STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, DIVISION OF FLORIDA LAND SALES, CONDOMINIUMS, AND MOBILE HOMES,	)	
Petitioner,	)	Case No. 06-4482
vs.	)	
EDEN ISLES CONDOMINIUM ASSOCIATION, INC.,	)	
Respondent.	)	

RECOMMENDED ORDER

This case came before Administrative Law Judge John G. Van Laningham for final hearing by video teleconference on February 1 and 2, 2007, at sites in Tallahassee and Lauderdale Lakes, Florida.

APPEARANCES

For Petitioner: David J. Tarbert, Esquire
Department of Business and Professional Regulation
1940 North Monroe Street, Suite 42
Tallahassee, Florida 32399-2202

For Respondent: Leonardo G. Renaud, Esquire
Leonardo G. Renaud, P.A.
8105 Northwest 155 Street
Miami Lakes, Florida 33016

STATEMENT OF THE ISSUE

The issue in this case is whether Respondent condominium association timely mailed or hand delivered to unit owners either a copy of the annual financial report for the year 2004 or, alternatively, a notice stating that a copy of the report would be provided to any owner, free of charge, upon request.

PRELIMINARY STATEMENT

On August 21, 2006, Petitioner Department of Business and Professional Regulation, Division of Florida Land Sales, Condominiums, and Mobile Homes, entered a Notice to Show Cause directing Respondent Eden Isles Condominium Association, Inc., to rebut the charge that it had failed timely to provide each unit owner with either the annual financial report for the year 2004 or, alternatively, a notice stating that a copy of such report would be delivered, without charge, to any owner who requested one, which failure violated Section 718.111(13), Florida Statutes. Respondent disputed the allegations and timely requested a formal hearing.

On November 6, 2006, the case was referred to the Division of Administrative Hearings ("DOAH"), where it was docketed as Case No. 06-4482 and assigned to an administrative law judge ("ALJ"). The ALJ soon consolidated this case with DOAH Case Nos. 06-4481 and 06-4483, finding that the parties and counsel

were the same in all three cases, which also presented similar issues.

The final hearing respecting the consolidated cases took place on February 1 and 2, 2007, as scheduled, with all parties present. Petitioner called two witnesses, its employees Patrick Flynn and Boyd McAdams, and introduced three composite exhibits, which were received in evidence. Respondent presented three witnesses: Louis Claps, a certified public accountant; Suzanna Rockwell, an employee of Respondent; and Jonathon Marks, the president of Respondent's Board of Directors. In addition, Respondent's Exhibits 1 through 7 were admitted.

The two-volume final hearing transcript was filed on February 28, 2007, making the Proposed Recommended Orders due on March 30, 2007, pursuant to the schedule established at the conclusion of the final hearing. At the parties' joint request, this deadline was later enlarged, to April 20, 2007. Thereafter, each party timely filed a Proposed Recommended Order, and these were carefully considered during the preparation of this Recommended Order.

Although the consolidated cases share a common evidentiary record, the undersigned has elected to issue a separate Recommended Order for each one.

Unless otherwise indicated, citations to the Florida Statutes refer to the 2006 Florida Statutes.

FINDINGS OF FACT

1. Respondent Eden Isles Condominium Association, Inc. ("Association") is the entity responsible for operating the common elements of the Eden Isles Condominium ("Condominium"), which consists of seven buildings comprising 364 units. As such, the Association is subject to the regulatory jurisdiction of Petitioner Division of Florida Land Sales, Condominiums, and Mobile Homes ("Division").

2. The Association retained Louis John Claps, C.P.A. & Associates, P.A. ("Claps") to audit the Association's books and prepare a financial statement respecting the year ending December 31, 2004. Thereafter, under a cover letter dated May 2, 2005, Claps delivered to the Association a financial report for the year 2004.

3. This financial report was readily available to the members of the Association's governing Board of Directors ("Board"), who in turn could make copies thereof for delivery to the unit owners in their respective buildings. (The owners in each building elect a "building director" to serve on the Board.) In addition, the financial report was available for inspection and copying at the Association's office; any unit owner who asked for a copy was given one. The Association, however, did not mail or hand deliver to each unit owner either a copy of the financial report or, alternatively, a notice

stating that a copy of such report could be had, at no charge, upon request.

CONCLUSIONS OF LAW

4. DOAH has personal and subject matter jurisdiction in this proceeding pursuant to Sections 120.569 and 120.57(1), Florida Statutes.

