

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

Final Order No. BPR-2002-02996 Date: **8-15-02**
FILED
Department of Business and Professional Regulation
AGENCY CLERK
Sarah Wachman, Agency Clerk

IN RE PETITION FOR DECLARATORY STATEMENT

JOHN J. JOHNSON, UNIT
OWNER, BAYWATCH CONDOMINIUM,

By: Brandon M. Nichols
Docket No. CD2002-025

Petitioner.

DS 2002-009

DECLARATORY STATEMENT

The Petitioner, John J. Johnson (Johnson), filed a petition for declaratory statement requesting an opinion as to whether the Baywatch Condominium Association of Pensacola Beach, Inc. (Association) must prepare audited financial statements, as provided in the bylaws of the Association, or reviewed financial statements, as provided in section 718.111(13)(a)2, Florida Statutes.

PRELIMINARY STATEMENT

Johnson, a unit owner in the Baywatch Condominium, filed his petition with the division on April 4, 2002. Notice of the Petition was published in the Florida Administrative Weekly on April 26, 2002. In the petition, Johnson objected to the association's providing reviewed financial statements, which are required by section 718.111(13)(a)2, Florida Statutes, rather than audited financial statements of the association's financial condition, as required by the association bylaws.

On May 14, 2002, the division received an Amendment to Petition for Declaratory Statement, which stated that the Board of Directors had prepared compiled financial statements as opposed to reviewed financial statements for the years ending on

December 31, 1999, December 31, 2000, and December 31, 2001. The Amendment also cited to rule 61B-22.006(12)(1998), Florida Administrative Code, and asked if the Association properly waived the requirement of the bylaws to provide financial statements in compliance with that rule for 2002 by voting at the annual meeting to waive the audit requirement.

The division has jurisdiction to issue a declaratory statement in response to the specific facts and issue presented in the petition for declaratory statement submitted by Johnson. See Chiles v. Dept. of State, Div. of Elections, 711 So. 2d 151, 154 (Fla. 1st DCA 1998).

ISSUES PRESENTED

- 1) Whether the Association may prepare compiled financial statements or reviewed financial statements as required under section 718.111(13)(a)2, Florida Statutes, where the bylaws expressly provide for audited financial statements; and
- 2) Whether the Association members may waive the bylaw's requirement to provide audited financial statements for the year where the members voted to waive the requirement at the annual meeting.

STATEMENT OF FACTS

The following facts are based on information submitted by Petitioner and not disputed by the Association. 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. Johnson is a "unit owner," as defined in section 718.103(28), Florida Statutes, of a condominium unit at Baywatch Condominium.

2. Baywatch Association, Inc. (Association) is the "association," as that term is defined in section 718.103(2), Florida Statutes, for the Baywatch Condominium, located in Pensacola Beach, Florida.

3. Baywatch Condominium is a "condominium" as that term is defined by section 718.103(11), Florida Statutes (2001). The condominium was created under chapter 718, Florida Statutes (1981), "as amended," as stated in section 1 of the Bylaws.

4. The Association has total annual revenues of at least \$200,000 but less than \$400,000.

5. Section 6.7 of the Bylaws states that:

An audit of the accounts of the Association shall be made annually by a certified public accountant, and a copy of the account report shall be furnished to each member no later than April 1 of the year following the year for which the audit is made.

6. The condominium documents provide no procedure to waive the audit requirement.

7. The Board of Directors has prepared compiled financial statements for the years ending on December 31, 1998, December 31, 1999, December 31, 2000, and December 31, 2001.

8. The Board of Directors has prepared reviewed financial statements for the years ending December 31, 1994 and December 31, 1995.

9. The Petitioner is not in possession of the financial statements for the years prior to 1994 and for the years 1996, 1997, and 1998.

10. The members of the Association voted at the annual meeting on April 27, 2002, to waive the audit requirement for the year 2002.

CONCLUSIONS OF LAW

12. The division has jurisdiction to enter this Order in accordance with sections 120.565 and 718.501, Florida Statutes.

13. Section 718.111(13), Florida Statutes, provides the financial reporting requirement for condominium associations. The Baywatch Condominium Association has total annual revenues of at least \$200,000 but less than \$400,000. Pursuant to section 718.111(13)(a)2, Florida Statutes, the Association is required to prepare reviewed financial statements.

14. Under section 718.111(13)-(14), Florida Statutes (1994-2001) and rule 61B-22.0061, Florida Administrative Code (1994-1996) and rule 61B-22.006(10), Florida Administrative Code (1997-1999), an association with annual revenues between \$200,000 and \$400,000 was required to prepare reviewed financial statements each year unless the requirement was waived by a majority vote of unit owners.

