STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SABAL PALM CONDOMINIUMS OF PINE ISLAND RIDGE ASSOCIATION, INC., ON ITS OWN BEHALF, AND ON BEHALF OF ALL OWNERS OF CONDOMINIUMS ONE THROUGH AND INCLUDING ELEVEN OF SABAL PALM CONDOMINIUMS OF PINE ISLAND RIDGE,

Petitioner,

vs. Case No. 12-2812RP

DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, DIVISION OF FLORIDA CONDOMINIUMS, TIMESHARES AND MOBILE HOMES,

Respondent.
_____/

FINAL ORDER

An administrative hearing in this case was held on November 20, 2013, in Tallahassee, Florida, before Administrative Law Judge William F. Quattlebaum, Division of Administrative Hearings.

APPEARANCES

For Petitioner: Christopher M. Trapani, Esquire
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For Respondent: Ian Brown, Esquire
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STATEMENT OF THE ISSUES

The issues in this case are: 1) whether the abatement of certain requests for arbitration filed by the Petitioner constitutes a "rule" that must be adopted by the Respondent; and 2) whether Proposed Florida Administrative Code Rules 61B-45.0365, 61B-50.1265 and 61B-80.1165 are invalid exercises of delegated legislative authority.

PRELIMINARY STATEMENT

The Florida Department of Business and Professional Regulation, Division of Florida Condominiums, Timeshares, and Mobile Homes (Respondent), has proposed to adopt rules related to abatement of certain requests for arbitration. On August 16, 2012, the Sabal Palms Condominiums of Pine Island Ridge Association, Inc., on its own behalf and on behalf of all Owners of Condominiums One through and including Eleven of Sabal Palms Condominiums of Pine Island Ridge (Petitioner), filed a Petition for Administrative Determination of Invalidity of Proposed Rules.

On August 20, 2012, a Notice of Hearing was issued scheduling the administrative hearing to commence on September 21, 2012.

On September 6, 2012, the Petitioner filed a Motion to Amend Petition and Motion for Continuance. On September 10, 2012, the Petitioner filed an Amended Motion to Amend Petition and Motion for Continuance. Without objection, the motions were granted by an Order dated September 11, 2012, and the hearing was rescheduled to commence on December 4, 2012.

On November 8, 2012, the Petitioner filed an Unopposed Motion for Continuance. The motion was granted by an Order dated November 15, 2012, and the hearing was rescheduled to commence on April 2, 2013.

On February 28, 2013, the Petitioner filed an Unopposed Motion for Continuance. The motion was granted by an Order dated March 12, 2013, and the hearing was rescheduled to commence on June 6, 2013.

On May 8, 2013, the Respondent filed an Unopposed Motion for Continuance. The motion was granted by an Order dated May 15, 2013, and the hearing was rescheduled to commence on August 21, 2013.

On July 26, 2013, the Petitioner filed an Unopposed Motion for Continuance. The motion was granted by an Order dated July 26, 2013, and the hearing was rescheduled to commence on November 20, 2013.

On November 4, 2013, the parties filed a Pre-Hearing Stipulation containing a Statement of Admitted Facts. The

stipulated facts have been adopted and are incorporated herein as necessary.

On November 8, 2013, the Petitioner filed a Motion for Continuance. On November 12, 2013, the Respondent filed a response in opposition to the motion, and the motion was denied by an Order entered on that date.

At the hearing, the Petitioner presented the testimony of one witness and had Exhibits numbered 1 through 24 admitted into evidence.[1/] The Respondent presented the testimony of one witness and had Exhibits numbered 1 through 4 admitted into evidence.

The Transcript of the hearing was filed on December 16, 2013.

On December 19, 2013, the Respondent filed a Joint Motion for Extension of Time to File Proposed Final Orders on behalf of both parties seeking to extend the deadline for filing proposed orders to January 20, 2014, and the request was granted.

On January 17, 2014, the Petitioner filed an unopposed Motion for Extension of Time to File Proposed Final Order seeking to extend the filing deadline to January 27, 2014, and the request was granted.

On January 27, 2014, the Respondent filed a Motion for Attorney's Fees pursuant to section 120.595, Florida Statutes (2013).[2/] On the same date, both parties filed Proposed Final

Orders that have been considered in the preparation of this Order.

