

# DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION

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# RECALL ARBITRATION SUBJECT MATTER INDEX

December 2005

Note: This supplement contains summaries of arbitration recall final orders entered by division arbitrators in the arbitrator program described by Sections 718.112(2)(j), and 718.1255, Florida Statutes, during the period September 1, 2005, through December 31, 2005. The final order summaries are organized by subject matter. Indexes of earlier final orders are available online at the above web address.

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## Arbitration Procedure

### ***Authority to file petition***

[Scariati v. The Villages at Emerald Lakes One Condo. Ass'n, Inc.,](#)

Case No. 2005-02-1485 (Grubbs / Final Order / September 2, 2005)

- The association's refusal to allow the board member whose recall was sought to see the recall agreement before or during the board meeting on whether to certify the recall was improper. The board has a duty to meet and review the written recall agreement in good faith. Just as a board has the duty to certify a recall properly executed by a majority of the unit owners, the board has a duty not to certify an agreement that has not been signed by a majority of the unit owners. Had the "recalled" board member been allowed to view the written recall agreement before and during the board meeting, she would have noticed the problem with the written recall agreement at that time, as she did when she finally received a copy of the recall agreement during the course of the arbitration proceeding. Thus, had the board proceeded properly in considering the recall agreement, it could have avoided this subsequent proceeding and the attendant expenses.

### ***Failure to comply with 61B-50 / Order of the arbitrator***

#### ***Generally***

[Scariati v. The Villages at Emerald Lakes One Condo. Ass'n, Inc.,](#)

Case No. 2005-02-1485 (Grubbs / Final Order / September 2, 2005)

- The basic requirement for a successful recall is that a majority of the voting interests vote to recall that board member. The purpose of all the other rule and statutory requirements is to safeguard the integrity of the process, i.e., to ensure that a recall agreement actually reflects the will of the majority and ensure that the board cannot thwart a valid recall effort supported by the majority.

### ***Withdrawal of petition / Withdrawal of written agreement***

[Barbizon Condo. Ass'n, Inc. v. Unit Owners Voting for Recall,](#)

Case No. 2005-04-9421 (Grubbs / Summary Final Order / November 22, 2005)

- Where respondent admitted that ballots were pre-marked "for the unit owners convenience," and agreed that for the good of the condominium and because elections would be held shortly the respondent would "withdraw the recall agreement," the board's decision not to certify the agreement would be approved and affirmed.
- Once a recall agreement is served on the board, the individual ballots or signatures become, in effect, fused together as the recall agreement, which then cannot be altered by withdrawing or adding ballots to it. Therefore, the responses by individual unit owners to the petition for arbitration attempting to withdraw their individual ballots were

stricken. However, the unit owner representative may "withdraw" the entire agreement, which has the same effect as if the respondent confessed error.

### **Attorney's Fees / Costs)**

### **Board's Failure to Certify Recall**

***Failure to date recall agreements / Failure of agreements to be executed within a finite period of time***

***Failure to obtain a majority of voting interests / Failure to properly calculate a majority of voting interests***

[Islander Club Condo. Ass'n, Inc. v. Unit Owners Voting for Recall,](#)

Case No. 2005-04-1875 (Mnookin / Summary Final Order / September 19, 2005)

- Where the association rejects a recall effort based, in part, on the recall failing to obtain the required number of votes to remove a board member, the board's decision to reject the recall effort was affirmed based on the unit owner representative failing to file an answer disputing the facts presented in the petition and based on the arbitrator's confirmation of the recall votes as failing to obtain a sufficient number of votes to recall a board member.

[Scariati v. The Villages at Emerald Lakes One Condo. Ass'n, Inc.,](#)

Case No. 2005-02-1485 (Grubbs / Final Order / September 2, 2005)

- The basic requirement for a successful recall is that a majority of the voting interests vote to recall that board member. The purpose of all the other rule and statutory requirements is to safeguard the integrity of the process, i.e., to ensure that a recall agreement actually reflects the will of the majority and ensure that the board cannot thwart a valid recall effort supported by the majority.

