

Final Order No. BPR-97-00388 Date 1-27-97

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Dept. of Business and Professional Regulation

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By: *Brandi 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

CASTLE BEACH CLUB
CONDOMINIUM ASSOCIATION, INC.,

DS95474

Petitioner,
_____ /

DECLARATORY STATEMENT

The Division of Florida Land Sales, Condominiums and Mobile Homes in the Department of Business and Professional Regulation (hereinafter "Division") issues this declaratory statement pursuant to Sections 718.501 and 120.565, Florida Statutes, based upon the following:

STATEMENT OF THE ISSUES

1. Whether the association may contract with a hotel operator to operate the condominium for a term longer than three years pursuant to Section 718.3026, Florida Statutes.
2. To what extent can the association's board of directors delegate its power to operate and maintain the condominium property to the hotel operator pursuant to Sections 718.111 and 718.3025, Florida Statutes. Petitioner lists specifically the following activities it anticipates delegating to the hotel operator/manager: valet parking; security; cleaning services; maintenance of the common elements and limited common elements with the right to make capital improvements thereon; pool operation and maintenance; furnishings; cable television; and commercial practices, i.e., ability to control the types of stores opened in the commercial units.

FINDINGS OF FACT

1. The petitioner, Castle Beach Club Condominium Association, Inc., is the association responsible for operating and maintaining Castle Beach Club Condominium.
2. Castle Beach Club, A Condominium is a 575 unit condominium in Miami Beach, Dade

County, Florida. § 1(d), Prospectus. The condominium is a mixed-use condominium containing 36 commercial units and 539 residential units. § 2, Prospectus. Approximately 442 residential units are designated as "hotel" units, which are rented on a transient basis. The remaining residential units do not participate in the hotel program. § 1(d), Prospectus.

3. The Declaration of Condominium for Castle Beach Club, A Condominium (hereinafter "Declaration") provides that residential units may be occupied on a transient basis. Art. XXX, Declaration; § 1(b), Prospectus. This condominium was created with the use of the residential units as a hotel clearly contemplated by the developer. This condominium was filed as a conversion of an existing structure, most likely a hotel.

4. Article XVIII, § 18 03, of the Declaration authorizes the association to "contract, sue or be sued with respect to the exercise or non-exercise of its powers," which includes contracting for the management of the condominium property. Section 16(e) of the By-Laws of Castle Beach Club Condominium Association, Inc. (hereinafter "By-Laws") provide that the association has the power:

To contract for the management and maintenance of the Condominium Property and to authorize a management agent to assist the Association in carrying out its powers and duties by performing such functions as the submission of proposals, collection of Assessments, preparation of records, enforcement of rules and maintenance, repair and replacement of the Common Elements with funds as shall be made available by the Association for such purposes. The Association and its officers shall, however, retain at all times the powers and duties granted by the Condominium documents and the Condominium Act, including, but not limited to, the making of Assessments, promulgation of rules and execution of contracts on behalf of the Association.

5. Unit owners are required to use the valet parking space assigned to them and to obey the association's rules regarding the use of the assigned space. Arts. XXII, § 22.12 and XXXI, Declaration. The association is authorized to contract with a company to manage the valet parking. Art. XXXI, Declaration.

6. Article 4 of the Prospectus states that the recreation facilities may be expanded or added without unit owner consent. No parallel provision appears in the Declaration. The Declaration grants the association the authority to maintain, repair and replace the common elements. Art. XVIII, §

18.12; Art. V, § 16(k), By-Laws. It does not appear that the association has been granted the sole authority to make improvements to the common elements.

7. Article XXV of the Declaration provides for the existence of 36 commercial units within the condominium. That article provides, in part, as follows:

Although a specific initial use is indicated for the Commercial Units within this Prospectus, the Commercial Units may be used for any and all lawful purposes, without the consent of the Association, and may be transferred, conveyed, leased or disposed of without the consent of the Association. Furthermore, the Developer reserves the right, at any time, to convey any or all of the Commercial Units to the Association, and the Association shall be obliged to accept same. Upon the conveyance of a Commercial Unit to the Association, the percentage of Common Expense and ownership of Common Elements attributable to any Commercial Unit conveyed to the Association shall be deemed transferred to the Association, as well. The Commercial Units shall be used in accordance with applicable laws, including, but not limited to, Chapter 718 of the Florida Statutes and zoning regulations of the city of Miami Beach. Subject to the foregoing, the Owner of a Commercial Unit has the right to permit the public to use it and to charge a fee for the use of the Commercial Unit to both Owners and to the public. No action may be taken which adversely affects the rights and interests of the Commercial Unit Owners without their prior written consent.

