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

In Re: Petition for Declaratory Statement HAWTHORNE RESIDENTS COOPERATIVE ASSOCIATION, INC.,

Petitioner.

CASE NO. 89L-188

DOCKET NO. DS89451

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DECLARATORY STATEMENT

This declaratory statement is rendered by the Director of the Division of Florida Land Sales, Condominiums and Mobile Homes, Department of Business Regulation, pursuant to Sections 120.565 and 719.501, Florida Statutes.

FINDINGS OF FACT

1. The factual findings made herein are based upon representations of the Petitioner contained in the Petition for Declaratory Statement, as well as additional information provided by Petitioner to the Division of Florida Land Sales, Condominiums and Mobile Homes (hereinafter referred to as the "Division").

2. On or about September 14, 1989, the Division received a Petition for Declaratory Statement from C. Everett Boyd, Jr., Esquire, of the law firm of Ervin, Varn, Jacobs, Odom and Ervin, attorneys for the Hawthorne Residents Cooperative Association, Inc.

3. The Hawthorne Residents Cooperative Association, Inc. (hereinafter referred to as the "Association") was incorporated in December of 1982 and is the homeowners' association for the mobile home park cooperative Hawthorne at Leesburg (hereinafter referred to as the "Cooperative"). The Association is the owner of the underlying cooperative property and the owner of all unsold cooperative units.

4. The Cooperative is comprised of One Thousand One Hundred Ninety-Five (1,195) cooperative units and common areas. In the southeast corner of the cooperative property originally stood the park's sewage treatment plant. Use of the plant was discontinued in 1978 and the treatment facilities were dismantled and removed from the site during 1983 and 1984. The sewage treatment plant site (hereinafter referred to as the "undeveloped property") has remained vacant land for which no use was ever specified by the Association.

5. According to the petition, of the One Thousand One Hundred Ninety-Five (1,195) units, twenty (20) units are impractical and impossible to use as residential units due to their physical location or characteristics. The units are variously described as too small because they are located on a curve or a corner, have a well or pumping station on the unit or immediately adjacent thereto, are too close to an open drainage ditch or other similar facility, or have drainage and flooding problems. As these twenty (20) units cannot be used as home sites, it is impossible to lease these units to

prospective unit owners who would share in the payment of maintenance fees to meet the common expenses of the Cooperative.

6. The Association proposes to amend the Cooperative's Master Form Proprietary Lease (hereinafter referred to as the "Lease") to: (a) convert each of the twenty (20) unusable units to common property of the Cooperative; and (b) create twenty (20) home sites on the undeveloped property, with the existing unusable units then being "relocated" by amendment to the new twenty (20) units.

7. Petitioner states the proposed amendment will not: (a) change the configuration or size of a relocated unit in any material fashion; (b) materially alter or modify the appurtenances to any unit; or (c) alter the percentage of common expenses or common surplus shared by unit owners.

8. The original cooperative documents, including the Lease, were recorded in December of 1982. Paragraph 46 of said Lease provides in pertinent part:

> This proprietary lease may be amended by the approval of a resolution adopting such amendment by not less than seventy-five percent (75%) of the members of the corporation....No amendment shall change the configuration or size of any unit in any material fashion, materially alter or modify the appurtenances to such unit, or change the proportion or percentage by which the owner of the parcel shares the common expenses and owns the common surplus unless the record owner thereof and all lienors of record thereon shall join in the execution of the amendment.

9. Section 719.106(3), Florida Statutes (1981), the statutory provision in effect at the time the original cooperative documents were filed, provides:

> Unless otherwise provided in the cooperative documents as originally recorded, no amendment thereto may change the configuration or size of any cooperative unit in any material fashion, materially alter or modify the appurtenances of the unit, or change the proportion or percentage by which the owner of the parcel shares the common expenses and owns the common surplus, unless the record owner of the unit and all record owners of liens on it join in the execution of the amendment and unless all other units approve the amendment.

10. Section 719.1055, Florida Statutes, added to Chapter 719, Florida Statutes by Chapter 88-148, Laws of Florida, and effective July 1, 1988, provides:

> Unless otherwise provided in the cooperative documents as originally recorded, no amendment thereto may change the configuration or size of any cooperative unit in any material fashion, materially alter or modify the appurtenances of the unit, or change the proportion or percentage by which the owner of the parcel shares the common expenses and owns the common surplus, unless the

record owner of the unit and all record owners of liens on it join in the execution of the amendment and unless the record owners of all other units approve the amendment.

11. Petitioner requests a declaratory statement as to whether the provisions of Chapter 719, Florida Statutes, and in particular section 719.1055, Florida Statutes, apply to the amendment of the Lease and therefore require approval of the proposed amendment to the Lease by 100% of the unit owners.

