

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND )  
PROFESSIONAL REGULATION, )  
DIVISION OF FLORIDA LAND SALES, )  
CONDOMINIUMS, AND MOBILE HOMES, )  
 )  
Petitioner, )  
 )  
vs. ) Case Nos. 03-3208  
 ) 03-3209  
CLARCONA RESORT CONDOMINIUM )  
ASSOCIATION, INC., )  
 )  
Respondent. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

On December 19, 2003, an administrative hearing in these consolidated cases was held in Orlando, Florida, before William F. Quattlebaum, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

For Petitioner: Joseph S. Garwood, Esquire  
Department of Business and  
Professional Regulation  
The Augusta Building, Suite 100  
8685 Northwest 53rd Terrace  
Miami, Florida 33166

For Respondent: Robert L. Taylor, Esquire  
Taylor & Carls, P.A.  
850 Concourse Parkway, South  
Suite 105  
Maitland, Florida 32751

STATEMENT OF THE ISSUES

The issues in the case are whether the allegations set forth in two separate Notices to Show Cause are correct, and, if so, what penalty, if any, should be imposed.

PRELIMINARY STATEMENT

By Notice to Show Cause dated April 1, 2003 (DOAH Case No. 03-3209, DBPR Case No. 2003040435), the Department of Business and Professional Regulation, Division of Florida Land Sales, Condominiums, and Mobile Homes (Petitioner), alleges that Clarcona Resort Condominium Association, Inc. (Respondent or Association), failed to provide a unit owner with timely access to requested association records. The Notice alleges that pursuant to Subsection 718.111(12)(b), Florida Statutes (2003), association records are to be made available within five working days after receipt of a written request. The Notice alleges that the Respondent received unit owner Mike Sims' request on February 13, 2002, and that the records were not made available to Mr. Sims' representative, Curtis Faulk, until February 23, 2002, eight working days after the request. The Notice also alleges that the Respondent further violated Subsections 718.111(12)(b) and (c), Florida Statutes (2003), by failing during the February 23 meeting to provide Mr. Faulk with access to certain "accounts receivable" records or to a "reserve fund study."

By Notice to Show Cause dated July 16, 2003 (DOAH Case No. 03-3208, DBPR Docket No. 2003056262), the Petitioner alleges that the Respondent violated Subsections 718.111(12)(b) and (c), Florida Statutes (2003), by failing to provide access to the minutes of the Association's annual meeting to unit owner Ansel Wood when Mr. Wood arrived, pursuant to a prior written request, to review records on February 26, 2003. The Notice further alleges that Mr. Wood renewed his request on March 4, 2003, and that the access to the requested records was never provided to Mr. Wood.

By Petitions for Hearing, the Respondent challenged the allegations of the Notices to Show Cause. The Petitions were forwarded on September 8, 2003, to the Division of Administrative Hearings, which consolidated the cases and scheduled the matter for a November 14, 2003, hearing. The hearing was continued at the joint request of the parties and rescheduled for December 19, 2003.

At the hearing, the Petitioner presented the testimony of three witnesses, and had Exhibits numbered 1 and 2 admitted into evidence. The Respondent presented the testimony of three witnesses, and had Exhibits numbered 1 through 6 admitted into evidence. Subsequent to the hearing, the Petitioner filed the deposition testimony of a fourth witness.

No transcript of the hearing was filed. By stipulation of the parties, the Proposed Recommended Orders were filed prior to January 25, 2004.

FINDINGS OF FACT

1. The Respondent is the association governing the Clarcona Condominium in Apopka, Florida. The Clarcona Condominium is comprised of a total of 946 units.

2. The Respondent has an office located on the Clarcona property where available records of the association are located.

Notice to Show Cause dated April 1, 2003  
(DOAH Case No 03-3209, DBPR Docket No. 2003040435)

3. By letter hand delivered to the Respondent's office on February 13, 2002, Mike Sims, a Clarcona unit owner, asked to review the Respondent's financial records, including accounts receivable and a "reserve study."

4. Mr. Sims previously requested information and records from the association, and apparently received the information on a timely basis.

5. Subsequent to the February 13 request, Mr. Sims designated another resident, Curtis Faulk, to represent him in his records request.

6. The Association manager made an appointment with Mr. Faulk for February 23, 2002, to review the requested

records. During the appointment, Mr. Faulk reviewed some of the requested information.

