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Department of Business and Professional Regulation
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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. 2008060443

SUNRISE LAKES CONDOMINIUM
APARTMENTS PHASE III INC. 2,

_____/

DS 2008-084

DECLARATORY STATEMENT

The Department of Business and Professional Regulation, Division of Florida Condominiums, Timeshares, and Mobile Homes (the "Division") hereby issues this Declaratory Statement pursuant to sections 120.565 and 718.501, Florida Statutes. The issue is whether coowners of multiple units at Sunrise Lakes Condominium Apartments, Phase III Inc. 2 are eligible to serve on the board at the same time under section 718 112(2)(d)1, Florida Statutes (2008).

PRELIMINARY STATEMENT

On October 24, 2008, the Division received a petition for declaratory statement from Sunrise Lakes Condominium Apartments, Phase III Inc. 2 ("Association") Notice of receipt of the petition was published in Florida Administrative Weekly on November 21, 2008 On November 12, 2008, the Division acknowledged receipt of the petition, and requested the Association's governing documents, which were filed on December 1, 2008. On December 10, 2008, the Division requested additional governing documents from the Association, and on December 18, 2008, the Association filed

Sunrise Lakes Condominium Apartments, Phase III Inc. 2's Articles of Incorporation, Bylaws, and Exhibit "1" to its Declaration.

FINDINGS OF FACT

The following findings of fact are based on information submitted by the 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 The Association is organized under chapter 718, Florida Statutes (the "Condominium Act"), and incorporated under chapter 617, Florida Statutes (the "Florida Not For Profit Corporation Act"). Declaration of Condominium, Sunrise Lakes Condominium Apts. Building No. _____ (the "Declaration") at I.

2. The condominium consists of more than 10 condominium units. See Exhibit A to the Declaration.

3 The Association provided copies of two warranty deeds showing that some unit owner members of the Association own more than one unit. See also Pet. for Dec. Stmt. at 2. The deeds also show that title to some units is held by spouses in a form of joint tenancy See also Pet for Dec. Stmt. at 2

4 "The Association currently has candidates for the Board of Directors who are spouses who jointly own more than one unit in the Condominium." Pet. for Dec. Stmt at 3.

5. The Association asserts that under the 2008 amendment to section 718.112(2)(d)1, Florida Statutes, "that spouses may not be elected to Board of Directors for a condominium by virtue of their joint ownership of one unit," (Pet. for Dec Stmt. at

4), but is uncertain "whether spouses who own multiple units in joint name are eligible to serve on the Board of Directors simultaneously." (Pet. for Dec. Stmt. at 6)

6 Article II, Section 1, of the Association's bylaws provides that:

> Membership in the Association shall be limited to owners of the Condominium units in Condominiums wherein the Corporation has been designated the Association to operate and administer said Condominium by virtue of the Declaration of Condominium of said Condominium Transfer of unit ownership, either voluntary or by operation of law, shall terminate membership in the Association and said membership is to become vested in the transferee. If unit ownership is vested in more than one person, then all of the persons so owning said unit shall be members eligible to hold office, attend meetings, etc., but as hereinafter indicated, the vote of a unit shall be cast by the "voting member." If unit ownership is vested in a Corporation, said Corporation may designate an individual officer or employee of the Corporation as its "voting member."

CONCLUSIONS OF LAW

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

8. The Association has standing to seek this declaratory statement. Section 718.103(2), Florida Statutes (2008).

9 Condominiums are created and governed by statute. See, e.g., Suntide Condo. Ass'n, Inc. v. Div of Fla Land Sales and Condo., Dep't of Bus. Reg , 463 So. 2d 314 (Fla. 1st DCA 1984). In Florida, the governing statute is chapter 718, known as the Condominium Act.

10. The Legislature amended section 718.112(2)(d)1, Florida Statutes, in 2008, to add, among other things:

> *In a condominium association of more than 10 units, coowners of a unit may not serve as members of the board of directors at the same time.*

Ch 28-2008, § 7, at 634, Laws of Fla.

11. Legislative intent controls construction of statutes in Florida "[T]hat intent is determined primarily from the language of the statute [and] . . . [t]he plain meaning of the statutory language is the first consideration. Our rules of construction require us to give all words their plain meaning. Ford v. Browning, 992 So. 2d 132 (Fla 2008) (citing Fla. Dep't of Bus & Prof'l Regulation, Div. of Pari-Mutuel Wagering v Inv Corp of Palm Beach, 747 So. 2d 374, 382 (Fla. 1999) ("This Court consistently has adhered to the plain meaning rule in applying statutory and constitutional provisions.")) Ford 992 So. 2d at 138 Accordingly, "a unit" means any one unit.

12. The plain meaning of the amendment is that coowners of one or more residential units are ineligible to concurrently serve on the board of directors in a condominium association of more than 10 units. However, to the extent the Association contends that the amendment could be interpreted to consider the status of the persons owning each individual coowned unit separate and apart from the coownership of another unit it is necessary to further consider the legislative intent.

