

Final Order No. BPR-98-07288 Date 11-10-98

FILED

Dept. of Business and Professional Regulation

AGENCY CLERK

State of Florida Agency Clerk

By: _____

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

IN RE:

DS 98-028

PETITION FOR DECLARATORY STATEMENT

**MARK B. NAGEL , MEMBER,
LAKE COMO CO-OP, INC.,**

Petitioner.

Docket No. DS98140

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 719.501 and 120.565, Florida Statutes.

FINDINGS OF FACT

1. On August 13, 1998 the Division received a Petition for Declaratory Statement from Mark B. Nagel, Member, (the Petitioner), concerning the Lake Como Co-op Inc.
2. The Petitioner is a member of the cooperative association that operates the Lake Como Cooperative. Lake Como is a cooperative created pursuant to chapter 719,

Florida Statutes. There are currently 158 units in the cooperative.

3. The Petitioner requests a declaratory statement as to: *whether pursuant to § 719.1055(1), (2) and (3), Florida Statutes, the Lake Como Cooperative Association plan to expand the existing housing section of the property to accommodate additional home sites requires a vote of 100%, 75% or a majority of the membership of the Association.*

4. Article V, Membership of the Articles of Incorporation of the Lake Como Cooperative states that:

1. This corporation shall be organized on a non stock basis and shall issue Membership Certificates instead of shares of stock. One Hundred Fifty-Eight (158) Membership Certificates are authorized to be issued.

2. Every person or entity who has entered into an occupancy agreement with the Association for a lot/unit in the mobile home park and who has purchased a Membership Certificate in the Association as specifically provided for in the Bylaws shall be a member of this Association. . . Membership shall be appurtenant to and may not be separated from the occupancy agreement and Membership Certificate and may be transferred by the conveyance or other transfer of that occupancy agreement and Membership Certificate pursuant to and as determined by the Bylaws of the Association.

The proposed action to add additional homesites to the cooperative property also requires an amendment to the Articles to add additional members to the 158 unit membership in the cooperative.

5. Paragraph 4.14 of the Bylaws of the Association provides that:

Actions Specifically Requiring Member Votes. The following actions require approval by the members and may not be taken by the Board of Directors acting alone:

* * * * *
(g) Other matters contained in the Articles of Incorporation, these Bylaws, or the laws of the State of Florida that specifically require a vote of the

members.

(h) Expenditure of any sum greater than FIFTY THOUSAND AND NO/100 DOLLARS (\$50,000) whether by entering into a contract of any duration, encumbering the property by the lien of a mortgage, or in any other manner.

6. Article XII of the Articles of Incorporation states:

Amendment: Any amendment to these Articles shall require the assent of a majority of all members entitled to vote at any regular or special meeting of the membership duly called and convened. If there are no members, any amendment to these Articles shall require the assent of a majority of the Board of Directors. (Emphasis added).

7. Article 8, section 8.1(y) of the Bylaws of the Cooperative provides that the Board has the power:

...upon such approval as required by Chapters 719 and 723, Florida Statutes, by the members of the Corporation, to: (i) convert property owned or purchased by the Corporation into additional lots/units; issue additional membership certificates for each additional lot/unit so created; and (iii) change the proportion or percentage by which each Member shares in the common expenses and the common surplus and equity in the Corporation as a result thereof. (Emphasis added).

8. On September 18, 1998, the Division published the Notice of Receipt of the Petition for Declaratory Statement in the Florida Administrative Weekly. A copy of the Petition was sent to Joint Administrative Procedures Committee and to the Association on September 4, 1998.

9. On October 21, 1998, the Division received a response from the Lake Como Co-op, Inc., the Association that operates the cooperative. The Association stated that it had no issue with the interpretation of the Co-op documents or the statutes in this matter. The response stated that the Association believes that a 100% vote of the unit owners is

required to approve the issuance of additional membership certificates for newly created lots/units, in accordance with Section 719.1055, Florida Statutes.

10. In making the foregoing statements of fact, the division has relied on the statements of fact set out in the petition, the response and accompanying documents without taking any position with regard to the validity of the facts.

CONCLUSIONS OF LAW

1. The Division has jurisdiction to enter this order pursuant to sections 719.501, and 120.565, Florida Statutes.

2. Petitioner, a member of the Cooperative, is a substantially affected person within the meaning and intent of section 120.565, Florida Statutes, and has standing to seek this declaratory statement.

