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FAX COVER SHEET

To: Lisa Lerner, Esq.
Fax: (305) 446-5575
Date: June 26, 2001
Tel: (305) 442-3334, ext. 307
Subject: Court case vs. Towers interpreting "3/5 Board vote"
Number of pages (including cover page): 5

Dear Lisa:

It was a pleasure speaking with you on the phone yesterday, and I appreciate your openness to consultation on the issue of the approval process needed for structural changes such as those involved in the proposed moving of the Towers gym facility.

To summarize, pursuant to the provisions of the August 1987 Amendment to the by-laws of the Towers, in order to make such structural changes, a vote of three-fifths of the Board of Directors is required - unless the changes cost more than \$250,000.. in which case a vote of 75% of the unit owners is required.

As discussed, the attached court case vs. the Towers interprets "three-fifths" of the Board as meaning sixty percent of the Board members, with no "rounding up" of percentages allowed.

I left a message for Cynthia today, and hope to speak with her soon to have her authorize a written opinion from your firm on this matter.

With kind regards,

Sincerely,



IN THE CIRCUIT COURT OF THE
11TH JUDICIAL CIRCUIT IN AND FOR
DADE COUNTY, FLORIDA.

GENERAL JURISDICTION DIVISION

CASE NO. . 90-50534 (20)

NORMAN T. ROBERTS,

Plaintiff,

vs.

THE TOWERS OF KEY
DISCAYNE, INC.,

Defendant.

DECLARATORY SUMMARY JUDGMENT

THIS CAUSE came before the Court on February 11, 1991, upon Plaintiff's Motion for Summary Judgment. Both parties appeared through counsel who argued the matter to the Court. Upon review of the pleadings and discovery, and considering argument of counsel and being otherwise fully advised, the Court finds that there is no issue of material fact and that Plaintiff is, as a matter of law, entitled to the relief sought in the Complaint for Declaratory Relief.

FACTS

The Court finds the following facts to be established without controversy:

- A. Plaintiff is a unit owner at The Towers of Key Biscayne Condominium, and has been a director continuously since March 15, 1987. Plaintiff's second two-year term as director terminates on

Case No. 90-50534 (20)

March 15, 1991. Defendant is the association representing the unit owners of the condominium.

B. Plaintiff intends to be a candidate for election as a director of the Defendant association at the next annual unit owner's meeting scheduled for March 15, 1991, and at least two unit owners intend to nominate him for director at the meeting.

C. On October 4, 1990, the directors of Defendant (the entire board consisting of seven directors) voted four to three to pass an amendment to the By-Laws of Defendant. Among other things, the purported amendment provided:

14.2 Notwithstanding anything to the contrary contained in Sections 14 and 14.1, no member may be a candidate for director, where, in the event that member is elected, his term of office will result in his service as a director for more than four (4) consecutive years.

14.3 A former director may be re-elected, or appointed to the board of directors if at least two (2) calendar years has elapsed since his most recent service as director.

D. Article 57 of the Defendant's By-Laws provides in relevant part:

The By-Laws of said corporation...may be amended... by resolution adopted by a three-fifth (3/5) vote of the board of directors of this corporation at any duly called meeting of said board...

Plaintiff by this action seeks a Judgment confirming his right to be a candidate for director at the March 15, 1991, meeting, and declaring the aforesaid amendment to be invalid.

ANALYSIS

The Court finds the following principles to control this

case.

The amendment to the By-Laws voted on by the directors on October 4, 1990, did not pass with the requisite votes for an amendment to the By-Laws. The actual vote was four out of seven, or a percentage of approximately fifty-seven (57%) percent. Because sixty (60%) percent (three-fifths (3/5)) of the directors must vote for the measure, the amendment in fact failed.

The Court cannot accept Defendant's suggestion that where a percentage voting requirement results in so many whole votes and a fraction, a rounding (up or down as the case may be) procedure is applied. Because the requirement for a minimum of votes for passage based on a fractional percentage is a threshold, the resulting excess "fraction cannot be lopped off or ignored". Bonney v. Smith, 147 P.2d 777, 773 (Oklahoma 1944). To hold otherwise would, to the extent of the "lopping off", disenfranchise the unit owners of their respective representation.

Section 718.112(2)(d)(1) states, in part:

The By-Laws shall not restrict any unit owner desiring to be a candidate for board membership from being nominated from the floor...[at a unit owners' meeting]

Because all bylaws are subject to the provisions of the Condominium Act, Chapter 718, Florida Statutes, as provided in Section 718.112(2), there may be no bylaw containing the restriction prohibited by Section 718.112(2)(d)(1). The purported amendment, even if validly passed, would be directly

violative of that statutory provision in that Plaintiff would, by virtue of the amendment, be prohibited from being nominated from the floor for director at the annual meeting of unit owners. It follows that the amendment is invalid to the extent that it purports to restrict Plaintiff's candidacy (or, for that matter, the candidacy of any person otherwise qualified).

Accordingly, it is

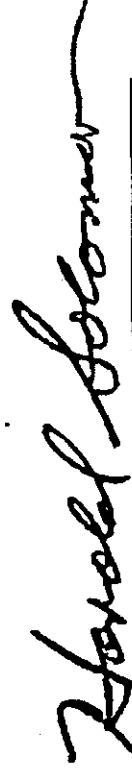
ADJUDGED, that

1. Articles 14.2 and 14.3 of the amendment to the By-Laws of the Towers of Key Biscayne Condominium, purportedly approved by the directors of Defendant on October 4, 1990, are declared to be invalid, and Defendant is enjoined from enforcing said provisions.