13 Legislative intent is the polestar by which an agency or a court must be guided in interpreting a statutory provision even where reasonable difference may arise to its meaning. In re Order on Prosecution of Criminal Appeals by Tenth Judicial Circuit Public Defender, 561 So. 2d 1130 (Fla. 1990); Lowry v. Parole and Prob. Comm'n, 473 So 2d. 1248 (Fla. 1985). To determine the legislative intent a court will consider the act as a whole, i e , a) the evil to be corrected; b) the language of the act, including its title, history of its enactment; and c) state of the law already in evidence. State Dep't of Envtl. Regulation v. SCM Glidco Organics Corp , 606 So. 2d 722 (Fla 1st DCA 1992).

Application of the three elements of consideration to be applied to determine legislative intent leads to the following analysis.

I. The Evil to be Corrected

14 Prior to the 2008 amendment to section 718.112(2)(d)1, Florida Statutes, any unit owner was eligible to be a candidate for the board See, e.g., In re: Petition for Declaratory Statement, Grubbs, DS 2005-013; Case No. 2005-01-6727 (Cochran, May 20, 2005), Lakewood Vill Condo. Ass'n, Id , v. Beracha, County Court for the Seventeenth Judicial Circuit, Broward County; Steven G. Shutter, Judge; L.T. Case No 07-6293 COWE 80. Article II, Section 1, of the Association's bylaws is consistent with this non-restrictive standard of eligibility.

15. Prior attempts to prevent more than one coowner from serving on the same board were unsuccessfully made through amendment to the declaration (Grubbs) and bylaws (Beracha) The proposed amendment in Grubbs failed upon the following quoted analysis

> 6. The Division has previously interpreted the 'any unit owner' language from sections 718.112(2)(d)1 and 3, Florida Statutes See In re Pet. for Declaratory Statement Hollybrook Golf and Tennis Club Condo , Inc , Case No. 96L-0189 (Ellzey 9/18/96)(declaring that section 718.112(2)(d)3, Florida Statutes (1995) means that every unit owner has a right to be a candidate for a position on the board of directors despite residency requirements in the association's bylaws), In re Pet. for Arb. Schultz v La Costa Beach Club Resort Condo Ass'n, Inc., Case No. 2003-08-3347 (Scheuerman Nov. 21, 2003)(finding that '[t]he statute presently contains no facial qualifications on the right of an owner to run for the board' so 'any unit owner is eligible to continue to sit on the board, once duly elected, regardless of the status of an alleged delinquency in the payment of assessments' despite provisions in the bylaws requiring removal for nonpayment).

> 7. Based on this same reasoning, the Division, in La Costa Beach Club Resort, noted that 'there is support for the proposition that a bylaw prohibiting more than one owner of a unit owned by more than one person to sit on the board is invalid.' (Id. at note 2). Grubbs,¶ ¶ 6,7, pg 5

16. In response to a sentiment in the condominium community, as reflected in Grubbs and Beracha, it was deemed reasonable to set a limit of one board seat per coowner of more than one unit, because of the inherent propensity for persons with joint financial interests to pursue common goals. This is particularly so where spouses serve on the board simultaneously, such as in the factual situation presented by the Association

17. The Florida Supreme Court has recognized the democratic nature of the condominium form of ownership and living. Woodside Vill. Condo Ass'n v. Jahren, 806 So. 2d 452, 456 (Fla 2002).[1] Within the condominium democratic sub society, the principle of the greater society that debate on public issues should be uninhibited, robust, and wide-open, must be protected See generally Nodar v. Galbreath, 462 So 2d 803 (Fla. 1984) (citing Rosenblatt v Baer, 383 U.S. 75 (1966)) Alignment of financial interests creates an inherent risk of disproportionately affecting the balance of a board's voting power and its ability for robust and independent debate Protection of such uninhibited, robust, and wide-open debate can be accomplished through a prohibition against such alignment.

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[1] "[I]nherent in the condominium concept is the principle that to promote the health, happiness, and peace of mind of the majority of the unit owners since they are living in such close proximity and using facilities in common, each unit owner must give up a certain degree of freedom of choice which he might otherwise enjoy in separate, privately owned property Condominium unit owners comprise a little democratic sub society of necessity more restrictive as it pertains to use of condominium property than may be existent outside the condominium organization" Woodside Vill Condo Ass'n v Jahren, 806 So 2d 452, 456 (Fla 2002) (internal citations omitted)

18. The Grubbs Declaratory Statement represents the (former) state of the law whereby eligibility requirement for board of director candidacy and membership was broad and non-restrictive. Thus, the evil to be corrected is the prior permissibility for persons with joint financial interests to obtain a leveraged voting position on the board of directors.

