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

IN RE: PETITION FOR BINDING ARBITRATION - HOA

Poinciana Village Nine Association, Inc.,

Petitioner,

v.

Unit Owners Voting for Recall,

Respondents.

Case No. 2009-04-1204

/

FINAL ORDER ON PETITION FOR RECALL

Central Issue

Should the Petitioner Homeowner Association's decision to not certify the written recall agreement served on July 22, 2009, be affirmed?

Sub-Issues

A. Has turnover of the Association from the developer to the resident homeowners occurred?

B. Are both the developer and the homeowners entitled to representation on the Board of Directors?

Based upon the below-articulated findings of fact and conclusions of law, the refusal of the Board to Certify the Recall Agreement is **AFFIRMED**.

Procedural History

On August 4, 2009, Poinciana Village Nine Association, Inc. filed a petition for binding recall arbitration, asking that the Association's decision to not certify the recall be affirmed.

On August 26, 2009, the Unit Owners Voting for Recall ("Respondent") filed an Answer asking that the recall be certified for various reasons, including the failure of the Association to timely hold a recall meeting.

The Association filed a Reply to the Answer on September 22, 2009.

Case Management Conferences were held on September 30, December 1, December 18, and December 29, 2009. Both parties attended all conferences by counsel. Paul E. DeHart, Esq., represented the Association, and Karen Wonsettler, Esq., represented the Respondent.

FINDINGS OF FACT

1. The Poinciana Village Nine Association is 1 of 10 village Associations that belong to the Master Association of Poinciana Village ("APV"), located in Osceola County, Florida.

2. Poinciana Village Nine Association, Inc. ("Village Nine") was created in October of 1981 by its Articles of Incorporation and Declaration of Use Restrictions, and Amendments thereto, all of which were duly recorded. Village Nine was incorporated under Chapter 617 of the Florida Statutes, which governs not-for-profit corporations. Chapter 720 of the Florida Statutes governs Homeowners Associations, and it was enacted in 1995.

3. Village Nine is a mobile home community, as are the other nine Village Associations. The residents own the lots upon which their mobile homes are situated.

4. Mark Taliento is a member of Village Nine's Board; he owns 101 undeveloped, vacant lots, in his capacity as President of Showcase Mobile Homes. Mr.

Taliento does not have a residence on any of his lots. His only purpose in owning the lots is to sell them.

5. Mr. Taliento purchased 103 lots in 2005, from developer Broadmoor Partners II ("Broadmoor"); he has sold 2 of those lots since that time. He sold one lot in May of 2006 and the second lot in December of 2007. Mr. Taliento is holding the remaining 101 lots out for sale in the regular course of business for Showcase Mobile Homes, Inc.

6. There exists no written succession of rights and responsibilities from developer Broadmoor to Taliento.

7. Village Nine's governing documents state that a voting interest is based upon lot ownership. There are 379 lots in Village Nine Association.

8. Although Mr. Taliento's lots are undeveloped, the remaining 278 lots are fully developed. Mr. Taliento pays a bulk assessment of $3,484.63 for his 101 lots at the end of each year. The bulk assessment equals $33.83 per lot annually. By contrast, each homeowner pays an annual assessment of $492.00, for a lot, which money is due at the beginning of the calendar year.

9. On July 22, 2009, at 9:00 a.m., Village Nine was served with 146 recall ballots. At the time the recall was served, Village Nine had 5 members on the Board:

a. Mark Taliento, receiving 143 recall votes;

b. Jerome Carpenter, receiving 139 recall votes;

c. Barbara Hahl, receiving 136 recall votes;

d. Joyce Goss, receiving 133 recall votes; and,

e. Richard Stone, receiving 129 recall votes;

10. On July 29, 2009, the Association held an "Emergency Meeting" at 3:15 p.m. to consider the recall agreement.

11. The Emergency Meeting was noticed on July 29, 2009, by posting a hand-written statement of "Emergency Meeting" at 3:15 p.m. No date or location for the meeting was stated. Also missing was information about the purpose of the meeting.

12. The emergency meeting, which was held that day, resulted in the Board voting to not certify the recall. The Board's minutes provide the following reasons for its decision:

A. The service of the recall agreement was defective, in that the time of service was not noted on the served copy;

B. The number of votes needed to recall any director is 190; the total number of ballots received was 146, so the recall is void *ab initio;*

C. Nine of the 146 ballots were deficient for various stated reasons, including—

(i) The ballot signatory not owning the property in question; and,

(ii) Payment of the assessment fee being delinquent.