5. Upon finding reasonable cause to believe that a violation of the Condominium Act or any rule promulgated thereunder has occurred, the Division is authorized to institute an administrative enforcement proceeding through which various coercive means of securing compliance may be imposed, including "a civil penalty [of up to $5,000] against a developer or association, or its assignee or agent . . . ." § 718.501(1)(d)4., Fla. Stat. The Division may also

> issue an order requiring the developer, association, officer, or member of the board of administration, or its assignees or agents, to cease and desist from the unlawful practice and take such affirmative action as in the judgment of the division will carry out the purposes of this chapter.

§ 718.501(1)(d)2., Fla. Stat.

6. Because the imposition of a fine is (obviously) punitive in nature and implicates significant property rights, the Division has the burden, in an enforcement proceeding brought for that purpose, of proving the alleged violation by clear and convincing evidence. Department of Banking and

Finance, Div. of Securities and Investor Protection v. Osborne Stern & Co., 670 So. 2d 932, 935 (Fla. 1996).

7. Regarding the standard of proof, in Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983), the Court of Appeal, Fourth District, canvassed the cases to develop a "workable definition of clear and convincing evidence" and found that of necessity such a definition would need to contain "both qualitative and quantitative standards." The court held that:

> clear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

Id. The Florida Supreme Court later adopted the Fourth District's description of the clear and convincing evidence standard of proof. Inquiry Concerning a Judge No. 93-62, 645 So. 2d 398, 404 (Fla. 1994). The First District Court of Appeal also has followed the Slomowitz test, adding the interpretive comment that "[a]lthough this standard of proof may be met where the evidence is in conflict, . . . it seems to preclude evidence that is ambiguous." Westinghouse Elec. Corp., Inc. v. Shuler Bros., Inc., 590 So. 2d 986, 988 (Fla. 1st DCA 1991), rev.

denied, 599 So. 2d 1279 (Fla. 1992)(citation omitted).

8. In this case, the Division has alleged that the Association failed timely to deliver to each unit owner either the financial report for the year 2004 or, alternatively, a notice stating that a copy of the report would be delivered, free of charge, to any owner who requested one. Based on this allegation, the Association stands accused of having violated Section 718.111(13), Florida Statutes, which provides in pertinent part as follows:

> Within 90 days after the end of the fiscal year, or annually on a date provided in the bylaws, the association shall prepare and complete, or contract for the preparation and completion of, a financial report for the preceding fiscal year. Within 21 days after the final financial report is completed by the association or received from the third party, but not later than 120 days after the end of the fiscal year or other date as provided in the bylaws, the association shall mail to each unit owner at the address last furnished to the association by the unit owner, or hand deliver to each unit owner, a copy of the financial report or a notice that a copy of the financial report will be mailed or hand delivered to the unit owner, without charge, upon receipt of a written request from the unit owner.

9. Here, the deadline for providing the report (or a notice of its availability) to unit owners was the 120th day after the end of the fiscal year on December 31, 2004, which happened to fall on Saturday, April 30, 2005. However, because

the Association received the financial report, at the earliest, on Monday, May 2, 2005, strict compliance with the statute was impossible.[i] Regardless, it is undisputed, as a matter of fact, that the Association never mailed or hand delivered to each unit owner either a copy of the report or a notice of its availability as required by the statute.

10. It is concluded, therefore, that the Association violated Section 718.111(13), Florida Statutes, as charged.

11. Under the Division's penalty guidelines, a "failure to timely provide the annual financial report" in violation of Section 718.111(13) is classified as a "minor violation." See Fla. Admin. Code R. 61B-21.003(7)(a).[ii]

12. The penalty for a minor violation is to be determined in accordance with the following:

> If an enforcement resolution is utilized, the division shall impose a civil penalty between $1 and $5, per unit, for each minor violation. The penalty will be assessed beginning with the middle of the specified range and adjusted either up or down based upon any accepted aggravating or mitigating factors. An occurrence of six or more aggravating factors or five or more mitigating factors will result in a penalty being assessed outside of the specified range. The total penalty to be assessed shall be calculated according to these guidelines or $100, whichever amount is greater. Finally, in no event shall a penalty of more than $2,500 be imposed for a single violation.

