

Department of Business and Professional Regulation
AGENCY CLERK
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By: Brandon M. Nichol
STA.

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

IN RE PETITION FOR DECLARATORY STATEMENT

DS 2008-011

CLARCONA RESORT CONDOMINIUM ASSOCIATION, INC.

Docket No. 2008010666

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 Clarcona Resort Condominium Association, Inc. (Association) may vote the units it has acquired title to under sections 718.104(4)(j) and 718.111(9), Florida Statutes.

PRELIMINARY STATEMENT

On February 21, 2008, the Division received a petition for declaratory statement from Association, by and through William C. Church, President of Association. The Division sent a letter to Mr. Church on February 28, 2008, acknowledging receipt of the petition and requiring Mr. Church to send a copy of the governing documents. The Division received a copy of the governing documents on March 10, 2008.

Notice of receipt of the petition was published in Florida Administrative Weekly on March 7, 2008.

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. The purpose of Association is to operate and administer condominiums located on certain property located in Orange County, Florida, and to carry out the functions and duties as set forth in the declarations of the condominiums. Art. II, Articles of Incorporation of Jellystone Park Condominium Association, Inc. (Art. of Incorp.).¹

2. Association operates and maintains 946 condominium units located in eleven separate condominiums originally developed by Sun Resorts, Inc. (Developer) and submitted to the condominium form of ownership from 1983 to 1988. Settlement Agreement at 1-2. Of the 946 units created, only 772 were developed in Condominiums I, IIA, IIB1, and IIB2.² Id. at 3.

3. The condominiums governed by Association shall be hereinafter known as "Clarcona Community." This petition is concerned with: The 533 unit "Yogi Bear's Jellystone Park Camp-Resort (Apopka) Condominium" (Condo I); the 24 unit "Yogi Bear's Jellystone Park Camp-Resort (Apopka) IIIB Condominium" (Condo IIIB); the 28 unit "Yogi Bear's Jellystone Park Camp-Resort (Apopka) IIIC Condominium" (Condo

¹By amendment filed in the public records of Orange County in March 1997, the name of the association was changed from Jellystone Park Condominium Association, Inc. to Clarcona Resort Condominium Association, Inc. Articles of Amendment to the Articles of Incorporation of Jellystone Park Condominium Association, Inc. at 1.

² Units are created when the declaration of condominium is recorded in the public records, but may not necessarily be developed at the time of recording. § 718.104(2), Fla. Stat.; Winkelman v. Toll, 661 So. 2d 102, 105-6 (Fla. 1995).

IIIC); and the 24 unit "Yogi Bear's Jellystone Park Camp-Resort (Apopka) IIID Condominium (Condo IIID). Pet. for Dec. Stmt. at 2.³

4. The condominiums of Clarcona Community adopt chapter 718, Florida Statutes, the Condominium Act. See e.g., Condo I Declaration at 1.⁴

5. In a settlement agreement with Developer, Association acquired warranty deeds in lieu of foreclosure for the units and corresponding appurtenances of Condos IIIB, IIIC, and IIID. Settlement Agreement at 5; Pet. for Dec. Stmt. at 2. Furthermore, Association has received title to units 470 & 560, located in Condo I, by way of foreclosure. Pet. for Dec. Stmt. at 2.

6. Developer agreed to terminate these three condominiums upon approval of the bankruptcy court. Settlement Agreement at 5, sec. 4. It agreed it would not retain any unit member votes for these 123 units upon termination. Id. Developer relinquished its retained developer rights, including its right to vote any of these undeveloped units. Settlement Agreement at 8, sec. 9.

7. Association states that it intends to vote the units to terminate the undeveloped condominiums and make the land common area. Letter from David M. Shannon to Dep't of Bus. & Prof'l Reg., (Mar. 4, 2008).

8. Article II, section 2 of the Bylaws provides in relevant part that:

³ Condo I is not specifically mentioned in the petition; however, based on the petition and plot plan and survey, the units 470 and 560 acquired by foreclosure are contained in Condo I. See Pet. for Dec. Stmt. at 2; ex. A to Declaration of Condominium of Yogi Bear's Jellystone Park Camp-Resort (Apopka), a Condominium (Condo I Declaration).