***Failure to properly serve written agreements on the board***

[Bay Vista Condo. Ass'n, Inc. v. Unit Owners Voting for Recall,](#)

Case No. 2005-04-5820 (Grubbs / Summary Final Order on Petition for Recall Arbitration / November 16, 2005)

- Reciting in the minutes that the agreement is in violation of section 48.031, without more, is insufficient to find that service was improper. Additionally, when there was no dispute that the president of the association received the recall agreement, the failure to serve the president in accordance with the statute and rule would not authorized rejection of the written recall agreement.

### **Generally**

[Scariati v. The Villages at Emerald Lakes One Condo. Ass'n, Inc.,](#)

Case No. 2005-02-1485 (Grubbs / Order Denying Motion to Dismiss / June 7, 2005)

- The pre-arbitration notice required by §718.1255(4)(b), F.S., is not necessary when a petition for arbitration challenges the board's certification of a recall, just as it is not necessary in a recall case brought by the board pursuant to §718.112(2)(j)3, F.S. When a former board member challenges the certification of her recall, the issues are the same as those that might be raised in a recall petition. In either case the question is whether the board has acted properly in fulfilling its responsibilities in accordance with the statutes and rules relating to the recall of board members. Because of the nature of a recall and the finality of the decision by the board, subject to review by an arbitrator, it is questionable whether a pre-arbitration notice in a recall case would serve any purpose, since the purpose of pre-arbitration notice is to allow the offender to correct his errors and cure his violations without the necessity of formal legal proceedings. Once a board determines that a recall is certified, it is a final decision for all practical purposes.

***Illegible or incorrect signatures / Failure to print name***

***Misleading information given to voters / Fraud***

***Proxy***

[Sea Island North III Condo. Ass'n, Inc. v. Unit Owners Voting for Recall](#),  
Case No. 2005-04-5918 (Earl / Summary Final Order / October 25, 2005)

- Proxy voted by the an individual during a recall by unit owner meeting that failed to indicate a proxy holder, failed to provide directions as to how to cast votes for each board member subject to recall and, as a majority of the members of the board were subject to recall, and failed to provide any directions as to who to vote for as replacement board members was defective.

***Qualifications of replacement candidates / Replacement candidates not properly elected (See also, Replacement Candidates)***

***Representative***

***Unit owner delinquent in assessment***

***Unit owner meeting to recall failed to comply with 61B-23.0027***

***Generally***

***Presiding officer***

***Quorum***

***Vote cast by unauthorized person***

[Sorenson v. Bridgeton North, Inc.](#),  
Case No. 2005-03-0747 (Mnookin / Summary Final Order / September 9, 2005)

- Board's failure to certify recall - vote case by unauthorized person - generally - When determining the validity of recall ballots, the signature must be that of the individual who owns the condominium unit, as of the date the board is served with the recall agreements, or by another individual with appropriate authority to sign on behalf of the record title holder. If a ballot is signed by an individual who thereafter sells his or her unit and is not a unit owner on the date the board is served with the recall agreements, the ballot is invalid.

[Sunset Palm Villas Condo. Ass'n, Inc. v. Unit Owners Voting for Recall,](#)

Case No. 2005-04-1879 (Bembry / Summary Final Order / November 3, 2005)

- Where the association's rejection of recall ballots as being signed by someone other than the unit owner went unchallenged by the unit owners voting for recall who failed to file any documents in the proceeding, the association's decision to reject the ballots and not certify the written recall agreement was upheld.

**Power of attorney**

[Harbourtowne at Country Woods Condo. Ass'n, Inc. v. Unit Owners Voting for Recall,](#)  
Case No. 2005-02-9267 (Scheuerman / [Summary Final Order](#) / July 22, 2005 and [Final Order on Motion for Rehearing](#) / September 2, 2005)

- Where an unrecorded copy of a durable power of attorney was served on the board with a recall agreement, the power of attorney was not invalid because it was not recorded.

**Proxy**

**Trusts / Trustee**

**Voting certificate**

[Bay Vista Condo. Ass'n, Inc. v. Unit Owners Voting for Recall,](#)

Case No. 2005-04-5820 (Grubbs / Summary Final Order on Petition for Recall Arbitration / November 16, 2005)

- If voting certificates are not required by the condominium documents, the failure to have a voting certificate, or "authorized signatory," on file cannot be a basis for rejecting a recall agreement. Further, even if there had been a voting certificate requirement, the association failed to establish that it had enforced the requirement in past elections.