7. As of the February 13 request and, apparently, continuing through at least February 23, the Respondent's accounts receivable records were being converted from one type of software system to another. There was concern by the Association manager that the Association's accounts receivable records were not accurate. The only reserve study apparently available was a "draft" that had been prepared for review by an accountant for the Association manager.

8. Because the Respondent was concerned about the accuracy of the accounts receivable records and the draft reserve study, the Respondent did not provide the accounts receivable or the draft reserve study for Mr. Faulk's review.

9. The evidence establishes that the requested accounts receivable and reserve study information were not provided within five working days of the Respondent's receipt of Mr. Sims' request.

Notice to Show Cause dated July 16, 2003  
(DOAH Case No 03-3208, DBPR Docket No. 2003056262)

10. By letter received on February 19, 2003, Clarcona unit owner Ansel Wood sought to review certain association records including the "unapproved minutes of the most recent meeting" of the Association membership. Mr. Wood and the Association

manager set an appointment for February 26, 2003, to review the requested records.

11. At the appointed time, Mr. Wood received access to some of the requested records, but not to the "unapproved minutes of the most recent meeting." At the time of the review by Mr. Wood, the meeting minutes had not been typed.

12. The meeting referenced in Mr. Wood's letter of request occurred in January 2003.

13. The evidence establishes that the requested minutes of the January 2003 meeting were not provided within five working days of the Respondent's receipt of Mr. Wood's request.

14. Mr. Wood sold his unit sometime in May 2003.

15. The minutes of the meeting were not typed until June 4, 2003. Mr. Wood did not receive access to the meeting minutes prior to the sale of his unit.

#### CONCLUSIONS OF LAW

16. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this proceeding. § 120.57(1), Fla. Stat. (2003).

17. The Petitioner has the burden of proving the allegations in the Notices to Show Cause by a preponderance of the evidence. Florida Department of Transportation v. J.W.C. Company, Inc., 396 So. 2d 778 (Fla. 1st DCA 1981). In this case, the burden has been met.

18. In relevant part, Section 718.111, Florida Statutes (2003), provides as follows:

(12) OFFICIAL RECORDS.--

(a) From the inception of the association, the association shall maintain each of the following items, when applicable, which shall constitute the official records of the association:

1. A copy of the plans, permits, warranties, and other items provided by the developer pursuant to s. 718.301(4).
2. A photocopy of the recorded declaration of condominium of each condominium operated by the association and of each amendment to each declaration.
3. A photocopy of the recorded bylaws of the association and of each amendment to the bylaws.
4. A certified copy of the articles of incorporation of the association, or other documents creating the association, and of each amendment thereto.
5. A copy of the current rules of the association.
6. A book or books which contain the minutes of all meetings of the association, of the board of directors, and of unit owners, which minutes shall be retained for a period of not less than 7 years.
7. A current roster of all unit owners and their mailing addresses, unit identifications, voting certifications, and, if known, telephone numbers. The association shall also maintain the electronic mailing addresses and the numbers designated by unit owners for receiving notice sent by electronic transmission of those unit owners consenting to receive notice by electronic transmission. The electronic mailing addresses and numbers provided by unit owners to receive notice by electronic transmission shall be removed from association records when consent to receive notice by electronic transmission is revoked. However, the association is not

liable for an erroneous disclosure of the electronic mail address or the number for receiving electronic transmission of notices.

8. All current insurance policies of the association and condominiums operated by the association.

9. A current copy of any management agreement, lease, or other contract to which the association is a party or under which the association or the unit owners have an obligation or responsibility.

10. Bills of sale or transfer for all property owned by the association.

11. Accounting records for the association and separate accounting records for each condominium which the association operates.

All accounting records shall be maintained for a period of not less than 7 years. The accounting records shall include, but are not limited to:

a. Accurate, itemized, and detailed records of all receipts and expenditures.

b. A current account and a monthly, bimonthly, or quarterly statement of the account for each unit designating the name of the unit owner, the due date and amount of each assessment, the amount paid upon the account, and the balance due.

c. All audits, reviews, accounting statements, and financial reports of the association or condominium.

d. All contracts for work to be performed. Bids for work to be performed shall also be considered official records and shall be maintained for a period of 1 year.

