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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 LAND SALES, CONDOMINIUMS, AND  
MOBILE HOMES

IN RE PETITION FOR DECLARATORY STATEMENT

Docket No. 2006056782

Inverness Village Condominium Association, Inc.

DECLARATORY STATEMENT

**DS 2006-049**

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 718.501 and 120.565, Florida Statutes. The issue is whether directors and officers who directly participated in the cleanup and code compliance efforts following Hurricane Wilma may be compensated for their work under section 718.112(2)(a)1, Florida Statutes, and if so, may the directors to be compensated vote or abstain from voting on the question under section 718.111(1)(b), Florida Statutes.

PRELIMINARY STATEMENT

On October 17, 2006, the Division received a petition for declaratory statement from Inverness Village Condominium Association, Inc. (Inverness Village). Notice of receipt of the petition was published in Florida Administrative Weekly on November 22, 2006. The Division received a supplement to the petition on December 19, 2006. No hearing was requested or held.

### FINDINGS OF FACT

The following findings of fact are based on information submitted by Petitioner. 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. Petitioner, Inverness Village is a condominium "association" operating Inverness Village Condominium as that term is defined by 718.103(2), Florida Statutes.<sup>1</sup> The association is incorporated as a not for profit corporation in this state. Art. Second, Art. of Incorp., Declaration at 20.

2. Inverness Village Condominium was created with the filing of its Declaration of Condominium (Declaration), which incorporated chapter 718, Florida Statutes, in the public records on February 27, 1980. Declaration at 1. The condominium was developed as one-story buildings containing four units each. Id. art. I, at 2.

3. Article IX of the Declaration establishes the association's operational authority and specifically states in part:

Said Association shall have all of the powers and duties set forth in the Condominium Act, as well as all of the powers and duties as are granted to or imposed upon it by this Declaration, the By-Laws of said Association, and its Articles of Incorporation.

Art. IX, Declaration; Art. Tenth, Art. of Incorp., Declaration at 21.

4. Article X of the Declaration requires the association to generally maintain the common elements. The association may contract with any person, firm or corporation for the general maintenance of the condominium property. Art. XV(a), Declaration at 12; art. II(5), Bylaws. The association may contract for management services to provide general

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<sup>1</sup> The Declaration includes the Charter of Devonhunt Condominium Association, Inc. Articles of Incorporation, which provide that Devonhunt Condominium Association is the association charged with

maintenance of the condominium property. Art. XXI(e), Declaration at 17; art. II(5), By-Laws.

5. For reconstruction and repair of the condominium property after a hurricane, the declaration requires the association to contract for property insurance coverage to provide funds for these catastrophic damages. Art. XII(b), Declaration at 8. The association is responsible for negotiating all settlements with the insurer, designating the Insurance Trustee,<sup>2</sup> obtaining bids from contractors for reconstruction where the damages exceeds \$20,000, contracting with a licensed contractor to repair and restore the condominium property, seeing that the insurance proceeds are properly spent, assessing for additional funds where the insurance proceeds are insufficient, and maintaining an escrow account of funds sufficient to ensure the payment of insurance premiums. Id.

6. The declaration treats general maintenance of the common elements separately from repair and reconstruction after a casualty, such as hurricane. Cf. art. X with art. XII, Declaration. The Condominium Act also covers cleanup of damage caused by a hurricane differently than general obligations for maintenance and repair caused by aging and wear and tear. Cf. § 718.111(11) with § 718.113, Fla. Stat.

7. The directors' duties are also separately identified as to general maintenance of the condominium property and their obligation to insure it against loss due to casualty. Art. II(5)(A)-(D), (G) (maintenance) (E) (insurance), Bylaws, Declaration at 27.

8. Officers have specifically designated duties. Art. III(6), Bylaws, Declaration at 29. The president presides at meetings, manages the association's business, implements

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operating the Inverness Village Condominium Three. The association provided this set of documents as its governing documents.

