

Final Order No. BPR-2008-10393 Date: **12-4-08**

FILED

Department of Business and Professional Regulation
AGENCY CLERK

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By Brandon M. Nichols

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

IN RE: PETITION FOR DECLARATORY STATEMENT

Docket No. 2008050050

THE DECOPLAGE CONDOMINIUM ASSOCIATION, INC.

DS 2008-065

DECLARATORY STATEMENT

The Department of Business and Professional Regulation, Division of Florida Condominiums, Timeshares, and Mobile Homes (Division) hereby issues this Declaratory Statement pursuant to section 120.565, Florida Statutes (2008).

PRELIMINARY STATEMENT

On September 3, 2008, the Division received a Petition for Declaratory Statement from The Decoplage Condominium Association, Inc. (Decoplage) requesting an opinion as to whether it must conduct a vote to elect directors in 2008 where no election is required under its current bylaws, which provide for two year terms that end in 2009, under the amendment to section 718.112(2)(d)1, Florida Statutes, adopted by chapter 2008-28, § 7, Laws of Florida, and Florida Administrative Code Rule 61B-23.0021(2).

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Notice of receipt of the petition was published in Florida Administrative Weekly on September 26, 2008. Decoplage supplemented its petition with additional information on November 5, 2008. No hearing was requested.

FINDINGS OF FACT

The following findings of fact are based on information submitted by Decoplage. 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. Decoplage is a not-for-profit Florida corporation responsible for the operation of the Decoplage Condominium located in Miami Beach, Florida. Arts. I, XVIII Declaration of Condo. Establishing The Decoplage, A Condo. (recorded Dec. 7, 1992) [Declaration].

2. The declaration of condominium includes the articles of incorporation and the bylaws. Exs. C & D, Declaration. Under the declaration, the association and the unit owners are "governed by and shall comply with the Condominium Act and this Declaration and By-Laws as they may exist from time to time." Art. XXXI, sec. 31.03, Declaration.

3. The association's annual meeting is held in November on a date set by the board. Art. III, sec. 2, Bylaws, Amend. to Declaration, By-Laws, and Art. of Incorp. (Oct. 1, 1996).

4. Directors are elected at an annual meeting by a plurality vote. Art. V, sec. 2, Bylaws, Amend. to Declaration, Art. of Incorp., and By-Laws (Apr. 14, 1999). The bylaws as amended provide: "[e]ffective on the next election to be conducted in November 1999, the Directors to be chosen for the ensuing term shall be chosen at the

Annual Meeting of this Association by plurality vote; and they shall serve for a term of two (2) years.”

5. Five directors were elected in November 2007; the terms of those directors, as provided by the association's bylaws, will expire in November 2009. Pet. for Dec. Stmt. at 1.

6. The association asks whether it needs to conduct an election at its annual meeting in November 2008.

CONCLUSIONS OF LAW

7. 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.

(2) The petition seeking a declaratory statement shall state with particularity the petitioner's set of circumstances and shall specify the statutory provision, rule, or order that the petitioner believes may apply to the set or circumstances.

8. Rule 28-105.001, Florida Administrative Code (2007), provides:

A declaratory statement is a means for resolving a controversy or answering questions or doubts concerning the applicability of statutory provisions, rules, or orders over which the agency has authority. A petition for declaratory statement may be used to resolve questions or doubts as to how the statutes, rules, or orders may apply to the petitioner's particular circumstances. A declaratory statement is not the appropriate means for determining the conduct of another person.

9. Section 718.112(2)(d)1, Florida Statutes, as amended in 2008 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:

(d) *Unit owner meetings.*—

1. There shall be an annual meeting of the unit owners The terms of all members of the board shall expire at the annual meeting and such board members may stand for reelection unless otherwise permitted by the bylaws. In the event that the bylaws permit staggered terms of no more than 2 years and upon approval of a majority of the total voting interests, the association board members may serve 2-year staggered terms.

Ch. 2008-28, § 7, Laws of Fla. (2008) (Fla. HB 995).

8. The legislature intended “that the board members’ terms must expire at the annual meeting, whether or not it is mentioned in the bylaws.” Fla. H.R. Comm. on Saf. and Sec. Council, HB 995 (2008) Staff Analysis 8 (rev. April 14, 2008) (available at <http://www.flsenate.gov/data/session/2008/House/bills/analysis/pdf/h0995c.SSC.pdf>).

