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STATE OF FLORIDA DATE

DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION
DIVISION OF FLORIDA LAND SALES, CONDOMINIUMS, AND MOBILE HOMES

In re: Petition for Declaratory Statement

South River Village One Condominium
Association, Inc.

Petitioner.

DBR Docket No. DS92137

DECLARATORY STATEMENT

The Department of Business and Professional Regulation, Division of Florida Land Sales, Condominiums, and Mobile Homes (Division), issues this Declaratory Statement, based on the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. South River Village One Condominium (Condominium) is a condominium located in Stuart, Martin County, Florida.
2. South River Village One Condominium Association, Inc. (Petitioner), is the association which operates the Condominium.
3. On August 10, 1992, the Division received a request from the Petitioner for a declaratory statement.
4. Petitioner requests a declaratory statement on the issue of whether Petitioner's past and current procedures used to apportion common area expenses to individual unit owners is proper under Section 718.104(4)(f) and (g), Florida Statutes. Petitioner

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also seeks a declaratory statement as to what is the applicable law for the collection of assessments at the present time.

5. Article 2 of the Declaration of Condominium states, in part, as follows:

2.2 Phase Condominium Development. SOUTH RIVER VILLAGE ONE is proposed as a phase condominium under the provisions of The Condominium Act. It is proposed that there will be seven (7) additional phases to the first phase submitted to the condominium form of ownership by this instant Declaration of Condominium....

6. Article 2.2 (b-i) of the Declaration of Condominium sets out each unit owner's fractional ownership interest in the common elements. The lists are specific and detailed. They provide for changes in ownership of the common elements during the different stages of development. For example, Article 2.2(i) provides that "upon completion of Phase VIII (which is the last Phase) each unit owners' fractional ownership in the common elements shall be as follows...." The interest of each individual unit is then enumerated. The unit owners' undivided share in the common elements is stated in terms of a percentage.

7. Article 5.3 of the Declaration of Condominium states, in part, as follows:

5.3 Liability for Common Expenses. Each unit owner shall be liable for a proportionate share of the common expenses, that share being the same as the undivided share in the common elements appurtenant to his unit.

Thus, a unit owner's liability for common expenses is dependent upon the unit owner's ownership interest in the common elements.

8. In 1982, the developer, without recording any amendment to the declaration at that time, altered the development plan by changing the floor plan of certain units and increasing the interior square footage of some of the individual units to be contained in future phases. For instance, prior to the changes to the development plan, each Phase was to contain four two-bedroom, two-bath units with 1103 square feet; four two-bedroom, two-bath units with 1030 square feet; four one-bedroom, one-and-one-half-bath units with 755 square feet; and two one-bedroom, one-bath units with 645 square feet. The developer, however, changed the development plan so that Phases VI, VII, and VIII would contain four two-bedroom, two-bath units with 1103 square feet; four two-bedroom, two-bath units with 1030 square feet; two two-bedroom, one-and-one-half-bath units with 940 square feet; two one-bedroom, one-and-one-half-bath units with 755 square feet; and two one-bedroom, one-bath units with 645 square feet.

9. On January 19, 1983, the Declaration of Condominium was amended to reflect the changes to the development plan. The amendment changed the fractional ownership of the common elements from the proportions appearing in the original declaration for units to be contained in Phases VI, VII, and VIII. This amendment, therefore, altered the allocation of common expenses for those units to be contained in Phases VI, VII, and VIII. Specifically, prior to the changes to the development plan and prior to the amendment to the Declaration, the percentage of ownership of the

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common elements for units in all phases, those that had been created and in future phases, were allocated as follows:

2 bedroom/2 bath (1103 s.f.):	1.07%
2 bedroom/2 bath (1030 s.f.):	1.00%
1 bedroom/1 1/2 bath (755 s.f.):	.74%
1 bedroom/ 1 bath (645 s.f.):	.63%

After the change to the development plan and pursuant to the amendment to the Declaration, the percentage of ownership of the common elements for the units to be contained in phases VI, VII, and VIII were amended as follows:

