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Final Order No. BPR-96-05128 Date 7-19-96

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Dept. of Business and Professional Regulation

AGENCY CLERK

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By: Brandon L. [Signature]

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

IN RE: PETITION FOR DECLARATORY STATEMENT

HOLLYBROOK GOLF AND TENNIS
CLUB CONDOMINIUM, INC.,

Petitioner.

Docket No. DS96193

_____ /

DECLARATORY STATEMENT

The Department of Business and Professional Regulation, Division of Florida Land Sales, Condominiums and Mobile Homes (Division) hereby issues this Declaratory Statement pursuant to sections 718.501 and 120.565, Florida Statutes.

FINDINGS OF FACTS

1. On March 14, 1996, the Division received a petition for declaratory statement from Hollybrook Golf and Tennis Club Condominium, Inc. (Petitioner). Petitioner requests a declaratory statement as to two issues: (1) whether a bylaw requiring all members of the board of directors to be permanent residents who have occupied their units for no less than 9 months of the year before their nomination and who will continue to occupy their units for at least 9 months of each year during their tenure in office is enforceable under section 718.112(2)(d)3, Florida Statutes, and Florida Administrative Code Rule 61B-23.0021(5) and (9); and (2) if so, may the association require each candidate for election to the board to sign an affidavit attesting to his or her qualifying under the residency bylaw as a precondition to placing the candidate's name on the ballot?

2. On April 5, 1996, the Division published notice of the petition for declaratory statement in the Florida Administrative Weekly. No requests to intervene were received.

3. Petitioner is the association charged with the operation and maintenance of a phase condominium known as Hollybrook Golf and Tennis Club Condominium, which consists of 1,902 units and is located in Pembroke Pines, Broward County, Florida. Petitioner is incorporated under chapter 617, Florida Statutes, as a not for profit corporation. Art. II, § 1, By-Laws of Hollybrook Golf and Tennis Club Condominium Association, Inc. (hereinafter By-Laws).

4. The condominium was created by the filing of the declaration in the public records of Broward County, Florida, on September 5, 1973. Declaration of Condominium, Hollybrook Golf and Tennis Club Condominium (hereinafter "declaration").

5. The bylaws of the association provide that representative directors are elected by unit owners in each phase.

6. Article V, section 2 of the By-Laws of the association provide, in part as follows:

All members shall be permanent residents, as herein defined, and Directors shall be elected from the Phase or Tower in which they reside.

* * * *

A permanent resident is defined to mean an adult unit owner who has occupied a unit in Hollybrook for not less than nine (9) months during the year immediately preceeding [sic] his/her nomination or filing a Notice of Candidacy, and will continue to own and occupy a unit for not less than nine (9) months each year during his/her term of office.

7. Article V, section 9(a)(2) and (3) provide as follows:

9. ELECTION OF OFFICERS:

(a) Qualifications:

* * * *

(2) A Candidate for an elective office shall take, sign or subscribe to an oath of affirmation in writing substantially as follows:

"I, _____, being duly sworn do depose and say, that I am a candidate for the office of _____ and no other office, I am a permanent resident of the Hollybrook Condominium Complex as defined in the Hollybrook By-Laws, in good standing, residing in Building, Apartment No. _____

Signature

PRINT NAME

Sworn to and Subscribed before me,
this day of , of 19
at Pembroke Pines, Broward County, Florida."

(3) If a candidate fails to comply with the provisions of this section, his name shall not appear on the ballot.

CONCLUSIONS OF LAW

The Division has jurisdiction to issue this Declaratory Statement pursuant to section 120.565, Florida Statutes. The Petitioner is an "association" within the meaning of section 718.103(2), Florida Statutes (1995).

