DIVISION OF FLORIDA
LAND SALES, CONDOMINIUMS
AND MOBILE HOMES
DATE 4/9/90
DOCKET CLERK C. Blackburn

STATE OF FLORIDA
DEPARTMENT OF BUSINESS REGULATION
DIVISION OF FLORIDA LAND SALES, CONDOMINIUMS AND MOBILE HOMES
725 SOUTH BRONOUGH STREET - JOHNS BUILDING
TALLAHASSEE, FLORIDA 32399-1007

In Re:

DOCKET NO. DS89466
CASE NO. 89L-167

Petition for Declaratory Statement
Harry Benson; Fountains Association, Inc.
_____/

DECLARATORY STATEMENT

COMES NOW, the undersigned and issues this declaratory statement as Director of the Division of Florida Land Sales, Condominiums and Mobile Homes, pursuant to Sections 718.501 and 120.565, Florida Statutes.

FINDINGS OF FACT

1. On or about July 20, 1989, the Division received a Petition for Declaratory Statement from Harry Benson, a unit owner in the Fountains of Ponte Verda, a condominium. Subsequently, the Division notified the Fountains Association, Inc. of the pendency of this proceeding. The association has filed no documents in response to that notification.

2. According to the petition, Mr. Benson contests the validity of two amendments to the bylaws. The first amendment changes the percentage vote of the unit owners required to exercise the powers of the association from seventy-five percent (75%) to fifty-one percent (51%). The second amendment requires that all unit owners rent through the association, with the

association being the exclusive rental and management agent, and further requires the use of the association's standard lease form. According to the petition, in addition to the foregoing, unit owners renting their units through the association must pay a ten percent (10%) management fee to the association.

3. Petitioner seeks to challenge these two (2) amendments to the bylaws, claiming inconsistency with Sections 718.112(2)(h) and 718.112(2)(i), Florida Statutes. With reference to the first amendment, the Petitioner claims that the percentage amendment allows a limited number of local unit owners to pass bylaws favorable to their interests. With reference to the second amendment, Petitioner contends that the practice violates fair trade practices, that the unit owners may no longer control the rental of their units, and that it removes the right of the unit owner to actively screen potential renters.

CONCLUSIONS OF LAW

1. The Division has jurisdiction over this matter pursuant to Sections 718.501 and 120.565, Florida Statutes.

2. Section 718.112(2)(h)1, Florida Statutes, provides as follows:

> (h) Amendment of bylaws.-
>
> 1. The method by which the bylaws may be amended consistent with the provisions of this chapter shall be stated. If the bylaws fail to provide a method of amendment, the bylaws may be amended if the amendment is approved by the owners of not less than two-thirds of the voting interests.

Petitioner claims that the amendment to the bylaws which changed the percentage vote of the unit owners required to exercise the powers of the association from seventy-five percent (75%) to fifty-one percent (51%), violates the above-stated section. However, it is not perceived that the bylaw amendment violates that section of the Condominium Act. Those unit owners who purchased during that period of time in which a seventy-five percent (75%) vote was required to amend the bylaws were on notice that the bylaws could be amended and that conceivably the seventy-five percent (75%) vote previously required could be deleted in favor of a fifty-one percent (51%) figure. See, for example, Kroop v. Caravell Condominium, Inc., 323 So.2d 307 (Fla. 3d DCA 1975).

3. Next, Petitioner claims that the amendment to the bylaws which requires all unit owners to use the association as rental agent for their units, and further requiring use of the association's standard lease agreement, and further calling for a ten percent (10%) management fee to be paid to the association, violates Section 718.112(2)(i), Florida Statutes, providing:

> (i) Transfer fees - No charge shall be made by the association...in connection with the...lease...or other transfer of a unit unless the association is required to approve such transfer and a fee for such approval is provided for in the declaration, articles, or bylaws. Any such fee may be preset, but in no event may such fee exceed Fifty Dollars ($50.00) per applicant....Nothing in this paragraph shall be construed to prohibit an association from requiring as a condition to permitting the letting or renting of a unit, when the

> association has such authority in its documents, the depositing into an escrow account maintained by the association a security deposit in an amount not to exceed the equivalent of 1 month's rent....

According to the above-stated section, a condominium association is not permitted to charge a transfer fee in connection with the lease of a unit unless association approval is required for the lease and unless such fee if provided for in the declaration, articles, or bylaws. In no event may a fee exceed $50.00. In the declaratory statement of Ramblewood East Condominium Association, Inc. v. Division of Florida Land Sales, Condominiums and Mobile Homes, issued November 21, 1985, and as affirmed without opinion by the Fourth District Court of Appeal, the Division examined the issue of whether a rule requiring renters in that condominium to pay a use fee for the use of the common elements constituted a prohibited transfer fee. The Division determined that the use fees were being assessed in connection with the lease of a unit and were accordingly prohibited by the provisions of Section 718.112(2)(i), Florida Statutes.[1]

