

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 No. 09-1232
)
WATERFRONT PARK CORPORATION,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case by Administrative Law Judge Carolyn S. Holifield, on April 29, 2009, in St. Petersburg, Florida.

APPEARANCES

For Petitioner: William R. Wohlsifer, Esquire
Department of Business and
Professional Regulation
1940 North Monroe Street, Suite 42
Tallahassee, Florida 32399-2202

For Respondent: Kerry H. Brown, Esquire
Post Office Box 15223
St. Petersburg, Florida 33733-5223

STATEMENT OF THE ISSUE

The issue in this case is whether Respondent used its "best efforts" to obtain and maintain adequate insurance to protect its property in accordance with Subsection 719.104(3), Florida

Statutes (2008),¹ as alleged in the Notice to Show Cause; and, if so, what penalty, if any, should be imposed.

PRELIMINARY STATEMENT

By Notice to Show Cause dated February 6, 2009, Petitioner, Department of Business and Professional Regulation, Division of Florida Land Sales, Condominiums, and Mobile Homes ("Division"), alleges that Respondent, Waterfront Park Corporation ("Association"), was in violation of Subsection 719.104(3), Florida Statutes, by failing to obtain and maintain adequate insurance to protect the Association's property. According to the Notice to Show Cause, the foregoing allegation was based on evidence that was presented to the Division, and, if true, "is good and sufficient cause for the Division to enter a cease and desist order, impose civil penalties, and take affirmative action which in the judgment of the Division will carry out the purposes of Chapter 719, Florida Statutes."

Respondent challenged the allegation in the Notice to Show Cause by filing a Response to Notice to Show Cause and Request for Formal Hearing. The case was forwarded to the Division of Administrative Hearings on March 10, 2009, and was scheduled for an April 29, 2009, hearing.²

On March 23 and April 17, 2009, Respondent filed motions requesting leave to amend its previously-filed responses to the Notice to Show Cause. Both motions were granted. Pursuant to

an Order issued April 27, 2009, Respondent was granted leave to file the Second Amended Response to Notice to Show Cause and Request for Formal Hearing ("Second Amended Response"), which effectively superseded the previously-filed responses.

Prior to hearing, the parties filed a Joint Pre-Hearing Stipulation ("Pre-Hearing Stipulation") in which they stipulated to facts which required no proof at hearing. Also, in the Pre-hearing Stipulation, Respondent withdrew the defenses raised in paragraphs 7 and 8(e) of the Second Amended Response. The specific section referenced was the "constitutional defense based on the guarantee [in the Florida Constitution] that all political power is inherent in the people."

At the final hearing, Petitioner called three witnesses: Cheryl Carson, Investigation Specialist II, with the Department; and Victor Buhler and George William Sherman, owners of units in Waterfront Park. Petitioner's Exhibits 1 through 10 were admitted into evidence. Respondent presented the testimony of two witnesses: Robert Kendrick, president and treasurer of the Waterfront Park Association; and Roger Ashley, owner of a unit in Waterfront Park. Respondent's Exhibits 1 through 9 were admitted into evidence.

No transcript of the hearing was filed. By stipulation of the parties, Proposed Recommended Orders were filed on May 11, 2009. Respondent also filed a Supplemental Memorandum of Law.³

In response to Respondent's request, on May 28, 2009, Petitioner filed a letter clarifying paragraphs 14, 18, 19 and 21 of Petitioner's Proposed Recommended Order.⁴ The post-hearing documents filed by the parties have been considered in preparation of this Recommended Order.

FINDINGS OF FACT

1. Respondent, Waterfront Park Corporation, is a non-profit Delaware corporation, organized in 1956, registered as a foreign for-profit corporation, and doing business in the State of Florida.

2. The Association is subject to the regulatory jurisdiction of Petitioner, Department of Business of Business and Professional Regulation, Division of Florida Land Sales, Condominiums, and Mobile Homes.

3. The Association is responsible for operating the common elements of the Waterfront Park Corporation Co-operative Apartment ("Cooperative").

4. The Cooperative is located in St. Petersburg, Florida, about one block from Tampa Bay and consists of three buildings with a total of 35 residential units.

5. The Cooperative's governing documents include the Waterfront Park Corporation Co-operative Apartment Perpetual Use and Equity Contract ("Equity Contract"), the Association's By-Laws, and its Articles of Incorporation.

6. Section 6(3) of the Equity Contract provides that "[t]he Cooperative agrees that, to the limit of its resources, it will . . . adequately insure all of the property of the Cooperative against fire, storm, tornado and public liability."

