

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JOHN R. WHITT AND KIMBERLY
WHITT,

Petitioners,

vs.

Case No. 14-4847

BAYHEAD LANDINGS PROPERTY OWNERS
ASSOCIATION, INC.,

Respondent.

_____/
DANIEL J. DICIOLLA, AUDIE G.
CHILDERS, LYNN ELROD CHILDERS,
ROBERT MCCASKILL, AND SARAH
MCCASKILL,

Petitioners,

vs.

Case No. 14-4848

BAYHEAD LANDINGS PROPERTY OWNERS
ASSOCIATION, INC.,

Respondent.

_____ /

RECOMMENDED ORDER

A final hearing was held in this matter before Robert S.
Cohen, Administrative Law Judge with the Division of
Administrative Hearings, on January 14, 2015, in New Port Richey,
Florida.

APPEARANCES

For Petitioners: Barbara Billiot Stage, Esquire
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Orlando, Florida 32835

For Respondent: Gary M. Schaaf, Esquire
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STATEMENT OF THE ISSUE

The issue is whether Respondent homeowners' association properly revived its expired Declaration of Covenants, Conditions, and Restrictions in accordance with sections 720.403-720.407, Florida Statutes.

PRELIMINARY STATEMENT

Petitioners, Daniel J. DiCiolla, Audie G. Childers, Lynn Elrod Childers, Robert McCaskill, and Sarah McCaskill, filed their Amended Petition for Administrative Proceedings in this matter on October 3, 2014. Petitioners, John R. Whitt and Kimberly Whitt, filed their Amended Petition for Administrative Proceedings in this matter on October 7, 2014. The two Petitions were consolidated by Order of Consolidation entered October 28, 2014.

The final administrative hearing was held on January 14, 2015. At the hearing, Petitioners presented the testimony of Daniel J. DiCiolla as its sole witness. Respondent presented the

testimony of Gary Yates and Margaret Costa as witnesses. The parties offered into evidence Exhibits 1 through 9, 11 through 14, 16 through 22, 24 and 25, all of which were admitted.

A one-volume Transcript was filed on February 10, 2015. Petitioners and Respondent filed their proposed findings of fact and conclusions of law on February 20, 2015.

References to statutes are to Florida Statutes (2014) unless otherwise noted.

FINDINGS OF FACT

1. Petitioners own residential properties in Bayhead Landings community (the "Community").

2. Petitioners are members of Respondent, Bayhead Landings Property Owners Association, Inc. (the "Association").

3. The Association has historically operated and governed the Community.

4. The Declaration of Covenants, Conditions, and Restrictions of the Association (the "Declaration"), by its terms, provided that it would expire at the end of 2010, unless it was renewed in accordance with its terms.

5. Because the Declaration was to expire, by its terms, at the end of 2010, the Association attempted to preserve the Declaration, prior to its expiration, on more than one occasion, the last of which was in the latter part of 2010.

6. At that time, a membership vote to approve the preservation was conducted by written consents, pursuant to chapter 617, Florida Statutes. The membership vote resulted in 41 votes in favor and zero votes against preserving the Declaration, with six abstentions or non-votes.

7. In the fall of 2013, Petitioners in this consolidated matter, with the exception of the Whitts, commenced a suit against the Association, seeking to invalidate the 2010 preservation and seeking a determination that the Declaration had expired, by its terms, and become void on December 31, 2010 (the "Declaratory Suit"). While the Whitts were not plaintiffs in the Declaratory Suit, they were parties to the pre-suit mediation demand and took part in the pre-suit mediation, prior to the filing of the Declaratory Suit.

8. In their Petitions and in testimony at the final hearing in this matter by Petitioner, Daniel J. DiCiolla, Petitioners have continued to assert that the Declaration had expired and become void on December 31, 2010.

9. In early 2014, the plaintiffs in the Declaratory Suit filed a motion for summary judgment, based on several arguments, one of which was that the Association had improperly conducted the 2010 preservation vote by written consent, instead of voting in person or by proxy at a duly noticed meeting.

10. At the March 17, 2014, hearing on the Plaintiffs' Motion for Summary Judgment, plaintiffs' counsel, who is also the Petitioners' counsel in this proceeding, argued that the Declarations "weren't preserved" and that if the Association wanted to protect the property, it could always revitalize the Declaration.

11. The court in the Declaratory Suit, by final judgment dated March 24, 2014, granted summary judgment in favor of the plaintiffs, holding that the 2010 preservation vote, because it was conducted by written consent, had been ineffective, and that the Declaration was therefore void, as of its expiration date on December 31, 2010. As of January 1, 2011, the Declarations were declared expired by the Pasco County Court in case number 2013-CC-003057.

12. On April 2, 2014, the Association appealed the final judgment on various grounds.

13. The trial court, on May 15, 2014, entered an order staying the effect of the final judgment pending the appeal (the "Stay Order").

