

Sarah Wachman, Agency Clerk

STATE OF FLORIDA
By: Brandon M. Nichols
DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION
DIVISION OF FLORIDA LAND SALES, CONDOMINIUMS, AND MOBILE HOMES

IN RE PETITION FOR DECLARATORY STATEMENT

DS 2007-028

VENTURE OUT AT CUDJOE CAY, INC.

Docket No. 2007036682

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 Venture Out at Cudjoe Cay, Inc. (Association) may appoint a unit owner to fill a vacancy caused by an ineligible person being voted to the board instead of filling the vacancy with the unit owner who received the next highest number of votes at the annual meeting under section 718.112(2)(d)(8), Florida Statutes.

PRELIMINARY STATEMENT

On June 14, 2007, the Division received a petition for declaratory statement from Association, the association in charge of managing Venture Out at Cudjoe Cay Inc., a Condominium (Venture Out). The Division sent Association a letter on July 10, 2007, stating a clear statement of facts and a copy of the current condominium documents were needed to review the petition. The Division received a response from Association on July 23, 2007, which clarified the issue and provided some of the governing documents. The Division sent a letter to Association on July 25, 2007, stating it would need a complete set of the governing documents in order to proceed with a review of

the petition for declaratory statement. The Division received a complete copy of the documents on August 2, 2007.

FINDINGS OF FACT

The following findings of fact are based on information submitted by Association. 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. Venture Out in America, Inc. submitted the land and property for Venture Out to the condominium form of ownership. This is a land condominium in which units are the lots used for the placement of recreational vehicles (RV) or mobile homes. Art. XII, Amended Declaration of Condo. for Venture Out at Cudjoe Cay, Inc., a Condo. (Amended Declaration) at 8. The declaration adopts the Condominium Act, as amended from time to time. Amended Declaration at 1.

2. Association was created to operate and govern Venture Out. Id.; Art. II, Amended Art. of Incorporation. Association is a condominium "association," as that term is defined by section 718.103(2), Florida Statutes (2004).

3. Article V, section A of the Amended Declaration provides that "[t]here shall be one person with respect to each unit ownership who shall be entitled to vote at any meeting of the unit owners; such person shall be known (and is hereinafter referred to) as a 'voting member'." Article V, section C of the Amended Declaration provides that "[u]nit ownership, for the purpose of voting rights, is defined as ownership in fee title; however, should a person acquire the unexpired term of a ninety-nine year leasehold interest in and to a unit, said Lessee shall be entitled to the voting rights of said unit."

4. Article VIII, section A of the Amended Declaration provides that Venture Out shall be governed by the by-laws.

5. "Membership in the [Association] shall be limited to owners of Condominium units" Art. II, By-laws of Venture Out of Cudjoe Cay, Inc., a Condo. (By-laws). "Each member of the Board of Directors ... shall be either the owner of a Condominium unit or an owner of an interest therein." Art. III, section 1(a), By-laws.

6. "Once elected and qualified, the directors shall serve until their successors have been elected and qualified or until disqualified under other paragraphs of this document." Id.

7. Article III, section 4 of the By-laws covers vacancies on the board of directors. Section 4 provides that:

If the office of any Director or Directors becomes vacant by reason of death, resignation, retirement, disqualification, removal from office, or otherwise, a majority of the remaining Directors, though less than a quorum, shall choose a successor or successors, who shall hold office until the next annual election. The election held for the purpose to filling said vacancy may be held at any regular or special meeting of the Board of Directors.

Art. III, sec. 4, By-laws.

8. Article III, section 5 of the By-laws covers disqualification and resignation of directors. Section 5 provides that:

Any Director may resign at any time by sending a written notice of such resignation to the office of the Corporation delivered to the Secretary. Unless otherwise specified therein, such resignation shall take effect upon receipt thereof by the Secretary. More than three (3) consecutive absences from regular meetings of the Board of Directors, unless excused by resolution of the Board of Directors, shall automatically constitute a resignation effective when such resignation is accepted by the Board of Directors. In the

event a Director ceases to be an owner of a Condominium unit or having an interest therein, or in the event corporate ownership ceases to be an officer of said corporation, then the directorship shall immediately and automatically terminate. No member shall continue to serve on the Board should he be more than thirty (30) days delinquent in the payment of an assessment and said delinquency shall automatically constitute a resignation effective when such resignation is accepted by the Board of Directors.

Id. at sec. 5.