7. Article 8 of the Association's Articles of Incorporation provides that "[t]he management of the affairs of the corporation shall be conducted by its Board of Directors ["Board"] in accordance with the requirements of its By-Laws."

8. Paragraph 51 of the Association's By-Laws provides, in part, the following: "The Board of Directors shall, from time to time, fix and determine the sum or sums necessary and adequate for the continued ownership and operation of the project. They shall determine the amounts required for capital items . . . , and for operating items such as taxes, insurance, repairs, betterments and operating expenses."

9. Prior to April 15, 2006, the Association maintained casualty insurance through Allstate Insurance Company ("Allstate") over its property, including windstorm, general liability, and fire coverage for the three buildings.

10. Sometime prior to January 17, 2006, the Association was notified that Allstate was canceling the Association's casualty policy, effective April 15, 2006.

11. At the Association's meeting on January 17, 2006, members were advised that Allstate, who handled the "building

insurance," had canceled its policy. Following this announcement, there was a discussion regarding: (1) the impact on members if the Association did not or could not secure insurance; (2) the possibility of the Association's being self-insured; and (3) cost and possibility of the Association's obtaining insurance.

12. During the January 17, 2006, meeting, the president and treasurer of the Board, Robert Kendrick, advised Association members that, at the present time, the only company that might insure the Association was Citizens Insurance Company ("Citizens"), the State's insurer of last resort. Mr. Kendrick further advised the members that if insurance were obtained through Citizens, the premiums would be at least two to three times what the Association paid in 2005.

13. Sometime prior to the January 17, 2006, meeting, Mr. Kendrick received information about the cost of obtaining insurance through Citizens. This information was provided to him by telephone from the agency that had provided the Association's Allstate coverage. Although Mr. Kendrick received the Citizen's quote by telephone and wrote it down, he did not include it in the Association's proposed 2006 budget. Mr. Kendrick's reason for not including the premium cost for coverage by Citizens was that he had not received a written quote.

14. The budget presented at the January 17, 2006, annual meeting had been prepared before the Association was notified that its Allstate policy was being canceled. Therefore, the amount of insurance premium budgeted for 2006 was similar to the Allstate insurance premium. At the January 17, 2006, annual meeting, the vote to approve the budget, with an insurance premium budgeted similar to the Allstate premium, was unanimous.

15. On or about March 30, 2006, an insurance agent or broker with Insurance Technologies Corporation provided the Association with a written quote for coverage through Citizens. The quote offered the following coverage through Citizens: property damage, including windstorm, at the limit of \$3.5 million for the three buildings with a \$2,500 general deductible and a five percent windstorm deductible for an annual premium of \$17,773.

16. The cost of the annual premium cost for property damage insurance, including windstorm, was significantly higher than the amount budgeted for the year. Therefore, no insurance was purchased for the period after April 15, 2006, when Allstate's coverage expired.

17. Mr. Kendrick did not include the Citizen's premium quote in the proposed 2007 Association budget or any property coverage other than \$2,500 for general liability and directors' and officers' coverage. Mr. Kendrick determined to not include

other insurance coverage because of the cost of additional coverage.⁵

18. Since Allstate canceled its policy, the Association has not purchased any alternative coverage.

19. The coverage limit for the Association's property under the Allstate policy that was canceled, effective April 15, 2006, was for an amount less than \$3.5 million. However, the price quotes for the alternative coverage for the Association's property was based on \$3.5 million.

20. In or about December 2007, about one year and nine months after Allstate canceled the Association's casualty policy, the Association's Board solicited casualty policy quotes from brokers, Tampa Bay Insurance and its successor, MSM Insurance. The broker provided the Association with a quote from Century Surety and another one from Lloyd's of London.

21. Mr. Kendrick's understanding was that the broker he contacted would go out into the market and get the best quote available. In fact, the cover letters from the broker on both the Century Surety quote and the Lloyd of London's quote stated, "I assure you that I have tried every angle to get you the best possible pricing available." In accordance with the foregoing, Mr. Kendrick reasonably relied on the broker to provide the Board with the lowest price for casualty insurance, including windstorm coverage.

22. The Century Surety December 12, 2007, "property" quote, which excluded coverage for wind/hail and theft, was \$11,964.61.

23. The Lloyd's of London January 21, 2008,⁶ quote was \$37,441.39 for "Commercial [Property] Wind" coverage. The amount quoted by Lloyd's of London was more than six times the amount of the Allstate premium for similar coverage and approximately double the Citizens premium quote from the prior year.