On February 11, 2014, the Petitioner filed a Notice of Filing Exceptions to Respondent's Proposed Final Order. On February 12, 2014, the Respondent filed a Motion to Strike the Petitioner's Exceptions, and the motion was granted by an Order issued on that date.

FINDINGS OF FACT

1. The Petitioner is a "condominium association" as defined by section 718.103(2), Florida Statutes.

2. The Petitioner is responsible for the administration, maintenance, management and operation of common elements and other condominium property identified as Condominiums One through and including Eleven of the Sabal Palm Condominiums of Pine Island Ridge, which are residential condominiums located in Broward County, Florida.

3. The Respondent is the state agency charged with enforcing the requirements set forth in chapter 718 (the Florida Condominium Act) and related administrative rules.

4. The Petitioner's Declaration of Condominium prohibits owners from keeping "any pet" in an apartment, other than as provided under rules adopted by the Petitioner.

5. The Petitioner's Rules and Regulations state as follows: "[N]o owners are permitted pets without prior written consent of

the Board of Directors, other than a cat and/or fish. Permission will not be granted for any pet which weighs more than twenty (20) pounds at maturity. No lessee is allowed to keep pets except for one cat and/or fish."

6. The Petitioner's Rules and Regulations further state that "dogs are not permitted unless 'grandfathered' or [with] prior approval by the Board of Directors."

7. Disputes occur between the Petitioner's Board of Directors (board) and condominium apartment owners (owners) related to pets prohibited under the aforementioned rules.

8. Pursuant to section 718.1255, the board is required to submit a request for non-binding arbitration by the Respondent prior to pursuing litigation in court to force compliance by an owner with established condominium restrictions.

9. The Petitioner regularly files requests for arbitration with the Respondent, accompanied by a $50 filing fee.

10. The Respondent employs Florida Bar licensed attorneys on a full-time basis as arbitrators.

11. The purpose of the arbitration program is to address the financial disadvantage owners face when involved in litigation with condominium associations. Section 718.1255(3) provides as follows:

> LEGISLATIVE FINDINGS.--
>
> (a) The Legislature finds that unit owners are frequently at a disadvantage when litigating against an association. Specifically, a condominium association, with its statutory assessment authority, is often more able to bear the costs and expenses of litigation than the unit owner who must rely on his or her own financial resources to satisfy the costs of litigation against the association.
>
> (b) The Legislature finds that alternative dispute resolution has been making progress in reducing court dockets and trials and in offering a more efficient, cost-effective option to court litigation. However, the Legislature also finds that alternative dispute resolution should not be used as a mechanism to encourage the filing of frivolous or nuisance suits.
>
> (c) There exists a need to develop a flexible means of alternative dispute resolution that directs disputes to the most efficient means of resolution.
>
> (d) The high cost and significant delay of circuit court litigation faced by unit owners in the state can be alleviated by requiring nonbinding arbitration and mediation in appropriate cases, thereby reducing delay and attorney's fees while preserving the right of either party to have its case heard by a jury, if applicable, in a court of law.

12. Arbitration is a quasi-judicial proceeding. Parties may agree to be bound by the written decision issued by an arbitrator.

13. Arbitrators have the ability to issue subpoenas, permit discovery, and impose reasonable sanctions for violations of

procedural rules or the failure to comply with certain orders issued by an arbitrator.

14. If neither party files a complaint for trial de novo in a court of competent jurisdiction within 30 days of an arbitrator's decision, the arbitration decision is final. Either party can enforce the decision by filing a petition in a court of competent jurisdiction after the 30 days have passed.

15. Upon receipt of a request for arbitration, the assigned arbitrator reviews the request for arbitration to determine compliance with statutory filing requirements. Such requirements include prior notice to the owner allegedly in violation of the condominium restrictions, an opportunity to correct the alleged violation, and notice that litigation will commence if the alleged violation is not corrected. If the requirements are not met, the arbitration request is dismissed without prejudice. If the requirements are met, the Respondent provides a copy of the arbitration request to the offending owner, and the owner is required to respond to the alleged violations.

