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Final Order No. BPR-95-01863 Date 4-17-95

**FILED**

Dept. of Business and Professional Regulation  
**AGENCY CLERK**

Sarah Wachman, Agency Clerk

By: Brandon S. Moore

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

IN RE:

Petition for Declaratory Statement,  
James Sylak

DBPR Docket No. DS94295  
Legal No. 94L-0959

**AMENDED FINAL DECLARATORY STATEMENT**

Comes now, the undersigned as Director of the Division of Florida Land Sales, Condominiums, and Mobile Homes, and issues this Declaratory Statement as follows:

**PROCEDURAL STATEMENT**

The original Declaratory Statement was issued in this case on December 30, 1994. However, a member of the public objected to the manner in which notice of receipt of the Petition for Declaratory Statement was given in this case, and as an accommodation, notice was published in the Florida Administrative Weekly, despite the fact that each potentially interested person had been personally contacted and offered an opportunity to intervene. Upon publication in the Florida Administrative Weekly, no person has petitioned to intervene in this proceeding, and the Division hereby enters its amended Final Declaratory Statement.

### FINDINGS OF FACT

1. On July 26, 1994, the Division received a Petition for Declaratory Statement submitted by Petitioner James Sylak. Petitioner is the owner of unit 3B6 in Newport I, a Condominium. Petitioner seeks a declaratory statement regarding whether the developer of his project is entitled to vote for a majority of the board of administration of the condominium association. The petition was supplemented with additional information on October 21, 1994.

2. According to the petition, Newport I Condominium was the first of a number of independent and separate condominiums planned to comprise the Newport Condominium Development. All condominiums planned to be included within the project were, according to the declaration, to be operated by a single association, the Newport Condominium Association, Inc. Newport I Condominium consists of 144 residential units developed as a phase condominium. Phases 1 through 6 were submitted to the condominium form of ownership through recordation of the original declaration of condominium and five amendments thereto. The seventh and last phase was never submitted to the condominium form of ownership, and the time for adding phase 7 has expired.

3. The creating developer of Newport I is Developers of Newport, Inc. The developer corporation was administratively dissolved in August of 1993 for failure to file its annual report. The developer entity through its principal Charles Tapalian was

specifically advised of the pendency of this declaratory statement proceeding, and although initially the developer indicated an intent to join in the proceeding, ultimately the developer declined to join as a party in this proceeding.

4. The Newport II Condominium was created on January 27, 1989, through recordation of its declaration of condominium. However, instead of being operated by the Newport Condominium Association, Inc., as contemplated by the declarations of condominium of Newport I and II, the developer set up a separate condominium association, the Newport II Condominium Association. Newport II contains forty-eight (48) units. Only phase 1 of Newport II was ever created. Originally, the declaration called for the condominium to contain 7 phases, all of which were to be added to the condominium within 6 years of 1989.

5. According to the information submitted with the petition for declaratory statement and supplemental materials, the developer no longer owns any units at the Newport I and II condominiums, and is not currently offering for sale or lease any units in condominiums I and II. There is no construction activity anywhere within the entire project, nor has there been any construction activity for the past several years. The land upon which future condominiums were planned to be built is still titled in the developer's name, although there is some indication that foreclosure proceedings are pending against the developer as owner of the undeveloped property.

6. Three of the five current board members were appointed by the developer in the last election of the Newport Condominium Association, Inc., held on February 11, 1994.

#### CONCLUSIONS OF LAW

1. The Division has jurisdiction over the parties and subject matter of this action pursuant to section 120.565, Florida Statutes, and section 718.501, Florida Statutes.

2. The issue presented is whether the developer is entitled to vote for a majority of the board of administration of the Newport Condominium Association, Inc., the condominium association which operates Newport I, a Condominium.

3. Section 718.301, Florida Statutes, provides as follows:

(1) . . . Unit owners other than the developer are entitled to elect not less than a majority of the members of the board of administration of an association:

(a) Three years after 50 percent of the units that will be operated ultimately by the association have been conveyed to purchasers;

(b) Three months after 90 percent of the units that will be operated ultimately by the association have been conveyed to purchasers;

(c) When all the units that will be operated ultimately by the association have been completed, some of them have been conveyed to purchasers, and none of the others are being offered for sale by the developer in the ordinary course of business;

(d) When some of the units have been conveyed to purchasers and none of the others are being constructed or offered for sale by the developer in the ordinary course of business;

(e) Seven years after recordation of the declaration of condominium; or, in the case of an association which may ultimately operate

more than one condominium, 7 years after recordation of the declaration for the first condominium it operates; or, in the case of an association operating a phase condominium created pursuant to s. 718.403, 7 years after recordation of the declaration creating the initial phase, whichever occurs first. The developer is entitled to elect at least one member of the board of administration of an association as long as the developer holds for sale in the ordinary course of business at least 5 percent, in condominiums with fewer than 500 units, and 2 percent, in condominiums with more than 500 units, of the units in a condominium operated by the association. Following the time the developer relinquishes control of the association, the developer may exercise the right to vote any developer-owned units in the same manner as any other unit owner except for purposes of reacquiring control of the association or selecting the majority members of the board of administration. [Emphasis added].

