

Department of Business and Professional Regulation
AGENCY CLERK

Sarah Wachman, Agency Clerk

By:

Brandon M. Nuhoh

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

DS 2006-058

IN RE PETITION FOR DECLARATORY STATEMENT

Docket No. 2006064922

JOSEPH WHITE, Unit Owner,
Sea Brook Place Condominium Association, Inc.

DECLARATORY STATEMENT

DS 2006-060

Joseph White (White) filed a Petition for Declaratory Statement requesting an opinion as to whether The Sea Brook Place Condominium Association, Inc. (Sea Brook) is required by section 718.303(2), Florida Statutes, to give a unit owner an opportunity for a hearing and a reasonable time to correct the violation after the hearing, and then only impose a fine if it is not corrected.

PRELIMINARY STATEMENT

On November 20, 2006, the Division received a petition for declaratory statement from White. On November 27, 2006, the Division acknowledged the petition and notified White that the question as initially presented could not be addressed in a declaratory statement and that the governing documents would need to be filed. The time in which to issue a statement was stopped until White filed an amended petition with the additional information on February 7, 2007. White did not request a hearing and the division did not hold a hearing.

07 MAR - 8 PM 3:25

RECEIVED
FLSCLM

The Division published notice of the petition in Florida Administrative Weekly on February 2, 2007.

The Division mailed a notice of receipt of the petition and the amended petition to the association on January 19 and February 9, 2007, respectively. The association did not file a response.

The question under the amended petition is whether Sea Brook's hearing and fining bylaw is consistent with section 718.303, Florida Statutes.

FINDINGS OF FACT

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

2. According to White's petition, the Sea Brook bylaw is not consistent with section 718.303, Florida Statutes. In White's view, the board's enforcement of its fining authority "can lead to unjustified fining if a hearing is not given first and then a reasonable time to correct a violation subsequent to the hearing." Only then, if the "violation is not corrected within the time period subsequent to the hearing then can I [White] see that a fine can be imposed subsequent to the other terms of our documents at Seabrook." Supp. Pet. (Feb. 7, 2007).

3. Sea Brook is the entity created to operate the condominium. Art. IX, Declaration of Condo. of Sea Brook Place, A Condo. The declaration adopts the

Condominium Act "as the same may be amended from time to time." Art. II(H),
Declaration.

4. Section 5 of Sea Brook's bylaws was amended, in part, as follows:

All of the powers and duties of the Condominium Association, including those existing under the Condominium Act, the Not-For Profit Corporate Act, or any successor statutory provisions, as amended from time to time, and the Condominium Documents, shall be exercised by the Board of Directors unless otherwise specifically reserved therein to the Members. . . . Such Power shall include, without limitation on the generality of the foregoing, the power to establish, levy, assess and collect any periodic or special assessments, and all other fees, dues, charges, fines, and assessments authorized by the Declaration of Condominium, Articles of Incorporation, these By-Laws and any Rules and Regulations as may from time to time be promulgated by the Board of Directors. All sums which become due from a Unit Owner either as periodic Assessments, Special Assessments, fees, dues, charges or fines, shall constitute a lien on the real property of such Unit Owner and shall be subject to enforcement consistent with the provisions of the Declaration of Condominium for Sea Brook Place Condominium Association, Inc.

Amend. to the By-Laws of Sea Brook Place Condo. Ass'n, Inc. at 1 (Mar. 19, 2002) (emphasis added).

5. Section 5.1 of the amended bylaws of Sea Brook provides the
hearing and fining procedure:

[I]n the sole and absolute discretion of the Board of Directors, a fine or fines may be imposed against and upon any Unit Owner for the failure of that Unit Owner, . . . to fully comply with the provisions of the Declaration of Condominium, Articles of Incorporation, By-Laws and rules and regulations of Sea Brook Place Condominium, pursuant to the following procedures to the extent that same is not in conflict with the requirements of the Condominium Act, Section 718 Florida Statutes:

(a) Notice. The Board of Directors or the Association's management entity shall notify the Unit Owner of the infraction or infractions in writing. Included with such notice of infraction(s) shall be a notice of the next regularly scheduled meeting of the Board of Directors, at which the Owner shall be afforded an opportunity to present reasons why a fine or fines should not be imposed.

(b) Hearing. The matter of non-compliance shall be presented to the Board of Directors at such meeting of the Board and the Board of Directors shall hear reasons why the fines in question should not be

imposed. A written determination of the imposition of fines and the reasons for such decision shall be furnished to the Owner not later than thirty (30) days from the date of conclusion of said meeting of the Board of Directors or any continuation thereof.

(c) Appeal. Any owner aggrieved by the decision of the Board of Directors as to the imposition of a fine or fines against such owner may file a written request with the Board of Directors for an appeal and reconsideration of such decision. , , , The filing of an appeal . . . shall not stay or lessen the obligation of that Owner to make prompt payment for fines imposed. . . .

(d) Penalties. The Board of Directors may impose fines in the form of special assessments against a Unit(s) owned by the Unit Owner in such amounts as provided in the provisions of the Rules and Regulations for Sea Brook Place Condominium Association, Inc.

