

DS 2008-098

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

IN RE: PETITION FOR DECLARATORY STATEMENT

Docket No. 2009000294

LAUDERDALE WEST COMMUNITY ASSOCIATION NO. 1, INC.

DECLARATORY STATEMENT

The Department of Business and Professional Regulation, Division of Florida Condominiums, Timeshares, and Mobile Homes (Division) hereby issues this Declaratory Statement pursuant to sections 120.565 and 718.501, Florida Statutes.

PRELIMINARY STATEMENT

On December 24, 2008, the Division received a Petition for Declaratory Statement from Edward Jansen, President of the Lauderdale West Community Association No. 1, Inc. (Association), requesting an opinion as to the number and term of directors to be elected in 2009 at Association under section 718.112(2)(d), Florida Statutes (2008).

On January 13, 2009, the Division sent Association a letter acknowledging receiving the petition and requesting a current set of the governing documents to complete the petition. The Division received the governing documents on January 26, 2009.

Notice of receipt of the petition was published in Florida Administrative Weekly on January 23, 2009. No hearing was requested.

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. Lauderdale West Development Corporation submitted the lands and improvements for the Lauderdale West Condominium No. II to the condominium form of ownership in January 1973.¹ Lauderdale West Condominium No. II is one of a series of condominiums in the Lauderdale West project.² The condominiums adopt chapter 711, Florida Statutes (1971).³

2. Association is the Florida not-for-profit corporation responsible for operating and managing the seventeen (17) separate condominiums and three (3) phases of single family residential units comprising the Lauderdale West project.⁴ Association is a condominium "association" under the Condominium Act.⁵

¹ Decl. of Condo of Lauderdale West Condo No. II, a Condo (Declaration), at 1. The Division assumes that the declaration provided by Association is representative of the declarations for the remaining condominiums in Lauderdale West

² Id. at art 3

³ Id. at 1 The declaration does not state the year of the statute but the year is provided based on the recording date

⁴ Art. 2 1, Arts of Incorpor of Lauderdale West Cmty. Ass'n No 1, Inc. (Art. of Incorpor), Lauderdale West Cmty. Ass'n No 1, Inc., Certificate of Amends of Arts of Incorpor , at 1 (Recorded May 25, 2000) (Am Art of Incorpor)

⁵ § 711 03(2), Fla Stat (1973)

3. Association's annual meeting, at which the directors are elected, is held on the fourth Monday of March of each year.⁶ The board of directors shall consist of no less than five (5) nor more than eleven (11) directors; the exact number is determined at the time of election.⁷

4. The directors' terms, as set forth in a 1984 amendment to article 3.4 of the by-laws, provided that:

Subject to the provisions of Paragraph 3.3 above the term of each director's service shall be for two years, except the election in the year 1984 for directors shall be on the following basis: the candidates receiving the six highest votes shall serve for a two year term, expiring in 1986 and the candidates receiving the next five highest votes shall serve for a term of one year, expiring at the close of the election in 1985. Commencing in 1985 and thereafter, there shall be elected directors to fill the vacancies created by the expiration of the term of directors that year. Each director shall serve until his successor is elected and installed, is removed or his office is declared vacant as provided in Paragraph 3.3.⁸

5. The provision governing directors' terms was amended again on May 8, 2000.

Article 3.4 of the By-laws now provides that:

The term of each director's service shall be for two years. Directors shall be elected annually to fill the vacancies created by the expiration of the term of directors that year. Each director shall serve until his a [sic] successor is elected and installed, or is removed, or the office is declared vacant as provided in Paragraph 3.3.⁹

⁶ Art 2 1, Lauderdale West Cmty. Ass'n No 1, Inc , Certificate of Amends of By-laws (Recorded May 25, 2000) (Am By-laws 2000).