The legislature created one exception to the one-year term for an association that adopted or reaffirmed an existing bylaw allowing for 2-year staggered terms.¹ Reaffirmation is needed to ensure that a prior bylaw inserted by a developer without a unit owner vote or a bylaw approved by less than a majority of the total voting interests is affirmed in compliance with section 718.112(2)(d)1, Florida Statutes. See In re: Pet. for Decl. Stmt. de la Bahia Condo. Ass’n, Inc., BPR-2008-08158, Docket No. 2008046156, Agency Clerk DS 2008-061 (Sept. 25, 2008) (de la Bahia condominium association must conduct a vote to readopt or reaffirm its present bylaw staggering the terms of directors under the amendment to section 718.112(2)(d)1, Fla. Stat.).

¹ See also Fla. H.R. Comm. Saf. and Sec. Council, tape recording of proceedings (April 18, 2008) (on file with The Florida House of Representatives, Office of the Clerk) (Representative Robaina stating: “Speaker what this allows is for the staggered terms in the event they are provided for in the condominium’s bylaws and there is a majority vote of the unit owners.”).

10. A “[s]taggered board of directors” is “[a] board of directors whose members’ terms of service overlap so that only part of the board’s makeup is voted on in any single election. Typically, members serve terms of two or more years, with some members’ terms expiring at each annual election.” BLACK’S LAW DICTIONARY 142 (8th ed. 2005).²

11. Decoplage’s bylaws are no longer consistent with section 718.112(2)(d)1, Florida Statutes (2008) because the board members’ terms are not one-year terms that expire at the annual meeting and because the board members serve concurrent terms not staggered terms.

12. Condominiums are created and governed by the Condominium Act, chapter 718, Florida Statutes. See, e.g., Suntide Condo. Ass’n, Inc. v. Div. Fla. Land Sales and Condo., Dep’t of Bus. Reg., 463 So. 2d 314 (Fla. 1st DCA 1984). Decoplage is also governed by chapter 617, Florida Statutes. Art. of Incorpor. at 1. Both chapters apply to Decoplage, but where the corporate powers and duties are expressly limited or restricted under the Condominium Act, the condominium provision controls. § 718.111(1)-(2), Fla. Stat.

13. The declaration is referred to as the constitution of the condominium and the bylaws as the statutes. Woodside, 806 So. 2d at 456; 18A Am. Jur. 2d Corporations § 310 (1985) (“bylaws are the private ‘statutes’ by which the corporation is regulated and functions”). In corporate law, the bylaws are a contract between the corporation and its members while the articles of incorporation are a contract between the corporation and

² “When the language of a statute is clear and unambiguous, the statute must be given its plain and ordinary meaning.” BB Landmark, Inc. v. Haber, 619 So. 2d 448, 449 (Fla. 3d DCA 1993). When the meaning is clear, resort to a dictionary suffices. Id. (applying the dictionary definition of materially and adverse to determine whether a developer change triggered rescission rights under § 718.503, Fla. Stat.).

the state, the corporation and the owners, and between the owners. 18A Am. Jur. 2d contracts § 313 (1985). Bylaws may not be inconsistent with the declaration or state law. §§ 617.0206, 718.112(3)(d), Fla. Stat.; art. XXXI, sec. 31.03, Declaration.

14. Historically, corporate charters were considered contracts subject to the constitutional prohibition on legislative amendments that impair vested rights. Pearsall v. Great N. Ry. Co., 161 U.S. 646, 660 (1896). The general rule was applied to corporate property rights, contracts, and substantive changes affecting the organizational purpose of the corporation. Id. at 661-64.

15. Where the legislation operates only to regulate the manner in which the business is exercised, it does not affect constitutional rights. Pearsall, 161 U.S. at 656. These types of enactment are generally upheld under the legislature's police power. Id. 656, 714 (giving examples of regulations for the safety of railroad passengers, public nuisance restrictions, and public welfare restrictions of monopolies).