4. Similarly, the ten percent (10%) management fee required to be paid to the association is a fee in connection with the lease (transfer) of a unit and in order to be validly enacted, it must meet the requirements of Section 718.112, Florida Statutes. First, no charge may be made unless the association is

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[1] The statute was subsequently amended to permit an association to charge common element use fees under certain prescribed conditions. See, Section 718.111(4), Florida Statutes.

required to approve such transfer. The petition is silent on this precise issue, but assuming association approval is required for the lease, the fee for such approval must be provided in the declaration, articles, or bylaws. In the instant case, the text of the bylaw amendment provided with the petition does not mention or require the ten percent (10%) management fee and is possible that such fee only appears in the standard lease form adopted by the association. Accordingly, if the transfer fee is not expressly provided for in the condominium documents specified, but is instead provided for in the standard lease, the association may not charge the ten percent (10%) management fee. In any event, the 10% management fee[2] may not exceed $50 per applicant.

5. Petitioner also argues that the amendment to the bylaws requiring all unit owners to rent through the association violates Florida law including Section 718.112(2)(i), Florida Statute and fair trade practices laws. The Division has no authority to construe anti-trust statutes, and declines to do so. On the issue of whether the bylaw amendment making the association the exclusive rental agent violates Section 718.112(2)(i), Florida Statutes, it is not perceived that this particular subsection, dealing with transfer fees, has been violated. Petitioner has not challenged in this proceeding the reasonableness of the bylaw

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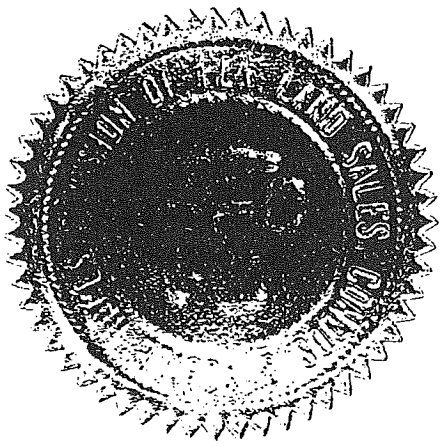
2 It is assumed that the association, in its capacity as rental agent, has complied with the applicable requirements of Chapter 475, Florida Statutes.

amendment and accordingly, that issue will not be ruled on except to note that a similar provision was upheld under a restraint on alienation challenge in Holiday Out in America at St. Lucie, Inc. v. Bowes 285 So.2d 63 (Fla. 4th DCA 1973). However, that provision was contained in the original declaration as opposed to a bylaw amendment, and as stated, the reasonableness of the subject provision under current standards is not before the Division, as the Petitioner has only asserted inconsistency with Section 718.112(2)(i), Florida Statutes. Similarly, the petition does not contain sufficient allegations of fact in order to make a determination on the issue of whether the condominium association is estopped from enforcing the new bylaw amendment against pre-existing unit owners who may have bought their unit in specific reliance on the previous rental restrictions. Compare, Enegren v. Marathon Country Club Condominium West Association, Inc., 525 So.2d 488 (Fla. 3d DCA 1988).

6. In summary, it is held that the amendment to the bylaws changing the percentage vote of the unit owners violates no specific provision of the Condominium Act. Further, that portion of the amendment requiring all unit owners to utilize the association as management agent, is not violative of Section 718.112(2)(i), Florida Statutes. Finally, the required 10% management fee is a transfer fee within the meaning of section 718.112(2)(i), Florida Statutes, and is only valid if expressly provided for in the declaration, articles or bylaws and if such fee does not exceed $50.00 per applicant.

DONE and ORDERED this 9th day of April, 1990.



Roger M. Nichols
ROGER M. NICHOLS
Assistant Secretary
Department of Business Regulation

RIGHT TO APPEAL

THIS FINAL ORDER CONSTITUTES FINAL AGENCY ACTION AND MAY BE APPEALED PURSUANT TO SECTION 120.68, FLORIDA STATUTES, AND RULE 9.110, FLORIDA RULES OF APPELLATE PROCEDURE, BY FILING A NOTICE OF APPEAL CONFORMING TO THE REQUIREMENTS OF RULE 9.110(d), FLORIDA RULES OF APPELLATE PROCEDURE, BOTH WITH THE APPROPRIATE DISTRICT COURT OF APPEAL ACCOMPANIED BY THE APPROPRIATE FILING FEE, AND WITH CONNIE D. BLACKMAN, CLERK FOR THE DIVISION OF FLORIDA LAND SALES, CONDOMINIUMS AND MOBILE HOMES, WITHIN 30 DAYS OF THE RENDITION OF THIS ORDER.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Certified U. S. Mail to Harry C. Benson, 1500 Roberts Drive, Jacksonville, Florida, 32250, this 6th day of April, 1990.

Connie D. Blackman

Connie D. Blackman, Clerk
Division of Florida Land Sales,
Condominiums and Mobile Homes

Copies furnished to:

Alex M. Knight, Chief
Bureau of Condominiums

Karl M. Scheuerman
Assistant General Counsel