

Final Order No. BPR-99-04664 Date 8-11-99

FILED

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

IN RE:

DS 99-012

PETITION FOR DECLARATORY STATEMENT

JUSTO E. GOMEZ , Unit Owner,
ARLEN BEACH CONDOMINIUM ASSOCIATION, INC.

Petitioner.

Docket No. DS 1999096

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.

PRELIMINARY STATEMENT

1. On April 20, 1999, the Division received a Petition for Declaratory Statement from Justo E. Gomez, the owner of a unit at the Arlen Beach Condominium.
2. The Division sent a copy of the Petition to the Arlen Beach Condominium Association on April 27, 1999. The Association submitted its response to the Petition on May 11,

1999.

3. On April 27, 1999, copies of the Petition were sent to the Joint Administrative Procedures Committee, and the Association. On May 7, 1999, the Division published the Notice of Receipt of the Petition for Declaratory Statement in the Florida Administrative Weekly, Volume 25, Number 18. On April 27, 1999, the Division requested additional information from the Petitioner. The information was received on May 18, 1999.

FINDINGS OF FACT

1. Petitioner, Justo E. Gomez, is a unit owner at the Arlen Beach Condominium and a member of the Arlen Beach Condominium Association, Inc.

2. Intervenor, the Arlen Beach Condominium Association, Inc. is the entity responsible for management of the Arlen Beach, a condominium located in Miami-Dade County, Florida.

3. According to the Petition and the Response submitted by the Association at the annual board meeting of the condominium association, on January 19, 1999, an election was held to amend certain provisions of the condominium's declaration. The board did not have the required 3/4 vote to pass the changes at the meeting so it chose to keep the election process open for 90 days. The board meeting was adjourned and the voting process remained open. During the next 90 days, the board meeting was held and adjourned 4 times. At the last meeting, on April 13, 1999, the board announced that sufficient votes were collected in favor of the proposed amendments. The process of the adjourning and reconvening the meeting was accomplished with the consent of the members present at the meeting.

4. According to the Petition, the voting was not done by secret ballot. No election of

board members occurred during this time since the number of persons wishing to run for the board was less than or equal to the number of vacancies to be filled. Petitioner does not raise an issue as to the election of board members.

5. Petitioner attached to his Petition a copy of the Second Notice of Annual Meeting and Notice of Board of Director's Meetings Arlen Beach Condominium Association Inc., and a sample proxy ballot. The Association advised that when the time for the voting occurred, the limited proxies were used and any owner who desired to vote in person could have obtained a ballot if they had not already submitted a limited proxy. If the unit owner had submitted a limited proxy, he could have revoked the proxy and voted in person as well.

6. The Declaration of Condominium, Article VI Method of Amendment of Declaration, provides that the Declaration may be amended at any regular or special meeting of the unit owners of the condominium called or convened in accordance with the bylaws.

7. Section 4 of the Bylaws of the condominium association addresses proxies and provides that votes may be cast in person or by proxy. The section further states that "proxies shall be valid only for the particular meeting designated therein." Article 3, section 6 of the Bylaws of the condominium association addresses meetings of the membership and authorizes the meetings to be adjourned if a quorum of voting members is not present either in person or by proxy.

8. There is nothing in the condominium documents that require the votes on an amendment to the bylaws or to the declaration to be made by secret ballot.

9. Petitioner requests a declaratory statement as to the following:

Whether pursuant to section 718.112(2)(b)3, Florida Statutes, the condominium association

may hold the voting process open for 90 days to allow unit owners to vote for/against an amendment to the condominium's declaration.

CONCLUSIONS OF LAW

1. The Division has jurisdiction to enter this order pursuant to sections 718.501, and 120.565, Florida Statutes (1997).

2. Section 120.565(1), Florida Statutes, (1997) provides that any substantially affected person may seek a declaratory statement regarding an agency's opinion as to the applicability of a statutory provision, or of any rule or order of the agency, as it applies to the Petitioner's particular set of circumstances.

3. The Petition requests an interpretation of section 718.112(2)(b)3, Florida Statutes (Supp. 1998), quorum voting requirements. Section 718.112(2)(b)3 states:

(2) Required provisions.--The bylaws shall provide for the following and, if they do not do so, shall be deemed to include the following:

(b) Quorum; voting requirements; proxies.--

3. Any proxy given shall be effective only for the specific meeting for which originally given and any lawfully adjourned meetings thereof. In no event shall any proxy be valid for a period longer than 90 days after the date of the first meeting for which it was given. Every proxy is revocable at any time at the pleasure of the unit owner executing it.

4. The voting process that took place at the condominium was not an election of board members but was for the purpose of making certain amendments to the condominium declaration. Section 718.110, Florida Statutes (1997) governs amendments to the condominium declaration and does not impose the requirement of a secret ballot or any requirement that the voting be done at a particular meeting and does not prohibit the adjournment of a meeting to gather the necessary votes to pass the amendment.

5. According to the Petition, the meeting of the unit owners, held on January 19, 1999, was adjourned to four different dates to keep the voting process open for a period of 90 days. Petitioner does not challenge the validity of any one proxy. Although petitioner does not challenge the validity of any particular proxy vote, he does raise the issue of whether the voting process as a whole should have been kept open for the 90 days. Pursuant to section 718.112(2)(b)3, Florida Statutes, the proxies were valid for the 90 days subsequent to the meeting, if not revoked. At the final meeting held April 13, the board announced that there were sufficient votes to pass the amendments. Since the final meeting took place 84 days after the initial meeting, the proxies collected at the initial meeting were valid.

