

Department of Business and Professional Regulation
AGENCY CLERK

Sarah Wachman, Agency Clerk

By: Sarah Wachman

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

IN RE: PETITION FOR DECLARATORY STATEMENT

JOSEPH E. WHITE, TIMESHARE OWNER,
JUPITER REEF CLUB, A CONDOMINIUM

CASE NO. 2004009986

DS 2004-007

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 718.501 and 120.565, Florida Statutes.

ISSUES PRESENTED

Whether a real estate broker, who owns a whole condominium unit within the timeshare plan and who offers other owners' timeshare interests for resale, is entitled to hold a minority seat on the board of directors of the owners' association by appointment under a claim of being a successor developer after the creating developer turned over control of the association to the owners under section 718.301, Florida Statutes.

STATEMENT OF FACTS

The following facts are based on information submitted by the petitioner supplemented by facts provided by respondents. The Division takes no position

as to the accuracy of the facts, but merely accepts them as submitted for purposes of this final order. Petitioner did not request a hearing and none was held.

1. Joseph E. White (White) is a unit owner in the Jupiter Reef Club, a Condominium. White filed his petition with the Division on February 2, 2004. Notice of the petition was published in the Florida Administrative Weekly on April 30, 2004. White filed additional information with the Division on April 6, 2004.

2. Stephen Bradley (Bradley) and Ogden Resort Developments, Inc. (Ogden Resort) filed their motion to intervene on May 13, 2004 and their response to the petition on May 17, 2004. Ogden Resort is the creating developer of the Jupiter Reef Club, A Condominium. Bradley is a director of Ogden Resort and holds the positions of president and treasurer.

3. Jupiter Reef Club, A Condominium (Jupiter Reef Club) was created in 1983 by the creating developer Ogden Resort Developments, Inc. Public Offering Statement Jupiter Reef Club, A Condominium (POS) at 6; Declaration of Condo. (Declaration) at 1 (1983). The condominium is operated by the Jupiter Reef Club Condominium Owners Association, Inc. Art. B, Declaration at 2. The association has not sought to intervene in this proceeding.

4. Jupiter Reef Club is a timeshare condominium, consisting of 31 whole condominium units, which have been divided into 52 week timeshare periods for a total of 1,581 timeshare periods. POS at 6-7. Fifty-one weeks were offered for sale in each unit. POS at 6. The fifty-second week is owned by the association as a maintenance week. Art. III, Declaration at 4.

5. Bradley owns a whole condominium unit in Jupiter Reef Club in his own name by transfer from Ogden Resort. Ogden Resort responds that it retains an ownership interest in the resort, but does not specify the nature of such interest. The record does not indicate that Ogden Resort continues to own any timeshare interests or whole condominium units or that it is actively offering its timeshare interests for sale.

6. Bradley is a licensed real estate broker who maintains a sales office at Jupiter Reef Club for the purpose of listing and offering other owners' timeshare interests for resale. White asserts that Bradley has not offered his unit or any weeks within his unit for sale since he acquired ownership of the unit. White asserts that Ogden Resort is not offering units or timeshare interests for sale. Neither Bradley nor Ogden Resort dispute this contention nor do they assert that they are actively selling developer owned units.

7. Ogden Resort transferred control of the owners' association to the owners other than the developer. While the record does not indicate the precise date of turnover, the division infers that turnover occurred many years ago.

8. Bradley has maintained a seat on the board of directors for the past 23 years. Bradley's seat is not elected, but considered by the intervenors to be a matter of right by virtue of Bradley's ownership of a whole unit and as an assumed successor developer or assignee of Ogden Resort. Letter of Edward Dicker, Esq. to Board of Directors 2 (Apr. 12, 2001). Bradley and Ogden Resort assert that the declaration permits Bradley to retain this seat by election, under article XIX of the declaration, or because there has been an "understanding

between Ogden Resort and the Board ...that as long as Ogden Resort maintained an interest in the Jupiter Reef Club it would be entitled to select one member of the Board." Response at 3.

9. Both Bradley and Ogden Resort have a substantial interest in this proceeding as both assert a property interest in the resort and an interest in being represented on the board. Bradley presently holds a seat on the board as representative of Ogden Resort.

