STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JONATHAN YOUNG AND LORETTA SHIRLEY,

Petitioners,

vs. Case No. 18-5291

SPRINGLAKE-NORTHWOOD HOMEOWNERS ASSOCIATION, INC., AND ITS BOARD OF DIRECTORS AND DEPARTMENT OF ECONOMIC OPPORTUNITY,

Respondents.
_____/

RECOMMENDED ORDER

On December 7, 2018, Robert E. Meale, Administrative Law Judge of the Division of Administrative Hearings (DOAH), conducted the final hearing by videoconference in Lauderdale Lakes and Tallahassee, Florida.

APPEARANCES

For Petitioner: Jonathan Paul Young, pro se
Loretta Shirley, pro se
9635 Northwest 83rd Street
Tamarac, Florida 33321

For Respondents Springlake-Northwood Homeowners Association, Inc., and its Board of Directors (HOA):

Lauren T. Schwarzfeld, Esquire
Kaye Bender Rembaum, P.L.
1200 Park Central Boulevard South
Pompano Beach, Florida 33064

For Respondent Department of Economic Opportunity (DEO):

Rebekah Davis, Esquire
Department of Economic Opportunity
Mail Station 110
107 East Madison Street
Tallahassee, Florida 32399

STATEMENT OF THE ISSUE

The issue is whether, pursuant to section 720.406(2), Florida Statutes (2018), a revitalization organization committee of HOA (Committee) is entitled to approval from DEO of a proposed revitalization of the declaration of restrictive covenants.

PRELIMINARY STATEMENT

On July 3, 2018, Emily E. Gannon, an attorney, submitted a copy of the proposed Revitalized Amended and Restated Declaration of Restrictions for Springlake-Northwood (Revitalized Declaration), a copy of numerous written consents of lotowners, and other documents. By letter dated August 31, 2018, DEO advised Ms. Gannon that it had determined that the submitted documents comply with the requirements of chapter 720, part III, and DEO approved the proposed Revitalized Declaration. The August 31 letter includes a notice stating that any person whose substantial interests are affected by this determination may obtain an administrative hearing by filing a petition within 21 days of receipt of the determination.

On September 25, 2018, Petitioners filed a Petition for Administrative Hearing (Petition) with a copy to HOA and

Ms. Gannon's law firm. The Petition states that Petitioners learned of the proposed agency action on September 10, 2018, following the receipt of information from DEO pursuant to a public records request submitted on September 4, 2018.

At the hearing, Petitioners called two witnesses and offered into evidence four exhibits: Petitioners Exhibits B, C, H, and I; HOA called four witnesses and offered into evidence five exhibits: HOA Exhibits 1 through 5 (HOA Exhibit 3 is Petitioners Exhibit A); and DEO called no witnesses and offered into evidence one exhibit: DEO Exhibit 1. All exhibits were admitted except Petitioners Exhibits B, H, and I, which were proffered.

The parties did not order a transcript. Petitioners and an unidentified party filed proposed recommended orders on December 17, 2018.

FINDINGS OF FACT

1. In 1978, HLR, Inc., recorded restrictive covenants on 97 lots of a subdivision known as Northwood in Tamarac, Broward County (as amended, Declaration). As authorized by the Declaration, HOA has administered and maintained the common area, including a recreation area and lake that are owned by HOA. By operation of the Marketable Record Title Act, chapter 712, Florida Statutes (MRTA), and the failure of HOA to file timely a notice under section 712.05(2), the Declaration was extinguished

sometime in 2008, and the lots were freed from the restrictive covenants.

2. At some point, Susan DePotter, Phyllis Bonfoey, and Elaine Hidalgo, who are lotowners, formed the Committee to revitalize the Declaration. With the assistance of Ms. Gannon, the Committee prepared the Revitalized Declaration and supporting documents and presented them to the other lotowners for their approval.

