

Final Order No. BPR-2008-07093 Date: **8-22-08**
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Department of Business and Professional Regulation
AGENCY CLERK

Sarah Wachman, Agency Clerk

By: *Brandon M. Nichol*

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 2008-028**
AVENTURA MARINA ONE CONDOMINIUM ASSOCIATION, INC.

Docket No. 2008024085

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.

PRELIMINARY STATEMENT

On April 21, 2008, the Division received a Petition for Declaratory Statement from Aventura Marina One Condominium Association, Inc., (Aventura One), through its counsel, seeking an opinion as to whether Aventura Marina Owners' Association, Inc. (Master Association) is a master condominium association under section 718.103(23), Florida Statutes, and whether Aventura One may require an amendment to the master association governing documents to require it be designated a seat on the board.

The Division sent a letter to counsel on April 30, 2008, informing him that the Division may not issue a declaratory statement where it would affect the substantial interests of a person who was not a party to the proceedings or where parties disputed

the material facts. The Division requested supplemental information and required Aventura One to serve Aventura Two and Master Association with a copy of its petition.

The Division received a copy of the governing documents, a supplement, and notice of service on the other associations from counsel on May 12, 2008.

On June 5, 2008, Aventura Two and Master Association filed a joint response to the petition.

Notice of the receipt of petition was published in Florida Administrative Weekly on May 9, 2008.

FINDINGS OF FACT

The following findings of fact are based on information submitted by counsel for Aventura One, Aventura Two and Master 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. Aventura Marina, Ltd. (Developer) submitted the land and improvements for Aventura One to the condominium form of ownership by recording the declaration in the public records on November 15, 2005. Arts. 1.2, 2.18, Declaration of Aventura Marina Condominium Number One (Declaration One). Aventura One contains one building with one hundred twenty-six (126) units. Art. 3.1, Declaration. The Declaration adopts chapter 718, the Condominium Act of 2005. Art. 2.1, Declaration.

2. Aventura One was created to operate and govern Aventura One condominium. Art. 2.4, Declaration; Art. 3, Articles of Incorporation for Aventura Marina One Condominium Association, Inc. (Art. of Incorp. One).

3. Developer also created Aventura Marina Two Condominium Association, Inc. (Aventura Two) by recording the declaration in the public records on August 17, 2006. Arts. 1.2, 2.18, 2.4, Declaration of Aventura Marina Condominium Number Two (Declaration Two).

4. Aventura Two consists of one building containing two hundred fifty-two (252) units. Art. 3.1, Declaration Two.

5. Developer filed a declaration of covenants for Master Association in the public records on November 15, 2005, which is the same date it created Aventura One. Art. 2.22, Declaration One; Declaration of Covenants, Restrictions and Easements for Aventura Marina (Master Declaration).

6. Both Aventura One and Two are subject to the Master Declaration. Art. 22, Declaration One; art. 22, Declaration Two. Article 22 of the declarations for both condominiums provides:

The Homeowners' Association. The Condominium is part of a Community known as Aventura Marina (the "Community"). The Common Properties of the Community are governed by the Homeowners' Association pursuant to the Homeowners' Covenants. The Homeowners' Covenants also contain certain rules, regulations and restrictions relating to the use of such Common Properties as well as the Condominium Property (including Units). Each Unit Owner will be a member of the Homeowners' Association and will be subject to all of the terms and conditions of the Homeowners' Covenants, as amended and supplemented from time to time. Among the powers of the Homeowners' Association are the power to assess Unit Owners (and other members of the Homeowners' Association) for a pro-rata share of the expenses of the operation and maintenance of (including the management fees relating to) such Common Properties and to impose and foreclose liens in the event such assessments are not paid when due. Except for those instances where the use is limited pursuant to the Homeowners' Covenants, the Unit Owners shall be entitled to use all of said Common Properties in accordance with and subject to the terms of the Homeowners' Covenants. The Homeowners' Association may impose certain obligations on the Association including, but not limited to, obligating the Association to

collect Assessments due the Homeowners' Association despite the fact that such Assessments are not Common Expenses of the Condominium.

7. Master Association is defined as a homeowners' association. Art. 1.1(d), Master Declaration.

8. Master Association owns, operates and maintains common properties in which members have use rights. The common properties include the parking areas, roads, pedestrian bridges, walkways, recreation areas, the Master Life Safety Systems, surface water, sprinklers, landscaping, street lights, the marina, and all of the property that is part of the community. Art. 1.1(i), (q), Master Declaration; Aventura Two and Master Response to Pet. for Decl. Stmt. at 5 [hereinafter "Response"].

9. Master Association has easements through the two condominium properties for conducting safety and maintenance activities, enforcing the architectural control restrictions, regulating parking, maintaining the parking areas, and maintaining the pedestrian bridges serving the two condominiums. Arts. 3.4(h), Declaration One and Two.