16. Today, corporations are created under corporate law, which provides that the legislature retains the power to amend, repeal, or modify the governing law. Hopkins v. Vizcayans, 582 So. 2d 689, 692 (Fla. 3d DCA 1991); § 617.0102, Fla. Stat. This reservation of legislative power is part of every corporate "contract." Id. The terms of directors and officers may be changed under this express reservation, which falls under the legislature's police power, and because it pertains to the manner in which the association operates not a property right. See id.; accord Att'y Gen. ex rel. Dusenbury v. Looker, 69 N.W. 929, 930 (Mich. 1897) (holding legislative amendment changing the terms of the directors and providing for minority shareholder representation was constitutional), aff'd sub nom. Looker v. Maynard, 179 U.S. 46 (1900); compare Winston

Towers 200 Ass'n, Inc. v. Saverio, 360 So. 2d 470 (Fla. 3d DCA 1978) (holding that retroactive application of association bylaw amendment restricting pets was unconstitutional) with Woodside v. Jahren, 806 So. 2d 452 (Fla. 2002) (finding that properly adopted leasing restriction applied even to owners who purchased their units prior to the amendment).

17. As originally enacted, the condominium law drafters envisioned that “bylaws should be limited to voting rights and matters of procedure.” Russell McCaughan, The Florida Condominium Act Applied, 17 U. FLA. L. REV. 1, 49 (1964). Generally, condominium association bylaws provide the procedures for the association’s conduct of business and operation of the condominium, such as the manner in which a board notices and calls meetings and the process by which owners exercise their substantive right to vote. § 718.112(2), Fla. Stat. Setting the terms of directors is related to the manner in which unit owner voting rights are exercised. Accord Looker, 69 N.W. at 930.

18. Since Decoplage’s creation, the legislature intended that the bylaws be consistent with the Condominium Act as all provisions of section 718.112(2) are “deemed” to be included in the bylaws. § 718.112(2), Fla. Stat. (Supp. 1992; 2008). As a Florida corporation, Decoplage cannot have any expectation that the laws controlling its corporate existence and manner of governance will not change. § 617.0102, Fla. Stat.; see Hopkins, 582 So. 2d 692; accord Looker, 69 N.W. at 930. Therefore, the amendment applies to Decoplage.

19. Generally, laws are prospective in application from the effective date. 48A Fla. Jur. 2d Statutes § 99 (2000); During v. Reynolds, Smith & Hills, 471 So. 2d 603, 607 (Fla. 1st DCA 1985). “[T]he citizens of this State cannot be charged reasonably with

notice of the consequences of impending legislation before the effective date of that legislation, for it is generally accepted that a statute speaks from the time it goes into effect." During, 471 So. 2d at 607 (quoting Dewberry v. Auto-Owners Ins. Co., 363 So. 2d 1077, 1080 (Fla. 1978)). Even where the effective date is several months after the enactment, the law is prospective in application. See City of St. Augustine v. Authentic Old Jail, Inc., 388 So. 2d 1044 (Fla. 5th DCA 1980) (holding that seven month delay between enactment and effective date of city ordinance did not preclude enforcement to actions occurring after the effective date).

20. Subsection 718.112(2)(d)1, Florida Statutes, took effect on October 1, 2008. Ch. 2008-28, § 25, Laws of Fla. The amendment applies to Decoplage. However, by the time this order is entered, the association will have noticed and perhaps held its annual meeting. Further, the time for noticing and holding an election in November would have required the first notice to be issued in September before the effective date of the amendment. For enforcement purposes, the Division has determined that the amendments will be enforced prospectively. When Decoplage's board members' terms expire in 2009, the association has a choice either to have all board members serve one-year terms; or, to adopt a bylaw by a majority vote of the total voting interests providing that board members may serve two-year staggered terms. Decoplage will need to comply with the amendments for its next annual meeting.

For the reasons stated above it is hereby:

ORDERED that The Decoplage Condominium Association, Inc. is not required to conduct a vote to elect directors in 2008 under the amendment to section

718.112(2)(d)1, Florida Statutes, adopted by chapter 2008-28, § 7, Laws of Florida, and Florida Administrative Code Rule 61B-23.0021(2).

DONE and ORDERED this 25th day of November, 2008,
at Tallahassee, Leon County, Florida.



Division of Florida Condominiums,
Timeshares, and Mobile Homes

MICHAEL T. COCHRAN, Director
Department of Business and
Professional Regulation
Division of Florida Condominiums,
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Northwood Centre
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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 David H. Rogel, 121 Alhambra Plaza, 10th Floor, Coral Gables, FL 33134 on this 8th day of December, 2008.

Robin McDaniel
Robin McDaniel, Division Clerk

Copies furnished to:

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