3. The Declaration had been amended four times prior to its extinguishment. On December 6, 1989, HOA recorded an unnumbered amendment to the Declaration, which implemented an occupancy requirement that at least 80% of the lots be occupied by at least one person at least 55 years old, an occupancy prohibition against permanent residents by any person under 16 years old, and a leasing restriction that no lot may be leased without the prior approval of HOA. On January 6, 1990, HOA recorded the fourth amendment to the Declaration, which changed the frequency of payment of lotowners' fees from quarterly to annually. On October 24, 2000, HOA recorded an unnumbered amendment to the Declaration, which changed the office location of HOA. The record does not contain other amendments to the Declaration.

4. The Revised Declaration generally tracks the Declaration. Major changes made by the Revitalized Declaration are the deletion of the above-described provisions of the

amendment recorded on December 6, 1989, although article III, section 3, of the bylaws of HOA submitted to DEO continue to prohibit leasing of a lot without the approval of the HOA board of directors. Minor changes involve the deletion of references to HLR, Inc., whose responsibilities as the developer of Northwood ended many years ago. As provided in the fourth amendment to the Declaration, the Revitalized Declaration continues to require lotowners to pay fees annually, even though, at times since the recording of the fourth amendment, HOA has allowed lotowners to pay fees quarterly.

5. By memorandum mailed to all lotowners on or about February 20, 2018, the Committee enclosed the Revitalized Declaration, articles of incorporation and bylaws for the HOA, and a consent form. The memorandum explains the revitalization process and asks for the written approval of each lotowner to the revitalization. Specifically, the memorandum asks each lotowner to sign and return, starting March 7, 2018, the enclosed consent form to one of the three Committee members, each of whose address and telephone number is listed. Most of the executed consents were signed by May 31, 2018, but about a dozen were signed after May 31, 2018. Each executed consent was returned to one of the three Committee members.

6. The consent forms are straightforward and easy to understand. They include spaces for a signature, date, and

address of the lot owned by the person signing the form, but do not include an acknowledgement.

7. Owners of 58 lots returned signed, unacknowledged consent forms indicating their approval of the Revitalized Declaration. On September 19, 2018, seven owners signed unattested "affidavits" stating that they had signed consent forms, but felt "pressured, coerced, misled, and/or threatened" by other homeowners to do so, although these "affidavits" do not attempt to rescind the previously granted consents.

8. By letter dated July 3, 2018, Ms. Gannon transmitted to DEO a copy of the proposed Revitalized Declaration; a copy of the Declaration; copies of 58 signed consent forms; a notarized affidavit signed by a member of the HOA board of directors, Brian McLaughlin; and a notarized affidavit signed by Ms. Gannon.

9. In Mr. McLaughlin's affidavit, he attests to the following: to the best of his knowledge, the Revitalized Declaration, articles of incorporation, and bylaws are true and correct; to the best of his knowledge, the amendments to the bylaws on seven occasions from 1981 through 1997 have been lost; and, to the best of his knowledge, the submittal satisfies the requirements of section 720.404.

10. In Ms. Gannon's affidavit, she attests:

> [T]o the best of my knowledge, the proposed Revitalized . . . Declaration . . . was approved by at least a majority of the affected parcel owners by Written Consent.
>
> [T]o the best of my knowledge, the enclosed . . . 58 Written Consent Forms are the true and correct copies of the . . . Written Consent Forms that were received by the . . . Committee reflecting consent to the proposed Revitalized . . . Declaration . . . .

11. By letter dated August 31, 2018, DEO approved the proposed Revitalized Declaration. The letter advises that HOA must comply with the requirements of section 720.407(1) through (3), including the recording of the documents described in section 720.407(3), and states that the Revitalized Declaration will become effective upon recording. The second page of the letter is a "Notice of Administrative Rights," which advises that a person "whose substantial interests are affected by this determination has the opportunity for an administrative proceeding pursuant to section 120.569, Florida Statutes." The notice requires that such a person file a petition within 21 calendar days of receipt of the DEO's determination.

