

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

Docket No. 2005056839

Jerry L. Robertson, Unit Owner,
Cortez Villas Property Association, Inc.

DS 2005-054

DECLARATORY STATEMENT

Jerry L. Robertson (Robertson), Petitioner, filed a Petition for Declaratory Statement requesting an opinion as to whether section 718.112(2)(k), Florida Statutes, requiring condominium association bylaws to include nonbinding arbitration, applies to the 1973 declaration of covenants and restrictions for Cortez Villas Property Association, and, if so, whether the property association must adopt a bylaw to include a provision for condominium arbitration.

PRELIMINARY STATEMENT

On November 3, 2005, the Division received a petition for declaratory statement from Robertson, unit owner. Notice of receipt of the petition was published in Florida Administrative Weekly on November 23, 2005. The 90 days for the Division to respond to the petition was stayed while the petitioner provided additional information. No hearing was requested or held.

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FINDINGS OF FACT

The following findings of fact are based on information submitted by Robertson. The Division takes no position as to the accuracy of the facts, but merely accepts them as submitted for purposes of this final order.

1. Robertson is a member of Cortez Villas Property Association (Cortez Villas).

2. The declaration of covenants and restrictions for Cortez Villas was filed in 1973.

3. Cortez Villas's bylaws do not contain a provision requiring condominium nonbinding arbitration.

4. Robertson's petition asks if section 718.112(2)(k), Florida Statutes (2005), is applicable to Cortez Villas. This question requires the Division to address whether Cortez Villas is a condominium subject to chapter 718, Florida Statutes.

5. The purpose of Cortez Villas as described in article II of its Amended Articles of Incorporation of Cortez Villas Property Association, Inc. includes the following:

(e) To provide, purchase, acquire, replace, improve, maintain and/or repair such buildings structures, street lights and other structures, landscaping, paving and equipment, both real and personal, related to the health, safety and social welfare of the members of the Association, as the Board of Directors in its discretion determines necessary, appropriate, and/or convenient.

6. The articles also state that the general powers of the Cortez Villas include "hold[ing] funds solely and exclusively for the benefit of the members for purposes set forth in these Articles of Incorporation." Art. III(a), Art. of Incorp.

7. The declaration of covenants and restrictions for Cortez Villas

contains the following:

Section 1. Membership. The Members of the Association are: (a) any Condominium Association, as to all Owners of Units subject to the Declaration of Condominium for which such Condominium Association was created provided the Developer declared the condominium regime created thereby or otherwise agrees that such condominium regime is to have its association as a member of the Association and such condominium regime covers at least 18 Units; (b) every person or entity who is a record owner of a Unit that is not subject to the provisions of any Declaration of Condominium described above; and, (c) the Developer at all times as long as it owns any property subject to this Declaration, or has the right to elect a Director of the Association, provided that any such person or entity who holds such interest merely as a security for the performance of an obligation shall not be as a member. Membership shall be appurtenant to and may not be separated from ownership of any Unit which is subject to assessment.

Art. IV, Declaration of Covenants and Restrictions for Cortez Villas.

8. While the declaration appears to contemplate non-condominium members of the association, a prior Division investigation determined that the Cortez Villas development is completely built out and composed entirely of condominiums. Division File No. 2005000511.

9. All unit owners are obligated to pay assessments to the Cortez Villas.

Art. V, § 1, Declaration. Failure to pay assessments subjects a unit owner to a lien on his unit. Id.

CONCLUSIONS OF LAW

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

2. Robertson has standing to seek this declaratory statement.

3. Section 718.103(2), Florida Statutes (2005), provides:

"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 in the entity is composed exclusively of unit owners or their elected or appointed representatives and is a required condition of unit ownership.

4. In 1991, the legislature amended this provision to substantially similar form of that listed above. See Ch. 91-103, Laws of Fla. Prior to this change, section 718.103(2), Florida Statutes, more narrowly defined association as "an entity which is responsible for the operation of a condominium." According to Senate Staff Analysis dated April 10, 1991, the legislature changed this provision in order to codify the judicial decision of Jungle Den and the Department of Business Regulation rule promulgated in response to Jungle Den. See Downey v. Jungle Den Villas Recreation Ass'n, Inc., 525 So. 2d 438 (Fla. 5th DCA 1988) (applying both the "constituency" and "function" tests to define a master association as a condominium association under the jurisdiction of the chapter 718, Florida Statutes), review denied, 536 So. 2d 244 (Fla. 1988). Therefore, to be subject to regulation under chapter 718, Florida Statutes, an association must:

- (1) function like a condominium association in that it must operate real property in which condominium owners have use rights, and
- (2) contain a membership constituency that is
 - (a) exclusively composed of unit owners or their representatives,
 - and (b) mandatory as a condition of condominium ownership.

