

DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION
Recall Procedures for Homeowners' Associations
Division of Florida Condominiums, Time Shares and Mobile Homes
Arbitration Section

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Recall Guide for Homeowners Seeking to Recall Members of Their Board of Directors.

INTRODUCTION

This guide is intended to provide a general overview of the process for recalling members of the board of directors of a homeowners' association. The laws and rules governing such recalls are subject to change. Therefore, before starting a recall, a homeowner should review the most current laws and rules.

Section 720.303(10)(a)1. of the Florida Statutes provides that a member or members of the a homeowners' association's board of directors may be removed by a vote of the majority of the association's voting interests. The statute also provides that the recall may be without cause. This means that the homeowners seeking the recall do not have to provide a reason for recalling a director. The homeowners simply have to follow the procedures of the statute and applicable administrative rules. Homeowners may recall a member or members of their board by a vote at homeowner meeting or by written recall agreement.

The statues and administrative rules applicable to recalls may be found at www.myfloridalicense.com/dbpr/lsc/statutes.html.

Additional information and resources may be found at the arbitration section's homeowners' association arbitration website:

www.myfloridalicense.com/dbpr/lsc/homeowners.html.

RECALL BY VOTE AT A MEETING

If permitted by the governing documents, Homeowners may recall board members by a vote taken during a meeting.¹ The procedural requirements for a recall at a meeting are challenging and complex. Therefore, a recall at a meeting is seldom successful and owners are strongly discouraged from attempting a recall in this manner even if the governing documents permit a recall at an owner meeting.² Therefore, this guide will focus on recall by written agreement.

¹ Fla. Stat. 720.303(10)(c)1.

² Specific procedural requirements for this type of recall may be found in Rule 61B-81.002 of the Florida Administrative Code.

WRITTEN RECALL AGREEMENT

The requirements for a recall by written agreement are contained in Rule 61B-81.003 of the Florida Administrative Code.

A “written recall agreement” simply refers to separate recall ballots signed by unit owners that are served together on the association. It is highly recommended that the Division’s approved sample recall ballot be used. It may be found at www.myfloridalicense.com/dbpr/lsc/documents/recall_agreement_ballot.pdf.³ When filled out as indicated, the Division’s form ballot will be accepted by an arbitrator as meeting the technical requirements found in the applicable statute and rule regarding the form of the ballot. This guide assumes that the Division’s form ballot is being used.

The Homeowner Representative

The homeowners⁴ should choose a person to serve as their representative. The homeowner representative coordinates the recall effort. If the board challenges the recall and petitions the Division for recall arbitration, the homeowner representative will have an opportunity to respond to the petition for arbitration filed by the board. The homeowners should choose someone who is accessible and lives in the development, will accept certified mail from the Division, and is willing to commit himself or herself to the task of coordinating the recall effort and defending the recall effort. This individual does not need to be an attorney, but should be someone who is familiar with the laws and procedures relating to recalls, and who is willing to become involved. Of course, the homeowners may choose to hire, at their own expense, an attorney to represent them.

The Recall Ballot

Use of the Division’s approved recall form ballot will help homeowners to avoid many of the pitfalls and errors made in attempted recalls. The form recall ballot consists of three parts.

Block A of the recall ballot contains an introductory paragraph stating that the purpose of the agreement is to recall board members followed by a brief description of the applicable statutes and administrative rules. A blank space is provided for the association’s name. It is important to make certain that the association’s name is correct in order to avoid confusion.

The introductory paragraph is followed by the area where the voter votes to recall or retain board members. There are blank spaces provided for listing the names of the board members whose recall is sought. Although not required, the homeowner representative or other people helping to coordinate the recall should print the names of

³ The recall ballot may also at times be referred to as the recall agreement.

⁴ “Homeowners” is used throughout this document to refer to the homeowners seeking the recall.

the board members whose recall is sought. Care should be taken to ensure correct spelling of names in order to avoid possible confusion. It is not necessary to list all the current board members, just those whose recall is sought. The form ballot provides five spaces. If the recall involves more than five board members, the form may be modified to add additional board members.