12. On September 10, 2018, Petitioners received notice of the proposed approval of the Revitalized Declaration. On September 18, 2018, HOA recorded the Revitalized Declaration. On

September 25, 2018, Petitioners timely filed the Petition challenging the proposed approval of the Revitalized Declaration.

CONCLUSIONS OF LAW

13. DOAH has jurisdiction. §§ 120.569 and 120.57, Fla. Stat. Essentially, DEO has proposed to grant an application submitted by the HOA, and Petitioners have filed the Petition challenging this proposed agency action.

14. The jurisdictional determination is governed by Agrico Chemical Co. v. Department of Environmental Regulation, 406 So. 2d 478 (Fla. 2d DCA 1981), which applies to a third-party challenge to proposed agency action to grant a permit application. Under Agrico, a permit challenger must show that it will suffer an injury in fact of sufficient immediacy to entitle him to a formal hearing and its substantial injury is of a type or nature that the proceeding is designed to protect. Agrico, 406 So. 2d at 482. The injury-in-fact prong is satisfied by "actual or immediate threatened injury at the time the petition was filed." S. J. v. Thomas, 233 So. 3d 490, 499 (Fla. 1st DCA 2017) (citation omitted) (petitioner had already suffered actual injury in the form of a disciplinary school transfer prior to filing petition).

15. Typically, DEO's proposed approval precedes the recording of the revitalized declaration because section 720.407(2) mandates the recording of the revitalized declaration,

after its approval by DEO; in such cases, the alleged injury is immediate and threatened. Where a revitalization committee records a revitalized declaration before the time for filing a request for a hearing and such a request is later filed, the alleged injury is actual, as it is here where Petitioners' interests in their lot have been encumbered by the restrictive covenants contained in the Revitalized Declaration. Petitioners' interests are within the zone of interests protected by chapter 720, part III, which protects the interests of lotowners like Petitioners by requiring the consent of the majority of lotowners to the revitalization and prohibits provisions in the revitalized declaration more restrictive than the provisions in the extinguished declaration.

16. The burden of proving compliance with the statutory requirements for revitalization is on HOA. Dep't of Transp. v. J. W. C., 396 So. 2d 778 (Fla. 1st DCA 1981). The standard of proof is a preponderance of the evidence. § 120.57(1)(j).

17. DEO characterizes as "ministerial" its responsibilities under chapter 720, part III, because, in their simplicity, the applicable conditions do not invite the exercise of agency discretion. These conditions are found in three statutes.

18. Section 720.404 conditions a revitalization of a declaration upon the following:

> (1) All parcels to be governed by the revived declaration must have been once governed by a previous declaration that has ceased to govern some or all of the parcels in the community;
>
> (2) The revived declaration must be approved in the manner provided in s. 720.405(6); and
>
> (3) The revived declaration may not contain covenants that are more restrictive on the parcel owners than the covenants contained in the previous declaration, except that the declaration may:
>
> (a) Have an effective term of longer duration than the term of the previous declaration;
>
> (b) Omit restrictions contained in the previous declaration;
>
> (c) Govern fewer than all of the parcels governed by the previous declaration;
>
> (d) Provide for amendments to the declaration and other governing documents; and
>
> (e) Contain provisions required by this chapter for new declarations that were not contained in the previous declaration.

19. Section 720.405(4) explicitly requires the revitalized declaration to be the same as the declaration as to voting interests, proportional-assessment obligations, and amendment provisions.

