

Final Order No. BPR-95-01510 Date 3-30-95

FILED

Dept. of Business and Professional Regulation

AGENCY CLERK

Sarah Wachman, Agency Clerk

By: Brandon L. Moore

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

IN RE: PETITION FOR DECLARATORY STATEMENT

THE HILLS OF INVERRARY
CONDOMINIUMS INC.,

Docket No. DS93432

Petitioner
_____ /

DECLARATORY STATEMENT

This Declaratory Statement is rendered by the State of Florida, Department of Business and Professional Regulation, Division of Florida Land Sales, Condominiums, and Mobile Homes, by and through its undersigned Division Director, pursuant to Sections 120.565 and 718.501, Florida Statutes.

FINDINGS OF FACT

1. A Petition for Declaratory Statement was filed with the Division on October 21, 1993, by The Hills of Inverrary Condominiums, Inc. (Petitioner or Association). Notice of the Petition was published in the Florida Administrative Weekly. No requests to intervene have been received.

2. Petitioner is a condominium association which currently operates multiple condominiums, collectively known as The Hills of Inverrary Condominiums, in Lauderhill, Broward County, Florida. The Hills of Inverrary Condominiums are grouped into three tracts,

known as Tract A, Tract B, and Tract C. Each Tract contains multiple individual condominiums. The Hills of Inverrary Condominiums comprise one subdivision in the Inverrary development.

3. One declaration of condominium from a condominium in each tract was submitted with the Petition for Declaratory Statement. It is presumed that these declarations are representative of the declarations of the remaining condominiums operated by the Petitioner and that their provisions are substantially identical. The Declaration of Condominium for Hills of Inverrary, Tract B, Phase II Condominium was recorded on September 16, 1971. The Declaration of Condominium for Hills of Inverrary, Tract C, Phase I Condominium was recorded on January 5, 1972. The Declaration of Condominium for Hills of Inverrary, Tract A, Phase II Condominium was recorded on January 6, 1972.¹

4. The declarations of the Hills of Inverrary Condominiums contain identical language providing that each condominium is "one phase of a multiphase project" encompassing the balance of the condominiums in the tract in which the condominium is located and all of the condominiums in the other two tracts. The declarations also state that all of the condominiums "are being developed under a common plan."

5. The declarations of the Hills of Inverrary Condominiums provide in section XIV that all of the condominiums in Tracts A, B, and C shall be administered, operated and managed by an Association

¹ It is assumed that all of the declarations for each of the condominiums were recorded prior to July 1, 1975.

known as the Hills of Inverrary Condominiums, Inc., pursuant to the provisions of the governing documents of the condominiums and the Association.

6. The Petitioner seeks a declaratory statement on two issues:

a. whether its method of allocating assessments and expenses equally among all unit owners in the Hills of Inverrary subdivision is proper under the declarations and lawful under Chapter 718, Fla. Stat., or whether it must allocate the expenses and assessments for each tract on a pro rata basis from each unit owner in the tract, and

b. whether its method of electing members of the board of directors is proper under the governing documents and Chapter 718, Fla. Stat.

A. ALLOCATION OF ASSESSMENTS AND EXPENSES

7. The declarations of condominium of the Hills of Inverrary Condominiums contain identical language in Article III regarding subdivision costs, tract costs, and allocation of costs as follows:

B. Subdivision Costs. Each Dwelling Unit shall be charged with one two hundred and thirty-third (1/233rd) of those costs and expenses (herein referred to as Subdivision Costs) as more particularly hereinafter defined, incurred by the Association in connection with those facilities and amenities of common interest and concern to the entire subdivision of The Hills of Inverrary, such as . . . the maintenance of the roadway within the Easement for Private Accessway . . . ; the guardhouse located in Tract "A" of the Hills of Inverrary; the security services which may from time to time be employed by the Association; and the pumps and other equipment utilized in connection with the irrigation system.

