

Final Order No. BPR-2000-02153 Date: 6-2-00

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Department of Business and Professional Regulation
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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

Division Docket
Number CD2000-062

TAMMY LIEN, Unit Owner,
River Way Condominium

Petitioner,
and

DS 2000-013

RIVER WAY MANAGEMENT, INC.,

Intervenor.

DECLARATORY STATEMENT

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

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 15, 2000, the Division received a Petition for Declaratory Statement filed by Tammy Lien, a unit owner in the River Way Condominium.

2. Notice of receipt of the petition was duly published in Volume 26, Number 14, (April 7, 2000) Florida Administrative Weekly. The Association was advised of the petition and that it could seek to intervene in the declaratory statement proceeding by filing a response.

3. On April 11, 2000, the Division received a Response to Request for Declaratory Statement from River Way Management, Inc., the condominium association that operates River Way Condominium.

4. Petitioner is the owner of a condominium unit in the River Way Condominium located in Rockledge, Brevard County, Florida.

5. River Way Condominium is a condominium as defined by section 718.103(11), Florida Statutes, containing 214 units. The condominium is controlled by unit owners. The developer is the owner of 34 of the units, which are still being built and sold.

6. The Association conducted the election for the board of administration at the annual meeting held February 14, 2000. The board consists of five members, all of whose seats were open at the February election.

7. At the election, unit owners other than the developer elected three members of the five-member board.

8. The developer was allowed to use his 34 votes to elect one member of the board of directors.

9. According to the Association, the remaining board seat was elected by a vote of the total voting interests.

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

FS 718.301 (1)(d) states that the developer may exercise the right to vote any developer-owned units in the same manner as any other unit owner except for reacquiring control or selecting the majority members of the board. The majority of our board is three (3), the minority being two (2). The developer

has one seat on the board in the minority category. The other seat in the minority category is the board seat in question. How should it have been filled and who owns the seat?

My interpretation of the FS is that a seat on the board is either a unit owner (other than the developer) seat or a developer seat. If my interpretation is wrong and the seat in question is in fact a co-mingled developer/unit owner seat where are the recall requirements defined? ...If the seat is declared to be a developer seat or a co-mingled seat, would the director filling this seat be assigned an officer's position within the corporation?

8. In its response filed April 11, 2000, the Association asserts that the board seat in question may be voted on by all voting interests in the Association. The Association further states that for purposes of recalling the board member elected by the total voting interests, Rule 61B-23.0026, Florida Administrative Code, does not find application because the board seat is not one of the three elected by unit owners other than the developer and is not the board seat elected only by the developer. The Association states that the language of rule 61B-23.0027 applies for purposes of the ten (10) percent requirement for calling the special meeting to recall because the seat in question was elected by all of the voting interests.

CONCLUSIONS OF LAW

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

2. Petitioner and the Association are substantially affected by the Division's statutes, rules, or orders and have standing to seek a declaratory statement. Assertions interposed by the Association are in the nature of a request to intervene, which request is granted.

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. Section 718.301(1)(d), Florida Statutes, provides:

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;

(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

(e) seven years after recordation of the declaration of condominium, or in the case of an association which may ultimately operate more than one condominium, 7 years after recordation of the declaration for the first condominium it operates; or, in the case of an association operating a phase condominium created pursuant to s. 718.403, 7 years after recordation of the declaration creating the initial phase,

whichever comes first. The developer is entitled to elect at least one member of the board of administration of the association as long as the developer holds for sale in the ordinary course of business at least 5 percent, in condominiums with fewer than 500 units, and 2 percent, in condominiums with more than 500 units, of the units in a condominium operated by the association. Following the time the developer relinquishes control of the association, the developer may exercise the right to vote any developer-owned units in the same manner as any other unit owner except for purposes of reacquiring control of the association or selecting the majority members of the board of administration.

