

Final Order No. BPR-98-08102 Date 12/22/98

FILED

Dept. of Business and Professional Regulation

AGENCY CLERK

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By: Sarah Wachman

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

IN RE:

DS 98-029

PETITION FOR DECLARATORY STATEMENT

HARRY STARR, GOLDEN LAKES VILLAGE
CONDOMINIUM ASSOCIATION "A", INC.,

Docket No. DS98150

Petitioner.

DECLARATORY STATEMENT

The State of Florida Department of Business and Professional Regulation, Division of Florida Land Sales, Condominiums and Mobile Homes (Division) hereby issues this Declaratory Statement pursuant to sections 718.501 and 120.565, Florida Statutes (Supp.,1998).

FINDINGS OF FACT

The following findings of fact are based on information furnished in the petition for declaratory statement. The Division takes no position as to the accuracy of the facts, but merely accepts them as submitted for purposes of this declaratory statement. No hearing was requested or held in this case.

1. On September 18, 1998, the Division received a Petition for Declaratory Statement

from Harry Starr, (Petitioner), who is a unit owner of Golden Lakes Village Condominium and a member of the Golden Lakes Village Condominium Association "A", Inc.

2. The Golden Lakes Village Condominium Association "A", Inc., is the condominium association that operates the Golden Lakes Village, a condominium located in Palm Beach, Florida.

3. According to the Petition, Article XXXIII(b) of the Declaration of Condominium for Golden Lakes Village Condominium, provides that :

Each director shall be the resident owner of a condominium unit who shall be in residence of such unit not less than nine (9) months in each calendar year.

A copy of the recorded Declaration was not provided to the Division. Also, the Division has no information as to the date of the recordation of the Declaration in the records of the county in which the condominium is located.

4. Petitioner is a unit owner who desires to be a candidate for the Board of Administration of the condominium. Petitioner resides in Golden Lakes Village Condominium less than nine months in each calendar year.

5. According to the Petition, the Board of Directors of the Association has been furnished with an opinion that the amended language of section 718.112(2)(d)3, Florida Statutes (1998), "gives validity to the provisions of the Declaration as to residence requirements for board membership." A copy of this opinion was not furnished to the Division as part of this Petition.

6. The initial petition was filed with the Division on September 18, 1998. On September 24, 1998, counsel for the Division requested, by letter, that Petitioner furnish certain information, including copies of correspondence referenced in the Petition and a copy of the

recorded Declaration. The letter provided that the time for issuing the declaratory statement would be tolled pending receipt of the completed petition. Petitioner filed his amended Petition on October 2, 1998, without a copy of the requested documents.

7. Copies of the August 21 and August 28, 1998, correspondence referenced in the Petition from Bureau of Condominiums personnel to a Mr. Richard Sapir and to Petitioner, respectively, were ultimately obtained from the Bureau of Condominiums, Education Section.

8. The August 21 correspondence from Brett C. Cureton, Real Estate Development Specialist, Bureau of Condominiums, to a Mr. Richard Sapir, states that:

Specifically in your letter you have requested written clarification of section 718.112(2)(d)1., Florida Statutes, which was amended on May 30, 1998, and now states in part, "...in order to be eligible for board membership, a person must meet the requirements set forth in the declaration." The Division does presume that based on the plain language of the amendment, potential candidates for the board would be required to meet any requirements outlined in the declaration of condominium. Currently there are no written opinions or interpretations from the Division over the relationship between this new provision in section 718.112(2)(d)1., F.S., and section 718.112(2)(d)3., regarding submitting an intent to be a candidate which states in part, "... any unit owner or other eligible person desiring to be a candidate for the board of administration...."

9. The August 28 correspondence from Leann B. Ramseur, Real Estate Development Specialist, Bureau of Condominiums, to the Petitioner, states, in part:

...Section 718.112(2)(d)3., Florida Statutes, provides in part that "any unit owner or eligible person" may run for the board. The Condominium Act does not define the term, "eligible person." Therefore, any such requirements existing in an association's documents would be for each association to determine...the Division's position is that pursuant to the 1998 amendment, potential candidates for the board would be required to meet any requirements outlined in the declaration of condominium.