<sup>2</sup> An Insurance Trustee controls the insurance proceeds and pays contractors for the repairs at the direction of the board. Id. art. XII(B).

board orders, executes contracts, generally superintends and directs the officers, and reports to the board. Id.

9. The secretary keeps the meeting minutes, sends association notices, maintains the official records, keeps a current list of all owners, and performs general corporate secretarial duties. Art. III(6), Bylaws, Declaration at 29.

10. The treasurer keeps the financial accounts and records, disburses funds, and reports to the president and board on the financial condition of the association. Art. III(6), Bylaws, Declaration at 29-30.

11. Several members of the board performed services on behalf of the association in connection with restoration efforts after Hurricane Wilma. Pet. at ¶ 5. The services included: "assessing and surveying the property for damage; contracting and negotiating with contractors and service provides [sic] to perform restoration and recovery work; meeting and negotiating insurance settlements." Id. The board members were directly involved in coordinating hurricane cleanup of the property, working with service providers to comply with city code provisions, removing downed trees and restoring civility and community to the association. Id.

12. The declaration requires the directors to obtain an assessment of the casualty damages, contract for restoration work, negotiate insurance settlements, generally oversee the cleanup of the condominium property, monitor the work done by the contractors and service providers, and direct the disbursement of insurance proceeds. Art. XII, Declaration. As described, the work performed by the directors and officers falls

within the designated scope of their duties as directors and officers charged with reconstruction of the condominium property after an insurable event such as a hurricane.

13. "Directors shall receive no compensation for their services except as expressly provided by resolution duly adopted by the Members." Art. Tenth, Art. of Incorporation, Declaration at 22; art. II(6), By-Laws, Declaration at 28.<sup>3</sup> Approval by 75% of the members is required. Art. II(6), By-Laws. "[E]ach Unit Owner shall be entitled to one vote in the affairs of the Association for each Unit owned by him." Art. VI, Declaration at 5. The bylaws provide that "[e]ach Unit Owner shall be entitled to one vote" at any meeting of the members. Art. V(7), By-Laws, Declaration at 31.

14. The association asks a number of questions related to the issue, such as whether the work performed was outside the scope of their director and officer duties, whether the board may approve the compensation without a unit owner vote, and whether the directors may vote as unit owners and not directors. Pet. at ¶ 6.

#### CONCLUSIONS OF LAW

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

2. Inverness Village has standing to seek this declaratory statement.

3. The agency may only address questions related to how the Condominium Act and rules apply to the question asked. § 120.565, Fla. Stat.; Fla. Admin. Code R. 28-105.001.

4. Section 718.112(2)(a)1, Florida Statutes, provides in pertinent part:

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<sup>3</sup> The association provided the By-Laws of Devonhunt Condominium Association, Inc. as the bylaws applying to the association.

The form of administration of the association shall be described indicating the title of the officers and board of administration and specifying the powers, duties, manner of selection and removal, and compensation, if any, of officers and boards. . . . In the absence of provisions to the contrary in the bylaws, the board of administration shall have a president, secretary, and a treasurer, who shall perform the duties of such officers customarily performed by officers of corporations. . . . Unless otherwise provided in the bylaws, the officers shall serve without compensation and at the pleasure of the board of administration. Unless otherwise provided in the bylaws, the members of the board shall serve without compensation.

(emphasis added); cf. §§ 607.08101 and 617.08101 ("Unless the articles of incorporation or the bylaws provide otherwise, the board of directors may fix the compensation of directors.").

5. Section 718.111(1)(b), Florida Statutes, provides:

A director of the association who is present at a meeting of its board at which action on any corporate matter is taken shall be presumed to have assented to the action taken unless he or she votes against such action or abstains from voting in respect thereto because of an asserted conflict of interest. Directors may not vote by proxy or by secret ballot at board meetings, except that officers may be elected by secret ballot. A vote or abstention for each member present shall be recorded in the minutes.