C. Tract Costs. Each Dwelling Unit shall be charged with one sixty-third (1/63rd) [or other applicable share] of those costs and expenses (herein referred to as Tract Costs) incurred in connection solely with said Tract "C" [or other applicable Tract] such as the maintenance, management and operation of all Common Elements within all condominiums established and/or to be established in the said Tract "C"

D. Allocation of Costs. The allocation between Subdivision Costs and Tract Costs shall be solely within the discretion of the Association and such determination as may be made by the Association from time to time shall be final and binding upon all concerned parties.

8. Article XI of the declarations provides, in pertinent part, as follows:

The undivided interest in COMMON ELEMENTS appurtenant to each DWELLING UNIT shall be a fraction, the numerator of which shall be one (1) and the denominator of which shall be the total number of DWELLING UNITS in the Condominium....

9. Article XXXI of the declarations deals with "Assessment: Liability, Lien and Enforcement." It provides that the Association shall operate and manage the condominium and, to that end, has the power to levy and collect assessments against the units of the condominium.

10. The By-Laws of the Association provide in section VI, Fiscal Management, as follows:

The provisions for fiscal management of the Association, set forth in the Declarations of Condominiums and Articles of Incorporation,² shall be supplemented by the following provisions: . . .

² The Articles of Incorporation of the Association provide in section III (c) that it has the power to levy and collect assessments to defray the common expenses of the condominiums as provided in the declarations and in the By-Laws of the corporation.

2. The Board of Directors shall adopt a Budget and Assessment Notice for each calendar year which shall contain the following items:

a. Common Expense Budget[:] consisting of the estimated Tract Costs as such term is defined in the Declarations of Condominium and which shall include the estimated amounts necessary for all the maintenance, repair, replacement and operation of Common Elements and Limited Common Elements within each respective Tract . . .

b. Subdivision Maintenance Budget: covering Subdivision Costs as such term is defined in the Declarations of Condominium and, which shall include the amount of contribution necessary to pay the Association's proportionate share of the cost of the maintenance, repair, replacement and improvement of those areas as well as the cost of carrying on those functions of common interest to all owners within all Tracts of the Hills of Inverrary, both within and without each respective Condominium property, such as, for example, the Easement for Private Accessway . . ., the lighting appurtenant thereto . . .

3. Copies of the Budget and Assessment Notice, which shall specify those charges relating to Tract Costs and those relating to Subdivision Costs, shall be transmitted to each member . . .

11. It has been the practice of The Hills of Inverrary Condominiums, Inc. to treat all costs incurred in the operation of the condominiums operated by the Association as subdivision costs and not to treat any costs as tract costs. This practice has been reflected in the annual budgets and in the actions of the Association at its meetings. Special assessments also have been treated as subdivision costs only.

12. The Association interprets the governing documents as permitting the Board to allocate any and all costs in the manner described in paragraph 11 above and contends that authority for this practice is confirmed by the Association's approval of the

annual budgets.

B. METHOD OF ELECTING MEMBERS OF BOARD OF DIRECTORS

13. The Articles of Incorporation of the Association provide in section VII:

1. The Board of Directors shall consist of the number of directors determined in accordance with the By-Laws, but not less than six (6) directors . . . A majority of directors shall be members of the Corporation and the condominiums in each Tract of the Hills of Inverrary shall be entitled to designate one-third (1/3) of the total number of directors . . .

2. Directors of the Corporation shall be elected at the annual meeting of the members in the manner determined by the By-Laws.

14. The By-Laws of the Association provide in section IV as follows:

2. Election of directors shall be conducted in the following manner: . . .

c. The election shall be by written ballot (unless dispensed [with] by unanimous consent) and by a plurality of the votes cast, each person voting being entitled to cast as many votes as there are Directors to be elected, provided, however, there shall be no cumulative voting and each member may not cast more than one (1) vote for any person nominated as a Director.

15. It has been the practice of the Association to conduct an at-large election for members of the board of directors. It has not conducted elections so that the condominiums in each of the three tracts are designating one-third of the directors.