16. Violations of pet restrictions are commonly submitted for arbitration, and, on occasion, an owner may defend a disputed pet by asserting that the pet is "medically necessary" and/or that a complaint has been, or will be, filed under an applicable Fair Housing Act.

17. Fair housing laws essentially provide that it is unlawful to discriminate against any person in the provision of services or facilities in connection with his or her dwelling because of a handicap. Such discrimination includes refusal to make reasonable accommodations to rules or policies when such accommodations may be necessary to provide a handicapped person equal opportunity to use and enjoy a dwelling.

18. Courts have deemed reasonable accommodations to include trained service animals and emotional support animals in cases litigated under fair housing laws.

19. A variety of governmental agencies, including the Florida Commission on Human Relations, have statutory jurisdiction over disputes related to protections provided by applicable fair housing laws.

20. The Respondent lacks subject matter jurisdiction to arbitrate issues governed by fair housing laws.

21. When an owner indicates that the pet is, or will be, the subject of a fair housing complaint, the Respondent's arbitrators have issued orders requiring owners to demonstrate that such a complaint has been filed. If the owner fails to comply with the order by a time certain, the owner is deemed to have waived the opportunity to present such a defense.

22. If the owner demonstrates that the fair housing complaint has been filed, the Respondent's arbitrators have sua

sponte issued orders under various titles (hereinafter Abatement Orders) that delay arbitration until the pet issue is resolved by an appropriate agency.

23. Either party may provide notice of the resolution to the arbitrator after the fair housing complaint is resolved. The case may or may not proceed to arbitration, depending on the disposition of the fair housing complaint and whether there are disputed issues remaining for arbitration.

24. The routine practice of abating such arbitration requests commenced in 2005 and has continued through the date of the hearing.

25. The Abatement Orders issued by the Respondent's arbitrators cite no specific rule or legal authority for the decision to abate a case.

26. According to 2009-2010 email records, the Respondent's arbitrators have considered standardization of a procedural order to address abatement of fair housing cases; however, arbitrators are not required to use a specific standard order in abating a request for arbitration.

27. The Petitioner asserts that the Respondent has no authority to delay arbitration for resolution of a fair housing complaint, and that arbitrators should sever fair housing issues from non-fair housing issues and immediately proceed to arbitration.

28. The Petitioner has failed to present any credible evidence of injury caused by abatement of an arbitration so as to permit an appropriate governmental agency to address an alleged violation of fair housing protections.

29. The Respondent has not adopted rules expressly authorizing the abatement of an arbitration proceeding.

30. By letter dated February 9, 2012, the Petitioner notified the Respondent that it considered the practice of issuing Abatement Orders to be an unadopted rule, and that the Petitioner would file a petition for administrative hearing unless the Respondent commenced rulemaking proceedings. A draft of the proposed petition was included with the letter.

31. During this proceeding, the Respondent has asserted that the inherent ability of an arbitrator to issue an Abatement Order is within the authority of an arbitrator to manage a case; however, by letter dated February 24, 2012, the Respondent notified the Petitioner that, after reviewing the draft petition, the Respondent had decided to initiate rule development.

32. By letter dated March 1, 2012, the Petitioner notified the Respondent that the Petitioner would challenge any proposed rule that would authorize the Respondent to "temporarily or indefinitely" delay a request for arbitration as beyond the statutory authority granted to the Respondent by the Florida Condominium Act.

33. Section 718.1255 requires that the Respondent adopt rules of procedure to govern arbitration hearings. The Respondent has adopted such rules of procedure in Florida Administrative Code Chapters 61B-45, 61B-50 and 61B-80.

34. On March 9, 2012, the Respondent commenced development of the proposed rules at issue in this proceeding. The Petitioner has participated in the rulemaking process.

35. On March 16, 2012, the Respondent published Notices of Development of Proposed Rules 61B-45.0365, 61B-50.1265, and 61B-80.1165.

36. On July 27, 2012, the Respondent published Notice of Proposed Rules 61B-50.1265 and 61B-80.1165, which essentially relate to requests for arbitration related to board election disputes or recall of elected board members.

37. On August 24, 2012, the Respondent published Notice of Development of Proposed Rule 61B-45.0365, which relates to all requests for mandatory non-binding arbitration pursuant to section 718.1255.

