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FILED  
DIVISION OF FLORIDA  
LAND SALES, CONDOMINIUMS  
AND MOBILE HOMES  
DATE 6-17-92  
CLERK Chowell

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:

PETITION FOR DECLARATORY STATEMENT  
LUDLUM LAKE TOWNHOUSES SECTION ONE  
ASSOCIATION, INC., a Florida  
corporation,

DBR DOCKET NO. DS90324

Petitioner.

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DECLARATORY STATEMENT

This Declaratory Statement is rendered by the Director of the Division of Florida Land Sales, Condominiums and Mobile Homes, Department of Business Regulation (hereinafter the "Division"), pursuant to Section 120.565, Florida Statutes, and Rule 7-3, Florida Administrative Code. The Petitioner, Ludlum Lake Townhouses Section One Association, Inc., (hereinafter "Petitioner") filed a Petition for Declaratory Statement requesting the Division's interpretation of how Section 718.112, Florida Statutes, applies to its facts. The Division makes the following findings of facts and conclusions of law based on the facts in the petition and the exhibits furnished by the Petitioner.

FINDINGS OF FACT

1. Ludlum Lake Townhouses Section One, A Condominium, is a condominium as defined by Section 718.103(9), Florida Statutes (1989), located in Dade County, Florida.

2. The Petitioner is the condominium association as defined by Section 718.103(2) of Ludlum Lake Townhouses Section One, A Condominium.

3. The declaration of condominium for Ludlum Lake Townhouses Section One, A Condominium, was recorded on February 14, 1974, in the public records of Dade County, Florida.

4. On or around December 3, 1990, the Division received a Petition for Declaratory Statement from the above-referenced Petitioner.

5. Section 4.10 of the bylaws of the Ludlum Lake Townhouses Section One Condominium Association states:

Joinder in Meeting by Approval of Minutes. The joinder of a director in the action of a meeting by signing and concurring in the minutes thereof shall constitute the presence of such director for the purpose of determining a quorum.

6. Section 6.1 of the Ludlum Lake Townhouses Section One Condominium Association bylaws states:

Officers and Election. The executive officers of the Association shall be a President, a Vice-President, a Treasurer and a Secretary, all of whom must be directors and shall be elected annually by the members and who may be peremptorily removed, without cause, by vote of the directors at any meeting. The board of directors shall fill vacancies caused by the removal or resignation of officers and shall

from time to time elect such other officers and designate their powers and duties as the board shall find to be required to manage the affairs of the Association. [Emphasis Added].

7. The Petitioner requested a declaratory statement as to whether Section 4.10 of the bylaws must be followed or whether Section 718.112(2)(c), Florida Statutes (1989) and the rules promulgated pursuant thereto, overrides this portion of the bylaws. The Petitioner further requests a declaratory statement as to whether Section 6.1 of the bylaws is the correct procedure to be followed for the removal of a director, or whether the recall procedure stated in Section 718.112, Florida Statutes (1989), must be followed.

8. Section 718.112(2)(k), Florida Statutes (1989), states in relevant part:

(k) Recall of board members. - Subject to the provisions of s. 718.301, any member of the board of administration may be recalled and removed from office with or without cause by the vote or agreement in writing by a majority of all the voting interests.

9. The petitioner's initial inquiry is more particularly governed by Rule 7D-23.001(2), Florida Administrative Code.

That rule states in relevant part:

(2) a member of the board of administration may join by written concurrence in any action taken at a meeting of the board but such concurrence may not be used for the purposes of creating a quorum. [Emphasis Added].

#### CONCLUSIONS OF LAW

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

2. The Petitioner is substantially affected by the statutory provisions cited above and has standing to seek this declaratory statement.

