STATE OF FLORIDA
DEPARTMENT OF BUSINESS REGULATION
DIVISION OF FLORIDA LAND SALES, CONDOMINIUMS AND MOBILE HOMES
725 SOUTH BRONOUGH STREET - THE JOHNS BUILDING
TALLAHASSEE, FLORIDA 32399-1030

FILED
DIVISION OF FLORIDA
LAND SALES, CONDOMINIUMS
AND MOBILE HOMES
DATE 1/31/91
DOCKET CLERK C. Cann

In re: Petition for Declaratory Statement

Robert Jackson; Englewood Golf Condominium Villas Association, Inc.

DOCKET NO. DS90056

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FINAL DECLARATORY STATEMENT

COMES NOW, the undersigned as director of the Division of Florida Land Sales, Condominiums and Mobile Homes, and enters this Declaratory Statement pursuant to section 120.565, Florida Statutes and section 718.501, Florida Statutes.

FINDINGS OF FACT

1. On or about April 19, 1990, the Division of Florida Land Sales, Condominiums and Mobile Homes received the petition for declaratory statement filed by Robert Jackson, a unit owner in the Englewood Golf Condominium Villas IV Condominium and member of the Englewood Golf Condominium Villas Association, Inc.

2. Under the provisions of Section 718.501, Florida Statutes, the Division published Notice of Receipt of the Petition in the Florida Administrative Weekly; in addition, the Division by letter notified the association of the pendency of this declaratory statement proceeding. The association has intervened in this case and presented legal argument.

3. Petitioner seeks a declaratory statement on whether certain amendments to the declaration violate Section

718.115(1), Florida Statutes, or other portions of the Condominium Act. The challenged amendments change the manner of sharing the expenses of roof maintenance and replacement, and reallocate certain plumbing expenses.

4. Under the declaration of condominium, recorded in 1972 and as it existed prior to the amendments challenged herein, the condominium association was specifically responsible for the maintenance and replacement of roofs covering the units[1]; similarly, the association was responsible for the maintenance and replacement of common elements presumably including plumbing fixtures and lines serving the individual units. According to article 6.2 of the declaration:

> 6.2 By the Association. The Association shall maintain in first-class condition, repair, service and replace at the Association's expense; which shall be common expense:
>
> (a) All common elements and limited common elements.
>
> (b) All roofs and exterior surfaces of units, . . .
>
> (c) All streets, sidewalks, utility installations of all kinds, drainage facilities and other structures, facilities or improvements of any kind located on any easements of or through the condominium and on any part of the common elements . . .

5. Based on article 4.6 of the declaration of condominium, a unit shall consist of that part of the building within the outer surfaces of the building walls, the upper surfaces of the roof and the bottom of the building slab or

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[1]The intervenor association asserts the although the documents placed this obligation on the association, . . . "[A]s a practical matter, the Association has not maintained the roofs or sewer lines serving individual units for over eighteen years."

foundation. Accordingly, based on this provision, a roof covering a unit is within the defined boundaries of the unit itself, and is not part of the common elements of the condominium.

6. The challenged amendments to the declaration remove from the responsibility of the association the maintenance, repair and replacement of the roofs of the units, and specifically provide that it is the unit owner's responsibility to maintain and replace his roof. Additionally, the amendments transfer the responsibility to maintain, repair and replace all plumbing fixtures and lines serving only one unit from the association to the unit owner, whether or not the lines are located within the unit, within the limited common elements, or the common elements. The challenged amendments to articles 6.2 and 6.3 are as follows:

> 6.2 By the Association. The Association shall maintain in first-class condition, repair, service and replace at the Association's expense; which shall be common expense:
> (a) . . .
> (b) All ~~roofs and~~ exterior surfaces of units, ... Provided, however, it shall be the first and primary responsibility of each unit owner to keep and maintain all other portions of his unit, . . . including but not limited to the following exterior portions of his unit, . . .: roofs, screens, windows, shutters and doors.
>
> 6.3 By the Unit Owner.
> (a) To keep and maintain the portions of his Units as specified for maintenance and repair by Unit Owners in 6.2(b) above in first-class condition and repair and state of cleanliness at his expense. Included in this responsibility is the responsibility of the Unit Owners to maintain, repair and replace all plumbing fixtures and lines serving only his unit whether said fixtures or lines are located in the unit, the limited common

elements or the common elements. Same shall be accomplished without delay and, to the greatest extent possible, without disturbing other unit owners. [Emphasis added].