10. Article XIX of the Declaration of Condominiums provides for the gradual transfer of control from Ogden Resort to the non-developer owners. Under the Declaration of Condominium, Ogden Resort was required to turn over control of the board three years after 50% of the units had been sold and closed or three months after 90% of the units had been sold and closed. Art. XIX, Declaration. Article XIX(3) of the Declaration of Condominium provides that after transfer of control of the association from the developer to the owners, the developer "shall be entitled to elect at least one member of the Board of Directors of the Association as long as Developer holds at least one (1) of the units in the condominium for sale in the ordinary course of business."

11. Article III of the Declaration of Condominium provides that "[a] unit will no longer be committed to Interval Ownership any time all unit weeks are owned by the same legal entity." Art. III, Declaration at 4. For purposes of this statement, it is assumed that Bradley acquired his interest of a whole unit from Ogden Resort without its having been divided into 52 timeshare weeks with one week being assigned to the association as a maintenance week. Bradley's

whole ownership of a condominium unit removes the unit from being divided into 52 timeshare interests. However, this same provision permits Ogden Resort to assign its right to reinstate the whole unit to 52 timeshare weeks.

12. Art. V of the Articles of Incorporation of Jupiter Reef Club Condominium Owners Association, Inc. provides for the election of directors as provided in the bylaws. Art. V, Art. of Incorp. at 3.

13. Section 3.1 of the By-Laws of Jupiter Reef Club Condominium Owners Association, Inc. provide that the developer "shall be entitled to elect at least one Director as long as it holds at least 5% of the units that will ultimately be operated by the Association for sale in the ordinary course of business."

14. Each unit week owner is entitled to one vote. Art. X, Declaration at 6; art. IV, Art. of Incorp. at 3.

CONCLUSIONS OF LAW

15. The Division has jurisdiction to enter this order pursuant to sections 718.501 and 120.565, Florida Statutes. The Division has jurisdiction over the condominium timeshare plan pursuant to chapters 718 and 721, Florida Statutes.

16. Jupiter Reef Club, which is a condominium timeshare plan, is subject to both the Florida Vacation Plan and Timesharing Act (Timeshare Act) as well as the Condominium Act. § 721.03(2), Fla. Stat. (2003).

17. White has standing to seek a declaratory statement because he owns a timeshare interest at Jupiter Reef Club, which is governed by chapters 718 and 721, Florida Statutes, and because he is a member of the association. § 721.03(2), Fla. Stat. Bradley and Ogden Resort argued that White has failed to

demonstrate that his substantial interest is affected because he has failed to describe how he is personally affected or how the association is affected.

18. As an owner and member in the association, White is entitled to vote to elect directors to the board. § 718.112(2)(d)1-2, Fla. Stat. Under the Condominium Act, White is directly affected by the manner in which directors are elected to the board. See In re: Pet. for Dec. Stmt., James Sylak, DBPR Docket No. DS94295 (Dec. 30, 1994) (unit owner was substantially affected by the developer's appointment of directors). The right to vote in condominium and timeshare associations is a vested right appurtenant to ownership of the property interest. § 718.106(2)(d), Fla. Stat.; see also § 721.13(7), Fla. Stat. (adjourning and reconvening board meetings to hold the annual election where less than a quorum is present). Withholding a director's seat from the election, affects White's right as an owner to elect members to the board that represent his interests.

19. Ogden Resort and Bradley will be substantially affected by this proceeding, as the developer's right to a minority seat on the board is in question; therefore, their request to intervene is granted. § 120.565, Fla. Stat.; Chiles v. Dep't of State, Div. of Elections, 711 So. 2d 151, 153-54 (Fla. 1st DCA 1998).

20. Section 718.301, Florida Statutes (2003), provides for the gradual transition of control of the association from the developer to the owners. The transfer of control of the association has taken place.

21. Bradley and Ogden Resort argue that section 718.301, Florida Statutes (2003), should not be applied retroactively to the Declaration of Condominium and bylaws, which were recorded in 1983. As a general rule, the law on the date that a declaration is recorded governs the substantive rights of the unit owners, the developer and the association. Suntide Condo. Ass'n, Inc. v. Div. of Fla. Land Sales and Condos., 463 So. 2d 314, 317 (Fla. 1st DCA 1984). However, strictly applying the rule of statutory construction in the condominium context would require courts to ignore all subsequent amendments and would "result in a morass of legal entanglement where no holding in any one condominium case could be precedent for any other except those created in the same year." Rothfleisch v. Cantor, 534 So. 2d 823, 825 (Fla. 4th DCA 1988). In this case, the pertinent provisions were in effect in 1983, so the issue of retroactive application of law does not arise.

