

STATE OF
DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION
DIVISION OF FLORIDA LAND SALES, (

Department of Business and Professional Regulation
AGENCY CLERK
Sarah Wachman, Agency Clerk

By: Sarah Wachman

IN RE: PETITION FOR DECLARATORY STATEMENT

Daniel Gilroy

Petitioner,

v.

Docket No. CD2001-034

Third Ocean Club Condominium
Association, Inc.,

DS 2001-010

Intervenor.

DECLARATORY STATEMENT

Comes now, the undersigned Director of the Division of Florida Land Sales, Condominiums, and Mobile Homes, and enters this final declaratory statement as follows:

The Division on August 10, 2001 received a petition for declaratory statement from Mr. Daniel Gilroy, a unit owner in the Third Ocean Club Condominium. The issue presented is whether an amendment to the declaration that prohibits tenants from keeping pets violates any rights granted to tenants pursuant to s. 718.106, F.S.

Notice of receipt by the Division of the petition for declaratory statement was duly published in the Florida Administrative Weekly. The Third Ocean Club Condominium Association, Inc. intervened in this matter and filed a response to the petition on October 8, 2001. The association argued in favor of the validity of the amendment to the declaration.

Section 10.6 of the declaration as originally recorded in 1972 provided:

10.6 Pets. No unit nor any portion of the condominium property shall be occupied by a pet except weighing less than twenty (20) pounds, tropical fish, or birds in cages. No pets shall be allowed outside the boundaries of a unit unless said pet shall be leashed or contained in some manner.

Article 10.3 of the declaration was amended in 1981 by not less than 75% of the total voting interests to provide as follows:

10.3 Leasing. After approval by a majority of the Board of Directors of the Association as provided in the By-laws, entire apartments may be rented provided the Occupancy is:

- (a) Only by the Lessee and his family, servants, and guests,
- (b) For a period not to exceed one year, including renewal periods, and not less than one month, and
- (c) By a maximum number of six persons.

Tenants shall not be permitted to keep and maintain pets on the condominium property.

Prior arbitration decisions entered by the Division pursuant to s. 718.1255, F.S., have explored the status of tenants residing in condominium units vis a vis the rights granted to unit owners in the documents and statute. In Towers of Quaside No. 4 Condominium Association, Inc. v. Mui, Arb. Case No. 95-0358, Final Order (October 15, 1996), the arbitrator upheld the right of the association to enforce a portion of the declaration prohibiting lessees or tenants to keep pets. In Grove Isle Condominium Association, Inc. v. Levy, Arb. Case No. 96-0172, Summary Final Order (November 19, 1996), the arbitrator considered a section of the declaration which permitted owners to have pets, and the implementing board rule prohibiting tenants from keeping pets. The arbitrator upheld the rule, noting:

It does not appear that the rule against pet ownership by tenants is wholly arbitrary, violates public policy, or abrogates a fundamental constitutional right.

In the arbitration case of Quatrain Condominium II Association, Inc. v. Conviser, Arb. Case No. 97-2185, Summary Final Order (April 28, 1998), the arbitrator upheld a pet rule prohibiting tenants from keeping pets, noting that "this differential treatment" between owners and tenants is valid.

In fact, there is nothing contained in Ch. 718, F.S. guaranteeing that tenants shall be treated generally as owners. Quite to the contrary, tenants are specifically not granted many of the fundamental rights conferred by the Legislature only upon owners. A tenant under the statute has no right to attend or speak at board meetings or membership meetings.¹ A tenant under the statute has no right to vote in the affairs of the association, or typically to become a candidate for the board.² A tenant cannot pursuant to s. 718.112(2)(a)2., F.S., direct written inquiries to the association. A tenant has no right of access to the official records pursuant to s. 718.111(12), F.S. Petitioner Gilroy relies upon section 718.106, F.S., providing in part as follows:

718.106 Condominium parcels; appurtenances; possession and enjoyment.--

(4) When a unit is leased, a tenant shall have all the use rights in the association property and those common elements otherwise available for use generally by unit owners and the unit owner shall not have such rights except as a guest, unless such rights are waived in writing by the tenant. Nothing in this subsection shall interfere with the access rights of the unit owner as a landlord pursuant to chapter 83.

