

Final Order No. BPR-2008-04973 Date: **6-11-08**

FILED
Department of Business and Professional Regulation

AGENCY CLERK

Sarah Wachman, Agency Clerk

By: *Brandon M. Nichol*

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

IN RE: PETITION FOR DECLARATORY STATEMENT

DS 2008-019

JAN SAWITOSKI, UNIT OWNER, SOUTHERN BREEZE
GARDENS CONDOMINIUM ASSOCIATION, INC.

Docket No. 2008016365

DECLARATORY STATEMENT

The Department of Business and Professional Regulation, Division of Florida Land Sales, Condominiums, and Mobile Homes (Division) hereby issues this Declaratory Statement pursuant to sections 120.565 and 718.501, Florida Statutes.

PRELIMINARY STATEMENT

On March 17, 2008, the Division received a Petition for Declaratory Statement from Jan Sawitoski, a unit owner at the Southern Breeze Gardens Condominium (Southern Breeze), seeking an opinion as to whether Southern Breeze Gardens Condominium Association, Inc.'s (Association) amendment to the declaration imposing a transfer fee on unit leases and requiring association approval of all unit owner leases under section 718.110(13), Florida Statutes, applies to unit owners who did not consent to the amendment.

08 JUN 13 AM 11:33

RECEIVED
FLS&MH

The Division sent a letter to Ms. Sawitoski on March 26, 2008, informing her that the Division may not begin its review of the petition until it received a full set of the governing documents.

The Division received a copy of the governing documents on April 11, 2008. Sawitoski sent a copy of an early version of a portion of the association's rules and current rules on May 6, 2008. Association filed a full copy of the Initial Rules and Regulations on May 29, 2008. Ex. 6, Prospectus.

Notice of the receipt of petition was published in Florida Administrative Weekly on April 4, 2008. Notice was mailed to Association's registered agent on March 26, 2008.

Association intervened and responded on April 18, 2008.

FINDINGS OF FACT

The following findings of fact are based on information submitted by Ms. Sawitoski and 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. Fleur Development, Inc. (Developer) submitted the land and improvements for Southern Breeze to the condominium form of ownership by recording it in the public records on January 11, 1991. Declaration of Condo. of Southern Breeze Gardens, A Condo. at 1 (Declaration). Southern Breeze contains twenty-eight (28) units. Art. III, sec. 3.1, Declaration at D-4.

2. Association was created to operate, maintain, preserve, administer and manage Southern Breeze. Art. III, Arts. of Incorpor. for Southern Breeze Gardens Condo. Ass'n, Inc. (Art. of Incorpor.).

3. The declaration as originally recorded provides certain restrictions on the use of units "in order to maintain a community of congenial residents who are financially responsible and [to] protect the value of the Units." Art. XII, sec. 12.1, Declaration. The declaration restricts transfers of the units to anyone other than another unit owner. Art. XII, sec. 12.2, Declaration. Subsection 12.2 provides:

12.2 TRANSFER OF INDIVIDUAL CONDOMINIUM UNITS:

No Unit Owner may effectively dispose of his Unit unless to another Unit Owner, except as follows:

A. A unit owner intending to make a bona fide sale of his Condominium Unit shall give the Board of Directors of the Association notice of such intention, together with the name and address of the intended purchaser and such other information (to be requested within five (5) days from receipt of such notice) as may be required by the Board of Directors, except that no Unit Owner shall be permitted to dispose of his Unit unless and until all sums, charges and assessments have been paid and the intended purchaser agrees to be bound by the Declaration of Condominium, By-Laws, Articles of Incorporation and all other rules, regulations and restrictions set forth by the Condominium Association as well as the Condominium Act. The Condominium Association may, if it desires, charge a processing fee not to exceed \$50.00.

* * * *

H. Except in the case of transfers made to a spouse, child, children, or parents of the donor or deceased Unit Owner, all transfers by gift, devise or inheritance shall be subject to the following provisions:

* * * *

L. Any sale, mortgage, lease or other transfer not authorized pursuant to the terms of this Article, shall be void unless subsequently approved by the Association.

* * * *

N. No Unit may be leased, sublet or assigned more than twenty-six (26) times per year maximum for a minimum of two weeks each time.

Art. XII, sec. 12.2, Declaration (1991).

4. The Association amended article XII in 2007. Pet. at 1 (July 5, 2007); Association Response (May 17, 2007). The amendment adds a new subsection, which provides:

12.2(O) No unit may be leased without prior written approval of the Association. Application for approval shall be on such form and be accompanied by such information as the Board of Directors deems appropriate. Application for approval shall be accompanied by processing fee as set by the Board of Directors in compliance with the Condominium Act, as it may be amended from time to time. If a complete application is not disapproved or denied within 10 days after filing with the Board, it shall be deemed approved.

