

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

IN RE: PETITION FOR BINDING ARBITRATION – HOA RECALL

Villages of Rio Pinar
Community Association, Inc.,

Petitioner,

v.

Case No. 2016-03-1948

Homeowners Voting for Recall,

Respondent

James V. Rowell

Filed with
Arbitration Section

Petitioner,

NOV 16 2016

v.

Div. of FL Condos, Timeshares & Mobile Homes
Dept. of Business & Professional Regulation
Case No. 2016-03-2689

Villages of Rio Pinar
Community Association, Inc.,

Respondent.

SECOND CORRECTED SUMMARY FINAL ORDER NUNC PRO TUNC¹

The issue in this case is whether certain members of the board of directors of Villages of Rio Pinar Community Association, Inc. (the Association) have been recalled.

Relevant Procedural History

On June 30, 2016, the Association filed its petition in Arb. Case No. 2016-03-

¹ This *Second Corrected Summary Final Order Nunc Pro Tunc* corrects the date of filing of the original petition in the *Corrected Summary Final Order* from July 5, 2016, to June 30, 2016. This *Second Corrected Summary Final Order* also incorporates the change made in the *Corrected Summary Final Order* made pursuant to Rule 61B-80.122(2), Florida Administrative Code, to correct the inadvertent misstatement of the number of votes in favor of recall for each board member, and thus, the board members recalled.

1948. On July 11, 2016, the Association remitted the remaining \$150.00 of the filing fee.

On July 11, 2016, James V. Rowell (Petitioner Rowell) filed a petition which was assigned Arb. Case No. 2016-03-2689. On July 15, 2016, a Case Management Conference (CMC) was held with counsel for both parties attending.

On July 21, 2016, the Association was ordered to file an Amended Petition in Arb. Case No. 2016-03-1948. On July 22, 2016, Petitioner Rowell in Arb. Case No. 2016-03-2689 filed an emergency motion, and later the same day, an amended emergency motion, for reconsideration of the undersigned's requirement that the Association file an Amended Petition in Arb. Case No. 2016-03-1948. On July 25, 2016, the Association filed its Amended Petition. On July 26, 2016, the Association filed a response to Petitioner Rowell's July 22, 2016 amended motion for reconsideration in Arb. Case No. 2016-03-2689. On August 1, 2016, the Homeowners Voting for Recall filed an Answer to the Amended Petition in Arb. Case No. 2016-03-1948.

On September 7, 2016, a Notice of Communication and Order Consolidating Cases, Requiring Filing and Setting Case Management Conference was entered. The Order consolidated Arb. Case Nos. 2016-03-1948 and 2016-03-2689. On September 15, 2016, the Association filed the documents required by the September 7, 2016 Order.

On September 21, 2016, a second CMC was held with counsel for both parties appearing. On September 22, counsel for the Homeowners Voting for Recall filed a Request for Clarification after the second CMC regarding who opposing counsel was representing at the second CMC. On the same day, opposing counsel filed a response.

On September 29, 2016, the Association filed the documents required by the September 22, 2016 Order After Case Management Conference.

Findings of Fact

1. The Association is the legal entity responsible for the operation of the common areas within the development.
2. The homeowners voting in favor of the recall are the respondent in this matter.
3. The Association is comprised of 360 or 361 voting interests.² Regardless of whether there are 360 or 361 voting interests, 181 votes in favor of recall are necessary to attain a majority to recall a board member.
4. Under Section 4.2 of the Association's By-laws, board members serve one-year terms.