10. On October 30, 1998, the Division published Notice of Receipt of the Petition in the Florida Administrative Weekly, Volume 24, Number 44. A copy of the Amended Petition was

sent to the Joint Administrative Procedures Committee and to the Association on October 14, 1998. To date, the Division has received no response to the Petition.

11. Petitioner requests a declaratory statement on:

Whether pursuant to section 718.112(2)(d)1. and section 718.112(2)(d)3., Florida Statutes, the provision in the condominium documents of Golden Lakes Village Association requiring that a unit owner reside in the condominium at least 9 months out of the year to qualify for board membership is valid.

CONCLUSIONS OF LAW

1. The Division has jurisdiction to enter this order pursuant to sections 718.501 and 120.565, Florida Statutes (1998).

2. Petitioner, a unit owner and association member, is a substantially affected person within the meaning and intent of section 120.565, Florida Statutes, and has standing to seek this declaratory statement.

3. Petitioner seeks a declaratory statement as to the relationship between sections 718.112(2)(d)1., and 718.112(2)(d)3., Florida Statutes (Supp., 1998).

4. Section 718.112(2)(d)3., Florida Statutes (Supp., 1998) provides in part:

(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.--

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3. The members of the board of administration shall be elected by written ballot or

voting machine. ... Any unit owner or other eligible person desiring to be a candidate for the board of administration must give written notice to the association not less than 40 days before a scheduled election. ... Emphasis added.

5. Prior to 1998, the Division interpreted the "any unit owner" language of section 718.112(2)(d)3., Florida Statutes, to give every unit owner in a condominium the right to be a candidate for the board and to specifically prohibit residency requirements for board membership. In Re Petition for Declaratory Statement Hollybrook Golf and Tennis Club Condominium, Inc., Case No. 96L-0189 (Ellzey 9/18/96). In Hollybrook, the Division declared that under section 718.112(2)(d)3., Florida Statutes (1995) and Florida Administrative Code Rule 61B-23.002(5), (9),¹ every unit owner has a right to be a candidate for a position on the board of directors.

6. However, this interpretation of section 718.112(2)(d)3., Florida Statutes, was issued prior to the 1998 amendments to the Condominium Act. At the time that the Hollybrook order was issued, section 718.112(2)(d)1., Florida Statutes (1995) provided in part:

(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. ...Any unit owner desiring to be a candidate for board membership shall comply with subparagraph 3.

7. However, in 1998, the Legislature enacted an amendment to section 718.112(2)(d)1., Florida Statutes, which added the following underlined language:

(d) Unit owner meetings.--

¹ Florida Administrative Code Rule 61B-23.002(5), (9), states that: "...any unit owner ...desiring to be a candidate for the board of administration shall give written notice to the association."

1. ...Any unit owner desiring to be a candidate for board membership shall comply with paragraph 3. In order to be a candidate for the board, a person must meet the requirements set forth in their declaration and must be eligible to vote in the jurisdiction of his or her residence. This provision shall also apply to any person designated by a corporation as a board candidate. A person who had been convicted of any felony by any court of record in the United States and who has not had his or her right to vote restored pursuant to law in the jurisdiction of his or her residency is not eligible for board membership. Emphasis added.

8. Petitioner argues that the newly enacted section 718.112(2)(d)1., conflicts with section 718.112(2)(d)3., Florida Statutes, because the term "any unit owner" has been interpreted in previous declaratory statements issued by the Division to mean that all unit owners are eligible to run for board membership. However, section 718.112(2)(d)3., Florida Statutes, did not and does not specifically and clearly provide that no unit owner may be denied the right to run for election to the board. The ban against residency requirements arose out of a declaratory statement issued by the Division construing the terms of sections 718.112(2)(d)1. and 3., Florida Statutes, which were in effect at the time the declaratory statement was issued. In Re Petition for Declaratory Statement Hollybrook Golf and Tennis Club Condominium, Inc., Case No. 96L-0189 (Ellzey 9/18/96). Section 718.112(2)(d)3., Florida Statutes, does not conflict with the new language of 718.112(2)(d)1., Florida Statutes. Originally, the only requirement for board candidacy, under section 718.112(2)(d)1., Florida Statutes, was to comply with section 718.112(2)(d)3., Florida Statutes. Section 718.112(2)(d)3., Florida Statutes, sets the procedures for the election of board members. For example, one of the procedural requirements for board candidacy is notice to the board of a candidate's intent to run. However, sections 718.112(2)(d)1., and 718.112(2)(d)3., Florida Statutes (1998), together now provide that a candidate for the

