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Department of Business and Professional Regulation

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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

Docket No. 2006051291

MAISON GRANDE CONDOMINIUM ASSOCIATION, INC.

DS 2006-043DECLARATORY 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 section 120.565, Florida Statutes.

PRELIMINARY STATEMENT

On September 18, 2006, the Division received a petition for declaratory statement from Maison Grande Condominium Association, Inc. requesting an opinion as to whether it may remove a board member for failing to meet an eligibility requirement of residence of 9 or more months a year under section 718.112(2)(a), (d), and (j), Florida Statutes. Notice of receipt of the petition was published in Florida Administrative Weekly on October 6, 2006.

FINDINGS OF FACT

The following findings of fact are based on information submitted by Maison Grande. 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. Maison Grande Condominium Association, Inc. is a condominium association operating Maison Grande Condominium, which is located in Dade County, Florida. Declaration of Condominium of Maison Grande Condominium at 1.

2. Maison Grande is incorporated as a not for profit Florida corporation. Art. of Incorp. (Mar. 18, 1971).

3. Maison Grande Condominium was submitted to condominium ownership in 1971 under chapter 711, Florida Statutes.

4. Angela Yera is a unit owner in Maison Grande.

5. Ms. Yera was appointed by the board to fill a vacancy during the middle of a unit owner recall election of the board. Ms. Yera was not included in the recall. The board and the unit owners seeking recall settled the recall effort.

6. At the time Ms. Yera was appointed to the board, she did not reside in her unit 9 months or more in any calendar year.

7. Maison Grande alleges that Ms. Yera's appointment was invalid because she did not meet the eligibility requirements of article 8.1 of the articles of incorporation, which provides:

The affairs of the Association shall be managed by a Board of Directors of eleven members of the Association, who reside in their unit not less than nine months in the calendar year. The Board of Directors may, from time to time, increase or decrease the number of persons to serve on the Board, provided, however, that the Board shall consist of an odd number of members, and provided, that no unit shall have more than one person serving as a director at any one time. The Board shall never consist of less than five members.

Art. 8.1, Amend. Art. of Incorp. (Mar. 12, 1980) (emphasis added).

8. The amended bylaws of the association also provide that membership on the eleven member board of directors requires the directors to "reside in their unit not less than nine (9) months in the calendar year." § 3.1, Amend. By-Laws.

9. At a meeting, the interim board, constituted under the recall settlement, voted to dismiss Ms. Yera from service.

10. An election was held for the four director positions recalled. The new board met and ratified the interim board's vote to remove Ms. Yera from the board for failing to meet the eligibility requirements.

11. Every unit owner is entitled to one vote for each unit owned. Art. 19.1, Declaration; § 2.5, Amend. By-Laws Maison Grande Condo. Ass'n, Inc. (Mar. 12, 1980).

12. The bylaws provide for the election of directors at the annual meeting. § 3.2(a), Amend. By-Laws. "Any member of the Board of Directors may be recalled and removed from office with or without cause by the vote or agreement in writing of a majority of all unit owners." Id. § 3.2(f). Vacancies are filled by the board. Id. § 3.2(e).

CONCLUSIONS OF LAW

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

2. Maison Grande has standing to seek a declaratory statement.

3. 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.

4. Rule 28-105.001, Florida Administrative Code, 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 only 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 or for obtaining a policy statement of general applicability from an agency. A petition for declaratory statement must describe the potential impact of statutes, rules, or orders upon the petitioner's interests.

6. The association operates the condominium under the declaration, its articles of incorporation and bylaws. § 718.112(1)(a), Fla. Stat. The bylaws are required to provide for the election of directors and the method of filling vacancies on the board. Id. § 718.112(2)(d), Fla. Stat.; Fla. Admin. Code R. 61B-23.0021.

7. The board fills vacancies, other than those created by a recall election, by board appointment or by election. Id. § 718.112(d)8; Fla. Admin. Code R. 61B-23.0021. "Unless otherwise provided in the bylaws, a board member appointed or elected under this section shall fill the vacancy for the unexpired term of the seat being filled." Id. § 718.112(2)8, Fla. Stat.

