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

IN RE: PETITION FOR ARBITRATION

Robert E. Sorensen,

Petitioner,

v. Case No. 2005-03-0747

Bridgeton North, Inc.,

Respondent.

_____/

SUMMARY FINAL ORDER

This final order is entered pursuant to rule 61B-45.030, Florida Administrative Code, which permits the arbitrator to enter a summary final order where there are no disputed issues of material fact.

PROCEDURAL HISTORY

On June 3, 2005, Robert E. Sorensen, petitioner/unit owner, filed a petition for arbitration, naming Bridgeton North, Inc. as the respondent/association. In his petition, the petitioner alleges that the association improperly certified the petitioner's removal from the board of directors pursuant to a written recall. Specifically, the petitioner has alleged that two (2) recall ballots were invalid and improperly accepted. If these ballots had been appropriately invalidated, the petitioner argues that the recall would have failed based on an insufficient number of votes. In response to the arbitrator's order requiring supplemental information, dated July 18, 2005, the association argued that the board was properly served with thirty-three (33) written recall agreements on May 17,

2005, for the recall of Robert Sorensen, and conducted a meeting on May 24, 2005, for the purpose of certifying or not certifying the attempted recall. During the recall meeting, the board determined that a sufficient number of valid recall ballots had been served on the board and a majority of the board voted to certify the recall and Mr. Sorensen's removal from the board of directors. Regarding the disputed ballots, the association argues that the ballots were in fact properly executed recall ballots.

In order to determine the validity of the two (2) recall ballots in question, the arbitrator issued an order on August 15, 2005, requiring the petitioner to submit a property deed for unit #707 indicating the unit owner of record and an affidavit from Jim Mineo, owner of unit #308, attesting that his ballot had been forged, as advanced by the petitioner. The association was also permitted to submit affidavits and other arguments in opposition to the petitioner's allegations. In response to this order, on August 23, 2005, the petitioner submitted a property deed for unit #707 and an "affidavit" executed by Mr. Mineo to purportedly confirm that he did not sign the recall ballot submitted for his unit. The association submitted affidavits on August 30, 2005, executed by unit owners attesting that they witnessed Mr. Mineo sign the recall ballot used in this recall attempt. The association also presented further arguments regarding the validity of the recall ballot submitted for unit #707.

CONCLUSIONS OF LAW

As the association maintains sixty-four (64) voting interests, a board member must receive at least thirty-three (33) valid votes in order to be properly recalled from the board. Here, only two (2) of the thirty-three (33) recall ballots submitted in this matter are in dispute. If one of these ballots is deemed invalid, the recall will fail and the

certification of the recall by the association will be reversed. The first ballot in question is the ballot submitted for unit #707. This ballot was signed by Claire Clark. The petitioner asserts that this ballot is invalid because Ms. Clark sold her unit to Diane Springer on May 2, 2005, before the date the board was served with the recall agreements on May 17, 2005. Because Ms. Clark was not the unit owner on the date the recall agreements were delivered to the board, the petitioner argues that the ballot should have been rejected. On August 15, 2005 and August 30, 2005, the association submitted pleadings which included arguments rejecting the petitioner's assertions relating to the recall ballot submitted for unit #707.

On August 23, 2005, the petitioner filed a warranty deed for unit #707 and an application for certificate of approval for sale confirming that the owner of the condominium unit as of May 2, 2005, was Diane Springer. The association filed its response on August 30, 2005, arguing that the issue concerns the owner of the unit as of the date the recall ballot was signed, not the owner as of the date the recall agreement was served on the board.[1] Based on prior case law, this argument is emphatically rejected. As ruled in the arbitrator's previous order, the issue is whether the signature on the recall ballot is that of the owner of the condominium

[1] While counsel for the association further argues that recall ballots do not expire through the passage of time under rule 61B-23.0028(1)(i), Florida Administrative Code, which is correct, a recall ballot may be rendered invalid due to outside factors such as where an owner rescinds his or her ballot before the ballots are served on the board or where a unit owner sells the condominium property before service of the recall agreements on the board and is no longer a unit owner.

unit as of the date the board is served with the recall agreements. See Board of Administration of the Sea Monarch Condominium Association, Inc. v. Group of Members of the Association Who Executed a Written Agreement to Recall Members of the Board of Directors, Arb. Case No. 95-0246, Amended Summary Final Order (December 18, 1995)(ballot not counted because it was signed by an individual who later sold the unit and who was not a unit owner at the time the written agreements were served on the board). Compare, Gulf Island Beach & Tennis Club Condominium Association, Inc. v. Unit Owners Seeking Recall, Arb. Case No. 98-4198, Summary Final Order Certifying Recall (August 18, 1998)(recall ballot valid where it was signed by the individual who was the owner of record as of the date the written agreement was served on the board). If the ballot does not contain the signature of the record owner as of the date the board is served with the recall agreements, the ballot is invalid. Pursuant to section 718.112(2)(j)(2), Florida Statutes, a board member may be recalled from the board "with or without cause by the vote or agreement in writing by a majority of all the voting interests." Ms. Clark, as a non-unit owner, was not a member of the voting interests when the recall ballots were served on the board, thus, her ballot was invalid. Further, pursuant to rule 61B-23.0028(1)(h), Florida Administrative Code, the written agreements used for the purpose of recalling a board member shall become an official record of the association "upon service upon the board." As the recall ballots become an official record of the association as of the date the board is served with the agreements, the date of service controls and the individuals who execute recall ballots must be the unit owners of record as of the date the board is served with the recall agreements for the ballots to be deemed valid. This is not a requirement added,

