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

IN RE PETITION FOR DECLARATORY STATEMENT

DS 2007-019

GULF AND BAY CONDOMINIUM ASSOCIATION, INC.

Docket No. 2007028049

DECLARATORY STATEMENT

The Department of Business and Professional Regulation, Division of Florida Land Sales, Condominiums, and Mobile Homes (Division) hereby issues this Declaratory Statement pursuant to sections 120.565 and 718.501, Florida Statutes. The issue is whether Gulf and Bay Club Condominium Association, Inc. (Gulf and Bay) may adopt a bylaw restricting unit owners from serving on the board for more than two consecutive three year terms under section 718.112(2)(d), Florida Statutes (2005), and Florida Administrative Code Rule 61B-23.0021. The Division finds that a limitation on a unit owner's legal right to serve as a director on the board of directors is inconsistent with the Condominium Act.

PRELIMINARY STATEMENT

On May 11, 2007, the Division received a petition for declaratory statement from Gulf and Bay. Notice of receipt of the petition was published in Florida Administrative Weekly on May 25, 2007.

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FINDINGS OF FACT

The following findings of fact are based on information submitted by Gulf and Bay. 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. Gulf and Bay is a condominium association organized to operate and manage Gulf and Bay Club, a condominium located in Sarasota County, Florida. Art. 6, Declaration of Condo. of Gulf and Bay Club (Declaration) (amended 2001).

2. Gulf and Bay is a condominium "association," as that term is defined by section 718.103(2), Florida Statutes.

3. All record unit owners are members of the association. Art. 4.1, Am. Art. of Incorp.

4. The association operates and manages the condominium under the powers given by the Condominium Act, the Florida Not for Profit Corporation Act, and those set forth in the declaration, the articles of incorporation, and the bylaws, if not inconsistent with the Condominium Act. Art. 6, Am. Declaration; art. 3.2, Am. Art. of Incorp. The association has all the powers granted by the Condominium Act and Florida Not for Profit Corporation Act "not in conflict with the terms of these Articles of Incorporation or the Declaration of Condominium." Art. 3.1, Am. Art. of Incorp.

5. An elected board of directors manages the association. Art. 5.1, Am. Art. of Incorp. The unit owners elect the directors at the annual meeting in a manner determined by the bylaws. Art. 5.2, Am. Art. of Incorp.

6. Article 3.4 of the bylaws provides that a director must be either a member of the association, a member's spouse, a designated voter of a unit owner who is not a natural person, or fall within select exceptions to the rule requiring membership.

7. The current bylaws provide that members are elected to serve three year terms of office. Art. 3.2, Bylaws of Gulf and Bay Club Condominium Association, Inc. (Bylaws). There is currently no limitation on the number of terms or total number of years a person may serve on the board. Id. Article 3.2 of the bylaws currently provides:

Number and Term. The affairs of the Association shall be managed by a Board of Directors consisting of nine (9) directors. The members of the Board of Directors shall be elected at the annual meetings of the membership of the Association. The election shall be at large by all members of the Association. Directors shall be elected to serve a three (3) year term office. A Director's term of service shall extend until the Director's successor is duly elected and qualified or until the Director's earlier resignation, removal or death.

8. A group of owners in the association have proposed an amendment to the bylaws to prohibit a director from serving more than two consecutive terms on the board of directors. The proposed amendment to article 3.2 provides (additions indicated by underlining):

Number and Term. The affairs of the Association shall be managed by a Board of Directors consisting of nine (9) directors. The members of the Board of Directors shall be elected at the annual meetings of the membership of the Association. Directors shall be elected to serve a three (3) year term office. A Director's term of service shall extend until the Director's successor is duly elected and qualified or until the Director's earlier resignation, removal or death. No Director shall serve for more than two (2) consecutive terms, whether full or partial terms. A Director who has served for more than two (2) consecutive terms (full or partial) shall not be eligible for election or appointment as a Director until the second annual owners meeting following the conclusion of his second (2nd) term.

