

Final Order No. BPR-2007-01533 Date: **2-23-07**  
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Sarah Wachman, Agency Clerk  
By: Brandon M. Nish

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. 2007003592

BERNARD ROSS, a Unit Owner,  
CLOISTER BEACH TOWERS ASSOCIATION, INC.

**DS 2007-003**

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. The issue is whether Cloister Beach Towers Association, Inc.'s (Cloister Beach) bylaw provision restricting board members to three year terms is consistent with section 718.112(2)(d)3, Florida Statutes. The Division finds that the limitation on a director's right to seek re-election is not consistent with the Condominium Act.

PRELIMINARY STATEMENT

On January 16, 2007, the Division received a petition for declaratory statement from Bernard Ross (Ross), a unit owner in Cloister Beach. Ross's petition states that he represents 21 other unit owners. The Division notified Ross that the time to issue a statement would be delayed until it received a copy of the governing documents. Ross filed the documents on January 31, 2007.

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Notice of receipt of the petition was published in Florida Administrative Weekly on February 9, 2007.

The Division mailed notice of the petition to Cloister Beach on January 26, 2007.

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, Ross, owns unit 14A at Cloister Beach Towers Condominium.
2. Cloister Beach is a condominium "association," as that term is defined by 718.103(2), Florida Statutes.
3. Cloister Beach did not file a response to the petition.
4. The developer submitted the land for Cloister Beach Towers Condominium to the condominium form of ownership in October 1966. The date of recording is not visible on the documents; however, the declaration adopts the Condominium Act, chapter 711, Florida Statutes, which was repealed and re-enacted as chapter 718, Florida Statutes, in 1976. Art. 1, Declaration of Condo. of Cloister Beach Towers (Declaration).
5. Ownership of a unit confers membership rights in the association. Art. 4.3(f), Declaration; art. 4.1, Art. of Incorp.
6. The association operates the condominium under the powers and authority granted it by the not for profit corporate laws, the Condominium Act, the declaration, the articles of incorporation, and the bylaws. Art. 7, Declaration; art. 3, Art. of Incorp. The

association has all the powers granted by the Condominium Act "except as limited by these Articles and the Declaration of Condominium." Art. 3.2, Art. of Incorp.

7. A unit owner elected board of directors manages the association. Art. 5, Art. of Incorp. The unit owners elect directors at the annual meeting in the manner set out in the bylaws. Art. 5.2, Art. of Incorp.

8. In 1995, the association amended and restated the bylaws. Certificate of Amend. to the Declaration of Condo. for Cloister Beach Towers, A Condo. and Amend. and Restated By-Laws for Cloister Beach Towers Ass'n, Inc. (recorded May 4, 1995). The bylaws provide for the annual election of directors by the unit owners. Art. 3, Bylaws of Cloister Beach Towers Association, Inc. (Amend. Bylaws). Each director of a 9 member board is elected to a staggered 3-year term. Art. 3, Amend. Bylaws.

9. Art. 3.1 of the amended bylaws, with emphasis added, provides:

The term of each Director's Service shall extend until their elected term is completed and thereafter until their successor is duly elected and qualified or until the Director is recalled in the manner provided in the Condominium Act or resigns. A seat held by a Director who ceases to be a member of the Association shall thereby automatically become vacant. *A Director who has completed a three year term as a member of the Board of Directors shall not be eligible to serve on the Board of Directors again for a period of one year.*

10. Article 8.5 of the bylaws provides that the bylaws "shall be deemed amended, if necessary, so as to make the same consistent with . . . the Condominium Act as amended from time to time."

11. In November 2006, Ross wrote a letter to the unit owners quoting article 3.1 of the amended bylaws and pointing out the term limit provision. Pet. at 1, ex. A.

12. Citing to a letter from the division, Cloister Beach responded to Ross that the bylaw conflicted with the Condominium Act, which permitted every owner to be a candidate for election. Pet. at 1, exs. B and C.

13. Two candidates for election in 2007 are ending three year terms of service and would be ineligible to run for re-election under article 3 of the bylaws. Pet. ex. D.

#### CONCLUSIONS OF LAW

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

2. Ross has standing to seek this declaratory statement.

3. The bylaws are automatically amended, "if necessary, so as to make the same consistent with the provisions of the Declaration of Condominium, the Articles of Incorporation, or the Condominium Act as amended from time to time." Art. 8.5, Amend. Bylaws.

4. Condominiums are created and governed by statute. See, e.g., Suntime Condo. Ass'n, Inc., v. Division of Fla. Land Sales and Condo., Dep't of Bus. Reg., 463 So. 2d 314 (Fla. 1st DCA 1984). In Florida, the governing statutes are in chapter 718, which is known as the Condominium Act. Section 718.111(2), Florida Statutes, outlines the powers and duties of the association as "those set forth in this section and, except as expressly limited or restricted in this chapter, those set forth in the declaration and bylaws...."