22. Section 718.301(1), Florida Statutes (1983), provides in part:

The developer is entitled to elect at least one member of the board of administration of an association as long as the developer holds for sale in the ordinary course of business at least 5 percent, in condominiums with fewer than 500 units, and 2 percent, in condominiums with more than 500 units, of the units in a condominium operated by the association.

23. Section 718.301(1), Florida Statutes was amended in 1988 to add:

Following the time the developer relinquishes control of the association, the developer may exercise the right to vote any developer-owned units in the same manner as any other unit owner except for purposes of reacquiring control of the association or selecting the majority members of the board of administration.

§ 718.301(1), Fla. Stat. (1988).

24. The amendment clarifies that a developer may not vote its units to retain control of a condominium association or reacquire control of the association. See Hamptons Dev. Corp. v. Division of Land Sales and Condo., 519 So. 2d 661 (Fla. 3d DCA 1988). If Ogden Resort had sold its units and timeshare interests to purchasers, then reacquired the units and timeshares from the purchasers, it still could not vote its units or timeshare interests for the purpose of reacquiring control of the board. Id. Ogden Resort has turned over control of the association, so the 1988 amendment language is not in issue.

25. In 1983 and today, a creating developer must be actively offering units for sale in the ordinary course of business in order to be entitled to a seat on the board. § 718.301(1), Fla. Stat. Offering timeshare interests in the ordinary course of business is defined as the "solicitation, advertisement, or inducement, or any other method or attempt, to encourage any person to acquire the opportunity to participate in a timeshare plan." § 721.05(22), Fla. Stat. (2003). Offering condominium units for sale in the ordinary course of business is defined as offering seven parcels in condominiums with 70 parcels or five parcels in condominiums with fewer than 70 parcels within a year, or participating in a common promotional plan that offers seven parcels for sale or lease within a year. Fla. Admin. Code R. 61B-15.007(2). Section 3.1 of the By-Laws echoes this requirement by granting the developer a seat on the board as long as it holds at least 5% of the units operated by the association for sale in the ordinary course of business.

26. Bradley has retained a seat on the board for over 20 years. The information provided assumes that Bradley acquired his whole unit interest from Ogden Resort, but no facts are presented to indicate whether the transfer included an assignment of developer rights. The facts as stated are that Bradley has never offered timeshare interests in his unit but holds his unit for his personal use. Bradley acts as a real estate broker to offer other owners' interests for resale. The question is whether this activity entitles Bradley to a minority seat on the board as an officer of the creating developer or in his own right as a unit owner without the seat being included as a seat open for election.

27. The answer is no. Assuming that Bradley received an assignment of developer rights with his unit ownership, Bradley would be entitled to exercise any rights reserved to the developer under the governing documents that had not expired. A successor developer is one who succeeds to the interests of the developer by sale, lease, assignment, mortgage or other transfer and offers those interests for sale in the ordinary course of business. § 721.05(9)(b), Fla. Stat. An owner who acquires only one unit or more than 7 timeshare interests in one transfer for his own personal use is not a developer. Id. § 721.05(9)(d); see also Bishop Associates Limited Partnership v. Belkin and Division of Florida Land Sales, Condominiums, and Mobile Homes, 521 So. 2d 158, 160-1 (Fla. 1st DCA 1988) ("The term developer is appropriately only applied to owners like appellants, who own more than one unit, and would not apply to individuals who own one unit in which they live."). Bradley holds 1 out of 31 condominium units or 3 percent of the units in Jupiter Reef Club. Bradley holds 52 timeshare weeks

of 1,581 timeshare weeks in Jupiter Reef Club or 3 percent of the timeshare interests in the plan. Bradley does not hold 5 percent of the units in the condominium of less than 500 units.