10. Master Association also owns and controls property located within the footprint of Aventura One that is not a part of that condominium. Response at 3. This property is identified as the "Mini-Master Area located on the Ground Floor and the Mini-Master Area located on the Second Level" of Aventura One. Id.

11. Master Association does not own property designated as condominium property. Response at 5. Article 4.3 of the Master Declaration authorizes the developer and the Master Association to assign to condominium unit owners exclusive use but not title of a parking space and storage locker, which are "limited common properties." Art.

1.1(o), Master Declaration (defining limited common property as designated for exclusive use by a lot owner). Once assigned the space and locker become "an appurtenance to such Owner's Unit." Art. 4.3, Master Declaration.

12. Developer identified possible future development property that it later may add to the Master Association common properties. Art. 1.1(n), ex. D, Master Declaration. The future development property was developed as Aventura Two. Compare exs. D & G (site plan), Master Declaration with ex. 2, Declaration Two, at 44; Response at 2 (Aventura Two is referred to as "future development property" because it had not yet been recorded). Aventura One asserts that the property has been completely built out. Letter from Kenneth E. Zeilberger (May 8, 2008). Aventura Two and Master Association do not dispute this fact, but confirm that the "future development property" was developed as Aventura Two.

13. Master Association assesses and collects common property expenses from all of the unit owners. Art. 8.1, Master Declaration. Master Association may record a lien on any unit not paying the assessment and may foreclose the lien if not paid. Art. 8.8, Master Declaration.

14. The unit owners "are entitled to elect from among themselves, respectively, one Voting Member for each such respective Neighborhood Association, each such Voting Member to have and cast the number of votes (including fractional votes) equal to the aggregate percentage obligation of the Condominium Lots represented by the Neighborhood Association (as determined in the manner set forth in Section 7.2 of the Homeowners' Covenants)." Id. The aggregate percentage obligation is based upon the "sellable square feet" in the condominium building. Id. Under this provision, Aventura

One's voting member has about one-third of the voting power in the community. Pet. at 1-2.

15. Master Association may have from 3 to 9 directors. Art. 10.1, Master Art. of Incorp. The first board had three directors. Art. 10.5, Master Art. of Incorp. Directors are elected at the annual meeting. Id. art. 10.3. "The election shall be decided by majority vote of all Voting Members present in person or who cast ballots at the annual meeting." Art. 4.1, By-Laws of Aventura Marina Owners' Ass'n, Inc. (Master Bylaws). Under these provisions, Aventura One asserts that as a member it has one-third of the voting power, so it is "virtually impossible" for it to elect a director from Aventura One.

16. Aventura One claims the voting structure is inequitable since it must pay one-third of the Master Association's expenses without a voice in the Master Association because it cannot elect a director to a seat on the board with only a one-third vote. Pet. at 2. Aventura One argues that it is entitled to a permanent seat on the board so that it will have a voice in one-third of the assessments it pays to the Master Association. Pet. 1-2.

17. Aventura Two and Aventura Master disagree. They respond that a prior director owned units in both One and Two and a current director also owns units in both condominiums. Response at 10.

18. Master Association and Aventura Two assert that it does not own any condominium property, so it is not a residential condominium as defined by section 718.103(23), Florida Statutes. It argues that since it is not a residential condominium, it cannot be a condominium association. They also assert that the Division is without authority to amend the Master Association governing documents to change the

membership voting rights. Amendments to the governing documents are made in accordance with the provisions for amendment in the documents and require approval from Aventura Two. Lastly, Master Association argues that the owners of Aventura One should have asked the developer to amend the voting provisions before turnover. Response at 3-12.

CONCLUSIONS OF LAW

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

20. Aventura One has standing to seek this declaratory statement. §§ 120.565, 718.103(2), Fla. Stat.

21. Aventura Two and Master Association have standing to intervene in this proceeding as their substantial interests may be affected by a decision. §§ 120.565, 718.103, Fla. Stat.

23. Section 120.565, Florida Statutes, provides:

(1) Any substantially affected person may seek a declaratory statement regarding an agency's opinion as to the applicability of a statutory provision, or of any rule or order of the agency, as it applies to the petitioner's particular set of circumstances.

(2) The petition seeking a declaratory statement shall state with particularity the petitioner's set of circumstances and shall specify the statutory provision, rule, or order that the petitioner believes may apply to the set or circumstances.

24. Rule 28-105.001, Florida Administrative Code (2007), provides:

A declaratory statement is a means for resolving a controversy or answering questions or doubts concerning the applicability of statutory provisions, rules, or orders over which the agency has authority. A petition for declaratory statement may be used to resolve questions or doubts as to how the statutes, rules, or orders may apply to the

petitioner's particular circumstances. A declaratory statement is not the appropriate means for determining the conduct of another person.

