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STATE By: Sarah Wachman  
DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION  
DIVISION OF FLORIDA LAND SALES, CONDOMINIUMS, AND MOBILE HOMES

IN RE: PETITION FOR DECLARATORY STATEMENT

**DS 2005-044**

HENRY CLAYTON COFIELD, UNIT OWNER,

Petitioner, and

Docket No. 2005-04-8159

VENETIA CONDOMINIUM ASSOCIATION, INC.,

Intervenor.

DECLARATORY STATEMENT

Mr. Henry Cofield (petitioner) filed a petition for declaratory statement requesting an opinion as to whether section 718.404(2), Florida Statutes, applied to his condominium association.

PRELIMINARY STATEMENT

On September 12, 2005, the Division received the petition for declaratory statement submitted by Mr. Cofield. Notice of receipt of the petition was duly published in the Florida Administrative Weekly. In his petition for declaratory statement, the petitioner requested an informal proceeding. An informal proceeding was accordingly scheduled and held on October 18, 2005. At the informal proceeding, the association through its counsel appeared and was permitted to intervene as a party in the proceeding. Each party presented arguments in the course of the proceeding.

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## FINDINGS OF FACT

The following findings of fact are based on information submitted by the parties. 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 petitioner, Mr. Cofield, is a unit owner in The Venetia, a condominium located in Miami, Florida. Petitioner is a member of the Venetia Condominium Association, Inc., the association responsible for the operation of the condominium.

2. According to the petition, the subject condominium contains 341 residential units and 41 commercial units. The condominium is a standard condominium that was created by the recordation of its declaration of condominium in the public records on February 17, 1995.

3. Article IX of the association's articles of incorporation provides in part:

Article IX

Board of Directors

A. The form of administration of the Association shall be by a Board of three (3) Directors. After Unit Owners other than the Developer are entitled to elect a majority of the Board, the Board of Directors shall consist of two (2) members elected by the Commercial Members and one (1) member elected by the Residential Members...

(4) Petitioner asks whether section 718.404, Florida Statutes, that permits residential owners to elect a majority of the board under certain circumstances, may properly apply to this association.

## CONCLUSIONS OF LAW

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

2. Petitioner has standing to seek this declaratory statement.

3. Section 718.404, Florida Statutes, provides as follows:

**718.404 Mixed-use condominiums.**--When a condominium consists of both residential and commercial units, the following provisions shall apply:

(1) The condominium documents shall not provide that the owner of any commercial unit shall have the authority to veto amendments to the declaration, articles of incorporation, bylaws, or rules or regulations of the association.

(2) Subject to s. 718.301, where the number of residential units in the condominium equals or exceeds 50 percent of the total units operated by the association, owners of the residential units shall be entitled to vote for a majority of the seats on the board of administration.

(3) In the declaration of condominium for mixed-use condominiums created after January 1, 1996, the ownership share of the common elements assigned to each unit shall be based either on the total square footage of each unit in uniform relationship to the total square footage of each other unit in the condominium or on an equal fractional basis.

(4) The provisions of this section shall not apply to timeshare condominiums.

4. Petitioner argues that the statute set forth above should apply to the condominium, such that in accordance with section 718.404(2), Florida Statutes,

the owners of the residential units should be entitled to elect a majority of the seats on the board. Petitioner argues that in his condominium, with the residential units greatly outnumbering the commercial units, it is inequitable for the few to control the many.

5. The association points out that Section 718.404, Florida Statutes, was created by Ch. 95-274, Laws of Florida, and was effective June 14, 1995, which is *after* the subject condominium was created on February 17, 1995. The association argues that the statute cannot be applied retroactively but can only apply to condominiums created on or after June 14, 1995. Counsel for the petitioner argues, on the other hand, that the statute could be construed as remedial or procedural in nature, and could, therefore, be applied correctly to pre-existing condominiums.