Amendment to Declaration of Condo. of Southern Breeze Gardens Condo. Ass'n, Inc.

The amendment includes an application form for use to obtain Association approval of the lease. Pet. ex. B. The form requires a \$100 application fee. Id.

5. Ms. Sawitoski purchased her unit in 2002 under the original declaration. She did not vote to approve the 2007 amendment. Pet. at 1. Ms. Sawitoski argues that the amendment restricts her right to lease her unit and may not be applied to her under section 718.110(13), Florida Statutes (2004).

6. The association has the power to "approve or disapprove the transfer of ownership of Units in the manner provided in Article XII of the Declaration of Condominium." Art. II, sec. 2.7(H), By-Laws of Southern Breeze Gardens Condo. Ass'n, Inc. [Bylaws] The board may adopt rules "pertaining to additional restrictions on either the term of leases for individual units or the number of times per year a unit can be leased beyond those rules set forth in the original Rules and Regulations attached as an exhibit to the Prospectus for Southern Breeze Gardens." Id. Art. VII, sec. D, Bylaws.

7. The initial rules provided:

(11) No industry, business trade, occupation or profession of any kind, commercial, religious, educational, or otherwise, designated for profit, altruism, exploration, or otherwise, shall be conducted, maintained, or permitted in any residential Unit, except with the prior written consent of the Board of Directors.

* * * *

(16) Owners may have 30 pound dogs and no more than one cat per owner. Lessees and renters are not allowed to have pets on the condominium property or within the Units. . . .

(17) No more than eight (8) persons can occupy a three bedroom Unit without the prior written approval of the Board of Directors. No more than seven (7) persons can occupy a two bedroom Unit without the prior written approval of the Board of Directors.

* * * *

(20) No Unit may be leased, sublet or assigned more than twenty-six (26) times per year maximum for a minimum of two weeks each time.

8. The association amended the rules on April 1, 2007 to provide: "[a]ll renters and guests **MUST** register upon arrival. Registration forms can be found in the lobby."

House Rules, no. 1 (undated) (emphasis in original). The association also added rule number 13, which provides:

All leases and rentals will require a fully approved application (see form enclosed). A fee of \$ 100.00 will be charged for the process of approval. As provided in our by-laws, the owner is responsible for his or her tenants. Violations of the house rules will be **strictly enforced** and result in fines levied in accordance [sic] our by-laws. All house rules are to be included in all lease and rental agreements.

House Rules, no. 13 (Apr. 1, 2007) (emphasis in original).

9. The association is authorized to enforce the governing documents. Art. II, sec. 2.7(I), Bylaws.

CONCLUSIONS OF LAW

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

11. Ms. Sawitoski has standing to seek this declaratory statement. §§ 120.565, Fla. Stat.; 718.103(28), Fla. Stat.

12. Association has standing to intervene. §§ 120.565, Fla. Stat.; 718.103(2), Fla. Stat.

13. Section 120.565, Florida Statutes, provides:

(1) Any substantially affected person may seek a declaratory statement regarding an agency's opinion as to the applicability of a statutory provision, or of any rule or order of the agency, as it applies to the petitioner's particular set of circumstances.

(2) The petition seeking a declaratory statement shall state with particularity the petitioner's set of circumstances and shall specify the statutory provision, rule, or order that the petitioner believes may apply to the set or circumstances.

14. Rule 28-105.001, Florida Administrative Code (2007), provides:

A declaratory statement is a means for resolving a controversy or answering questions or doubts concerning the applicability of statutory provisions, rules, or orders over which the agency has authority. A petition for declaratory statement may be used to resolve questions or doubts as to how the statutes, rules, or orders may apply to the petitioner's particular circumstances. A declaratory statement is not the appropriate means for determining the conduct of another person.

15. Section 718.110(13), Florida Statutes, provides:

(13) Any amendment restricting unit owners' rights relating to the rental of units applies only to unit owners who consent to the amendment and unit owners who purchase their units after the effective date of that amendment.

Ch. 2004-353, § 1, Laws of Fla. (2004).