⁴The Division was provided with the Declarations of Condo I, Yogi Bear's Jellystone Park Camp-Resort (Apopka) IIA (Condo IIA), and Yogi Bear's Jellystone Park Camp-Resort (Apopka) IIBI (Condo IIBI). The provisions of the Declarations provided are substantially similar, and therefore the Division will assume the Declarations of Condo IIIB, Condo IIIC, and Condo IIID are identical to the Declarations provided.

Membership in the Association shall be limited to owners of Condominium 'Units,' as defined in the Declaration of Condominium to which these By-laws are attached. ... If Unit ownership is vested in more than one person, then all of the persons so owning said Unit shall be members eligible to hold office, attend meetings, etc., but as hereinafter indicated, the vote of a Unit shall be cast by the "Voting Member." If Unit ownership is vested in a corporation, said corporation may designate an individual officer or employee of the corporation as its Voting Member.

Art. II, sec. 2, By-Laws of Jellystone Park Condominium Association, Inc. (Bylaws).⁵ (emphasis added).

9. Article II, section 3 of the Bylaws provides that "[t]he owner(s) of each Condominium Unit shall be entitled to one (1) vote for each Condominium Unit owned. If a Condominium Unit owner owns more than one (1) Unit he shall be entitled to one vote for each Unit owned. The vote of the Condominium Unit shall not be divisible." (emphasis added).

10. Article II, section 4 of the Bylaws provides that "[u]nless otherwise provided in these By-Laws, the presence in person or by proxy of a majority of the Unit Owners' total votes shall constitute a quorum."

11. Article 10.2 of the Condo I Declaration provides in relevant part that:

The Owners of Units shall be members of the Association. ... The total number of votes shall be equal to the total number of Condominium Units as declared as of that date and each Condominium Unit shall have no more and no less than one (1) equal vote in the Association. If one (1) owner owns more than one (1) Condominium Unit, he shall have one (1) vote for each Condominium Unit he owns. The vote of a Condominium Unit is not divisible. Unit ownership for purpose of voting rights is defined as ownership in fee title. Every Owner of a Condominium Unit, whether he has acquired his ownership by purchase, gift, conveyance, or

⁵ See *supra*, note 1.

transfer by operation of law, or otherwise, shall be bound by the By-laws and Articles of Incorporation of the Association and by the provisions of this Declaration. (emphasis added).

12. Article II, section 6 of the Bylaws provides that:

If a Condominium Unit is owned by one person, his right to vote shall be established by the record title to the Unit. If a Condominium Unit is owned by more than one person, the person entitled to cast the vote for the Unit shall be designated in a Certificate signed by all of the record owners of the Unit and filed with the Secretary of the Association. If a Condominium Unit is owned by a corporation, the officer or employee thereof entitled to cast the vote of the Unit for the corporation shall be designated in a Certificate for this purpose, signed by the President or Vice President and attested to by the Secretary or Assistant Secretary of the corporation, and filed with the Secretary of the Association. The person designated in the Certificate who is entitled to cast the vote for the Unit shall be the Voting Member. (If such a Certificate is not on file with the Secretary of the Association for a Unit owned by more than one person or by a corporation, the vote of the Unit concerned shall not be considered in determining the requirement for a quorum, or for any purpose requiring the approval of a person entitled to cast the vote for the Unit, unless said Unit is owned by a husband and wife. Such Certificate shall be valid until revoked, or until superceded by a subsequent Certificate, or until a change occurs in the ownership of the Unit concerned. (emphasis added).

13. Article III, section 8 of the Bylaws provides that “[a]pproval or disapproval by a Unit owner upon any matter, whether or not the subject of an Association meeting, shall be by the Voting Member....”