5. First, as to the function portion of the test, Cortez Villas functions like a condominium association. According to the articles of incorporation quoted

above, it operates and maintains real property in which condominium unit owners have use rights.

6. Second, under the constituency part of the test, membership in Cortez Villas is a mandatory condition of condominium ownership. The association's declaration of covenants and restrictions provide that membership in Cortez Villas is appurtenant to the units and cannot be separated from the units. Further, the development is completed, and the association is entirely composed of condominium units. Cf. Dep't of Bus. Regulation v. Siegel, 479 So. 2d 112 (Fla. 1985) (holding that homeowners' association whose membership might possibly include non-condominium unit owners in the future was not an "association" as defined by section 718.103(2), Florida Statutes).

7. While originally in its declaration of covenants and restrictions Cortez Villas was contemplated to be a property association that would contain non-condominium residential units, it became a condominium association by operation of law under Siegel and section 718.103(2), Florida Statutes, which now incorporates the test that Siegel utilized.

8. Because, Cortez Villas satisfies the function and constituency prongs, it is a condominium association subject to the requirements of chapter 718, Florida Statutes.

9. However, the version of chapter 718, Florida Statutes, governing a particular condominium is the law in existence on the date of recording the declaration of condominium. Sans Souci v. Dep't of Bus. Regulation, 421 So. 2d 623 (Fla. 1st DCA 1982); Suntide Condo. Ass'n v. Dep't of Bus. Regulation, 463

So. 2d 314, 317 (Fla. 1st DCA 1984). Cortez Villas's declaration was filed in 1973. Generally, a statute is not to be given retroactive effect unless the statute expressly states that it is to be applied retroactively. Century Vill., Inc. v. Wellington Condo. Ass'n, 361 So. 2d 128 (Fla. 1978).

10. Notwithstanding the above, future legislative acts may be incorporated as amendments to the original declaration if the declaration contains express language referring to the Condominium Act as the same may be amended from time to time. Kaufman v. Shere, 347 So. 2d 626 (Fla. 3d DCA 1977).

11. Even in the absence of automatic amendment clauses, certain other changes to the Condominium Act are exceptions to the general rule as well. Provisions which are remedial or procedural and which do not create new or take away vested rights, but only operate in furtherance of the remedy or confirmation of already existing rights, do not come within the legal concept of a retrospective law or the general rule against retrospective operation of a statute. City of Lakeland v. Catinella, 129 So. 2d 133, 136 (Fla. 1961); City of Orlando v. Desjardins, 493 So. 2d 1027 (Fla. 1986).

12. Cortez Villas's declaration does not include an automatic amendment clause. However, the current arbitration provision of chapter 718, Florida Statutes, is remedial in nature and does not create or take away any existing rights. It simply provides a remedy for already existing rights. Therefore, section 718.112(12)(k), Florida Statutes (2005), is applicable to Cortez Villas.

13. Section 718.112(2), Florida Statutes (2005), provides the following in part (emphasis added):

REQUIRED PROVISIONS. –The bylaws shall provide for the following and, if they do not do so, shall be deemed to include the following:

(k) *Arbitration.* –There shall be a provision for mandatory nonbinding arbitration as provided for in s. 718.1255.

14. According to a plain reading of the above provision, condominium bylaws that do not contain the required provisions of section 718.112(2), Florida Statutes (2005), are deemed by statute to include them. Because the mandatory nonbinding arbitration is included in the list of required provisions, it is deemed to be included in the bylaws of Cortez Villas even though the bylaws as originally written do not contain the arbitration provision.

15. Consequently, Cortez Villas is not required to amend its bylaws to include a mandatory nonbinding arbitration provision since by statute the provision is already deemed to be incorporated into its bylaws. However, Cortez Villas may wish to amend its bylaws to incorporate the provisions of the Condominium Act. This would assist it and its members in resolving future questions and issues.

ORDER

Based upon the findings of fact and conclusions of law, it is declared that section 718.112(2)(k), Florida Statutes, requiring condominium bylaws to include nonbinding arbitration, applies to the 1973 declaration of covenants and restrictions for Cortez Villas Property Association; however, the property

association does not have to adopt a bylaw to include a provision for condominium arbitration since one is deemed by statute to be included.

DONE and **ORDERED** this 30th day of December, 2005, at Tallahassee, Leon County, Florida.




MICHAEL T. COCHRAN, 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

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 Jerry L. Robertson, 4206 38th Avenue West, Bradenton, Florida, 34205, this 12th day of January, 2006.


ROBIN MCDANIEL, Division Clerk

Copies furnished to:
Janis Sue Richardson,
Chief Assistant General Counsel