condominium board must meet the procedural requirements of 718.112(2)(d)3., Florida Statutes, the eligibility requirements set forth in the declaration, and cannot be a convicted felon whose rights have not been restored.

9. "Ambiguity is prerequisite to judicial construction, and in absence of ambiguity the plain meaning of statute prevails." Metropolitan Dade County v. Milton, 707 So.2d 913, 914 (Fla. 3d DCA 1998). There is no ambiguity in the language of the 1998 amendment. The plain language of the newly amended statute specifically sets forth that, in order to be eligible to run for board election, a person must meet the eligibility requirements set forth in the condominium's declaration.

The plain meaning of a statute should not be disturbed, especially where, as in this case, the language is clear and unambiguous and "conveys clear and definite meaning." Blum v. Tamarac Fairways Ass'n, Inc., 684 So.2d 826, 828 (Fla. 4th DCA 1996). In such a case, "there is no occasion for resorting to rules of statutory interpretation and construction beyond the plain meaning rule. That rule provides that the statute itself must be given its plain and obvious meaning." Blum, 684 So.2d at 828.

10. A court will look beyond the ordinary meaning of statutory language only where the literal meaning of the statutory language would render the statute meaningless. Badaraco, 676 So.2d at 503. In this case, section 718.112(2)(d)3., Florida Statutes, does not conflict with the new provision of section 718.112(2)(d)1., Florida Statutes, it just basically sets out the notice requirements and procedures that must be followed to qualify for board candidacy. The newly enacted section is more specific since it clearly states that the candidate must meet the eligibility requirements set forth in the condominium documents.

11. The relevant statute that applies here is 718.112(2)(d)1., Florida Statutes (1998),

which specifically refers to the qualifications of candidates for board membership. Section 718.112(2)(d)3., Florida Statutes (1998) concerns the procedure potential board candidates and the association must follow in order to run and hold an election. Section 718.112(2)(d)1., Florida Statutes, as amended in 1998 to provide that candidates for board membership must meet the requirements set forth in the condominium declaration and must be eligible to vote, is a more specific provision concerning candidate qualifications. Thus, the newer, more specific statute applies to this situation over the more general provision of section 718.112(2)(d)3., Florida Statutes. Fletcher v. Fletcher, 573 So.2d 941, (Fla. 1st DCA. 1991). "It is well established that, where there is in the same statute a specific provision, and also a general one that in its most comprehensive sense would include matters embraced in the former, the particular provision will nevertheless prevail; the general provision must be taken to affect only such cases as are not within the terms of the particular provision." Fletcher, 573 So.2d at 942. It would be erroneous to construe other more general provisions to give a provision of a declaration a meaning other than its plain and ordinary meaning. Heck v. Parkview Place Homeowners Ass'n, Inc., 642 So. 2d 1201 (Fla. 4th DCA 1994).

12. This interpretation is consistent with the intent of the Florida Legislature when it enacted the section. It is permissible to consider the contextual use of a term in ascertaining its meaning. Metropolitan Dade County, 707 So.2d at 915 (citing Miele v. Prudential-Bache Sec., Inc., 656 So.2d 470 (Fla.1995).) The legislative history of section 718.112(2)(d)1., Florida Statutes (1998), reveals that this provision was enacted mainly to serve to prohibit convicted felons who had not had their right to vote restored from serving on condominium boards. See: The House of Representatives Committee on Real Estate and Probate Final Bill Research and Economic Impact

Statement for CS/HB 3321, June 3, 1998, page 10. In the bill analyses concerning the section, the effect of this additional language was considered to substantively change existing law by providing that a candidate for board membership must meet the requirements set forth in the condominium declaration and must be eligible to vote. House of Representatives Committee on Real Estate and Probate Final Bill Research and Economic Impact Statement for CS/HB 3321, June 3, 1998, page 4.