24. When Mr. Kendrick received the quotes from Century Surety (\$11,964.61) and Lloyd's of London (\$37,441.39), he believed that the two policy amounts were to be added together for a combined premium of almost \$50,000. However, at hearing, Mr. Kendrick admitted that his belief may have been incorrect and that the quote from Lloyd's of London may have been a revised premium for all coverage.

25. At the Association's 2008 annual meeting, four proposed budgets were presented to the members to vote on.

26. Proposed Budget 1 for 2008 reflected \$2,000 as being the total premium for all forms of insurance for 2008. The source of this estimate is unknown. The total cost of Proposed Budget 1 for 2008 was \$61,400.00.

27. Proposed Budget 2 reflected a cost of \$22,000 for "insurance" and, also listed as a separate line item, \$42,000

for "security." Although Proposed Budget 2 did not specify, the \$42,000 included not only the cost of a security guard, but also other significant line item increases, including the estimated \$22,000 for insurance coverage. The total cost of Proposed Budget 2 for 2008 was \$119,400.

28. According to Mr. Kendrick, the proposed 2008 budgets were prepared in late 2007 and before he received the above-referenced quotes from Tampa Bay Insurance and MSM. Therefore, the \$22,000 for insurance coverage, including windstorm coverage, was merely an estimated cost. The source from which that estimate was obtained is unclear.

29. Proposed Budget 1 was approved by the members on an 11 to three vote, with five abstentions.

30. In October 2009, Mr. Kendrick, acting on behalf of the Board, obtained another quote for casualty insurance, including windstorm coverage, from MSM. The quote provided by MSM and dated October 28, 2008, was for \$59,972.39 and was from the carrier, Lloyd's of London. The quote was itemized as follows: (1) annual premium of \$56,000; (2) taxes and fees of \$3,722.39; and (3) the agency fee of \$250.

31. At the Association's 2009 annual general meeting, two proposed budgets were presented on which the shareholders could vote. Of the numerous line items, there are only three differences between Proposed Budget 1 and Proposed Budget 2.

Proposed Budget 1 reflected \$2,000 for insurance, \$4,000 for security, and \$3,600 for administrative purposes, while Proposed Budget 2 included a significant increase in each of those line items. Proposed Budget 2 reflected \$60,000 for insurance, \$40,000 for security, and \$6,000 for administrative purposes. Based on the foregoing, Proposed Budget 2, which totaled \$157,500, exceeded Proposed Budget 1, which totaled \$61,100, by \$96,400.

32. The two proposed budgets for 2009 appeared on the same sheet and included a "note" regarding the impact of each of the two budgets on the members' ownership fees. According to the "note," Proposed Budget 1 would result in no change in the members' maintenance fees, and Proposed Budget 2 would result in a 260 percent increase in members' maintenance fees.

33. On January 20, 2009, during the Association's annual meeting, the members approved Proposed Budget 1, described in paragraph 31 and which totaled \$61,100. That budget, which included no casualty insurance, was approved by a 12-to-one vote of the members. The votes of two shareholders were not counted, because no proper proxies from them had been received as of the meeting date.

34. Except as noted above, no other efforts to obtain windstorm coverage were undertaken by Mr. Kendrick on behalf of the Board.

35. At all times relevant to this proceeding, the Association did not have sufficient funds to purchase casualty insurance. Moreover, the majority of the owners of the units were unwilling and/or unable to pay additional assessment.

36. On April 14, 2009, about two months after the action in this case was filed, the Board purchased a broad form casualty policy which covered damage to the Association's property, excluding windstorm. The policy was purchased from Chubb Insurance Company for an annual premium of \$6,222.88.

37. Prior to filing its Notice to Show Cause, the Division provided the Association with an opportunity to provide proof of its intent to comply with Subsection 719.104(3), Florida Statutes. The Division also gave the Association several reasonable extensions of time in which to provide proof of its intent to comply with the above-referenced provision.⁷

CONCLUSIONS OF LAW

38. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this proceeding pursuant to Section 120.569 and Subsection 120.57(1), Florida Statutes (2009).

39. Subsection 719.501(1), Florida Statutes, authorizes the Division to enforce and ensure compliance with the Cooperative Act, Chapter 719, Florida Statutes, and rules related to that chapter.

