STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MICHAEL GERTINISAN, individually as a resident/ site owner in the Bay Hills Village Condominium,	)	
Petitioner,	)	
vs.	)	CASE NO. 93-6214RX
DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, DIVISION OF FLORIDA LAND SALES CONDOMINIUMS AND MOBILE HOMES,	)	
Respondent.	)	

FINAL ORDER

Upon due notice, the Division of Administrative Hearings by its duly designated Hearing Officer, William R. Cave, held a formal hearing in the above-captioned matter on November 23, 1993 in Tallahassee, Florida.

APPEARANCES

For Petitioner: Michael Gertinisan, pro se
10506 Bay Hills Circle
Thonotosassa, Florida 33592

For Respondent: Karl M. Scheuerman, Esquire
Department of Business and Professional Regulation
Division of Florida Land Sales, Condominiums, and Mobile Homes
Northwood Centre
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Tallahassee, Florida 32399-1007

STATEMENT OF THE ISSUES

Whether Rule 61B-23.003(9), Florida Administrative Code, is an invalid exercise of delegated legislative authority.

PRELIMINARY STATEMENT

On October 29, 1993, Petitioner, Michael Gertinisan, as President of Bay Hills Village Ad-Hoc Committee, filed a petition challenging the validity of Rule 61B-23.003(9), Florida Administrative Code, alleging that the rule was an invalid exercise of delegated legislative authority in that the challenged rule gave prospective application to Section 718.301(1)(e), Florida Statutes (1991),

rather than retroactive application. By an Order of Assignment dated November 3, 1993, the petition was accepted in that the petition appeared to comply with the requirements of Section 120.56, Florida Statutes. The matter was scheduled for hearing on November 23, 1993. Prior to hearing, the Respondent filed a Motion To Redesignate Proper Petitioner And To Amend Case Style. By this motion, the Respondent argues that the Bay Hills Village Ad-Hoc Committee has no standing to challenge the rule but concedes that Petitioner as an individual resident/site owner in the Bay Hills Village condominium has standing to challenge the rule. Argument on the motion was presented at the hearing. The motion was granted and Michael Gertinisan, as an individual resident/site owner in Bay Hills Village Condominium, was designated as the Petitioner. An order granting that motion and amending the case style was entered on December 7, 1993.

At the hearing, the Petitioner testified in his own behalf. Petitioner's Exhibit 1 was received as evidence in this case. Respondent presented the testimony of Richard Gentry and Michael Gertinisan. Respondent did not offer any documentary evidence.

Rule 61B-23.003, Florida Administrative Code, and Chapter 91-103, Laws of Florida, were officially recognized at the hearing. Subsequent to the hearing, the Respondent filed a Request to Take Judicial Notice of Chapter 91-426, Laws of Florida, which shall be treated as a request for official recognition. The request is granted and Chapter 91-426, Laws of Florida, is officially recognized.

There was no transcript of this proceeding filed with the Division of Administrative Hearings. The Petitioner, by a motion that was unopposed by Respondent, requested an extension of time for filing a proposed final order. The motion was granted and the time for filing proposed final orders was extended from December 3, 1993 until December 13, 1993. The Respondent timely filed its proposed final order under the extended time frame. The Petitioner elected not to file a proposed final order. A ruling on each proposed finding of fact submitted by the Respondent has been made as reflected in an Appendix to the Final Order.

FINDINGS OF FACT

Upon consideration of the oral and documentary evidence adduced at the hearing, the following relevant findings of fact are made:

1. Petitioner, Michael Gertinisan, is a unit owner and member of the Bay Hills Village Condominium Association, Inc. (Association). The Association is responsible for the operation of the Bay Hills Village Condominium.

2. Petitioner purchased his unit in December, 1992. Prior to December, 1992, the Petitioner had leased the unit for a number of years.

3. The Bay Hills Village Condominium is a mobile home park condominium where each unit is comprised of a parcel of vacant land upon which is placed a mobile home.

4. Transfer of control of the Association from the developer to the unit owners, other than the developer, pursuant to Section 718.301, Florida Statutes, has not occurred. However, unit owners, other than the developer, are entitled to elect a representative to the board of administration of the Association in an upcoming election.

5. The declaration of condominium for Bay Hills Village Condominium was recorded in the public records in 1985. A number of units were sold to purchasers in 1985.

6. At the time Bay Hill Village Condominium was created and the declaration of condominium recorded in the public records in 1985, the controlling statute, Chapter 718, Florida Statutes, contained no maximum period of time during which the developer was entitled to control the operation of the Association through its ability to elect a majority of the board of administration.

7. The developer of a condominium is statutorily entitled to control the affairs of the condominium association for a period set forth in the statutes. This right to control the affairs of the condominium association for the period set forth in the statutes is a substantive vested right. With the right to control the condominium association, comes the attendant rights, including but not limited to, the right to: (a) adopt a budget meeting the marketing needs of the developer; (b) enter in to contracts with related entities providing for maintenance and management of the condominiums; (c) control ingress and egress on and over the condominium property to move construction equipment; (d) adopt board policies relating to the renting of units in the condominium; (e) adopt board policies regarding placement of "For Sale" signs on the condominium property and to model its units; (f) maintain the property in accordance with the developer's need to conduct an ongoing sales program; and (g) change the size and configuration of units in the condominium to meet the needs of the developer's marketing campaign.

