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Dept. of Business and Professional Regulation

AGENCY CLERK

Sarah Wachman, Agency Clerk

By: *Barbara L. ...*

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

IN RE: PETITION FOR DECLARATORY STATEMENT

FAIRWINDS COVE CONDOMINIUM ASSOCIATION
OF HUTCHINSON ISLAND, INC.,

Petitioner.

DBPR Docket No. DS95219

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. On or about May 12, 1995, the Division received a Petition for Declaratory Statement from Fairwinds Cove Condominium Association of Hutchinson Island, Inc. (petitioner or association). The association is responsible for the operation and administration of the Fairwinds Cove Condominium (condominium).

2. The Division duly noticed its receipt of the Petition for Declaratory Statement in the Florida Administrative Weekly.

3. The petition states that the association seeks to install and staff a security gate and guardhouse at the entrance to the condominium. The petition further states that the security gate

and guardhouse would be an improvement to the common elements.

4. Paragraph 5.2(b) of the declaration of condominium, titled Alteration and Improvement, provides in pertinent part:

"After the completion of the improvements included in the common elements contemplated by this Declaration, there shall be no alteration or further improvement of common elements without prior approval in writing by the record owners of all of the apartments; provided, however that any alteration or improvement of the common elements bearing the approval in writing of the record owners of not less than 75% of the common elements, and which does not interfere with the rights of any owners without their consent, may be done if the owners who do not approve are relieved from the initial cost of such alteration or improvement. The share of any cost not so assessed shall be assessed to the other apartment owners in the shares that their shares in the common elements bear to each other. There shall be no change in the shares and rights of an apartment owner in the common elements altered or further improved, whether or not the apartment owner contributes to the costs of such alteration or improvement."
(emphasis added)

5. The petitioner requests the Division's official opinion as to how section 718.116(9)(a), Florida Statutes, will apply to the petitioner given the circumstances and language in the declaration set forth above. Specifically, the petitioner asks whether the provision permitting minority owners who do not approve the improvement to be excused from its payment is valid.

CONCLUSIONS OF LAW

The Division is that State agency responsible for the enforcement of Chapter 718, Florida Statutes and the rules promulgated pursuant thereto, and has jurisdiction over Petitions for Declaratory Statements regarding that Chapter, pursuant to

Section 120.565, Florida Statutes, and Rule 7-3.001, Florida Administrative Code.

The petition defines the change to the common elements as a material alteration or addition, rather than maintenance. Therefore, this declaratory statement adopts this assumption.

Section 718.116(9)(a), Florida Statutes, provides in pertinent part:

No unit owner may be excused from the payment of his share of the common expense of a condominium unless all unit owners are likewise proportionately excused from payment

In the instant case, the declaration purports to excuse a unit owner from the payment of any share of the initial cost of an alteration or improvement that he or she does not approve. This is in direct conflict with section 718.116(9)(a), Florida Statutes.

The cost to construct the guardhouse and security gate would appear to be an appropriate common expense. Section 718.115(1)(a), Florida Statutes, provides in pertinent part that "[c]ommon expenses include the expenses of the operation, maintenance, repair, replacement, or protection of the common elements and association property" As such, there is no authority for allowing the unit owners who do not approve of the addition of the guardhouse and gate to be excused from payment of their proportional share of the initial cost. Section 718.116(9)(a), Florida Statutes, requires that they pay their proportional share. Accordingly, if the guardhouse and gate are approved pursuant to the mechanism proposed by the association (approval by not less

than 75% of the owners), all unit owners must pay their proportional share of the initial cost.

While the association did not present the question for response by the Division, it is noted that using this method of approval (approval of not less than 75% of the owners) may in fact violate the Condominium Act. Section 718.113(2), Florida Statutes, provides that "[e]xcept as otherwise provided in this section, there shall be no material alteration or substantial additions to the common elements or to real property which is association property, except in a manner provided in the declaration." The declaration in this case provides two methods for effecting an alteration or improvement of the common elements: "there shall be no alteration or further improvement of common elements without prior approval in writing by the record owners of all of the apartments; provided, however that any alteration or improvement of the common elements bearing the approval in writing of the record owners of not less than 75% of the common elements, and which does not interfere with the rights of any owners without their consent, may be done if the owners who do not approve are relieved from the initial cost of such alteration or improvement." (emphasis supplied). Since unit owners who do not approve of an alteration or improvement of the common elements may not be relieved of the initial cost of the alteration or improvement, the second method provided in the declaration would be invalid in its entirety and the association would need the prior approval in writing of the record owners of all the apartments.

CONCLUSION

Based on the foregoing Findings of Fact and Conclusions of Law, it is concluded that pursuant to Section 718.116(9)(a), Florida Statutes, the provision in petitioner's declaration, exempting any unit owners who do not approve of an alteration or improvement of the common elements from paying their proportional share of its initial cost, is invalid.

DONE AND ORDERED this 9th day of October, 1995.



W. James Norred
W. JAMES NORRED, ACTING DIRECTOR
Division of Florida Land Sales,
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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 DECLARATORY STATEMENT.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Leif J. Grazi, Esq., Grazi, Gianino & Cohen, P.A., 217 E. Ocean Boulevard, P.O. Drawer 2846, Stuart, Florida 34995 on this _____ day of _____, 1995.

CAROLYN HOWARD, DOCKET CLERK

Copies furnished to:

Patricia A. Draper
Senior Attorney

Faye Mayberry, Chief
Bureau of Condominiums

fairwind.ds