

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. 2011005109

TIDY ISLAND CONDOMINIUM
ASSOCIATION, INC.

DS 2011-009

DECLARATORY STATEMENT

The Department of Business and Professional Regulation, Division of Florida Condominiums, Timeshares, and Mobile Homes issues this Declaratory Statement under section 120.565, Florida Statutes (2010).

PRELIMINARY STATEMENT

On February 1, 2011, the Division received a Petition for Declaratory Statement from Telese B. McKay, Esquire, attorney for Tidy Island Condominium Association, Inc. (Tidy Island), seeking an opinion on whether Tidy Island may cast votes for unbuilt units it owns or count them toward a quorum under section 718.112(2)(b), Florida Statutes. Tidy Island did not request a hearing.

The Division acknowledged receipt of the petition on February 3, 2011 informing Tidy Island that it was in receipt of the Petition for Declaratory Statement and declaration of condominium for Tidy Island, a Condominium. The Division requested a copy of the association's bylaws and articles of incorporation. The requested documents were provided on February 11, 2011.

Notice of receipt of the petition was published in Florida Administrative Weekly on February 18, 2011.

FINDINGS OF FACT

The following findings of fact are based on information submitted by Tidy Island. 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. Tidy Island operates a condominium complex consisting of single family homes, duplexes, triplexes and quadraplexes, all with undivided shares in the common elements.¹

2. In 2007, substantial changes were made to all original governing documents. Upon its original recording, the condominium was intended to contain 138 total units with forty (40) units awaiting construction.²

3. Following specific procedures set forth in article 10.2 of Tidy Island's declaration of condominium, twenty-eight (28) of the unbuilt units have been classified, through membership vote, as "Unavailable Units." Unavailable Units may not be sold and/or constructed unless the membership so votes.³ Unavailable units are not at issue here.

4. The association owns twelve unbuilt units and a specific procedure set forth in article 10.9 of the declaration of condominium allows for the association board to cast votes in representation of those unbuilt units⁴

¹ Pet for Decl Stmt at 2 (January 24, 2011)

² Id.

³ Id.

⁴ Id. at 2-3, art 10.9, Amend and Rest Decl of Condo for Tidy Island (Mar 14, 2007)

5. Specifically, article 10.9 of the declaration provides that the “[b]oard shall have the right to cast the voting interests attributable to Unbuilt Units owned by the association . . . [but not] with respect to the election or recall of Directors.”⁵

6. Unbuilt units have been considered for quorum purposes.⁶

CONCLUSIONS OF LAW

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

8. 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.

9. 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.

10. Section 718 501, Florida Statutes, provides that the division has jurisdiction over “residential condominium units,” defined in section 718.103(23), Florida Statutes, as containing two (2) or more residential units.⁷

⁵ Art 10 9, Amend and Rest Decl of Condo for Tidy Island

⁶ Pet for Decl Stmt at 3

⁷ §§ 718 501(1), 718 103(23), Fla Stat (2010)

11. As a condominium association controlling between ninety-eight (98) and 138 residential condominium units, Tidy Island has standing to petition for a declaratory statement.⁸

12. Section 718.112(2)(b), Florida Statutes, as amended in 2008, provides in pertinent part:

No voting interest or consent right allocated to a unit owned by the association shall be exercised or considered for any purpose, whether for a quorum, an election or otherwise.

13. Prior to the 2008 amendment, chapter 718 was silent as to the association's right to cast votes for units that it owned.⁹

14. The statutory language of 718 112(2)(b), Florida Statutes, provides that an association which owns residential units may not exercise any of the voting interests appurtenant to those units for *any* reason. The voting interests, as specifically noted in the statute, may not be used for election purposes or for the purposes of establishing a quorum.¹⁰

15. Article 10.9 of the declaration and article 2 2 of the association bylaws are in partial contravention of chapter 718. Those articles provide for and make reference to a voting scheme designed to incorporate the voting interests of unbuilt units—units which are owned by the association. Article 10.9 is titled “Voting Interest Attributable to Unbuilt Units” and provides that “the Voting Interests attributable to Unbuilt Units owned by the Association shall be cast by those Members voting on such matter, i.e.[,] the voting interest attributable to Unbuilt Units owned by the Association shall be deemed to have

⁸ §§ 718 103(2), 120 565, Fla Stat (2010)

⁹ See Ch 2008-28, § 7, at 632, Laws of Fla

¹⁰ § 718 112(2)(b)(2), Fla Stat (2010)

been cast in the same manner and percentages as those Voting Interests attributable to Members other than the association who were present, in person or by proxy, and who cast votes on such matter.”¹¹ This provision is contrary to the clear statutory language provided in section 718.112(2)(b)(2), Florida Statutes.

