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

IN RE: PETITION FOR ARBITRATION

BAY VISTA CONDOMINIUM ASSOCIATION, INC.,

Petitioner,

v. **Case No. 2005-04-5820**

UNIT OWNERS VOTING FOR RECALL,

Respondent.
_________________________________/

SUMMARY FINAL ORDER ON PETITION FOR RECALL ARBITRATION

Rule 61B-50.119(2), Florida Administrative Code, provides: "At any time after the filing of the petition, if no disputed issues of material fact exist, the arbitrator shall summarily enter a final order denying relief and certifying the recall if the arbitrator finds that no preliminary basis for relief has been demonstrated in the petition."

BACKGROUND

On August 23, 2005, Bay Vista Condominium Association, Inc., (association or petitioner) filed a petition for recall arbitration pursuant to rule 61B-50.105(1)(b), Florida Administrative Code, seeking affirmation of its decision not to certify a recall by written agreement. The group of unit owners who voted to recall the board members was named as the respondent in this action in accordance with section 718.112(2)(j)3., Florida Statutes (2003) and rule 61B-50.107(3), Florida Administrative Code.

An order requiring answer was entered on September 6, 2005, and sent to the unit owner representative listed on the ballot, an attorney. On September 16, 2005, the

attorney's firm filed a copy of a letter sent to a unit owner, Mr. Garvin, which stated that the Order Requiring Answer, the petition, and other materials were being sent to Mr. Garvin as the law firm was no longer involved in this matter. The letter advised Mr. Garvin to file a response to the Order Allowing Answer. On September 19, 2005, an order was entered granting the respondent an extension of time in which to file its answer due to the change in the respondent's representative.

An order requiring a supplement to the petition was entered on September 21, 2005, which, *inter alia,* directed the petitioner to supplement the petition with the specific provisions in the condominium documents that require a voting certificate for the units having more than one owner and documentation establishing that the association had enforced the voting certificate requirement in previous elections. The order also required the petitioner to file the exhibits to the minutes, which included a recording of the recall board meeting, because the minutes of the meeting were insufficient to support the grounds for rejection of the recall raised in the petition for arbitration.

On September 27, 2005, petitioner filed its supplement to the petition, including the DVD/CD recording of the recall board meeting. The supplement specifically stated that "[t]he declaration, By-Laws, and Articles of Incorporation do not include any voting certificate requirements."

On September 29, 2005, the Chief Arbitrator sent a letter to a Mr. Battistella, stating that the Chief Arbitrator had spoken to him and to Mr. Garvin by telephone and that Mr. Battistella would be recognized as the unit owner representative in this case. The letter also granted an additional extension of time in which to file the respondent's answer. The letter was filed in this case on the same day.

A case management conference was held on September 29, 2005, with counsel for the petitioner; the respondent's representative, Mr. Battistella; and the arbitrator participating. A case management order was subsequently entered on September 30, 2005. The order stated in part:

> As stated in the Order Requiring Supplement to Petition, the minutes do not support most of the grounds stated in the petition for rejecting the recall. Section 718.112(2)(j)(2), Fla. Stat., is not mentioned in the minutes, and even if it were, hand delivery of the recall agreement to the president of the board has been found to be sufficient. *See, e.g., Aqua Gardens Townhouse Ass'n v. Unit Members Voting for Recall*, Arb. Case No. 02-5861, Recall Arbitration Summary Final Order (December 24, 2002). In the minutes, all fifteen ballots were rejected, according to the minutes, for violations of statutes that do not exist, i.e. "Ch. 718.112.d.5.(j)" and rules that encompass every requirement governing recall agreements and recall at a unit owners meeting. Stating that a ballot is being rejected for violating chapter 61B-23.0027 and chapter 61B-23.0028 does not provide the specific reason the ballot is being rejected and is insufficient to allow the board to legitimately find the ballot to be invalid. The factual basis for the refusal of the board to certify the recall must be stated.
>
> However, in this case, there was a video recording of the recall board meeting that was incorporated into the minutes of the board meeting. At the time of the conference call, the recording had not been viewed, and the parties were advised that reasons for rejecting the recall raised in the recall meeting, even if not specifically stated in the minutes, could be relied upon by the petitioner to support its decision. Therefore, the petitioner was advised that it could file affidavits supporting the argument in the petition that some of the ballots were pre-marked. The ballots on their face are not obviously pre-marked, as is the case where the ballots are marked then copied for distribution or where the ballots contain computer generated "x"s in the recall/retain boxes. When the ballots do not show on their face that they have been pre-marked, the board must identify at its board meeting the ballots that were pre-marked and state that they are being rejected for that reason.
>
> After the case management conference, the arbitrator viewed the CD of the board meeting that had been provided. …Someone, apparently the president, announced that the recall was not being certified, then went down the list of ballots giving the unit number and then reciting the same statutes and rules that are recited in the minutes. No factual basis was provided. … When questions were asked of the president about what the violations recited were, he responded that they referred to violations of

> unit owners' rights and due process rights. He stated at another time that the jargon of the codes was hard to digest. The only discussion about the factual basis for rejection of the recall referred to misinformation provided to the unit owners, such as the board members not paying their maintenance fees. However, there was no mention, that the arbitrator heard, of ballots being pre-marked (sic) by someone other that the unit owner voting, and there was no identification of any ballots that were purportedly pre-marked.
>
> Therefore, unless the petitioner reviews the tape and can specify where in the meeting the pre-marking of ballots was discussed, the petitioner and respondent should not submit the affidavits relating to the issue of pre-marked ballots. It was not stated by the board as a reason for rejecting the recall, and it is not apparent from the face of any ballot.

On November 1, 2005, the petitioner filed its response to the case management order. Despite the clear language in the case management order, the petitioner submitted "affidavits" of three unit owners stating that their ballots had been pre-marked. Petitioner ignored the requirement that petitioner had to specify where in the course of the meeting these ballots specifically or the pre-marking of ballots generally were mentioned by the board as a basis for rejecting the recall agreement. Thus, the alleged pre-marking of the three ballots cannot be considered by the arbitrator because it was not a basis for the board's rejection of the written recall agreement and was not apparent from the face of the ballot. [1]

FACTS

1. The petitioner is a condominium association with 27 voting interests; therefore, 14 units must vote in favor of a recall for it to be effective.

2. On August 11, 2005, the board of directors, through its president, was served with a written recall agreement consisting of 15 separate ballots seeking the recall of at

least six of the seven board members: Peter Garcia, Daniel Guzman, Arzaz Kahn, Joseph Molnar, Brandon Spirk and Jose Nazer. Keeley Sanchez, although listed on all the ballots, was retained as a director on all of the ballots.

3. The ballots are on the form provided by the Division for a written recall ballot. The names of all seven board members are handwritten on the form. Five of the board members names are written on the five lines provided on the form, with one board member, Keeley Sanchez, written above the first line, and another board member, on some ballots Jose Nazer on some Brandon Spirk, handwritten below the last line. For the names written above and below the lines, there were no corresponding pre-printed boxes in the recall and retain columns. However, on each ballot submitted, across from Keeley Sanchez's name was a box with a check mark in the "retain" column, and across from the last board member's name was a box with a check mark in the "recall" column. The checks and boxes were hand-drawn. From looking at the ballot, one cannot determine whether the person signing the ballot placed a box and check mark into the "recall" or "retain" spaces, or whether a box was already included in the recall or retain space next to these "extra" board members.

4. On August 16, 2005, the board of directors met to determine whether to certify the written recall agreement. The minutes of the meeting, which provided the basis for the board's rejection of the recall agreement, read in part as follows:

Agenda Item B: Review of Recall Ballot/Agreement

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[1] Of course, the petitioner also failed to submit affidavits, as required. The documents submitted were entitled "affidavits," but actually were simply statements of the unit owners. They were not made under oath or affirmation before a person having authority to administer oaths, as required for affidavits.