***Vote cast improperly***

[Bay Vista Condo. Ass'n, Inc. v. Unit Owners Voting for Recall,](#)

Case No. 2005-04-5820 (Grubbs / Summary Final Order on Petition for Recall Arbitration / November 16, 2005)

- When the ballots are not obviously pre-marked, as is the case when the ballots are marked then copied for distribution or where the ballots contain computer generated

"x"s in the recall boxes, the board must identify at its board meeting the ballots that are pre-marked and state that they are being rejected for that reason.

[Sea Island North III Condo. Ass'n, Inc. v. Unit Owners Voting for Recall,](#)  
Case No. 2005-04-5918 (Earl / Summary Final Order / October 25, 2005)

- Where a single vote was taken to recall all board members subject to the recall, the unit owner meeting failed to comply with rule 61B-23.0027(3)(d), Fla. Admin. Code, which requires voting interests to vote to recall each board member separately, unless otherwise provided in the declaration or bylaws and, therefore, the vote was invalid.

***Vote withdrawn / Rescission / Added after service of petition***

[Sorenson v. Bridgeton North, Inc.,](#)  
Case No. 2005-03-0747 (Mnookin / Summary Final Order / September 9, 2005)

- Board's failure to certify recall - vote withdrawn/added after service of petition - Where the association attempts to add new recall ballots subsequent to the date on which the board was been served with the recall agreements, the new ballots are not valid for the instant recall effort because recall votes cannot be added or withdrawn after the board is served with the recall agreements.

***Written agreement form did not substantially comply with 61B-23.0028***

**Recall / Retain lines**

[Bravura I Condo. Ass'n, Inc. v. Unit Owners Voting for Recall,](#)  
Case No. 2005-05-5563 (Earl / Summary Final Order / November 10, 2005)

- Where the recall agreement consisted of a letter indicating that all the members of the board of directors were being recalled with lists of names and signatures attached in the form of a petition, with each unit owner signing directly below the prior signatory, but with no separate recall/retain spaces by which the unit owners may choose to recall or retain individual board members, the agreement inextricably linked all the board members by not permitting a unit owner to vote to recall one and retain the others, thus substantially failing to comply with rule 61B-23.0028(1)(b), Fla. Admin. Code.

[WPB Berkshire Condo. Ass'n, Inc. v. Unit Owners Voting for Recall,](#)  
Case No. 2005-04-7905 (Grubbs / Summary Final Order on Petition for Recall Arbitration / October 11, 2005)

- Although the petitioner alleged, in the course of a conference call, that at least one ballot should be rejected as "pre-marked," any ballots allegedly pre-marked would have had to be identified in the minutes to be considered as a basis for rejection by the arbitrator, unless the pre-marking is apparent from the face of the ballot.

- Where only one person is being recalled, the "pre-marking" of the ballots does not invalidate the ballot, just as the failure to include recall/retain lines on a ballot when only one person is being recalled will not invalidate the ballot.

**Written agreement held to be defective**

**Written agreement held to substantially comply**

**Class Voting**

**Conflict of Interest**

**Corporations / Chapter 617, Florida Statutes**

**Developer**

Harbourtowne at Country Woods Condo. Ass'n, Inc. v. Unit Owners Voting for Recall, Case No. 2005-02-9267 (Scheuerman / [Summary Final Order](#) / July 22, 2005 and [Final Order on Motion for Rehearing](#) / September 2, 2005)

- A subsequent developer which acquired all or most of the inventory of units from the prior subsequent developer is entitled to recall the representative of the prior subsequent developer regardless of whether the recall or re-appointment was negotiated in an assignment of developer rights. Along with the transfer of the units came the voting rights appurtenant to the units, and the subsequent developer became imbued with the voting (and recall) rights of the prior developer.
- Nothing in the statute or documents prohibited the developer from appointing an individual in his stead to take a place on the board, whether through a power of attorney or other written instrument that serves to appoint that individual to that position.

