AND MOBILE HOMES
DATE 5/1/91
DOCKET CLERK A. Cannon

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: Springwood Condominium Association of Naples, Inc. Docket No. DS90065

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FINAL DECLARATORY STATEMENT

The undersigned, as the Director of the Division of Florida Land Sales, Condominiums and Mobile Homes, hereby issues this Final Declaratory Statement pursuant to Sections 718.501 and 120.565, Florida Statutes.

FINDINGS OF FACT

1. On or about May 8, 1990, the Division received the petition of the Springwood Condominium Association of Naples, Inc., which is the condominium association responsible for the operation of Springwood, a Condominium, a residential condominium located in Collier County, Florida. The developer of the project, Springwood of Naples, Inc., was notified of the pendency of this proceeding but has not intervened herein.

2. The original declaration of condominium was recorded on June 21, 1984. The condominium was intended to be developed in three phases pursuant to Section 718.403, Florida Statutes. Each phase was originally to contain thirty-two units in eight buildings, for a total of ninety-six units if all phases were recorded.

3. Phase I of the condominium was submitted with the recordation of the original declaration on June 21, 1984. Phase II was added to the condominium on August 12, 1985 by virtue of the recordation of an instrument entitled "First Amendment to Declaration of Condominium."

4. On October 29, 1987, the developer recorded a Second Amendment to Declaration of Condominium which purported to change the legal descriptions of Phases I, II and III; to add Phase III to the condominium; to change the size, location and unit numbers of the units in Phase III; to change the configuration of the common area and to add tennis courts for the use and benefit of all unit owners; and to change the guaranteed assessment level as to Phase III. The second amendment also purported to change the unit type and unit configuration in Phase III from apartment-type units to larger villa-type units requiring substantially more exterior maintenance. Under the amendment, several of the units previously designated to be located in Phase III were relocated to Phases I and II. Not all unit owners of record consented to or joined in the second amendment. The developer also failed to execute the second amendment. However, the mortgagee joined in this amendment.

5. According to the original declaration, the latest date for the addition of Phase III to the condominium was November, 1988. The second amendment purported to extend the completion date for Phase III to August 1, 1989. As of the date of the petition, 25 units remain unbuilt in Phase III.

6. On January 20, 1988, the developer recorded a document entitled "Third Amendment to Declaration of Condominium" which was executed by the developer and purported to add Phase III to the condominium in the same revised configuration as that set forth in the second amendment. The mortgagee of the Phase III property did not join in or consent to the third amendment which ratified and confirmed the second amendment.

7. On September 1, 1988, the developer recorded a document entitled "Amendment to Third Amendment to Declaration of Condominium" which purported to change the unit numbers of the villa units in Phase III from one or two digit numbers to four digit numbers.

8. Turnover of control of the condominium association pursuant to Section 718.301, Florida Statutes occurred on or about July 21, 1989. Since turnover of control, according to the petition, the developer insists that the ownership of twenty-five unbuilt units in Phase III entitles the developer to appoint at least one director; paradoxically, the developer denies any responsibility to pay assessments on the unbuilt units. In addition, the developer according to the petition has no apparent intention to provide the tennis courts or to build the remaining units.

9. Petitioner requests issuance of a declaratory statement on the following issues. First, petitioner asks whether under Sections 718.104, 718.110, and 718.403, Florida Statutes, an amendment to a declaration of condominium adding a subsequent phase requires execution by the developer, or whether

two separately recorded documents may collectively suffice to add the additional phase; whether under Section 718.110(4), Florida Statutes, an amendment to a declaration of condominium purporting to materially change the size and configuration of certain units and to change the location of units from one phase to another, and to change the legal description of phases, may be effective to accomplish those ends without the unanimous consent of all existing unit owners absent a provision in the declaration authorizing such; how many units and what is the status of the property contained within Springwood, a Condominium; if Phase III was validly added to the condominium, whether the unbuilt units must be constructed as nearly as possible to the original development plan, or whether they can be built in accordance with a revised development plan; and if it is concluded that Phase III was not validly added, whether it is now too late for the developer to add Phase III without obtaining unanimous consent of all unit owners.

CONCLUSIONS OF LAW

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

2. First, Petitioner asks whether under various portions of the Condominium Act, an amendment to a declaration adding a subsequent phase requires execution by the developer. Under Section 718.403(6), Florida Statutes, an amendment by the developer which adds any land to the condominium shall contain a statement submitting the additional land to the condominium form

of ownership. Under Section 718.403(7), Florida Statutes, an amendment to the declaration which adds land to the condominium shall be executed and acknowledged in compliance with the same requirements as for a deed. All persons who have record title to the interest in the land submitted to condominium ownership must join in the execution of the amendment. Under Section 718.104(2), (3), Florida Statutes, all persons who have record title to the interest in the land being submitted to condominium must join in the execution of the declaration, and all persons who have any record interest in a mortgage encumbering the interest in the land being submitted must either join in or consent to the declaration. Pursuant to Section 718.110(2), Florida Statutes, an amendment to the declaration made by the developer must be evidenced in writing.

