

Final Order No. BPR-2009-00555 Date: **1-23-09**
FILED

Department of Business and Professional Regulation
AGENCY CLERK
Sarah Wachman, Agency Clerk

By *Brandon M. Hilde*

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. 2008056492

THE OLYMPUS CONDOMINIUM ASSOCIATION, INC.

DS 2008-078

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 section 120.565, Florida Statutes (2008).

PRELIMINARY STATEMENT

On October 9, 2008, the Division received a Petition for Declaratory Statement from The Olympus Condominium Association, Inc. (Association), by and through its attorney, Andrew I. Lewis, requesting an opinion as to whether it must vote to reaffirm the 2-year staggered term provision in its by-laws under section 718.112(2)(d)1, Florida Statutes (2008), and whether the terms of directors currently in mid-term may serve out the full term.

Notice of receipt of the petition was published in Florida Administrative Weekly on October 31, 2008. 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. Zuckerman-Vernon Corp. submitted the land for The Olympus, a Condominium (Olympus), to the condominium form of ownership in November 1973. Art. 1, Declaration of Condo. of The Olympus, a Condominium (Declaration). Olympus is a phase condominium development consisting of three phases in Broward County, Florida. Id. at arts. 3, 5. The Declaration adopts the Condominium Act, chapter 711, as that statute is "amended from time to time." Id. at art. 1.

2. Association is the Florida not-for-profit corporation responsible for the operation of Olympus. Id. at arts. 5(f), (g); Articles of Incorporation of The Olympus Ass'n (Art. of Incorporation), at 1.

3. Association's annual meeting, where the board directors are elected, is held on the fourth Thursday of February of each year. Art. V, sec. 2, Amendment to the Declaration of Condo. of The Olympus, a Condo. and to the By-Laws of The Olympus Ass'n (Jan. 21, 1982) (Am. By-laws).

4. The board of directors consists of nine (9) Directors; three (3) Directors at Large elected by all members of Association; and six (6) Resident Directors, with two directors elected solely by the members of each phase of Olympus. Id. at art. II, sec. 1. The 1982 annual election set up the "staggered terms" structure by electing three (3) Directors at large, with the candidate receiving the most votes elected to a two-year

term and the candidates receiving the second and third most votes elected to one-year terms; and six (6) Resident Directors, with the candidates from each Phase receiving the greatest number of votes elected to two-year terms and the candidates from each Phase receiving the second greatest number of votes elected to one-year terms. Id. at art. II, sec. 2(A).

5. For elections held after 1982, five (5) directors are elected at each annual meeting; two (2) Directors at Large and three (3) Resident Directors. Id. at 2(B). The director at large candidate receiving the greatest number of votes is elected to a two-year term, while the candidate receiving the second greatest number of votes is elected to a one-year term. Id. The resident director candidates from each Phase receiving the greatest number of votes are elected to two-year terms. Id.

6. At the most recent annual meeting, which occurred prior to the amendment to section 718.112(2)(d)1, Florida Statutes, certain directors were elected to two-year terms. Pet. for Dec. Stmt. at 2.

7. Association asks whether the terms of any board member elected to a two-year term at the February 2008 annual meeting expire in February 2009 at the time of the next annual meeting or if they are allowed to serve out their two-year terms. Id. at 2-3. A majority of the total voting interests of Association have not reaffirmed the use of staggered terms since the amendment passed. Id. at 2.

CONCLUSIONS OF LAW

1. 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.

2. 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.

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

* * * *

(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.

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

4. Condominiums are created and governed by the Condominium Act. See, e.g., Suntime Condo. Ass'n, Inc. v. Div. Fla. Land Sales and Condo., Dep't of Bus. Reg., 463 So. 2d 314 (Fla. 1st DCA 1984). The Condominium Act in effect on the date the declaration is recorded becomes part of the declaration. Id. 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). However, future legislative acts may be incorporated as amendments to the original declaration if the declaration contains an express provision adopting the Condominium Act as the same may be amended from time to time. Century Vill., Inc. v. Wellington, E, F, K, L, H, J, M, & G, Condo. Ass'n, 361 So. 2d 128, 132-33 (Fla. 1978).

5. The declaration and by-laws governing Olympus and Association adopt the Condominium Act as amended from time to time. Declaration at 1; By-laws of The Olympus Ass'n at 1. Therefore, future legislative changes to the Condominium Act may be incorporated as amendments to the original documents. See Century Vill., 361 So. 2d at 132-133 (finding condominium agreed to be bound by all future amendments to the Condominium Act because expressly stated in the governing documents). Consequently, the recent amendments to section 718.112(2)(d)1 governing the election and terms of directors are incorporated into Association's by-laws. However, even in the absence of the "amended from time to time" language, the Division has taken the position that all condominium associations are subject to the amendments to section 718.112(2)(d)1 for elections occurring after the amendment's effective date. See In Re: Pet. for Decl. Stmt. The Decoplage Condo. Ass'n, BPR-2008-10393, Docket No.