(e) Continuing Non-compliance or Violation. Each calendar day, after receipt of notice by the Unit Owner of such non-compliance or violation, during which such non-compliance or violation continues shall be deemed a separate violation or act of non-compliance for which fines may be imposed.

(f) Payment of Fines. Fines shall be paid not later than thirty (30) days after the notice of the imposition or assessment thereof.

(g) Collection of Fines. Fines due from a Unit Owner shall be treated as a special assessment against that Unit and subject to collection as any other assessment due Sea Brook Place.

Art. 5.1, Amend. Bylaws (Mar. 19, 2002) (sections (h) – (i) omitted) (emphasis added).

CONCLUSIONS OF LAW

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

2. White has standing to seek this 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.

§ 120.565, Fla. Stat. (2006) (emphasis added).

4. Section 718.303(3), Florida Statutes, provides the following (emphasis added):

If the declaration or bylaws so provide, the association may levy reasonable fines against a unit for the failure of the owner of the unit, or its occupant, licensee, or invitee, to comply with any provision of the declaration, the association bylaws, or reasonable rules of the association. No fine will become a lien against a unit. No fine may exceed \$100 per violation. However, a fine may be levied on the basis of each day of a continuing violation, with a single notice and opportunity for hearing, provided that no such fine shall in the aggregate exceed \$1,000. No fine may be levied except after giving reasonable notice and opportunity for a hearing to the unit owner and, if applicable, its licensee or invitee. The hearing must be held before a committee of other unit owners. If the committee does not agree with the fine, the fine may not be levied. The provisions of this subsection do not apply to unoccupied units.

5. White amended his petition to generally disagree with the board's procedural enforcement of its fining amendment.¹ Based upon White's general description and the documents, the Division determines that the notice procedure is consistent with section 718.303(3), Florida Statutes, which requires "a single notice."

¹ "The purpose of a declaratory statement is to allow a petitioner to select a proper course of action in advance" and not to seek approval or disapproval of conduct that has already occurred. *Novick v. Dep't of Health*, 816 So. 2d 1237, 1240 (Fla. 5th DCA 2002). White's initial petition concerned the board's hearing and fining of another unit owner for painting her fence, which the board found to be a violation of the governing documents. The division informed White that this question was not proper for a declaratory statement under section 120.565, Florida Statutes, and Florida Administrative Code Rule 61B-28.105.001 because it involved a unit owner who was not a party to his petition and it concerned board actions that had already taken place.

6. The bylaw provides for a hearing before the board of directors. This hearing procedure is not consistent with section 718.303(3), Florida Statutes, which requires a hearing "before a committee of other unit owners."

7. White raised the question of whether an association fine may become a lien on the unit. The bylaw provides that the fines "shall be treated as a special assessment against that Unit and subject to collection as any other assessment due Sea Brook Place." § 5.1(g), Amend. Bylaw. This provision is inconsistent with section 718.303(3), Florida Statutes, which provides: "No fine will become a lien on a unit." Section 718.303(3), Florida Statutes, has been automatically incorporated into the governing documents under article II(H) of the Declaration of Condominium.² Kaufman v. Shere, 347 So. 2d 626, 628 (Fla. 3d DCA 1977).

8. White's disagreement with the board not allowing a unit owner time to correct the violation after the hearing and only then imposing a fine if the unit owner does not correct the violation is not a question that is directly answered by section 718.303, Florida Statutes, which provides: "No fine may be levied except after giving reasonable notice and opportunity for a hearing to the unit owner." This section only requires a notice and a hearing. It does not provide for a period of time after the hearing for a unit owner to correct a violation before the board may impose a fine. An association may adopt a bylaw giving a unit owner an opportunity after a hearing to correct a violation before a fine would be imposed, but the statute does not require it.

² If White is seeking to have any provision of the bylaw, which is recorded in the county records and appurtenant to every owner's title, declared void, his remedy is in court. Pollack v. Three Horizons N. Condo., Inc., 457 So. 2d 1152 (Fla. 3d DCA 1984) (accepting jurisdiction to grant declaratory relief on validity of bylaw); §§ 26.12, 718.104, 718.105, Fla. Stat.

ORDER

Based upon the findings of fact and conclusions of law, it is declared that The Sea Brook Place Condominium Association, Inc.'s procedural provisions: (1) for notice before the board imposes a fine against a unit owner for violation of the governing documents, is consistent with section 718.303(2), Florida Statutes; however, the bylaw provisions: (2) for a hearing before the board and not a committee of other owners; and (3) the provision turning a fine into an assessment that may be collected as a lien against the unit, conflict with section 718.303(2), Florida Statutes.

DONE and ORDERED this 5th day of March, 2007,
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 Joseph White, 130 Seabreeze Circle, Jupiter,
Florida 33477, and Steve Inglis, Registered Agent for The Sea Brook Place
Condominium Association, Inc., 1930 Commerce Lane, Suite 1, Jupiter, Florida
33458, this 12th day of March, 2007.

Robin McDaniel
ROBIN MCDANIEL, Division Clerk

Copies furnished to:

Janis Sue Richardson,
Chief Assistant General Counsel

Mary Ann Campbell, Director and President
The Sea Brook Place Condominium Association, Inc.
134 Seabreeze Circle
Jupiter, FL 33477