14. Article VIII of the Bylaws provides that:

At any foreclosure sale of a Unit the Board of Directors may, with the authorization and approval by the affirmative vote of Voting Members casting not less than three-fourths (3/4) of the total votes of the Unit owners, acquire in the name of the Association or its designee, a Condominium Unit being foreclosed. The term “foreclosure” as used in this section shall mean and include any foreclosure of any lien, including

a lien for assessments. The power of the Association to acquire a Condominium Unit at any foreclosure sale shall never be interpreted as any requirement or obligation on the part of the Board of Directors, or of the Association, to do so at any foreclosure sale, the provisions hereof being permissive in nature and for the purpose of setting forth the power in the Board of Directors to do so should the requisite approval of the Voting Members be obtained. (emphasis added).

15. Article 7 of the Condo I Declaration provides that:

The Common Expenses of the Condominium shall include the expenses of the operation, maintenance, repair or replacement of the Common Elements and the Commons, costs of carrying out the powers and duties of the Association and any other expense designated as Common Expense by the Condominium Act. Each Unit Owner shall be responsible and liable for an equal share of the Common Expenses regardless of the purchase price, size or location of the Unit.

No Unit owner may be excused from the payment of his share of the Common Expenses of the Condominium unless all Unit Owners are likewise proportionately excused from payment, except that the Developer is excused from the payment of its share of the Common Expenses which have been assessed against its Units from the effective date of the Prospectus through December 31, 1984....

16. Association has the following questions regarding the units owned by the Association:

How and by what means does the Association vote the Condominiums IIIB, IIIC, & IIID that were received in lieu of foreclosure and Units 470 and 560 that were received in foreclosure?

In an election for Directors can these units be voted, and if yes by whom?

If there is a vote for amendments to the Documents, how would they be voted?

At a Unit Owner Meeting, would these units be used to obtain a quorum?

Pet. for Dec. Stmt. at 2.

CONCLUSIONS OF LAW

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

18. Association has standing to seek this declaratory statement.

19. 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 applying 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).

20. Section 718.104(4)(i) (renumbered (4)(j) by ch. 2000-302, Laws of Fla. (2000)), Florida Statutes (1984)⁶, provides that the declaration must provide for the "[u]nit owners' membership and voting rights in the association."

21. Section 718.111(9), Florida Statutes (1984)⁷, provides that "[t]he association has the power, unless prohibited by the declaration, articles of incorporation, or bylaws of

⁶Section 718.104 was not amended until 1990, and no amendment has altered the language of (4)(i) (renumbered (4)(j)). Therefore the cited language applies to all of the condominiums at issue. See Ch. 90-151, Laws of Fla.

the association, to purchase units in the condominium and to acquire and hold, lease, mortgage, and convey them.”

22. Section 718.106(2), Florida Statutes (1984)⁸, provides in relevant part that:

(2) There shall pass with a unit, as appurtenances thereto:

(a) An undivided share in the common elements and common surplus.

* * * * *

(d) Membership in the association designated in the declaration, with the full voting rights appertaining thereto.

23. Section 718.111(9), Florida Statutes allows an association to purchase units in the condominium as long as it's not prohibited by the declaration, articles, or bylaws. See Trafalgar Towers Ass'n #2 v. Zimet, 314 So. 2d 595, 597 (Fla. 4th DCA 1975) (concluding nothing in the governing documents of the condominium prevented the association from purchasing a unit as authorized by statute). Article VIII of the Bylaws specifically allows the Association to acquire units by foreclosure, as long as three-fourths vote of the unit owners is obtained. Because there has been no question as to whether the units acquired by foreclosure were acquired properly, the Division will assume article VIII was properly followed and that Association holds title to the units at issue.

24. Association, by obtaining title to the units in Condos IIIB, IIIC, and IIID, as well as units 470 & 560 from Condo I, is the unit owner of these units and has all of the

⁷Section 718.111 was amended three times from 1986 to 1987. See Chs. 86-175, 87-46, 87-117, Laws of Fla. However, the provisions of section 718.111(9) were not amended during this time. Therefore the cited language applies to all of the condominiums at issue.

