

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

IN RE PETITION FOR DECLARATORY STATEMENT

Docket No. 2003092101

THE HERON MASTER ASSOCIATION, INC.

DS 2003-039

DECLARATORY STATEMENT

The Heron Master Association, Inc. (Heron Master Association), Petitioner, filed a Petition for Declaratory Statement requesting an opinion as to whether Heron Master Association may adopt an amendment to its bylaws with a two-thirds unit owner vote to appoint members to the board representing each of the three condominium associations and opt out of the requirements of electing board members under section 718.112(2)(d)3, Florida Statutes.

STATEMENT OF FACTS

The following facts 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 declaratory statement. Petitioner did not request a hearing and none was held.

1. Heron Master Association filed its petition with the Division on November 19, 2003. Notice of the petition was published in Florida Administrative Weekly on December 12, 2003.
2. Heron Master Association is a condominium "association" as that term is defined by section 718.103(2), Florida Statutes (2003).

3. Heron Master Association is the master association containing two sub-associations: The Heron Coach House Villas Condominium Association, Inc. (Heron Coach House Villas), consisting of 15 unit owners, and The Heron Coach Houses Condominium Association, Inc. (Heron Coach Houses), consisting of 48 unit owners.

4. Membership in one of the sub-associations requires membership in Heron Master Association, and all members of Heron Master Association are members of one of the two sub-associations. Therefore, all members of Heron Master Association are condominium unit owners, making Heron Master Association a condominium association under chapter 718, Florida Statutes. Every member is entitled to one vote on all master association matters, including the election of directors. Art. III, § 6, Bylaws for Heron Master Ass'n, Inc.

5. Article VII, section 3 of the Articles of Incorporation for Heron Master Association provides: "Members of the Board of Directors shall be elected and hold office in accordance with the bylaws."

6. Article III, section 1 of the Bylaws for Heron Master Association provides that one of the purposes of the annual meeting of members is "election of the Board of Directors for the ensuing year, all of whom shall take office immediately following election."

7. Article V, section 1 of the Bylaws for Heron Master Association provides: "Each director shall hold office for the term for which he is elected and until his successor is elected and qualified."

8. According to the petition, on March 3, 1997, the first meeting of Heron Master Association was held at which a motion was made and passed that Heron Master

Association's board should consist of the President and Treasurer of Heron Coach Houses and the President of Heron Coach House Villas. However, no official amendment to the bylaws or the articles of incorporation of Heron Master Association was ever made.

9. According to the petition, from 1997, until the year 2003, directors of Heron Master Association were appointed to the board. After this method was challenged in 2003, Heron Master Association held an election of the board of directors where the same candidates were elected to the board that would have been on the board had the appointment method been in place.

10. Article VI, section 3 of the proposed amendments to the articles of incorporation for Heron Master Association provides: "Members of the Board of Directors shall hold office in accordance with the Bylaws."

11. Article V, section 1 of the proposed amendments to the bylaws for Heron Master Association provides:

The business, property and affairs of this corporation shall be managed by a Board of Directors composed of three (3) persons who shall be members of this corporation. The three directors shall consist of the President and Treasurer of the Heron Coach Houses Condominium Association, Inc. Board of Directors and the President of The Heron Coach House Villas Condominium Association, Inc. Board of Directors, as they may be elected from time to time by each Condominium Association. Each director shall hold office for the term for which he or she is elected in his or her Condominium Association and until his or her successor is elected and qualified.

12. In the Petition for Declaratory Statement submitted by Heron Master Association, Charles A. Hornell, President of the Association, argues that if Heron Master Association must comply with a formal election system for its board of directors,

representatives from Heron Coach House Villas will never be elected because the number of unit owners of Heron Coach Houses far exceeds the number of unit owners of Heron Coach House Villas.

13. On January 15, 2004, the Heron Master Association held a meeting on this question. Fifty-one unit owners (80% of the total voting interests) voted in person or by proxy. Forty-nine owners voted for the adoption of the amendment in the bylaws and two owners voted against the amendment.

CONCLUSIONS OF LAW

14. The Division has jurisdiction to enter this order in accordance with section 120.565 and 718.501, Florida Statutes (2003).

15. Heron Master Association is substantially affected by the election procedures and requirements of chapter 718, Florida Statutes, and their applicability to master associations.