2 bedroom/2 bath (1103 s.f.)	1.03%
2 bedroom/2 bath (1030 s.f.)	.97%
2 bedroom/1 1/2 bath (940 s.f.)	.91%
1 bedroom/1 1/2 bath (755 s.f.)	.72%
1 bedroom/1 bath (645 s.f.)	.62%

Accordingly, the owners of the two bedroom, two bath units in Phases I, II, III, IV, and V own a slightly larger percentage of the common elements than do the owners of the same type of units in Phases VI, VII, and VIII, even though the square footage of the units are the same.¹ Therefore, the owners in Phases I, II, III, IV and V pay a slightly higher common expense than the owners in Phases VI, VII, and VIII even though they may own the same types of units.²

¹ Likewise, the owners of the one-bedroom, one-and-one-half bath units and the one-bedroom, one-bath units in Phases I, II, III, IV, and V own a slightly larger percentage of the common elements than do the same type of units in Phases VI, VII, and VIII, even though the square footage of the units are the same.

² This analysis excludes the owners of the two-bedroom, one-and-one-half bath units in Phases VI, VII, and VIII because there are no similar units in the earlier phases.

10. The 1983 amendment to the Declaration of Condominium, which changed the fractional ownership of the common elements, was passed by a majority of the board of directors and joined in by the developer, pursuant to Article 14.2(c)(1) of the Declaration. The amendment, on its face, states that it was adopted in order to correct misstatements of fact in the Declaration.

11. The amendment to the Declaration was adopted after Phases I, II, III, IV and V had been submitted to the condominium form of ownership. The amendment changed the square footage and the percentage of ownership of units in future Phases VI, VII, and VIII. The amendment did not decrease or increase any existing owner's share in either the common elements or common expenses.

CONCLUSIONS OF LAW

The Division has jurisdiction over the Petitioner and the subject matter of the Petition for Declaratory Statement pursuant to Sections 120.565, and 718.501, Florida Statutes. South River Village One Condominium meets the definition of "condominium" as stated in Section 718.103(9), Florida Statutes. South River Village One Condominium Association, Inc., meets the definition of "association" as stated in Section 718.103(2), Florida Statutes.

The Condominium Act governs every condominium created and existing in the State of Florida. It is well established that the law governing a particular condominium is the law in existence on the date of recording the declaration of condominium. Sans Souci v. Division of Florida Land Sales and Condominiums, Department of Business Regulation, 421 So.2d 623 (Fla. 1st DCA 1982); Suntide

Condominium Association, Inc. v. Division of Florida Land Sales, etc., 463 So.2d 314, 317 (Fla. 1st DCA 1984) review denied, 469 So. 2d 750 (Fla. 1985). For the purpose of this declaratory statement, the law that will be applied is the law in effect in 1981, when the original declaration was recorded.

Section 718.104, Florida Statutes (1981) provides, in pertinent part, as follows:

(4) The declaration must contain or provide for the following matters: ...

(f) The undivided share in the common elements appurtenant to each unit stated as percentages or fractions, which, in the aggregate, must equal the whole.

(g) The proportions or percentages of and manner of sharing common expenses and owning common surplus, which, for a residential condominium, must be the same as the undivided shares in the common elements.

Section 718.403, Florida Statutes (1981), which applies to phase condominiums, provides, in part, as follows:

(2) The original declaration of condominium shall describe: ...

(c) Each unit's percentage ownership in the common elements as each phase is added.

The original Declaration of Condominium correctly followed the law in effect at the time it was recorded. The Declaration provided the percentage ownership in the common elements as each phase was added, in accordance with Section 718.403, Florida Statutes (1981). The Declaration also provided each unit's undivided share in the common elements stated as percentages which, in the aggregate, equaled the whole, as required by Section

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718.104(4)(f), Florida Statutes (1981). The Declaration further provided that each unit owner would be liable for a proportionate share of the common expenses based on the owner's share in the common elements, in accordance with Section 718.104(4)(g), Florida Statutes (1981).