⁸Section 718.106 was not amended until 1990, and no amendment has altered the content of (2)(a) and (2)(d). Therefore the cited language applies to all of the condominiums at issue. See Ch. 90-151, Laws of Fla.

rights appurtenant to the units. See Martin v. Ocean Reef Villas Ass'n, 547 So. 2d 1237, 1238 (Fla. 5th DCA 1989) (noting that unit owned by association was association property and not part of the common elements, and association as owner of unit could refinance a purchase money mortgage without the consent of all the unit owners). These rights include membership in the association and full voting rights that are granted to all other unit owners. See § 718.106(2)(d), Fla. Stat. (1984) (stating that membership in the association and full voting rights pass with the unit as appurtenances).

25. Because Association is a corporation, the Division must look to the voting provisions contained in the governing documents regarding units owned by corporations to determine how the units owned by Association are to be voted.

26. Article II, section 2 of the Bylaws provides that “[i]f Unit ownership is vested in a corporation, said corporation may designate an individual officer or employee of the corporation as its Voting Member.” Article II, section 6 of the Bylaws provides that:

If a Condominium Unit is owned by a corporation, the officer or employee thereof entitled to cast the vote of the Unit for the corporation shall be designated in a Certificate for this purpose, signed by the President or Vice President and attested to by the Secretary or Assistant Secretary of the corporation, and filed with the Secretary of the Association. The person designated in the Certificate who is entitled to cast the vote for a Unit shall be the Voting Member.

27. Article II, section 6 of the Bylaws provides that either an officer or employee of the corporation may be designated as the Voting Member for the corporation. A meeting of the association board would be required to designate either a board member or an officer as the Voting Member, and the notice and meeting requirements of section 718.112(2)(c) and the governing documents of Association would need to be followed.

Article IV, section 8 of the Bylaws provides that a majority of the board will constitute a quorum, and that "the acts of the majority of the Directors present at such meetings at which a quorum is present shall be the acts of the Board of Directors." After a board member or officer has been designated by the board, a proper certificate filed with the Secretary of the Association according to the provisions of article II, section 6 of the Bylaws would entitle the Voting Member to cast the votes of the units owned by Association. Article II, section 6 provides that if the proper procedures are not followed and a certificate is not on file with the association, the votes for the units will not be considered for determining quorum or approval of any measure brought to vote.

28. Article III, section 8, provides that "[a]pproval or disapproval by a Unit owner upon any matter, whether or not the subject of an Association meeting, shall be by the Voting Member..." Therefore, the Voting Member may vote the units owned by the Association in elections for the Board of Directors, for amendments to the governing documents of Association and the condominiums in which the units are contained, and any other matter requiring approval by the unit owners. Furthermore, as long as a certificate is properly filed with the Association, the units will be used to determine a quorum at a unit owners meeting. See art. II, sec. 6, Bylaws.

29. In deciding this petition, the Division notes a concern regarding a condominium association, by acquiring a unit, being a member in itself. A well established corporate law doctrine provides that "[a] corporation cannot vote its own stock irrespective of whether it is treasury stock, unissued shares or shares that have been retired. ... A corporation cannot properly be a shareholder in itself, and therefore shares of its own stock held by a corporation cannot be voted. In some states, it is expressly so provided

by statute." William Meade Fletcher et al., *Fletcher Cyclopedia of the Law of Private Corporations*, § 2041 (perm. ed., rev. vol. 1997). Furthermore, treasury shares cannot be counted in computing a quorum. *Id.* at § 2013.

30. Section 607.01401(29), Florida Statutes, defines "treasury shares" as "shares of a corporation that belong to the issuing corporation, which shares are authorized and issued shares that are not outstanding, are not canceled, and have not been restored to the status of authorized but unissued shares." Section 607.0721(2), Florida Statutes, governing for-profit corporations, provides that "[t]he shares of a corporation are not entitled to vote if they are owned, directly or indirectly, by a second corporation, domestic or foreign, and the first corporation owns, directly or indirectly, a majority of the shares entitled to vote for directors of the second corporation." Furthermore, section 607.0721(4), provides that "[r]edeemable shares are not entitled to vote on any matter, and shall not be deemed to be outstanding, after notice of redemption is mailed to the holders thereof...." However, section 607.0721(2) does not limit "the power of a corporation to vote any shares, including its own shares, held by it in a fiduciary capacity." The issue becomes how the concepts of treasury stock and voting rights apply to not-for-profit corporations, especially condominium associations where by purchasing a unit an association becomes a member in itself with the right to vote as an appurtenance to the unit.