3. Based on the foregoing provisions, it is elementary that an amendment to a declaration of condominium adding a subsequent phase requires execution of the amendment by the developer. The developer would generally have record title (or a leasehold interest) in the land being submitted as the additional phase, and he must join in the execution of that amendment.

4. Although the developer failed to execute the second amendment to the declaration which purported to add Phase III to the condominium, the developer attempted to cure that deficiency through its execution of the third amendment to the declaration of condominium. This situation is distinguishable from the situation occurring in the declaratory statement issued by the

Division In re: Tropic Schooner Condominium Apartment of Marco, a Condominium, Case No. 88-A321, issued December 20, 1988, in which the Division determined that where a bank had failed to join in a declaration or execute a consent to the addition of a future phase, where it had a record interest in a mortgage encumbering the property, the property constituting the future phase had not been submitted to condominium. In this case, the problem caused by non-joinder was sought to be remedied through a future amendment to the declaration. It is not inconsistent with general real property law to hold that the two instruments, considered in conjunction with each other, had the effect of curing the defect in the first amendment such that the subsequent curative amendment had the effect of relating back to the date of the first amendment. See, generally, 23 Am. Jur. 2d, Deeds, Sections 333-4; c.f., Golden v. Hayes, 277 So.2d 816 (Fla. 1st DCA 1973).

5. The second inquiry in the petition for declaratory statement focuses on whether the October 29, 1987 amendment to the declaration, which purported to change the size and configuration of units and to shift units from one phase to another, to change the legal description of phases and to change other aspects of the phase plan, was valid without the unanimous consent of all unit owners and lien holders.

6. An answer to this question depends in part on the application of the phase statute. Since in this case the original declaration of condominium was recorded on June 21, 1984, the version of the phase statute then in effect is

applicable to this dispute. The amendments to the phase statute contained in Chapter 84-368, Laws of Florida, were not effective until October 1, 1984, and have no application here. Under Section 718.403, Florida Statutes (1983), a developer may develop a condominium in phases if the original declaration satisfies certain conditions. The declaration must describe the land which may become part of the condominium, the number and general size of units to be included in each phase, each unit's percentage ownership in the common elements as well as other requirements. Under Section 718.403(6), Florida Statutes (1983), notwithstanding the provisions of Section 718.110, Florida Statutes, amendments adding phases shall not require execution or consent by the unit owners other than the developer. Accordingly, so long as the developer remains within the parameters of the phase plan as described in the original declaration of condominium, unit owner joinder is not required to add additional phases pursuant to Section 718.403. Where, as here, however, the developer seeks to deviate from the development plan as described in the original declaration, the developer loses the exemption from the provisions of Section 718.110(4) as otherwise provided by Section 718.403(6), Florida Statutes. Review, in this regard, the declaratory statement issued In re: Village Townhouse-Pompano Beach et al., Case No. 89A-0044 in which the Division determined that where a developer had failed to comply with the time deadlines set forth in his original documents for the addition of future phases, the future phases could not under Section 718.403, Florida Statutes, be

added as part of the phase condominium absent the concurrence of the unit owners. Accordingly, the October 29, 1987 amendment does not comply with Section 718.403, Florida Statutes.

7. Under the provisions of Section 718.110(4), Florida Statutes, unless otherwise provided in the original declaration, no amendment thereto may change the configuration or size of any condominium unit in any material fashion, materially alter or modify the appurtenances to the unit, or change the proportion or percentage by which the unit owners share the common expenses and own the common surplus, unless all record owners of all units and all record owners of liens on the units approve the amendment. In this case, the October 29, 1987 amendment to the declaration implicated many of the categories provided within Section 718.110(4), Florida Statutes. Accordingly, the amendment is only valid if it complies with that section, which requires that unless otherwise provided in the original declaration, no amendment described by that section shall be valid unless all unit owners and all lien holders on the units approve the amendment. In pertinent part, the declaration in this case provides:

> XII. AMENDMENT OF DECLARATION
>
> This Declaration may be amended at any time by unanimous written agreement of the Owners of all Condominium Parcels, the Owners and holders of all institutional mortgages, as evidenced by an instrument executed by each such Owner and institutional mortgagee, and recorded in the Public Records of Collier County, Florida. As to all matters except those adjusting the Ownership Interest in Common Elements and Common Surplus, the various Assessment Shares of Condominium Parcel Owners, the vote of such Owners as

> members of the Condominium Association and any provisions affecting the rights and interests of Institutional Lenders including but not limited to, provisions IV - C and X. (which shall require written approval of such mortgagees), this Declaration may be amended with the consent of the Owners of 75% or more Condominium Parcels. Such amendment shall contain a Certificate of the Condominium Association confirming the fulfillment of the above requirements and shall be recorded in the Public Records of Collier County, Florida.
>
> In no event shall this Declaration be amended in any manner which shall divest any Owner and holder of an institutional mortgage, or any Condominium Parcel Owner of any vested right of a readily ascertainable value without first obtaining the consent of the Owner and holder of any such institutional first mortgage or any such Condominium Parcel Owner whose interest is so affected, ...
>
> Notwithstanding any of the foregoing to the contrary, however, the Developer may, without recourse to the unit owners, amend this declaration to add Phase II and III to the condominium. [Emphasis added].