⁷ Id at art 3 1

⁸ Art 3 4, Lauderdale West Cmty. Ass'n No 1, Inc., Certificate of Amend. of By-laws (Recorded Jul 22, 1986) (Am By-laws 1984)⁸; Pet for Dec. Stmt at 2

⁹ Art. 3 4, Am By-laws 2000; Pet for Dec Stmt at 2

6. Association asks whether the eight (8) directors elected in 2008 should serve two-year terms to create an 8/3 stagger or whether Association should proceed with a 6/5 stagger as it announced prior to the 2008 election.¹⁰

CONCLUSIONS OF LAW

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

2. Association has standing to seek this declaratory statement.¹¹

3. 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.

4. 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.

5. Section 718.112(2)(d)1, Florida Statutes, as amended in 2008 provides:

¹⁰ Pet for Dec. Stmt at 1

¹¹ §§ 718 103(2), 120 565, Fla Stat

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

* * * *

(d) *Unit owner meetings.*—

1. There shall be an annual meeting of the unit owners The terms of all members of the board shall expire at the annual meeting and such board members may stand for reelection unless otherwise permitted by the bylaws. In the event that the bylaws permit staggered terms of no more than 2 years and upon approval of a majority of the total voting interests, the association board members may serve 2-year staggered terms.¹²

6. The legislature intended “that the board members’ terms must expire at the annual meeting, whether or not it is mentioned in the bylaws.”¹³ The legislature created one exception to the one-year term for an association that adopted or reaffirmed an existing by-law allowing for two-year staggered terms.¹⁴ Reaffirmation is needed to ensure that a prior by-law inserted by a developer without a unit owner vote or a by-law approved by less than a majority of the total voting interests is affirmed in compliance with section 718.112(2)(d)1, Florida Statutes.¹⁵

7. A “[s]taggered board of directors” is “[a] board of directors whose members’ terms of service overlap so that only part of the board’s makeup is voted on in any single election. Typically, members serve terms of two or more years, with some members’

¹² Ch. 2008-28, § 7, Laws of Fla. (2008) (Fla HB 995)

¹³ Fla H R Comm on Saf. and Sec Council, HB 995 (2008) Staff Analysis 8 (rev April 14, 2008) (available at http://www.flsenate.gov/data/session/2008/House/bills/analysis/pdf/h0995c_SSC.pdf)

¹⁴ See also Fla H.R Comm Saf and Sec Council, tape recording of proceedings (April 18, 2008) (on file with The Florida House of Representatives, Office of the Clerk) (Representative Robaina stating. “Speaker what this allows is for the staggered terms in the event they are provided for in the condominium’s bylaws and there is a majority vote of the unit owners.”)

¹⁵ See In re Pet for Decl Stmt de la Bahia Condo Ass’n, Inc., BPR-2008-08158 (Sept 25, 2008) (concluding de la Bahia condominium association must conduct a vote to readopt or reaffirm its present by-law staggering the terms of directors under the amendment to section 718 112(2)(d)1, Fla Stat)

terms expiring at each annual election.”¹⁶ “When the language of a statute is clear and unambiguous, the statute must be given its plain and ordinary meaning.”¹⁷ When the meaning is clear, resort to a dictionary suffices.¹⁸

8. Although article 3.4 of the By-laws, as amended in 2000, provides only that “[t]he term of each director shall be for two years,” the Association operates a staggered board of directors by nature of the election structure set up by article 3.4 of the By-laws, as amended in 1984.¹⁹ The staggered board is maintained through article 3.4, which provides that directors are elected to fill vacancies created by term expiration—resulting in the requisite overlap. Therefore, the current by-laws governing board of director elections for Association meet the definition of “staggered terms.”

9. However, Association’s by-laws are no longer consistent with section 718.112(2)(d)1, Florida Statutes (2008) because the board members’ terms are not one-year terms that expire at the annual meeting and because the provisions allowing two-year staggered terms have not been reaffirmed by a majority of the total voting interests of Association.