2. Plaintiff, NORMAN T. ROBERTS, shall be permitted, subject to the applicable condominium documents, to run for election as director at the annual meeting of unit owners of The Towers of Key Biscayne Condominium, scheduled for March 15, 1991, and to serve as director if so elected.

ORDERED at Miami, Florida, this 14th day of February,

1991.



CIRCUIT JUDGE

Copies furnished:
EDWARD J. SCHACK, ESQ
MORTIMER FRIED, ESQ.

RECORDS SECTION
DIXIE COUNTY
DATE: 10-5-80
OFFICIAL USE ONLY
1980 OCT -5 AM 11:51 90R366892

1980 OCT -5 AM 11:51 90R366892

DE: 1473082223
CERTIFICATE OF AMENDMENT
TO
BY-LAWS OF THE TOWERS OF KEY BISCAYNE, INC.

The undersigned President and Secretary of THE TOWERS OF KEY BISCAYNE, INC., a Florida corporation not for profit, hereby certify that the following amendments to the By-Laws to THE TOWERS OF KEY BISCAYNE, INC., a condominium established according to its Declaration thereof, recorded in Official Records Book 7856 at Page 375 of the Public Records of Dade County, Florida, have been duly adopted by the Board of Directors of the Association on ~~OCTOBER 4, 1980~~ in accordance with the provisions of Article 57 of the By-Laws of THE TOWERS OF KEY BISCAYNE, INC.:

RESOLVED, that Article 14 (DIRECTORS), be amended to read as follows:

14. The number of directors which shall constitute the Board of Directors commencing with the annual election March, 1978, shall be seven (7) and each director shall be elected to serve until his term shall expire, or until the next annual meeting and or until his successor shall be elected and shall qualify. Directors must be members or nominees of corporate members, except as otherwise provided for in the Articles of Incorporation.

14.1 At the March, 1983 election for the Board of Directors, Directors shall be elected for the following terms of office:

- a. The three (3) candidates receiving the highest number of votes shall be elected for a two (2) year term of office.
- b. The four (4) candidates receiving the next highest number of votes shall be elected for a one (1) year term of office.

Commencing with the March, 1984 Election and continuing with the elections held in each Even numbered year thereafter four (4) Board members will be elected to a two (2) year term of office, to fill the vacancies created by the four (4) Board Members whose term of office expires in such year.

1980

OFFICE OF THE COUNTY CLERK
DADE COUNTY
[Signature]

File 1473082224

Commencing with the 1985 election and continuing with the Election held in each Odd number year thereafter three (3) Board Members will be elected to a two (2) year term of office to fill the vacancies created by the Board members whose term of office expires in such year.

14.2 Notwithstanding anything to the contrary contained in sections 14 and 14.1, no member may be a candidate for director, where, in the event that member is elected, his term of office will result in his service as a director for more than four (4) consecutive years.

14.3 A Former Director may be re-elected, or appointed to the board of directors if at least two (2) calendar years has elapsed since his most recent service as Director.

RESOLVED, that Article 20 and Article 21 (EXECUTIVE COMMITTEE), be amended to read as follows:

20. The board of directors shall, by resolution passed by a majority of the whole board, designate an executive committee to consist of three or more of the directors of the corporation. ~~the executive committee shall make recommendations to the Board of Directors.~~ The executive committee may take action on the Board's behalf but only if it has first received the approval of a majority of the whole Board to do so as evidenced by a resolution of the Board specifically referring to the action to be taken.

21. The executive committee meeting may be held at such time and place within Dade County, Florida, as shall be determined from time to time by the Board of Directors.

21. ~~The executive committee shall meet on the first Monday of each month, except on a day is a legal holiday, in which event the meeting shall take place on the following Monday.~~ Written Minutes of all proceedings of all meetings of the executive committee shall be prepared. In addition, such proceedings shall be tape-recorded and the taping shall not be interrupted at any time during the proceedings. The minutes and

Dec 28
1984
Meeting

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OF DADE COUNTY, FLORIDA
RECORD YEAR 1982
CLERK OF CIRCUIT & COUNTY COURTS

OFF: 1473042226

STATE OF FLORIDA)
) ss:
COUNTY OF DADE)

BEFORE ME, the undersigned authority, this day personally appeared, RICHARD THOMAS, President and MAX GOODMAN, Secretary, of THE TOWERS OF KEY BISCAIYNE, a Non-Profit Florida corporation, and known to me to be the persons who, as such officers, executed the foregoing Certificate and who acknowledged before me that they executed the same as such officers of said corporation and for and for and upon behalf of said corporation, and that the seal affixed to said Certificate is the true and genuine seal of said corporation.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my seal of office, this 4TH day of OCTOBER, 1980.



Allen D. Harper
NOTARY PUBLIC,
State of Florida at Large

Commission expires:

Notary Public
State of Florida at Large
By Commission Expires
October 27, 1982

RECORDED IN OFFICIAL RECORDS BOOK
OF DADE COUNTY, FLORIDA
RECORD YEAR 1982
CLERK OF CIRCUIT & COUNTY
COURTS