20. Section 720.406(1) requires the Committee to submit the revitalization package to DEO within 60 days of receiving the requisite number of consents. The package "must include":

(a) The full text of the proposed revived declaration of covenants and articles of incorporation and bylaws of the homeowners' association;

(b) A verified copy of the previous declaration of covenants and other previous governing documents for the community, including any amendments thereto;

(c) The legal description of each parcel to be subject to the revived declaration and other governing documents and a plat or other graphic depiction of the affected properties in the community;

(d) A verified copy of the written consents of the requisite number of the affected parcel owners approving the revived declaration and other governing documents or, if approval was obtained by a vote at a meeting of affected parcel owners, verified copies of the notice of the meeting, attendance, and voting results;

(e) An affidavit by a current or former officer of the association or by a member of the organizing committee verifying that the requirements for the revived declaration set forth in s. 720.404 have been satisfied; and

(f) Such other documentation that the organizing committee believes is supportive of the policy of preserving the residential community and operating, managing, and maintaining the infrastructure, aesthetic character, and common areas serving the residential community.

21. Petitioners have challenged generally three aspects of the proposed revitalization: 1) the scope of the proposed Revitalized Declaration compared to the Declaration; 2) the

consents; and 3) the role of Ms. Gannon in performing duties of the Committee.

22. In no way is the Revitalized Declaration more restrictive than the Declaration. Section 720.404(3) prohibits covenants in a revitalized declaration that are more restrictive than covenants in the declaration, not more restrictive than practices of a homeowners' association that are more generous than specified by the declaration. The Declaration specifies the payment of fees annually, and so does the Revitalized Declaration. Although the bylaws are more restrictive than the Declaration in requiring the approval of the HOA board of directors for any lease, chapter 720, part III, does not prohibit a more restrictive provision in bylaws than a declaration.

23. Petitioners argued for a deadline within which consents must be filed, but none is contained in chapter 720, part III. The only deadline, which the HOA met, is that the lotowners receive the revitalization package at least 14 days before voting. § 720.405(5).

24. Petitioners claimed that the owners of a majority of the lots failed to consent, evidently based on the seven "affidavits" that Petitioners claim rescinded seven consents. The language of these "affidavits" does not clearly rescind the prior consent. Even if the "affidavits" purportedly rescinded prior consents, chapter 720, part III, fails to indicate whether

a lotowner may rescind his or her consent and, if so, by when he or she must do so. But the most important problem with Petitioners' "affidavits" is that, even if construed as allowable rescissions, the proposed Revitalized Declaration still won consents from 51 lotowners, which is a majority of the 97 lotowners.

25. Nor is the admissibility of the written consents at issue. Even after HOA objected to Petitioners' "affidavits" on the ground of hearsay, which was overruled because the "affidavits" supplemented or explained the "affiants'" earlier written consents, as provided by section 120.57(1)(c), Petitioners failed to object to, or move to strike, the consents on the basis of hearsay or authenticity. Thus, it is unnecessary to determine whether the written consents were admissible under section 120.57(1)(c) ("Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but it shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.") or section 120.569(2)(g) ("evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs shall be admissible"). Compare O'Brien v. Fla. Birth-Related Neurological Injury Comp. Ass'n, 710 So. 2d 51 (Fla. 4th DCA 1998) (objection to lack of review by medical panel waived by failure to raise it at the hearing), with Harris v. Game &

Freshwater Fish Comm'n, 495 So. 2d 806 (Fla. 1st DCA 1986) (objection to hearsay not waived by failure to raise it at hearing).

26. Petitioners raised a number of objections to Ms. Gannon's performance of responsibilities imposed upon the Committee and to the activity of HOA, which Petitioners claim was terminated upon the extinguishment of the Declaration in 2008. With one exception, these contentions are based on a misreading or misapplication of the pertinent statutes.

27. First, HOA is a Florida corporation, whose existence is dictated by its articles of incorporation, which do not mandate dissolution upon the extinguishment of the Declaration, and Florida law governing corporations, which likewise does not mandate dissolution upon the extinguishment of the Declaration. In fact, section 720.405(3) recognizes the possibility that an association may continue to exist after the extinguishment of the declaration that it previously administered.

