

Final Order No. BPR-2000-02736 Date: 7/20/2000
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Department of Business and Professional Regulation
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Sarah Wachman, Agency Clerk

By: Sarah Wachman

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

IN RE: PETITION FOR DECLARATORY STATEMENT

Division Docket
Number CD2000-075

OLIVE GLEN CONDOMINIUM ASSOCIATION, INC.,
Petitioner.

DS 2000-008

AMENDED DECLARATORY STATEMENT

The State of Florida, Department of Business and Professional Regulation, Division of Florida Land Sales, Condominiums, and Mobile Homes (Division) enters this Amended Declaratory Statement pursuant to sections 120.565 and 718.501, Florida Statutes, to correct the citations to administrative Rule 61B-23.003(7)(f), on pages 5 and 7 of the Declaratory Statement.

FINDINGS OF FACT

The following findings of fact are based on information submitted by Petitioner. The Division takes no position as to the accuracy of the facts, but merely accepts them as submitted for purposes of this declaratory statement.

1. On March 27, 2000, the Division received a Petition for Declaratory Statement filed on behalf of Olive Glen Condominium Association, Inc. (Association or Petitioner), by and through counsel. Additional information was requested and was received June 13, 2000.

2. Notice of receipt of the petition was duly published in Florida Administrative Weekly, Volume 26, Number 16, April 21, 2000.

3. Olive Glen Condominium Association, Inc., is the entity responsible for the operation of Olive Glen, a residential condominium consisting of 276 units located in Pompano Beach, Broward County, Florida.

4. Turnover of control of the association has occurred. Unit owners other than the developers control the board of administration of the Association.

5. As contemplated by section 718.112(2)(d) 8, Florida Statutes, the Association amended its bylaws to provide for different election procedures. The Association utilizes proxies and ballots in elections and does not use the inner/outer envelope system described in Rule 61B-23.0021, Florida Administrative Code.

6. The condominium consists of a mixture of lessees and owner/occupants. Approximately 70 percent of the condominium units are leased.

7. One individual controls 70 units, another 25 units and a third, 10 units. All of the three unit owners continually lease their units. None of the three unit owners received an assignment of developer rights.

8. Petitioner states that the three investor unit owners meet the definition of "successor developer" in Rule 61B-15.007, Florida Administrative Code. Petitioner asks the following:

a. Whether the three investors are successor developers and if so, whether the Association should limit such parties to electing a minority of the board.

b. Assuming that they are successor developers, we would appreciate suggestions as to the manner in which the proxies or ballots for these parties should be totaled. Of particular concern is the event where all three investor owners select candidates which differ. How then is the Board of Directors to regulate which are the minority seats?

CONCLUSIONS OF LAW

1. The Division has jurisdiction to enter this order pursuant to sections 718.501 and 120.565, Florida Statutes.
2. Petitioner has standing to seek a declaratory statement.
3. The purposes and use of declaratory statements are set out in Chapter 120, Florida Statutes, and Chapter 28-105, Florida Administrative Code:

120.565 Declaratory Statement by agencies. –

- (1) Any substantially affected person may seek a declaratory statement regarding the agency's opinion as to the applicability of a statutory provision, or of any rule or order of agency, as it applies to the petitioner's particular set of circumstances.
- (2) The petition seeking a declaratory statement shall state with particularity the petitioner's set of circumstances and shall specify the statutory provision, rule, or order that the petitioner believes may apply to the set of circumstances.

28-105.001 Purpose and Use of Declaratory Statement. A declaratory statement is a means for resolving controversy or answering questions or doubts concerning the applicability of statutory provisions, rules, or orders over which the agency has authority. A petition for declaratory statement may be used only to resolve questions or doubts as to how the statutes, rules, or orders may apply to the petitioner's particular circumstances. A declaratory statement is not the appropriate means for determining the conduct of another person or for obtaining a policy statement of general applicability from an agency. A petition for declaratory statement must describe the potential impact of statutes, rules, or orders upon the petitioner's interests.

