

Final Order No. BPR-98-03373 Date 5-22-98

FILED

Dept. of Business and Professional Regulation

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By: Brandon M. Nichols

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

IN RE:
PETITION FOR DECLARATORY STATEMENT

DS 98-010

**BAYWAY ISLES-POINT BRITTANY TWO
CONDOMINIUM CORPORATION, INC.,**

Petitioner.

Docket No. **DS98028**

DECLARATORY STATEMENT

The Department of Business and Professional Regulation, Division of Florida Land Sales, Condominiums and Mobile Homes (Division) hereby issues this Declaratory Statement pursuant to Sections 718.501 and 120.565, Florida Statutes (1997).

FINDINGS OF FACT

1. On February 24, 1998, the Division received a Petition for Declaratory Statement from Bayway Isles-Point Brittany Two Condominium Corporation, Inc., by and through John D. Fassett, Secretary/Treasurer, a condominium operated under the provisions of Chapter 718, Florida Statutes.

2. Bayway Isles-Point Brittany Two Condominium Corporation, Inc., (Association),

is the association for the Bayway Isles-Point Brittany Two Condominium. The Declaration of Condominium of the Association was executed on March 7, 1969, and filed in the land records of Pinellas County on March 10, 1969.

3. Petitioner requests a Declaratory Statement as to the following:

Whether section 718.111(11), Florida Statutes, constitutes both the law and a statement of public policy of the state of Florida, and that the provisions of section 718.111(11), are applicable to all condominium associations in the State including the [petitioner], and that any interpretations of insurance provisions of declarations of condominium associations should take into consideration the public policy of Florida reflected in section 718.111(11) and the Declaration of Condo Two Association, properly interpreted, imposes no responsibility on the Association to obtain and maintain hazard insurance covering appliances and other property within the individual units which the Declaration requires the unit owners to maintain, repair, and replace, and that the current officers and directors of Condo Two Association are not precluded from obtaining a proper interpretation of the Association's responsibility in this regard by the fact that the Association for many years has paid for coverage of such appliances and other equipment without challenging or otherwise questioning decisions by managing agents employed by the Association to obtain policies including such coverage.

4. Petitioner represents that the Association has and is continuing to pay hazard insurance for coverage of appliances and other personal property in individual units of the condominium. Not until 1997 when the Association sought competitive bids for insurance coverage did the Association realize and question the extent of the coverage customarily maintained by the Association.

5. Section 718.111(11)(a), (b), and (c), Florida Statutes(1995, Supp. 1996), states:

(a) The association shall use its best efforts to obtain and maintain adequate insurance to protect the association, the association property, the common elements, and the condominium property required to be insured by the association pursuant to paragraph (b). The association may also obtain and maintain liability insurance for directors and officers, insurance for the benefit of association employees, and flood insurance for common elements, association property, and units. An association or

group of associations may self-insure against claims against the association, the association property, and the condominium property required to be insured by an association, upon compliance with sections 624.460 - 624.488. A copy of each policy of insurance in effect shall be made available for inspection by unit owners at reasonable times.

(b) Every hazard policy which is issued to protect a condominium building shall provide that the word "building" wherever used in the policy include, but not necessarily be limited to, fixtures, installations, or additions comprising that part of the building within the unfinished interior surfaces of the perimeter walls, floors, and ceilings of the individual units initially installed, or replacements thereof of like kind or quality, in accordance with the original plans and specifications, or as they existed at the time the unit was initially conveyed if the original plans and specifications are not available. However, unless prior to October 1, 1986, the association is required by the declaration to provide coverage therefor, the word "building" does not include unit floor coverings, wall coverings, or ceiling coverings, and as to contracts entered into after July 1, 1992, does not include the following equipment if it is located within a unit and the unit owner is required to repair or replace such equipment: electrical fixtures, appliances, air conditioner or heating equipment, water heaters, or built-in cabinets. With respect to the coverage provided for by this paragraph, the unit owners shall be considered additional insureds under the policy.

(c) Every insurance policy issued to an individual unit owner shall provide that the coverage afforded by such policy is excess over the amount recoverable under any other policy covering the same property without rights of subrogation against the association.