The President presented a motion to reject the recall documents. Mr. Garcia seconded the motion. Mr. Spirk reviewed the 15 ballots rejecting them for the following Florida Statute and Code violations:

Ballot #1 Juan Arroyo Apt. 202

- Unit owned by multiples, no authorized signatory on file
- This ballot was rejected for violations of Ch. 718.112.d.5.(j), 718.112.d.5.(j)2, Ch.48.031, Ch.61b.23.0027, 61b.23,0028

Ballot #2 Natalie Smith Apt. 205

- This ballot was rejected for violations of Ch. 718.112.d.5.(j), 718.112.d.5.(j)2, Ch.48.031, Ch.61b.23.0027, 61b.23,0028

Ballot #3 Monika Sonnet Apt. 207

- This ballot was rejected for violations of Ch. 718.112.d.5.(j), 718.112.d.5.(j)2, Ch.48.031, Ch.61b.23.0027, 61b.23.0028

Ballot #4 Domenic Suppa Apt. 301

- This ballot was rejected for violations of Ch. 718.112.d.5.(j), 718.112.d.5.(j)2, Ch.48.031, Ch.61b.23.0027, 61b.23.0028

Ballot #5 Gerardo Martinez Apt. 302

- Unit owned by multiples, no authorized signatory on file
- This ballot was rejected for violations of Ch. 718.112.d.5.(j), 718.112.d.5.(j)2, Ch.48.031, Ch.61b.23.0027, 61b.23,0028

The minutes continued through the remainder of the fifteen ballots, citing the same list of statutes and rules for each of the 15 ballots and adding to the list for units 202, 302, 305, 401, 406, and 506 the second reason for rejection – that the unit was owned by more than one person and there was no authorized signatory on file. There are no other statements in the minutes regarding the reasons the written recall agreement was not certified. Although the minutes also specifically incorporate the video recording made of the meeting into the minutes, the video recording reveals that the minutes accurately recorded the basis for rejection of the written recall agreement as stated at the meeting.

5. The motion to reject the recall was passed 6–0, with Keeley Sanchez abstaining, and the association filed its petition for arbitration on August 23, 2005.

CONCLUSIONS

The arbitrator has jurisdiction over the parties to and the subject matter of this proceeding pursuant to sections 718.112(2)(j)3. and 718.1255, Florida Statutes.

The petition for arbitration contends, *inter alia*, that the recall agreement should be rejected because it was not properly served on the association. There is nothing in the minutes that provides any facts explaining how the recall agreement was served. The only mention in the minutes related to service is the statement as to each ballot that it was rejected for "violations" of "Ch.48.031." Of course, service of the recall agreement does not have to be in accordance with section 48.031, Florida Statutes, for service to be valid. Rule 61B-23.0028(1)(g), Florida Administrative Code, states that

> the written agreement or a copy shall be served on the board by certified mail or personal service. …Service of the written agreement on an officer, association manager, board member or the association's register agent will be deemed effective service on the association. …Personal service shall be effected in accordance with the procedures set out in Chapter 48, Florida Statutes, and the procedures for service of subpoenas as set out in Rule 1.410(c), Florida Rules of Civil Procedure.

The minutes do not provide any facts regarding service of the agreement; however, the petition alleges that it was "received by the board President on August 11, 2005." Reciting in the minutes that the ballot was in violation of section 48.031, Fla. Stat., without more, is insufficient to find that service was improper.[2] Further, since there is no dispute that the president of the association received the written agreement on

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[2] Section 48.031, F.S. refers to service of process generally; section 48.081 refers to service on a corporation. In the petition, petitioner argues that the recall agreement was not served by the sheriff or an authorized process server. However, section 48.021, not 48.031, refers to service by the sheriff and that section was not cited by the board.