13. On July 30, 2009, the Association held a follow-up Board Meeting, properly noticed, to "affirm" the previous day's refusal to certify the recall.

14. On August 4, 2009, Village Nine filed the instant Petition for Recall Arbitration asking that its decision to not certify the recall be affirmed.

15. On August 26, 2009, the Respondent filed an Answer to the Recall Petition asking that the recall be certified for various reasons, including the failure of Village Nine to timely hold a recall meeting and for considering the recall at an emergency meeting, rather than a timely, properly-noticed meeting.

16. An election of Board Members is scheduled for January 12, 2010.

CONCLUSIONS OF LAW

The arbitrator has jurisdiction over the parties and the subject matter of this dispute pursuant to §§ 720.303(10), 718.112(2)(j), and 718.1255, Fla. Stat. (2009). A Summary Final Order is appropriate because there are no disputed issues of fact. Fla. Admin. Code R. 61B-80.114 (2009).

Any member of a homeowner association's board of directors may be recalled and removed from that office, with or without cause, provided a majority of the association's voting interests agree to do so by written ballot, or agreement. Fla. Stat. §720.303 (10) (2009).

Analysis of Legal Issues

The legal issues raised by the parties, as well as the sub-issues identified *supra* are addressed below.

Village Nine argues 3 reasons to affirm its decision. One of these reasons concerns the validity of 9 ballots. That argument is not addressed herein because it is not necessary to reach that issue to determine the appropriate outcome for the recall.

The other two issues raised by Village Nine are:

1. Improper service of the Recall Agreement; and,

2. The Recall Ballots are insufficient in number to result in a Recall of any Board Member, rendering the recall void *ab Initio*.

The Respondent has raised two arguments:

1. Village Nine's emergency board meeting to consider the recall agreement was invalid, requiring certification of the recall; and,

2. Mr. Taliento, as President of Showcase Mobile Homes, Inc., is a developer whose votes do not count as part of the overall voting interests.

Issue I

Improper Service of the Recall Agreement

Village Nine argues that its decision to not certify the recall should be affirmed because service of the recall agreement was defective. The affidavit of service states that the recall agreement was served upon the Association's registered agent at 9 a.m. on July 22, 2009. Village Nine does not dispute this affidavit and has no evidence to the contrary. Nevertheless, Village Nine argues that because the time of service was not entered on the served copy, the service was invalid under § 48.031(5), Fla. Stat. (2009).

It is well established in arbitration recall case law that, where there is no dispute as to when the association received the recall agreement, the method of delivery is of no significance. The Association does not dispute the date and time stated in the affidavit of service. The law requires formal service only to determine when the agreement was received. *Camelot Homeowner's Association, Inc. v. Homeowners Voting for Recall*, Arb. Case No. 2005-06-0136, Summary Final Order (December 1, 2005), *citing Riviera Villas Condo. Assoc., Inc. v. Unit Owners Voting for Recall*, Arb. Case No. 2004-02-4696, Summary Final Order (July 6, 2004).

Accordingly, Village Nine is deemed to have been served with the written recall agreement on July 22, 2009.

Issue II

Emergency Meeting

Village Nine, having been served with the written recall agreement on July 22, 2009, was required to hold a duly-noticed recall meeting within 5 business days of that date, which was July 29, 2009. Fla. Admin. Code R. 61B-81.003(3) (2009). The language of that regulation states:

> ...The board shall hold a **duly noticed** meeting of the board to determine whether to certify (to validate or accept) the recall by written agreement within five full business days after service of the written agreement upon the board. **It shall be presumed that service of a written agreement to recall one or more directors shall not, in and of itself, constitute grounds for an emergency meeting of the board to determine whether to certify the recall** [emphasis added].

July 29, 2009, was the date the Association held an emergency meeting to consider the recall. As stated in the above-cited Rule, however, an emergency meeting is not appropriate for consideration of a recall agreement. Also problematic is the fact that the Notice of Emergency Meeting—

1. Was not "duly noticed" as set out in § 720.303(2)(c), Fla. Stat. (2009); and,

2. Contrary to the requirements of the By-Laws, at Article V, the Notice did not identify the following information concerning the meeting:

   A. Date;

   B. Location; or,

   C. Purpose.

A meeting is "duly noticed" under the statute when a non-emergency meeting is posted in a conspicuous place in the community at least 48 hours in advance of the meeting.