TIMELINE											
Date	Item										
2015	During 2015 the Association operated with a seven-member board of directors. See Florida Sec. of State, Div. of Corp., Feb. 13, 2015 Annual Report										
11-13-15	Notice of 11-30-15 Annual Meeting and Election (AM&E) mailed										
11-30-15	Minutes of the November 30, 2015 AM&E show the meeting was called to order at 6:00 p.m. and adjourned at 6:02 p.m. The minutes reflect that a quorum was not established. The minutes further reflect that, "2 intents [sic][notice of intent to be a candidate for the board] were received from Tom Dougherty and Eph Martin." No indication in the minutes that anyone moved to adjourn the meeting to a later date. Finally, the minutes reflect that the organizational meeting was to be held at a later date.										
3-10-16	Association operating with a seven-member board. See Florida Sec. of State, Div. of Corp., Mar. 10, 2016 Annual Report										
5-27-16	At least as early as this date, the board was aware of a recall effort. See Letter from counsel for Association to Phil Hampton dated May 27, 2016.										
6-20-16	Board served with written recall agreement. The recall ballots are in the form available from the Division's website. There are five board members subject to recall with the votes to recall each as follows: <table border="1" style="margin-left: auto; margin-right: auto;"> <thead> <tr> <th style="text-align: center;">Board Member Subject to Recall</th> <th style="text-align: center;">Number of Votes to Recall</th> </tr> </thead> <tbody> <tr> <td>1. Ephraim Martin</td> <td style="text-align: center;">220</td> </tr> <tr> <td>2. Thomas M. Dougherty</td> <td style="text-align: center;">219</td> </tr> <tr> <td>3. Lamaricus W. Lee</td> <td style="text-align: center;">173</td> </tr> <tr> <td>4. Jason J. Alday</td> <td style="text-align: center;">131</td> </tr> </tbody> </table>	Board Member Subject to Recall	Number of Votes to Recall	1. Ephraim Martin	220	2. Thomas M. Dougherty	219	3. Lamaricus W. Lee	173	4. Jason J. Alday	131
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² The parties did not agree on the number.

TIMELINE	
Date	Item
	5. Philip W. Hampton 117
	The replacement candidates named are: Tim Cates, John Fisher, Ginger Longstaff, Shelly Ott, Malaika Vasiliadis and John "Jack" Young.
6-24-16	Board held a meeting to address the recall. Notice for the meeting does not state the purpose of the meeting. According to the minutes of the meeting to address the recall, the Board did not reject any specifically identified recall ballots. Instead, the stated reason for rejecting the recall was because "it was served on the Association within sixty (60) days of an election which had already been scheduled months in advance." The parties agree that at the meeting, two board members voted to reject the recall and four board members voted to accept the recall. See Minutes of 6-24-16 meeting filed with the Amended Petition in Arb. Case No. 2016-03-1948 and the Petition in Arb. Case No. 2016-03-2689.
Undated	Notice of Election for "Election Meeting" to be held July 18, 2016, "for the purpose of electing Directors and such other business as may lawfully be conducted." Affidavit of compliance required under Section 720.306(5), Florida Statutes, states, "Notice of the Annual Meeting..." was mailed May 12, 2016.
7-18-16	According to counsel for the Association, there was no quorum for the "Election Meeting," and the meeting was adjourned to 9-15-16.
9-15-16	According to counsel for the Association, there was no quorum for this meeting.

Conclusions of Law

This final order is entered pursuant to section 720.311(1), Florida Statutes, which requires recall disputes filed with the Division to be conducted in accordance with the provisions of sections 718.112(2)(j) and 718.1255, Florida Statutes, and the rules adopted by the Division. Rule 61B-80.114, Florida Administrative Code, provides for summary disposition of a petition for recall arbitration where there are no issues of material fact in dispute.

Before addressing the recall, it is necessary to address the November 30, 2015 AM&E and the July 18, 2016 "election" and the September 15, 2016 "election." The crux of this case is the composition of the board at the time of the June 24, 2016 board meeting to address the recall.

Elections

It is clear the board was operating as a seven-member board in 2015 and at least

through March of 2016. Section 12.3 of the Association's By-laws provides as follows:

Notwithstanding the foregoing, these By-Laws may be amended after the Turnover Date by two-thirds percent (66 $\frac{2}{3}$ %) of the Board acting alone to change the number of directors on the Board. Such change shall not require the approval of the Members. Any change in the number of directors shall not take effect until the next Annual Members Meeting.

Thus, any change from a seven-member board could not take place until the November 2016 AM&E.

The minutes of the November 30, 2015 AM&E indicate a quorum was not attained, and there is no indication in the minutes that anyone moved to adjourn the meeting to a later date. The minutes indicate that only Tom Dougherty and Eph Martin had submitted a notice of intent to be a candidate for the board. What is the meaning of these facts regarding board membership after November 30, 2015?