6. Since the bylaws for Inverness Village provide a method of compensating the board, section 718.112, Florida Statutes, does not prohibit paying the directors and officers for the work performed. Art. Tenth, Art. of Incorporation, Declaration at 22; art. II(6), By-Laws, Declaration at 28. Under its bylaws, the board must have 75% approval of the unit owners to pay themselves for the hurricane cleanup work. Accord Basch v. Hopson, 831 So. 2d 760, 761-62 (Fla. 4th DCA 2002) (reversing summary judgment as no evidence was presented that condominium unit owners had approved an increase in compensation as required under the bylaws).



7. The board asks a number of related questions, such as whether the work performed was outside the scope of the directors and officers' corporate duties, so that the directors and officers' might be compensated for their work. An officer or director who performs extraordinary services outside the scope of their corporate duties, is entitled to reimbursement under an implied contract theory. 8A Fla. Jur. 2d § 415 Business Relationships (1996); see Hackley v. Oltz, 105 So. 2d 20 (Fla. 3d DCA 1958) (opining that officers may be entitled to additional compensation for extraordinary services that were outside the scope of their duties and were rendered to the corporation under circumstances that implied the company agreed to pay them); Basch, 831 So. 2d at 761-62 (reversing summary judgment as question of fact remained as to whether services performed by officers were outside the scope of their duties); Avila, So. Condo. Ass'n v. Kappa Corp. 347 So. 2d 599, 607 (Fla. 1977) ("no director or officer shall be required to return any portion of moneys paid by the association where it is shown that he received the funds with the consent of the association or with the consent of a substantial number of the individuals comprising the association"). Any reimbursement of private funds spent for common expenses would have to be properly accounted for by submitting receipts and invoices to the association for reimbursement. §§ 718.111(12)(a)(11)a., 718.111(13), Fla. Stat.; Fla. Admin. Code R. 61B-22.002, 61B-22.006(1)-(2). Accord Flight Equip. & Eng'g, 103 So. 2d at 625 (requiring officer to account fully for the corporate sums withdrawn for expenses and failing to do so reimburse corporation for the funds unaccounted for).

8. In order to determine if this applies to condominium officers and directors, it must be determined if the hurricane cleanup work is outside the scope of the officers and directors' duties as defined by the governing documents and the Condominium Act. The

Condominium Act generally assigns the directors the duty to maintain, repair and replace the common elements. §§ 718.111(3), (4), 718.113, Fla. Stat.

9. The directors are required to contract for insurance to protect the condominium property against windstorm damage. Art. XII, Declaration; § 718.111(11), Fla. Stat. The declaration requires the board to negotiate insurance settlements, contract for the restoration work, oversee the work, and direct the Insurance Trustee to pay the contractors. The cleanup work described by the association falls within the scope of the board's duties under article XII of the Declaration. § 718.111(2), Fla. Stat. (duties include those set forth in declaration); § 718.111(3)-(4), .113, Fla. Stat. (duty to maintain common elements). Because it is determined from the facts presented that the work performed was within the scope of the directors and officers duties, the question of the board voting on compensation for work performed outside the scope of their duties does not arise.

10. Section 718.112(2)(a)1, Florida Statutes, permits directors and officers to be compensated if the bylaws authorize it. Under the bylaws, the board may not approve their own compensation.<sup>4</sup> Art. Tenth, Art. of Incorpor., Declaration at 22; art. II(6), By-Laws, Declaration at 28.<sup>5</sup> However, the board may be compensated by approval of 75% of the unit owners. Art. II(6), By-Laws.

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<sup>4</sup> § 617.08101, Fla. Stat. (boards authorized to fix the compensation of the officers and directors unless the bylaws or articles provide otherwise); Ch. 90-179, § 45, Laws of Fla. (1990) (codified at § 617.08101); 8A Fla. Jur. 2d Business Relationships § 324 (2006).