5. Section 718.112(2), Florida Statutes, 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:

(a) *Administration*.--

1. 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.

\* \* \* \*

(d)1. There shall be an annual meeting of the unit owners. . . 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.

\* \* \* \*

3. The members of the board shall be elected by written ballot or voting machine. . . . *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.* . . . There shall be no quorum requirement; however, at least 20 percent of the eligible voters must cast a ballot in order to have a valid election of members of the board. . . .

§ 718.112(2), Fla. Stat. (2006) (emphasis added).<sup>1</sup>

7. The Division previously interpreted the “any unit owner” language from sections 718.112(2)(d)1 and 3, Florida Statutes. See In re Pet. for Declaratory Statement Hollybrook Golf and Tennis Club Condo., Inc., Case No. 96L-0189 (Ellzey 9/18/96)(declaring that section 718.112(2)(d)3, Florida Statutes (1995) means that every unit owner has a right to be a candidate for a position on the board of directors despite

<sup>1</sup> Kaufman v. Shere, 347 So. 2d 626, 628 (Fla. 3d DCA 1977) (amendments to the Condominium Act may be adopted where the governing documents adopt all amendments as the legislature “from time to time” enacts them); § 718.103(2), Fla. Stat. (every condominium existing and created is subject to the act).

residency requirements in the association's bylaws); In re Pet. for Arb. Schultz v. La Costa Beach Club Resort Condo. Ass'n, Inc., Case No. 2003-08-3347 (Scheuerman Nov. 21, 2003)(finding that "[t]he statute presently contains no facial qualifications on the right of an owner to run for the board" so "any unit owner is eligible to continue to sit on the board, once duly elected, regardless of the status of an alleged delinquency in the payment of assessments" despite provisions in the bylaws requiring removal for nonpayment); In re: Pet. for Dec. Stmt. Hollybrook Golf and Tennis Club Condominium, Inc., BPR-96-05128 (Sept. 18, 1996) (finding that bylaw imposing residency requirements as a condition of eligibility for board membership conflicted with section 718.112(2)(d)3, Fla. Stat. (1995), and Fla. Admin.Code. R. 61B-23.002(5), (9), because "every unit owner has the right to be a candidate for a position on the board of directors"); In re: Pet. for Dec. Stmt.: William A. Grubbs, Sandpiper Village Condo. Ass'n, Inc., BPR 2005-02777 (May 26, 2005)(finding that bylaws prohibiting multiple owners of a single unit from simultaneously serving on the board of directors conflicts with section 718.112(2)(d), Florida Statutes).

8. Every unit owner has the right to run for election to the board of directors with the exception of convicted felons whose right to vote has not been restored.

718.112(2)(d), Fla. Stat. The Legislature amended this section in 2000. Ch. 2000-302, § 55, at 3141, Laws of Fla. (2000). The Legislature repealed the following sentence from section 718.112(2)(d)1: "In order to be eligible for board membership, a person must meet the requirements set forth in the declaration." Id.

9. The legislative staff analysis on the repeal of this sentence described the law in 1999:



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[aws] O[f] F[la.].

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

10. The staff analysis determined that the effect of the repeal was to remove "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." Fla. H.R. Comm. on Real Prop. & Prob., CS/CS/HB 593 (2000) Staff Analysis 38 (final July 26, 2000) (on file with legislature at <http://www.flsenate.gov/data/session/2000/House/bills/analysis/pdf/HB0593S2Z.RPP.pdf>))

10. The Condominium Act provides that every unit owner is eligible to run for election. The bylaw provision of Cloister Beach finding that members of the board are not eligible to run for re-election on completion of a staggered three-year term is inconsistent with the Condominium Act. All unit owners in Cloister Beach are eligible to run for election to the board of directors.

For the reasons stated above it is hereby:

ORDERED that Cloister Beach Towers Association, Inc.'s (Cloister Beach) bylaw provision limiting a director's right to seek re-election is not consistent with section 718.112(2)(d)3, Florida Statutes, which provides that all unit owners, except convicted

felons whose right to vote has not been restored, are eligible to run for election to the board.

DONE this 21<sup>st</sup> day of February, 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 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 Robert M. Kesten, Esq., Morris & Kesten, LLP, P.O. Box 276153, Boca Raton, Florida, 33427, this 28<sup>th</sup> day of February, 2007.

Robin McDaniel  
Robin McDaniel, Division Clerk

Copies furnished to:

Janis Sue Richardson,  
Chief Assistant General Counsel

Cloister Beach Towers Association, Inc.  
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