb. Case No. 95-01012, Summary Final Order (July 24, 1995)). Furthermore, proposed Rule 61B-80.110(2)(a), Florida Administrative Code, states in pertinent part that "[s]ervice shall be made by delivering or mailing…to the attorney." Nevertheless, Respondents' argument that Petitioner was properly served and, therefore, failed to timely conduct the meeting to deny or certify the recall as required by section 720.303(10)(c)2, F.S., would not lead to automatic certification of the recall in this case because the recall agreement was void *ab initio*. The fact that the board failed to hold a timely meeting to determine whether or not to certify the recall would not rehabilitate the flawed agreement. (See Carlton Place Condo. Assn., Inc. v. Unit Owners Voting for Recall, Arb. Case No. 2003-06-9241, Summary Final Order (August 25, 2003)).

[2] Respondents argue that because the rules relied upon by Petitioner are proposed rules, yet to be formally adopted by the Division, Respondents had no way of knowing the requirements under these rules. This defense is rejected, as statutory authority to conduct these arbitration proceedings rests in sections 720.303(10)(d) and 720.311(1), Florida

board rejected the recall: 1) petitions did not allow for a person signing petition to keep named board member on the board; 2) signers printed, rather than signed names and there was no way to verify actual signatures; 3) no date was provided with signatures; 4) there was no designated authorized representative; and, 5) person signing did not show the authority to sign for the lot. Petitioner's five reasons not to certify the recall will be individually addressed at the end of this discussion. The dispositive issue in this case is whether or not the absence of a signature or a signature line on a recall ballot technically voids the ballot, thereby rendering the written recall agreement void *ab initio*.

The law is clear in that failure to provide a recall ballot containing the signature of each voter is a fatal flaw of the recall effort. Rule 61B-23.0028(1)(3), Florida Administrative Code, speaks to the necessity of a signature, which requires that the form of a written recall agreement "[p]rovide a signature line for the person executing the written agreement to affirm that he is authorized…to cast the vote for that unit." The requirement of a signature of the person executing a legal document, such as a ballot, is not only self-evident, but is detrimental to its legal effect. Furthermore, the requirement of a signature line, as prescribed in the rule, ensures that the identifying mark on that line, whether printed or in script form, was intended by that voter as his or her signature. The written recall ballots in this case fail to provide signature lines or to designate a space for a signature. Each ballot contains only two columns, entitled "Name" and "Address." And although many voters provided their names in script form

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Statutes, both providing that the mandatory binding arbitration of recall disputes 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.

under the “Name” column, others printed their names, which creates for the fact finder the impossible task of determining whether the voter intended to provide his or her “name” or intended to provide a legal signature. Therefore, the written recall agreement is held void *ab initio*.

As for Petitioner’s reason that the recall ballots did not allow for the person signing to keep the named board member on the board, the rules for recall and case law speak directly to the inclusion of recall and retain lines on a recall ballot. Rule 61B-23.0028(1)(b), states that all written agreements for recall shall “[p]rovide 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.” In Carlton Bay Condo. Assoc., Inc. v. Unit Owners Voting for Recall, Arb. Case No. 2003-07-2813, Summary Final Order (July 24, 2003), the association’s sole basis for rejecting the recall was that the ballots were fatally flawed because of the absence of separate lines on which the voter could indicate a desire to recall or retain each board member subject to the recall effort. The arbitrator held that “[t]he omission of recall and retain lines, however, is insufficient in and of itself to invalidate an otherwise valid recall where only a single board member is sought to be recalled…any unit owner who did not wish to recall [that board member] could simply have refused to sign the agreement.”

In the instant case, the recall ballots submitted by Respondents were collective or petition-style ballots, rather than the typical, separate ballot for each homeowner with all directors being sought for recall listed together (and, thus, requiring retain and recall

lines next to each director name). Ballots submitted by Respondents consisted of only two separate ballots for the two directors sought to be recalled, with the homeowners voting in favor of the recall listed below that director's name. Each of Respondents' ballots clearly instructed owners as to the purpose of including one's signature on the ballot so that voters had the opportunity to recall one member by signing the respective ballot or not recalling the listed member by merely refusing to sign. The rationale for requiring recall and retain lines is simple. Where board members are grouped together on one recall ballot, a voter not wishing to recall but one board member would be forced to recall both members if the voter were so desperate or adamant in the removal of one of the two board members. In other words, the removal of one member would ensure the removal of the other, and such a cumulative styled ballot with no recall or retain lines next to each name would be deemed void *ab initio*. (See Evanston Park Condominium Association, Inc. v. Unit Owners Voting for Recall, Arb. Case No. 99-2257, Final Order (Dec. 12, 1999), citing Board of Directors of Pinebark Condominium Association, Inc. v. Lopez et al., Arb. Case No. 93-0177, Summary Final Order (Dec. 2, 1993)). As such, Respondents' deviation from the typical recall ballot does not fly in the face of the rationale for requiring recall and retain lines next to each board members name; the fate of Jim Marlow was not impermissibly linked to the fate of Steven Frazer. Petitioner's reason that Respondents failed to include recall and retain lines on the recall ballots is therefore rejected by the arbitrator.