40. Subsection 719.501(1), Florida Statutes, which enumerates the Division's powers and duties, provides, in pertinent part, the following:

(1) . . . In performing its duties, the [D]ivision shall have the following powers and duties:

* * *

4. The division may impose a civil penalty against a developer or association, or its assignees or agents, for any violation of this chapter or related rule. . . A penalty may be imposed on the basis of each day of continuing violation, but in no event shall the penalty for any offense exceed \$5,000. By January 1, 1998, the division shall adopt, by rule, penalty guidelines applicable to possible violations or to categories of violations of this chapter or rules adopted by the division. The guidelines must specify a meaningful range of civil penalties for each such violation of the statute and rules and must be based upon the harm caused by the violation, the repetition of the violation, and upon such other factors deemed relevant by the division. For example, the division may consider whether the violations were committed by a developer or owner-controlled association, the size of the association, and other factors. . . It is the legislative intent that minor violations be distinguished from those which endanger the health, safety, or welfare of the cooperative residents or other persons and that such guidelines provide reasonable and meaningful notice to the public of likely penalties that may be imposed for proscribed conduct

41. In this case, the Division alleged that the Association violated Subsection 719.104(3), Florida Statutes, by

failing to use its "best efforts" to "obtain and maintain adequate insurance to protect Association property." The Division appears to contend that adequate insurance for the Association's property is casualty insurance, including windstorm coverage.

(3) INSURANCE.--The association shall use its best efforts to obtain and maintain adequate insurance to protect the association property. The association may also obtain and maintain liability insurance for directors and officers, insurance for the benefit of association employees, and flood insurance. A copy of each policy of insurance in effect shall be made available for inspection by unit owners at reasonable times.

(a) Windstorm insurance coverage for a group of no fewer than three communities created and operating under chapter 718, this chapter, chapter 720, or chapter 721 may be obtained and maintained for the communities if the insurance coverage is sufficient to cover an amount equal to the probable maximum loss for the communities for a 250-year windstorm event. Such probable maximum loss must be determined through the use of a competent model that has been accepted by the Florida Commission on Hurricane Loss Projection Methodology. Such insurance coverage is deemed adequate windstorm insurance for the purposes of this section.

42. The clear and unambiguous language in Subsection 719.103(3), Florida Statutes, requires the Association to "use its best efforts" to "obtain and maintain" adequate insurance on its property.

43. The term "best efforts" is not defined in Chapter 719, Florida Statutes, or any related chapter, and no court decisions have interpreted Chapter 719, Florida Statutes. However, case law provides some guidance as to what "best efforts" require.

44. In Faith v. Faith, 709 So. 2d 600 (Fla. 3rd DCA 1998), a property settlement agreement clearly contemplated that the former husband would use his best efforts to close a real property transaction. The agreement provided that, "if despite his best efforts and through no fault of his own," the transaction did not close, the settlement agreement would have to be renegotiated. When the former husband went back to the table, the seller raised the price of the property. Based on the increased price, the former husband determined that the deal was not financially viable and, thus, abandoned the deal. The court held that where the independent economic analysis was not contradicted, the husband was not obliged to proceed with the transaction. Id.

45. As noted above, Subsection 719.103(3), Florida Statutes, requires that the Association use its "best efforts" to obtain and maintain adequate insurance to protect its property. That provision is not an absolute and unequivocal mandate that the Association obtain and maintain insurance. For example, Subsection 719.106(1)(k), Florida Statutes, which mandates certain coverage provides:

Bylaws; cooperative ownership.--

(1) MANDATORY PROVISIONS.--The bylaws or other cooperative documents shall provide for the following, and if they do not, they shall be deemed to include the following:

* * *

(k) Insurance or fidelity bonds.--The association shall obtain and maintain adequate insurance or fidelity bonding of all persons who control or disburse funds of the association. The insurance policy or fidelity bond must cover the maximum funds that will be in the custody of the association or its management agent at any one time. As used in this paragraph, the term "persons who control or disburse funds of the association" includes, but is not limited to those individuals authorized to sign checks, and the president, secretary, and treasurer of the association. The association shall bear the cost of bonding and insurance. [Emphasis added]

46. The undisputed evidence established that, at all times relevant hereto: (1) the Association did not have funds to purchase the insurance premiums for casualty insurance; and (2) the unit owners voted against budgets that would provide for such coverage, thereby, indicating that they were unwilling to have their assessments increased.