August 11, 2005, the failure to serve the president in accordance with the statute and rule would not authorize rejection of the written recall agreement.

In addition to the lack of proper service, the petitioner mentioned several other reasons in its petition to justify the board's rejection of the written recall agreement. However, the minutes of the board meeting do not support the allegations in the petition for arbitration. The minutes of a recall board meeting must be specific, and any reason for rejecting a ballot set forth in the petition for arbitration that is not found in the minutes may not be considered by the arbitrator. Rule 61B-50.105(5)(h), Fla. Admin. Code; *see also, e.g.*, *Pendleton Club Ass'n, Inc. v. Unit Owners Voting for Recall*, Arb. Case No. 01-3686, Summary Final Order (September 28, 2001)(the board's general conclusory allegations that the recall was illegal or otherwise invalid are not sufficient; objections to ballots must be specific); *Hibiscus Gardens Condo., Inc. v. Unit Owners Voting for Recall*, Case No. 2005-00-9561, Summary Final Order, (March 31, 2005)(reasons contained in the petition which are not stated in the minutes of the board meeting may not be considered).

In this case, it could not be determined from the minutes the reasons for the rejection of the recall agreement, except as to units 202, 302, 305, 401, 406, and 506, which were identified as having multiple owners without an "authorized signatory on file." However, when the petitioner was asked to file a supplement to its petition, identifying where in the condominium documents voting certificates were required for units owned by more than one person, the petitioner in its Supplement to Recall Arbitration Petition stated that, "[t]he Declaration, By-Laws, and Articles of Incorporation do not include any voting certificate requirements." If voting certificates are not

required in the condominium documents, the failure to have a voting certificate, an "authorized signatory," on file cannot be a basis for rejecting the recall agreement. Additionally, even if there had been a voting certificate requirement, rule 61B-23.0028(3)(b)6., Fla. Admin. Code, states that "[t]he failure of the association to enforce a voting certificate requirement in past association elections and unit owner votes shall preclude the association from rejecting a written recall ballot or agreement for failing to comply with a voting certificate requirement." In the order requiring a supplement to the petition, the petitioner was directed to attach to the supplement documentation establishing that petitioner had enforced the voting certificate requirement in past elections. Petitioner failed to do so.

Nevertheless, in the petitioner's response to the case management order, filed November 1, 2005, the petitioner argued that four unit owners signing the recall ballots were not the sole owners of their units and "without the signature of all the unit owners or a voting certificate they are not authorized to act on behalf of their unit." Petitioner did not explain why the number of multiple owner ballots that were not signed by the "authorized" owner had dropped from six, as stated in the minutes, to four. The petitioner again omitted any reference to any provision in the condominium documents requiring a voting certificate, and petitioner again failed to provide any documentation showing that the petitioner had ever enforced the alleged requirement in past elections. Therefore, the lack of a voting certificate or "authorized signatory" on file with petitioner is not a legitimate basis for rejecting the recall agreement.

Because the board failed to identify any other reasons for rejecting the recall, other than the recitation of non-existent sections of the statutes and all-encompassing

rules, it cannot be found that the board's decision to deny certification of the recall was based on any legitimate reasons. Unless the board has indicated the specific ballots rejected, or recited a reason for rejection that is clear from the face of the individual ballots, the rejection of a ballot is invalid.

In *Fosca Condominium Association, Inc. v. Unit Owners Signing the Recall Agreement*, Arb. Case No. 93-0373, Summary Final Order (December 29, 1993), the arbitrator noted that if a board of directors

> decides to reject the recall effort, it carries the burden of meeting the strict requirements of the statute and rules. One of these require-ments is that the minutes must state the specific reasons why the board rejected the recall effort. Previous arbitration decisions have underscored this requirement and barred from the complaint any allegations of deficiencies in the recall petitions which were not also set out in the board meeting minutes. (citations omitted)

Rule 61B-50.105(5)(h), Fla. Admin. Code, provides, in pertinent part, that all petitions for recall arbitration must contain:

> [e]ach specific basis upon which the board based its determination not to certify the recall, including the unit number and specific defect to which each challenge applies. **Any specific reason upon which the board bases its decision not to certify the recall that is stated in the petition for recall arbitration, but absent from the board meeting minutes or attachments thereto, shall be ineffective and shall not be considered by the arbitrator.** (e.s.)