6. In 1969, the Condominium Act was codified under Chapter 711, Florida Statutes. But not until 1978, did the legislature require an association "to use its best efforts to obtain and maintain adequate insurance to protect the association and the common elements."

7. However, an examination of the definition of "common elements" may shed light on the association's responsibilities. Chapter 711.06, Florida Statutes (1969), defined "common elements" as:

- (1) Common elements includes within its meaning the following items:
 - (a) The land on which the improvements are located and any other land included in the condominium property whether or not contiguous.

- (b) All parts of the improvements which are not included within the units.
- (c) Easements through units for conduits, ducts, plumbing, wiring and other facilities for the furnishing of utility services to units and the common elements.
- (d) An easement of support in every portion of a unit which contributes to the support of a building.
- (e) Installations for the furnishing of utility services to more than one unit or to the common elements or to a unit other than the unit containing the installation.
- (f) The property and installations in connection therewith required for the furnishing of services to more than one unit or to the common elements.
- (2) The declaration may designate other parts of the condominium property as common elements.

8. The statutory definition of "common elements" in 1969 did not include appliances or other personal property contained within the interior perimeter of the individual units.

9. In Article 2.4 of the Declaration of Condominium of Bayway Isles-Point Brittany "Two", a condominium, "common elements" is defined as:

Common elements shall include" (a) the condominium property not included in the apartments; (b) tangible personal property required for the maintenance and operation of the common elements even though owned by the Association; and (c) other items as stated in the Condominium Act.

10. Petitioner's definition of "common elements" as defined in the Declaration of Condominium does not include personal or tangible property contained within the interior perimeter of the apartment.

11. Notwithstanding the above definition, Petitioner's declaration of condominium further addresses the association's and the individual unit owner's respective responsibilities with regard to the common elements and the condominium apartment. Article 5.2 states in pertinent part:

(a) By Association. The Association shall maintain, repair and replace as a common expense of the apartment building containing an apartment:

- (1) All portions of the apartment contributing to the support of the apartment building, which portions shall include but not be limited to

the outside walls of the apartment building and all fixtures on the exterior thereof, boundary walls of an apartment, floors and ceiling slabs, loadbearing columns, and loadbearing walls, but shall not include screening, windows, exterior doors, glass, and interior surfaces of walls, ceilings and floors.

(2) All conduits, rough plumbing but not fixtures, wiring and other facilities for the furnishing of utility services which are contained in an apartment but which service all or parts of the building other than the apartment within which contained.

(3) All incidental damage caused to an apartment by such work shall be promptly repaired by the Association.

(b) By the Apartment Owner. The responsibility of the apartment owner shall include:

(1) To maintain, repair and replace at his sole and personal expense, all doors, windows, glass, screens, electric panels, electric wiring, electric outlets and fixtures, air-conditioners, heaters, hot water heaters, refrigerators, dishwashers, other appliances, drains, plumbing fixtures and connections, interior surfaces of all walls, including boundary and exterior walls, floors and ceilings, and all other portions of his apartment except the portions specifically to be maintained, repaired and replaced by the Association.

(2) Not to enclose, paint or otherwise decorate or change the appearance of any portion of the exterior of the apartment building.

(3) To promptly report to the Association any defect or need for repairs, the responsibility for the remedying of which is that of the Association.

12. Petitioner's Declaration of Condominium requires the Association to purchase an insurance policy "covering damage to the apartment building and its appurtenances...." "It shall *not* be the responsibility or duty of the Association to obtain insurance coverage upon the personal liability, personal property or living expenses of any apartment owner but the apartment owner may obtain such insurance at his own expense...." Article 8.2 states more specifically, in pertinent part:

(a) Casualty. All buildings and improvements upon the land and all personal property included in the common elements shall be insured in an amount equal to the maximum insurable replacement value, excluding foundation and excavation costs, as determined by the board of directors of the Association. Such coverage shall afford protection against:

(1) Loss or damage by fire and other hazards covered by a standard extended

coverage; and

(2) such other risks as from time to time shall be customarily covered with respect to buildings similar in construction, location and use as the buildings on the land, including but not limited to vandalism and malicious mischief.