5. Chapter 718 provides for turnover of control to allow unit owners other than the developer to control the association that operates the condominium. Turnover is a process that begins with unit owners' other than the developer entitlement to representation on the board of directors and culminates with unit owners other than the developer electing a majority of the members of the board of administration. The process is complete when all of the statutory requirements set out at section 718.301, Florida Statutes, have been satisfied. Once unit owners other than the developer are entitled to elect no less than a majority of the members of the board of administration, the developer loses that right. *Declaratory Statement, Bay Yacht Club Condominium Association, Inc., Petitioner, (Kearney, February 4, 1983); Declaratory Statement, The Villas at Countryside Condominium Association, Inc., Petitioner, (December 29, 1986)*. By the express provision of the statute, the developer cannot regain control of the board of administration, regardless of the number of units owned. However, so long as the developer holds for sale in the ordinary course of business 5 percent of the units operated by the association in a condominium with fewer than 500 units, the developer is entitled to elect at least one member of the board. In order to fulfill the intent of section 718.301, Florida Statutes, as to entitlement to representation on the board, it may be necessary for an association to conduct separate balloting for a majority of the board and for a minority of the board. *Id.*

6. On the facts presented herein, at the February election, unit owners other than the developer were entitled to elect no less than a majority, or three members of the five member board of administration, because turnover had already occurred. The developer, assuming that it was holding for sale at least five percent of the units operated by the association, was entitled to elect one member of the board of administration. The remaining board seat could be voted on by all of the voting interests. Based on the facts of the petition and the Association's response, the election was conducted as described above.

7. To construe the statute as requiring all board seats to be designated as either unit owner other than developer or developer seats would not give effect to the statutory requirement that the developer is entitled to elect at least one member of the board so long as it holds for sale the requisite number of units. If the statute intended the developer to be entitled to elect a minority of the board, as opposed to one seat, it would have so stated. Therefore, Petitioner's theory that all board seats are either developer-elected or unit-owner-other-than-the-developer-elected is inconsistent with section 718.301, Florida Statutes.

8. The recall provisions in Rules 61B-23.0026, 23.0027, and 23.0028, Florida Administrative Code, are consistent with the foregoing analysis. When both the developer and unit owners other than the developer are entitled to representation on the board of administration, a member or members of the board elected or appointed by unit owners other than the developer can be recalled only by unit owners other than the developer and a member or members elected or appointed by the developer can be recalled only by the developer. *Fla. Admin. Code R. 61B-23.0026(1),(2)*. The rule ensures that the right of unit owners other than the developer to control the board of administration is not lost in the event that a board seat elected by non-developer unit owners becomes vacant. By allowing only unit owners other than the developer to recall or

replace such a board seat, the rule ensures that unit owners other than the developer retain the right to majority representation on the board of administration.

9. Since the board seat addressed herein was filled by all of the voting interests, the percentage of unit owners required to recall the board member elected to that seat should be based on the total voting interests. Thus, calling the special meeting referenced in Rule 61B-23.0027, Florida Administrative Code, would require ten (10) percent of the total voting interests.


10. As to Petitioner's last question, neither Chapter 718, the administrative rules promulgated thereunder, nor any of the Division's orders govern the issue of which board member(s) should be designated as corporate officer(s). Such designation(s) would depend on the provisions of the declaration of condominium, the Article of Incorporation, and the Bylaws of the Association. If no provision is made therein, a condominium association could look to the requirements of Chapters 607 or 617 Florida Statutes, as applicable, to determine which board member would be designated as an officer. *Fla. Stat. §718. 111(2) (1999)*.

WHEREFORE, the Division declares that on these facts, unit owners other than the developer are entitled to elect a majority of the members of the board of administration and the developer is entitled to elect at least one member of the board, so long as the developer holds for sale at least 5 percent of the units operated by the Association. When both unit owners other than the developer and the developer are entitled to representation on the board of administration, a member or members elected or appointed only by the developer can be recalled only by the developer and a member or members elected or appointed only by unit owners other than the developer can be recalled only by unit owners other than the developer. The percentage required to call a special meeting for recall of a board seat elected by all of the voting interests is ten

percent of the total voting interests. Neither Chapter 718, Florida Statutes, nor any of the Division's statutes, rules or orders address the issue of which board member(s) can be designated as corporate officers.

DONE AND ORDERED this 15th day of June, 2000.




ROSS 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 Tammy Lien, 184 Turtle Place, Rockledge, Florida 32955 and Timothy Pickles, Esquire, Watson, Soileau, DeLeo Burgett & Pickles, P.A., 1970 Michigan Avenue, Building C, Post Office Box 1888, Cocoa, Florida 32923-1888, this _____ day of _____, 2000.

Kristie Harris
Docket Clerk

Copies furnished to:

Kathryn E. Price
Assistant General Counsel

Jim Mullins, Acting Chief
Suzanne Schmidt, R.E.D.S.
Bureau of Condominiums

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