13. Thus, as of May 30th, 1998, a condominium unit owner must meet the requirements for board membership set forth in the condominium documents. This amendment to the statute specifically overrules the Division's prior position that section 718.112(2)(d) 3. Florida Statutes, prohibited residency limitations for unit owners desiring to run for board elections.

14. A provision in a condominium declaration must be strictly construed. Pepe v. Whispering Sands Condo. Ass'n, Inc., 351 So. 2d 755 (Fla. 2d DCA 1977). In Pepe, the Court stated:

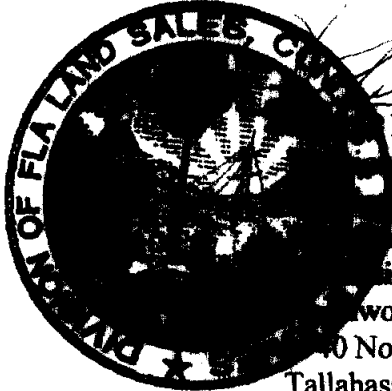
A declaration of a condominium is more than a mere contract spelling out mutual rights and obligations of the parties thereto--it assumes some of the attributes of a covenant running with the land, circumscribing the extent and limits of the enjoyment and use of real property. Stated otherwise, it spells out the true extent of the purchased, and thus granted, use interest therein. Absent consent, or an amendment of the declaration of condominium as may be provided for in such declaration, or as may be provided by statute in the absence of such a provision, the enjoyment and use cannot be impaired or diminished. 351 So 2d at 757, 758.

Any attempt to interpret the terms of a declaration, must first look to the plain language, the unambiguous terms. Lambert v. The Berkeley S. Condo. Ass'n, Inc., 680 So. 2d 588 (Fla. 4th DCA 1996) (when a document's language is clear, a court cannot indulge in construction or interpretation of its plain meaning). In this case, the declaration is clear and not ambiguous that the

unit owners must reside in the condominium for 9 months out of the year.

Wherefore, the Division declares that the residency requirement in the condominium declaration of Golden Lakes Village Condominium Association "A" does not conflict with either section 718.112(2)(d)1., or 718.112(2)(d)3., Florida Statutes (1998).

DONE AND ORDERED this 21st day of December, 1998, at Tallahassee, Leon County, Florida.



[Signature]
NOWICKI, P.H.D., DIRECTOR
of Florida Land Sales,
Condominiums and Mobile Homes
Department of Business and
Professional Regulation
Wood Centre
40 North Monroe Street
Tallahassee, Florida 32399-1030

RIGHT TO APPEAL

THIS DECLARATORY STATEMENT CONSTITUTES FINAL AGENCY ACTION AND MAY BE APPEALED BY PETITIONERS 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(d), FLORIDA RULES OF APPELLATE PROCEDURE, BOTH WITH THE APPROPRIATE DISTRICT COURT OF APPEAL ACCOMPANIED BY APPROPRIATE FILING FEES, AND WITH SARAH WACHMAN, AGENCY CLERK FOR THE DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, WITHIN 30 DAYS OF THE RENDITION OF THIS DECLARATORY STATEMENT.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Declaratory Statement has been furnished by U.S. Mail to Harry Starr, Attorney At Law, Suite 2 C, 320 East Shore Road, Great Neck, New York, 11023; and to Golden Lakes Village Condominium Association "A", Inc. 1700 Golden Lakes Boulevard, West Palm Beach, Fla., 33411, on this _____ day of _____, 1998.

Kristie L. Harris
Docket Clerk

Copies furnished to:

Martha F. Barrera,
Assistant General Counsel

Leann B. Ramseur, R.E.D.S.
Bureau of Condominiums