3. The Condominium Act governs every condominium created and existing in the State of Florida. It is well established that the law governing a particular condominium is the law in existence on the date of recording the declaration of condominium. Sans Souci v. Division of Florida Land Sales and Condominiums Department of Business Regulation, 421 So.2d 623 (Fla. 1st DCA 1982); Suntide Condominium Association, Inc. v. Division of Florida Land Sales, 463 So.2d at 317 (Fla. 1st DCA 1984). The general rule is that a statute is not to be given retroactive effect unless the statute expressly states that it is to be applied retroactively. Century Village, Inc. v. Wellington, E, F, K, L, H, J, M & G, Condominium Association, 361 So.2d 128 (Fla. 1978). Notwithstanding the above, future legislative acts may be incorporated as amendments to the original declaration, if the declaration contains express language referring to the Condominium Act as the same may be amended from time to time. See Century Village, San Souci, supra. Declarations of condominium which contain these automatic amendment clauses subject the condominium to the application of all subsequent amendments to the Condominium Act, thus avoiding the general rule against retroactive application of statutes.

4. Even in the absence of automatic amendment clauses, certain other types of amendments to the Condominium Act are

exceptions to the general rule stated above and will be applied retroactively to all condominiums. Statutes which are remedial or procedural, which do not create new or take away vested rights, but only operate in furtherance of the remedy or confirmation of rights already existing, do not come within the legal concept of a retrospective law, or the general rule against retrospective operation of statutes. City of Lakeland v. Catinella, 129 So.2d 133, 136 (Fla. 1961); City of Orlando v. Desjardins, 493 So.2d 1027 (Fla. 1986); Young v. Altenhaus, 472 So.2d 1152 (Fla. 1985); St. John's Village I, Ltd. v. Department of State, Division of Corporations, 497 So.2d 990 (Fla. 5th DCA 1986); Ziccardi v. Strother, 570 So.2d 1319 (Fla. 2d DCA 1990).

5. In the instant case, the declaration of condominium does not contain an automatic amendment clause. The Petitioner's questions should thus be examined in terms of whether the provisions of Chapter 718 which are cited in the petition are remedial or procedural such that they may be retroactively applied.

6. The Petitioner's initial inquiry as to whether a quorum of the board of directors may be obtained by the joinder and concurrence of a director in the minutes of the meeting is specifically governed by Rule 7D-23.001(2), Florida Administrative Code. This rule is procedural in that it sets out a limitation on how the board of administration may establish a quorum. The rule does not create a new right for the board or take away any vested rights, but merely relates to

the procedure by which a quorum of the board of director may be established. See Young v. Altenhaus, supra. The rule may thus be applied retroactively to the petitioner. The rule states in part:

(2) A member of the board of administration may join by written concurrence in any action taken at a meeting of the board but such concurrence may not be used for the purposes of creating a quorum.

The provision in the Petitioner's bylaws which allows the concurrence of a director in action taken at a board meeting to constitute the presence of such director for the purpose of establishing a quorum is in conflict with the above rule.

7. It should be noted that this case is different from the facts stated in Chateau Deville Condominium Association, Inc. v. Mikhail, 583 So.2d 358 (Fla. 5th DCA 1991). In that case the issue was whether a quorum was established at a special unit owner meeting by the subsequent signing of the minutes by unit owners not present at the meeting. At the time, Section 718.112(2), Florida Statutes, provided:

(b) Quorum; proxies --

1. Unless otherwise provided in the bylaws the percentage of voting rights required to make decisions and to constitute a quorum shall be a majority of the voting interests, and decisions shall be made by owners of a majority of the voting interests represented at a meeting at which a quorum is present. Unit owners may vote by proxy.

Rule 7D-23.002(10), Florida Administrative Code, provided that the written joinder or absentee ballot of a unit owner may not be utilized to establish a quorum. The association bylaws contained a provision which allowed a unit owners' signing of

the minutes of a meeting at which he was entitled to vote but failed to attend, to constitute his presence for the purpose of establishing a quorum.

The court held that the unit owners' subsequent signing of the minutes of the special meeting could be used to establish a quorum. This was so because of the exception in Section 718.112(2), Florida Statutes, which made the rule inapplicable if the bylaws contained a different provision. In that case, the bylaws did contain a contrary provision. In the instant case however, Chapter 718 does not contain a provision to the effect that the bylaws may state otherwise than as provided in Rule 7D-23.001(2), Florida Statutes. Thus, the Rule is to be applied regardless of any contrary provisions in the bylaws of the Petitioner Association.

