Final Order No. BPR-2005-05425 Date: 9-28-05
FILED
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. 2005046436

JUSTO E. GOMEZ, Unit Owner,
Arlen Beach Condominium Association, Inc.

DS 2005-041

DECLARATORY STATEMENT

Justo E. Gomez (Gomez), Petitioner, filed a Petition for Declaratory Statement requesting an opinion as to whether Arlen Beach Condominium Association, Inc. (Arlen Beach) may require a two-thirds vote of the voting members present at a unit owner meeting to recall a director under section 718.112(2)(j), Florida Statutes.

PRELIMINARY STATEMENT

On September 6, 2005, the Division received a petition for declaratory statement from Gomez, unit owner. Notice of receipt of the petition was published in Florida Administrative Weekly on September 16, 2005. A hearing was not requested or held.

FINDINGS OF FACT

The following findings of fact are based on information submitted by Gomez. The Division takes no position as to the accuracy of the facts, but merely accepts them as submitted for purposes of this final order.

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1. The Arlen Beach's bylaws contain the following provision regarding the recall of directors of their board:

> Section 3. Removal of Directors. At any time after the first annual meeting of the membership, at any duly convened regular or special meeting, any one or more of the Directors may be removed, with or without cause, by the affirmative vote of the voting members casting not less than two-thirds (2/3rds) of the total votes present at said meeting; and a successor may then and there be elected to fill the vacancy thus created. Should the membership fail to elect said successor, the Board of Directors may fill the vacancy in the manner provided in Section 4 below.

CONCLUSIONS OF LAW

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

2. Gomez has standing to seek this declaratory statement.

3. Section 718.112(2), Florida Statutes provides, in part, the following (emphasis added):

> (2) REQUIRED PROVISIONS. – The bylaws shall provide for the following and, if they do not do so, shall be deemed to include the following:
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> ******
>
> (j) *Recall of board members.* – Subject to the provisions of s. 718.301 [which pertains to the transfer of control from the developer to the association], any member of the board of administration may be recalled and removed from office with or without cause by the vote or agreement in writing by a majority of all the voting interests. A special meeting of the unit owners to recall a member or members of the board of administration may be called by 10 percent of the voting interests giving notice of the meeting as required for a meeting of unit owners, and notice shall state the purpose of the meeting. Electronic transmission may not be used as a method of giving notice of a meeting in whole or in part for this purpose.
> 1. If the recall is approved by a majority of all voting interests by a vote at a meeting, the recall will be effective as provided herein. The board shall duly notice and hold a board meeting within 5 full business days of the adjournment of the unit owner meeting to recall one or more board members. At the meeting, the board shall either certify the recall, in which case such members or members shall be recalled effective immediately and shall turn over to the board within 5 business days any and all records

and property of the association in their possession, or shall proceed as set forth in subparagraph 3.

2. If the proposed recall is by agreement in writing by a majority of all voting interests, the agreement in writing or a copy thereof shall be served on the association by certified mail or by personal service in the manner authorized by chapter 48 of the Florida Rules of Civil Procedure. The board of administration shall duly notice and hold a meeting of the board within 5 full business days after receipt of the agreement in writing. At the meeting, the board shall either certify the written agreement to recall a member or members of the board, in which case such member or members shall be recalled effective immediately and shall turn over to the board within 5 full business days any and all records and property of the association in their possession, or proceed as described in paragraph 3.

4. Section 718.112(2), Florida Statutes, utilizes the mandatory language "shall" rather than the permissive language "may." According to the plain meaning of the provision, condominium bylaws must contain the required provisions detailed in section 718.112(2), Florida Statutes, and if they do not contain the required provisions, the required provisions are deemed by law to be included.

5. One of the provisions required of condominium bylaws includes section 718.112(2)(j), Florida Statutes, allowing for the recall of directors by a majority of all voting interests of the condominium association, either by a majority vote of all voting interests at a special meeting or by a written agreement of a majority of all voting interests.

6. Arlen Beach's bylaws contain a provision that varies from the provision required pursuant to section 718.112(2)(j), Florida Statutes. Arlen Beach's bylaws authorize the recall of directors by a two-thirds vote of all those attending a duly convened meeting, rather than a majority of all total voting interests as required by section 718.112(2)(j), Florida Statutes.

7. Because Arlen Beach's bylaw regarding the number of voting interests needed to recall directors varies from the mandatory and required provision, Arlen Beach's bylaw is invalid and overridden by section 718.112(2)(j), Florida Statutes. See In re: Petition for Declaratory Statement, Ludlum Lake Townhouses Section One Ass'n, Inc., Case No. DS90324, (Jun. 17, 1992) (stating that section 718.112(2), Florida Statutes, overrides the association's bylaw that allows the board of directors to remove a director); San Remo Condo. Ass'n v. Unit Owners Voting for Recall, Arb. Case No. 98-5285, Partial Summary Final Order (Dec. 28, 1998) ("[T]he provision in the condominium documents requiring a vote of 2/3 of the 14 voting interests to effect a recall is overridden by the statutory provision that any board member may be recalled by a simple majority vote"); Ocean Four Condo. Ass'n, Inc. v. Unit Owners Voting for Recall, Arb. Case No. 00-0607, Final Order on Recall (May 2, 2000) ("[B]y operation of the statute, the language requiring the agreement of a majority of all the voting interests in order to effect the recall of a director is deemed to be included in the bylaws, and the language permitting recall on the agreement of a majority of those voting interests at a meeting is held to be invalid.").

8. Therefore, Arlen Beach must abide by section 718.112(2)(j), Florida Statutes, meaning only a majority of all of the total voting interests may vote or agree in writing to recall directors of their board of administration. Since Arlen Beach consists of 273 units, a majority of 273, or 137, must vote in favor of recall to effectively recall directors. Further, pursuant to section 718.112(2)(j)3., Florida

Statutes, any recall vote is subject to arbitration if the board does not certify the recall vote results.

ORDER

Based upon the findings of fact and conclusions of law, it is declared that under section 718.112(2)(j), Florida Statutes, Arlen Beach may not require a two-thirds vote of the voting members present at a unit owner meeting to recall a director.

DONE and **ORDERED** this 26th day of September, 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 Justo E. Gomez, 5701 Collins Avenue, Apartment 1621, Miami Beach, Florida 33140, this 30th day of September, 2005.

Robin McDaniel
ROBIN MCDANIEL, Division Clerk

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