CONCLUSIONS OF LAW

The Division has jurisdiction to issue this Declaratory Statement pursuant to Section 120.565, Florida Statutes. The Petitioner is an "association" within the meaning of Section 718.103(2), Florida Statutes. Castle Beach is a "mixed-use" condominium as defined by a 1995 amendment to Section 718.103(20), Florida Statutes. Ch. 95-274, § 34, West Sess. Law Serv. (1995) 1936, 1982.

Petitioner requests a declaratory statement on whether it may contract for a term longer than three years with a hotel operator to manage the condominium. If so, it asks for a determination on which of the association's powers may be delegated to the manager. Petitioner lists specifically the following activities it anticipates delegating to the hotel operator/manager: valet parking; security; cleaning services; maintenance of the common elements and limited common elements with the right to make capital improvements thereon; pool operation and maintenance; furnishings; cable television;

and commercial practices, i.e., ability to control the types of stores opened in the commercial units. This declaratory statement does not address any of the other terms of the contractual arrangement contemplated by the parties and is limited to the issues noted.¹

I. Whether the Association's Board of Directors May Contract with a Hotel Operator to Manage the Condominium for a Term Longer than Three Years Pursuant to Section 718.3026, Florida Statutes.

The association has the power to contract for management services. § 718.111(3); art. XVIII, § 18.03, Declaration; see *Point East Management Corp. v. Point East One Condominium Corp.*, 282 So. 2d 628, 630 (Fla. 1973) (there is no legislative prohibition against management contracts), *cert. denied*, 415 U.S. 921 (1974). Section 718.3026, Florida Statutes (1993), provides that "[a] contract with a manager, if made by competitive bid, may be made for up to 3 years." This section was amended to exempt contracts between an association and a community association manager. Ch. 95-274, § 44, West Sess. Law Serv. (1995) 1936, 1990.

When an association contracts with a person to perform the duties of a community association manager, it must hire a person licensed by the state pursuant to Sections 468.431, *et seq.* Rule 61B-23.001(6), Fla. Admin. Code. Community association management includes controlling and disbursing funds of a condominium association, coordinating the maintenance for a residential condominium association, and managing other day-to-day aspects of the operation of the condominium when done for remuneration. § 468.431, Fla. Stat.

The contract contemplated by the association with the hotel operator includes the maintenance of the common elements and condominium property, and managing the day-to-day operation of the

¹ For example, this declaratory statement does not address whether the hotel operation is an ancillary operation; whether the association's method of budgeting the expenses and revenues resulting from any agreement reached between it and the hotel operator complies with the statute and rules; or whether the contract complies with the Condominium Act. See § 718.3025, Fla. Stat.; *Halpern v. Retirement Builders, Inc.*, 507 So. 2d 622 (Fla. 4th DCA 1987) (management contract containing escalation clause was void as a matter of public policy), *review denied*, 518 So. 2d 1277 (Fla. 1987); see also *Fairways Royale Ass'n, Inc. v. Hasam Realty Corp.*, 419 So. 2d 667 (Fla. 4th DCA 1982) (association did not have a cause of action against the corporate lessor but could have brought an action against the board members in their individual capacities for breach of fiduciary duty in secretly including an escalation clause in the recreation lease and benefitting thereby; and unit owners not association had a cause of action for fraud and deceit for failing to disclose existence of escalation clause). The hotel operator's obligations under Chapter 509, Florida Statutes, is also beyond the scope of this statement.

condominium. The contract provides that the hotel may bill the association for providing its services for security, maintenance, valet parking, and cleaning. The cost of these services is to be determined by the hotel and may be increased in succeeding years based upon the consumer price index. The hotel operator will be performing the duties of a community association manager for remuneration. Therefore, the hotel operator is exempt from Section 718.3026, Florida Statutes, by that section's terms. The association is not limited to a three year term for its contract with the hotel for property management services.

The inquiry does not end here. Since the hotel will be performing the services of a community association manager, the association is bound by Section 718.3025, Florida Statutes. This section requires the inclusion of certain terms in the contract for management services. For example, any contract for management services must specify the costs incurred for the services or the responsibilities that are to be reimbursed by the association. § 718.3025(1)(b), Fla. Stat. The proposed contract between the parties has not been executed, so any attempt to assess the contract's compliance with Section 718.3025 would be inappropriate. Additionally, an assessment of the contract's compliance with Section 718.3025 is beyond the scope of this declaratory statement.