If the notice of a Board Meeting is defective, certification of the recall will be required, unless the election is void *ab initio*. *Windrush Condo. Ass'n., Inc. v. Unit Owners Seeking Recall*, Arb. Case No. 00-1560, Summary Final Order (Nov. 21, 2000) (Where the notice of the board meeting to consider a recall failed to include the place or agenda or time of the meeting, the notice was defective and the recall was certified.).

The emergency meeting and its notice were both insufficient to consider the recall agreement. The recall meeting held on July 30, 2009, was properly noticed, but it

was not timely held. That meeting occurred 6 business days after service of the Recall. Accordingly, that meeting is irrelevant to the issues under consideration.

In light of the fact that the Association did not properly hold a Board Meeting to consider the Recall, the next question to be considered is whether the recall is to be certified for that reason alone. Section 720.303(10)(f), Fla. Stat. addresses that question:

> If the board fails to duly notice and hold a meeting within 5 full business days after service of an agreement in writing or within 5 full business days after the adjournment of the member recall meeting, the recall shall be deemed effective and the board directors so recalled shall immediately turn over to the board all records and property of the association.

The strict remedial provisions of this statute are modified by Fla. Admin. Code R. 61B-80.102 (6) and case law, which hold that the failure to timely hold a recall board meeting or file a recall petition will not validate a recall that is void at the outset for failing to obtain a majority of the voting interests. *Castro, Philips, Hyotte, and Chapman v. Pine Island Bay Homeowner Association*, Arb Case No. 2006-04-5179, Final Order of Dismissal (February 5, 2007); *Gateland Unit Owners Voting for the Recall of Culotta*, Arb. Case No. 98-5247, Amended Summary Final Order (January 25, 1999) (where the recall effort is void *ab initio*, the board's failure to properly notice or conduct its meeting on whether to certify the recall cannot be used to validate the recall agreement); *Laguna Club Condominium Ass'n, Inc. v. Unit Owners Voting for Recall*, Arb. Case No. 99-1335, Summary Final Order (July 30, 1999) (where the recall effort was fatally flawed and the recall agreement was void *ab initio*, procedural flaws in the board's reaction to the recall cannot be used to validate the recall agreement).

Issue III

Did the Recall Obtain a Sufficient Number of Votes?

If the 146 recall ballots served on the Association were less than one-half of the number of voting interests, the recall is void *ab initio*, rendering the above-described procedural errors without effect.

The Association states that the total voting interests were 379; the Unit Owners, in contrast, argue that the total voting interests were 278 because Taliento is a developer, requiring that his 101 lots not be included with the homeowners' voting interests and reserved only for developer representatives on the Board. The question of whether Village Nine has 278 or 379 voting interests depends upon the following two determinations:

1. Is Mark Taliento a home owner and thereby entitled to vote as one; or a developer?

2. If Mark Taliento is a developer, has turnover occurred?

If Mark Taliento is a not a home owner, but a developer, then the total voting interests for non-developer board members are 278, and 140 votes are needed to recall any given board member.

Issue IV

Is Mark Taliento a Developer or a Homeowner?

The parties agreed on December 18, 2009, that Mr. Taliento is a subsequent developer within the meaning of §720.301(6)(b), Fla. Stat. (2009).

On December 29, 2009, Village Nine retracted its agreement that Mark Taliento is a subsequent developer, and it asserted a position that he is simply a homeowner of 101 undeveloped lots, entitled to vote them any way he pleased.

Chapter 720, Fla. Stat. (2009), governs Homeowners Associations, including Village Nine, to a limited extent. Even though Chapter 720, Fla. Stat. (2009), was enacted in 1995, it nevertheless applies to Village Nine, a corporation formed in 1981, due to the "Reservation of Power" clause found in § 617.0102, Fla. Stat. (2009), the chapter under which Village Nine was incorporated:

> "The Legislature has the power to amend or repeal all or part of this act at any time, and all domestic and foreign corporations subject to this act shall be governed by the amendment or repeal."

Section 720.301(6)(b), Fla. Stat. (2009) defines a developer as follows:

> "Developer is a person or entity that:
>
> (a) Creates the community served by the association; or,
>
> (b) Succeeds to the rights and liabilities of the person or entity that created the community served by the association, provided such is evidenced in writing."