A. Condominium Association.

25. Section 718.103(2), Florida Statutes (2007), 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.

26. In 1991, the legislature amended this provision to a substantially similar form to that listed above. See Ch. 91-103, Laws of Fla. Prior to this change, section 713.103(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 Downey v. Jungle Den Villas Recreation Association, 525 So. 2d 438 (Fla. 5th DCA 1988) and the Department of Business Regulation rule promulgated in response to Jungle Den. See Jungle Den, 525 So. 2d at 440-41 (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) have a membership constituency that:

(a) is exclusively composed of unit owners or their representatives; and

(b) is mandatory as a condition of condominium ownership.

Function Test.

27. Master Association operates the common area property for the use and benefit of the condominium unit owners in Aventura One and Two. Aventura One and Two condominium associations operate and maintain the two condominiums while the Master Association has architectural control over the common areas, assesses the owners through the condominium associations for maintenance of the common areas, maintains the Master Life Safety Systems located in the common areas and on the common elements of both condominiums, maintains the marina used by the owners to dock their boats, and enforces the master covenants and restrictions. Arts. 5.2, 6, 8, 9, Master Declaration; art. 5, Art. of Incorporation (including power to buy and lease property). Master Association performs the functions of a condominium association. Jungle Den, 479 So. 2d at 441 (function test met where recreation association operated property in which unit owners had use rights and had power to assess unit owners to make capital improvements and acquire assets).

Constituency Test.

28. The constituency test has two parts: (i) whether only condominium owners can be members and (ii) whether membership is mandatory. Both tests are met.

29. Only condominium owners are members of the Master Association. Art. 6.1, Master Art. of Incorporation. Owners in each condominium elect a voting member to represent

their interests in the Master Association. Art. 6.3, Master Association. The first part of this test is met.

30. All condominium owners are mandatory members in the Master Association. Art. 11, Aventura One; art. 22, Aventura Two; art. 3, Master Declaration. The second part of this test is met.

31. The development is complete. Only residential condominiums were developed and only condominium unit owners have use rights in Master Association property and membership in Master Association. The exception to Jungle Den for homeowners' associations that may at some future time have non-condominium members and non-condominium property does not arise. See Dep't of Bus. Reg., Div. of Land Sales & Condo. v. Siegel, 479 So. 2d 112 (Fla. 1985) (applying "function test" to homeowners association, whose membership could include non-unit owners, and who assessed for non-condominium property to find it was not an "association" as defined by 718.103(2)).

32. Aventura Master Association is a condominium association as defined by section 718.103(2), Florida Statutes.

B. Bylaw Amendment.

33. Aventura One also asks the Division to order Aventura Master to amend its bylaws provide it with a permanent seat on the board of directors. Aventura One does not cite to a provision of the Condominium Act or provide case law in support of its request.

34. Aventura Two and Master Association argue that Aventura One is asking the Division to reform their contract, which provides for the membership and voting rights in article 3.2 of the declaration of covenants, article 6.3 of the articles of incorporation, and

4.1 of the bylaws. They argue that only courts may reform the declaration when there has been a mutual mistake on the part of all parties to the declaration, articles and bylaws, which has not occurred in this case. Providence Sq. Ass'n, Inc. v. Biancardi, 507 So. 2d 1366 (Fla. 1987) (holding that reformation of declaration to change percentage shares of ownership equitable where declaration is based on a mutual mistake). They argue that an amendment approved by all members is required to change the membership and voting rights in order to avoid materially and adversely affecting Aventura Two's voting rights in the Master Association, which would be inconsistent with 718.106(2)(d) and 720.306(1)(c), Florida Statutes. Response at 7-10. Section 720.306(1)(c), Florida Statutes, governs homeowners' associations and does not apply to condominium associations. § 720.302(4), Fla. Stat.; Circle Villas Condo. Ass'n, Inc. v. Circle Property Owners' Ass'n, Inc., 957 So. 2d 1207, 1210 (Fla. 4th DCA 2007). Since Master Association is now a condominium association, it is subject to the Condominium Act.

35. Under the Condominium Act, condominium associations are incorporated. § 718.111(1), Fla. Stat. The articles of incorporation and the bylaws provide for the number of directors and their method of election by the members. § 718.112(1) & (2)(a), Fla. Stat. Only where the bylaws are silent as to the composition and the selection of the board does the Condominium Act determine the number and manner of selection of the directors to the board. § 718.112(2)(a), Fla. Stat. Master Association's articles of incorporation and bylaws provide the number of directors and the manner in which they are elected. Art. 3, Master Declaration; Arts. 6, 10, Art. of Incorp.; art. 4, Master Bylaws.

Only if a bylaw is inconsistent with the statutory requirements, will the Condominium Act control. § 718.112(2), (3)(d), Fla. Stat.