In its filings, the Association cites to *Turner v. Butler Farms Homeowners Ass'n, Inc.*, Arb. Case No. 2015-02-8216, Summary Final Order (Nov. 24, 2015) as the controlling case for purposes of the instant case.³ As explained below, the undersigned determines otherwise.

Section 720.306(9)(a), Florida Statutes, provides:

(9) ELECTIONS AND BOARD VACANCIES.—

(a) Elections of directors must be conducted in accordance with the procedures set forth in the governing documents of the association. Except as provided in paragraph (b) [providing reasons for ineligibility], all members of the association are eligible to serve on the board of directors, and a member may nominate himself or herself as a candidate for the board at a meeting where the election is to be held; provided, however, that if the election process allows candidates to be nominated in advance of the meeting, the association is not required to allow nominations at the meeting. An election is not required unless more candidates are nominated than vacancies exist. Except as otherwise provided in the governing documents, boards of directors must be elected by a plurality of the votes cast by eligible voters. Any challenge to the election process

³ In their filings, the Homeowners Voting for Recall did not address *Butler Farms* by name.

must be commenced within 60 days after the election results are announced.

The governing documents of the Association do not provide an election process for nominating candidates in advance of the meeting. Thus, under the above quoted statute, nominations at the November 30, 2015 AM&E would have been required to be called for, even though Tom Dougherty and Eph Martin each submitted a notice of intent to be a candidate.

At the November 30, 2015 AM&E, a quorum of the membership was not attained.

Section 3.6 of the Association's By-laws provides:

3.6. Adjournment of Members Meetings. If, however, a quorum shall not be present at any Members meeting, the meeting may be adjourned as provided in the Florida Statutes. In the absence of a provision in the Florida Statutes, the Members present shall have power to adjourn the meeting and reschedule it on another date.

Section 720.306(7), Florida Statutes, provides:

(7) ADJOURNMENT.—Unless the bylaws require otherwise, adjournment of an annual or special meeting to a different date, time, or place must be announced at that meeting before an adjournment is taken, or notice must be given of the new date, time, or place pursuant to s. 720.303(2). Any business that might have been transacted on the original date of the meeting may be transacted at the adjourned meeting. If a new record date for the adjourned meeting is or must be fixed under s. 607.0707, notice of the adjourned meeting must be given to persons who are entitled to vote and are members as of the new record date but were not members as of the previous record date.

Thus, the statute controls. When a quorum was not attained, the meeting was not adjourned to another date. When that occurred, the seven members of the board at that time, and not just the two board members who had submitted notice of intent to be a candidate form, became holdover members for a one-year term in the absence of death, resignation or recall. See *Todd v. Westbrooke Villas Homeowners Ass'n, Inc.*,

Arb. Case No. 2011-02-7796, Corrected Summary Final Order *Nunc Pro Tunc* (Sept. 14, 2011)(citing *Jimenez v. The Townhomes at Villas del Campo HOA, Inc.*, Arb. Case No. 2011-01-7142, Summary Final Order (July 8, 2011) (even though Association by-laws authorized re-scheduling of annual election meeting, Association not required to do so under statute); *Drish v. Ivy Lake Estates Ass'n, Inc.*, Arb. Case No. 2008-03-9462, Summary Final Order (Feb. 19, 2009) (citing *Villamil v. Brickell Key One Condo. Ass'n, Inc.*, Arb. Case No. 94-0087, Summary Final Order (Oct. 19, 1994) (In *Villamil* no statutory affirmative duty to re-schedule election when condominium election failed due to lack of quorum at annual election meeting, thus where by-laws of homeowners' association authorized members at annual election meeting to reconvene meeting but members failed to do so, homeowners' association neither authorized nor obligated to reconvene annual election meeting)). Given the foregoing, the attempted "election" meeting of the membership on July 18, 2016, and September 15, 2016, would have been a nullity, even assuming a quorum had been attained at either meeting.

Recall

Having determined that the entire seven-member board held over after November 30, 2015, the recall served on the board on June 20, 2016, now may be considered. As noted above, the parties agree that at the June 24, 2016 meeting to address the recall, the majority of the board, i.e., four members, voted to accept the recall, and there are a sufficient number votes to recall two board members - Ephraim Martin and Thomas M. Dougherty.