Mr. Taliento, having purchased his lots from Broadmoor Partners II, the community developer, is not someone who created the community served by the association. Furthermore, because there is no document evidencing Mr. Taliento's succession to the rights and liabilities of Broadmoor Partners II, he is not a subsequent developer. Accordingly, Mr. Taliento is a homeowner, and he is entitled to vote his 101 lots in accordance with Article VII of the Articles of Incorporation.

The fact that Mr. Taliento pays 1/14th of the assessment for his lots that other homeowners do is contrary to the provisions of the Declaration, at Article III:

> "3. Both annual and special assessments shall be fixed at the same rate for each Lot subject to assessment."

Mr. Taliento pays $33.83 per lot, in arrears, while every other resident homeowner pays an assessment of $492.00 at the beginning of the calendar year.

Neither party was able to explain the special assessment rate paid by Mr. Taliento contrary to the requirements, nor was Article III of the Declaration amended to so provide. Notwithstanding this apparent violation of governing documents, Mr. Taliento's special assessment rate is not reflective of any special status he has as owner of 101 undeveloped lots.

Sub-Issues I and II
Has Turnover Occurred?
Is Representation on the Board of Directors to be shared?

Having concluded that Mr. Taliento is a homeowner, the next question is whether control of the Association has been turned over to the homeowners, or whether control of it still resides with Broadmoor Partners II? If control of the Association has been turned over to the homeowners, does that fact have any impact upon the makeup of the Board of Directors?

The parties agreed at the December 18, 2009, Case Management Conference that turnover of Village Nine had not occurred because of the language contained in §720.307, Fla. Stat. (2009). That statutory section describes the procedure for a transition of control from a developer to homeowners, as it relates to "turnover" of the Homeowners' Association. However, the provisions of that section do not apply to Village Nine, as stated in subsection (4):

> "(4) This section does not apply to a homeowners' association in existence on the effective date of this act . . . "

Village Nine was incorporated in 1981, so the provisions of § 720.307, Fla. Stat. (2009) do not apply. In light of the fact that Village Nine was incorporated under Ch. 617, Fla. Stat. (1981), that statute is the next place to look for guidance on "turnover" and the transition of power from the developer to the Association. Chapter 617, Fla.

Stat. (1981-2009), however, does not contain any language that governs either "turnover" or the transition of control from a developer to homeowners.

In the absence of any statutory guidance, the governing documents are the next source for insight as to whether—

A. The control of Village Nine has been turned over to the homeowners; and,

B. If representation on the Board of Directors is to be shared between the homeowners and developer.

Village Nine's governing documents do not address either issue. In fact, the concept of turnover and its consequence of sharing power on the Board of Directors between the developer and the homeowners is not found in any statute governing non-profit corporations until the enactment of § 720.307, Fla. Stat. (2009). In light of the fact that this section of the statute does not apply to Village Nine, there is no applicable statutory concept of either "turnover" or shared directors in this case.

None of the governing documents for Village Nine delineate a process or percentage of home ownership that results in a "turnover" of Village Nine control from the Developer to the homeowners. However, it is apparent that control of Village Nine has been turned over from Broadmoor Partners II to the homeowners, based upon the following facts:

1. The majority of the lots are owned by resident homeowners, and the governing documents provide for one vote per lot; and,

2. No developer owns any lots.

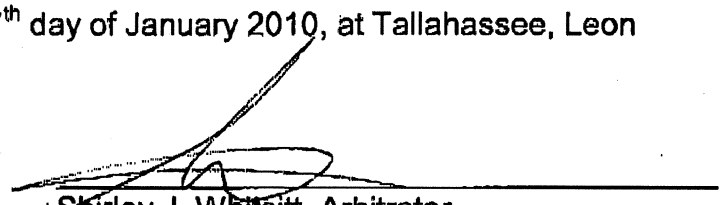
Despite the fact that control of Village Nine has been turned over from Broadmoor Partners II to the homeowners, the governing documents do not provide for a sharing of seats between the two groups on the Board of Directors

Because the homeowners control the majority of the voting interest, they are free to elect to the Board whomever they choose to vote for. In this case, the number of recall ballots totaled 146, which was short of the 190 required for the recall of any board member. In light of this fact, the procedural irregularities of the recall meeting are irrelevant.

Based upon the foregoing, **IT IS ORDERED**:

The Decision of the Board to not certify the Recall is **AFFIRMED.**

DONE AND ORDERED this 7th day of January 2010, at Tallahassee, Leon County, Florida.



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing final order was sent by facsimile on the 7th of January 2010 and by U.S. mail, postage prepaid, on the 8th day of January 2010, to:

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