4. In accordance with the portion of the statute set forth above, unit owners other than the developer are entitled to turnover of control of the association from developer control upon the first occurrence of any of the conditions set forth therein. Turnover of control may either be triggered<sup>1</sup> through the percentage sellout formulations provided for by section 718.301(1)(a) and (b), Florida Statutes, or may in the alternative be triggered by a cessation of sales and construction activity as provided for in section 718.301(1)(c) and (d), Florida Statutes. In the instant

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<sup>1</sup>Even if the developer had sold the bulk of its inventory to a separate investor, but later regained title to those units through foreclosure or deed in lieu of foreclosure, turnover as triggered by the original conveyance to the investor would have been triggered irreversibly. Hamptons Development Corporation of Dade v. Division of Florida Land Sales, Condominiums and Mobile Homes, 519 So. 2d 661 (Fla. 3rd DCA 1988).

case, under the operation of the statute, turnover should already have occurred in accordance with section 718.301(1)(d), Florida Statutes. According to this portion of the statute, when some of the units have been conveyed to purchasers, and none of the others are being constructed or offered for sale by the developer in the ordinary course of business, turnover is instantly triggered. The facts of this case fit easily into the parameters set forth in that section, and turnover should have already occurred in this development.

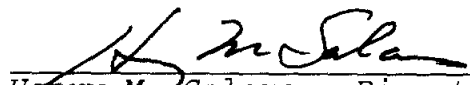
5. The ability to elect a majority of the board of directors substantially affects non-developer unit owners. Bishop Associates Limited Partnership v. Belkin and Division of Florida Land Sales, Condominiums and Mobile Homes, 521 So. 2d 158 (Fla. 1st DCA 1988). Until the non-developer unit owners control the association, the association may not institute, maintain, settle or appeal actions in its own name on its own behalf. Section 718.111(3), Florida Statutes. Compare, Toppino & Sons v. Seawatch at Marathon Condominium Association, Inc., No. 80,873 (Fla. Nov. 14, 1994). Once turnover has been triggered in accordance with the provisions of section 718.301, Florida Statutes, the developer, required to relinquish control, may not re-assert control of the board. Section 718.301(1), Florida Statutes; Bay Yacht Club Condominium Association, Inc., Declaratory Statement (Division of Florida Land Sales, Condominiums and Mobile Homes, Feb. 4, 1983). While the

developer of a condominium is statutorily entitled to control the affairs of the association for the period set forth in the statute, and while the right to control the affairs of the condominium association for the period set forth in the statute is in the nature of a substantive vested right (Gertinisan v. Division of Florida Land Sales, Condominiums and Mobile Homes, 16 F.A.L.R. 833 (Fla. D.O.A.H., Jan. 14, 1994)), once the period of entitlement in the statute ends, turnover is triggered and thereafter the developer may not lawfully elect a majority. There appears in the record no justification for the developer's continuous refusal to turn over control of the association.

Wherefore, based on the foregoing, it is declared that the developer is not entitled to vote for a majority of the board, and that the appointments made by the developer in the election held February 11, 1994, are null and void. The remaining two unit owner-appointed directors may, in accordance with Rule 61B-23.0021(13), name replacement board members for the three vacancies.

DONE AND ORDERED this 13<sup>th</sup> day of April, 1995, at Tallahassee, Leon County, Florida.



  
Henry M. Solares, Director  
Department of Business and  
Professional Regulation  
Northwood Centre  
1940 North Monroe Street  
Tallahassee, Florida 32399-1030

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to James Sylak, 175 Kings Highway, #3B6, Port Charlotte, Florida 33983, this \_\_\_\_\_ day of \_\_\_\_\_ 1995.

\_\_\_\_\_  
Carolyn Howard, Docket Clerk

RIGHT TO APPEAL

THIS FINAL ORDER CONSTITUTES FINAL AGENCY ACTION AND MAY BE APPEALED BY THE PETITIONER 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 CAROLYN HOWARD, DOCKET CLERK FOR THE DIVISION OF FLORIDA LAND SALES, CONDOMINIUM, AND MOBILE HOMES, WITHIN THIRTY (30) DAYS OF THE RENDITION OF THIS FINAL ORDER.

Copies furnished to:

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