4. The Condominium Act and administrative rules promulgated thereunder provide a mechanism to determine whether a developer or one who succeeds to the interests of a developer is entitled to vote to elect a majority of the members of the board of administration. The intent of the provision is to ensure that at some point unit owners other than the developer are allowed to elect a majority of the members of the board of administration, at which point control of the board by the developer must end. *Bishop v. Belkin*, 521 So. 2d 158 (Fla. 1st DCA 1988). Section

718.301, Florida statutes, sets out the points in time when turnover of control of the association must occur:

Transfer of association control.—

(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 fifty 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; or

(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; or [Emphasis supplied].

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A "successor" or "subsequent" developer is one who succeeds to the interests of a developer by sale, lease, assignment, foreclosure of a mortgage or other transfer *and* who offers condominium parcels for sale or lease in the ordinary course of business. *Fla. Admin. Code Rule 61B-15.007*. Section 718.301, Florida Statutes, makes no distinction between the various types of developers in its requirement that unit owners other than the developer are entitled to elect a majority of the members of the board of administration. Since the use of the term in the statute is unqualified, it applies equally to creating as well as subsequent developers. *Bishop v. Belkin*, 521 So. 2d 158 (Fla. 1st DCA 1988). Accordingly, successor or subsequent developers would be subject to the statutory requirements that determine entitlement to elect a majority of the members of the board of administration.

5. Control of the association is significant in that the statute provides that until unit owners other than the developer obtain control of the association, they cannot institute, maintain, settle, or appeal actions or hearings in the name of the association concerning matters of common

interest to most or all unit owners including, but not limited to, the common elements, the roof or structural components of a building or other improvements; mechanical, electrical, and plumbing elements. In addition, after turnover, the unit-owner-controlled board of administration may vote to change management and other contracts that may have primarily benefited the developer.

6. Once turnover occurs, the developer may not regain control of the board, but is entitled to representation on the board, so long as he holds for sale in the ordinary course of business five percent, or two percent, depending on the number of units in the condominium. *Fla. Stat. §718.301(1)* (1999). See also, *In Re: Petition for Declaratory Statement, Hisco and Essex Park Villas Condominium Association, Inc., Petitioners*, Case Number DS99-021 (Suarez, December 22, 1999); *In Re: Petition for Declaratory Statement, Tammy Lien, Petitioner, and River Way Management, Intervenor*, Case Number DS2000-013 (Fleetwood, June 2, 2000).

7. In a post-turnover association, such as in the instant case, the issue is whether one who acquires a number of condominium units and offers them for lease within the meaning of Rule 61B-15.007, Florida Administrative Code, is entitled to representation on the board of directors. For purposes of determining whether successor or subsequent developers, such as in the instant case, are entitled to majority representation on the board of administration, Rule 61B-23.003(7)(f), Florida Administrative Code, applies:

61B-23.003 Transition from Developer Control.

* * *
(7)(a) For purposes of computing the percentages of units conveyed to purchasers which will entitle unit owners other than the developer to elect not less than a majority of the members of the board of administration, units sold or otherwise transferred in a bulk transfer by the current developer shall be utilized in the above computation for a turnover of control of the association board unless the sale or other transfer is accompanied by an assignment of the developer's rights to the grantee or transferee. If an assignment of developer's rights does not accompany the bulk transfer, in all instances the units sold or otherwise transferred shall be utilized in the computation for a turnover.
* * *

(f) If the transferee or grantee does not receive an assignment of developer's rights, and if the transferee or grantee, at the time of such transfer or at a subsequent time becomes a developer as defined by rule 61B-15.007, Florida Administrative Code, such developer is entitled to vote for a majority of the members of the board of administration so long as such developer is offering units for sale in the ordinary course of business as defined in Rule 61B-15.007, Florida Administrative Code. If, however, such developer is not offering units for sale in the ordinary course of business as defined in Rule 61B-15.007, Florida Administrative Code, such developer is not entitled to vote for a majority of the members of the board of administration. [Emphasis supplied].