14. The Stay Order was thereafter amended, on June 12, 2014 (the "Amended Stay Order"), to allow members, instead of paying their assessments to the Association, to pay such assessments to the escrow account of plaintiffs' counsel, who is also counsel for Petitioners in this matter.

15. The Association, prior to the Declaratory Suit, had incurred substantial legal costs in successfully defending two pieces of litigation.

16. The Amended Stay Order, while providing that the Association could petition for the release of assessments paid into the escrow account held by plaintiffs' counsel, provided, in paragraph 6, that no such funds could be released for payment of the Association's past legal fees.

17. The entry of the summary judgment and the Stay Order created confusion among the membership, as a result of which many members believed they had no continuing obligation to pay their assessments, and made no such payments.

18. While the appeal was pending, the Association took steps to revive the Declaration, pursuant to sections 720.403-720.407, Florida Statutes.

19. The Board of Directors (the "Board") for the Association appointed a committee (the "Organizing Committee") to administer the revival of the Declaration. The appointment of the Organizing Committee was published to the membership of the Association at the annual members meeting held on May 10, 2014.

20. Petitioners, Audie Childers and Daniel J. DiCiolla, were present at the May 10, 2014, annual members meeting at which the appointment of the Organizing Committee was announced to the membership.

21. The Organizing Committee had no formal meetings, but met in a series of work sessions at which administrative functions, such as stuffing and placing postage on envelopes, making copies, mailing out letters, receiving letters, and counting ballots, were performed. Notice of these sessions was not provided to the members of the Association.

22. The Organizing Committee never held a meeting at which a final decision was made regarding the expenditure of Association funds, and the Organizing Committee was never vested with the power to approve or disapprove architectural decisions with respect to a specific parcel of residential property owned by a member of the Community.

23. In its effort to revive the Declaration, the Association obtained a majority vote of the membership in favor of revival, consisting of 26 affirmative votes, in accordance with section 720.405(6). The revival vote was conducted by written consent, in accordance with section 720.405(6).

24. The revived Declaration was approved by the Florida Department of Economic Opportunity, by letter to the Association dated August 21, 2014.

25. Once the revival was complete, the Association dismissed the appeal. Plaintiffs' motion for attorney's fees and costs remained for determination by the appellate court at the time of this hearing.

26. The parcel owners of real property governed by Respondent are still subject to the stay and required to pay assessments and otherwise comply with the Declaration.

27. The Bylaws governing Respondent were at all times in full force and effect, and the ruling in the Pasco County Court case did not invalidate the Bylaws.

28. The Bylaws were written in 1990 before chapter 617, Florida Statutes, was revised to allow not-for-profit corporations to use written consents, and provided that the only method allowed for the membership to vote was either in person or by proxy at a duly noticed meeting.

29. The Declaration and Bylaws were written and recorded in 1990, before sections 720.403-720.407 were enacted in 2004.

30. Petitioners were at no time opposed to the preservation of the Declaration or the revival of the Declaration.

31. Petitioners introduced no evidence in support of any damages suffered as a result of the Declaration being revived.

CONCLUSIONS OF LAW

32. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this proceeding. §§ 120.569 and 120.57(1), Fla. Stat.

33. Petitioners have the burden of proving by a preponderance of the evidence their claim for relief in this

matter. See Fla. Dep't of Transp. v. J.W.C. Co., Inc., 396 So. 2d 778 (Fla. 1st DCA 1981).

34. By final judgment entered on March 24, 2014, the county court found that the Declaration is void and that the Declaration had expired as of the date of its termination, December 31, 2010. Section 720.403(1), Florida Statutes (2010), provides:

Consistent with required and optional elements of local comprehensive plans and other applicable provisions of the Local Government Comprehensive Planning and Land Development Regulation Act, homeowners are encouraged to preserve existing residential communities, promote available and affordable housing, protect structural and aesthetic elements of their residential community, and, as applicable, maintain roads and streets, easements, water and sewer systems, utilities, drainage improvements, conservation and open areas, recreational amenities, and other infrastructure and common areas that serve and support the residential community by the revival of a previous declaration of covenants and other governing documents that may have ceased to govern some or all parcels in the community.

35. The above-quoted provision comes into play when, such as here, the Declaration has expired or "ceased to govern" all or some parcels in a community. There is no dispute among the parties to this case that the Declaration expired December 31, 2010, and no longer existed on January 1, 2011. As explicitly stated by the county court, the Declaration no longer governed the Association after December 31, 2010.

36. Because an appeal of its final judgment was taken, the county court entered a stay (which it later amended) of the effect of the judgment. This stay imposed certain requirements on the landowners such as the process for payment of assessments into escrow rather than to the Association where some bitter feelings and distrust had arisen, and the effect on a landowner who refused to pay assessments (a lien would attach to the property). The stay did not undo, nor could it have undone, the expiration of the Declaration which occurred, by operation of law on December 31, 2010. In the final judgment entered on March 24, 2014, the court specifically held that the Declaration had expired.

