STATE OF FLORIDA
DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION
DIVISION OF FLORIDA LAND SALES, CONDOMINIUMS, AND MOBILE HOMES
IN RE: PETITION FOR ARBITRATION

Palm Greens at Villa Del Ray
Recreation Association, Inc.,

Petitioner,

v. Case No. 2003-07-3298

Barbara Schlossberg, Number 1
Condominium Association--Palm
Greens at Villa Del Ray, Inc., and
Unit Owners Voting for Recall,

Respondents.
_____/

SUMMARY FINAL ORDER

Comes now, the undersigned arbitrator, and issues this summary final order as follows:

Petitioner Palm Greens at Villa Del Ray Recreation Association, Inc., (hereinafter "Master Association") filed its petition for recall arbitration in this matter on July 23, 2003. According to the petition, petitioner is a master/recreation association that operates certain recreation property used in common by the unit owners living in 2 separate condominiums. The two condominiums are operated by two separate condominium associations known as Number 1 Condominium Association--Palm Greens at Villa Del Ray, Inc. and Number 2 Condominium Association--Palm Greens at Villa Del Ray, Inc. (hereinafter "Association #1" and "Association #2"). The petition names the association for condominium #1 and the owners who voted in favor of recall as respondents. The respondents filed an

answer to the petition on August 1, 2003.

According to the petition, voting membership in the master association is limited to three representatives from each condominium association[1]. Thus there are 6 voting members in the association who also constitute the board of the master association. These members were elected to the board of the master association in accordance with the procedure provided for in the bylaws of the condominium associations. According to the procedures outlined in the condominium documents, the unit owners in the separate condominiums directly elect their representatives to the master association. The petition maintains that only the 6 board members--3 from each association--are given full voting rights in the affairs of the master association.

The petition alleges that on or about July 11, 2003, the master association received a written recall agreement purporting to recall the three voting representatives of the Number 1 Condominium Association--Palm Greens at Villa Del Ray, Inc. On July 18, 2003, the board of directors of the master association met at a duly noticed meeting to consider whether to certify or reject the recall. At the meeting, it was determined by a majority of the quorum present that the recall effort was flawed and should not be certified.[2]

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[1] The arbitrator does not agree with the assertion in the petition that the condominium associations are the only voting members in the master association. First, prior to the April 2003 amendments to the bylaws, a direct vote of the individual unit owners in the condominium associations was required where the master association sought to impose a special assessment in excess of $50 per unit or to increase a budget in excess of 10% of the prior year's budget. It appears that unit owners from 1973 to 2003 voted directly in the fiscal affairs of the master association under these circumstances until this bylaw was repealed, thus fueling the present recall effort when owners demanded reinstatement of the bylaw. Moreover, as referenced below, individual owners pursuant to the condominium association bylaws are permitted to vote directly to elect and to recall their representatives to the master association.

[2] Four members of the master association board were present at the meeting, including three members from Association #2 and one member from Association #1, Marilyn Schwartz who was

One argument advanced by the master association is that Section 718.112(2)(j), Florida Statutes only permits recalls by at least a majority of the "members" of the association. According to this argument, only the 6 board members of the master association are "members" of the master association and have the ability to recall representatives to the board; the individual owners are powerless to recall the board. The master association also disputes the method used by the unit owners voting in favor of recall to fill vacancies caused by the recall, arguing that the documents for association #1 allow for a recall of the master representatives at a meeting while the recall actually occurred by written ballot.[3] The master association further believes that only the board of the master association is authorized to both recall itself and to fill vacancies caused by recall.[4] The master association also argues that even assuming that the condominium documents control the method of recall and the appointment of replacements to the board of the master association, the documents were not followed because the documents only mention recall at a meeting, and the recall at issue in this case occurred in writing. The master association also complains that the condominium association has not provided it with a copy of the deeds in order to demonstrate that each of the hundreds of owners who signed recall ballots are in fact owners in the condominium.[5] The

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subject to the recall and who voted against certifying the recall, thereby tipping the vote in favor of challenging the recall.