36. The Master Association governing documents determine the membership and the voting rights for the unit owners. Section 718.103(2), Florida Statutes, defines a condominium association in part by the composition of its "membership." The members are the unit owners. The unit owners in each condominium elect a voting member in the Master Association. Under section 718.106(2)(d), Florida Statutes, the Master Association documents must designate the "full voting rights" appurtenant to membership in the Master Association. The governing documents do so. It is not unusual for master associations to have individual associations as members with the voting rights apportioned based upon the number of units within each subassociation. Compare In re: Pet. for Decl. Stmt. Wynmoor Community Council, Inc., DBPR Docket No. DS94029; BPR-94-04603 at 3 (Aug. 4, 1994) (subassociations are voting members of master holding number of votes equal to number of units) with In re: Pet. for Arb., Palm Greens at Villa Del Ray Recreation Ass'n, Inc. v. Schlossberg, 2003 WL 24042704 (Fla. DBPR Arb. Aug. 13, 2003) (unit owners in both condominium subassociations elected three representatives/members each with one vote in the master association).

37. Aventura One argues that it should have an equal vote and not the one-third vote granted by the governing documents. Aventura One argues that it is virtually impossible for it to elect a director from among its ownership to the Master Association board since it has one-third vote and a majority vote is required. It suggests that the

directors do not act in the best interest of Aventura One since the directors, who are elected at large by both condominium association members, are from Aventura Two.

38. Aventura Two and Master Association dispute these assertions and point to two directors who were unit owner members in both condominiums as proof that Aventura One was represented on the board. All directors are charged with the fiduciary responsibility to act in the best interests of all of the owners. § 718.111(1)(a), Fla. Stat; Art. 4.10, Master Association.

39. As condominium arbitration decisions have explained, the Legislature amended the definition of association to incorporate master associations into the Condominium Act regulations, but has not taken further legislative action to accommodate the unique characteristics of a master association to fit all of the provisions in the act. Palm Greens, at 3. An arbitrator found that section 718.112(2)(d)3, Florida Statutes, did not "guarantee that each individual unit owner in a master association [was] entitled to one vote in choosing all board members on the master association[,]" but that the law gives the vote to the voting member. In re: Pet. for Arb. Wynmoor Community Council, Inc., Arb. Case No. 94-0258, 1994 WL 16185627, at ¶ 7 (Fla. DBPR Arb. Nov. 8, 1994). "If the legislature had intended to disrupt the voting rights established in master association documents, in terms of adjusting who was entitled to vote for which board positions, and how many votes each person was entitled, such intent must be manifested through more direct evidence than exists here." Id.

40. In this case, the owners are members of the Master Association and directly elect their voting representatives. Art. 6.3, Master Art. of Incorpor. The unit owners elect their voting representative in the same way they elect their own directors. Id. If the

owners do not elect a voting representative then the president of the subassociation becomes the voting member of the Master Association. Id. Aventura One's challenge is to the value or weight of its vote, which is one-third to Aventura Two's two-third vote in the election of directors. Aventura One does not cite to authority for its position.

41. Aventura One presents no facts on which to base a conclusion that the directors have not faithfully performed their duties. Disputes over money are often the root of condominium disputes and complaints.¹ As long as unit owners live in condominiums this will be the case. Imposing a requirement of a permanent seat on the board, while perhaps ameliorating these complaints, is beyond the scope of this proceeding. That is up to the unit owners who have the power to amend the bylaws. The Condominium Act does not provide the relief requested and the Division is without authority in this proceeding to require the Master Association to record an amendment to the bylaws.

ORDER

Based on the findings of fact and conclusions of law, it is ordered that Aventura Marina Owners' Association, Inc. is a condominium association as defined by section 718.103(2), Florida Statutes, and Aventura Marina One Condominium Association, Inc. may not require the master association to amend the governing documents to designate a seat on the board to Aventura One in this proceeding.

¹ There is some evidence that Aventura One and the Master Association are disputing whether the Master Association owes Aventura One expenses associated with operating the Mini-Master areas.

DONE and ORDERED this 19th day of August, 2008,

at Tallahassee, Leon County, Florida.



Division of Florida Condominiums,
Timeshares, and Mobile Homes

A handwritten signature in black ink, appearing to read 'M. 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 ANY PARTY ADVERSELY AFFECTED 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 Kenneth E. Zeilberger, Esq., Katzman & Korr, 1501 Northwest 49th Street, 2nd Floor, Fort Lauderdale, FL 33309, Edoardo Meloni, Esq., Fein and Meloni, 900 South State Road 7, Plantation, FL 3317-4523, on this 25th day of August, 2008.

Robin McDaniel
Robin McDaniel, Division Clerk

Copies furnished to:

Janis Sue Richardson
Chief Attorney