¹ Section 718.112(2)(c),(d), F.S.

² Section 718.112(2)(b); 718.112(2)(d)3., F.S.

The association shall have the right to adopt rules to prohibit dual usage by a unit owner and a tenant of association property and common elements otherwise readily available for use generally by unit owners.

Petitioner argues that s. 718.106, F.S. requires that tenants be treated equally as owners, and that the 1981 amendment to the declaration conflicts with the original declaration and is therefore invalid.³

There is no indication in the text of s. 718.106, F.S., added to the statute through ch. 90-103, Laws of Florida, that the Legislature intended to place tenants in parity with owners insofar as pet and other unit use restrictions are concerned.⁴ The amendment appears primarily to address dual usage of the common elements and association property by a tenant and the owner from whom the tenant is renting. Under the amendment, by virtue of the lease of a unit, a tenant is deemed to have acquired the owner's use rights in the common elements and association property, and associations are granted the authority to pass rules prohibiting dual usage by the tenant and the owner for the duration of the lease. Pet restrictions, on the other hand, are considered unit use restrictions, a topic not spoken to by s. 718.106, F.S. Therefore, *even assuming* that the statute was interpreted as prohibiting a declaration from discriminating against tenants, under the language of s. 718.106, F.S., such an intent would be restricted to the common elements or

³ The Division rejects the latter argument. There is no claim that the amendment procedure was flawed, or that the amendment was not approved by at least 75% of the total voting interests. The intent of the 1982 amendment to the declaration is clear and does not require a corresponding amendment to section 10.6 in order to manifest the intent of the document as a whole.

⁴ To the extent that petitioner seeks to apply this 1990 statutory amendment to a declaration pre-existing the effective date of the amendment, the issue of whether such an application would as interpreted by petitioner impair vested rights may be presented. See, i.e., Maison Grande Condominium Association, Inc. v. Dorten, Inc., 580 So. 2d 859 (Fla. 3rd DCA 1991).

association property since those are the only locations addressed in the statute.

Moreover, if the statute were construed as broadly as petitioner urges, there is no guidance in the statute that would suggest where equal treatment may end, and where the rights of owners qua owners would begin. Uncertainty would be created on whether tenants would be entitled to attend and speak at board meetings, to vote on matters coming before a membership vote, or to run for the board. In the absence of a specific indication of legislative intent that tenant equality was within the intended scope of the statute, and in the absence of language in the statute that would offer guidance on these issues, the Division cannot conclude that section 718.106 requires that unit restrictions such as pet restrictions must apply without distinction between unit owners and tenants.

Neither can it be said that the 1981 amendment to the declaration prohibiting tenants from possessing pets conflicts with any fundamental right or is wholly arbitrary. As stated by the court in Hidden Harbor Estates v. Bassc, 393 So. 2d 637 (Fla. 4th DCA 1981):

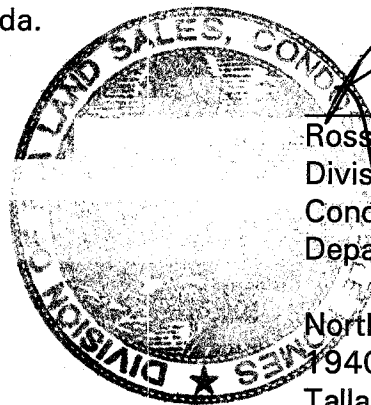
The restrictions [found in the declaration] are clothed with a very strong presumption of validity which arises from the fact that each individual unit owner purchases his unit knowing of and accepting the restrictions to be imposed. Such restrictions are very much in the nature of covenants running with the land and they will not be invalidated absent a showing that they wholly arbitrary in their application, in violation of public policy, or that they abrogate some fundamental constitutional right.


The statute itself, as demonstrated above, invites the distinction to be made

between an owner and a non-owner occupant, and hence a rule or amendment to the declaration that builds upon this foundation cannot be said to be arbitrary. In addition, petitioner has failed to demonstrate how the policy violates any constitutional right or public policy.

