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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. 2005013907

ROBERT J. DYMOWSKI, Unit Owner,
Southeaster, Inc.

DS 2005-009

DECLARATORY STATEMENT

Robert Dymowski (Dymowski), Petitioner, filed a Petition for Declaratory Statement requesting an opinion as to whether under section 718.112(2)(c), Florida Statutes, the board may pass by four of its eight members a motion, which was not on the agenda of a properly noticed meeting, to call a special meeting immediately following the noticed meeting to discuss additional issues and whether the action on those additional issues at the special meeting was valid.

PRELIMINARY STATEMENT

On March 18, 2005, the Division received a petition for declaratory statement from Dymowski, unit owner. Notice of receipt of the petition was published in Florida Administrative Weekly on March 31, 2005. The Division received Southeaster Inc.'s (Southeaster) response to the Petition on April 6, 2005. No hearing was requested or held.

FINDINGS OF FACT

The following findings of fact are based on information submitted by Dymowski and Southeaster. 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. Dymowski is a unit owner of Southeaster, a condominium "association," as that term is defined by section 718.103(2), Florida Statutes.

2. The notice for the February 25, 2005 Board of Directors meeting included the following:

> Agenda:
> The Board of Directors are meeting with the Association's legal counsel to discuss the following:
> 1) Updating the Southeaster By-Laws as required by the Florida Statutes and the Florida Administrative Code.
> 2) Review possible conflict in definition between Section A.1 of the Declaration and Section 7.3 of the By-Laws pertaining to assessments.

3. The same notice also included a roster of the 2005 board members, which listed the names of eight individuals.

4. At the February 25, 2005 board meeting, the members discussed the noticed items and then considered an unnoticed item, a motion for a special meeting in order to fill two board vacancies and to discuss engaging a law firm to write a legal opinion. Four of the six present board members voted in favor of the motion to hold the special meeting, which was then held immediately after the noticed board meeting.

5. On May 24, 2005, the Southeaster Board provided the Division with the minutes from its April 1, 2005 board meeting. Although these minutes indicate that the board discussed Dymowski's concerns, nothing indicates that

the board ratified its actions of February 25, 2005 on the unnoticed items. The following is the section from the meeting minutes regarding the issue at hand (emphasis added):

> Bob Dymowski filed a complaint to the Division of Land Sales, Condominiums and Mobile Homes questioning the validity of the February 25, 2005 meeting at the attorney's office. Michelle Sanders sent a letter back to the Board telling us we have 10 days to respond. Tom Moreno gave the letter to the Board today, the 11th day. Joe Corradino will fax a response to the Department of Business and Professional Regulation tomorrow, April 2, 2005. Copies of Bob's complaint will be sent to all owners. We received a letter from our lawyer, Harry Carls, stating the meeting was a valid meeting. Joe will send a copy of Harry Carls letter to the Department of Business and Professional Regulation.

6. Southeaster provided the Division with a portion of a letter from its attorney, dated April 1, 2005, regarding the validity of its actions of February 25, 2005 upon the unnoticed items. The attorney's letter discussed the need for subsequent board ratification to remedy the invalidity of prior board action on the unnoticed items (emphasis added):

> Third, I am in receipt of a courtesy copy of the Petition for Declaratory Statement filed by Robert J. Dymowski, along with a copy of the agenda for the February 25, 2005 Board meeting. I note that the Agenda had only two (2) items for discussion on it. Therefore, any additional items that were discussed must be ratified at the next meeting. As I indicated in my March 3, 2005 correspondence, this can easily be accomplished by noticing a new meeting, adding the items that were addressed to the agenda for that meeting and then vote to either ratify the decisions made at the previous meeting, or void them.

CONCLUSIONS OF LAW

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

2. Dymowski has standing to seek this declaratory statement.

3. Southeaster is a proper party to intervene.

4. The Condominium Act governs every condominium created and existing in the State of Florida. The law governing a particular condominium is the law in existence on the date of recording the declaration of condominium. Sans Souci v. Dep't of Bus. Regulation, 421 So. 2d 623 (Fla. 1st DCA 1982); Suntide Condo. Ass'n v. Dep't of Bus. Regulation, 463 So. 2d 314, 317 (Fla. 1st DCA 1984). The general rule is that a statute is not to be given retroactive effect unless the statute expressly states that it is to be applied retroactively. Century Vill., Inc. v. Wellington Condo. Ass'n, 361 So. 2d 128 (Fla. 1978).

5. Notwithstanding the above, future legislative acts may be incorporated as amendments to the original declaration, if the declaration contains express language referring to the Condominium Act as the same may be amended from time to time. See Kaufman v. Shere, 347 So. 2d 626 (Fla. 3d DCA 1977). Declarations which contain these automatic amendment clauses subject the condominium to the application of all subsequent amendments to the Condominium Act, thus avoiding the general rule against retroactive application of statutes.