CONCLUSIONS OF LAW

1. The Division has jurisdiction over this matter pursuant to Sections 120.565 and 718.501, Florida Statutes.

2. The condominium association takes the position that at the time of recordation of the pertinent condominium documents, there was an issue as to whether the association could lawfully maintain any portion of a unit under the then-existing Condominium Act, and that the association, through the amendment procedure, merely brought the condominium documents into line with the Condominium Act. Furthermore, the association asserts that the amendments do not prejudice the rights of any unit owner, do not discriminate against any unit owner or class of unit owners, and do not affect the common elements or increase the proportionate share of the common expenses. The petitioner unit owner, while appearing to concede that under the amendment the proportionate share of common expenses would remain the same, takes the position that the transfer of responsibility to maintain the roof and plumbing facilities will disproportionately impact unit owners because the roofs are not all of the same size. The unit owner also states that reserves have not been maintained for these items. Finally, the petitioner asserts that the amendments are inconsistent with Article 16.5 of the Declaration, providing as follows:

> . . . [N]o amendment adopted under the provisions of this Article XVI shall discriminate unreasonably against any Unit owner or against any Unit or class or group of Units, unless the Unit owners so affected shall consent; and no such amendment shall increase the number of Units or alter the boundaries of the common elements or alter the share in the common elements appurtenant to a Unit or increase the owner's share of the common expenses, unless the record owner of the Unit concerned and the record owner of any first mortgage on such Unit shall join in the execution of the Amendment. . . .

3. First, the deletion of an item from the common expense classification, as was done in this case for roofs and sewer lines serving a unit, is not prohibited by Article 16.5. The boundaries of the common elements are not altered, the share of ownership of the common elements appurtenant to a unit are not changed, and there is no resultant increase in a unit owner's share of common expenses. Although overall, common expenses may be reduced by operation of the amendment, the division of common expenses among the unit owners has not changed.

4. Section 711.13(1), Florida Statutes (1971), provides that maintenance of the common elements is the responsibility of the association. Under Section 711.14(1), Florida Statutes (1971), common expenses include the expenses of the operation, maintenance, repair or replacement of the common elements, the costs of carrying out the powers and duties of the association and any other expense designated as common expense by the statute, the declaration or bylaws. The Condominium Act as it existed at the time of the recording of the declaration did not authorize the association to accept the responsibility

for the maintenance of a unit or a portion thereof, or to assess the expenses of maintenance of a unit as a common expense to all unit owners. Review, in this respect, Rothenberg v. Plymouth #5 Condominium Association, 511 So.2d 651 (Fla. 4th DCA 1987) and compare, the declaratory statement issued by the Division In re: Petition for Declaratory Statement of Becker; Courtyards of Broward Condominium Association, Inc., Case No. 89L-75, to the effect that since the fee for cable television does not relate, directly or otherwise, to the operation, maintenance, repair or replacement of a common element, it was an inappropriate common expense.[2] Accordingly, while not perhaps directly at issue, a persuasive argument may be advanced that the original language in the declaration of condominium was inconsistent with the existing Condominium Act.[3]

5. Although as demonstrated by the analysis set forth herein, it is currently permissible under certain circumstances for the association to accept responsibility for the maintenance of a portion of the unit, there is of course no obligation on

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[2]Note that the statute was subsequently amended, and currently provides that cable television expenses may be a common expense of the association if approved by the board.

[3]The Condominium Act was amended, and effective October 1, 1990, an association is specifically authorized to maintain a unit or a portion thereof and assess the same as a common expense if provided in the declaration. See, Section 718.111(6), Florida Statutes, in conjunction with Section 718.115(1), Florida Statutes. Also, assuming that the former designation of the expenses of maintenance and repair of the roof, as provided in the original declaration, was invalid, the later enactment of authorizing language in the statute does not have the effect of legitimizing otherwise invalid common expenses incurred prior to the effective date of the amendment. Review, for a similar analysis, Scudder v. Greenbriar Condominium Association, Inc., 15 F.L.W. 229 (Fla 4th DCA September 5, 1990).

the association to do so. Accordingly, neither Section 718.116(6), Florida Statutes nor Section 718.113(1), Florida Statutes, is violated where the association ceases to accept maintenance responsibility for a portion of the unit through amendment to the declaration of condominium.