16. Section 718.112(2)(d)3, Florida Statutes (2003), provides the formal procedural requirements for electing directors to the board of a condominium association:

The members of the board shall be elected by written ballot or voting machine. Proxies shall in no event be used in electing the board, either in general elections or elections to fill vacancies caused by recall, resignation, or otherwise, unless otherwise provided in this chapter. Not less than 60 days before a scheduled election, the association shall mail or deliver . . . to each unit owner entitled to vote, a first notice of the date of election. Any unit owner or other eligible person desiring to be a candidate for the board must give written notice to the association not less than 40 days before a scheduled election. Together with the written notice and agenda as set forth in subparagraph 2., the association shall mail or deliver a second notice of the election to all unit owners entitled to vote therein, together with a ballot that will list all candidates. . . . The division shall set by rule established voting procedures consistent

with the provisions contained herein, including rules providing for the secrecy of ballots. Elections shall be decided by a plurality of those ballots cast. . . . Notwithstanding the provisions of this subparagraph, an election is not required unless more candidates file notices of intent to run or are nominated than board vacancies exist.

17. Section 718.112(2)(d)8, Florida Statutes (2003), provides in pertinent part:

Notwithstanding subparagraphs (b)2. and (d)3., an association may, by the affirmative vote of a majority of the total voting interests, provide for different voting and election procedures in its bylaws, which vote may be by a proxy specifically delineating the different voting and election procedures. The different voting and election procedures may provide for elections to be conducted by limited or general proxy.

18. Because Heron Master Association is a condominium association under the definition contained in section 718.103(2), Florida Statutes, Heron Master Association must comply with chapter 718, Florida Statutes, including the sections dealing with election of directors. Where the bylaws of Heron Master Association differ from chapter 718, Florida Statutes, the statutory provisions must control. Woodside Village Condo. Ass'n, Inc. v. Jahren, 806 So. 2d 452 (Fla. 2002). Although section 718.112(2)(d)8, Florida Statutes, allows condominium associations to opt out of some of the statutorily mandated election procedures, it does not provide a method for a condominium master association to opt out of holding elections altogether. Therefore, a change in the condominium documents of Heron Master Association to provide for an appointment procedure rather than an election procedure for the board of directors would violate section 718.112(2)(d)3, Florida Statutes. Until such time that the legislature changes the provisions of chapter 718, Florida Statutes, as they relate to master associations, Heron Master Association must hold elections for its board of directors.

19. This holding does not prohibit the association from amending its bylaws to adopt a representational form of governance in which the bylaws require proportional representation for elected directors. For example, in other master associations with a disproportionate number of owners in its constituent subassociations, the master association bylaws may provide for one director from a smaller subassociation but two directors elected from a larger subassociation. The law does not prohibit the subassociation and the master from holding concurrent elections, nor does it prohibit the same candidate from being elected and holding a position on both the subassociation and the master. These are matters that may properly be addressed in the bylaws of the subassociations and the master.¹

ORDER

Based upon the findings of fact and conclusions of law, it is declared that Heron Master Association must hold elections for its board of directors pursuant to section 718.112(2)(d)3, Florida Statutes, and may not opt out of this statutory requirement in favor of an appointment procedure.

DONE and ORDERED this 9th day of April, 2004.




MICHAEL T. COCHRAN,
Acting Director
Department of Business and
Professional Regulation
Division of Florida Land Sales,
Condominiums, and Mobile Homes
1940 North Monroe Street
Tallahassee, Florida 32399-1030

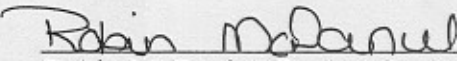
¹ The division has issued previous declaratory statements on master association issues. See Petition for Declaratory Statement of Vogel v. Number One Condominium Association, Inc., Case No. 85A-401 (Aug. 20, 1987) (subassociations are members) and Petition for Declaratory Statement Wynmoor Community Council, Case No. DS94480 (Feb. 7, 1996) (representative membership). Also review a Summary Final Order in an arbitration decision entered in Palm Greens at Villa Del Ray Recreation Association, Inc. v. Schlossberg, Arb. Case No. 2003-07-3298 concerning recall elections in master associations.

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 Charles A. Hornell, 16550 Heron Coach Way, Apt. 205, Fort Myers, Florida, 33908, this 22nd day of April, 2004.


Robin McDaniel, Docket Clerk

Copies furnished to:

Janis Sue Richardson,
Chief Assistant General Counsel