Next to each board member's name are "recall" and "retain" boxes. By marking one of these boxes, the voter chooses either to recall or to retain the individual. It is important that the voter choose to either recall or retain (not recall) each director. **The marking of these boxes must be performed by the voter. If someone other than the voter pre-marks the recall/retain boxes, the ballot will be deemed invalid.**⁵

Block B of the recall ballot provides for the vote of replacement board members to fill the vacancies created by the recall. **This portion of the ballot should only be completed if the recall seeks to remove a majority or more of the board members.**⁶ There should be at least as many replacement board members as board members whose recall is sought. This part of the ballot consists of an introductory paragraph followed by blank spaces to list replacement board member candidates. As with the recall vote, the voter must personally mark the voting box. If more replacement candidates are needed than spaces provided on the form ballot, additional spaces may be added as necessary. It should be noted that if the ballot is modified to add more spaces, it must include a space for a write-in candidate.

The replacement candidates should be persons willing to serve on the board and print these persons' names on the ballot. Ensure that the replacement candidates are eligible to serve on the board. A person might not be eligible to serve on the board for various reasons, for example, the governing documents require that a director be an owner.

Block C of the recall ballot provides spaces for the voter's printed name, signature, unit number and the date the ballot was signed. When signing the ballot, the owner should sign his or her name as listed in the official association roster. For clarity, the name listed on the association's official member roster should be used.

The person signing the ballot must be eligible to cast a vote on behalf of the unit. Typically, condominium governing documents restrict voting to owners. Ballots may be rejected in cases where the ballot was signed by a non-owner spouse or tenant. Additionally, if the voter claims to be a trustee of a trust that owns a unit or to hold a power of attorney permitting the person to vote on behalf of the unit, if not already on file with the association, a copy of the documents establishing the person's authority to vote

⁵ If the voter is physically incapable of completing a ballot due to a disability, then it may be completed by another person at the immediate direction of voter with a notation to that effect.

⁶ Where the recall results in the recall of at least a majority of the members of the board, the vacancies created by the recall are filled by the homeowners voting in favor of the recall. If the recall results in the recall of less than a majority of the members of the board, then the vacancies created by the recall may be filled by the remaining board members. Fla. Stat. § 720.303(10)(e).

on behalf of the unit needs to be provided to the association either prior to the service of the written recall agreement or attached to the ballot when the written agreement is served on the board. Where the association has suspended an owner's right to vote for nonpayment of regular assessments that are delinquent more than 90 days,⁷ after proper notice and before the recall is served, a recall ballot signed by the owner will be invalid.

Block C also provides space for the homeowner representative to list his or her contact information. This portion of the ballot should be completed by the homeowner representative before the ballots are distributed to the members. It is important because it lets voters know to whom to return completed ballots. It also is important because should the association fail to certify the recall and file for recall arbitration with the Division, the Division will need to know how to contact the homeowner representative so that the interests of the homeowners voting in favor of the recall can be represented.

Voting Certificates

A voting certificate is a document which designates one of the record title owners (or the corporate, partnership, or entity representative) who is authorized to vote on behalf of a parcel that is owned by more than one owner. Some governing documents require voting certificates. In such a case, a recall ballot might be rejected if the owners of the parcel do not have voting certificate on file with association. Therefore, before serving the recall agreement on the association, it is important to make certain that owners have voting certificates on file where required.

Service of the Written Recall Agreement

Once a sufficient number of ballots is collected, the ballots are to be served on the association together, forming the written recall agreement. It is typical that some ballots will be defective. Therefore, as many ballots as possible should be collected. Additional ballots may not be added to the recall effort after service of the written recall agreement. The written recall agreement may be served by certified mail or by personal service on any officer of the association, the association manager, a board member, or the association's registered agent.⁸

Board Meeting

The association's board of directors must hold a duly noticed meeting within five full business days after service of the written recall agreement to determine whether to certify or not to certify the recall. If the recall of a board member is certified, that board member is removed from office. Then, if a majority of the board members are recalled (more than half of the board members) replacement candidates elected by the homeowners voting in favor of the recall are seated in their places. If less than a