2008050050, Agency Clerk DS 2008-065 (Dec. 4, 2008) (analyzing condominium and corporate law to determine amendment to section 718.112(2)(d)1 applies prospectively to all condominium associations).

6. The legislature intended “that the board members’ terms must expire at the annual meeting, whether or not it is mentioned in the bylaws.” 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>).

The legislature created one exception to the one-year term for an association that adopted or reaffirmed an existing bylaw allowing for two-year staggered terms.¹ Reaffirmation is needed to ensure that a prior bylaw inserted by a developer without a unit owner vote or a bylaw approved by less than a majority of the total voting interests is affirmed in compliance with section 718.112(2)(d)1, Florida Statutes. See In re: Pet. for Decl. Stmt. de la Bahia Condo. Ass’n, Inc., BPR-2008-08158, Docket No. 2008046156, Agency Clerk DS 2008-061 (Sept. 25, 2008) (de la Bahia condominium association must conduct a vote to readopt or reaffirm its present bylaw staggering the terms of directors under the amendment to section 718.112(2)(d)1, Fla. Stat.).

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’ terms expiring at each annual election.” BLACK’S LAW DICTIONARY 142 (8th

¹ 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.”).

ed. 2005).² The current by-laws governing board of director elections for Association meet the definition of "staggered terms." See art. II, sec. 2 Am. By-laws.

8. However, Association's bylaws 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.

9. Generally, laws are prospective in application from the effective date. 48A Fla. Jur. 2d Statutes § 99 (2000); During v. Reynolds, Smith & Hills, 471 So. 2d 603, 607 (Fla. 1st DCA 1985). "[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 accepted that a statute speaks from the time it goes into effect." During, 471 So. 2d at 607 (quoting Dewberry v. Auto-Owners Ins. Co., 363 So. 2d 1077, 1080 (Fla. 1978)). Even where the effective date is several months after the enactment, the law is prospective in application. 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).

10. Subsection 718.112(2)(d)1, Florida Statutes, took effect on October 1, 2008. Ch. 2008-28, § 25, Laws of Fla. The amendment applies to Association. The amendments are prospective in application. Therefore, for directors elected to two-year terms in

² "When the language of a statute is clear and unambiguous, the statute must be given its plain and ordinary meaning." BB Landmark, Inc. v. Haber, 619 So. 2d 448, 449 (Fla. 3d DCA 1993). When the meaning is clear, resort to a dictionary suffices. Id. (applying the dictionary definition of materially and adverse to determine whether a developer change triggered rescission rights under § 718.503, Fla. Stat.).

February 2008, the amendment will not apply retroactively to terminate the positions mid-term. However, these seats will default to one-year terms upon expiration in February 2010 unless Association reaffirms the by-law providing that board members may serve two-year staggered terms by a majority vote of the total voting interests. Allowing currently elected directors to complete their terms will have the least disruptive impact on the association's administration.

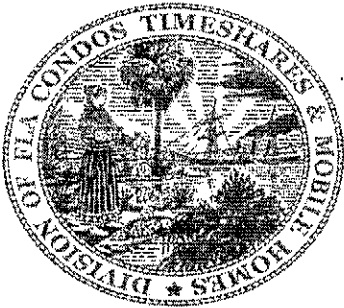
11. Furthermore, the election held in February 2009 must adhere to the new provisions in section 718.112(2)(d)1. Director seats up for election at the annual meeting in February 2009 must be for one-year terms unless Association reaffirms the by-law approving two-year staggered terms.

For the reasons stated above it is hereby:

ORDERED that The Olympus Condominium Association, 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 bylaws by majority vote of the total voting interests approving two-year staggered terms or else all director's terms default to one-year terms upon expiration. The directors elected to two-year terms in February 2008 are allowed to continuing serving until the terms expire in February 2010.

DONE and ORDERED this 23rd day of January, 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 Dennis Eisenger, Esq., Registered Agent for The Olympus Condominium Association, Inc., Eisenger, Brown, Lewis & Frankel, P.A., Pres. Cir. #265-S, 4000 Hollywood Blvd., Hollywood, FL 33021 on this 26th day of January, 2009.

Robin McDaniel
Robin McDaniel, Division Clerk

Copies furnished to:

Janis Sue Richardson
Chief Assistant General Counsel