8. In those situations where the developer still exercises control over the condominium association, the aforestated rights of the developer would be substantively impaired by a retroactive application of Section 718.301(1)(e), Florida Statutes, as created by Chapter 91-103, Section 12, Laws of Florida, to condominiums in existence prior to the affective date of the Chapter 91-103, Section 12, Laws of Florida.

CONCLUSIONS OF LAW

9. The Division of Administrative Hearings has jurisdiction over the parties to, and the subject matter of, this proceeding pursuant to Section 120.56 and 120.57, Florida Statutes.

10. The validity of rules normally will be sustained as long as they are reasonably related to the purpose of the enabling legislation and are not arbitrary or capricious. Florida Beverage Corporation v. Wynne, 306 So.2d 200 (1 DCA Fla. 1975) Agrico Chemical Co. v. Department of Environmental Regulation, 365 So.2d 759. As stated by the court in Department of Professional Regulation, Board of Medical Examiners v. Durrani, 455 So.2d 515 (1 DCA Fla. 1984):

> The well recognized general rule is that the agencies are to be accorded wide discretion in the exercise of their lawful rulemaking authority, clearly conferred or fairly implied and consistent with the agencies' general statutory duties. Florida Commission on Human Relations v. Human Development Center, 413 So.2d 1251 (Fla. 1st DCA 1982). An agency's construction of the statute it

> administers is entitled to great weight and is not to be overturned unless clearly erroneous. Baker v. Board of Medical Examiners, 428 So.2d 720 (Fla. 1st DCA 1983). Where, as here, the agency's interpretation of a statute has been promulgated in rulemaking proceedings, the validity of such rule must be upheld if it is reasonably related to the purpose of the legislation interpreted and it is not arbitrary and capricious. The burden is upon the petitioner in a rule challenge to show by a preponderance of the evidence that the rule or requirements are arbitrary and capricious. Agrico Chemical Co. v. State, Department of Environmental Regulation, 365 So.2d 759 (Fla. 1st DCA l978); Florida Beverage Corp. v. Wynne, 306 So.2d 200 (Fla. 1 DCA 1975). Moreover, the agency's interpretation of a statute need not be the sole possible interpretation or even the most desirable one; it need only be within the range of possible interpretations. Department of Health and Rehabilitative Services v. Wright, 439 So.2d 937 (Fla. 1st DCA 1983) (Ervin, C. J., dissenting); Department of Health and Rehabilitative Services v. Framat Realty, Inc., 407 So.2d 238 (Fla. 1st DCA 1981). . .

11. To prevail in this case, the burden is upon the Petitioner to demonstrate that the challenged rule is an invalid exercise of delegated legislative authority. Humana, Inc. v. Department of Health and Rehabilitative Services, 469 So.2d 889 (1 DCA Fla. 1985); Agrico Chemical Co. v. Department of Environmental Regulation, 365 So.2d 759 (1 DCA Fla. 1978); An invalid exercise of delegated legislative authority is defined by Section 120.52(8), Florida Statute, which in pertinent part provides:

> (8) "Invalid exercise of delegated legislative authority" means action which goes beyond the powers, function, and duties delegated by the Legislature. A proposed or existing rule is an invalid exercise of delegated legislative authority if any one or more of the following apply:
>
> . . . .
>
> (c) The rule enlarges, modifies, or contravenes the specific provisions of law implemented, citation to which is required by s. 120.54(7);
>
> . . . .
>
> (e) The rule is arbitrary or capricious.

12. Under Section 718.301, Florida Statutes, as it existed prior to the enactment of Chapter 91-103, Section 12, Laws of Florida, which forms the basis for the challenged rule in this case, a developer was basically entitled to elect a majority of the members of the board of the association until a certain number of units in the condominium were sold to purchasers. Prior to the 1991

amendment of Section 718.301, Florida Statutes, there was no maximum period of time during which a developer could control the condominium association.

13. Chapter 91-103, Section 12, Laws of Florida, created Section 718.301(1)(e), Florida Statutes, which substantively changed the statutory provision regarding the turnover of control of the condominium association and in pertinent part provides:

> 718.301 Transfer of association control.
> (1) . . . Unit owners other than the developer are entitled to elect not less than a majority of the members of the board of administration of an association:
> . . . .
> (e) Seven years after the recordation of the declaration of condominium, or in the case of an association which may ultimately operate more than one condominium, 7 years after recordation of the declaration for the first condominium it operates, or in the case of an association operating a phase condominium created pursuant to s. 718.403, 7 years after recordation of the declaration creating the initial phase,

Pursuant to Chapter 91-103, Section 28, Laws of Florida, this amendment was to become effective on January 1, 1992. However, in special session, the Legislature enacted Chapter 91-426, Section 5, Laws of Florida, which amended Chapter 91-103, Section 28, Laws of Florida, providing for an effective date of April 1, 1992, for Chapter 91-103, Section 12, Laws of Florida.

