

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

IN RE: PETITION FOR ARBITRATION

**THE RIVER CLUB TOWNHOUSES
CONDOMINIUM ASSOCIATION, INC.,**

Petitioner,

v.

Case No. 2006-01-5806

UNIT OWNERS VOTING FOR RECALL,

Respondent.

_____ /

SUMMARY FINAL ORDER ON PETITION FOR RECALL ARBITRATION

This final order is entered pursuant to rule 61B-50.119(3), Florida Administrative Code, which provides that “[a]t any time after the filing of the petition, if no disputed issues of material fact exist, the arbitrator shall summarily enter a final order awarding relief and failing to certify the recall if the arbitrator finds that no meritorious defense exists or if substantial compliance with the requirements of the rules and statutes relating to recall has not been demonstrated, and the petition is otherwise appropriate for relief.”

On March 17, 2006, The River Club Townhouses Condominium Association, Inc., (petitioner or association) filed a petition for recall arbitration naming the group of unit owners who voted to recall the board as the respondent in accordance with rule 61B-50.107(3), Fla. Admin. Code.

Because a unit owner representative was not named in the recall agreement, on March 31, 2006, an “Order Requiring Posting and Order Allowing Respondent to Answer to Petition” was entered. The order required the petitioner to post the order,

which was accomplished on April 5, 2006, and allowed the representative of the unit owners to come forward and file an answer to the petition for recall arbitration within ten (10) days from the date of the posting of the order. The order noted that the written recall agreement appeared to be deficient and that the facts alleged in the petition were sufficient to support the board's action. The order stated that if the respondent did not dispute that the written recall agreement attached to the petition was the agreement served on the board, the decision not to certify the recall would be affirmed because the recall agreement was "fatally flawed." The respondent did not file an answer or respond in any other way to the order. Therefore, this order is entered based on the facts alleged in the petition for arbitration and the information set forth in the exhibits attached to the petition.

The River Club Townhouses is located in Dade County. It is operated and managed by The River Club Townhouses Condominium Association, Inc. There are 61 voting interests in the association. The owner of each unit is entitled to one vote. To recall the board of directors or any particular board member, the majority of the voting interests must vote in favor of the recall. Therefore, the owners of thirty-one (31) units would have to vote in favor of the recall for it to be effective.

There are three (3) members on the board of directors. On February 27, 2006, the written recall agreement was served on the board of directors by way of mail delivery on the association's president. Upon receipt, the board was unsure of what the document was intended to be. It was accompanied by a cover letter dated February 13, 2006, entitled "Petition of intend [sic] to remove current board member/directors from the River Club Association." The letter stated that the "proposal to request a \$150,000

loan is totally unacceptable,” and explained that the current board has disregarded what the majority want. The letter concluded, “We are providing the majority of signatures approving the request to remove the current board members, we will name a time to meet and name the replacements, once the board is removed. You have five complete business days to respond and you must stop all legal matters at this point until this issue is resolved. ...” The cover letter was not signed.

Attached to the cover letter are three pages of signatures, with a unit number next to each signature, under the heading, “Petition of intend (sic) to remove current board members/directors from the River Club Association.” Twenty-three signatures were on the first page, eleven signatures were on the second page, and three signatures were on the third page, for a total of 37 signatures.

On March 8, 2006, the board of directors met to discuss whether to certify the recall agreement. The board determined that the recall agreement did not comply with rule 61B-23.0028(1), Florida Administrative Code, in several respects. Basically, the minutes of the board meeting state that the recall agreement was not certified due to numerous deficiencies in the written agreement, including (1) the failure to include the names of the board members sought to be recalled; (2) the lack of recall and retain lines next to the names of the board members; (3) the failure to list any replacement board members or have a place for write-in candidates; (4) the failure to include the date of the signature; (5) the failure to provide a statement that the person signing the agreement is authorized to cast the vote for the unit; and (6) the failure to designate a unit owner representative.

Suffice it to say that the recall agreement met none of the requirements of rule 61B-23.0028(1), Fla. Admin. Code, except that of service on the association. Although a written recall agreement can fail to comply with one or two of the rule requirements and still be considered in substantial compliance with the rule, a valid recall agreement can never be considered valid if it does not list the board members sought to be recalled and provide for recall and retain spaces next to each board member's name "so that the person executing the agreement may indicate whether that individual board member should be recalled or retained." Rule 61B-23.0028(1)(b), Fla. Admin. Code.

In Courts of Inverrary Condominium Association, Inc. v. Unit Owners Voting for Recall, Case No. 02-5480, Final Order (September 19, 2002), the arbitrator noted that "[t]he cases are legion holding that in the interest of fair play, each board member sought to be recalled must be given separate consideration and accommodation in the ballot form used." See also, e.g., Olive Glen Condominium Ass'n, Inc. v. Unit Owners Voting for Recall, Case No 02-4985, Final Order Affirming Decision Not to Certify Recall (July 3, 2002); Laguna Club Condominium Ass'n, Inc. v. Unit Owners Voting for Recall, Case No. 99-1355, Summary Final Order (July 30, 1999); Board of Directors of Pinebark Condominium Ass'n, Inc. v. Lopez and Other Unit Owners, Case No. 93-0177, Summary Final Order (December 2, 1993); Isla Del Mar Condominium Ass'n, Inc. v. Unit Owners Signing the "Recall" Petition, Case No. 93-0146, Final Order (June 18, 1993).

In this case, the agreement states only that the signatories "intend to remove current board members/directors from the River Club Association." The board members are not listed and a unit owner could not vote to retain one director while recalling the

others, a clear violation of rule 61B-23.0028(1)(a) and (b), Fla. Admin. Code. See Lake Howell Arms Condo. Ass'n, Inc. v. Unit Owners Voting for Recall, Arb. Case No. 98-3766, Summary Final Order (May 22, 1998)(lack of recall and retain lines for each director is fatal and agreement is void *ab initio*).

The recall agreement was not in substantial compliance with rule 61B-23.0028, Fla. Admin. Code, and the board correctly determined not to certify the recall.¹ However, because the recall agreement was void *ab initio*, even if the board's meeting to consider the agreement was not timely held pursuant to section 718.112(2)(j)2., Florida Statutes, the recall could not be "deemed" certified as provided by section 718.112(2)(j)4., Florida Statutes.

Based on the foregoing, it is

ORDERED:

The decision of the board not to certify the recall of the board is hereby APPROVED and AFFIRMED. The association shall post this order on the condominium property.

DONE AND ENTERED this 2nd day of May, 2006, at Tallahassee, Leon County, Florida.

Diane A. Grubbs, Arbitrator
Dep't of Business and Professional Regulation
Arbitration Section
1940 North Monroe Street
Tallahassee, Florida 32399-1029

¹ If the respondent attempts another recall, the respondent should check the Department's website for information on how to proceed and use the recall ballot form to ensure compliance with the rule. The form can be obtained at the website, myflorida.com/dbpr/lsc/arbitration/index.shtml, or by calling (850) 414-6867.

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 2nd day of May, 2006:

Laura M. Manning, Esquire
SIEGFRIED, RIVERA, LERNER,
DE LA TORRE & SOBEL, P.A.
515 North Flagler Street,
Suite 701
West Palm Beach, Florida 33401
Attorney for Petitioner

Diane A. Grubbs, Arbitrator