WHEREFORE, the Division concludes that article 10.3 of the declaration of the Third Ocean Club Condominium prohibiting tenants from keeping pets does not violate s. 718.106, F.S. and does not conflict with article 10.2 of the declaration. The association's request for an award of attorney's fees is denied; there is no demonstrated basis upon which to award fees in this declaratory statement proceeding.

DONE AND ORDERED this 26th day of November, 2000, at Tallahassee, Leon County, Florida.




Ross Fleetwood, Division 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

Certificate of Service

I hereby certify that a true and correct copy of the foregoing declaratory statement has been sent by U.S. Mail to the following person on this ___ day of November, 2001:

Deborah L. Ross, Esquire
Cornett, Gooze, Ross & Earle, P.A.
401 Osceola Street
Stuart, Florida 34994

Daniel Gilroy
P.O. Box 7281
Vero Beach, Florida 32968

Beatrice Pruitt, Docket Clerk

NOTICE OF RIGHT OF APPEAL

THIS FINAL ORDER CONSTITUTES FINAL AGENCY ACTION AND MAY BE APPEALED BY ANY PARTY SUBSTANTIALLY AFFECTED BY THIS FINAL ORDER 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 THE APPROPRIATE FILING FEE, AND WITH THE AGENCY CLERK, DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, AT 1940 NORTH MONROE STREET, TALLAHASSEE, FLORIDA 32399-1007 WITHIN THIRTY (30) DAYS OF THE RENDITION OF THIS ORDER.



STATE OF FLORIDA
DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION

September 13, 2001

Florida's Future...
**Right Here.
Right Now.**

Jeb Bush
Governor

Kim Binkley-Seyer
Secretary

Office of the
General Counsel

1940 North Monroe Street

Tallahassee, Florida

32399-2202

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850.483.0062

FAX

850.921.2981

INTERNET

www.myflorida.com

Ms. Liz Cloud
Florida Department of State
Florida Administrative Weekly
401 South Monroe Street
Tallahassee, Florida 32399-0250

Re: In Re: Petition for Declaratory Statement, Daniel Gilroy,
Petitioner (Corrected); Docket Number DS2001-034

Dear Ms. Cloud:

Please find enclosed a Notice of Receipt of the Petition for Declaratory Statement for publication in the next Florida Administrative Weekly regarding the above-referenced petition.

The invoice for this publication should be directed to Sharon Elzie, Senior Management Analyst II, Director's Office, Department of Business and Professional Regulation, Division of Florida Land Sales, Condominiums, and Mobile Homes.

Sincerely,

Valeria Singleton
Valeria Singleton
Administrative Assistant

Enclosures

cc: Sharon Elzie, SMA II
Beatrice Pruitt, Docket Clerk

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NOTICE OF RECEIPT OF PETITION FOR DECLARATORY STATEMENT
(CORRECTED)

NOTICE IS HEREBY GIVEN that the Division of Florida Land Sales, Condominiums, and Mobile Homes, Department of Business and Professional Regulation, State of Florida, received a petition for declaratory statement in In Re: Petition for Declaratory Statement, Daniel Gilroy, Petitioner.

The Petitioner requests an interpretation as to whether an amendment to the declaration of condominium that prohibits tenants from maintaining pets on the condominium property violates section 718.106(4), Florida Statutes, where the rules of the association otherwise permit unit owners to maintain certain types of pets.

A copy of the Petition for Declaratory Statement, Docket Number DS2001-034, may be obtained by writing to the Agency Clerk, Department of Business and Professional Regulation, Division of Florida Land Sales, Condominiums, and Mobile Homes, 1940 North Monroe Street, Tallahassee, Florida 32399-2217. Please refer all comments to Karl Scheuerman, Assistant General Counsel, Department of Business and Professional Regulation, Division of Florida Land Sales, Condominiums, and Mobile Homes, 1940 North Monroe Street, Tallahassee, Florida 32399-2202.