CONCLUSIONS OF LAW

A. The Division has jurisdiction over this matter pursuant to sections 120.565 and 719.501, Florida Statutes.

B. Pursuant to section 719.106(3), Florida Statutes (1981) and section 719.1055, Florida Statutes (1988), the provisions originally provided in the corporate documents of the Association regarding the adoption of amendments thereto which materially change the configuration or size of a unit, materially alter or modify appurtenances of a unit, or change the percentage of common expenses and surplus, control the amendment of the cooperative documents.

C. Pursuant to paragraph 46 of the Lease, "not less than" seventy-five percent (75%) of the members of the Cooperative must approve amendments to the Lease. Furthermore, where a proposed amendment would: (1) change the configuration or size of a unit in a material fashion; (2) materially alter or modify the appurtenances to a unit; or (3) change the

proportion or percentage of common expenses or surplus shared by the owner of a unit, each unit owner of an affected unit as well as any lienor of record on an affected unit, must approve the amendment. Thus, for amendments resulting in any of the three changes delineated, approval of one hundred percent (100%) of the owners of affected units, and any lienors of record thereon, must be obtained along with approval of an additional number of "non-affected" unit owners so that a total approval rate of at least seventy-five percent (75%) of owners is secured. An amendment that would result in any of these three types of changes will fail without the approval of all affected unit owners and lienors of record, even if seventy-five percent (75%) of the "non-affected" members support the proposed amendment. Where a proposed amendment resulting in the changes described above would affect each unit within the Cooperative, one hundred percent (100%) of the unit owners and all lienors of record must approve the amendment in order for it to be adopted. Thus, the issues to be addressed are whether the proposed amendment would result in any of the three changes noted above and, if so, what percentage of the unit owners would be affected thereby.

D. The primary purpose of the proposed amendment is to facilitate the sale of all 1195 units so that all units share the common expenses of the Cooperative. The relocation of the unusable units would permit their use, sale, and proper assessment. The proposed amendment would not alter the

percentage of common expenses or common surplus, but would allow for the proper distribution of expenses and surplus based upon the percentages outlined in the cooperative documents.

E. The undeveloped property is a common area of the Cooperative. Subsections 719.103(5) and (20), Florida Statutes define "common area" to mean the portions of the property not included in the units. The undeveloped property is owned by the Cooperative, is clearly not included within the units as presently constituted, and is, therefore, a common area of the Cooperative.

Use of a common area in accordance with the purpose intended is a right appurtenant to each cooperative unit. Subsection 719.105(2), Florida Statutes, provides:

> Each unit owner is entitled to the exclusive possession of his unit. He is entitled to use the common areas in accordance with the purposes for which they are intended, but no use may hinder or encroach upon the rights of other unit owners.

Furthermore, subsection 719.109(1), Florida Statutes, states:

> All common areas and recreational facilities serving any cooperative shall be available to unit owners in the cooperative or cooperatives served thereby and their invited guests for the use intended for such common areas and recreational facilities. The entity or entities responsible for the operation of the common areas and recreational facilities may adopt reasonable rules and regulations pertaining to the use of such common areas and recreational facilities.

As previously noted, no use of the undeveloped property was specified by the Association. As numerous recreational areas exist in the Cooperative and as no particular use for the common area at issue was specified, it appears to be the position of the Association that unit owners have no right to use the undeveloped property. This position, taken to its logical conclusion, would require that the exact, permissible uses of each common area within a cooperative be delineated and would require the prohibition of any use of a common area which was not specified. Interpreting the right to use common areas for the purposes intended in the aforementioned manner would be burdensome to unit owners who would have to ensure every desired use was among those named as permissible. That this is not reasonable is shown by examining open or green spaces in cooperatives. These areas are not uncommon and their specific uses are not often delineated. While not often identified as such, they are, nevertheless, places for walking, playing sports, or sunning, among other uses. These common uses of green spaces would generally be considered acceptable uses unless restricted. Thus, lack of specification of the allowable uses of an open space, such as the undeveloped property, does not diminish the types of permissible uses but, if anything, expands the types of acceptable uses because no restrictions apply.

This view is consistent with a provision found in the corporate documents of the Cooperative. Paragraph 11 of the

Lease provides that lessees have ". . . the right of joint use and enjoyment with other lessees of the common areas in the cooperative not specifically leased to other lessees,except in so far as it may be limited or restricted by this lease or by the rules and regulations and by laws of the corporation. Lessee's use of common areas and properties shall not encroach upon the rights of other lessee's" (Emphasis added). Paragraph 11, in addition to the previously cited statutory provisions, provides an appurtenant right to use all common areas except as restricted in the corporate documents.[1] The Cooperative's corporate documents do not limit or restrict the use of the undeveloped property by the unit owners. Thus, while no particular use of the undeveloped property was specified, neither was its use limited or restricted. The absence of a restriction or limitation on use of the undeveloped property clearly indicates the common area was available for use even though the individual permissible uses were not specified.