Since the three investor unit owners did not receive an assignment of developer rights, and are not currently offering any units for sale, paragraph (f) above would operate to allow the Association to preclude those owners from voting to elect a majority of the members of the board of administration. This is so because they are leasing, rather than selling their units. Subsequent developers who are not offering units for sale, are not entitled to vote for a majority of the members of the board of administration. *Fla. Admin. Code Rule 61B-23.003(7)(f); In Re: Petition for Declaratory Statement, Hisco, Inc., and Essex Park Villa Condominium Association, Inc., Petitioners, Case Number DS99-021 (Fleetwood, December 22, 1999); In Re: Petition for Declaratory Statement, Steve Culotta, Southgate Gardens Condominium Association, Inc., Petitioner, Case Number 89L-98 (Kearney, October 25, 1989); Bishop v. Belkin, 521 So. 2d 158 (Fla. 1st DCA 1988); Declaratory Statement, In Re: Petition for Declaratory Statement, Arnold Belkin, Petitioner, Case Number 84A-372 (Coates, August 15, 1986).*

8. The purposes of section 718.301, Florida Statutes, regarding unit owners' entitlement to elect a majority of the members of the board of administration could never be carried out if the issue were determined otherwise. Specifically, if the three investor unit owners were allowed to vote to elect a majority of the members of the board of administration while operating their leasing programs, unit owners other than those developers would not be able to

control the board of administration, for as long as the leasing program continued. That result is not contemplated by the statute.

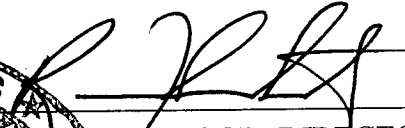
9. Based on the foregoing, the Association may limit the investor unit owners from voting to elect a majority of the members of the board of administration. To accomplish that end, it may be necessary to conduct separate balloting for a majority of the board and for a minority of the board. See, *In Re: Petition for Declaratory Statement, Villas at Countryside Condominium Association, Inc. and Hillcrest Villas, Inc., Petitioners*. Case Number 86A-249 (Coates, December 29, 1986).

10. Petitioner's second request for advice as to the manner in which proxies and ballots should be totaled is not addressed in this declaratory statement. First, Petitioner failed to provide sufficient facts upon which a declaratory statement could be based, in that Petitioner did not provide a factual situation to which any of the Division's statutes rules, or orders could be applied, nor did Petitioner specify the statute, rule, or order upon which a declaratory statement on this issue could be based. Second, the provisions of the condominium documents would govern the issue, and the Division's statutes, rules and orders would not find application, since Petitioner elected to adopt different election procedures than those in the statute and rules. Third, Petitioner's questions regarding the tabulation of proxies and ballots may be answered by holding separate balloting in the election for a majority of the board and for a minority of the board, as referenced hereinabove.

Wherefore, the Division declares that so long as the investor unit owners are not offering units for sale within the meaning of Rule 61B-23.003(7)(f), Florida Administrative Code, those unit owners may not vote to elect a majority of the members of the board of administration. The

Division declines to offer advice as to the manner in which votes may be tabulated, as that issue does not involve the interpretation of any of the Division's statutes, rules, or orders.

DONE AND ORDERED this 20th day of July, 2000.


R. R. FLEETWOOD, 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 APPROPRIATE FILING FEES, AND WITH THE AGENCY CLERK, 1940 NORTH MONROE STREET, NORTHWOOD CENTRE, TALLAHASSEE, FLORIDA 32399-2217, 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 Randall Roger, Kaye and Roger, 6261 Northwest 6th Way, Suite 103, Fort Lauderdale, Florida, 33309, this _____ day of _____, 2000.

Kristie Harris
Docket Clerk

Copies furnished to:

Kathryn E. Price
Assistant General Counsel

Jim Mullins, Acting Chief
Bureau of Condominiums

Suzanne Schmidt, R.E.D.S.

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