II. The Language of the Act, including its Title, History of its Enactment

19. Prior to the 2008 amendments to section 718.112(2)(d)1, Florida Statutes, all unit owners (other than convicted felons who have not had their civil rights restored) were eligible to run for and serve on their condominium association board of directors, providing they gave proper notice of their intent to run for election.

20. The title to HB 995 provides, in relevant part, "[a]n act relating to community associations . . . amending s. 718.112, F.S. . prohibiting certain persons from serving on the board." The phrase, "certain persons," refers to coowners of units in a condominium association with 10 or more units. This is evident in that all of the other classes of persons subject to new board-eligibility restrictions under the act are referred to elsewhere in the title. This can be illustrated by comparing HB 995's House of Representative Staff Analysis to HB 995's title, as follows

> *The bill provides that:*
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> - [Staff Analysis] "any person seeking board membership must furnish the association with an additional certification"[2] [referenced to in the title as] "requiring the association to provide a certification form to unit owners for specified purposes);"[3]

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[2] 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 ld SSC pdf

[3] Ch 28-2008, § 7, at 634, Laws of Fla

- [Staff Analysis] "board members' terms must expire at the annual meeting, whether or not it is mentioned in the bylaws"[4] [referenced to in the title as] "revising terms of service for board members);"[5]

- [Staff Analysis] "a condominium association with 10 or more units, coowners of a unit may not serve as members of the board of directors at the same time"[6] [referenced to in the title as] "prohibiting certain persons from serving on the board);"[7]

- [Staff Analysis] "any person who has been suspended or removed by the division . . . is not eligible for board membership"[8] [referenced to in the title as] "providing for the removal of board members under certain circumstances);"[9]

- [Staff Analysis] "any person . . . who is delinquent in the payment of fees or assessments is not eligible for board membership"[10] [referenced to in the title as] "as requiring that directors who are delinquent in certain payments owed in excess of certain periods of time be suspended from office or deemed to have abandoned their offices,"[11] and

- [Staff Analysis] "any person who has been convicted of a felony in Florida, a United States district or Territorial Court, or any other jurisdiction that would be considered a felon if committed in Florida, is not eligible for board membership "[12] (Although this provision is not referenced in HB 995's title, it is clear that it is not the provision that the phrase "certain persons" refers to, since only the definition of felony was expanded, not the definition of "persons.")

21. The Legislature's use of "certain persons" in HB 995's title to refer to coowners of "a unit" shows that the focus of the amendment is on the persons not the

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[4] Fla H R Comm on Saf and Sec Council, HB 995 (2008) Staff Analysis 8
[5] Ch 28-2008, § 7, at 634, Laws of Fla
[6] Fla H R Comm on Saf and Sec Council, HB 995 (2008) Staff Analysis 8
[7] Ch. 28-2008, § 7, at 634, Laws of Fla
[8] Fla H R Comm on Saf and Sec Council, HB 995 (2008) Staff Analysis 8
[9] Ch. 28-2008, § 7, at 634, Laws of Fla.
[10] Fla H R Comm on Saf and Sec Council, HB 995 (2008) Staff Analysis 8
[11] Ch 28-2008, § 7, at 634, Laws of Fla
[12] Fla H R Comm on Saf and Sec Council, HB 995 (2008) Staff Analysis 8

number of units they may coown Likewise, the focus is on coownership, not on the number of units coowned.

III. State of the Law Already in Evidence

22. The state of the law already in evidence provided for broad and non-restrictive eligibility for board membership. See discussion supra paragraph 16 More specifically, the only bar to board eligibility was the conviction of a felony.

23. With the inclusion of five new categories of persons restricted from serving as a board member, it is evident that the language of the act, including its title, and history of its enactment reflect an intentional move toward a narrower and more restrictive eligibility requirement for board of director candidacy and membership.

24. Thus, it is clear that under the amendment coownership of one unit bars coowners from serving on the board at the same time. It would clearly be in derogation of the statute to interpret the amendment to mean that simultaneous board membership by these same persons could be accomplished in instances of coownership of multiple units

25. Allowing simultaneous board membership by persons who are coowners of multiple units is contrary to the plain meaning of the statute and would defeat the legislative intent of the amendment. Therefore, the Division concludes that coowners of one or multiple units are not eligible to serve on the board at the same time with their fellow coowner.

For the reasons stated above it is hereby

ORDERED that coowners of one or more units at Sunrise Lakes Condominium Apartments, Phase III Inc. 2, are not eligible to serve on the board at the same time, under section 718.112(2)(d)1, Florida Statutes (2008).

DONE and **ORDERED** this 6th day of February 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 ASSOCIATION 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 Joel M. McTague, Esquire, Frank Weinberg Black, PL, 621 NW 53rd Street, Ste 420, Boca Raton, Florida 33487, on this 10th day of February 2009

Robin McDaniel, Division Clerk

Copies furnished to

William R. Wohlsifer
Senior Attorney