invented or created by the arbitrator, as argued by the association's counsel, but, rather, a policy mandated by the statute, rules governing recall proceedings and prior case law. Here, it is clear that the recall ballot submitted for unit #707 was signed by Claire Clark, who was the unit owner as of the date the recall ballot was signed but had transferred ownership to Diane Springer prior to the date upon which the board was served with the recall agreements. Accordingly, the ballot submitted for unit #707, signed by Claire Clark, was improperly accepted by the board.

As the association contains sixty-four (64) voting interests, a board member must receive at least thirty-three (33) valid votes to be recalled. In this case, thirty-three (33) total votes were cast in favor of recalling the petitioner from the board of directors. With the exclusion of the ballot submitted for unit #707, the total number of ballots is reduced to thirty-two (32). Even if the ballot purportedly submitted for Jim Mineo's unit were deemed valid, the recall would still fail as a sufficient number of voting interests have not voted to recall Mr. Sorensen from the board of directors. It is noted that the association's response received on August 30th attempts to add at least four (4) ballots to recall Mr. Sorensen. Because these ballots were submitted subsequent to the date on which the board was served with the recall agreements, the ballots are not valid for this recall effort. See Fountainview Association, Inc. v. Unit Owners Voting for Recall, Arb. Case No. 02-5819, Summary Final Order (December 20, 2002)(unit owners not permitted to add four newly acquired recall ballots obtained after the initial recall agreements had been served on the board). As previously indicated, recall ballots become an official record of the association on the date the board is served with the recall agreements, not on the date the recall agreement is executed. Thus, the date of

service of the recall agreements on the board controls not only the validity of the ballots relating to qualified signatures, but also for the purposes of adding and/or rescinding ballots. Accordingly, the additional ballots referred to in the association's response cannot be used in this recall effort.

The petitioner in this matter received, at most, thirty-two (32) votes for his removal from the board of directors. It is not necessary to rule on the validity of the ballot submitted for Mr. Mineo's unit because even if the ballot was properly accepted, the recall against Mr. Sorensen would still fail. Because a board member must receive at least thirty-three (33) votes in order to be removed from the board of directors, Mr. Sorensen did not receive the required number of recall votes and, therefore, his recall should not have been certified.[2]

It is therefore ORDERED:

The recall of Robert Sorensen from the board of directors is not certified and the board's decision to certify his recall is hereby reversed. The individual appointed to replace Mr. Sorensen on the board shall immediately step down and return all association possessions to the board. Mr. Sorensen shall immediately resume his position as a board member for the remainder of his original term. DONE AND ORDERED this 9th day of September 2005, at Tallahassee, Leon County, Florida.

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Melissa Mnookin, Arbitrator
Department of Business and
Professional Regulation

[2] Certainly, the rulings herein do not preclude the unit owners from initiating another recall attempt to remove Mr. Sorensen, or any other board member, from the board of directors, and, pursuant to rule 61B-23.0028(1)(i), Florida Administrative Code, written recall ballots may be reused, assuming the ballot is valid, in one subsequent recall effort.

Arbitration Section
Northwood Centre
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 to the following persons on this 9th day of September 2005:

Robert E. Sorensen
7100 Sunshine Skyway Lane
Unit 401
St. Petersburg, Florida 33711

Michael D. Allweiss, Esq.
Allweiss & Allweiss
One Progress Plaza
Suite 810
St. Petersburg, Florida 33701

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Melissa Mnookin, Arbitrator

Right to Appeal

As provided by section 718.1255, F.S., this final order may be appealed by filing a complaint for trial de novo with a court of competent jurisdiction in the circuit in which the condominium is located, within 30 days of the entry and mailing of this final order. This order does not constitute final agency action and is not appealable to the district courts of appeal. If this final order is not timely appealed, it will become binding on the parties and may be enforced in the courts.

Attorney's Fees

As provided by s. 718.1255, F.S., the prevailing party in this proceeding is entitled to have the other party pay its reasonable costs and attorney's fees. Rule 61B-45.048,

F.A.C. requires that a party seeking an award of costs and attorney's fees must file a motion seeking the award not later than 45 days after rendition of this final order. The motion must be actually received by the Division within this 45 day period and must conform to the requirements of rule 61B-45.048, F.A.C. The filing of an appeal by trial de novo of this final order tolls the time for the filing of a motion seeking prevailing party costs and attorney's fees until 45 days following the conclusion of the de novo appeal proceeding and any subsequent appeal.