Pet. Dec. Stmt. ¶ 6(j) at 7 (emphasis in original).

9. Article 10.4 of the bylaws provides that “[n]o amendment shall discriminate against any unit owner nor against any unit or class or group of units unless the unit owners so affected shall consent.”

10. If the proposed amendment to article 3.2 is adopted by the required membership vote, two current directors whose terms are expiring would be prohibited from running for election to the board at the next annual membership meeting. Both of these directors have expressed their desire and intent to run for the board at the next annual membership meeting.

CONCLUSIONS OF LAW

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

2. Gulf and Bay has standing to seek this declaratory statement.

3. Condominiums are created and governed by statute. See, e.g., Suntime Condo. Ass'n, Inc., v. Div. of Fla. Land Sales and Condo., Dep't of Bus. Reg., 463 So. 2d 314 (Fla. 1st DCA 1984). In Florida, the governing statutes are in chapter 718, known as the Condominium Act. "The powers and duties of the Association include those set forth in this section, and except as expressly limited or restricted in this chapter, those set forth in the declaration and bylaws" § 718.111(2), Fla. Stat. (2004).

4. Section 718.112(2), Florida Statutes, provides:

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

(a) Administration.--

1. The form of administration of the association shall be described indicating the title of the officers and board of administration and specifying the powers, duties, manner of selection and removal, and compensation, if any, of officers and boards.

* * * *

(d)1. There shall be an annual meeting of the unit owners.... If there is no provision in the bylaws for terms of the members of the board, the terms of all members of the board shall expire upon the election of their

successors at the annual meeting. Any unit owner desiring to be a candidate for board membership shall comply with subparagraph 3. A person who has been convicted of any felony by any court of record in the United States and who has not had his or her right to vote restored pursuant to law in the jurisdiction of his or her residence is not eligible for board membership. The validity of an action by the board is not affected if it is later determined that a member of the board is ineligible for board membership due to having been convicted of a felony.

* * * *

3. The members of the board shall be elected by written ballot or voting machine.... Any unit owner or other eligible person desiring to be a candidate for the board must give written notice to the association not less than 40 days before a scheduled election.... There shall be no quorum requirement; however, at least 20 percent of the eligible voters must cast a ballot in order to have a valid election of members of the board....

§ 718.112(2), Fla. Stat. (emphasis added).

5. The Division has interpreted the “any unit owner” language from sections 718.112(2)(d)1 and 3, Florida Statutes, to mean that every unit owner has the right to run for election to the board of directors except for convicted felons whose right to vote has not been restored. See In re Pet. for Dec. Stmt. Bernie Ross, BPR-2007-01533 (Feb. 21, 2007) (finding a bylaw provision limiting a director’s right to seek re-election upon completion of a three-year term inconsistent with section 718.112(2)(d)(3), Fla. Stat.); In re: Pet. for Arb. Schultz, Case No. 2003-08-3347 (Nov. 21, 2003) (Scheuerman) (stating that because “[t]he statute presently contains no facial qualifications on the right of an owner to run for the board ... any unit owner is eligible to continue to sit on the board, once duly elected, regardless of the status of an alleged delinquency in the payment of assessments” despite provisions in the bylaws requiring removal for nonpayment); In re: Pet. for Dec. Stmt. Hollybrook Golf and Tennis Club Condo., Inc., BPR 96-05128 (Sept. 18, 1996) (finding that “every unit owner has the right to be a candidate for a position on the board of directors,” and a bylaw imposing a residency requirement for board

eligibility conflicted with section 718.112(2)(d)(3), Fla. Stat., and Fla. Admin. Code R. 61B-23.002(5), (9)); In re: Pet. for Dec. Stmt.: William A. Grubbs, BPR 2005-02777 (May 26, 2005) (finding that bylaws prohibiting multiple owners of a single unit from simultaneously serving on the board of directors conflict with section 718.112(2)(d), Fla. Stat.).