47. Applying the principle enunciated in Faith, "best efforts" takes into consideration the economic viability of undertaking a course of action. In this case, "best efforts" does not require that the Association purchase an insurance policy at any cost. This is particularly true where, as in this

case, the undisputed evidence established that the Association did not have sufficient financial resources to purchase the casualty insurance with windstorm coverage.

48. The Division contends that the foregoing is the coverage required under Subsection 719.104(3)(a), Florida Statutes.

49. Subsection 719.103(3)(a), Florida Statutes, provides that a group of "no fewer than three communities" created and operated under Chapters 718, 719, 720 or 721, Florida Statutes, may obtain and maintain "windstorm insurance coverage" for those communities and sets the amount of that coverage.⁸ This provision does not mandate that windstorm insurance be obtained and maintained; it merely authorizes the designated number of communities to join forces to purchase and maintain windstorm insurance coverage for their communities. Chapter 719, Florida Statutes, includes numerous provisions which require associations to perform certain duties or responsibilities. Several such mandates included in Section 719.104, Florida Statutes, are as follows: (1) Subsection 719.104(2)(a), provides that associations "shall maintain" copies of the certain documents as part of its official records; (2) Subsection 719.104(2)(b), Florida Statutes, provides that official records of associations "shall be maintained within the state" and "shall be made available to unit owners within

5 working day after receipt of written request"; (3) Subsection 719.104(2)(c), Florida Statutes, provides that the official records of the association "shall be open to inspection by any association member"; and (4) Subsection 719.104(4), Florida Statutes, provides that association's board of directors "shall mail or furnish by personal delivery to each unit owner a complete financial report."

50. In this enforcement proceeding, the Division seeks to impose a civil penalty or fine of not more than \$5,000 on Respondent. Such a fine is penal in nature and, thus, to prevail in this enforcement proceeding, the Division must prove the alleged violation by clear and convincing evidence.

51. Clear and convincing evidence has been described by the Supreme Court of Florida as follows:

[C]lear 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.

Inquiry Concerning a Judge No. 93-62, 645 So. 2d 398, 404 (Fla. 1994), quoting Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

52. To prevail, the Division must show by clear and convincing evidence that the Association failed to "use its best efforts" to obtain and maintain adequate insurance to protect the Association's property.

53. The Division did not meet its burden of proof as the evidence did not clearly or convincingly establish the allegation made in the Notice to Show Cause.

RECOMMENDATION

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

RECOMMENDED that Petitioner, Department of Business and Professional Regulation, Division of Florida Land Sales, Condominiums and Mobile Homes, enter a final order: (1) finding that Respondent, Waterfront Park Corporation, did not violate Subsection 793.104(3), Florida Statutes; and (2) rescinding the Notice to Show Cause.

DONE AND ENTERED this 30th day of October, 2009, in
Tallahassee, Leon County, Florida.

Carolyn S. Holifield

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Filed with the Clerk of the
Division of Administrative Hearings
this 30th day of October, 2009.

ENDNOTES

- ^{1/} All statutory references are to Florida Statutes (2008), unless otherwise noted.
- ^{2/} The case was initially assigned to Administrative Law Judge Daniel M. Kilbride, but was transferred to the undersigned on April 16, 2009.
- ^{3/} Respondent filed a Memorandum of Law on April 29, 2009.
- ^{4/} Petitioner indicated that this clarification was written in response to a request by Respondent. In its letter, Petitioner requested that the Administrative Law Judge "accept the clarification that Mr. Kendrick's testimony was that he was aware of an estimate from Citizens in February 2006, but did not receive a firm quote until March 31, 2006." The letter went on to explain that, "[t]his testimony was proffered to explain why Citizens' price quote was not included in the 2006 proposed budget, nor reported to the unit owners at the annual meeting held in January 2006, but for Mr. Kendrick's the limited statement that, [t]he only company that possibly might insure us is Citizens Insurance Co." Finally, the letter requested the correction of a scrivener's error in paragraph 21 of Petitioner's Proposed Recommended Order.

^{5/} This determination and decision were likely impacted by the majority of the Association's members' previous opposition to purchasing insurance coverage that would increase their assessments.

^{6/} The cover letter regarding this quote is mistakenly dated January 21, 2007; the correct date is January 21, 2008.

^{7/} The extensions granted by the Division extended the time to provide proof from September 9, 2008, to September 30, 2008, then to October 15, 2008, and, finally, to November 3, 2008.

^{8/} If windstorm insurance coverage is obtained under this provision, the coverage must be "sufficient to cover an amount equal to the probable maximum loss for the communities for a 250-year windstorm event."

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.