8. All unit owners are entitled to run for the board. § 718.112(2)(d), Fla. Stat. The only eligibility criterion set by law precludes a convicted felon who has not had his or her civil rights restored from running for election. Id. Section 718.112(2)(d), Florida Statutes (2006), provides:

(d) *Unit owner meetings.*--

1. There shall be an annual meeting of the unit owners. Unless the bylaws provide otherwise, a vacancy on the board caused by the expiration of a director's term shall be filled by electing a new board member, and the

election shall be by secret ballot; however, if the number of vacancies equals or exceeds the number of candidates, no election is required. If there is no provision in the bylaws for terms of the members of the board, the terms of all members of the board shall expire upon the election of their successors at the annual meeting. Any unit owner desiring to be a candidate for board membership shall comply with subparagraph 3. A person who has been convicted of any felony by any court of record in the United States and who has not had his or her right to vote restored pursuant to law in the jurisdiction of his or her residence is not eligible for board membership. The validity of an action by the board is not affected if it is later determined that a member of the board is ineligible for board membership due to having been convicted of a felony.

9. Maison Grande cites to two declaratory statements issued by the Division on the question of eligibility for board candidacy. In Starr, Golden Lakes Village Condominium Association "A", Inc., DS98-029; Docket No. DS98150 (Dec. 22, 1998), the Division found that a bylaw requiring unit owners to be in residence for 9 or more months of the year was valid under an amendment to section 718.112(2)(d)1, Florida Statutes (1998). The 1998 amendment provided: "In order to be eligible for board membership, a person must meet the requirements set forth in the declaration." This amendment reversed prior Division decisions applying this section, which found that every unit owner was entitled to be a candidate for board membership and to serve if elected.

10. In 2000, the Florida Legislature repealed the 1998 amendment expressly to overturn this declaratory statement as it was not the intent of the legislature to allow associations to enact eligibility requirements that would preclude a unit owner from being a candidate for the board. The amendment to section 718.112(2)(d) provides:

(2) REQUIRED PROVISIONS.—The bylaws shall provide for the following and, if they do not do so, shall be deemed to include the following:

(d) Unit owner meetings.—

1. There shall be an annual meeting of the unit owners. Unless the bylaws provide otherwise, a vacancy on the board of administration caused by the expiration of a director's term shall be filled by electing a new board member, and the election shall be by secret ballot; however, if the number

of vacancies equals or exceeds the number of candidates, no election is required. If there is no provision in the bylaws for terms of the members of the board of administration, the terms of all members of the board of administration shall expire upon the election of their successors at the annual meeting. Any unit owner desiring to be a candidate for board membership shall comply with subparagraph 3. ~~In order to be eligible for board membership, a person must meet the requirements set forth in the declaration.~~ A person who has been convicted of any felony by any court of record in the United States and who has not had his or her right to vote restored pursuant to law in the jurisdiction of his or her residence is not eligible for board membership. The validity of an action by the board is not affected if it is later determined that a member of the board is ineligible for board membership due to having been convicted of a felony.

Ch. 2000-302, § 53, Laws of Fla. (2000).

11. The legislative bill analysis explained the legislature's intent behind the amendment as follows:

Section 53 -- Amends s. 718.112(2)(d), F.S., regarding unit owner meetings; s. 718.112(2)(e), F.S., relating to budget meetings; and s. 718.112(2)(f), F.S., relating to the annual budget.

Present Situation: In 1998 the following sentence was added to s. 718.112(2)(d)1., F.S.:

"In order to be eligible for board membership a person must meet the requirements set forth in the declaration." This sentence was added pursuant to CS/HB 3321, ch. 98-322, L.O.F. The division construed the sentence to allow declarations to contain a requirement that a person must be a resident of the condominium in order to become a member of the board.⁶⁹ That sentence was not intended to allow a residency requirement; it was simply intended to support other requirements set forth in the declaration. This intent is clear based upon the previous sentence in that subparagraph, which states that "any unit owner" desiring to be a candidate is eligible. The pertinent provision in the 1998 legislation added language that was intended to prevent convicted felons (who did not have their rights restored) from serving on condominium association boards.⁷⁰

Effect of Proposed Changes: Removes the sentence which was added in 1998, which the division construed to allow residency requirements with regard to membership on the board, and deletes superfluous language.