8. Based on the foregoing, the answer to Petitioner's first inquiry is that Chapter 718, Florida Statutes, and the administrative rules promulgated thereunder, override the provision in the association bylaws which allows the concurrence of a director in the minutes of a meeting to constitute the presence of such director for the purpose of establishing a quorum.

9. The Petitioner's second inquiry as to whether the recall procedure of the current condominium act applies to the petitioner, is governed by Section 718.112(2)(k), Florida Statutes. Section 711.11(2)(a), Florida Statutes (1973), in effect at the time the Petitioner's declaration of condominium was recorded, stated that the bylaws could provide the manner

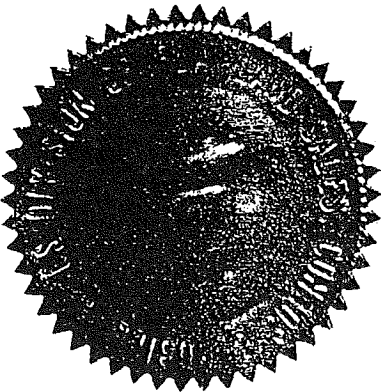
of selection and removal of officers and boards. The current statute provides the procedure by which unit owners may utilize the remedy of recall, and requires the bylaws to contain that procedure. The current statute does not create any rights for unit owners, nor does the statute take away vested rights. The statute simply operates in furtherance of the remedy of recall, which remedy was already provided by the earlier versions of Chapter 718, Florida Statutes. See City of Lakeland, supra, at 136. The statute is thus both remedial and procedural. Pursuant to Section 718.112(2)(k), Florida Statutes (1989), a director may be removed with or without cause by a vote or agreement in writing by a majority of all the voting interests. It is unclear whether Section 6.1 of the Petitioner's bylaws refers to removal of directors as executive officers only, or whether the provision refers to removal of directors both as executive officers and as directors. The Condominium Act, at all times relevant herein, has provided that the bylaws must contain the manner of selection and removal of the officers and board members. The provision in the Petitioner's declaration of condominium allowing the board to remove officers, is not inconsistent with the Condominium Act. However, if the association interprets the provision in Section 6.1 of the bylaws as allowing a director to be removed by the vote of the other directors at any meeting, such interpretation conflicts with Section 718.112(2)(k), Florida Statutes.

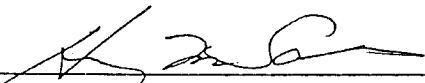


Pursuant to the discussion and cases cited in the preceding paragraph, the Division declares that Section 718.112(2)(k), Florida Statutes, overrides the provision in the association bylaws to the extent that the provision purports to allow the board of directors to remove a director.

WHEREFORE, the Division DECLARES that Section 4.10 of the Ludlum Lake Townhouses, Section One Association bylaws is in conflict with Chapter 718, Florida Statutes, and is thus invalid. The Division further declares that Section 718.112(2)(k), Florida Statutes, overrides Section 6.1 of the Ludlum Lake Townhouses Section One Association bylaws, to the extent that the provision in the bylaws is interpreted to allow the board of directors to remove a director.

DONE AND ORDERED this 17<sup>th</sup> day of June, 1992.



  
HENRY M. SOLARES, DIRECTOR  
Division of Florida Land Sales,  
Condominiums and Mobile Homes  
Department of Business Regulation  
State of Florida

RIGHT TO APPEAL

THIS DECLARATORY STATEMENT, WHICH CONSTITUTES FINAL AGENCY ACTION, 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 FEES, AND WITH THIS AGENCY WITHIN 30 DAYS OF THIS ORDER.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. Mail to BARBARA PETERSON, Ludlum Lake Townhouses, 7077 Northwest 169th Street, Hialeah, Florida 33015, this 17<sup>th</sup> day of June, 1992.

  
CAROLYN D. HOWARD, DOCKET CLERK

Copies furnished to:

Faye S. Mayberry, Chief  
Bureau of Condominiums

Kathryn E. Price  
Assistant General Counsel