28. Bradley is not a developer because he did not create the condominium and because he is not offering units for sale or lease in the ordinary course of business. A developer owns the interests it is offering for sale. A real estate broker does not own the interests he is offering, but is under a brokerage contract to the seller to offer the seller's interest for resale to the public. In order to meet the definition of a developer who is offering interests for sale, Bradley would have to be a developer who is offering developer-owned timeshare interests for sale. He is not. Providing professional brokerage services offering other owners' units for sale does not constitute offering units for sale in the ordinary course of business as a developer. See Fla. Admin. Code R. 61B-15.007(2)(b).

29. Ogden Resort likewise is not offering any units or timeshare interests for sale in the ordinary course of its business. Bradley, as an officer or employee of Ogden Resort, is not offering any of Ogden Resort's units or timeshare interests for sale in the ordinary course of business. Therefore, it is not entitled to a seat on the board by appointment. § 718.301(1), Fla. Stat.

30. The bylaws are consistent with this conclusion. § 3.1, By-Laws (offering 5% of the developer's interests for sale in the ordinary course of business). The declaration of condominium is consistent with this conclusion.

Art. XIX, Declaration (developer holds one seat as long as it offers one unit for sale in the ordinary course of business).

31. The ordinary course of the developer's business is the sale of condominium units and timeshare interests created and owned by the developer. A developer's ordinary course of business is not provision of professional real estate brokerage services or the offering of real estate owned by others. The governing documents are consistent with this in retaining a minority seat on the board for the developer during the time the developer still owns and offers its interests for sale. Once the developer has sold all of its interests there can be no reason for the developer to continue to retain a seat on the board because the developer has no property interest in the resort. To reach the conclusion that a real estate broker is a developer by offering other owners' units for sale in his brokerage business would permit any broker who does not own any interest in the resort to hold a seat on the board. This is not the intent of the law. The law intends owners to have control of the association so that the owners can determine what is in their best financial interests. "A general review of Chapter 718 reveals that it was created to facilitate the transfer of control of the association from the developers to the non-developer unit owners." Belkin, 521 So. 2d at 162.

32. Bradley and Ogden Resort argue that the petition should be dismissed under section 120.565, Florida Statutes, because it does not request an application of a rule, law, or division order, rather the issue is a matter of interpreting the association's bylaws. White quotes from section 718.301, Florida

Statutes, and includes a copy of the statute. While White's petition does not expressly state within the petition, rather than the attachments, a citation to section 718.301(1), Florida Statutes, he has provided sufficient reference and a copy of the statute to identify it. Bradley and Ogden Resort's argument would dismiss the petition for failing to cite to the statute directly rather than indirectly as was done. The division will not dismiss this petition on these grounds because White's petition was clear enough to specify the statutory provision. § 120.565(1), Fla. Stat.

ORDER

WHEREFORE, it is declared that a real estate broker, who owns a whole condominium unit within the timeshare plan and who offers other owners' timeshare interests for resale, is not entitled in his own right nor as an officer of the developer who is no longer offering units or timeshare interests for sale in the ordinary course of business to hold a minority seat on the board of directors of the owners' association by appointment under section 718.301(1), Florida Statutes (2003).

DECLARED this 19th day of August, 2004, at

Tallahassee, Leon County, Florida.




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

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(d), FLORIDA RULES OF APPELLATE PROCEDURE, BOTH WITH THE APPROPRIATE DISTRICT COURT OF APPEAL ACIED BY THE APPOPRIATE FILING FEES, AND WITH THE AGENCY CLERK FOR THE DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, DIVISION OF FLORIDA LAND SALES, CONDOMINIUMS, AND MOBILE HOMES, 1940 NORTH MONROE STREET, TALLAHASSEE, FLORIDA 32399, WITHIN 30 DAYS OF THE RENDITION OF THIS ORDER DENYING PETITION FOR DECLARATORY STATEMENT.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing
Declaratory Statement has been furnished by U.S. mail to Joseph E. White, 130
Seabreeze Circle, Jupiter, Florida 33477, and Michael P. Donaldson, Esq.,
Attorney for Intervenors, Carlton Feilds, P.O. Drawer 190, Tallahassee, FL
32302, on this 30th day of August, 2004.

Robin McDaniel
Robin McDaniel, Docket Clerk

Copies furnished to:

Janis Sue Richardson,
Chief Assistant General Counsel