16. Section 718.110(13), Florida Statutes, was enacted in 2004 in response to the Florida Supreme Court's opinion in Woodside Village Condominium Association, Inc. v. Jahren, 806 So. 2d 452 (Fla. 2002). The supreme court noted that condominiums were a unique form of living arrangement that was subject to greater restrictions on an owner's right to lease a unit. Woodside, 806 So. 2d at 456. The original declaration allowed Jahren to lease for one year or less or to lease by successive leases in excess of a year without board approval. Id. 453. Leases longer than a year required board approval. Id. at 454. The declaration was amended to restrict all leases to 9 months in any 12 month period and to require board approval of all leases. Id. at 453-54. The supreme court held the amendment was valid because Jahren bought his unit knowing the declaration could be amended by its terms. Id. at 462. The supreme court's decision rests on the duration of the lease, not the board approval requirement. Id. at 462 ("we cannot conclude that the amendment restricting leases to nine months in any twelve-month period is arbitrary in its attempt to achieve this goal").

17. The enactment of subsection 718.110(13), Florida Statutes, changed the holding in Woodside for all amendments restricting an owner's right to lease from 2004 onward. Now any amendments to declarations that change an owner's right to lease his or her unit may only be applied to those existing owners who consent or those owners who purchase after the amendment is recorded in the public records.

18. Sawitoski argues that requiring an application, a transfer fee and association approval of each lease "restricts" her right to rent her unit and does not apply to her under section 718.110(13), Florida Statutes.

19. Association argues that the amendment is procedural and provides the information it needs to ensure compliance with the original provisions under article XII. Ass'n Pet. to Intervene & Response to Pet. for Dec. Stmt. (April 16, 2008). The amendment ensures the Association can maintain a community of congenial residents and provide a "nonintrusive method" for making sure owners comply with leasing only 26 two-week periods a year. Association argues that the declaration required a \$50 transfer fee, so the amendment applies the transfer fee on sales to leases within the same section 12.2. Association argues that both short-term leases and sales are "transfers" of the owner's interest in the unit under section 12.2(L), so both had to be approved by the Association when Sawitoski purchased her unit. Association's argument is that Sawitoski's substantive right to lease under article 12.2(N) is unchanged; only the procedural aspects of article 12.2 on transfers to enable the Association to ensure compliance with the declaration has been changed. Association argues that section 718.110(13), Florida Statutes, prohibits substantive restrictions and not procedural ones, so section 12.2(O) is consistent with the law.

20. The question is whether the application, board approval, and transfer fee requirements in the amendment impair Sawitoski's right to lease her unit, which would be prohibited by section 718.110(13), Florida Statutes. Under the original declaration, Sawitoski had the right to lease her unit 26 times a year for two-weeks at a time. She has the same right after the amendment.

Lease Amendment: Article 12.2(O)

21. Amendment to article XII, section 12.2(O), of the declaration provides three new requirements for leasing: (1) an application; (2) board approval; and (3) a \$100 transfer fee. Each requirement is discussed separately.

I. Application.

22. The application asks for the number of people who will occupy the unit, for credit references and emergency contact information. Application for Approval of Lease of Condominium Unit. It provides notice that the documents restrict the units to single-family residential use. The application acts as notice that the unit is being leased and provides a way for the association to track compliance with the existing leasing restriction. If Sawitoski were to lease her unit on a daily basis, she would be in violation of article XII, section 12.2(N). If she leased her unit to a commercial tenant, she would not be in compliance with the use restrictions.

23. The original association rules, which are incorporated in the association's bylaws, imposed occupancy limits and prohibited tenants from having pets. The board was authorized to enforce these restrictions. The registration rule, which Sawitoski agrees is reasonable, requires all guests and renters to register upon arrival. House Rule, no. 1. The registration process requires tenants to provide the association with identifying information. A registration form is still required, but it is in addition to a lease application.

24. Sawitoski argues that the application is a new restriction on her right to lease that was not included in the original declaration and seeks personal information not

included in the registration, such as the number of occupants, credit references and employment. Sawitoski's Reply to Association's Response (filed May 6, 2008). The association counters that it is a procedure to assist the board in enforcing the use restrictions.

25. The application is an expansion of the tenant registration process that was originally required, not an entirely new requirement. The association has always had the authority under the original declaration to enforce and ensure compliance with the use restrictions by both unit owners and their tenants. Arts. VII, XII, XVII, Declaration; art. XIII, Art. of Incorp. (powers); art. 2.7, Bylaws (powers); §§ 718.111(2), 718.303, Fla. Stat. The request for additional information from tenants is not a further restriction on Sawitoski's right to lease her unit. It is a means of providing the association with the information needed to ensure compliance with the governing documents.

II. Approval.

26. Article 12.2(O) authorizes the board to approve or disapprove leases in advance of a tenant occupying the unit. The approval or disapproval must be given in 10 days or the lease is deemed approved. Sawitoski argues that this is a new restriction on her right to lease because it gives the board authority to deny her choice of tenant. The association responds that this is not a restriction on her right to lease but a means of ensuring compliance with the governing documents.