6. A different analysis and result is potentially obtained in regard to that portion of the amendment to the declaration which seeks to include among the unit owner's individual responsibilities, the responsibility to maintain, repair and replace all plumbing fixtures and lines serving only his unit. The Division's response to this issue is necessarily limited by the documents themselves, which do not make it abundantly clear whether these plumbing fixtures and lines are common elements, limited common elements, or a portion of the units. Assuming that the plumbing lines currently form a portion of a common elements, it would be inappropriate for the association to transfer maintenance responsibility from the association to the individual unit owners absent an amendment to the declaration making these items limited common elements. Under the current Section 718.113(1), Florida Statutes, the declaration may provide that certain limited common elements shall be maintained by those entitled to use the limited common elements, or the association may provide the maintenance and treat the expenses either as a common expense or with the cost to be shared only by those entitled to use the limited common elements. Accordingly, if the plumbing lines are common

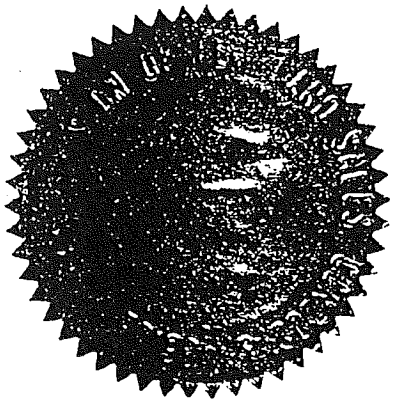
elements (and not limited common elements), the amendment to the declaration which transfers the responsibility for the maintenance thereof to the individual unit owners, is invalid due to its noncompliance and conflict with Section 718.113, Florida Statutes. It is the association's responsibility to maintain the common elements and in order to redefine a portion of the common elements as limited common elements, the declaration must be amended.

7. If the original condominium documents are properly construed as including within the description of the units those plumbing lines and fixtures only serving one unit, then the association may properly, as in the case of the roof, transfer maintenance responsibility from the association to the individual unit owner, without occasioning a violation of Section 718.113, Florida Statutes.

8. In sum, that portion of the amendment to the declaration of condominium which transfers responsibility for maintenance and replacement of the roof from the association to the unit owners, does not violate the Condominium Act. Also, if the original condominium documents designate the plumbing lines as a portion of the unit, the transfer of responsibility for this maintenance item to the individual unit owners, and the deletion of this item as a common expense, does not violate the Condominium Act. However, if the documents are properly construed as including these plumbing lines within the designation of the common elements, then the transfer of maintenance of these items without compliance with Section

718.113(1), Florida Statutes, and without an amendment reclassifying these items as limited common elements, violates that section.

DONE AND ORDERED this 31st day of January, 1991.



MATTHEW M. CARTER II, DIRECTOR
Division of Florida Land Sales,
Condominiums and Mobile Homes
Department of Business Regulation
725 South Bronough Street
Tallahassee, Florida 32399-1007

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Robert Jackson, 4 Bermuda Circle, Englewood, Florida 34223 and Robert Moore, Esquire, Kanetsky, Moore, and DeBoer, P.A., 227 Nokomis Avenue South, P.O. Box 1767, Venice, Florida 34284-1767 this 31st day of January, 1991.

Carolyn Cannon
Carolyn Cannon, Docket Clerk

Copies Furnished To:

Karl M. Scheuerman
Deputy General Counsel

Alexander M. Knight
Bureau Chief

RIGHT TO APPEAL

THIS FINAL ORDER CONSTITUTES FINAL AGENCY ACTION AND MAY BE APPEALED PURSUANT TO SECTION 120.68, FLORIDA STATUTES, AND RULE 9.110, FLORIDA RULES OF APPELLATE PROCEDURE, BY FILING A NOTICE OF APPEAL CONFORMING TO THE REQUIREMENTS OF RULE 9.110(d), FLORIDA RULES OF APPELLATE PROCEDURE, BOTH WITH THE APPROPRIATE DISTRICT COURT OF APPEAL, ACCOMPANIED BY THE APPROPRIATE FILING FEE, AND WITH CAROLYN CANNON, DOCKET CLERK FOR THE DIVISION OF FLORIDA LAND SALES, CONDOMINIUMS AND MOBILE HOMES, WITHIN THIRTY (30) DAYS OF THE RENDITION OF THIS FINAL ORDER.