⁷ Fla. Stat. 720.305(3)

⁸ Fla. Admin. Code R. 61B-81.003(1)(g)

majority of the board members are recalled, the remaining board members fill the vacancies created by the recall by appointing board members of their choice.⁹

Recall Arbitration

If at the board meeting, the board fails to certify the recall as to any board member named in the recall agreement, the association must file a petition for recall arbitration with the Division within five full business days.¹⁰ The arbitration petition will be assigned to one of the Division's arbitrators.¹¹ Arbitration is an alternative to a court proceeding where a neutral third person, the arbitrator, considers the facts and arguments presented by the parties and renders a decision.

After reviewing the petition, the arbitrator may issue an order requiring the respondent the homeowners voting in favor of the recall (the respondent) to file an answer. The order requiring answer and copy of the petition and its attachments will be served on the homeowner representative by certified mail.

The order requiring answer directs the respondent to file an answer within a certain number of days. The answer should be filed by the homeowner representative or an attorney employed on behalf the homeowners voting in favor of the recall. If the homeowners disagree with the facts and reasons for not certifying the recall stated in the petition, the homeowner representative must file an answer to the petition using the Division answer form, DBPR for HOA 6000-9. This form may be found at: www.myfloridalicense.com/dbpr/lsc/documents/60009AnswertoPetition020305.pdf. A copy of the answer must be provided to the association at the time the answer is filed with the arbitrator. If no answer is filed, the arbitrator will presume that the facts stated in the petition are true and that the attachments to the petition are accurate.

After an answer is filed, the arbitrator will review it to determine if there are any disputed issues. If there are disputed issues, a hearing is held and each party is given an opportunity to present evidence through witnesses and exhibits. If there are no disputed issues, the arbitrator will decide the case based on the assertions in the petition for arbitration, the answer, and applicable law. The arbitrator also may issue orders requesting additional information or documentation from a party. It is important to respond to the arbitrator's orders within the time given in the order. Failure to comply with an order might result in a sanction against the noncompliant party. If a party needs additional time to respond to the order requiring answer or any other order, such request must be made in writing to the arbitrator. A copy of the request must be provided to other party at the time the request is filed with the arbitrator.

The arbitrator's final decision as to whether the recall should or should not be certified is presented in the form of written order, a copy of which is provided to both parties' representatives.

⁹ §720.303(10)(e)..., Fla. Stat. & Fla. Admin. Code R. 61B-81.003((3)(a)3.

¹⁰ §720.303(10)(d) & & Fla. Admin. Code R. 61B-81.003(3)(b)1.

¹¹ The Division employs full-time arbitrators who are attorneys.

Recall arbitration proceedings are conducted on an expedited basis. Therefore, the parties should be prepared to proceed at a fast pace.

What Happens if The Association Fails to Hold a Meeting or Fails to File for Recall Arbitration?

Should the association fail to timely hold a meeting to consider the recall or file a petition for recall arbitration as required by law, the recall is effective.¹² However, if board members fail to follow the law and refuse to vacate their positions, individual homeowners may have to petition for arbitration in order to give the recall effect and remove board members.¹³ To do so, a homeowner must file for arbitration using the mandatory binding arbitration petition DBPR form HOA 6000-004. A copy of this form may be found at: www.myfloridalicense.com/dbpr/lsc/documents/60004Petition--RecallDispute020305.pdf.

The petition must be accompanied by a \$200.00 filing fee. It is important to understand that where individual homeowners file the petition, the homeowners will be liable for half of the costs incurred by the Division for arbitrating the dispute.¹⁴ Additionally, the party that wins the arbitration is entitled to recover its reasonable attorney's fees and costs from the opposing party.

¹² §720.303(10)(f), Fla. Stat. . & Fla. Admin. Code R. 61B-80.102(6)

¹³ Fla. Admin. Code R. 61B-80.102(1)

¹⁴ Fla. Admin. Code R. 61B-80.124