27. The original bylaws expressly authorize the board to "approve or disapprove the transfer of ownership of Units in the manner provided in Article XII of the Declaration of

Condominium." Art. 2.7(H), Bylaws. The reference to article XII is not limited to just sales but includes all transfers. Under the original declaration, the association has the right to void a lease or approve a non-compliant lease. Art. 12.2(L), Declaration; cf. Seagate, 330 So. 2d 484, 486 (Fla. 4th DCA 1976) (finding prohibition on leasing with exception for board approval in cases of hardship was not an unreasonable restraint on unit owner's right to alienate his unit). The power to deny a lease *before* the tenant moves in is consistent with the power to void a lease *after* the tenant moves in.

28. The amendment in article 12.2(O) provides a pre-approval process for the exercise of these powers rather than creating a new restriction on Sawitoski's lease right.

29. The requirement of board approval when exercised reasonably is not a restriction on Sawitoski's right to lease her unit, which remains unchanged by the amendment. "[R]easonable restrictions concerning use, occupancy, and transfer of condominium units are necessary for the operation and protection of the owners in the condominium concept." Lyons v. King, 397 So. 2d 964, 968 (Fla. 4th DCA 1981) (quoting White Egret Condo., Inc. v. Franklin, 379 So. 2d 346 (Fla. 1979)). If the board is reasonably applying the restrictions in the declaration they will be upheld. Id. Courts have held a board's right to approve leases was reasonable to ensure payment of maintenance fees and the residential character of the community. See Pine Island Ridge Condo. "F" Ass'n, Inc. v. Waters, 374 So. 2d 1033, 1035 (Fla. 4th DCA 1979) (finding that owner's prepayment agreement with developer did not stop association from foreclosing its lien for nonpayment of fees because it had not approved the

agreement); Seagate Condo. Ass'n, Inc. v. Duffy, 330 So. 2d 484, 485 (Fla. 4th DCA 1976) (holding that ban on leasing was reasonable means of inhibiting transient occupancy and of maintaining the residential character of condominium community); see also Kroop v. Caravelle Condo., Inc., 323 So. 2d 307, 309 (Fla. 3d DCA 1975) (approving trial court finding that restriction on leasing was not a restraint on alienation in part because owner could still sell unit).

30. The application information is consistent with the Association's authority to ensure compliance with the original use restrictions. The board is authorized to ensure the maintenance of a community of congenial residents and to enforce the restrictions on single family use, commercial use and prohibited uses. Art. VII, Declaration; art. VII, Bylaws. See Lyons v. King, 397 So. 2d 964 (Fla. 4th DCA 1981) (finding that board approval of leases was valid under declaration providing for maintenance of "community of congenial residents"); cf. Coquina Club, Inc. v. Mantz, 342 So. 2d 112 (Fla. 2d DCA 1977) (finding application process requires prospective purchaser to first meet use restrictions before association must provide buyer when it denies sale).

31. Only a restriction on an existing right to lease is prohibited. § 718.110(13), Fla. Stat. Article 12.2(O) of the declaration is not inconsistent with the board's power to enforce the leasing restrictions and its right of approval in the original declaration; therefore, it does not contravene section 718.110(13), Florida Statutes.

III. Transfer Application Fee.

32. An association may collect a fee for the transfer of a unit if the declaration, articles of incorporation or bylaws authorize the association to approve a transfer. § 718.112(2)(i), Fla. Stat. Subsection 718.112(2)(i), Florida Statutes, provides in part:

(i) *Transfer fees.*—No charge shall be made by the association or any body thereof in connection with the sale, mortgage, lease, sublease, or other transfer of a unit unless the association is required to approve such transfer and a fee for such approval is provided for in the declaration, articles, or bylaws. Any such fee may be preset, but in no event may such fee exceed \$100 per applicant other than husband/wife or parent/dependent child, which are considered one applicant.

33. Sawitoski argues the transfer fee is a new restriction on her right to lease. The association argues that the transfer fee in article 12.2(A) authorizes the fee on leases under amendment 12.2(O) and that it is a procedure not a restriction.

34. A transfer includes a lease as well as a sale, but the terms are not synonymous. A sale transfers all of the owner's title and interest in the real estate; a lease transfers the right to possess and use the property but not the title. Black's Law Dict. at 722, 1073 (7th ed. 2000).