38. On September 14, 2012, a Notice of Change was published, amending the text of the three proposed rules to provide as follows:

> (1) The presiding arbitrator before whom a case is pending may issue any orders necessary to effectuate discovery, to prevent delay, and to promote the just, speedy, and

inexpensive determination of all aspects of the case.

(2) When a case is placed in abeyance or abated by a non-final order, no filing fee is necessary to re-open the case or otherwise proceed with this matter.

39. The evidence fails to establish that the proposed rules are an invalid exercise of delegated legislative authority.

CONCLUSIONS OF LAW

40. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this proceeding. § 120.56, Fla. Stat.

41. Section 120.56(1) provides that any person substantially affected by a rule or a proposed rule may seek an administrative determination that the rule is an invalid exercise of delegated legislative authority. In order to establish that it has been "substantially affected," the Petitioner must establish: (1) a real and sufficiently immediate injury in fact; and (2) that the alleged interest is arguably within the zone of interest to be protected or regulated. Ward v. Bd. of Trs. of the Int. Imp. Trust Fund, 651 So. 2d 1236 (Fla. 4th DCA 1995). The Petitioner has failed to establish that it is a "substantially affected" party and lacks standing to challenge the "non-rule" abatement of cases or the proposed rules referenced herein.

42. The Petitioner has failed to establish that the issuance of Abatement Orders by the Respondent's arbitrators (whether or not such orders are within the inherent authority of an arbitrator) cause the Petitioner any injury.

43. The Petitioner has failed to establish that it is disadvantaged or injured in any appreciable way by the abatement of requests for arbitration pending the resolution of fair housing complaints by the appropriate agency, whether or not such abatements are pursuant to a rule.

44. The Petitioner asserts that the Respondent's sua sponte entry of Abatement Orders without providing an opportunity for the Petitioner to object is unfair and that, because the Abatement Orders are non-final, the Petitioner is precluded from seeking judicial review of such orders. The assertions do not rise to the level of the "real and sufficiently immediate injury in fact" required to establish standing in this case.

45. The Petitioner has asserted that Respondent's abatement of arbitration requests constitutes a "rule" that must be adopted through rulemaking. In response, the Respondent commenced proceedings to adopt applicable rules. Notwithstanding the proposed rules, the Respondent has asserted during this proceeding that an arbitrator has the inherent authority to issue Abatement Orders and that the action does not require rulemaking.

46. The issuance of an Abatement Order in a case commencing with a board's request for arbitration relating to a fair housing complaint does not constitute a "rule," and the practice is not invalid based on the absence of a properly adopted rule.

47. Section 120.52(16) provides, in relevant part, as follows:

> "Rule" means each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency and includes any form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule. The term also includes the amendment or repeal of a rule.

48. A rule is an agency statement that requires compliance, creates certain rights while adversely affecting others, or otherwise has the direct and consistent effect of law. Volusia Cnty. Sch. Bd. v. Volusia Homes Builders Ass'n, 946 So. 2d 1084, 1089 (Fla. 5th DCA 2006).

49. The Abatement Orders at issue in this proceeding are nothing more than procedural orders entered to facilitate the resolution of fair housing issues by appropriate agencies. The Abatement Orders create no rights, adversely affect no party, and do not have the direct and consistent effect of law. Not every activity of an administrative agency is controlled by the Florida Administrative Procedures Act. Dep't of Transp. v. Blackhawk

Quarry Co. of Fla., Inc., 528 So. 2d 447, 449 (Fla. 5th DCA 1988).