28. Section 720.405(1) provides that the revitalization committee shall "initiate" a proposed revitalization of the Declaration. The evidence is consistent with the initiation of the proposed revitalization by the Committee. The evidence does not support Petitioners' contention that HOA initiated the proposed revitalization. Nothing in chapter 720, part III, requires the Committee to litigate whether the proposed

revitalization should be approved, so the appearance in this case of HOA, rather than the Committee, is immaterial.

29. As for duties performed by Ms. Gannon, she may serve as an agent for the Committee and perform duties statutorily imposed upon it. See, e.g., Johnson v. Est. of Fraedrich, 472 So. 2d 1266 (Fla. 1st DCA 1985) (attorney for personal representative may file objection to a claim, even though the statute extends this right to a personal representative). Section 720.405(2) and (3) vary in language, but do not support Petitioners' contentions as to nondelegable duties of the Committee. Section 720.405(2) provides for the Committee "to prepare or cause to be prepared" the Revitalized Declaration, and section 720.405(3) provides for the Committee to "prepare" the articles of incorporation and bylaws. It is unclear why the statutory language is different in these provisions, but, as counsel for the Committee, Ms. Gannon may perform these duties for the Committee under the statutory language found in both subparagraphs of section 720.405.

30. But Petitioners' broad challenge of Ms. Gannon's performance of duties of the Committee, as well as their objections to the consents, bring into focus the failure of the revitalization package to comply with one statutory requirement. As noted above, in response to the requirement of section 720.406(1)(d) for a "verified copy of the written consents,"

Ms. Gannon's affidavit attests, to the best of her knowledge, that the transmitted copies are true and correct copies of the original consents. This purported verification fails due to the qualification that it is to the best of the affiant's knowledge. This failure is no technical shortcoming because each lotowner sent his or her original consent to a member of the Committee, who, not Ms. Gannon, was in a position to verify that a copy was faithful to the original.

31. On its face, Ms. Gannon's verification fails to comply with section 92.525, which provides:

> (1) If authorized or required by law, by rule of an administrative agency, or by rule or order of court that a document be verified by a person, the verification may be accomplished in the following manner:
>
> (a) Under oath or affirmation taken or administered before an officer authorized under s. 92.50 to administer oaths;
>
> (b) Under oath or affirmation taken or administered by an officer authorized under s. 117.10 to administer oaths; or
>
> (c) By the signing of the written declaration prescribed in subsection (2).
>
> (2) A written declaration means the following statement: "Under penalties of perjury, I declare that I have read the foregoing [document] and that the facts stated in it are true," followed by the signature of the person making the declaration, except when a verification on information or belief is permitted by law, in which case the words "to the best of my knowledge and belief" may be added. The

> written declaration shall be printed or typed at the end of or immediately below the document being verified and above the signature of the person making the declaration.
>
> * * *
>
> (4) As used in this section:
>
> * * *
>
> (b) The term "document" means any writing including, without limitation, any form, application, claim, notice, tax return, inventory, affidavit, pleading, or paper.
>
> (c) The requirement that a document be verified means that the document must be signed or executed by a person and that the person must state under oath or affirm that the facts or matters stated or recited in the document are true, or words of that import or effect.

Obviously, section 720.406(1)(d) does not permit a conditional verification of the copies of the written consents, so the condition as to knowledge stated in Ms. Gannon's affidavit fails to satisfy the statutory definition of a verification, regardless of whether the document was purportedly verified by the declaration under section 92.525(2) or by an oath or affirmative administered by a duly authorized person under section 92.525(1) and (4)(c).