II. The Extent to Which the Association May Delegate Certain of Its Powers to the Hotel Operator/Manager.

The Petitioner has asked to what extent it may delegate its authority to manage the condominium to a hotel operator. The contract with the prospective hotel operator authorizes the hotel operator to, among other things, make capital improvements to the common elements, to hire and fire employees who perform the day-to-day operational services, and the power to decide what type of stores will be housed in the commercial units.

Condominium associations are corporations formed under the corporation acts of this state. § 718.111(1), Fla. Stat. Therefore, associations have the authority to conduct business within this state and to operate condominiums for the welfare of the unit owners. *Id.* § 718.111. The articles of incorporation establish the purpose of the corporation, and the bylaws, when not inconsistent with chapters 617 and 718, Florida Statutes, determine the composition, powers and duties of the board of directors. *Id.* § 718.112(1).

Section 718.111(3), Florida Statutes, permits an association to contract for the "exercise and non-exercise" of its powers. *Accord* art. XVIII, § 18.03, Declaration. This grant of authority is very broad, but not unlimited. *Sunnyland Management Corp. v. Murry Hills Association, Inc.*, 350 So. 2d 10 (Fla. 4th DCA 1977), *cert. dismissed*, 354 So. 2d 987 (Fla. 1977) (invalidating management contract, which virtually divested association of all of its authority). The association may delegate much of its power to a manager, but it "shall, however, retain at all times the powers and duties granted by the Condominium documents and the Condominium Act, including, but not limited to, the making of Assessments, promulgation of rules and execution of contracts on behalf of the Association." Art. V, § 16(e), By-Laws.

As a general rule, the association may delegate its authority to manage and operate the condominium to a manager, but may not divest itself of the responsibility for the exercise of those powers by the manager.² *Sunnyland*, 350 So. 2d at 10; § 617.0801, Fla. Stat. (corporate powers must be exercised by or under the authority of the directors); *id.* § 617.0830 (directors must exercise their duties in a responsible manner and in good faith); *see id.* § 718.111(1) ("It is the intent of the Legislature that nothing in this paragraph shall be construed as providing for or removing a requirement of a fiduciary relationship between any manager employed by the association and the unit owners."). Some of the powers to be delegated to the hotel operator/manager that are listed by Petitioner fall within the association's authority under the governing documents for Castle Beach Club. Valet parking is provided for in the declaration. Art. XXXI, Declaration. The maintenance and operation of the common elements is a responsibility of the association under its governing documents and the law. Art. XVIII, § 18.03; art. V, § 16, By-Laws; § 718.111(4), Fla. Stat. To the extent that "furnishings" are part of the existing common elements, the association has the authority to maintain, repair, and replace these furnishings. Art. V, § 16(g) (association has authority to maintain, care and preserve condominium owned personal property); *id.* § 16(k) (repair and replace common element facilities, machinery and equipment); § 718.103(12), Fla. Stat. (condominium property includes personal property); *compare Goodner v. Daytona Beach Ocean Towers, Inc.*, 389

² Compare this to a board's power to delegate its authority to a board committee. A board's power to delegate is very broad and limited only to those powers that are vital to the corporate existence or that involve a high degree of discretion, e.g. filling vacancies on the board. *See* Rev. Model NonProfit Corp. Act § 8.25 (1987); Comment, *Corporation Executive Committees*, 16 *Clev. Marshall L. Rev.* 167, 171 (1967)

So. 2d 230 (Fla. 5th DCA 1980) (holding that 24 hour telephone switchboard service operated for those unit owners paying for the service was not a common element for which association was required to obtain unit owner approval before terminating) *with Ocean Monarch Condominium Association, Inc.*, Case No. DS 93118 (DBPR Oct. 29, 1993) (washers and dryers were association property). The association may contract with the hotel operator/manager to provide valet parking services and maintenance of the common elements.