6. The Petition raises the issue of whether the voting process on the proposed amendments to the declaration was valid because the original meeting was adjourned 4 times to maintain the voting process open so that sufficient votes could be collected. Section 718.112(2)(b)3, provides that the proxies are valid for the specific meeting for which originally given and any lawfully adjourned meetings thereof. Thus, this section cannot be interpreted to prohibit the condominium association's board from adjourning the meeting and continuing to collect votes to amend the condominium declaration.

7. The Petition also questions the voting process on the proposed amendments to the declaration because the process was not done by secret ballot. There is nothing in the condominium documents that requires the votes on an amendment to the bylaws or to the declaration to be made by secret ballot. The provision cited by the Petition, section 718.112 (2)(d)3, Florida Statutes, addresses unit owner meetings and applies to the elections for the members of the board of administration of the condominium, not voting for amendments, and states:

3. The members of the board of administration shall be elected by written ballot or voting machine. Proxies shall in no event be used in electing

the board of administration, either in general elections or elections to fill vacancies caused by recall, resignation, or otherwise, unless otherwise provided in this chapter. Not less than 60 days before a scheduled election, the association shall mail or deliver, whether by separate association mailing or included in another association mailing or delivery including regularly published newsletters, to each unit owner entitled to a vote, a first notice of the date of the election. 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. Together with the written notice and agenda as set forth in subparagraph 2., the association shall mail or deliver a second notice of the election to all unit owners entitled to vote therein, together with a ballot which shall list all candidates. Upon request of a candidate, the association shall include an information sheet, no larger than 8 1/2 inches by 11 inches, which must be furnished by the candidate not less than 35 days before the election, to be included with the mailing of the ballot, with the costs of mailing or delivery and copying to be borne by the association. However, the association has no liability for the contents of the information sheets prepared by the candidates. In order to reduce costs, the association may print or duplicate the information sheets on both sides of the paper. **The division shall by rule establish voting procedures consistent with the provisions contained herein, including rules providing for the secrecy of ballots.** Elections shall be decided by a plurality of those ballots cast. There shall be no quorum requirement; however, at least 20 percent of the eligible voters must cast a ballot in order to have a valid election of members of the board of administration. No unit owner shall permit any other person to vote his or her ballot, and any such ballots improperly cast shall be deemed invalid. A unit owner who needs assistance in casting the ballot for the reasons stated in s. 101.051 may obtain assistance in casting the ballot. Any unit owner violating this provision may be fined by the association in accordance with s. 718.303. The regular election shall occur on the date of the annual meeting. The provisions of this subparagraph shall not apply to timeshare condominium associations. Notwithstanding the provisions of this subparagraph, an election and balloting are not required unless more candidates file notices of intent to run or are nominated than vacancies exist on the board. (Emphasis added).

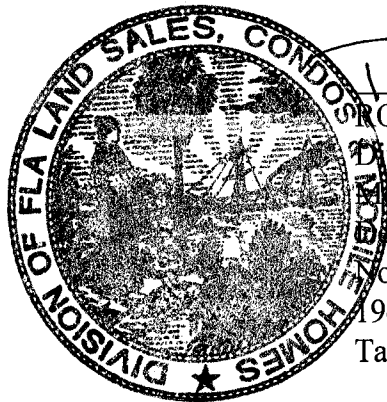
Thus, this section applies only to board elections and is not applicable to the facts set forth in the Petition since the contested action involved a vote to amend the declaration, not the election of a board member.

8. There is nothing in the Bylaws of the Association or the Declaration of Condominium or the condominium documents that are in conflict with either section. To the extent that the Petition seeks an interpretation of any ambiguous terms of the condominium documents, the Petition must be denied. The Division has no authority to interpret ambiguous provisions of a condominium declaration and then enforce its interpretation. Jurisdiction to construe and interpret what are essentially the terms of a contract is vested solely in the judiciary. *Peck Plaza Condominium v. Division of Florida Land Sales*, 371 So. 2d 152 (Fla. 1st DCA 1979); *Point Management, Inc. v. Dept. of Business Regulation*, 449 So. 2d 306 (Fla. 4th DCA 1984) (The Division has no jurisdiction to construe and interpret a settlement agreement and other condominium documents involved in prior litigation. A settlement agreement between parties to litigation is a contract).

For the reasons stated above, the Division declares that:

Section 718.112(2)(b)3, Florida Statutes, did not prohibit the Arlen Beach Condominium Association from adjourning its meeting and holding the voting process open for 90 days to allow unit owners to vote for/against an amendment to the condominium's declaration.

DONE this 9th day of August, 1999, at Tallahassee, Leon County, Florida.



Robin L. Suarez
ROBIN L. SUAREZ, ACTING 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 THE AGENCY CLERK FOR THE DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, DIVISION OF FLORIDA LAND SALES, CONDOMINIUMS AND MOBILE HOMES, 1940 NORTH MONROE STREET, TALLAHASSEE, FLORIDA 32399 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 Order Denying Petition for Declaratory Statement has been furnished to Justo E. Gomez, 5701 Collins Avenue apt. 719, Miami Beach, Florida 33140, and to Anthony A. Kalliche, Becker & Poliakoff, P.A., counsel for the Arlen Beach Condominium Association, 5201 Blue Lagoon Drive, Suite 100, Miami, Fl. 33126 by U.S. Mail to on this _____ day of August, 1999.

Docket Clerk

Copies furnished to:
Martha F. Barrera,
Assistant General Counsel

Julie Baker, Bureau Chief
Bureau of Condominiums