13. With regard to aggravating and mitigating factors, Rule 61B-21.003(3) provides as follows:

> The division will consider aggravating and mitigating factors in determining penalties for violations listed in this rule chapter. The factors are not necessarily listed in order of importance, and they shall be applied against each single count of the listed violation.
> (a) Aggravating Factors:
> 1. Filing or causing to be filed any materially incorrect document in response to any division request or subpoena.
> 2. Financial loss to parties or persons affected by the violation.
> 3. Financial gain to parties or persons who perpetrated the violation.
> 4. The disciplinary history of the association, including such action resulting in an enforcement resolution as detailed in Rule 61B-21.003, F.A.C., or Section 718.501, F.S.
> 5. The violation caused substiantial harm, or has the potential to cause substantial harm, to condominium residents or other persons.
> 6. Undue delay in initiating or completing, or failure to take, affirmative or corrective action after the association received the division’s written notification of the violation.
> 7. The violation had occurred for a long period of time.
> 8. The violation was repeated within a short period of time.
> 9. The association impeded the division’s investigation or authority.
> 10. The investigation involved the issuance of a notice to show cause or other proceeding.
> (b) Mitigating Factors:
> 1. Whether current members of the association board have sought and received educational training, other than information provided pursuant to Rule 61B-21.002,

F.A.C., on the requirements of Chapter 718, F.S., within the past two years.
2. Reliance on written professional or expert counsel and advice.
3. Acts of God or nature.
4. The violation caused no harm to condominium residents or other persons.
5. The association took affirmative or corrective action before it received the division's written notification of the violation.
6. The association expeditiously took affirmative or corrective action after it received the division's written notification of the violation.
7. The association cooperated with the division during the investigation.
8. The investigation was concluded through consent proceedings.

14. The evidence was insufficient, as a matter of fact, to persuade the undersigned to make a finding concerning the existence of any aggravating or mitigating factors.

15. Accordingly, the penalty should be assessed at the middle of the specified range ($1 to $5 per unit), which is $3 per unit. Because there are 364 units within the Condominium, the appropriate penalty in this case is $1,092.

16. The Division requests that, in addition to the being assessed a fine, the Association be ordered to take affirmative remedial action, which, as mentioned above, the Division is authorized to require. The corrective actions that the Division has proposed are reasonable and appropriate; they will be set forth in the recommendation below.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Division enter a final order finding the Association guilty of the charge of failing to timely provide each unit owner with either the annual financial report for the year 2004 or, alternatively, a notice stating that a copy of such report would be delivered, without charge, to any owner who requested one. In consequence of the Association's violation of Section 718.111(13), Florida Statutes, the Division should: (a) impose a civil penalty against the Association in the amount of $1,092; (b) order the Association to mail or hand deliver to each unit owner, within 30 days after the date of the Final Order, either a copy of the financial report for the year 2004 or, alternatively, a notice stating that a copy of such report will be provided at no cost to any owner who requests one in writing; and (c) order the Association to furnish the Division, within 45 days after the date of the Final Order, with an affidavit attesting that the remedial action just described has been taken.

DONE AND ENTERED this 11th day of May, 2007, in Tallahassee, Leon County, Florida.

JOHN G. VAN LANINGHAM
Administrative Law Judge
Division of Administrative Hearings
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 11th day of May, 2007.

ENDNOTES

[i]/ If the deadline were computed as being May 2, 2005, which was the first business day after April 30, 2005, then the Association theoretically could have satisfied the statutory reporting requirements, although in fact it did not meet this alternative deadline either.

[ii]/ Complicating the question of classification, the offense of failing "to provide year-end financial statements in a timely manner," in violation of § 718.111(13), Fla. Stat., is listed in Fla. Admin. Code R. 61B-21.003(7)(b) as a "major violation." The only distinction between the descriptions of the "minor violation" and the "major violation" is that the former uses the term "annual financial report" while the latter speaks of "year-end financial statements." Because the relevant portion of § 718.111(13), Fla. Stat., uses the term "financial report" and not "financial statement," however, it is concluded that, as used in the Rule, the two terms were intended to have the same

meaning; thus, the "distinction," such as it is, is immaterial. The upshot is that the Rule is ambiguous in regard to the classification of the offense at issue as either "minor" or "major" in terms of its potential for causing harm to consumers. That being the case, the undersigned has construed the ambiguity in favor of the Association, see, e.g., Munch v. Department of Professional Regulation, Div. of Real Estate, 592 So. 2d 1136, 1143 (Fla. 1st DCA 1992)(statute imposing penalty "must be construed strictly, in favor of the one against whom the penalty would be imposed."), and found the violation to be a minor one. This conclusion, moreover, is consistent with the facts, which show that the a violation was essentially technical in nature, inasmuch as the financial report was, in fact, available to the unit owners, albeit not pursuant to the statutorily prescribed reporting procedure.

COPIES FURNISHED:

David J. Tarbert, Esquire
Department of Business and
Professional Regulation
1940 North Monroe Street, Suite 42
Tallahassee, Florida 32399-2202

Ned Luczynski, General Counsel
Department of Business and
Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-2202

Leonardo G. Renaud, Esquire
Leonardo G. Renaud, P.A.
8105 Northwest 155 Street
Miami Lakes, Florida 33016

Michael Cochran, Division Director
Department of Business and
Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-0792

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.