3. The Petition seeks a ruling from the Division as to the percentage of unit owner vote that is required by § 719.1055(1), (2) and (3), Florida Statutes, and the Association documents for the Lake Como Cooperative Association to expand the existing housing section of the property to accommodate additional home sites.

4. Section 719.1055(1),(2) and (3), Florida Statutes, states as follows:

719.1055 Amendment of cooperative documents; alteration and acquisition of property.—

(1) **Unless otherwise provided in the original cooperative documents**, no amendment thereto may change the configuration or size of any cooperative unit in any material fashion, materially alter or modify the appurtenances of the unit, or change the proportion or percentage by which the owner of the parcel shares the common expenses and owns the common surplus, **unless the record owner of the unit and all record owners of liens on it join in the execution of the amendment and unless the record owners of all other units approve the amendment.** Cooperative documents in cooperatives created after July 1, 1994, may not require less

than a majority of total voting interests for amendments under this section, unless required by any governmental entity.

(2) Unless a lower number is provided in the cooperative documents or unless such action is expressly prohibited by the articles of incorporation or bylaws of the cooperative, the acquisition of real property by the association, and material alterations or substantial additions to such property by the association shall not be deemed to constitute a material alteration or modification of the appurtenances to the unit if such action is approved by 75 percent of the total voting interests of the cooperative.

(3) (a) Unless other procedures are provided in the cooperative documents or such action is expressly prohibited by the articles of incorporation or bylaws of the cooperative, the association may materially alter, convert, lease, or modify the common areas of the mobile home cooperative if the action is approved by 75 percent of the total voting interests of the cooperative.

(b) The association may change the configuration or size of a unit only if the action is approved by the affected unit owners and by 75 percent of the total voting interests of the cooperative. (Emphasis added).

5. The Association's proposal to add additional homesites to the cooperative on already existing cooperative property changes the proportion or percentage by which unit owner members share the common expenses and own the common surplus. In creating additional homesites, each member's share of the common expenses and common surplus will be smaller than the current 1/158 and an amendment to the cooperative documents is required. The documents state that an amendment to the documents requires the assent of a majority of all members. Section 719.1055(1), Florida Statutes, expressly allows the amendment to be made with the voting percentage stated in the documents.

6. However, Article 8.1(y), of the Bylaws provides specifically that the conversion of property owned by the cooperative into additional lots/units, the addition of

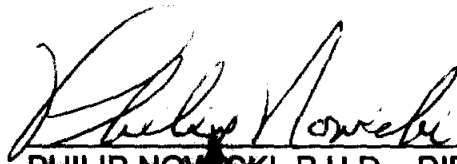
membership certificates and the change in the proportionate share of common expenses requires a vote "as required by Chapters 719 and 723, Florida Statutes." This section specifically refers to the statute rather than the cooperative documents and, unlike other sections of the cooperative documents, does not provide a percentage vote required for the action to be approved. Beau Monde, Inc. v. Bramson, 446 So.2d 164, (Fla. 2d DCA 1984) (When specific statute or provision in articles of incorporation requires unanimous consent, that statute or provision controls).

7. Since the Cooperative Documents refer to the statutory voting percentage required for a vote specifically to add homesites on cooperative property, add memberships and change the apportionment of common expenses, §719.1055(1), Florida Statutes, controls, not other provisions of the cooperative documents which are more general in nature. The statute requires the vote of 100% of the unit owners, to wit: "...the record owner of the unit and all record owners of liens on it... and unless the record owners of all other units approve the amendment."

WHEREFORE, the Lake Como Coop., Association must have the vote of 100% of the voting interests approve the addition of homesites on common element property

DONE AND ORDERED this 5th day of November, 1998, at Tallahassee, Leon County, Florida.




PHILIP NOWICKI, P.H.D., 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 PETITIONERS 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 SARAH WACHMAN, AGENCY CLERK FOR

**THE DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, 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 Declaratory Statement has been furnished by U.S. Mail to Mark B. Nagel, Lake Como Co-op., 20500 Cot Rd. #434, Lutz, Florida, 33549, and to Frances Lavalley, President, Lake Como Co-op, Inc., 20500 Cot Road, Lutz, Florida 33549, on this _____ day of _____, 1998.

Kristie L. Harris
Docket Clerk

Copies furnished to:

Martha F. Barrera,
Assistant General Counsel

Leann B. Ramseur, R.E. D. S.
Bureau of Condominiums