CONCLUSIONS OF LAW

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

2. Petitioner, The Hills of Inverrary Condominium, Inc., is

an "association" within the meaning of Section 718.103(2), Florida Statutes. Furthermore, Petitioner is a "multi-condominium association" as defined by Rule 61B-15.001(2), Florida Administrative Code, because it is a single association that operates more than one condominium. The individual condominiums located in the Hills of Inverrary subdivision are "condominiums" within the meaning of Section 718.103(10), Florida Statutes. In addition, the individual condominiums are "multi-condominiums" as defined by Rule 61B-15.001(1), Florida Administrative Code, because they are condominiums which are part of or included within a development that contains more than one condominium operated by a single association.

A. METHOD OF ASSESSMENTS

3. 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, 421 So. 2d 623 (Fla. 1st DCA 1982); Suntide Condominium Association, Inc. v. Division of Florida Land Sales and Condominiums, Department of Business Regulation, 463 So. 2d 314 (1st DCA 1984), review denied, 469 So. 2d 750 (Fla. 1985). Therefore, in the instant case, the applicable law is the law in effect in 1971 and 1972, when the original declarations were recorded.

4. Section 711.08(1)(f), Florida Statutes (1971) provided that the declaration of condominium had to contain or provide for "[t]he undivided shares, stated as percentages or fractions, in the

common elements which are appurtenant to each of the units." Further, the declaration had to contain or provide for "[t]he proportions or percentages and manner of sharing common expenses and owning common surplus." Section 711.08(1)(g), Florida Statutes (1971). Section 711.14(2), Florida Statutes (1971), provided that the "[f]unds for the payment of common expenses shall be assessed against unit owners in the proportions or percentages of sharing common expenses provided in the declaration."³

5. In the instant case, the declarations provide for the method and manner of allocating common expenses, as required by Section 711.08(1)(g), Florida Statutes (1971). Specifically, the declarations provide for the allocation of common expenses by tract and by subdivision. Tract costs include the costs incurred in connection with the maintenance, management and operation of all common elements within the condominiums in the particular tract. Subdivision costs include those costs incurred in connection with those facilities and amenities of common interest and concern to the entire subdivision such as the maintenance of the roadways, the guardhouse, security services, and the pumps and other equipment utilized in connection with the irrigation system.

6. The declarations' method of allocating common expenses by tract and by subdivision did not violate the statute in effect at the time that the declarations were recorded. The only requirements in the statute were that declarations provide for the method of allocating common expenses and that common expenses be

³ These provisions were not amended in 1972, 1973, or 1974.

assessed in the proportions or percentages of sharing common expenses provided in the declaration. The statute did not provide for a particular method, but left the determination up to the drafters of the declaration.

7. In 1975, the Legislature amended Section 711.14, Florida Statutes, pursuant to Chapter 75-224, Laws of Florida. The amendment provided that "[i]n a residential condominium, funds for the payment of common expenses shall be assessed against unit owners in the proportions or percentages of ownership of the common elements provided in the declaration." [Emphasis added]. Section 711.14(2), Florida Statutes (1975). However, the requirement that the common expenses be assessed in the proportions or percentages of ownership of the common elements does not apply to the instant case. That provision applies prospectively and not to those declarations recorded prior to July 1, 1975, the effective date of the 1975 amendment. See, Suntide Condominium Association, Inc. v. Division of Florida Land Sales and Condominiums, Department of Business Regulation, 469 So. 2d 750 (Fla. 1st DCA 1984), review denied, 469 So. 2d 750 (Fla. 1985); Chmil v. Mediterranean Manors Association, Inc., 516 So. 2d 1109 (Fla. 2d DCA 1987), review dismissed, 520 So. 2d 583 (Fla. 1988).