50. In response to the Petitioner's letter dated February 9, 2012, the Respondent commenced proceedings to adopt rules supporting the issuance of Abatement Orders. The Petitioner has asserted that the proposed rules identified herein are an invalid exercise of delegated legislative authority. Section 120.52(8) provides the following relevant definition:

> "Invalid exercise of delegated legislative authority" means action that goes beyond the powers, functions, and duties delegated by the Legislature. A proposed or existing rule is an invalid exercise of delegated legislative authority if any one of the following applies:
>
> (a) The agency has materially failed to follow the applicable rulemaking procedures or requirements set forth in this chapter;
>
> (b) The agency has exceeded its grant of rulemaking authority, citation to which is required by s. 120.54(3)(a)1.;
>
> (c) The rule enlarges, modifies, or contravenes the specific provisions of law implemented, citation to which is required by s. 120.54(3)(a)1.;
>
> (d) The rule is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency;
>
> (e) The rule is arbitrary or capricious. A rule is arbitrary if it is not supported by logic or the necessary facts; a rule is capricious if it is adopted without thought or reason or is irrational; or

> (f) The rule imposes regulatory costs on the regulated person, county, or city which could be reduced by the adoption of less costly alternatives that substantially accomplish the statutory objectives.
>
> A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement or interpret the specific powers and duties granted by the enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious or is within the agency's class of powers and duties, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than implementing or interpreting the specific powers and duties conferred by the enabling statute.

51. The Petitioner has failed to establish that it has been affected by the Respondent's proposed rules 61B-50.1265 and 61B-80.1165 in any manner whatsoever.

52. As to proposed rule 61B-45.0365, the evidence fails to establish: that the Respondent has materially failed to follow applicable rulemaking procedures; that the proposed rules enlarge, modify, or contravene the specific provisions of law implemented; that the rules are vague, fail to establish adequate standards for agency decisions, or vest unbridled discretion in the agency; or that the rules are arbitrary or capricious. There

is no evidence that the rules impose regulatory costs on any regulated person.

53. Finally, the evidence fails to establish that the proposed rules exceed the Respondent's rulemaking authority. The authority for rulemaking cited in the proposed rules is section 718.1255(4), which requires the Respondent to adopt rules of procedure to govern arbitration hearings.

54. The proposed rules identify sections 718.1255(3)(c) and 718.1255(4) as the law implemented. Section 718.1255(3)(c) establishes the "need to develop a flexible means of alternative dispute resolution that directs disputes to the most efficient means of resolution."

55. The Respondent has no statutory authority to arbitrate issues presented by fair housing claims. The Respondent's abatement of such arbitration requests, and its deference to appropriate other agencies, directs such disputes "to the most efficient means of resolution."

56. The Petitioner suggests that the Respondent should sever fair housing issues from requests for arbitration and immediately proceed to arbitrate whatever issues remain. Such a process would be innately inefficient. It would require an owner to simultaneously defend against a board in two separate actions and would require a second arbitration if the fair housing complaint was ultimately determined to be unfounded. Such a

process would be contrary to the Legislature's stated intent that the dispute resolution process be designed to remedy the disadvantage of an owner in litigating against an association.

ORDER

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

1. The Amended Petition for Administrative Determination of Invalidity of Proposed Rules filed by the Petitioner in this case is hereby DISMISSED.

2. Jurisdiction is reserved to consider the Respondent's Motion for Attorney's Fees (Motion). The Petitioner is directed to file a response to the Motion within 30 days from the date of this Final Order. Failure to file a response will be deemed to indicate that the Petitioner concurs with the Motion and will result, without further notice, in entry of an order granting the Motion.

DONE AND ORDERED this 10th day of March, 2014, in Tallahassee, Leon County, Florida.

William F. Quattlebaum

WILLIAM F. QUATTLEBAUM
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 10th day of March, 2014.

ENDNOTES

[1/] Copies of the Petitioner's Exhibits 22 through 24 were not submitted during the hearing. Exhibit 22 was identified as all exhibits attached to the Amended Petition. Exhibit 23 was identified as chapter 718, Florida Statutes. Exhibit 24 was identified as Florida Administrative Code Chapters 61B-45, 61B-50 and 61B-80.

[2/] Unless otherwise noted, all statutory references are to Florida Statutes (2013).

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NOTICE OF RIGHT TO JUDICIAL REVIEW

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 Rules of Appellate Procedure. Such proceedings are commenced by filing the original notice of administrative appeal with the agency clerk of the Division of Administrative Hearings within 30 days of rendition of the order to be reviewed, and a copy of the notice, accompanied by any filing fees prescribed by law, with the clerk of the District Court of Appeal in the appellate district where the agency maintains its headquarters or where a party resides or as otherwise provided by law.