

Final Order No. BPR-96-00712 Date 2-7-96

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;
Sidney Pasichow; Wynmoor
Community Council

Docket No. DS94480
Legal No. 94L-1262

DECLARATORY STATEMENT

Comes now, the undersigned as Director of the Division of Florida Land Sales, Condominiums, and Mobile Homes, and issues this Declaratory Statement as follows:

FINDINGS OF FACT

1. The Petition for Declaratory Statement was filed in this matter on November 18, 1994. The Petitioner is Sidney Pasichow, a unit owner in Portofino 1E, a condominium in Wynmoor Village, a development located in Coconut Creek, Florida. The original Petition for Declaratory Statement asked whether the Wynmoor Community Council has the authority to assess a unit owner for the use of council property or facilities. An example was contained in the petition whereby Wynmoor was shown to have a comprehensive educational program, with classes conducted by both paid and non-paid instructors. According to the petition, the recreation

department of the council arranges the classes as to time and room space and chooses the instructor, and unit owners who register in a class pay no fee. However, as to classes with a paid instructor, unit owners are forced to pay a fee for the instructor, and are required to pay for the class information bulletin and for class registration. Petitioner appears to take the position that when he enrolls in a particular class, for example, art class, the expenses incurred should not be shared by those who register for the class, but should be shared by all owners in all forty-two condominiums, whether they enroll in the class or not.

2. On February 10, 1995, a letter was sent from the Division to Petitioner Pasichow, which required that supplemental information be provided concerning an identification of the fees sought to be challenged.

3. Petitioner responded with certain supplemental information received February 21, 1995. The supplemental information contained, in addition to a letter of explanation, a copy of a newsletter published by Wynmoor; an organizational chart of the Wynmoor Community Council Entertainment Recreational Committee, along with a description of its function and budget; class schedules; a lengthy financial policy manual promulgated by the Wynmoor Community Council; and other information.

4. The association intervened as a party in this matter on September 8, 1995.

5. A declaratory statement was previously issued by the Division in the case of *In re: Petition for Declaratory Statement*;

Wynmoor Community Council, Inc., DBPR Docket No. DS94029, filed with the agency clerk on August 4, 1994. As stated in that declaratory statement, *Wynmoor Community Council, Inc.* is an entity formed for the operation of certain property owned by the council in which unit owners of forty-four separate condominiums have use rights. The property consists of real property used in common by the individual unit owners and includes a theater, tennis courts, a golf course, clubhouse, certain community roads, and other facilities. Each individual unit owner is a member in a separate condominium association operating the common elements of each respective condominium, and each individual unit owner is made a member in the council for the purpose of enjoyment of all facilities, but not for voting purposes. Voting members on the community council include one representative from each condominium association. The declaratory statement determined that the council was a condominium association as defined by section 718.103(2), Florida Statutes, and that its operation was accordingly governed by Chapter 718, Florida Statutes. The declaratory statement further ruled that the condominium statute was satisfied where the council forwarded its proposed budget to its voting membership, and that the council was not required to forward the budget to the individual unit owners. The declaratory statement also held that only the voting membership, and not all unit owners, are, consistent with the condominium statute, permitted to vote to waive or reduce reserves required by section 718.112, Florida Statutes.

CONCLUSIONS OF LAW

The Director of the Division of Florida Land Sales, Condominiums and Mobile Homes has the authority to issue this declaratory statement pursuant to section 120.565, Florida Statutes, and section 718.501, Florida Statutes.

Section 718.111(4), Florida Statutes, provides as follows:

(4) ASSESSMENTS; MANAGEMENT OF COMMON ELEMENTS. - The association has the power to make and collect assessments and to lease, maintain, repair, and replace the common elements; however, the association may not charge a use fee against a unit owner for the use of common elements or association property unless otherwise provided for in the declaration of condominium or by a majority vote of the association or unless the charges relate to expenses incurred by an owner having exclusive use of the common elements or association property.

The section of the statute set forth above gives the association the power to charge a use fee against a unit owner for use of the common elements or association property where such a fee is provided for in the declaration or by a majority vote of the association, or where the charges relate to expenses incurred by an owner having exclusive use of the common elements or association property. See, in this regard, *Rosso v. Golden Surf Towers Condominium Association, Inc.*, 20 F.L.W. D588 (Fla. 4th DCA March 8, 1995), on motion for rehearing, in which the court confirmed the condominium association's ability to charge a use fee in accordance with section 718.111(4), Florida Statutes. The property at issue in that case for which the association charged a fee was dock space for use in mooring a boat. The dock space was a common element.

In the instant proceeding, Petitioner argues that although the council is authorized to charge a fee for the exclusive use of council property or facilities in accordance with section 718.111(4), Florida Statutes, the council may not charge the individual unit owners for enrolling in a class on a first-come, first-serve basis where the instructor is to be paid a fee.

