

Department of Business and Professional Regulation
AGENCY CLERK

Sarah Wachman, Agency Clerk

By: Brandon M. Nichols

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

IN RE PETITION FOR DECLARATORY STATEMENT

Docket No. 2006019339

COZUMEL CONDOMINIUM ASSOCIATION, INC.

DS 2006-019

DECLARATORY STATEMENT

Cozumel Condominium Association, Inc. (Cozumel), Petitioner, filed a Petition for Declaratory Statement requesting an opinion as to whether Cape Marco Property Owners Association is a condominium association as defined by section 718.103(2), Florida Statutes, and if so, whether the developer is required to comply with the transfer of control provisions in section 718.301, Florida Statutes.

PRELIMINARY STATEMENT

On April 10, 2006, the Division received a petition for declaratory statement from Cozumel. Notice of receipt of the petition was published in Florida Administrative Weekly on April 21, 2006. The Division received the additional information it requested from Cozumel on May 22, 2006. The time in which to respond to the petition was stayed while Cozumel provided the additionally requested information.

COZUMEL CONDOMINIUM ASSOCIATION, INC.

DECLARATORY STATEMENT

FINDINGS OF FACT

The following findings of fact are based on information submitted by Cozumel. 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. Cozumel is a condominium "association" as that term is defined by section 718.103(2), Florida Statutes.
2. Turnover from the developer of Cape Marco Property Owners Association is scheduled for July 10, 2006.
3. The property governed by Cape Marco is completely built out.
4. Cape Marco's membership is composed of six condominium associations, which operate six condominiums within the Cape Marco community. The six condominium association members are Belize Condominium Association, Inc., Cozumel Condominium Association, Inc., Merida Condominium Association, Inc., Monterrey Condominium Association, Inc, Tampico Condominium Association, Inc., and Veracruz Condominium Association, Inc.
5. Cape Marco does not currently and cannot in the future contain noncondominium members.
6. Cape Marco's Articles of Incorporation include the following membership provisions (in part):

Article V
Membership

The members of the Association shall be Point Marco Development Corporation, a Florida Corporation, or the person or entity who is assigned the rights of Point Marco Development Corporation, as Declarant under the Declaration (also referred to as "Developer"), and each Condominium

Association created within Cape Marco as defined in the Declaration. No other persons or entities shall be entitled to membership.

Article VI
Voting Rights

The Association shall have two (2) classes of voting memberships:

1. Class A. Class A members shall be all of those Condominium Associations created within Cape Marco as described in the Declaration. Each Class A Member shall have one (1) vote for each condominium unit represented by such Class A Member.

2. Class B. There shall be one (1) Class B member, the Declarant, Point Marco Development Corporation, a Florida Corporation, or its assigns. The Class B member shall have one (1) vote for each condominium unit subject to the Declaration, plus one (1).

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The Class B membership shall cease and convert to Class A membership, based upon the Declarant's ownership, upon the occurrence of the first to occur of the following events:

1. One (1) year after the Declarant has conveyed title to all units which it intends to develop in Cape Marco; or
2. At any time that the Declarant, in its sole discretion, voluntarily converts its Class B membership to Class A membership; or
3. Upon transfer of Association control pursuant to Section 718.301, Florida Statutes, if the Association is subject to the provisions of Section 718.301 at the time such transfer is required by such section.

7. Cape Marco's Articles of Incorporation states the purposes of the corporation as follows (in part):

Article II
Purposes

The Association is organized to establish an association of the condominium associations in Cape Marco. The Association shall have the following specific purposes:

1. To provide for maintenance of areas and structures as may be placed under the jurisdiction of the Association by means of a Declaration of Restrictive Covenants and Easements for Cape Marco. . . .
2. To regulate the use of areas and structures as may be placed under the jurisdiction of the Association by means of the Declaration, including real property in which condominium unit owners in Cape Marco will have use rights.

8. Cape Marco's Articles of Incorporation list the following powers of the corporation, among others:

To fix, levy, collect and enforce payment by any lawful means, of all charges or assessments and assessment liens pursuant to the terms of the Declaration and to pay all expenses in connection therewith. Art. III, Art. of Incorp. Cape Marco.