35. Section 12.2 sets out separate paragraphs for different types of transfers. Transfers for the sale of a unit are governed by subsections A through C. A transfer from one spouse to another is governed by subsection G. All transfers by gift, devise or inheritance are governed by subsection H. Transfer by mortgage redemption, foreclosure sale, or other judicial sale are governed by subsection J. Leases are governed by subsection N. A transfer that does not comply with the restrictions in the appropriate subsection may nonetheless be approved by the board under subsection L.

36. Subsection L does not apply the transfer fee for sales to leases, rather it provides the board with authority to disapprove a transfer that does not comply with the use restrictions or to approve a noncompliant transfer to avoid an unreasonably strict application of each of the provisions in specific cases. If the application and fee provision in A were intended to apply to all transfers, A would not have been restricted to sales. If the notice and fee requirements in subsection A applied to all other types of transfers, then there would have been no need to include additional notice provisions in other subsections. Therefore, by its plain terms, the transfer fee in subsection A applies to sales not leases.

37. The transfer fee provision, which is an affirmative covenant not a restrictive covenant,¹ is adopted under the authority of section 718.112(2)(i), Florida Statutes. Section 718.112(2)(i), Florida Statutes, ties the payment of an administrative fee to a requirement of board approval for a transfer. This section is part of the procedural laws applying to association governance.

38. Rules of procedure generally define the manner in which a right is to be performed or enforced. For example, in analyzing a declaration with articles similar to articles XI and XII, an appellate court discussed the procedural aspects of these

¹ Restrictive covenants control the *use* of the land. See Hill v. Palm Beach Polo, Inc., 717 So. 2d 1080, 1081 (Fla. 1998). An affirmative covenant is contractual in nature, such as a requirement to pay assessments. Hill, 717 So. 2d at 1081-82. Both types of covenants in a condominium declaration "run with the land" and are enforceable until the condominium is terminated or amended. § 718.104(7), Fla. Stat.; Hovnanian Fla., Inc. v. Div. Fla. Land Sales & Condo., Dep't of Bus. Reg., 401 So. 2d 851, 854 (Fla. 1st DCA 1981) (adding as amended). A provision giving the association a right of first refusal to purchase a unit was not a covenant restricting the use of the land but an option contract. See Lakeside Manor Condo. Ass'n, Inc. v. Forehand, 513 So. 2d 1104, 1106 (Fla. 5th DCA 1987).

provisions as providing for an application, a notice to the association of an intention to sell or lease, a demand that the association provide a buyer if the prospective purchaser was denied, and the association's approval or denial within 30 days of an application. See Coquina Club, Inc. v. Mantz, 342 So. 2d 112, 113 (Fla. 2d DCA 1977) (finding application process requires prospective purchaser to first meet use restrictions before association must provide buyer when it denies sale). See also Backus v. Smith, 364 So. 2d 786, 787 (Fla. 1st DCA 1978) (noting that association failed to follow procedures in declaration and bylaws in denying sale).

39. A condominium's bylaws, rules and regulations are generally examples of procedural rights that are adopted to provide a means of enforcing or applying the substantive rights found in the declaration. For example, bylaws contain procedures for noticing meetings, holding elections, and may have procedures for approving unit transfers. See § 718.112(2), Fla. Stat. The transfer fee requirement is not a restriction on Sawitoski's right to lease her unit under article 12.2(N), so it is not prohibited by section 718.110(13), Florida Statutes. The transfer fee may be imposed under the authority of section 718.112(2)(i), Florida Statutes.

40. In summary, the bylaw amendment applies to Sawitoski.

ORDER

Based on the findings of fact and conclusions of law, it is ordered that Southern Breeze Gardens Condominium Association, Inc.'s (Association) amendment to the declaration imposing a transfer fee, application and approval process for unit leases may be applied to petitioner under section 718.110(13), Florida Statutes.

DONE and ORDERED this 2nd day of June, 2008,

at Tallahassee, Leon County, Florida.



[Handwritten Signature]

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, FL 32399-1030

Division of Florida Land Sales,
Condominiums & Mobile Homes

NOTICE OF RIGHT TO APPEAL

THIS FINAL ORDER CONSTITUTES FINAL AGENCY ACTION AND MAY BE APPEALED BY ANY PARTY ADVERSELY AFFECTED 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 Jan Sawitoski, 1101 Cara Court, Marco Island, FL 34145, and to William G. Morris, Esq., P.O. Box 2056, Naples, FL 34146-2056, and William G. Morris, Esquire, 247 N. Collier Blvd., Suite 202, P.O. Box 2056, Marco Island, FL 34146-2056, on this 13th day of June, 2008.


Robin McDaniel, Division Clerk

Copies furnished to:

Janis Sue Richardson
Chief Attorney