Generally, the Condominium Act in effect on the date that the declaration of condominium was recorded controls over later versions of the law. *Suntide Condominium Association, Inc. v. Division of Florida Land Sales & Condominiums, Department of Business Regulation*, 463 So. 2d 314 (Fla. 1st DCA 1984), *review denied*, 469 So. 2d 750 (Fla. 1985) (grounded on constitutional prohibition against impairment of contracts), *but see Rothfleisch v. Cantor*, 534 So. 2d 823 (Fla. 4th DCA 1988)(applying only the law in existence on date of recordation of declaration would result in a "morass of legal entanglement where no holding in any one condominium case could be precedent for any other."). However, where the governing documents adopt all amendments to the Condominium Act, then the current version of the statute is applicable. *Halpern v. Retirement Builders, Inc.*, 507 So. 2d 622 (Fla. 4th DCA 1987), *review denied*, 518 So. 2d 1277 (Fla. 1987).

The declaration provides that "[e]ach unit shall be governed by, and each unit owner shall comply with . . . the laws of the State of Florida as they may exist from time to time." Art. XIV, declaration. Subsequent amendments to the declaration have been filed pursuant to the provisions of chapter 718, Florida Statutes. See the First Amendment to the Second Amendment to the Declaration of Condominium, which was filed pursuant to section 718.104(4)(e), Florida Statutes (1979).

Article I, § 1 of the association's bylaws provide, in part with emphasis added, as follows:

These By-laws, together with the Declaration of Condominium and it's

[sic] exhibits, Chapter 711 and Chapter 617, Florida Statutes, 1970, and all amendments thereto . . . shall govern and control the condominium project.

The association's bylaws, which are incorporated into the declaration as section II, expressly adopt all amendments to the Condominium Act, which at the time was chapter 711, Florida Statutes (1973). Chapter 711, Florida Statutes was repealed with the enactment of chapter 718, Florida Statutes, a more comprehensive regulatory chapter in 1976. Ch. 76-222, Laws of Fla. Because the governing documents expressly adopt all amendments to the Condominium Act, section 718.112, Florida Statutes (1995), is applicable to Hollybrook Golf and Tennis Club Condominium.¹

The operation of the association is controlled by its articles of incorporation and bylaws. Fla. Stat. § 718.112(1). Section 718.112(2), Florida Statutes, provides that an association's bylaws shall provide for the enumerated operational aspects of the association, e.g. administration, budget, voting, and so on. If the bylaws do not provide for any of the enumerated matters, or are in conflict with the mandatory provisions, then the provisions of section 718.112(2), Florida Statutes, control. Fla. Stat. §§ 718.102 (every condominium in Florida is subject to the Condominium Act) and 718.104(4)(l) (declaration may not have provisions inconsistent with Condominium Act); *S & T Anchorage, Inc. v. Lewis*, 575 So. 2d 696 (Fla. 3d DCA 1991) (bylaws and articles must be consistent with declaration, which is the superior document governing the corporation), *review denied*, 626 So. 2d 2107 (Fla. 1993).

The bylaws of the association as originally recorded contained a residency qualification for a majority of the board, which provided as follows:

Of the permanent Board, it shall be a requirement that at least four (4) of the seven (7) Directors be permanent residents of the condominium.

¹ Section 711.11, Florida Statutes (1973), did not contain the language found in section 718.112(2)(d)3, Florida Statutes (1995), at issue herein, or provide for the selection or qualification of board members. Section 711.11(2)(a), Florida Statutes (1973), mandated that the bylaws of a condominium association provide:

The form of administration, indicating the title of the officers and board of administration, if any, and specifying the powers, duties, manner of selection and removal, and compensation, if any, of officers and boards

occupying their apartments for at least ten (10) out of any twelve (12) consecutive months.

This sentence was deleted by an amendment filed by the developer on January 23, 1976. Art. II, Amends. to Declaration (filed in Broward County, Fla. on Jan. 23, 1976). At some point, the residency requirement was readopted with a change from ten months to nine.²

Section 718.112(2)(d)1, Florida Statutes, provides that "[a]ny unit owner desiring to be a candidate for board membership shall comply with subparagraph 3." Section 718.112(2)(d)3, Florida Statutes, requires an association to send a first notice of election to every unit owner at least 60 days before the scheduled election. In addition, this section provides, in part with emphasis added, as follows:

Any unit owner or other eligible person desiring to be a candidate for the board of administration must give written notice to the association not less than 40 days before a scheduled election.

