

Final Order No. BPR-2001-04753 Date: 11-27-2001
FILED

Department of Business and Professional Regulation
AGENCY CLERK

Sarah Wachman, Agency Clerk

STATE OF FLORIDA
DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION
DIVISION OF FLORIDA LANDS AND CONSERVATION
MOBILE HOMES

By: Sarah Wachman

IN RE PETITION FOR DECLARATORY STATEMENT

FOUNTAINHEAD ASSOCIATION, INC., A Florida

Not For Profit Corporation,

DOCKET NO. CD2001-036

Petitioner.

DS 2001-011

DECLARATORY STATEMENT

Petitioner, Fountainhead Association, Inc. (Fountainhead), filed a petition for declaratory statement requesting an opinion as to whether chapter 718 (the Condominium Act) requires a condominium association to allow a non-unit owner to attend board of administration meetings and speak on agenda items where a unit owner has given that person a general power of attorney authorizing the person to act as attorney-in-fact at that particular meeting.

STATEMENT OF FACTS

The following facts are based on information submitted by the Petitioner. The Division relies on the statement of facts set out in the petition without taking any position with regard to the validity of the facts. Petitioner did not request a hearing and none was held.

1. Fountainhead filed its petition with the Division on August 8, 2001. Notice of the Petition was published in the Florida Administrative Weekly on September 26, 2001.

2. Fountainhead is an "association" as that term is defined in section 718.103(2), Florida Statutes (2001). Fountainhead is the association for the Fountainhead Condominium, located in Lauderdale By The Sea, Broward County, Florida.

3. Fountainhead Condominium is a "condominium" as that term is defined by section 718.103(11), Florida Statutes (2001).

4. Ms. Barbara Lizotte (Lizotte) is the "unit owner," as that term is defined by section 718.103(28), Florida Statutes (2001), of unit 1B at the Fountainhead Condominium.

5. Lizotte issued Mr. Randall K. Roger (Roger), an attorney, a general power of attorney on June 25, 2001, authorizing him to act in her place, in all matters affecting her unit, at the Fountainhead board of administration meeting to be held on June 26, 2001.

6. Roger subsequently sent a letter to Fountainhead asserting that the power of attorney issued by Lizotte entitled him to attend and participate in the June 26, 2001 board of administration meeting. Roger also asserted that he had the right, by virtue of the power of attorney, to speak on all agenda items at this meeting.

CONCLUSIONS OF LAW

1. The Division has jurisdiction to enter this Order in accordance with sections 120.565 and 718.501, Florida Statutes (2001).

2. Fountainhead is substantially affected by the provisions in chapter 718 and the Division's rules that specify the rights of unit owners in a condominium association.

3. Section 718.1035, Florida Statutes (2001) states that:

The use of a power of attorney that affects any aspect of the operation of a condominium shall be subject to and in compliance with the provisions of this chapter and all condominium documents, association rules and other rules adopted pursuant to this chapter, and all other covenants, conditions, and restrictions in force at the time of the execution of the power of attorney.

4. Section 718.112(2)(c), Florida Statutes (2001) states that:

Meetings of the board of administration shall be open to all unit owners. . . The right to attend such meetings includes the right to speak at such meetings with reference to all designated agenda items. . . . The association may adopt reasonable rules governing the frequency, duration, and manner of unit owner statements.

5. Fountainhead contends that section 718.112(2)(c), Florida Statutes (2001) prevents a non-unit owner holding a general power of attorney issued by a unit owner from attending, participating, and speaking on agenda items at a meeting of the board of administration because the statute refers only to "unit owners."

6. Chapter 718, Florida Statutes (2001) specifically designates a situation in which use of a power of attorney is limited.

7. Section 718.112(d)3, Florida Statutes (2001), which regulates elections of the members of the board, states that, "[n]o unit owner shall permit any other person to vote his or her ballot"

8. Where the legislature is silent as to a limitation on the use of a power of attorney in chapter 718, it is left up to the association to regulate a unit owner's ability to use a power of attorney through its bylaws and other condominium documents. Section 718.112(2)(c), Florida Statutes (2001) expressly gives associations the power to "adopt

reasonable rules governing the frequency, duration, and manner of unit owner statements.”

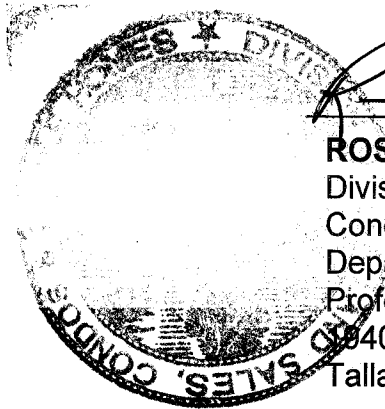
9. It is not sound policy to read the requirement that only unit owners may attend, speak at and participate in board of administration meetings into 718.112(2)(c), Florida Statutes (2001). Corporations, by their nature must provide an agent to represent it at these meetings. The legislature expressly authorized associations to handle their own affairs by stating that the association’s operation shall be governed by the articles of incorporation and the bylaws, which may have provisions in addition to those required by law. § 718.112(2), Fla. Stat. The legislature provided unit owners the right to speak at board meetings, but recognized the board’s right to conduct its meetings by authorizing it to regulate the manner of unit owner comments. This balancing of rights between unit owners and a board is one of the fundamental policies inherent in the Condominium Act. See *Sterling Village Condominium, Inc. v. Breitenbach* 251 So.2d 685, 688 (Fla. App. 1971). If the statute is read as preventing unit owners, who have no other means of speaking to the board on issues concerning their units, as an absolute prohibition on speech, this interpretation would contravene the express authority given to the association to adopt rules governing unit owner comments because the board may not promulgate a rule that directly contravenes a statute. § 718.104(4)(m), Fla. Stat.

10. Where no statute, administrative rule, or condominium document imposes a restriction on the use of a general power of attorney by a unit owner, there should be no bar to the use of a general power of attorney, especially, where the legislature has expressly authorized associations to adopt rules governing the activity.

ORDER

Based upon the findings of fact and conclusions of law, it is ORDERED that where the condominium documents are silent regarding the use of power of attorney, Petitioner is required by sections 718.1035 and 718.112(2)(c), Florida Statutes, to allow a person holding a power of attorney from a unit owner, to attend, speak at, and participate in the association's board of administration meetings.

~~DONE~~ and ORDERED this 26th day of November 2001.



ROSS FLEETWOOD, Director
Division of Florida Land Sales,
Condominiums, and Mobile Homes
Department of Business and
Professional Regulation
1940 North Monroe Street
Tallahassee, FL 32399-1030

NOTICE OF RIGHT TO APPEAL

THIS FINAL ORDER 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(c), 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 THIRTY
(30) DAYS OF THE RENDITION OF THIS FINAL ORDER.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Robert Rubenstein, Esq., Becker & Poliakoff, P.A., P.O. Box 9057, Fort Lauderdale, Florida 33310-9057, this _____ day of _____ 2001.

Beatrice Pruitt, Docket Clerk

Copies furnished to :

Ross Fleetwood
Director

Janis Sue Richardson
Chief Assistant General Counsel
Office of General Counsel