The amendment to the Declaration followed the same pattern as the original Declaration in regard to the method of allocating percentages of ownership and common expenses. Although the developer changed the percentages of common element ownership of the units to be contained in the future phases, the undivided share in the common elements continued, in the aggregate, to equal the whole.³

The Association is currently allocating common expenses based on the percentages of ownership contained in the amendment to the Declaration of Condominium, in accordance with Section 718.104(4)(g), Florida Statutes. Although the units in Phases I, II, III, IV, and V pay a slightly higher percentage of the common expenses than the same types of units in Phases VI, VII, and VIII, there was nothing in Chapter 718, Florida Statutes (1981), prohibiting that type of disparate allocation.

³ The Petition for Declaratory Statement did not specifically raise, and therefore, this Declaratory Statement does not address, the issue of whether this developer could change the phase plan by amending the Declaration pursuant to Section 718.110, Florida Statutes and Article 14 of the Declaration of Condominium. However, it is questionable whether the Division would even have the authority to issue a declaratory statement as to that particular question. See, Florida Optometric Association v. Department of Professional Regulation, 567 So. 2d 928 (Fla. 1st DCA 1990).

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Section 718.104(4)(f), Florida Statutes, was amended in 1991 and now also includes the following:

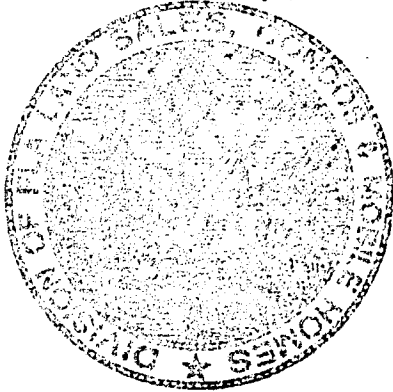
...In the declaration of condominium for residential condominiums created after April 1, 1992, the ownership share of the common elements assigned to each residential unit shall be based either upon the total square footage of each residential unit in uniform relationship to the total square footage of each other residential unit in the condominium or on an equal fractional basis.


Accordingly, a developer would now be prohibited from creating a condominium whereby two different owners with the same square footage owned a disproportionate share of the common elements. However, because the amendment to Section 718.104(4)(f), Florida Statutes, only applies to condominiums created after April 1, 1992, the amendment would not apply to the instant case.

Based on the foregoing, the answer to Petitioner's inquiry as to whether it is using the correct method to apportion common expenses is based upon the law in effect at the time the declaration was recorded. The Declaration, and the amendment, provided the percentage ownership in the common elements as each phase was added, in accordance with Sections 718.104(4)(f) and 718.403, Florida Statutes (1981). The Declaration, and the amendment, also provided that each unit owner would be liable for a proportionate share of the common expenses based on the owner's share in the common elements, in accordance with Section 718.104(4)(g), Florida Statutes (1981). The Association is currently assessing the unit owners in accordance with the percentage of ownership in the original Declaration, and as amended.

WHEREFORE, the Division DECLARES that Petitioner's current and past procedure for apportioning common area expenses to individual unit owners is in accordance with Section 718.104(4)(f) and (g), Florida Statutes (1981).

Dated this 19th day of August, 1994.




HENRY M. SOLARES, DIRECTOR
Division of Florida Land Sales,
Condominiums, and Mobile Homes
Department of Business and
Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-1030

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 HOWARD, DOCKET CLERK FOR THE DIVISION OF FLORIDA LAND SALES, CONDOMINIUMS, AND MOBILE HOMES, WITHIN THIRTY (30) DAYS OF THE RENDITION OF THIS FINAL ORDER.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Jane L. Cornett, Esquire, Wackeen, Cornett & Googe, P.A., P.O. Box 66, Stuart, Florida 34995, on this _____ day of _____, 1994.

CAROLYN HOWARD, DOCKET CLERK

Copies furnished to:

Yeline Goin
Senior Attorney

Faye Mayberry, Chief
Bureau of Condominiums

Veronica Johnson
Bureau of Condominiums

SOUTH.DS

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