8. In Chmil, Mediterranean Manors Association, Inc. was the entity responsible for the management and operation of 11 separate condominiums. The declaration provided that each apartment owner would "be liable for a proportionate share of the common expenses of the Association, such share being the same as the undivided

share in the common elements, which is appurtenant to his Apartment." The association interpreted the declaration as requiring each owner to be liable for a share of the common expenses of all condominiums within the common plan of the condominium project. However, approximately twelve years after the creation of the condominiums, the association began assessing each unit owner only for the common expenses of the particular condominium in which that unit was located, as called for by the Florida Department of Business Regulation. Some of the owners in one of the condominiums brought suit against the association. The court determined that the provisions in the declaration were not ambiguous and that it required an owner to pay only a share of the common expenses of the condominium in which his unit is located and not a share of the expenses of the other condominiums. The court in Chmil noted that the method of assessing one condominium for the expenses of another condominium did not appear to be against expressed public policy in 1974, the year the condominium in question was created. However, because such a method was contrary to the terms of the declaration itself, the association was required to follow the method described in the declaration.⁴

⁴ See also, Condominium Association of La Mer Estates, Inc. v. Semel, 610 So. 2d 569 (Fla. 4th DCA 1992) (Where 3 condominiums were created in the early 1970's and declaration required general expenses to be allocated among the various condominiums but expenses which benefitted only one condominium or one group of owners to be allocated to those benefitting from the alteration, addition, or repair, expenses had to be allocated in the manner provided in the declaration); In re: Petition for Declaratory Statement, Palm-Aire Country Club Condominium Association No. 4, Inc., BPR-94-04255, Docket No. DS93224 (DBPR, July 11, 1994) (Where 10 condominiums were created between 1973 and 1974 and declarations

9. Chmil is distinguishable from the instant case. In this case, the declarations of condominium specifically require condominiums within a tract to pay for the expenses of other condominiums within the same tract. Accordingly, because the law at the time the condominiums were created did not appear to prohibit one condominium from paying the expenses of another condominium and because the declarations specifically allow it, the Association is not required to assess in the same manner as the ownership share in the common elements. Instead, the Association should follow the provisions in the condominium documents.

10. However, it appears that the Association is not following the method of allocation and assessment of common expenses provided in the declarations. By way of example, if a condominium in Tract C needed to have the roof repaired, the declarations require that the cost of repairing the roof would be borne by all of the unit owners in Tract C, in the percentage of 1/63 per unit, regardless of whether those owners lived in the particular condominium whose roof had to be repaired. The owners of units in condominiums in Tracts A and B would not be assessed for the cost of repairing the roof. However, rather than assessing in the method described above, the Association is assessing all owners in the subdivision, including the owners in Tracts A and B, for the costs of maintaining the common elements in condominiums in Tract C.

contemplated that the unit owners in each condominium would be responsible only for the expenses associated with the common elements of their particular condominium, association required to assess in the manner provided in the declarations).

11. The provisions in the declarations regarding allocation of tract costs and subdivision costs are not ambiguous. The method of allocation used by the Association, assessing all costs as subdivision costs, is in conflict with the plain and unambiguous language of the declarations. All of the owners in the subdivision should only be assessed at a percentage of 1/233 for those costs incurred in connection with those facilities and amenities of common interest and concern to the entire subdivision, as provided in the declarations. The declarations list specific items that should be treated as subdivision costs. For instance, the roadway, the guardhouse, the security services, and the pumps and equipment used in connection with the irrigation system, are all subdivision costs and should be assessed on a 1/233 percentage. However, where it is clear that a particular cost is incurred solely in connection with the maintenance of common elements appurtenant to a particular condominium, only the owners in the tract in which the condominium is situated should be assessed.⁵

12. The Association argues that "[t]he conversion to financial operations allocated on a tract basis would be financial (sic) burdensome and would result in unnecessary and burdensome record keeping and destroy a custom of equal treatment in a community historically treated as one entity." However, burdensome

⁵ The Association's argument that pursuant to the documents it has unbridled discretion to determine tract and subdivision costs is not convincing where, as here, the documents themselves identify the types of expenses properly considered tract and subdivision costs. The board's categorization of costs must be consistent with the provisions in the documents.

record keeping and the fact that the Association has historically allocated all expenses as subdivision expenses are not justifiable reasons for an association to ignore the plain language in its condominium documents. Chmil, 516 So. 2d at 1113.

