

Final Order No. BPR-98-02409 Date 4-13-98

FILED

Dept. of Business and Professional Regulation

AGENCY CLERK

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By: Brandon M. Nichols

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

IN RE: PETITION FOR DECLARATORY STATEMENT

GEORGE N. MILLER, FOREST LAKES ESTATES
HOMEOWNERS ASSOCIATION 1993, INC.

DOCKET NO.: DS98012

Petitioner.

DS 98-003

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 section 723.006 and 120.565, Florida Statutes.

FINDINGS OF FACT

1. On January 13, 1998, the Division received a petition for declaratory statement from George N. Miller (Petitioner). Petitioner requests a declaratory statement as to whether certain provisions of the bylaws of the Association are in conflict with section 723.078, Florida Statutes. Specifically,

- a. that the residency provisions for board election are unenforceable;
- b. that the residency provisions for officer election are unenforceable;

- c. that the term limitation provisions for election as President are unenforceable; and
- d. that the vote required to amend the referenced bylaws requires a calculation of a majority of members represented, as contrasted with the Board's position that a plurality is all that is required to amend.

2. Notice of receipt of the Petition was published in the Florida Administrative Weekly, Volume 24, Number 5, at page 526, on January 30, 1998.

3. On February 13, 1998, the Division received a Petition to Intervene from the Forest Lake Estates Homeowners Association 1993, Inc.

4. Petitioner is a mobile home owner and a member of Forest Lakes Estates Homeowners Association 1993 Inc.

5. Intervenor is a homeowners association formed in accordance with section 723.075, Florida Statutes.

6. The bylaws of the association provide:

ARTICLE V AMENDMENTS TO THE BYLAWS OF THE CORPORATION

The Bylaws may be amended or revised if the amendment is approved by a majority vote of the membership at the Annual Meeting, or a special meeting called by the Board, in compliance with Article IV Section 3 (a) and (b).

Proposed amendments to the Bylaws, and the item they replace, shall be furnished to the general membership at least ten (10) days in advance of the meeting when the vote is to occur, by posting copies in conspicuous places on the Forest Lake Estates property.

ARTICLE IV SECTION 3 MEMBERSHIP MEETINGS

(d) Quorum. A quorum shall be consistent with Chapter [sic] 723.078 of the Florida Statutes. At a meeting of the general membership, a quorum shall consist of a majority of the paid-up membership.

Acts approved by a majority of the voters present at a membership meeting at which a quorum is present, shall constitute the acts of the general membership, except when approval by a greater majority is required by the Statutes of Florida, or these Bylaws.

7. Section 723.078(2)(b), Florida Statutes provides:

A majority of the members shall constitute a quorum. Decisions shall be made by a majority of members represented at a meeting at which a quorum is present.

8. The minutes of the Annual Meeting that were attached to the Petition to Intervene show that there were 643 members present, 83 proxies and 52 absentee ballots. The Petition states that there were 1,078 members in good standing.

CONCLUSIONS OF LAW

The Division has jurisdiction to enter this Order pursuant to section 120.565, Florida Statutes.

In regard to the residency and term limitation provisions for election, the Petitioner has set forth certain facts which are sufficiently limited to an interpretation of how the Bylaws of the Association should be interpreted when considered with section 723.078, Florida Statutes. Thus, even though this declaratory statement will necessarily apply to the class of persons who

compose the entire Association, the facts of this case are specific enough to enable this agency to make a response of a specific nature limited to the Petitioner's set of circumstances only, rather than a response of such a general and consistent nature as to meet the requirements of rulemaking. Florida Optometric Association v. Department of Professional Regulation, Board of Opticianry, 567 So.2d 928 (Fla. 1st DCA 1990). However, the extent to which the Board did not comply with the Association bylaws is outside the jurisdiction of the Division and thus the scope of this Declaratory Statement. If a member of an association thinks that the association is not complying with their bylaws, enforcement jurisdiction lies with the circuit court.

I. Quorum and
Vote Needed to Amend Bylaws

In its Petition to Intervene, the Association asserts that the bylaw amendments are valid because the vote of approval that the bylaw amendments received was "a plurality of a quorum." This is not what is required for a valid amendment under either the bylaws or under section 723.078(2)(h), Florida Statutes. The bylaws of the Association only allow a plurality vote in reference to its officers. See Article II, Section 3, (h) and (i). As stated above, whether the Association complied with its bylaws is not within the jurisdiction of the Division.

II. Any Action Which Is Not Directed or Prohibited
By Chapter 723 is Valid

The bylaws of the Association contain several unique provisions which, presumably, attempt to give balance and reliability to the Board. The Petitioner contends that these provisions violate section 723.078(2), Florida Statutes, in that "they constitute an impairment of the statutory right of a member desiring to be a candidate for board membership." Three of the provisions are currently part of the bylaws, and the remainder are proposed amendments. The three current provisions state:

ARTICLE II BOARD

Section 3

(c) Only four (4) year-round residents may be elected to the Board.