The association may not delegate a power that it has not been granted by the governing documents or law.³ *S & T Anchorage, Inc. v. Lewis*, 575 So. 2d 696, 698 (Fla. 3d DCA 1991) ("Because the Association is a corporation, it may not act in any way not authorized in its articles of incorporation or bylaws"), *review denied*, 626 So. 2d 2107 (Fla. 1993). The right to make capital improvements to the common elements and common element furnishings does not appear to have been a power vested by the governing condominium documents in the association.⁴ The only mention of this power is found in the prospectus. § 2(4), Prospectus. The prospectus is not a governing document.⁵ The prospectus is an offering circular that is distributed to potential buyers. *See id.* § 718.504. As such it does not convey any power or authority on the association. Only the declaration, articles of incorporation, bylaws and the controlling statutes may empower a board of directors to take certain actions. *See S & T Anchorage*, 575 So. 2d at 698 (bylaws and articles must be consistent with declaration, which is the superior document governing the corporation, so homeowner's association could not sell or convey dock area despite a vote of approval under the bylaws); § 718.112(2)(a) Fla. Stat. (bylaws shall specify the powers and duties of the board); *id.* § 718.104(4)(k) (declaration shall include a copy of the bylaws). Therefore, it appears that the

³ *Review Tower Forty-One Ass'n v. Levitt*, 426 So. 2d 1290 (Fla. 3d DCA 1983) (association did not have authority under declaration to permit a commercial business or religious display on condominium property); *Towerhouse Condominium, Inc. v. Millman*, 475 So. 2d 674, 677 (Fla. 1985) (association did not have the power to purchase real property)

⁴ *See* § 718.113(2) Fla. Stat.

⁵ This does not diminish the importance or the legal significance of the prospectus, which requires disclosure of important information to prospective purchasers. The declaration, which is filed in the public records, is the document that creates the condominium and empowers the association, not the prospectus. § 718.104, Fla. Stat. Until the declaration is filed, the condominium does not exist, so the association would have no authority to operate, maintain, or manage a condominium

association may not contract with a hotel operator/manager to make improvements to the common elements and the common element furnishings.

Security services are a recognized common expense attendant to the operation and maintenance of the condominium property where such services were provided from the date of turnover of control of the association by the developer to the unit owners or where security services are provided for in the condominium documents. § 718.115(1)(a), Fla. Stat. Security services are not listed in either the prospectus, which would indicate that the developer had provided such services, or the condominium documents. Therefore, the association may not contract for security services without amending its documents.

Cleaning services may be considered a part of the association's operation and management function if those services are limited to the common elements. However, it appears from the information provided by the Petitioner that the contract for cleaning services is for the cleaning of individual units, as well as the common elements. Unit owners, not the association, are responsible for keeping individual units clean. Art. XXII, § 22.02, Declaration (unit owner must maintain his unit in "a clean and sanitary manner"). Therefore, cleaning services for individual units does not fall within the association's powers and duties for maintenance of the condominium property. The association may delegate its authority to contract for the cleaning of the common elements, but not for cleaning individual units without amending the declaration to provide for such services.

If the pool is a part of the common elements, its maintenance falls within the association's responsibilities. It is not clear from the documents submitted whether the pool(s) are considered a part of the common elements or are a leased recreational facility. The declaration does not list the pool(s) specifically as a part of the common elements. Art. VIII, Declaration. Maintenance of the pool is not listed among the association's powers and duties. Art. XVIII, Declaration; art. V, § 16, By-Laws. The prospectus lists two pools as a part of the "recreational and other commonly used facilities that will be used only by the Unit Owners, . . . tenants, guests and invitees." § 4, Prospectus. Based upon the information provided by Petitioner, it is unclear whether the pool(s) are a part of the common elements for which the association has been given maintenance responsibility. Therefore, this part of Petitioner's question cannot be answered. If the pool is part of the common elements under the association's control, then the association may delegate its authority to maintain the pool

to a hotel operator/manager. If not, then it cannot without amending the Declaration.

Commercial activities are covered by article XXV of the Declaration. Under that provision, the association does not have the authority to dictate the use of the commercial units. No information was provided by the Petitioner as to whether the developer had conveyed any of the commercial units to the association pursuant to article XXV of the Declaration. If the developer has conveyed those commercial units to the association, then the units have become association property, which may be controlled by the association in accordance with the Condominium Act and any agreements governing the conveyance. It is not possible to render a decision regarding the management of the commercial units with the scant information provided. If the association has acquired control of the commercial units, then it may delegate the management of those units to the hotel operator/manager. If not, then the association cannot delegate any authority it does not have.

Section 718.1232, Florida Statutes (1993) provides that unit owners are to have access to cable television services. That section provides as follows:

No resident of any condominium dwelling unit, whether tenant or owner, shall be denied access to any available franchised or licensed cable television service, nor shall such resident or cable television service be required to pay anything of value in order to obtain or provide such service except those charges normally paid for like services by residents of, or providers of such services to, single-family homes within the same franchised or licensed area and except for installation charges as such charges may be agreed to between such resident and the provider of such service.