B. METHOD OF ELECTING MEMBERS OF THE BOARD OF DIRECTORS

13. At the time that the declarations were recorded, the Condominium Act did not provide a particular method for electing directors.⁶ Section 711.11(2)(a), Florida Statutes (1971) simply stated that the By-laws shall provide the "form of administration, indicating the title of the officers and board of administration, if any, and specifying the powers, duties, manner of selection and removal, and compensation, if any, of officers and boards." [Emphasis added].

14. The Articles of Incorporation of the Association set forth the basic method of allocating directors, that is, each tract shall designate one-third of the total number of directors. The Articles then specifically refer to the By-Laws for the election procedures. The By-Laws provide that directors shall be elected by a plurality of votes cast, with each person being entitled to cast one vote for each director position. The By-Laws do not refer to the provision in the Articles which entitles each tract to designate one-third of the directors.

15. The procedure set forth in the By-laws does not conflict with the law in effect at the time that the declarations were

⁶ Today Section 718.112(2)(d)3., Florida Statutes, requires that members be elected by written ballot or voting machine.

recorded, or the statute as amended. The provision in the Articles of Incorporation, providing that each tract shall designate one-third of the total number of directors, is also not in conflict with the statute. There does not appear to be a direct conflict between the Association's Articles of Incorporation and By-laws. The Association is again simply ignoring the plain and unambiguous language in its condominium documents. Here, the Association has chosen to ignore the requirements in the Articles of Incorporation providing that each tract shall designate 1/3 of the total number of directors. The Association has not presented any basis for its failure to follow its condominium documents other than stating that the Association has always conducted at-large elections.

16. Accordingly, the Association should follow the provisions in its Articles of Incorporation and By-laws regarding the election of directors. Of course, the Association must also continue to follow the election procedures in Section 718.112(2)(d)3., Florida Statutes, and Rule 61B-23.0021, Florida Administrative Code. Where there is a conflict between the Association's condominium documents and the statute and/or administrative rules regarding certain election procedures, the provisions in the statute and administrative rule are applicable.⁷ Rule 61B-23.0021(1)(a), Florida Administrative Code (the administrative rules regarding regular and run-off elections apply regardless of any provision to the contrary contained in the declaration, articles of

⁷ For instance, the provision in Article IV.2.b., providing for a nominating committee, is invalid pursuant to Rule 61B-23.0021(3), Florida Administrative Code.


incorporation or bylaws).

CONCLUSION

Based on the foregoing findings of fact and conclusions of law, the Division declares that the provisions in the Declarations of Condominium regarding the allocation of common expenses on a tract and subdivision basis does not conflict with the statute in effect at the time the Declarations were recorded. Further, the method of electing directors provided in the Articles of Incorporation and By-laws does not conflict with the statute in effect at the time the Declarations were recorded, or the statute as amended.

DONE AND ORDERED, this 29th day of March, 1995.




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

RIGHT TO APPEAL

THIS ORDER CONSTITUTES FINAL AGENCY ACTION AND MAY BE APPEALED BY PETITIONER PURSUANT TO THE FLORIDA RULES OF APPELLATE PROCEDURE AND SECTION 120.68 FLORIDA STATUTES, 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 FEES 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 ORDER.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been sent by regular U.S. mail, postage prepaid to: James A. Cherof, Esquire, Josias & Goren, P.A., 3099 E. Commercial Boulevard, Suite 200, Ft. Lauderdale, Florida 33308, on this ___ day of _____, 1995.

CAROLYN HOWARD, DOCKET CLERK

Copies furnished to:

Faye Mayberry, Chief
Bureau of Condominiums

Yeline Goin
Senior Attorney