⁶⁹ *In re: Petition for Declaratory Statement, Harry Starr, Golden Lakes Village Condominium Association "A", Inc.*, DBPR Declaratory Statement 98-029, at 10.

Fla. HR Comm. Real Prop. & Prob., Final Staff Analysis for CS/CSHB 593, 1st Engrossed, at 38 (July 26, 2000).

12. In 2005, the Division issued the second declaratory statement cited by Maison Grande: Grubbs (Sandpiper Village Condominium), Case No. DS 2005-013; Docket No. 2005016727 (May 26, 2005). The Division found that a bylaw prohibiting co-owners from serving on the board conflicted with section 718.112(2)(d), Florida Statutes.

13. The legislative intent and the statute are clear that condominium associations may not impose a residency requirement to restrict a unit owner's right to run for board election. Therefore, Maison Grande's bylaw provision conflicts with section 718.112(2)(d), Florida Statutes.

14. Maison Grande argues that even if the bylaw residency requirement is disallowed by the Condominium Act, it may nevertheless impose it under sections 617.0801 and 617.0802(1), Florida Statutes. The association is incorporated as a not for profit corporation and is subject to chapter 617, Florida Statutes. Section 617.0801, Florida Statutes, provides that corporations have certain powers and duties exercised by the board of directors under the articles of incorporation. Section 617.0802, Florida Statutes, provides that "[d]irectors must be natural persons who are 18 years of age or older but need not be residents of this state or members of the corporation unless the articles of incorporation or bylaws so require. The articles of incorporation or the bylaws may prescribe additional qualifications for directors."

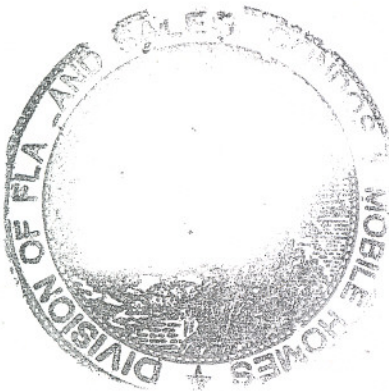
15. Section 718.111(1)(a), Florida Statutes, requires all associations created after 1977 to be incorporated. While incorporation is not mandatory for Maison Grande, it is incorporated. The association has all of the powers and duties of the corporate law "except as expressly limited or restricted in this chapter." § 718.111(2), Fla.Stat. The election for board membership is expressly limited and restricted by the Condominium Act,


which includes more provisions governing election procedures and rules. Therefore, the more general corporate law does not alter a unit owner's right to be a candidate for board membership.

16. Ms. Yera was appointed by the interim board. She is entitled to serve until the expiration of the term of her seat on the board unless otherwise provided in the bylaws. § 718.112(2)(d)8, Fla. Stat. Therefore, the board may not remove Ms. Yera from her position

ORDERED that, under section 718.112(2)(d), Florida Statutes, Maison Grande Condominium Association, Inc. may not remove a board member for failing to meet an eligibility requirement of residence of 9 or more months a year under section 718.112(2)(d), Florida Statutes.

DONE this 27th day of November, 2006, 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 ORDER DENYING PETITION FOR DECLARATORY STATEMENT 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 David A. Friedman, Fowler, White & Burnett, One Financial Plaza, Suite 1100, 100 Southeast Third Ave., Fort Lauderdale, Florida 33394, this 18th day of December, 2006.

Robin McDaniel
Robin McDaniel, Division Clerk

Copies furnished to:

Janis Sue Richardson,
Chief Assistant General Counsel