Generally, contracts for cable television services are not considered contracts for the management or operation of condominium property. *Country Manors Association, Inc. v. Master Antenna Systems, Inc.*, 458 So. 2d 835 (Fla. 4th DCA 1984) (cable television underground system, connections, and installations within walls are not "common elements"); see § 718.3025(4), Fla. Stat. (exempting cable television operators from the requirements governing association contracts for management of the condominium property); see *Palma Del Mar Condominium Association No. 5 of St. Petersburg, Inc. v. Commercial Laundries of West Florida, Inc.*, 586 So. 2d 315 (Fla. 1991) (contract for operation of laundry equipment exempt from § 718.3025, Fla. Stat.). No specific mention of cable television service is found in the Declaration or By-Laws. Art. VIII, § 8.01(2)

(defining common elements as including easements for wiring and other facilities for the furnishing of utility services); *id.* § 8.01(4) ("property and installations required for the furnishings of utilities and other services to more than one Unit or the Common Elements."); *id.* § 8.01(5) ("electricity servicing each Unit"); *cf.* § 12, Prospectus (itemizing utility and other services as water, sewage, waste disposal, electric, and trash removal but not telephone) The only references found are for utility services. It may be argued and later proven that the cable television wiring and installations are part of the common elements by virtue of the association's acquiring an ownership interest in these furnishings. However, no such information was provided by the Petitioner, and it is not possible to reach that assumption on the basis of the information provided

It is presumed, in the lack of evidence to the contrary, that the association has a contract for the furnishing of cable television service with a cable television utility, or that each unit owner has contracted for service with the cable television company. If the association has contracted for such service, the contract is subject to Sections 718.115(1)(b)⁶ and 718.3026, Florida Statutes. The association may delegate its authority to oversee the furnishing of cable television service, but any contract for cable television services must comply with Sections 718.115(1)(b) and 718.3026, Florida Statutes.

As long as the board has contracted with a licensed community association manager to operate the hotel program, the board may delegate any of its operational and maintenance duties to the hotel operator/manager. It does not appear that the right to make capital improvements to the common elements and furnishings, the provision of cleaning services for individually owned units and security services are powers vested in the board of directors, so the authority to manage these activities may not be delegated to a manager. The management of the pool(s), the commercial units, and cable television service are not clearly the responsibility of the association under the documents and information provided by the Petitioner, so no determination may be made regarding the

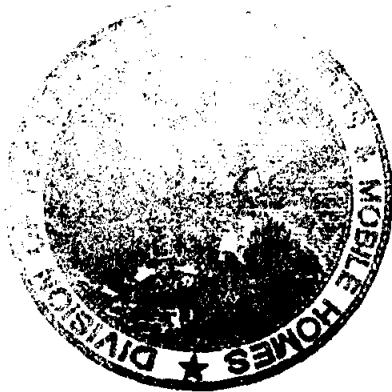
⁶ This section provides, in part, as follows:

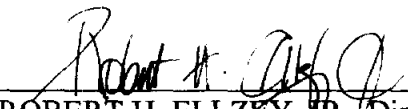
If so provided in the declaration, the cost of a master antenna television system or duly franchised cable television service obtained pursuant to a bulk contract shall be deemed a common expense, and if not, such cost shall be considered common expense if it is designated as such in a written contract between the board of administration and the company providing the master television antenna system or the cable television service. The contract shall be for a term of not less than 2 years.

delegation of the management of these services.

In summary, the association may contract with a hotel operator licensed in this state as a community association manager to operate and maintain the condominium property for a term longer than three years because these kinds of management contracts are exempt from Section 718.3026, Florida Statutes. The board of directors may delegate its duties and the exercise of its powers for the operation and maintenance of the condominium property to the hotel operator/manager, but may not divest itself of its fiduciary duties, or delegate a power not granted to it by the governing documents.

DONE and ORDERED this 21st day of January, 1996.





ROBERT H. ELLZEY, JR., 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 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 APPROPRIATE FILING FEES, AND WITH THE DOCKET CLERK FOR THE DIVISION OF FLORIDA LAND SALES, CONDOMINIUMS AND MOBILE HOMES, WITHIN 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 Andrew Cuevas, Esq., Cuevas & Rubin, P. A., 9200 South Dadeland Blvd., Suite 603, Miami, Florida 33156, this _____ day of _____, 1996.

Docket Clerk

Copies furnished to:

Janis Sue Richardson,
Senior Attorney

Faye Mayberry, Chief
Bureau of Condominiums

Castle Beach Club.DS