6. Even in the absence of automatic amendment clauses, certain other changes to the Condominium Act are exceptions to the general rule as well. Provisions which are remedial or procedural and which do not create new or take away vested rights, but only operate in furtherance of the remedy or confirmation of already existing rights, do not come within the legal concept of a retrospective law or the general rule against retrospective operation of a statute. City of

Lakeland v. Catinella, 129 So. 2d 133, 136 (Fla. 1961); City of Orlando v. Desjardins, 493 So. 2d 1027 (Fla. 1986); Young v. Altenhaus, 472 So. 2d 1152 (Fla. 1985); Ziccardi v. Strother, 570 So. 2d 1319 (Fla. 2d DCA 1990).

7. Southeaster's declaration does not contain an automatic amendment clause. Instead, Southeaster's declaration provides that Southeaster was created "pursuant to Chapter 711, Florida Statutes 1967." Therefore, Dymowski's questions should be examined in terms of whether the provision of chapter 718, Florida Statutes, which is cited in the petition is remedial or procedural in order to determine whether they may be retroactively applied.

8. Dymowski's question regarding the validity of the board's actions on the unnoticed items is governed by section 718.112(2)(c), Florida Statutes. Section 718.112(2)(c), Florida Statutes (2004) , provides in part:

> Adequate notice of all meetings, which notice shall specifically incorporate an identification of agenda items, shall be posted conspicuously on the condominium property at least 48 continuous hours preceding the meeting except in an emergency. Any item not included on the notice may be taken up on an emergency basis by at least a majority plus one of the members of the board. Such emergency action shall be noticed and ratified at the next regular meeting of the board.

This provision is procedural in that it sets out a procedure for noticing board meetings and a limitation on how the board of administration may consider matters not properly noticed. The provision does not take away any vested rights or create any rights, but merely relates to the procedure by which the board must provide notice of its meetings and may consider an item on an emergency basis. Therefore, the provision may be applied retroactively to Southeaster.

9. In order to have complied with section 718.112(2)(c), Florida Statutes, the Southeaster board must have provided advance notice of its February 25, 2005 meeting, including a complete list of agenda items to be addressed. The only way the board could be excused from this notice/agenda requirement is if the board was acting on an emergency basis.

10. Dymowski's petition assumes that the board's actions on the items not listed on the notice's agenda could be considered emergencies since his question revolves around the number of board members required to take up a matter on an emergency basis.

11. However, the unnoticed items upon which the board acted do not constitute emergencies. Division arbitration decisions have utilized the dictionary definition of "emergency" to conclude that an emergency in the context of section 718.112(2)(c), Florida Statutes, requires an unforeseen combination of circumstances calling for immediate action. See In Re: Petition for Arbitration Mait v. Flanco Condo Ass'n, Inc., Final Order, Case No. 92-0131. Neither filling two board vacancies nor engaging a law firm to write a legal opinion are unforeseen combinations of circumstances calling for immediate action. See In re: Petition for Arbitration, Petito v. Greenglades Condo. Ass'n, Summary Final Order, 5, Case No. 93-0239 ("The need to appoint officers should not be equated with an emergency; the hiring and firing of an association attorney, absent circumstances not present here, does not support a finding of an emergency....")

12. Because the unnoticed items do not constitute emergencies, the board should have complied with the noticing agenda requirements of section

718.112(2)(c), Florida Statues. The notice of the board's February 25, 2005 meeting did not include agenda items indicating discussion of filling vacant board seats and discussion of engaging an attorney to compose a legal opinion. Since the board did not property notice as agenda items its action on the vacancies and engaging the attorney as required by section 718.112(2)(c), Florida Statutes, the board's actions of February 25, 2005 on these unnoticed agenda items are invalid.

13. However, the Southeaster board could correct this problem by following its counsel's advice in the April 1, 2005 letter quoted above. In Wimbledon Townhouse Condo. I Ass'n Inc. v. Wolfson, the court permitted the board to subsequently ratify prior board actions which were conducted without prior notice. 510 So. 2d 1106 (Fla. 4th DCA 1987).

14. The Southeaster board has not provided the Division with any indication that it ratified its actions of February 25, 2005 on the unnoticed items at a subsequent and properly noticed board meeting. Such ratification is required for the action on the unnoticed items to be valid pursuant to section 718.112(2)(c), Florida Statutes.

ORDER

Based upon the findings of fact and conclusions of law, it is declared that under section 717.112(2)(c), Florida Statutes, the board may not pass a motion to call a special meeting immediately following the noticed meeting to discuss unnoticed issues, and the action on those additional issues at the special meeting is not valid absent subsequent ratification.

DONE and **ORDERED** this 1st day of June, 2005,

at Tallahassee, Leon County, Florida.



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 Robert J. Dymowski, 1356 Troon Lane, West Chester, PA 19380, and Joe Corradino, Southeaster Condominium, 4841 Saxon Drive, New Smyrna Beach, FL this 10th day of June, 2005.

Robin McDaniel
ROBIN MCDANIEL, Division Clerk

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