31. Section 617.1908, Florida Statutes, provides that "[e]xcept as otherwise made applicable by specific reference in any other section of this chapter, the provisions of chapter 607, the Florida Business Corporation Act, shall not apply to any corporations not for profit." But see *Larsen v. Island Developers, Ltd.*, 769 So. 2d 1071, 1072 (Fla.

3d DCA 2000) (holding that because derivative actions were derived from the common law and not initially granted by the legislature, in the absence of clear legislative directive section 617.1908 does not eliminate the right of derivative actions in the context of not-for-profit corporations); Fountainview Ass'n, Inc. v. Bell, 203 So. 2d 657 (Fla. 3d DCA 1967) (holding that under § 711.12, Fla. Stat., repealed, for profit principles of law applied to not-for-profit association). Chapters 617 and 718 do not contain provisions governing the rights of a not-for-profit corporation to become a member of itself. Therefore, an association voting the units it owns in a condominium is not inconsistent with the provisions of chapters 718 and 617, and the Division will not attempt to analogize the concept of treasury shares in for-profit corporations to membership in a not-for-profit condominium association. See Campus Comm., Inc. v. Dep't of Revenue, 473 So. 2d 1290, 1295-96 (Fla. 1985) (concluding that a court will not defer to an agency's interpretation of a statute when it attempts to "enlarge, modify, or contravene a statute"). Whether the concept should apply to real property interests where an association is expressly permitted by statute to purchase units in the condominium and membership in the association and full voting rights are an appurtenance to a unit that cannot be separated from the unit is not for the Division to decide.

ORDER

Based on the findings of fact and conclusions of law, it is ordered that: (1) under sections 718.104(4)(j) and 718.111(9), Florida Statutes, unless prohibited under the governing documents of Association, Association may designate a board member or officer as the Voting Member entitled to vote the units owned by Association; (2) as long

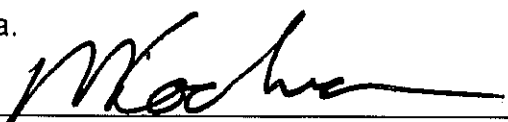
as the provisions of the governing documents are properly followed, the Voting Member may vote on any matter requiring unit owner approval; and (3) the units will be considered for the quorum requirement.⁹

⁹The Division, in its letter of acknowledgement to petitioner dated February 28, 2008, asked whether Association would be offering the units for sale to the public, developing the undeveloped units, and consequently filing with the division as a subsequent developer. A "subsequent developer" is defined by Florida Administrative Code Rule 61B-15.007(1)(b) as "any person, other than the creating developer or concurrent developer, who offers condominium parcels for sale or lease in the ordinary course of business." In a letter sent with the governing documents received by the Division on March 10, 2008, Association stated that it will seek to terminate the units owned, which are on vacant land, and make the units Common Grounds sometime in the future. Therefore, because Association is not offering units for sale or lease in the ordinary course of business, it does not presently meet the definition of "subsequent developer," and the Division does not need to address the potential issues that would follow from meeting the definition of the term in this statement.

DONE and ORDERED this 22nd day of April, 2008,

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
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**Division of Florida Land Sales
Condominiums & Mobile Homes** 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 William C. Church, President Clarcona Resort Condominium Association, 3000 Clarcona Road, Ste. 201, Apopka, FL 32703, on this 30th day of April, 2008.

Robin McDaniel
Robin McDaniel, Division Clerk

Copies furnished to:

Janis Sue Richardson
Chief Attorney

Derek A Schroth
Registered Agent for Clarcona Resort Condominium Association, Inc.
600 Jennings Avenue
Eustis, FL 32726