[3] According to documents contained with the original petition, the owners cast between 404 and 412 ballots in favor of the recall of the three representatives, while between 112 and 120 owners voted in favor of retaining these individuals. The association does not argue that these numbers do not constitute at least a majority of the total voting interests of Association #1.

[4] This argument would permit the master representatives of Association #1 to vote to recall representatives of Association #2 on the board of the master. This result would run contrary to the rule of law that only members of that class of voting rights who elected a board member are authorized to vote to recall that board member. See, rule 61B-23.0026, Florida Administrative Code, and Villa Dorada Condominium Association, Inc. v. Owners Voting for Recall, Arb. Case No. 92-0209, Final Order (December 10, 1993).

[5] In accordance with well-established precedent, any reasons for not certifying a recall agreement

master association also explains that the recall came about as the result of certain unpopular amendments to the bylaws of the master association, and argues that the master association was powerless to rescind the amendments, thus precipitating the recall.[6]

The petitioner is an "association" as defined by §718.103, Florida Statutes, which defines the term to include any entity that operates any real property in which condominium unit owners have use rights, where membership in the association is composed exclusively of unit owners or their elected representatives. In the recent declaratory statement of In re Petition for Declaratory Statement of Firestone, No 2 Condominium Association--Palm Greens at Villas Del Ray, Inc., Docket No. 2003-05-3516, DS #2003-009 (May 6, 2003), the Division determined that the petitioner herein was an association subject to Ch. 718, Florida Statutes. Because the master association is subject to the statute, it is required to conform its activities to the requirements of the controlling statute. See, §718.102, Florida Statutes.

The documents in this case are fairly straightforward. The bylaws of the master association provide in part:

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that do not appear in the minutes of the board meeting at which the recall is considered cannot be advanced for the first time in the petition for arbitration and cannot be considered by the arbitrator. See, International Towers Condominium Association, Inc. v. Owners Voting in Favor of Recall, Arb. Case No. 98-2861, Final order (March 6, 1998); Nova Hills North Condominium Association, Inc v. Unit Owners Voting in Favor of Recall, Arb. Case No. 01-3638, Final Order (November 20, 2001). Therefore, the arbitrator cannot consider this ground in determining whether to certify the recall. However, the arbitrator notes that there is no requirement in the law that copies of deeds be delivered to the association as part of the recall procedure. Moreover, the master association was free to consult the public records to the extent necessary to determine ownership status of the signatories to the agreements.

[6] It is also well-established that since the statute provides that board members may be recalled without cause, the justification or explanation for a recall effort is irrelevant in determining the validity of the recall effort. See, e.g., Gulf Island Beach and Tennis Club Condominium Association, Inc. v. Owners Voting for Recall, Arb. Case No. 98-4198, Final Order (August 18, 1998). Accordingly, whether the bylaw amendments could be rescinded by the master association is irrelevant and will not be explored here.

Article II MEMBERSHIP AND VOTING PROVISIONS

Section 1. Membership in the Association shall be limited to three representatives of each Sub-Association member. The terms Sub-Association Representative and Voting Member are used synonymously throughout these Bylaws.

Section 2. Voting. Each Sub-Association Representative shall have one vote. A majority of the total votes from all Sub-Association Representatives shall decide any question, unless the By-Laws or Management Agreement provide otherwise,...

Section 3. Unless otherwise provided in these By-Laws, the presence in person or by proxy of a majority of the Sub-Association Representatives' total vote shall constitute a quorum.

Section 5. Designation of Voting Member. The respective Bylaw provisions of the Sub-Associations shall determine the procedures for designation of Sub-Association Representatives.

ARTICLE IV
Directors

Section 1. Number, Term and Qualifications. ... All Directors shall be members of the Sub-Associations who have been designated as Sub-Association Representatives to the Mater Association,....