14. Acting on the authority granted the Respondent by the Legislature in Section 718.501(1)(f), Florida Statutes, "to promulgate rules . . . necessary to implement . . . and interpret this chapter", the Respondent promulgated Rule 61B-23.003(9), Florida Administrative Code, the challenged rule, which implements Section 718.301(1)(e), Florida Statutes (1991), as created by Chapter 91-103, Section 12, Laws of Florida, and provides as follows:

> (9) In condominiums created on or after January 1, 1992, unit owners other than the developer are entitled to elect not less than a majority of the members of the board of administration not later than 7 years after the recordation of the declaration. In the case of an association which may ultimately operate more than one condominium, where the initial condominium operated by the association is created on or after January 1, 1992, unit owners other than the developer are entitled to elect not less than a majority of the members of the board not later than 7 years after recordation of the initial condominium. In the case of a phase condominium created pursuant to section 718.403, Florida Statutes, where the declaration submitting the initial phase or phases is recorded on or after January 1,

> 1992, unit owners other than the developer are entitled to elect not less than a majority of the members of the board not later than 7 years after the recordation of the declaration submitting the initial phase or phases.

It should be noted that even though the above rule establishes January 1, 1992, as the date which triggers the running of the seven years after recordation of the declaration for transfer of control of the association, the effective date of that provision of Chapter 91-103, Section 12, Laws of Florida, was amended to be April 1, 1992, by Chapter 91-426, Laws of Florida.

15. It is clear from the language of the above rule that the Respondent has determined that Section 718.301(1)(e), Florida Statutes (1991), as created by Chapter 91-103, Section 12, Laws of Florida, should be applied prospectively. The Petitioner, on the other hand, takes the position that the statutory amendment should be applied retroactively and that the prospective application by the Respondent is an invalid exercise of delegated legislative authority.

16. Statutes are presumed to be prospective in application and will be given retroactive application only when the act clearly and explicitly provides for such application. Fleeman v. Case, 342 So.2d 815 (Fla. 1976); Century Village, Inc. v. Wellington E, F, K, L. H, J. M. and G Condominium Association, 361 So.2d 128 (Fla. 1978), and the cases cited therein; Van Bibber v. Hartford Accident & Indemnity Ins. Co., 439 So.2d 524 (Fla. 1983). This rule applies with particular force where the effect of giving a statute a retroactive operation would be to interfere with an existing contract, destroy a vested right, or create a new liability in connection with a past transaction. See: Florida Jur.2d, Statutes, Section 107. In this case, there is nothing in the language of Section 718.301(1)(e), Florida Statutes (1991), to indicate that the Legislature intended a retroactive application. Likewise, neither the enacting clause of Chapter 91-103, Laws of Florida, nor the effective date contained in Section 28 of that law, reveal any expression that the Legislature intended Section 718.301(1)(e), Florida Statutes, to operate retroactively. For an example of legislative expression of retroactive application, see Chapter 92-49, Section 41, Laws of Florida, wherein it expressly provides for the retroactive application of certain amendments to Chapter 718, Florida Statutes.

17. The evidence shows that the Respondent's decision to apply Section 718.301(1)(e), Florida Statutes (1991), as created by Chapter 91-103, Section 12, Laws of Florida, was a rational decision taken after thought and reason, is supported by facts and logic and is neither arbitrary nor capricious. Agrico Chemical Co. v. Department of Environmental Regulation, 365 So.2d 759 (1 DCA Fla. 1979).

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is, accordingly,

ORDERED that the Petitioner failed to establish that Rule 61B-23.003(9), Florida Administrative Code, is an invalid exercise of delegated legislative authority and the relief sought by the Petitioner is DENIED.

DONE AND ORDERED this 14th day of January, 1994, in Tallahassee, Florida.

WILLIAM R. CAVE
Hearing Officer
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(904) 488-9675

Filed with the Clerk of the
Division of Administrative Hearings
this 14th day of January, 1994.

APPENDIX TO FINAL ORDER, CASE NO. 93-6214RX

The following constitutes my specific rulings, pursuant to Section 120.59(2), Florida Statutes, on all the proposed findings of fact submitted by the parties in this case.

Petitioner's Proposed Findings of Fact:

The Petitioner elected to not file any proposed findings of fact.

Respondent's Proposed Findings of Fact:

1. Proposed findings of fact 1, 2, 3, 4, 5, 6, 8 and 9 are adopted in substance as modified in Findings of Fact 1, 2, 3, 4, 5, 6, 7 and 8, respectively.
2. Proposed finding of fact is unnecessary.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

A party who is adversely affected by this final order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rule of Appellate Procedure. Such proceedings are commenced by filing one copy of a notice of appeal with the agency clerk of the Division of Administrative Hearings and a second copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the appellate district where the party resides. The notice of appeal must be filed within 30 days of rendition of the order to be reviewed.