The right to use the undeveloped property, which right is appurtenant to each unit, is materially altered by redesignating all or part of the common area at issue as a site for cooperative units. Placement of units on the undeveloped property deprives the unit owners of the use of that area.[2]

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[1]See Section 719.105(1)(e), Florida Statutes, which provides that each cooperative parcel has as an appurtenance any appurtenance provided for in the cooperative documents.

[2]See Enright v. Sea Towers Owners' Association, Inc., 370 So.2d 28, 30 (Fla. 2d DCA 1979) in which the court stated that". . .[p]lacement of the building on the common area . . . effectively deprives the residents . . . of the use of that area."

Furthermore, in the Division's Declaratory Statement filed by Jack Iungerich April 30, 1982 and issued by the Division August 4, 1982, it was declared that an improvement to a patio, limited common element in that case, which would cause an encroachment upon a common element of a condominium, would materially alter an appurtenant right to use the common elements. Such a material alteration to the appurtenant right to use the common elements was held to require the approval of all unit owners pursuant to Section 718.110(4), Florida Statutes, which section is substantially similar to Section 719.1055, Florida Statutes. In Roth v. Springlake II Homeowners Association, Inc., 533 So.2d 819 (Fla. 4th DCA 1988), which did not involve either condominium or cooperative forms of ownership, the court held that a homeowners' association could not grant exclusive easements over common areas without the approval of all unit owners. In that case, as in a condominium, the unit owners each shared a percentage of ownership in the common areas. In the case at hand, unit owners do not share a percentage of ownership in the common areas, but instead each share an interest in the corporation that owns the common areas. All unit owners have an undivided appurtenant right to use the common areas and all unit owners must give their approval to material changes to that right pursuant to Section 719.1055, Florida Statutes, unless otherwise provided in the corporate documents.

It must also be pointed out that this is not a case where a common area with an unspecified use is to be transformed into a common area with a specific use. Neither is it a case where a particular use of a common area is to be substituted for another specific use while maintaining the integrity of the site as a common area (e.g. changing from a tennis court to shuffleboard). In those instances, the beneficial use of unit owners is not diminished. Instead, the present situation is one where all or part of a common area is to be transformed into a site for private dwellings. The beneficial use of the undeveloped property by all unit owners will be significantly diminished, if not extinguished, by the exclusive use of the unit owners whose units are placed on the undeveloped property.[3] Such a transformation cannot be anything less than a material alteration to the appurtenant right to use of common area. That new common areas will be created by the transformation of some units does not change the fact that the appurtenant right to use the undeveloped property will be materially altered.

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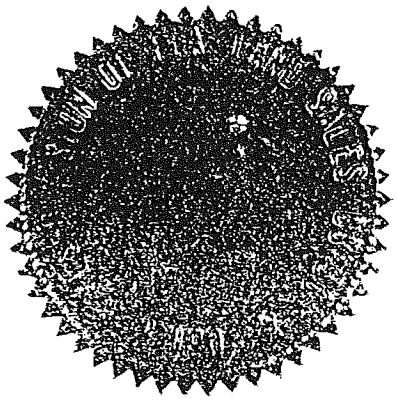
[3]See Penny v. Association of Apartment Owners of Hale Kaanapali, 776 P.2d 393 (Hawaii 1989) wherein the court noted that change of use of a condominium common element and conversion of a common element to a limited common element are significantly different.

F. The proposed amendment to create twenty (20) units on the undeveloped property materially alters or modifies the right to use a common area of the Cooperative, which right is appurtenant to each member of the Cooperative pursuant to Subsections 719.105(2) and 719.109(1), Florida Statutes and Paragraph 11 of the Lease. As Paragraph 46 of the Lease requires that amendments which materially alter or modify appurtenances be approved by each unit owner of an affected unit, as well as any lienor of record, and as all unit owners are affected by the proposed amendment, the Division hereby declares that the proposed amendment must be approved by the record owner of each unit and all record holders of liens on each unit in order for the proper adoption of the proposed amendment.

DONE AND ORDERED this 28th day of February, 1991.



MATTHEW M. CARTER II, DIRECTOR
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RIGHT TO APPEAL

THIS DECLARATORY STATEMENT 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, CLERK FOR THE

DIVISION OF FLORIDA LAND SALES, CONDOMINIUMS AND MOBILE HOMES, WITHIN 30 DAYS OF THE RENDITION OF THIS DECLARATORY STATEMENT.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Certified U. S. Mail to C. Everett Boyd, Jr., Esquire, Ervin, Varn, Jacobs, Odom and Ervin, Post Office Drawer 1170, Tallahassee, Florida 32302, this 28th day of February, 1991.

Carolyn Cannon
CAROLYN CANNON, DOCKET CLERK

Copies furnished to:

Alexander M. Knight, Chief
Bureau of Condominiums

James H. Parker
Assistant General Counsel