Petitioner's second reason for refusing to certify the recall, as stated in the recall meeting minutes, was that signers printed rather than signed their names, with no way

to verify actual signatures. This reason speaks indirectly to the aforementioned discussion of why a signature line, as prescribed by rule, is a fatal flaw of the written recall agreement. However, denying certification solely based on whether an intended signature is in block or print form rather than script, alone, is insufficient to support proper denial of certification if the ballots in this case had provided an additional "Signature" column, thereby (and in the absence of allegations of fraud or duress), making the exercise of distinguishing between a printed name and a legal signature, and the verification of actual signatures, unnecessary. (See Windermere Condominium, Inc. v. Unit Owners Voting for Recall, Arb. Case No. 97-2192, Final Order Certifying Recall (February 3, 1998), where the arbitrator held that a signature may be rendered in printed letters, handwritten letters, or in a cursive style.) Therefore, this reason is rejected by the arbitrator.

Petitoner's third reason for refusing to certify the written recall agreement is that no date was provided with signatures. Rule 61B-23.0028(1)(d), Florida Administrative Code, requires the written agreement to "[p]rovide a space for the person signing the agreement to state his name, identify his unit and indicate the date the written agreement was signed." However, it has been held by the Division that the lack of a space for the signatory to indicate the date the written agreement was signed is not a fatal flaw in absence of other indicating factors (e.g., fraud, gross negligence, intentional wrongdoing), and where the written agreement otherwise substantially complies with the provisions of Rule 61B-23.0028, Florida Administrative Code. (See Ocean Towers of Hutchinson Island v. Unit Owners Voting for Recall, Arb. Case No. 01-3189, Final Order

Certifying Recall (June 28, 2001)). In the instant case, no allegations of fraud, gross neglect, or allegations that otherwise speak to the integrity of the recall effort, have been raised by the Petitioner. Accordingly, failure to include the date with the signature is not, in and of itself, a sufficient basis to refuse certification of a recall written agreement, and Petitioner's reason is therefore rejected.

Petitioner's fourth reason for refusing to certify the written recall agreement is that no authorized representative was designated to represent the homeowners at the time the written recall agreement was served on the board. The failure to name an eligible representative, standing alone, is not sufficient grounds to refuse certification of the agreement. (See Habitat II Condominium, Inc. v. Unit Owners Voting for Recall, Arb. Case No. 97-0073, Final Order (April 29, 1997)). Petitioner states in Paragraph 4 of its petition that Petitioner received written notification on November 6, 2004, that Jack Zbarsky was designated as the authorized representative for the homeowners seeking the recall of Jim Marlow and Steven Frazer. Petitioner asserts that because Mr. Zbarsky is not a lot owner of the association and Mr. Zbarsky is not a member of the association, Mr. Zbarsky is therefore not qualified to represent the homeowners voting for recall. This argument is wholly rejected, as there is no requirement that a qualified representative be a member of the association.

Petitioner's give as its fifth reason for not certifying the written recall agreement that the person signing failed to show his or her authority to sign. This reason, alone, does not render the recall agreement invalid. (See Central Cortez Plaza Condo. Assn., Inc. v. Unit Owners Voting for Recall, Arb. Case No. 97-0179, Summary Final Order

(June 6, 1997), which held that the fact that the recall agreement form did not contain words indicating that the unit owner was "authorized" to cast a vote for the unit did not render the agreement invalid. Despite this deficiency, the agreement substantially complied with Rule 61B-23.0028(1), Florida Administrative Code, as spaces were provided for unit owners' name, unit number, and signature.) In the instant case, and as previously stated, the recall ballot included only two columns of information: voter's name and address. And although no signature column was listed, the information provided by voters on the ballot was sufficient information for Petitioner to verify against Petitioner's records whether or not voters listed were authorized to cast their votes (as was demonstrated by Petitioner in Paragraph 4 of the petition with regards to the voting interest of Mr. Zbarsky's lot).

In addition to the above five reasons why Petitioner refused to certify the recall, Petitioner includes two additional reasons in its petition that were not stated in the recall meeting minutes. It is well established that where a board does not advance at its meeting reasons for its decision not to certify the recall, these reasons cannot be later asserted as justification for the refusing to certify the recall. In Caribbean Condominium Management Association, Inc. v. Kennedy, Arb. Case No. 93-0175, Order Striking Allegations from Petition for Recall Arbitration (September 21, 1993), the arbitrator reasoned that if the board's basis for rejection of the recall was not required to be in the minutes, "every board of directors could fail to certify a recall and rely on its attorney to come up with the basis therefor after the fact." As such, Petitioner's additional two

reasons stated in the petition for refusing to certify the recall are inadmissible and shall not be considered.

WHEREFORE, Respondents' failure to provide a signature line for each voter as required in Rule 61B-23.0028, Florida Administrative Code, renders the written recall agreement void *ab initio*, and the decision of the board to not certify the recall is affirmed.

It is therefore **ORDERED**:

The decision of Petitioner to not certify the recall of Jim Marlow and Steven Frazer is AFFIRMED. Jim Marlow and Steven Frazer shall continue to serve as board members.

DONE AND ORDERED this 31st day of January 2005, at Tallahassee, Leon County, Florida.

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Susan Wilkinson Harnden, Arbitrator
Homeowners' Association Mediation and Arbitration Program
Division of Florida Land Sales, Condominiums, and Mobile Homes
Dept. of Business & Professional Regulation
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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 31st day of January, 2005:

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Susan Wilkinson Harnden, Arbitrator