<sup>5</sup> The association provided the By-Laws of Devonthunt Condominium Association, Inc. as the bylaws applying to the association. Before the enactment of section 617.08101, Florida Statutes, in 1990, the prohibition on directors approving their own compensation was rooted in general corporate law in this state. Flight Equip. & Eng'g Corp. v. Shelton, 103 So. 2d 615, 623-24 (Fla. 1958) (finding principle that directors cannot fix their own salaries, as officers, unless expressly authorized to do so by the charter or stockholders prevents "possible invasion of the corporate treasury").



11. The board asks whether the directors may vote at a board meeting to compensate themselves without a unit owner vote under section 718.111(1)(b), Florida Statutes. No. The bylaws require a unit owner vote. Since the unit owners must approve the compensation at a unit owner meeting called under section 718.112(2)(d), Florida Statutes, section 718.111(1)(b), Florida Statutes, does not apply as it applies to directors voting at a board meeting.

12. The board also asks whether the directors and officers may vote as unit owners, "even if a member owns multiple units," and not as board members if the vote on compensation is put to the members. Board members are also unit owners. Membership in the association with full voting rights is an appurtenance to unit ownership. § 718.106(2)(d), Fla. Stat. Unit owners do not give up this right by serving as a director or officer of the association. Fla. Admin. Code R. 61B-23.0026 (Developers are entitled to vote their units to elect members of the board and to recall the developer board members.).<sup>6</sup> Board members may exercise their rights to vote their units on any issue that comes up for a unit owner vote at a member meeting. § 718.112(2)(d), Fla. Stat. (annual meeting); § 718.112(2)(d)4, Fla. Stat. (approval by unit owners called for under governing documents shall be made at duly noticed meeting). For example, a board member up for re-election to the board may vote for himself for re-election. A board member may cast her unit's vote on the proposed budget. The bylaws provide that "[e]ach Unit Owner shall be entitled to one vote" at any meeting of the members. Art. V(7), By-Laws, Declaration at 31. The Declaration provides that each unit owner is entitled to one vote for each unit

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<sup>6</sup> Accord Webber v. Webber Oil Co., 495 A.2d 1215, 1221 (Me. 1985) (director was not disqualified from voting on his removal as it related to statutory right of directors to fix their compensation).

owned.<sup>7</sup> Art. VI, Declaration at 5. Therefore, the bylaws permit the directors to vote their units at any member meeting.

ORDERED that directors and officers of Inverness Village Condominium Association, Inc. who directly participated in the clean up and code compliance efforts following Hurricane Wilma may be compensated for their work in accordance with the bylaws by 75% vote of the unit owners, which bylaws are authorized by section 718.112(2)(a)1, Florida Statutes. Further, because the bylaws prohibit the directors from voting on their compensation, section 718.111(1)(b), Florida Statutes, does not apply; however, the directors to be compensated may vote as unit owners at a member meeting on their compensation under sections 718.106(2)(d) and 718.112(2)(d), Florida Statutes.

DONE this 5<sup>th</sup> day of January, 2007, at Tallahassee, Leon County, Florida.



  
Michael T. Cochran, Director  
Department of Business and  
Professional Regulation,  
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<sup>7</sup> Section 718.106(2)(d), Florida Statutes, provides a right to vote as an appurtenance to each unit. This right cannot be restricted in the governing documents based on a unit owner owning more than one unit. Therefore, the bylaws and declaration when read together grant each owner one vote per unit.

NOTICE OF RIGHT TO APPEAL

THIS 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 Steven S. Valancy, Esq., Jennings & Valancy, P.A., 311 S.E. 13th Street, Fort Lauderdale, Florida, 33316, this 11<sup>th</sup> day of January, 2007.

Robin McDaniel  
Robin McDaniel, Docket Clerk

Copies furnished to:

Janis Sue Richardson,  
Chief Assistant General Counsel