(d) Fifty (50) percent of the Officers may be year-round residents.

(g) The Offices of President and Vice President shall be filled by either a winter resident or a year-round resident [Reference: Act II Sec 3 (h) & (i)]. However, if the Office of President is filled by a winter resident, the Office of Vice President shall be a year-round resident. If the Office of President is filled by a year-round resident, then the Office of Vice President will be filled by a winter resident.

Nothing in section 723.078(2), Florida Statutes, prohibits these types of provisions in a park's bylaws. Additionally, no provisions in section 723.078(2) mandates actions which contravene

these paragraphs. Therefore these provisions are valid.

The proposed amendments which the Petitioner allege violate section 723.078(2), Florida Statutes state:

Add to ARTICLE II, section 3 (a)

1. The office of President shall be filled by a candidate who has served for a one year term on the Board.

Add to ARTICLE II, section 3

(j) President shall continue to be an honorary member of the Board as Past President until such time as the President is replaced by election. This position is non-voting.

CHANGE ARTICLE II, section 2 to agree with (j)

The Board shall consist of four (4) Officers and five (5) Directors; and one (1) Past President (non-voting).

As the Division stated above, nothing in section 723.078(2), Florida Statutes, prohibits these types of provisions in a park's bylaws, nor mandates actions which contravene these paragraphs. However, the validity does depend on whether the votes to amend the bylaws conformed with the association bylaws. The Board might want to reconsider whether the bylaw amendments had the correct number of votes for a valid amendment based on the requirement that the vote be a majority of a quorum.

III. Petitioner was not Denied the Right
to Seek Board Membership

Petitioner also contends that he was "effectively denied the right to seek membership to the Board, since his election was dependent upon meeting one or more of the criteria for membership, unknown as to whether or not attainable until the votes were cast and calculated." Once again, the provision requiring the president to be either a winter resident or a year-round resident, and the vice-president to be the opposite, does not violate the statute. Although this provision could be cumbersome, in that a vice-presidential choice might not be available until after it is known whether the president is a winter or year-round resident, there is no limitation in the bylaws or statute, on which type of resident can run for president. Thus Petitioner's right to run for president has not been denied. Indeed the minutes of the annual meeting that were furnished by Intervenor Association show that Petitioner did run for president and was defeated by a vote of 427 - 343.

Section 723.078(d), Florida Statutes, contains a sentence which says:

The bylaws shall not restrict any member desiring to be a candidate for board membership from being nominated from the floor.

Petitioner further asserts that the winter/year-round residency

requirement in the bylaws also violates this statutory provision. This statutory sentence addresses the method of nomination, and not an eligibility limitation, therefore this sentence in the statute is irrelevant to the winter/year-round residency requirement in the bylaws.

No case law on this type of restriction was found, however, an analogy can be made to Hidden Harbour Estates, Inc. v. Basso, 393 So.2d 637 (Fla. 4th DCA 1981). Hidden Harbour Estates was a mobile home condominium in which the rules of the association were at issue. In dicta, the court discussed the two types of categories of restrictive use. First, there are the restrictions imposed by the declaration of condominium which the court found were:

. . . clothed with a very strong presumption of validity which arises from the fact that each individual unit owner purchases his unit knowing of and accepting the restrictions to be imposed. . . Indeed, a use restriction in a declaration of condominium may have a certain degree of unreasonableness to it, and yet withstand attack in the courts. (Id at 639, 640).

The second category of restrictions were the rules promulgated by the association's board of directors. In those cases, the "rule of reasonableness" becomes the test. The court said:

By imposing such a standard, [reasonableness] the board is required to enact rules and make decisions that are reasonably related to the promotion of the health, happiness and peace of mind of the unit owners. (Id at 640).


The Division acknowledges the court's position on these standards, and includes them for whatever guidance and benefit they may give the parties in the future.

STATEMENT

In accordance with the foregoing discussion, the Division declares that the type of winter/year-round residency standards used by the Association as eligibility requirements to run for office do not violate chapter 723, Florida Statutes.

Done this 9th of April, 1998.




ROBERT H. BELLZEY, Jr., Director
Department of Business and
Professional Regulation
Division of Florida Land Sales,
Condominiums, and Mobile Homes
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 THE APPROPRIATE FILING FEE, AND WITH THE AGENCY CLERK FOR THE DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION WITHIN THIRTY (30) DAYS OF THE RENDITION OF THIS DECLARATORY STATEMENT.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Declaratory Statement was provided by certified mail to Bennett L. Rabin, Esquire, Attorney for Petitioner, Brudny & Rabin, P.A., One Urban Centre, 4830 West Kennedy Boulevard, Suite 985, Tampa, Florida 33609-2574, and Charles D. Waller, Esquire, Post Office Box 1668, Dade City, Florida 33526-1668, this _____ day of _____, 1998.

Kristie Harris, Docket Clerk

Copies furnished to:

Mary Denise O'Brien,
Assistant General Counsel

Jim Norred, Chief
Bureau of Mobile Homes