In *Board of Directors of Boca Cove Home Condominium Association, Inc. v. Martin*, Arb. Case No. 93-0261, Summary Final Order Certifying Recall (November 30, 1993), the board's responsibilities in determining whether to certify a recall were set forth as follows:

> The board of directors of an association has the obligation to act in good faith when determining whether to certify a recall agreement. If the

> majority of the voting interests have signed a recall agreement and the written agreement substantially complies with the requirements of rule 61B-23.0028, the board must certify the agreement, and the affected board member is recalled immediately. If the board decides not to certify the agreement, it must have a legitimate reason for refusing to do so and the specific reason or reasons must be set forth in the minutes of the board meeting. <u>The decision to certify the agreement or not to certify the agreement must be made by the board at the board meeting based upon legitimate grounds articulated at the meeting</u>. (e.s.)

In this case, the reasons recited in the minutes for rejecting the recall agreement were insufficient to support the board's decision not to certify the agreement. The petitioner was given the opportunity to establish that the specific reasons stated in the petition for rejecting the recall were articulated at the board meeting, but the recording of the board meeting only verified that the reasons set forth in the minutes were the only reasons given at the board meeting. Because the minutes of the board meeting do not support the allegations set forth in the petition for arbitration, those allegations cannot be considered in determining whether the board properly rejected the recall agreement. Because the reasons set forth in the minutes of the board meeting are not sufficient to support the board's rejection of the written recall agreement, and the recall agreement is not clearly deficient on its face, i.e. void *ab initio*, the written recall agreement must be certified.

It must be noted that in the case management order, the arbitrator asked the parties to address the issue of whether ballots signed on the date of the election of the board members could be considered valid. Rule 61B-23.0028(1)(i), Florida Administrative Code, provides that "written recall ballots become void with respect to the board member sought to be recalled where that board member is elected during a regularly scheduled election." Several of the ballots in this case were signed on the

day of the election; however, the petitioner did not assert or argue that ballots signed on the day of the election are invalid under the rule. Therefore, the undersigned will not consider that issue.[3]

Based on the foregoing, it is

ORDERED:

The recall of board members Peter Garcia, Daniel Guzman, Arzaz Kahn, Joseph Molnar, Brandon Spirk and Jose Nazer is hereby **CERTIFIED**. The recall is effective immediately. Any association records in the possession of any of the recalled board members shall be given to the new board of directors within five (5) days of the date of this order. As a majority of the board has been recalled, the replacement board members, Bernardo Delsa, Charles Grodson, Roland Monta, Emilia Pena, and Natalie Smith shall immediately take the seats of the recalled board members in accordance with rules 61B-23.0028(3)(b)4. and (6)(d), Florida. Administrative Code. [4]

DONE AND ORDERED this 16th day of November, 2005, at Tallahassee, Leon County, Florida.

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

[3] One of the ballots submitted, for unit 302, is dated May 8, 2005, which was several months before the August 2, 2005, election (or reelection) of the board members sought to be recalled. However, even though that ballot must be rejected pursuant to rule 61B-23.0028(1)(i), Fla. Admin. Code, the remaining ballots would still constitute a majority in favor of recall.

[4] Petitioner asserted that Monika Sonnet failed to receive any votes as a replacement candidate. Although Ms. Sonnet received one vote, it was on the ballot for Unit 302, the invalid ballot signed in May. Therefore, one seat on the board is vacant and should be filled by the new board.

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 16th day of November, 2005:

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Diane A. Grubbs, Arbitrator