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. 06-4483
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.
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STATEMENT OF THE ISSUE

The issue in this case is whether Respondent condominium association misused "reserve funds."

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 to obtain the approval of a majority of the unit owners prior to using statutory reserve funds for purposes other than capital expenditures, in violation of Section 718.112(2)(f)3., 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. 06-4483 and assigned to an administrative law judge ("ALJ"). The ALJ soon consolidated this case with DOAH Case Nos. 06-4481 and 06-4482, 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"). 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 Seth M. Lipson ("Lipson"), a certified public accountant, to audit the Association's books and prepare financial statements respecting the years ending December 31, 2002, and December 31, 2003.

3. Lipson delivered to the Board a financial report for each of these years. The respective balance sheets in each report made reference to a "replacement fund," which (as the notes to the financial statements reveal) Lipson believed constituted the statutory "reserve account" that Florida law requires be included in a condominium's annual budget unless, by a majority vote, the unit owners elect not to maintain such reserves for capital expenditures.

4. In fact, the Condominium's unit owners, by majority vote, had always waived the funding of reserves. The account that Lipson characterized as a "replacement fund" consisted not of statutory "reserve funds," but rather of funds that the Association had received over the years, through regular assessments for "common expenses," in excess of amounts needed to pay "common expenses." These excess "common expenses" assessments had been placed in certificates of deposit and, evidently, were available for such uses as the Board might determine, from time to time, were necessary and appropriate.

5. According to the financial reports that Lipson prepared, some of the excess funds had been used for purposes other than capital expenditures. Each balance sheet shows an amount "due" to the "replacement fund" from the account for operating expenses.

CONCLUSIONS OF LAW

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

7. 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.

8. 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).

9. 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).

10. In this case, the Division has alleged that the Association failed to obtain the approval of the Condominium's unit owners before using reserve funds for purposes other than capital expenditures, in violation of Section 718.112(2)(f), Florida Statutes, which provides in pertinent part as follows:

> REQUIRED PROVISIONS.--The bylaws shall provide for the following and, if they do not do so, shall be deemed to include the following:
>
> * * *
>
> (f) Annual budget.—
>
> * * *
>
> 2. In addition to annual operating expenses, the budget shall include reserve accounts for capital expenditures and deferred maintenance. These accounts shall include, but are not limited to, roof replacement, building painting, and pavement resurfacing, regardless of the amount of deferred maintenance expense or replacement cost, and for any other item for which the deferred maintenance expense or replacement cost exceeds $10,000. The amount to be reserved shall be computed by means of a formula which is based upon estimated remaining useful life and estimated replacement cost or deferred maintenance expense of each reserve item. The association may adjust replacement reserve assessments annually to take into account

> any changes in estimates or extension of the useful life of a reserve item caused by deferred maintenance. This subsection does not apply to an adopted budget in which the members of an association have determined, by a majority vote at a duly called meeting of the association, to provide no reserves or less reserves than required by this subsection. . . . .
>
> 3. Reserve funds and any interest accruing thereon shall remain in the reserve account or accounts, and shall be used only for authorized reserve expenditures unless their use for other purposes is approved in advance by a majority vote at a duly called meeting of the association. . . . .

(Emphasis added.)

11. According to the Division, the fact that the Condominium's unit owners voted each year to waive the requirements relating to statutory reserves is irrelevant, because once the accountant characterized the excess "common expenses" assessments as a "replacement fund," a reserve account subject to Section 718.112(2)(f), Florida Statutes, was created. The Division's position simply cannot be squared, however, with the plain language of the statute, which unambiguously provides that subsection (f) does not apply to a budget when, as here, a majority of the unit owners votes not to establish statutory reserves.

12. The Division's position is not only clearly contrary to the statute, but also, if accepted, would permit one person (the accountant)——who need not even hold a voting interest in

the condominium——to retroactively overturn the will of the unit owners with regard to statutory reserves. The legislature cannot possibly have intended to allow such an anomalous result.

13. Based on the evidence in the record, which establishes convincingly that, in connection with each relevant budget, the Condominium's unit owners waived the funding of reserves, it is concluded that the so-called "replacement fund" was not a "reserve account" subject to Section 718.112(2)(f), Florida Statutes, because the statutory provisions regarding reserves do not apply when waived, as here.[i] Accordingly, the Association did not improperly use statutory reserves, as charged.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Division enter a final order rescinding the Notice to Show Cause and exonerating the Association of the charge of using statutory reserve funds for purposes other than capital expenditures without first obtaining the unit owners' approval.

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

ENDNOTE

[i]/ The proper designation for the funds in question would have been "common surplus," which term is defined in § 718.103(10), Fla. Stat., as follows:

> "Common surplus" means the amount of all receipts or revenues, including assessments, rents, or profits, collected by a condominium association which exceeds common expenses.

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.