9. Cozumel's Declaration of Condominium includes the following regarding Cape Marco:

The association will be one of several members of Cape Marco Property Owners Association, Inc. ("Master Association), a Florida not-for-profit Corporation. In addition to the Association, other members of the Master Association will be such other condominium or neighborhood associations, property owners, or other persons or entities having an ownership or managerial interest in such other real property which is described in the Declaration of Restrictive Covenants and Easements for Cape Marco (the "Master Declaration") and subjected to the Master Declaration in accordance with its terms. Individual unit owners of Cozumel, A Condominium, shall not have any proprietary or other rights in the Master Association, except to the extent that the Association of which individual Unit owners are members, receives benefits from the Master Association. The Master Association will make assessments against its members, and those members, including the Association, shall be obligated to pay those assessments. Individual unit owners in Cozumel, A Condominium, shall be obligated to share in the expense of assessments due to the Master Association by the Association, and such expenses shall be deemed a Common Expense for owners of Units in Cozumel, A Condominium. The Association, acting through its Board of Directors, shall exercise whatever voting powers accrue to the Association by virtue of membership in the Association. Title to the units created hereunder shall be taken subject to that certain Declaration of Restrictive Covenants and Easements encumbering the Condominium Property and other real property, recorded at Official Record Book 1708, Page 590, Public Records of Collier County, Florida, and any amendments thereto. Said Declaration of Covenants, among other things, imposes a burden and obligation upon the Condominium Property and other properties, for the maintenance and support of the Master Association. § 23, Cozumel declaration.

10. The other condominium association members of Cape Marco have declarations of condominiums with a similar provision as Cozumel's quoted above.

CONCLUSIONS OF LAW

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

2. Section 718.103(2), Florida Statutes (2004), provides:

“Association” means, in addition to any entity responsible for the operation of common elements owned in undivided shares by unit owners, any entity which operates or maintains other real property in which unit owners have use rights, where membership in the entity is composed exclusively of unit owners or their elected or appointed representatives and is a required condition of unit ownership.

3. In 1991, the legislature amended this provision to substantially similar form of that listed above. See Ch. 91-103, Laws of Fla. Prior to this change, section 713.103(2), Florida Statutes, more narrowly defined association as “an entity which is responsible for the operation of a condominium.” According to Senate Staff Analysis dated April 10, 1991, the legislature changed this provision in order to codify the judicial decision of Jungle Den and the Department of Business Regulation rule promulgated in response to Jungle Den. See Downey v. Jungle Den Villas Recreation Ass’n, Inc., 525 So. 2d 438 (Fla. 5th DCA 1988) (applying both the “constituency” and “function” tests to define a master association as a condominium association under the jurisdiction of the chapter 718, Florida Statutes), review denied, 536 So. 2d 244 (Fla. 1988).

4. Therefore, to be subject to regulation under chapter 718, Florida Statutes, an association must (1) function like a condominium association in that it must operate real property in which condominium owners have use rights, and (2) have a membership constituency that is (a) exclusively composed of unit owners or their representatives, and (b) mandatory as a condition of condominium ownership.

5. Cape Marco functions like a condominium association. It operates and maintains real property in which condominium unit owners have use rights. Art. II, Cape Marco Articles of Incorporation. Also, the entity has the power to collect assessments and use the proceeds of assessments. Art. III, Cape Marco Art. of Incorp.

6. The constituency test has two parts: (i) whether only condominium owners can be members and (ii) whether membership is mandatory.

7. Cape Marco's membership is currently comprised exclusively of condominium owners (through the representation of their condominium associations), and it is not possible for noncondominium unit owners to be included at a later date. See Dep't of Bus. Regulation v. Siegel, 479 So. 2d 112 (Fla. 1985) (holding that homeowners' association whose membership might possibly include non-condominium unit owners was not an "association" as defined by section 718.103(2), Fla. Stat.). Only condominium associations can be Class A members of Cape Marco, and Class B membership will cease to exist upon turnover from the developer. Arts. V, VI, Cape Marco Art. of Incorp. Its

membership upon turnover will only be comprised of the six condominium associations.

8. Also, Cape Marco does not contain additional property that could include noncondominium residential property at some point in the future. The project is completely built out. Thus, Cape Marco satisfies the first prong of constituency test.

9. Cape Marco also satisfies the second prong of the constituency test as membership in the entity is a requirement of condominium ownership in the six condominiums in the Cape Marco community. § 23, Cozumel Declaration of Condo. Such membership transfers upon transfer of title to their condominium unit. Id.

10. Therefore, Cape Marco falls within the jurisdiction of chapter 718, Florida Statutes, and must abide by all of its requirements, including the turnover of control provisions in section 718.301, Florida Statutes.

ORDER

Based upon the findings of fact and conclusions of law, it is declared that Cape Marco Property Owners Association is a condominium association as defined by section 718.103(2), Florida Statutes, and the developer is required to comply with the transfer of control provisions in section 718.301, Florida Statutes.

DONE and ORDERED this ~~July~~ 3 day of July, 2006, at Tallahassee, Leon County, Florida.



Preston Booth for
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 Cheryl R. Kraus, Esq., Kraus & Ballenger, P.A., 1072 Goodlette Road North, Naples, Florida 34102, this 12th day of July, 2006.

Robin McDaniel
ROBIN MCDANIEL, Division Clerk

Copies furnished to:
Janis Sue Richardson,
Chief Assistant General Counsel