It is evident from the foregoing description of the materials submitted by Petitioner that the fee associated with his painting class is more in the nature of a service fee, and is not primarily a fee paid for use of the common elements or association property. An example of a use fee contemplated by the statute would be a fee for exclusive use of a recreation room. While one who enrolls in the class is physically situated within a council facility located upon council property, the individual is not paying a fee in order to be permitted to sit in an empty building and occupy association property for the sake of mere occupation, but is instead paying a fee for a class which is a voluntary service or benefit offered by the association to its members choosing to participate. Initially, then, it does not appear that the class fee is a use fee for use of the common elements as contemplated by section 718.111(4), Florida Statutes; in the alternative, the use fee aspect of this case is secondary because the fee is primarily a service fee.

Even assuming for the sake of argument that the class registration fee constitutes a use fee for the use of council properties, the charges appear to relate to expenses incurred by an owner having exclusive use of the particular portion of the

association property in which the class is offered. Section 718.111(4), Florida Statutes, permits such a use fee. In the declaratory statement issued by the Division in In re: James Ormsby, Case No. 86-48 (April 25, 1988), the Division considered whether a condominium association could properly charge an instruction fee where an instructor offered classes in the condominium's recreational hall. It was stated in the petition that a portion of the instruction fee charged for the class was remitted to the association and used to pay general operating expenses. The Petitioner asserted that such an arrangement violated section 718.111(4), Florida Statutes. The declaratory statement provided in part as follows:

The Petitioner asserts that the condominium association, by collecting twenty percent (20%) of the dance instructor's fee, is charging unit owners for the use of the common elements, in violation of Section 718.111(4), Florida Statutes (1987). That section provides:

The association has the power to make and collect assessments and to lease, maintain, repair, and replace the common elements; however, the association may not charge a use fee against a unit owner for the use of common elements or association property unless otherwise provided for in the declaration of condominium or by a majority vote of the association or unless the charge relates to expenses incurred by an owner having exclusive use of the common elements or association property. (Emphasis added).

The Petitioner also asserts that the collection of a twenty percent (20%) use fee violates Section 718.115(2), Florida Statutes (1987). That section provides:

Funds for the payment of common expenses shall be collected by assessments against unit owners in the proportions or percentages provided in the declaration. . .

In essence, the Petitioner asserts that because the use fees are not collected through assessments against the unit owners, there is no authority for their inclusion in the common expense fund. Such an interpretation would prevent an association from applying any profits from the lease of common elements to the maintenance of those areas because those monies would not have been collected as assessments against unit owners.

The fees collected from the instructors are not "funds for the payment of common expenses" as provided by Section 718.115(2), Florida Statutes, (1987). The fees are charges to the instructors for the temporary use of the recreation hall and are proper under Section 718.111(4), Florida Statutes (1987) (cited above). That section gives the condominium association the power to make and collect assessments and to lease, maintain, repair and replace the common elements.


WHEREFORE, the Division declares that the twenty percent (20%) use fee charged by the condominium association does not violate Chapter 718, Florida Statutes (1987).

Accordingly, the Division in *Ormsby* held that a condominium association may properly lease a portion of the common elements to a dance instructor; and that the dance instructor could pay rent to the condominium association, which rent could be utilized for maintenance of the common elements being utilized. The declaratory statement also implies that the dance instruction arrangement was the type of fee which relates to expenses incurred by an owner having exclusive use of the common elements which constitutes a permitted use fee under section 718.111(4), Florida Statutes.

In this case, it is determined that the association has the authority to lease the common elements and to charge rent for such use; that the association where it seeks to provide a voluntary class to the unit owners is not charging a use fee for the use of council properties, but is instead charging a service fee; and that even if the instruction or registration fee could be considered a use fee, the charges relate to expenses incurred as a result of the unit owners taking the class and having exclusive use of the council properties.

DONE AND ORDERED this 2nd day of February, 1996, in Tallahassee, Leon County, Florida.




W. JAMES NORRED, ACTING DIRECTOR
Division of Florida Land Sales,
Condominiums, and Mobile Homes
Department of Business and
Professional Regulation
Northwood Centre
1940 North Monroe Street
Tallahassee, Florida 32399-1030

RIGHT TO APPEAL

THIS FINAL ORDER CONSTITUTES FINAL AGENCY ACTION AND MAY BE APPEALED BY THE 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, CONDOMINIUM, AND MOBILE HOMES, WITHIN THIRTY (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 Sidney Pasichow, O.D., 3003 Portofino Isle, L3, Coconut Creek, FL 33066, and Earl Bosworth, 1310 Avenue of the Stars, Coconut Creek, FL 33068, this ____ day of _____, 1995.

Carolyn Howard, Docket Clerk

Copies furnished to:

Faye S. Mayberry
Pia Lehtonen
Karl M. Scheuerman

PASICHOW.DS