9. The Association and membership were either unaware or overlooked the distinction between an owner of a unit and an owner of a mobile home upon a unit, and elected an ineligible individual to the board. Id. After the ineligibility was discovered, the remaining directors appointed the next highest vote recipient to fill the vacancy. Id. Association relied on the holding in Warren v. Springwood Vill. Condo. Ass'n of Longwood, Arb. Case No. 00-0177, Partial Summary Final Order (Sept. 21, 2000) (Scheuerman, Arb.), which held that the election of an ineligible candidate to a board renders the election for the seat void and an eligible candidate who received the next highest vote should be appointed to the board. Id. Association seeks an opinion as to whether if this issue arises again, if section 718.112(2)(d)(8), Florida Statutes, allows the remaining directors to appoint an individual to fill a vacancy, or whether the next highest vote recipient who is eligible and willing to accept the position is appointed to fill the vacancy.

CONCLUSIONS OF LAW

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

11. Association has standing to seek this declaratory statement.

12. 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 law governing a particular condominium is the law in existence on the date of recording the declaration of condominium. Sans Souci v. Div. of Fla. Land Sales and Condos., 421 So. 2d 623, 628 (Fla. 1st DCA 1982); Suntime, 463 So. 2d at 317. But see Rothfleisch v. Cantor, 534 So. 2d 823, 825 (Fla. 4th DCA 1988) (limiting Suntime to its facts and applied the current version of the act on grounds that ignoring subsequent amendments to a law would limit precedent to only those condominiums created in the same year). However, future legislative acts may be incorporated as amendments to the original declaration when the declaration contains express language referring to the Condominium Act as the same may be amended from time to time. See Century Village, Inc. v. Wellington, E, F, K, L, H, J, M & G, Condo. Ass'n, 361 So. 2d 128, 132-33 (Fla. 1978) (holding constitutional concerns regarding contractual rights do not arise when declaration agrees to be bound by future amendments); Sans Souci, 421 So. 2d at 629 (stating "automatic amendment theory" applies all future amendments of the Condominium Act to the declaration). The declaration of Venture Out adopted Chapter 711, the Condominium Act. Amended Declaration at 1. However, the declaration provides that Venture Out will be governed by the Condominium Act "as same may be amended from time to time." Id. This language expressly provides that Venture Out will be subject to the current provisions of the Condominium Act, now chapter 718, Florida Statutes.

13. Section 718.112(2)(d)(8), Florida Statutes (2005), provides that:

Unless otherwise provided in the bylaws, any vacancy occurring on the board before the expiration of a term may be filled by the affirmative vote of the majority of the remaining directors, even if the remaining directors constitute less than a quorum, or by the sole remaining director. In the alternative, a board may hold an election to fill the vacancy, in which case the election procedures must conform to the requirements of subparagraph 3. unless the association has opted out of the statutory election process, in which case the bylaws of the association control. Unless otherwise provided in the bylaws, a board member appointed or elected under this section shall fill the vacancy for the unexpired term of the seat being filled. (emphasis added).

14. Section 718.112(2)(d)8 provides methods for filling a vacancy in the board prior to expiration of the term. However, the methods mentioned in section 718.112(2)(d)8 govern if not otherwise provided for in the by-laws. The by-laws of Venture Out provide that if a vacancy in the board occurs, "a majority of the remaining Directors, though less than a quorum, shall choose a successor or successors, who shall hold office until the next annual election." Art. III, sec. 4, By-laws (emphasis added). Section 718.112(2)(d)8 provides that the by-laws, if providing a manner for filling vacancies in the board prior to expiration of term, will govern the filling of the vacancy. The by-laws of Venture Out provide a manner for filling vacancies; however the question remains whether a vacancy created by the election of an ineligible individual falls under section 718.112(2)(d)8.

15. Association's petition expressed concern that an arbitration decision, holding that an association should appoint the next highest vote recipient in the case an individual is erroneously elected to the board, conflicts with the provisions of section 718.112(2)(d)8. Pet. at 1; see Warren v. Springwood Vill. Condo. Ass'n of Longwood, Arb. Case No. 00-0177, Partial Summary Final Order (Sept. 21, 2000) (Scheuerman,

Arb.). Warren involved an individual who was not a unit owner at the time he was elected to the board. Warren, Arb. Case No. 00-0177. The by-laws required that directors be unit owners, and the arbitrator ruled that the individual was not eligible to run for the board. Id. Although the individual had begun to serve his term, the arbitrator treated the election of the ineligible individual as a nullity, and agreed that the association should have filled the vacancy with an eligible candidate with the next highest number of votes who was willing to accept the position. Id. The arbitrator relied on the fact that the ineligible individual was elected at a general election and not an election to fill an interim vacancy. Id. The arbitrator further stated that:

Whether [the next highest vote recipients] initially accepted the position on the board and later resigned, or instead declined to accept the position on the board, will determine whether the board was permitted to fill the vacancy or whether instead the position should have been offered to ... the candidate with the next greatest number of votes.