6. Statutes are presumed to operate prospectively unless the legislature has clearly indicated to the contrary. In Fleeman v. Case, 342 So. 2d 815, 817-18 (Fla. 1977), the Court was called upon to determine whether section 711.231, Florida Statutes, prohibiting escalation clauses in leases of condominium recreational facilities, applied to leases in existence when this section of the statute was added. In ruling that the statute had no retroactive application, the Court stated:

We can restrict the debate on a legislative intent for retroactivity to the floor of those chambers, as well as avoid judicial intrusions into the domain of the legislative branch, if we insist that a declaration of retroactive

application be made expressly in the legislation under review. By this means the forward or backward reach of proposed laws is irrevocably assigned in the forum best suited to determine that issue, and the judiciary is limited only to determining whether the expressed retroactive application of the law collides with any overriding constitutional provision.

An examination of section 718.404, Florida Statutes, reveals no expressed legislative intent that the statute was intended by the legislature to apply to condominiums in existence before the law became effective.

7. Petitioner argues that remedial or procedural amendments to the statute, as opposed to substantive amendments to the condominium statute, can and should be applied to existing condominiums, citing Alamo Rent-A-Car v. Mancuisa, 632 So. 2d 1352 (Fla. 1994) and Village of El Portal v. City of Miami Beach, 362 So. 2d 275 (Fla. 1978). However, while not taking issue with this proposition, the Division concludes that the petitioner has not shown the rights at issue here to be procedural or remedial in nature. The right to control the board of administration of a condominium association has been equated with a vested property right that is not in the nature of a right affecting only procedures or remedies. See, for example, Bishop Associates Limited Partnership v. Belkin, 521 So. 2d 158 (Fla. 1st DCA 1988), where the court equates this right with a property right, although not a *fundamental* right. Id. at 162. Also, review the case of Gertinisan v. Dept. of Bus. and Prof. Reg., (January 14, 1994)(on file with Clerk, Div. of Admin. Hearings, available at [5](http://www.doah.state.fl.us/ros/1993/93-</a></p></div><div data-bbox=)

6214.doc.) In that case, Gertinisan challenged a Division rule that provided that the 1991 amendment to section 718.301, Florida Statutes, creating a maximum period of developer control of 7 years, only applied to condominiums created after the effective date of the statutory amendment. The hearing officer found that:

This right to control the affairs of the condominium association for the period set forth in the statutes is a substantive vested right...In those situations where the developer still exercises control over the condominium association, the aforesaid rights of the developer would be substantively impaired by a retroactive application of [the statutory amendment]...

Statutes are presumed to be prospective in application and will be given retroactive application only when the act clearly and explicitly provides for such application. [citations omitted]. This rule applies with particular force where the effect of giving the statute a retroactive operation would be to interfere with an existing contract, destroy a vested right, or create a new liability...[citation omitted]. [e.s.]

In the present case, the Division concludes that the 1995 amendment to section 718.404, Florida Statutes, contains no explicit language mandating an application to existing condominiums, and thus concludes in the absence of such stated legislative intent, that the amendment does not apply to this condominium created before its effective date. Further, the Division concludes that the statutory amendment does not speak in a procedural or remedial sense to how turnover should or should not occur, but instead addresses *entitlement to control* of the association, and thus concludes that the procedural or remedial exceptions urged by the petitioner do not apply here.

**ORDER**

Based upon the findings of fact and conclusions of law, it is declared that section 718.404(2), Florida Statutes, does not apply to the subject condominium that was created prior to the effective date of the statutory amendment.

**DONE** and **ORDERED** this 2nd day of December, 2005, at Tallahassee, Leon County, Florida.



A handwritten signature in black ink, appearing to read "M. Cochran", written over a horizontal line.

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  
Tallahassee, Florida 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 Henry Clayton Coefield, Petitioner, 555 N.E. 15<sup>th</sup> Street, #23J, Miami, Florida 33132 and Michael L. Hyman, Esquire, Hyman & Kaplan, P.A., 150 W. Flagler Street, Suite 2701, Miami, Florida 33130 on this 13<sup>th</sup> day of December, 2005:

  
ROBIN MCDANIEL, Division Clerk

Copies furnished:

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Division of Fla. Land Sales,  
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Janis Sue Richardson, Esquire  
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