6. Every unit owner has the right to run for election to the board of directors, except for convicted felons whose right to vote has not been restored. § 718.112(2)(d), Fla. Stat. In 2000, the Legislature repealed a 1998 amendment to section 718.112(2)(d)(1) that provided: "In order to be eligible for board membership, a person must meet the requirements set forth in the declaration." Ch. 2000-302, § 53, Laws of Fla. (2000). The Division had construed this provision to allow a bylaw setting residency requirements as a condition for board membership. See In re: Pet. for Dec. Stmt. Harry Starr, BPR 98-08102 (Dec. 22, 1998). The 2000 repeal was intended to overturn this declaratory statement because the Legislature did not intend to allow associations the ability to enact eligibility requirements to prevent a unit owner from being a candidate for the board. The legislative bill analysis explained the Legislature's intent behind the amendment as follows:

In 1998 the following sentence was added to s. 718.112(2)(d)(1), F.S.:

"In order to be eligible for board membership a person must meet the requirements set forth in the declaration." This sentence was added pursuant to CS/HB 3321, ch. 98-322, L[aws] O[f] F[la.]. The division construed the sentence to allow declarations to contain a requirement that a person must be a resident of the condominium in order to become a member of the board. (citing In re: Petition for Declaratory Statement, Harry Starr, Golden Lakes Village Condominium Association "A", Inc., DBPR Declaratory Statement 98-029, at 10). That sentence was not intended to allow a residency requirement; it was simply intended to support other requirements set forth in the declaration. This intent is clear based upon the previous sentence in that subparagraph, which states that "any unit owner" desiring to be a candidate is eligible.

Fla. HR Comm. Real Prop. & Prob., Final Staff Analysis for CS/CS/HB 593,
1st Engrossed, at 38 (July 26, 2000) on file with legislature at:
<http://www.flsenate.gov/data/session/2000/House/bills/analysis/pdf/HB0593S2Z.RPP.pdf>

7. The Condominium Act provides that every unit owner is eligible to run for election. An association may “grant itself in the Declaration of Condominium and bylaws only those powers not inconsistent with the Act.” Towerhouse Condo., Inc. v. Millman, 475 So. 2d 674, 676 (Fla. 1985). The proposed amendment to the bylaws limiting a director to no more than two consecutive terms is inconsistent with the Condominium Act.

8. Gulf and Bay also cites to Florida Administrative Code Rule 61B-23.0021 in its petition. The rule is a procedural rule implementing section 718.112(2)(d), Florida Statutes. Any unit owner who wants to run for election to the board sends his or her written notice to the board “not less than 40 days before a scheduled election.” Fla. Admin. Code R. 61B-23.0021(5). The ballots must include the names of all of the owners who have given their names to the association as candidates for election. Id. 61B-23.0021(9). The rule supports the Division’s conclusion that all unit owners of Gulf and Bay are eligible to run for election to the board of directors.

ORDER

Based on the findings of fact and conclusions of law, it is ordered that Gulf and Bay may not adopt a proposed amendment to the bylaws limiting a director’s right to seek re-election as such a bylaw would be inconsistent with section 718.112(2)(d)(3), Florida Statutes, which provides that all unit owners, except convicted felons whose right to vote has not been restored, are eligible to run for election to the board.

DONE and ORDERED this 13th day of June, 2007,

at Tallahassee, Leon County, Florida.



Division of Florida Land Sales,
Condominiums & Mobile Homes

A handwritten signature in black ink, appearing to read "Michael T. Cochran", written over a horizontal line.

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, 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 Kevin T. Wells, Esquire, 22 South Links Avenue, Suite 301, Sarasota, Florida 34236 on this 26th day of June, 2007.

Robin McDaniel
Robin McDaniel, Division Clerk

Copies furnished to:

Janis Sue Richardson
Chief Assistant General Counsel