15. Rule 61B-22.006(12), Florida Administrative Code (1998)(repealed, Dec. 18, 2001) provided :

Association not precluded from exceeding standards. Nothing herein precludes an association from exceeding the requirements of this rule by requiring that financial statements be prepared rather than a financial report of actual receipts and expenditures, or that financial statements be reviewed or audited rather than compiled, or be audited rather than reviewed. Where the association's articles of incorporation, declaration of condominium, or bylaws impose such a requirement, however, the requirement may not be waived except as provided in those documents.

This rule was repealed in 2000 when the legislature amended section 718.111(13), Florida Statutes, to incorporate the rule provisions and subsection 718.111(14), Florida Statutes, but without the waiver provision. Ch. 2000-302, § 52, Laws of Fla. (2000). Under section 718.111(13), the board of directors could exceed reporting requirements without a unit owner vote. § 718.111(13)(c), Fla. Stat. However, the board could not lower reporting requirements without a unit owner vote. § 718.111(13)(d), Fla. Stat.

16. The reference to the right to waive specific reporting requirements imposed by association bylaws that was in the rule was repealed when the waiver language in former subsection 718.111(14), Florida Statutes (1999) was repealed. The division's authority to issue declaratory statements or to enforce statutory reporting requirements does not extend to enforcing provisions in bylaws that do not conflict with the law. The association bylaws do not conflict with chapter 718, Florida Statutes.

17. For purposes of this discussion, it is assumed that the association had total revenues between \$200,000 and \$400,000 for each year from 1994 through the present. Under the rules and the statute, the association was required to prepare reviewed financial statements for each of these years. On these facts, the board prepared reviewed financial statements for 1994 and 1995 in compliance with section 718.111(13), Florida Statutes. Because no facts were provided for 1996 through 1997, it is assumed that the board prepared the annual financial statements in compliance with the law for each of those years.

18. The board has prepared compiled financial statements for each year from 1998 through 2001. Compiled statements are a lower standard than reviewed statements, so a majority vote of unit owners was required to approve the preparation of

compiled financial statements. Because the petition did not include any information on whether a vote was taken and, if so, whether a majority approval was obtained, it cannot be assumed that the board failed to put the question to a vote. So, it is assumed that the board complied with the statutory requirement of preparing a reviewed financial statement, or obtained a majority vote to prepare a compiled financial statement.

19. In answer to petitioner's first question, section 718.111(13), Florida Statutes, requires the association to prepare reviewed financial statements annually unless a majority of unit owners vote to prepare a report of cash receipts and expenditures or compiled financial statements. §718.111(13)(a)2, (d)2, Fla. Stat. The bylaws require audited financial statements. Because the division does not enforce association bylaws, any dispute over the validity of the association's actions under its bylaws is a judicial question.

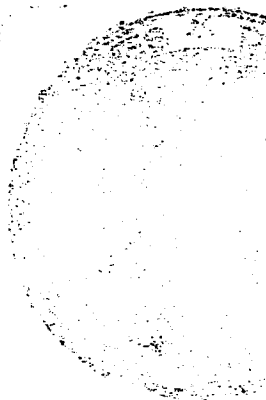
20. The second question relates to the bylaw requirement that the association prepare audited financial statements. The association voted to waive the audit requirement for 2002. The 2002 financial statements are not yet due, so the only question is whether the association may waive its bylaw requirement. The association must comply with its bylaws. The bylaws do not provide a method of waiving the audit requirement, so the association is required by its bylaws to prepare audited financial statements unless an amendment to the bylaws is adopted allowing for a waiver. The bylaws required a higher level of review than required by statute and the unit owners voted to waive the higher level requirement. As long as the report produced for 2002 complied with section 718.111(13), Florida Statutes, there has not been a violation of

the statutory requirement. Any dispute over the validity of the association's actions under its bylaws is a judicial question.

ORDER

Based upon the findings of fact and conclusions of law, it is ORDERED that Baywatch Condominium Association is required to prepare reviewed financial statements annually pursuant to section 718.111(13)(a)(2), Florida Statutes, unless a majority of the unit owners vote to prepare a report of cash receipts and expenditures or compiled financial statements, and because the association's bylaws exceed the statutory requirement by mandating audited financial statements, which is permitted by section 718.111(13)(1)(c)3, Florida Statutes, the owners may waive the higher reporting standard in the bylaws if the bylaws allow.

DONE and ORDERED this 13th day of August, 2002.



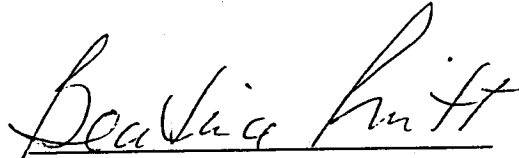
ROSS FLEETWOOD, Director
Division of Florida Land Sales,
Condominiums, and Mobile Homes
Department of Business and
Professional Regulation
1940 North Monroe Street
Tallahassee, FL 32399-1030

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: John J. Johnson, 541 Brookside Circle, Maitland, FL 32751, this 15th day of August, 2002.



Beatrice Pruitt, Docket Clerk

Copies furnished to:

Joseph S. Garwood
Assistant General Counsel