32. In general, an oath conditioned by the language, "to the best of my knowledge," is not an adequate oath, see, e.g., Gonzalez v. State, 991 So. 2d 971 (Fla. 5th DCA 2008), as HOA's

counsel would readily contend if Petitioners had been sworn in with an oath or affirmation subject to this condition. Reflective of the problem of the identity of the person who is in a position to verify a document, a verification based on knowledge and belief from a person not shown to have personal knowledge of the facts purportedly verified is not an adequate verification. See, e.g., Houk v. PennyMac Corp., 210 So. 3d 726, 733 (Fla. 2d DCA 2017) (verification from employee of assignee of note that law firm had lost note).

33. Petitioners also challenged the proposed revitalization due to ongoing enforcement of the Declaration by HOA after the extinguishment of the Declaration, but such action, if true, is not prohibited by chapter 720, part III. The legislature has not vested in DEO the authority to regulate this activity or even to deny approval for a revitalized declaration on this ground.

34. Lastly, Petitioners objected to the premature recording of the Revitalized Declaration. Section 720.407(1) imposes a deadline of 30 days following receipt of approval for the recording of a revitalized declaration, but does not address the contingency of a request for a hearing of a proposed approval. DEO's approval letter likewise fails to address the contingency of the filing of a request for a hearing. It is unclear how the 30-day deadline of section 720.407(1) may be applied when the time within which a person with a substantial interest may not

learn of DEO's approval until more than 30 days after its issuance, so as still to have a right to request a hearing, although this contingency is not at issue in the present case: HOA recorded the Revitalized Declaration before the time for filing a request for a hearing would have run for a person with a substantial interest who had learned of the proposed approval on the day that it was issued.

35. Section 720.407(4) prohibits the retroactive application of a revitalized declaration, and recording the Revitalized Declaration before the time had run for requesting a hearing has assured its retroactive application, regardless of whether the final order were to approve or not to approve the proposed Revitalized Declaration. If DEO were to approve the proposed Revitalized Declaration, the restrictive covenants will have been applied from the date of recordation, so they will have been applied retroactively. If DEO were to deny the approval of the proposed Revitalized Declaration, the restrictive covenants will also have been applied from the date of recordation, so they will also have been applied retroactively. Section 720.406(2) broadly conditions the approval or denial of approval of a revitalized declaration on compliance "with the act," meaning chapter 720, part III. Although section 720.407(4) is part of "the act," the retroactive HOA's recording of the Revitalized Declaration is not a ground for a denial of approval.

Sections 720.404, 720.405(4), and 720.406(1) provide the exclusive criteria on which DEO may approve or not approve a revitalized declaration, and the violation of the nonretroactivity provision would normally take place only after DEO has issued its proposed agency action on a revitalized declaration. Again, the legislature has not vested in DEO the authority to deny approval for a revitalized declaration on this ground.

RECOMMENDATION

It is

RECOMMENDED that the Department of Economic Opportunity enter a final order denying approval of the Revitalized Declaration.

DONE AND ENTERED this 4th day of January, 2019, in Tallahassee, Leon County, Florida.

ROBERT E. MEALE
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 4th day of January, 2019.

COPIES FURNISHED:

Jonathan Paul Young
Loretta Shirley
9635 Northwest 83rd Street
Tamarac, Florida 33321
(eServed)

Rebekah Davis, Esquire
Department of Economic Opportunity
Mail Station 110
107 East Madison Street
Tallahassee, Florida 32399
(eServed)

Lauren T. Schwarzfeld, Esquire
Kaye Bender Rembaum, P.L.
1200 Park Central Boulevard South
Pompano Beach, Florida 33064
(eServed)

Peter Penrod, General Counsel
Department of Economic Opportunity
Caldwell Building, MSC 110
107 East Madison Street
Tallahassee, Florida 32399-4128
(eServed)

Cissy Proctor, Executive Director
Department of Economic Opportunity
Caldwell Building
107 East Madison Street
Tallahassee, Florida 32399-4128
(eServed)

Stephanie Webster, Agency Clerk
Department of Economic Opportunity
Caldwell Building
107 East Madison Street
Tallahassee, Florida 32399-4128
(eServed)

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.