

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

Final Order No. BPR-2001-04482 Date: 10-26-01
FILED

IN RE: PETITION FOR DECLARATORY STATEMENT
Wilderness Country Club, Inc.,

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

Petitioner,

By: Brandon M. Nichols

Docket No. CD 2001-029

DS 2001-009

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 received a petition for declaratory statement submitted by the Wilderness Country Club, Inc., on July 10, 2001. The issue presented is whether the petitioner is an "association" within the meaning of s. 718.103, Florida Statutes, and is therefore governed by the Condominium Act. The Division duly noticed its receipt of the petition in the Florida Administrative Weekly.

According to the facts offered in the petition, the petitioner herein is the Wilderness Country Club, Inc. The Wilderness Country Club subdivision is located in Naples, Florida. The subdivision is composed of a golf course and a golf club, which are operated by the Wilderness Country Club, Inc., (hereinafter the "Club"). The subdivision also contains a condominium known as the Wilderness Country Club Condominium. The condominium is operated by a separate corporation known as the Wilderness Country Club Condominium Association, Inc., (hereinafter the "Association").

The property owned and operated by the Club is not included in the property

submitted to the condominium form of ownership by the declaration of condominium for the Wilderness Country Club Condominium. The Club property is not defined or described in the declaration as common elements. The Club maintains financial and accounting records separate from the Association.

According to article II, section 3 of the declaration, the unit owners in the condominium constitute the voting members of the Club. Membership in the Club is mandatory for the owners of units in the condominium. The bylaws and the articles of incorporation of the Club also create an additional class of nonvoting membership consisting of "visiting members" including the members of all neighboring clubs which are approved by the board of directors of the Club from time to time. This class of members has no voting rights but has the right to use the Club facilities.

Section 718.103(2), Florida Statutes defines the term "association" as:

(2) "Association" means, in addition to any entity responsible for the operation of common elements owned in undivided shares by unit owners, any entity which operates or maintains other real property in which unit owners have use rights, where membership is composed exclusively of unit owners or their elected or appointed representatives and is a required condition of unit ownership.

The definition as set forth above reflects a 1992 statutory amendment to the statute that essentially captured the holding of Downey v. Jungle Den Villas Recreation Association, Inc., 525 So. 2d 438 (Fla. 5th DCA 1988), rev. den. 536 So. 2d 244 (Fla. 1988). Under the statute¹ and the case law, an entity is considered a regulated

¹ Petitioner prefers to characterize the issue presented as whether the 1992 amendment may be applied retroactively to a pre-existing association. No issue of retroactive application is presented where the courts have, in effect, interpreted and applied the prior statute in a matter entirely consistent with the current text of the statute. Compare, Dept. Business Regulation v. Seigel, 479 So 2d 112 (Fla. 1985); Jungle Den, supra.

"association" either if it comprises a traditional condominium association set up to operate a condominium, or if it operates property in which condominium owners have use rights, where membership in the association is mandatory and where membership is composed exclusively of condominium unit owners or their representatives.

The Club satisfies certain components of the definition of "association." Article II, Section 3 of the declaration provides that membership in the Club is "mandatory and automatic" upon acquiring ownership of a unit within the project. All members of the Club have the right to use and enjoy the facilities managed by the Club. The declaration thus supports the conclusion that the Club satisfies the mandatory membership and the function aspects² of the definition.

However, it cannot be said that membership in the Club is composed exclusively of condominium unit owners or their representatives. The articles of incorporation for the Club provide in part as follows:

2.11 Visiting Members

A class of membership has been established to provide for reciprocal golfing and clubhouse privileges with neighboring facilities. The members of such class shall consist of all members in good standing of such other Clubs in the Naples area as may be determined each year by the Board of Directors...

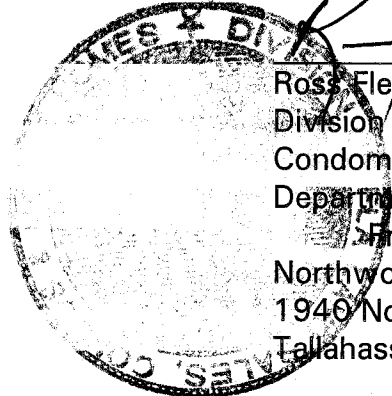
- A. Visiting Members shall have no right to participate in any of the matters for which the Club was organized with the exception of using club facilities....


² Petitioner argues that the function test is not satisfied where the property operated by the Club is not condominium property, a conclusion not facially evident considering that the definition of "condominium property" includes all improvements and rights appurtenant to a condominium intended for use in connection with the condominium. The documents make it clear that the golf course and other facilities operated by the Club were intended for use in connection with the condominium. Compare, Jungle Den, supra, wherein the court concluded that the recreation property and facilities administered by the separate recreation association were "in substance and equity, an 'appurtenance to the condominium' and the same as a 'common element'...."

In accordance with the articles of incorporation, membership in the Club is not exclusively composed of condominium unit owners. In essence, members of the general public who belong to neighboring golf clubs are eligible for membership in the Club. Hence, the "exclusivity" requirement of the statutory definition is not satisfied, and the Club is not a condominium association regulated by Ch. 718, F.S.

WHEREFORE, it is concluded that the Wilderness Country Club, Inc., is not an association within the meaning of s. 718.103, F.S.

DONE AND ORDERED this 25th day of October, 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 October, 2001: Lisa H. Barnett, Esquire, 821 Fifth Avenue South, Suite 201, Naples, Florida 34102.

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.