Florida Administrative Code Rule 61B-23.0021(5) provides, in part with emphasis added, as follows:

[A]ny unit owner or other eligible person desiring to be a candidate for the board of administration shall give written notice to the association not less than 40 days before a scheduled election.

Florida Administrative Code Rule 61B-23.0021(6) provides in part with emphasis added, as follows:

Upon receipt by the association of any timely submitted written notice by personal delivery that **a unit owner** or other eligible person desires to be a candidate for the board of administration, the association shall issue a written receipt acknowledging delivery of the written notice.

Florida Administrative Code Rule 61B-23.0021(9) provides, in part with emphasis added, as follows:

The written ballot shall indicate in alphabetical order by surname, **each and every unit owner** or other eligible person who desires to be a candidate for the board of administration and who gave written notice

² Handwritten notations on the bylaws presented with the petition indicate that the present residency restrictions were adopted on December 18, 1980.

to the association not less than 40 days before a scheduled election.

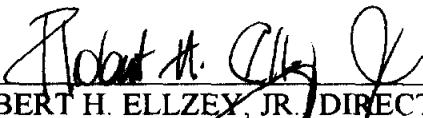
The Condominium Act states that every unit owner has the right to be a candidate for the board of directors. Fla. Stat. § 718.112(2)(d)1, 3. The Division has addressed the issue of a unit owner's right to be a candidate for the board in at least two prior declaratory statements. In *The Village of Kings Creek Condominium Association v. Division of Florida Land Sales, Condominiums, and Mobile Homes*, Case No. _____ (DBPR July 18, 1985), it was found that the declaration cannot contain a provision prohibiting a non-resident unit owner from serving on the board as this violates section 718.112(2)(d)1, Florida Statutes (1985), which permits any unit owner to be nominated at meeting. In *Bay Yacht Club Condominium Association, Inc. v. Division of Florida Land Sales and Condominiums, Department of Business Regulation*, Case No. _____ (DBPR Feb. 4, 1983), the Division stated that "[s]ection 718.112(2)(d), Florida Statutes, prohibits the bylaws from so restricting 'any unit owner,' which includes the developer" from being nominated as a candidate for the board of directors.

The residency requirement in the association's bylaws, which prohibits unit owners who do not reside in the condominium for a minimum of 9 months each year from being candidates for the board of directors conflicts with section 718.112(2)(d), Florida Statutes, and is therefore inconsistent with section 718.104(4)(l), Florida Statutes.

It is ORDERED that under section 718.112(2)(d)3, Florida Statutes (1995), and Florida Administrative Code Rule 61B-23.0021(5), (9), every unit owner in the Hollybrook Golf and Tennis Club Condominium Association has a right to be a candidate for a position on the board of directors; therefore, the residency requirements in article V of the bylaws is not enforceable.

DONE this 18th day of September, 1996, at Tallahassee, Leon County, Florida.




ROBERT H. ELLZEY, JR., DIRECTOR
Division of Florida Land Sales, Condominiums
and Mobile Homes
Department of Business and Professional
Regulation
Northwood Centre
1940 North Monroe Street
Tallahassee, Florida 32399-1030

RIGHT TO APPEAL

THIS DECLARATORY STATEMENT CONSTITUTES FINAL AGENCY ACTION AND MAY BE APPEALED BY 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 APPROPRIATE FILING FEES, AND WITH THE DOCKET CLERK FOR THE DIVISION OF FLORIDA LAND SALES, CONDOMINIUMS AND MOBILE HOMES, WITHIN 30 DAYS OF THE RENDITION OF THIS DECLARATORY STATEMENT.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Anthony A. Kalliche, Esquire, Becker & Poliakoff, P A., 5201 Blue Lagoon Drive, suite #100, Miami, Florida 33126, this _____ day of _____, 1996.

DOCKET CLERK

Copies furnished to:

Janis Sue Richardson,
Senior Attorney

Faye Mayberry, Chief
Bureau of Condominiums

Hollybrook.DS