Section 3. Removal of Directors. At any time after the first meeting of the membership, at any duly convened regular or special meeting, any one or more of the Directors may be removed, with or without cause, by the affirmative note of the voting members, casting not less than two-thirds (2/3) of the total votes present at said meeting, and a successor may then and there be elected to fill the vacancy thus created.

The bylaws of Association #1 provide in part as follows:

Section 5. Representation in the Recreation Condominium Association.

5.1 Number, Term and Qualifications of Representatives. There shall be three (3) Unit Owners of

> the Number One Condominium Association elected as Representatives to the Recreation Condominium Association. The election of Association Representatives shall be held at the Annual Meeting of and by the Unit Owners.
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> 5.2 Removal of Association Representatives to the Recreation Condominium Association. Any one or more of the Association Representatives may be removed, with or without cause, by a majority of the Unit Owners present at a Special Meeting held for that purpose. A successor may then and there be elected to fill the vacancy thus created…

Analysis

As a preliminary matter, the arbitrator finds it incongruous for the master association to admit on the one hand that owners are authorized to directly elect their representatives to the board, but at the same time argue that the owners cannot recall their elected representatives, particularly where, as here, the direct recall method is authorized by the bylaws of the condominium association.[7] Nonetheless, if it is shown that some material aspect of the recall procedure was inconsistent with the controlling statute, that portion of the bylaws must yield to the controlling statute. See, e.g., Woodside Village Condominium Association, Inc. v. Jahren, 806 So. 2d 452 (Fla. 2002).

An analysis of Chapter 718, Florida Statutes, the Condominium Act, does not support the conclusion that the owners in Association #1 violated the statute when recalling their representatives to the board of the master association. Chapter 718, Florida Statutes has not been specially tailored over the years to address the operation of master associations. While the legislature took a first step by amending

[7] Similarly, the argument of the master association that it alone has the authority to remove elected representatives of the two condominium associations sitting on the board of the master association has the effect on its face of disenfranchising the unit owners who elected the representatives. In a traditional condominium association, the board may not as a general proposition remove members of the board duly elected by the membership as this would infringe on the statutory right of the owners

the statute to embrace the holding of Downey v. Jungle Den Villas Recreation Association, Inc., 525 So. 2d 438 (Fla. 5th DCA 1988) by its adoption in Ch. 91-103, Laws of Florida, of the expanded definition of association contained in §718.103(2), Florida Statutes. There has been no further legislative action to assist in fitting what is otherwise essentially a square peg into a round hole. As a result, neither the election[8] provisions nor the recall provisions of the present statute have been adjusted to accommodate the unique characteristics of a Jungle Den recreation/master association which is nonetheless governed by the statute. Despite the lack of a favorable fit, the Division, pursuant to its affirmative duty to apply the statute, has ventured into this area on several occasions over the years, addressing issues such as whether individual owners are entitled to receive a copy of the master budget (In re: Petition for Declaratory Statement of Vogel v. Number One Condominium Association, Inc., Case No. 85A-401 (August 20, 1987)); whether the individual owners or the area representatives to the master are entitled to vote to waive reserves in a master association (In re: Petition for Declaratory Statement; Wynmoor Community, Case No DS 94029 (August 2, 1994)).

At present, the recall statute simply provides in relevant part:

> 718.112(2)(j) Recall of board members.--Subject to the provisions of s. 718.301, any member of the board of administration may be recalled and removed from office with or without cause by the vote or agreement in writing of a majority of all the voting interests.

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to elect their representatives. Hernandez v. Pinebark Condominium Association, Inc., Arb. Case No. 94-0531, Final Order (May 17, 1995).

[8] The statute creates more questions than answers when considering how to conduct an election in a master association. Questions such as whether the owners may nominate themselves where the documents do not contemplate an open election and whether a master association may opt out of the statutory election procedure and the method for doing so are difficult to resolve in the absence of additional direction in the statute.