10. Generally, laws are prospective in application from the effective date.²⁰ “[T]he citizens of this State cannot be charged reasonably with notice of the consequences of impending legislation before the effective date of that legislation, for it is generally

¹⁶ BLACK’S LAW DICTIONARY 142 (Abridged 8th ed 2005).

¹⁷ BB Landmark, Inc. v. Haber, 619 So. 2d 448, 449 (Fla. 3d DCA 1993)

¹⁸ Id (applying the dictionary definition of materially and adverse to determine whether a developer change triggered rescission rights under § 718 503, Fla. Stat)

¹⁹ Compare Art 3 4 Am By-Laws 2000 with Art 3 4 Am. By-Laws 1984

²⁰ 48A FLA JUR 2D Statutes § 99 (2000), During v Reynolds, Smith & Hills, 471 So 2d 603, 607 (Fla 1st DCA 1985)

accepted that a statute speaks from the time it goes into effect.”²¹ Even where the effective date is several months after the enactment, the law is prospective in application.²²

11. Subsection 718.112(2)(d)1, Florida Statutes, took effect on October 1, 2008.²³ The amendment applies to Association. The amendments are prospective in nature. Therefore, the eight (8) directors elected in March 2008 are allowed to serve out their two-year terms. The amendment will not apply retroactively to terminate the positions mid-term.²⁴ However, these seats will default to one-year terms upon expiration in March 2010 unless Association reaffirms the by-law providing that board members may serve two-year terms by a majority vote of the total voting interests.

12. Furthermore, the three (3) vacancies to be filled in 2009 must adhere to the new provisions in section 718.112(2)(d)1. Director seats up for election at the annual meeting in March must be for one-year terms unless Association reaffirms the by-law to approve two-year terms.

13. Finally, Association may not proceed with having the two (2) directors with the lowest votes in the 2008 election serve one-year terms, thereby creating two (2) additional vacancies to be filled in 2009.²⁵ This is inconsistent with the requirements of article 3.4 of the By-laws, as amended in 2000, which provides that “[t]he term of each

²¹ During, 471 So. 2d at 607 (quoting Dewberry v. Auto-Owners Ins. Co., 363 So. 2d 1077, 1080 (Fla. 1978))

²² See City of St. Augustine v. Authentic Old Jail, Inc., 388 So. 2d 1044 (Fla. 5th DCA 1980) (holding that seven month delay between enactment and effective date of city ordinance did not preclude enforcement to actions occurring after the effective date)

²³ Ch. 2008-28, § 25, Laws of Fla.

²⁴ In Re Pet. for Dec. Stmt. Olympus Condo Ass’n, BPR-2009-00555 (Jan. 23, 2009)

²⁵ See Pet. for Dec. Stmt. at 1

director shall be for two years.” All eight (8) directors elected in 2008 must serve two-year terms as required under article 3.4 of the By-laws.

For the reasons stated above it is hereby:

ORDERED that Lauderdale West Community Association No. 1, Inc. is required to abide by the new provisions governing director terms under the amendment to section 718.112(2)(d)1, Florida Statutes and may either reaffirm its by-laws by a majority vote of the total voting interests approving the two-year staggered term provisions or else all directors’ terms default to one-year terms upon expiration. The eight (8) directors elected to two-year terms in 2008 are allowed to continue serving until the terms expire in March 2010. The three (3) director seats elected in the March 2009 election must be for one-year terms.

DONE and **ORDERED** this 29th day of May, 2009,

at Tallahassee, Leon County, Florida.




MICHAEL T. COCHRAN, Director
Department of Business and
Professional Regulation
Division of Florida Condominiums,
Timeshares, 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 Edward Jansen, President, Lauderdale West Community Association No. 1, Inc., 1141 NW 85 Ave., Plantation, FL 33322-4624 on this 9th day of June, 2009.


for: Robin McDaniel, Division Clerk

Copies furnished to:

Janis Sue Richardson
Chief Assistant General Counsel