That portion of the Declaration set forth above does not require unanimous approval of the unit owners for all Section 718.110(4) type amendments; except as to those amendments adjusting the ownership interest[1] in the common elements and the common surplus, the declaration may be amended with the consent of the owners of 75% or more of the condominium parcels. Based on the information submitted with the petition in this case, it appears

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[1]This portion of the declaration is properly construed as referring only to changes to ownership interest not contemplated by the phase plan; hence, although the October 29, 1987 amendment added Phase III and automatically changed ownership interest, interpreting the declaration as a whole this portion of the declaration refers to changes other than those under the anticipated phase plan.

that at least 75% of the unit owners consented to the second amendment to the declaration of condominium, and accordingly, that amendment does not violate, and complies with, the provisions of Section 718.110(4), Florida Statutes.

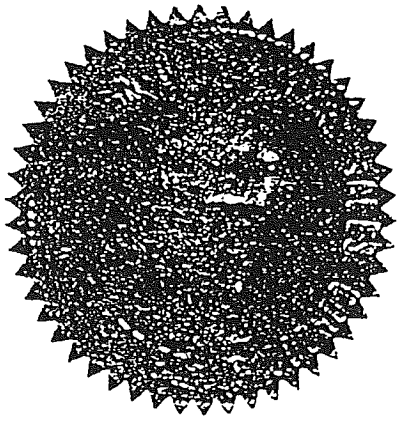
8. Based on the foregoing, the amendment recorded October 29, 1987 was valid for the purposes of changing the legal description of Phases I, II and III; was effective to add Phase III to the Condominium; to change the size, location and unit numbers of the units in Phase III; to change the configuration of the common areas; and to change the unit type as to Phase III and extend the time deadline for the addition of Phase III to August 1, 1989. As such, Springwood, a Condominium, consists of three phases and ninety-six units. The unbuilt units in Phase III despite their state of physical incompletion are legally created units for which assessment liability properly lies in the absence of a guarantee of common expenses under Section 718.116, Florida Statutes. Review, Hyde Park Condominium Association v. Estero Island Real Estate, Inc., 486 So.2d 1 (Fla. 2nd DCA 1986) and the clarifying amendment now appearing at Section 718.104(2), Florida Statutes (1991) to the effect that upon recording of the amendment adding a phase to the condominium, all units described in the phase amendment shall come into existence, regardless of the state of completion of the planned improvements in which the units may be located.

Finally, since the amendment changing the phase plan and creating Phase III was valid, the unbuilt units may properly be built according to the revised development plan.

9. As a final matter, according to the petition, the October 29, 1987 amendment purported to change the guarantee assessment level "as to Phase III." A one year guarantee pursuant to Section 718.116(8)(a)2, Florida Statutes (1985) was given by the developer in the First Amendment recorded August 12, 1985. The level of assessments guaranteed was not more than $60/month/unit. The Second Amendment, recorded October 29, 1987, contained a one year guarantee with the level of assessments not to exceed $66/month/unit. The guarantee is not, as suggested by petitioner, restricted on its face to purchasers in Phase III. Rather, it applies as it must to unit owners in all phases. Under a guarantee, the developer must in accordance with Section 718.116(8)(a)2 guarantee to each purchaser that assessments would not increase over a stated amount. Therefore, of necessity, a guarantee created simultaneous with the creation of a future phase must run in favor of unit owners in all existing phases. See, Scheuerman and Larsen, Guarantees of Common Expenses under Florida's Condominium Act, CPA Today, (Feb. 1988).

10. This declaratory statement is not intended to apply to any person other than the Petitioner herein in Petitioner's own unique set of circumstances. Accordingly this final order should not be construed to find application to situations governed by the phase statute as amended in 1984, or to any other particular set of facts other than petitioner's.

DONE AND ORDERED this 1st day of May, 1991.



HENRY M. SOLARES, DIRECTOR
Division of Florida Land Sales,
Condominiums and Mobile Homes
Department of Business Regulation
State of Florida

RIGHT TO APPEAL

THIS DECLARATORY STATEMENT CONSTITUTES FINAL AGENCY ACTION AND MAY BE APPEALED BY PETITIONER 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 30 DAYS OF THE RENDITION OF THIS FINAL ORDER.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to JOHN M. SWALM III, Esquire, 600 Fifth Avenue South, Suite 210, Naples, Florida 33940, this 1st day of May, 1991.

Carolyn Cannon

CAROLYN CANNON, DOCKET CLERK