12. Ballots, sign-in sheets, voting proxies, and all other papers relating to voting by unit owners, which shall be maintained for a period of 1 year from the date of the election, vote, or meeting to which the document relates.

13. All rental records, when the association is acting as agent for the rental of condominium units.

14. A copy of the current question and answer sheet as described by s. 718.504.



15. All other records of the association not specifically included in the foregoing which are related to the operation of the association.

(b) The official records of the association shall be maintained within the state. The records of the association shall be made available to a unit owner within 5 working days after receipt of written request by the board or its designee. This paragraph may be complied with by having a copy of the official records of the association available for inspection or copying on the condominium property or association property. (emphasis supplied)

19. As to Mr. Sims' records request, the evidence establishes that the Respondent failed to timely provide requested records to Mr. Sims or to Mr. Faulk. The statute clearly provides that such records are to be provided within five working days of the Association's receipt of a written request. The statute provides no exception to this requirement.

20. The Respondent asserts that the requirement is complied with by the fact that the records were located in the Association's office on the condominium property. The statute requires that the records be available for inspection within five working days after receipt of the request. The mere presence of the records on condominium property is insufficient to comply with the requirement of timely availability. The evidence establishes that some of the records were located on the property, but they were not made available to Mr. Sims or Mr. Faulk until after more than five working days had passed.

21. The evidence further establishes that even after the initial delay in making the records available, the accounts receivable records were not made available for review at the appointed time. The Respondent's assertion that the records were not accurate and were accordingly not made available, is not persuasive. The Association is required to maintain accurate records, and make them available according to the time frames set forth in the statute. As to the "draft" reserve study, once the accountant had completed the study and turned it over to the Association's management, the study should have been available for review upon request of an owner. There is no credible explanation as to why a study prepared by an accountant employed by the Association would require review by the Association manager before it could be made available to owners.

22. The evidence also establishes that Mr. Wood was not permitted timely review of the minutes of an association meeting. Mr. Wood requested on February 19, 2003, to review the minutes of a January 2003 meeting. The Respondent asserts that the minutes were unavailable because they were not typed.

23. The statute provides that the official records of an association include a "book" which contain the "minutes of all meetings of the association." Such a requirement indicates that the minutes of all association meetings must be typed within a time frame sufficient to permit an association member to request

and review the written material according to the time frames set forth in the statute. In other words, if a written request to review the minutes is made on the day after an annual meeting, the minutes should be transcribed and available for review within five working days of the request as required by the statute. More than four months passed after Mr. Wood's request before the minutes were placed in a typed form and made available for resident inspection.

24. Florida Administrative Code Rule 61B-21.003 sets forth the methodology utilized to determine a penalty appropriate to the facts of this case. Pursuant to Florida Administrative Code Rule 61B-21.003(7)(a), the violations here are defined as "minor," and the Rule provides that the Petitioner shall impose a penalty of between one dollar and five dollars per unit for each minor violation. The Rule provides that the penalty shall be assessed in the middle of the range and adjusted up or down based on the existence of mitigating factors, and that in no event shall a penalty of more than \$2,500 be imposed for a single violation. There are no mitigating or aggravating factors sufficient to warrant adjustment of the penalty from the middle of the range, which is three dollars. There are 946 units in the Clarcona Condominium, which would result in a penalty of \$2838, but for the maximum penalty of \$2,500 per

single violation. There are three counts set forth in the Notices to Show Cause, resulting in a total penalty of \$7,500.

25. Although the Notices to Show Cause in these cases also cite Subsection 718.111(12)(c), Florida Statutes (2003), as additional grounds for discipline in this case, the cited section does not appear to provide grounds for enforcement by the Petitioner of the requirement that records be made available to the association members on a timely basis, but rather provides a private civil remedy available to individual association members who are denied timely access to association records.

#### RECOMMENDATION

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

RECOMMENDED that the Department of Business and Professional Regulation, Division of Florida Land Sales, Condominiums, and Mobile Homes, enter a Final Order finding that the Respondent has violated Subsection 718.111(12)(b), Florida Statutes (2003), as set forth herein and assessing a penalty of \$7,500.

DONE AND ENTERED this 16th day of February, 2004, in  
Tallahassee, Leon County, Florida.

*William F. Quattlebaum*

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WILLIAM F. QUATTLEBAUM  
Administrative Law Judge  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 16th day of February, 2004.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.