**Dispute Moot (For example, election held after recall, recalled director resigns, etc.)**

**Effect of Recall**

**Jurisdiction**

**Power of Attorney**

**Proxy**

**Reconsideration / Rehearing**

**Replacement Candidates (see *a/so*, Board's Failure to Certify Recall)**

**Standing**

[Sorenson v. Bridgeton North, Inc.](#)

Case No. 2005-03-0747 (Mnookin / Order Denying Motion for Rehearing / September 26, 2005)

- The position of the Division, as reflected in recent case law, indicates that an ousted board member or unit owner may challenge the board's determination to certify a recall attempt pursuant to section 718.1255, F.S.

**Time Limits / Legitimate Justification (see also, Unit Owners Defenses – Failure to timely file petition)**

**Unit Owner Defenses to Petition for Arbitration**

***Division advice***

***Failure of association to previously enforce voting certificate requirement***

***Failure of minutes to include specific reasons for not certifying***

[Bay Vista Condo. Ass'n, Inc. v. Unit Owners Voting for Recall,](#)

Case No. 2005-04-5820 (Grubbs / Summary Final Order on Petition for Recall Arbitration / November 16, 2005)

- When the ballots are not obviously pre-marked, as is the case when the ballots are marked then copied for distribution or where the ballots contain computer generated "x"s in the recall boxes, the board must identify at its board meeting the ballots that are pre-marked and state that they are being rejected for that reason.
- Where the minutes of the meeting did not mention the pre-marking of ballots as a reason for rejecting the recall and the recording of the board meeting did not establish that the issue was discussed as a basis for rejecting the recall, the arbitrator would not consider the three "affidavits" submitted by the petitioner to establish that some unit owners' ballots were pre-marked when it is not apparent from the face of the ballot.
- Stating that a ballot or a recall agreement is being rejected for violating rules 61B-23.0027 and 61B-23.0028, which are the recall rules encompassing all of the requirements for any recall action, does not provide specific reasons for rejecting the ballot or the recall, and is insufficient to support the rejection of the recall or of a ballot. The factual basis for the refusal of the board to certify a recall must be stated.
- Reciting in the minutes that the agreement is in violation of section 48.031, without more, is insufficient to find that service was improper. Additionally, when there was no dispute that the president of the association received the recall agreement, the failure to serve the president in accordance with the statute and rule would not authorized rejection of the written recall agreement.

[WPB Berkshire Condo. Ass'n, Inc. v. Unit Owners Voting for Recall,](#)

Case No. 2005-04-7905 (Grubbs / Summary Final Order on Petition for Recall Arbitration / October 11, 2005)

- Although the petitioner alleged, in the course of a conference call, that at least one ballot should be rejected as "pre-marked," any ballots allegedly pre-marked would have had to be identified in the minutes to be considered as a basis for rejection by the arbitrator, unless the pre-marking is apparent from the face of the ballot.
- The statement in the recall board meeting that the recall does not comply with rule 61B-23.0028, F.A.C., is the equivalent of stating that the recall is rejected because it does not comply with the law. There must be a factual basis stated for the rejection of a recall or a recall ballot. If an individual ballot is being rejected, the unit number of the rejected ballot must be identified or the ballot identified in some other way. If the written agreement as a whole is being rejected due to some defect in the forms used, the part of the ballots or agreement the board found defective must be identified.

***Failure to give proper notice of board meeting***

***Failure to have a quorum at board meeting***

***Failure to hold or timely hold board meeting***

***Failure to timely file petition (see also, Time Limits / Legitimate Justification)***

***Generally***

***No Legitimate Reasons for Failing to Certify***

***Ratification***

**Vacancies**

Harbourtowne at Country Woods Condo. Ass'n, Inc. v. Unit Owners Voting for Recall, Case No. 2005-02-9267 (Scheuerman / [Summary Final Order](#) / July 22, 2005 and [Final Order on Motion for Rehearing](#) / September 2, 2005)

- Nothing in the statute or documents prohibited the developer from appointing an individual in his stead to take place on the board, whether through a power of attorney or other written instrument that serves to appoint that individual to that position.