Motions

The Association's original petition in Arb. Case No. 2016-03-1948 was on the

Division's form petition for use in a non-recall condominium case, accompanied by the \$50.00 filing fee for a condominium case. Nevertheless, the petition named as Respondent, "James V. Rowell as Homeowners' Representative." The petition as originally filed raised both election issues and recall issues and was accompanied by recall ballots in the form available from the Division's website for a recall in a homeowners association. The Articles of Incorporation and By-laws filed with the petition identify that they govern a homeowner's association and not a condominium. On July 11, 2016, the Association remitted the additional \$150.00 filing fee necessary for a homeowners arbitration case.

At the CMC on July 15, 2016, the Association was directed to file an Amended Petition, and an Order memorializing such was entered on July 21, 2016. Because this dispute ultimately involves a recall, the Order required the Association to file an Amended Petition using DBPR FORM HOA 6000-4, MANDATORY BINDING ARBITRATION FORM PETITION-RECALL DISPUTE.

On July 22, 2016, Petitioner Rowell under Arb. Case No. 2016-03-2689 filed an emergency motion, and later the same day, an amended emergency motion, for reconsideration of the undersigned's requirement that the Association file an Amended Petition in Arb. Case No. 2016-03-1948, using the form recall petition. Because this dispute ultimately involves a recall and Amended Petitions routinely are ordered in this forum, the motion for reconsideration will be denied. As for the request for clarification filed by counsel for the Homeowners Voting for Recall regarding opposing counsel's representation, a response was filed by opposing counsel, thus there is no need for clarification. Accordingly, it is

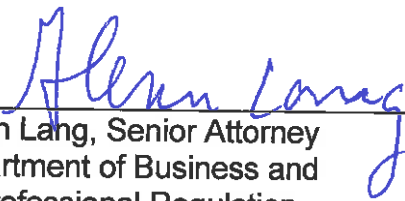
ORDERED:

1. The recall of board members Ephraim Martin and Thomas M. Dougherty is hereby CERTIFIED, and they are REMOVED as directors effective as of the date of the entry of this order. Within five (5) full business days from the effective date of this order, Ephraim Martin and Thomas M. Dougherty shall deliver any and all records of the Association in their possession to the board of directors.

2. As less than a majority of the seven-member board has been recalled, the vacancies shall be filled as provided in section 718.112(2)(j)6., Florida Statutes, and Rule 61B-81.003(3), Florida Administrative Code. "No recalled director shall be appointed by the board to fill any vacancy on the board." Fla. Admin. Code R. 61B-81.003(3).

3. The July 22, 2016 emergency motion for reconsideration is DENIED, as are any other pending motions or requests.

DONE AND ORDERED this 16th day of November, 2016, at Tallahassee, Leon County, Florida.



Glenn Lang, Senior Attorney
Department of Business and
Professional Regulation
Arbitration Section
2601 Blair Stone Rd.⁴
Tallahassee, Florida 32399-1029
Phone: (850) 414-6867; FAX: (850) 487-0870

Certificate of Service

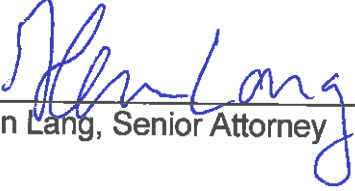
I hereby certify that a true and correct copy of the foregoing Second Correct Summary Final Order has been sent by facsimile, where available, email, where available and

⁴ Please note the change of street address.

U.S. Mail, postage pre-paid, to the following persons on this 16th day of November, 2016:

Villages of Rio Pinar Community
Association, Inc.
c/o Soundview Management
333 17th Street, Suite A
Vero Beach, FL 32960

Nancy P. Campiglia, Esq.
Your Towne Law, P.A.
1720 South Orange Ave.
Suite 302
Orlando, FL 32806
Facsimile: 407-982-2473
Email: ncampiglia@yourtownelaw.net
for Respondent in Case No. 2016-
03-1948 and Petitioner in Case No.
2016-03-2689



Glenn Lang, Senior Attorney