37. The Stay Order, as amended, provided that the Association could petition the court for release of escrowed funds, as needed to fund its debt obligations, including its legal costs, but specifically prohibited the Association from seeking funds to pay for legal fees incurred in defending the litigation that had just concluded. This led to the imposition of special assessments for attorney's fees.

38. By virtue of the final judgment and Amended Stay Order, the Association was not able to govern the Community in accordance with the terms of the Declaration. By not allowing the Association to assess all the funds required to pay its debts, primarily those associated with litigation, the Amended

Stay Order further made any claim that the Declaration was still in force and effect meaningless.

39. Without question, the Declaration had "ceased to govern some or all parcels in the community," thus triggering the opportunity to revive the declaration of covenants as set forth in statute. § 720.403(1), Fla. Stat. Therefore, even though the Amended Stay Order provided that the Declaration remained in full force and effect, in fact it did not.

40. Further, since the Amended Stay Order, by its terms, only had effect "pending the outcome of the Defendant's appeal to the Sixth Judicial Circuit Court," which the Association could dismiss at any time, the Amended Stay Order, by its unambiguous terms, terminated upon the Association's dismissal of the appeal.

41. Petitioners at all times took the position that the Declaration expired on December 31, 2010. They cannot recognize and accept the expiration, yet now attempt to argue the Declaration is somehow still in full force and effect when it suits their needs.

42. Petitioners presented no evidence at final hearing that they were in any way prejudiced by the revival having been obtained while the Amended Stay Order was in place. Mr. DiCiolla testified on behalf of Petitioners that he and all owners supported the preservation and that Petitioners would not have

stood in the way if the Association had undertaken the revival without first filing its appeal.

43. Regardless of Petitioners' stance regarding the need for revival, they continued to pursue this matter to have the efforts of the Association rendered null and void. Requiring the Association to again revive the Declaration would place form over substance and serve no legitimate interest other than chalking up a technical victory for Petitioners over the Association. Requiring the Association to again revive the Declaration would result in additional costs to the Association, and require many of its members to expend additional time performing the menial tasks associated with revival, such as preparing the documents, mailing the notices, conducting meetings, and tallying the results, and to what end? As set forth above, section 720.403(1) encourages communities and homeowners' associations "to preserve existing communities" through the revival process. The actions taken by Petitioners in this case thwart this explicit expression of legislative intent.

44. Petitioners' argument that the majority vote of the Association members in favor of revival was invalid, since the vote was conducted by written consents rather than voting in person or by proxy at a meeting, as provided in the Bylaws of the Association, is not supported by the facts or law of this case. Section 720.405(6) expressly provides, as its primary option, for

agreement in writing to obtain approval of the community for the "revived declaration of covenants and governing documents of the homeowners' association." This directly counters Petitioners' argument that the revival could only occur through votes made or proxies received at a duly noticed meeting of the Association. The voting provision in the Bylaws of the Association only refers to how votes are to be taken when a meeting is held, not, as here, when invoking the prescribed terms of the statute for consent of the membership.

45. Petitioners argue that 75 percent of the membership must vote to revive since that is provided in the Declaration. However, the statute requires that a simple majority of the membership is sufficient for revival. § 720.405(6), Fla. Stat. Moreover, since the Declaration had expired at the time of the revival, no conflict exists between the statute and the then-expired Declaration. Finally, the 75-percent vote provision contained in the Declaration addressed the issue of preservation, not revival pursuant to the statute. Petitioners' argument is, therefore, not valid.

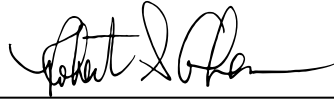
46. Petitioners' final argument is that the revival was invalid because no proper notice was given of either the formation of the Organizing Committee, which was formed by the Board, or the meetings at which the Organizing Committee members performed the various administrative duties leading to the

revival of the Declaration. Specifically, the Association's Board appointed the Organizing Committee to administer the revival. This was memorialized in a letter as provided for in Section 3.7 of the Association's Bylaws, and announced at a duly noticed annual members meeting, held on May 10, 2014, at which Petitioners Audie Childers and Daniel J. DiCiolla were present. Notice was not required pursuant to section 720.303(2)(a) since the only functions performed at these "meetings" were administrative, such as preparing flyers, making copies, stuffing, stamping, and addressing envelopes, mailing letters, receiving and opening the mail, and counting ballots. None of the duties for which notice of a meeting is required was performed by the Organizing Committee at these informal work sessions.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Economic Opportunity enter a final order dismissing the Petitions and affirming its approval of Respondent's revival.

DONE AND ENTERED this 1st day of April, 2015, in
Tallahassee, Leon County, Florida.



ROBERT S. COHEN
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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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.