Under the statute, board members may be recalled either in writing or by vote at a meeting by a majority of the total voting interests. The arbitrator rejects the master association's argument that since the condominium association documents only mention recall of the representatives to the master association by a vote taken at a meeting, recall by written ballot is unauthorized. The statute authorizes two methods of recall and controls over any documents to the contrary. Therefore, even assuming that the documents were intended to restrict the right to recall to one method to the exclusion of the other recall method, the statute controls and grants to the owners the option of two methods of recall. Compare, Oceans Four Condominium Association, Inc. v. Owners Voting for Recall, Arb. Case No. 00-0607, Final Order (May 2, 2000) (where the bylaws purport to permit a recall to occur by a majority of a quorum present at a meeting, the statue requiring the affirmative vote of a majority of the total voting interests controls); Continental Inn Condominium of Key Colony Beach, Inc. v. Unit Owners Voting for Recall, Arb. Case No. 99-3451, Final Order (December 30, 1999) (where the bylaws only permitted recalls for cause, the bylaws were superceded by the statute permitting recalls for no cause.) Based on these authorities, the arbitrator rejects the argument that the owners could not recall by ballot.

Next, the association argues that since the unit owners are not directly made members in the master association, the owners are powerless to recall their duly elected representatives. Section 718.112(2)(j), Florida Statutes provides that any member of the board of an "association" may be recalled by a majority of the total voting interests. In the Vogel declaratory statement discussed earlier, the Division

held that for purposes of receiving the annual budget, the "members" of Association #1 entitled to receive copies of the budget were the representatives to the master association. In the Wynmoor declaratory statement discussed above, the Division concluded that the voting members on the master association, and not the individual unit owners, were entitled to vote to waive master association reserves. The Division arrived at these holdings by examining the condominium or master association documents and ascertaining the members of the master. In the instant case, the documents appear to be more hybrid in form than the documents in other cases. Until very recently, individual owners were made *de facto* voting members for purposes of assessments in excess of $50 per unit and for approving the master budget where the proposed budget called for an increase of over 10% over the past year budget. Also, the bylaws of Association #1 specifically confer voter status on the individual unit owners for purposes of electing and recalling their representatives to the board of the master association. Therefore, unlike the other cases discussed herein, the documents at issue in this case appear to in effect create a second tier or hierarchy of voting rights or a de facto membership for certain limited purposes including the election and recall of the representatives on the board. Accordingly, it cannot be said that unit owners are not made voting members for the purposes of the election and recall of their representatives on the master association, and the master association has not demonstrated that it is inconsistent with Ch. 718 to confer upon those authorized to elect a board member, the ability to recall that board member.[9] It is perhaps intuitive, although not ostensibly required, to confer this

[9] There exist a number of possible configurations in this regard, none of which are explicitly authorized or prohibited by the statute. It is possible for the owners to directly elect the representative; it is possible for the board of the condominium association to select the

authority on the owners. [10]

WHEREFORE, the arbitrator hereby certifies the recall of the three master association directors, Marilyn Schwartz, Marvin Cohen, and Jerry Smiley. Effective immediately, the three replacement master association board members are Sol Bleiweiss, Norman Axelband, and Bernard Lillien. The former board members shall immediately turn over all master association official records to the replacement members, and the master association shall conduct itself in a manner consistent with this final order.

DONE AND ORDERED this 13th day of August, 2003, at Tallahassee, Leon County, Florida.

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Karl M. Scheuerman, Arbitrator
Department of Business and
Professional Regulation
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 final order has been sent by U.S. Mail to the following persons on this 13th day of August, 2003:

Edward Dicker, Esquire
Dicker, Krivok & Stoloff, P.A.
1818 Australian Ave. South
West Palm Beach, Florida 33401

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representative; or the documents may provide that the president of the condominium association is automatically appointed to the board of the master.

[10] On the other hand, where the documents do *not* confer the authority to elect on the individual owners, it would be anomalous to confer upon them the right to recall.

Michael E. Chapnick, Esquire
Katzman & Korr, P.A.
5581 West Oakland Pk. Blvd.
Second Floor
Lauderhill, Florida 33313

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Karl M. Scheuerman, Arbitrator