Id.

16. It is clear the arbitrator focused on both the timing of the initial vote and the reason for the subsequent vacancy. Section 718.112(2)(d)8 applies to vacancies occurring before the expiration of the term. In Warren, the disputed election was to fill five positions on the board during a general election, not to fill vacancies occurring before the expiration of the term. The arbitrator was able to avoid the provisions of section 718.112(2)(d)8 by ruling that the election was null and void from the beginning, even though the ineligible individual began to serve his term.

17. The Division does not agree with the holding of the arbitrator in Warren, and recedes from the ruling in that decision that the election of an ineligible individual should be considered null and void from the beginning. Arbitration decisions are considered

final and binding as between the parties unless judicial proceedings are initiated, in which case the final decision of the arbitrator is admissible in the trial de novo. § 718.1255(4), Fla. Stat. (2002); Fla. Admin. Code R. 61B-45.043(4). However, an arbitrator's decision is not considered final agency action. § 718.1255(4). Therefore, the Division is not bound by the ruling of the arbitrator in Warren, and considers it merely a single decision.

18. The arbitrator in Warren avoided the provisions of section 718.112(2)(d)8 by ruling the election was null and void from the beginning; effectively treating the situation as if the term never began. However, this ruling ignores the policy considerations resulting from situations where ineligible individuals are elected and the ineligibility is discovered after the individual has begun serving his term and voting on association matters. In Warren, the arbitrator notes that the ineligible individual had only served briefly before being removed; so the potential ill effects were minimized. However, a situation where an ineligible individual is elected to the board, serves for a significant portion of the term, rules on association matters, and is later removed when the ineligibility is discovered has the potential to throw matters in which the ineligible individual voted into question if that ineligible board member's service was deemed null and void from the beginning.

19. Section 718.112(2)(d)8, Florida Statutes, covers "any vacancy occurring on the board before the expiration of a term." (emphasis added). The discovery that an elected board member was not eligible to be elected after he/she begins serving the new term should result in an automatic and immediate resignation of the board membership. However, this resignation occurs during the new term, and must be considered as

creating a vacancy prior to the expiration of the term under section 718.112(2)(d)8. To rule the election null and void from the beginning would have far-reaching implications beyond simply who fills the vacancy; it ignores the reality that a new term has commenced with an individual ruling on board matters, and to attempt to treat the time lapsed as if it never occurred would upset the operation of the association and board, and potentially damage the harmony of the community.

20. There are a number of possible different fact situations in which the result in Warren may still apply. If the annual meeting has not yet concluded at the time the ineligibility is found, or the ineligibility is found before the election, then the candidate must be declared ineligible and the next highest vote getter will be elected to fill the position. If the board received information that a candidate was ineligible before the election and it disregarded the allegations without confirming or refuting them prior to the election, it may not rely on this opinion to appoint a member to fill the vacancy. These scenarios are not presented in this petition, but are discussed here. Each case will, of necessity, turn on the relevant facts of the case presented to the Division or to an arbitrator.

21. A vacancy created by the removal of an ineligible individual falls under section 718.112(2)(d)8, which first requires consideration of the by-laws. The by-laws of Association provide that a majority of the remaining directors shall choose the successor or successors to fill vacancies occurring on the board¹. Art. III, sec. 4, By-laws. Therefore, the by-laws of Association govern the filling of a vacancy created by the election of an ineligible individual.

¹ There is nothing stopping Association from appointing the next highest vote recipient in this situation. The by-laws allow the directors to choose the successor, which could be any eligible individual.

ORDER

Based on the findings of fact and conclusions of law, it is ordered that under section 718.112(2)(d)8, Florida Statutes, Venture Out at Cudjoe Cay, Inc. may appoint a unit owner to fill a vacancy caused by an ineligible person being voted to the board at the annual meeting by a majority of the remaining directors according to its by-laws.

DONE and **ORDERED** this 3rd day of October, 2007,

at Tallahassee, Leon County, Florida.



Michael T. Cochran

MICHAEL T. COCHRAN, Director
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Division of Florida Land Sales,
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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 Jonathon S. Miller, 621 NW 53rd Street, Ste. 300, Boca Raton,
Florida 33487, on this 4th day of October, 2007.

Robin McDaniel
Robin McDaniel, Division Clerk

Copies furnished to:

Janis Sue Richardson
Chief Attorney