16. Ordinarily, statutory amendments are afforded prospective application only.¹² This is partially due to the adverse effects a retroactive application of statutes can have on private contracts concerning condominiums.¹³ While a statute can have retroactive effect if specifically provided for in the relevant amendment, such specific retroactivity has not been provided in section 718.112(2)(b)(2), Florida Statutes, as it pertains to the 2008 amendment. However, retroactive effect of the statute has been incorporated into the declaration of condominium for Tidy Island.

17. Article 1.2 of the declaration of condominium for Tidy Island defines the term “Amended Act.” Amended Act “means the Condominium Act, *as it may be amended and/or renumbered from time to time.*”¹⁴ Thus, despite the fact that the amended declaration antedates the amended statute, retroactive effect of the changes in section 718.112(2)(b)(2), Florida Statutes is incorporated into the express language of the declaration.¹⁵

¹¹ Art 10.9, Amend and Rest Decl of Condo for Tidy Island

¹² See Century Vill, Inc v Wellington, 361 So 2d 128 (Fla 1978)

¹³ See Pomponio v Claridge of Pompano Condo, Inc., 378 So 2d 774, 780 (Fla 1979), Yamaha Parts Distrib's, Inc v Ehrman, 316 So 2d 557 (Fla 1975)

¹⁴ Art 1.2, Amend and Rest Decl of Condo for Tidy Island (emphasis added)

¹⁵ See Kaufman v Shere, 347 So 2d 626 (Fla 3d DCA 1977), cert denied, 355 So 2d 517 (Fla 1978) (holding “[t]he contested clause [in this case] unequivocally states that provisions of the Condominium Act are adopted ‘as it may be amended from time to time.’ We perceive no ambiguity in this language, and thus find that it was the express intention of all parties concerned that the provisions of the Condominium Act were to become a part of the controlling document[s] whenever they were enacted. Even if we were to find an ambiguity, we would be forced to construe it against the defendant developer/lessors as authors of the Declaration of Condominium” (citing Bouden v Walker, 266 So 2d 353 (2d DCA 1972)))

18. To the extent that the governing documents have incorporated all amendments to the Condominium Act, section 718.112(2)(b)(2), Florida Statutes, is given retroactive effect and invalidates the voting structure for unbuilt units provided in Article 10 of the declaration of condominium.

For the reasons stated above it is hereby:

ORDERED that Tidy Island may not use voting interests in unbuilt units owned by the association to either cast votes or create a quorum under section 718.112(2)(b)2, Florida Statutes.

DONE and **ORDERED** this 24th day of March 2011, at Tallahassee, Leon County, Florida.





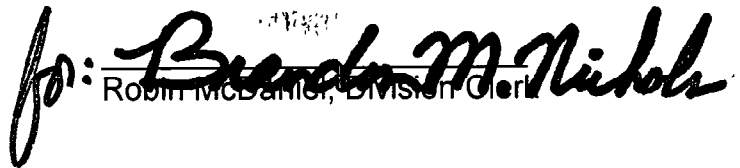
MICHAEL T. COCHRAN, Director
Department of Business and
Professional Regulation
Division of Florida Condominiums, Timeshares,
and Mobile Homes
Northwood Centre
1940 North Monroe Street
Tallahassee, FL 32399-1030

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 Telese B. McKay, Esq., McKay Law Firm, P.A , 2055 Wood Street, Suite 120, Sarasota, Florida 34237, on this 29th day of March 2011.

for:  Brenda M. Nichols
Robin McDaniel, Division Clerk

Copies furnished to:

Janis Sue Richardson
Chief Attorney