13. On March 20, 1998 the Division published the Notice of Receipt of the Petition for Declaratory Statement in the Florida Administrative Weekly.

14. Also on March 4, 1998, the Division sent a letter to Petitioner acknowledging receipt of the petition. The Division also forwarded a copy of the Notice of Receipt to the condominium association and to the Joint Administrative Procedure Committee.

15. The Division has received no responses to its Notice of Receipt.

CONCLUSIONS OF LAW

1. The Division has jurisdiction to enter this order pursuant to Sections 718.501, and 120.565, Florida Statutes (1997).

2. Section 120.565(1), Florida Statutes (1996 Supp.) states:

(1) Any substantially affected person may seek a declaratory statement regarding an agency's opinion as to the applicability of a statutory provision, or of any rule or order of the agency, as it applies to the petitioner's particular set of circumstances.

Thus, the purpose of a declaratory statement is to set out the agency's opinion as to the applicability of a specified statutory provision or of any rule or order of the agency as it applies to the petitioner in his or her particular circumstances only.

3. Petitioner seeks a determination of the applicability of section 718.111(11), Florida Statutes, to the Association's governing documents.

4. The first part of Petitioner's question, simply restated, queries whether section 718.111(11), Florida Statutes (1992), must be applied to insurance contracts entered into by the Association as required by Petitioner's Declaration of Condominium.

5. Petitioner's Declaration of Condominium was recorded in the public records of Pinellas County on March 10, 1969. The declaration states that it is "the purpose of this Declaration to submit the lands described and improvements described and to be constructed thereon to the condominium form of ownership and use in the manner provided in Chapter 711 of the Florida Statutes, herein called the "Condominium Act."

6. Petitioner's declaration does not include the "from time to time" language that calls for application of the "automatic amendment theory." See, *Sans Souci v. Division of Florida Land Sales, Condominiums, and Mobile Homes, Department of Business Regulation*, 421 So.2d 623, 629 (Fla. 1st DCA 1982). Without the automatic amendment language, the law in effect at recordation would control the condominium declaration as if engrafted onto the documents. *Suntide Condominium Ass'n, Inc., v. Division of Florida Land Sales, Condominiums, and Mobile Homes*, 463 So. 2d 314 (Fla. 1st DCA 1984), citing *Sans Souci*. However, the Fourth District Court in *Rothfleisch v. Cantor*, 534 So.2d 823 (Fla. 4th DCA 1988) stated:

The Court has read and carefully analyzed the fact situation in the Sun Tide case and finds that the holding, quoted above, while correct in that case, is taken out of context when applied to the facts in the instant case. If the Courts of this state were to apply the language in Sun Tide to condominium disputes, i.e. to apply only the law in existence as of the date of the filing of the declaration of condominium and ignore all subsequent amendments to said law, it would result in a morass of legal entanglement where no holding in any one condominium case could be precedent for any other except those created in the same year. This could not possibly be the intent of the legislature or the Courts of this state.

The Fourth District Court found that the subsequently amended Condominium Act controlled the authority of the president of the association to enter into a binding instrument. The applicability of the amended legislation did not interfere with any vested contractual rights set forth in the declaration itself.

7. In the instant case, the declaration of condominium grants the Association the authority to purchase insurance for the property. It is the usual practice, that an insurance contract insures the property for a period of one year. Hence, the insurance contract is renewed, and assumably renegotiated, annually. The insurance carrier may even change. Certain terms of the policy may even be susceptible to changes in the insurance law and regulations as said laws have been amended through the life of the condominium.

8. Section 718.111(11), Florida Statutes, governs the association's duty to maintain hazard insurance. Effective April 1, 1992, the legislature amended section 718.111(11)(b), Florida Statutes, regarding the definition of certain terms in insurance contracts entered after the effective date. Section 718.111(11)(b), provides that the word "building" does not include unit floor coverings, wall coverings, or ceiling coverings. Additionally, in insurance contracts entered into after July 1, 1992, the word "building" does not include electrical fixtures, appliances, air conditioner or heating equipment, water heaters, or built-in cabinets if the equipment is located within a unit and the unit owner is required to repair or replace such equipment.

9. The House of Representatives Final Bill Analysis & Economic Impact Statement of Ch. 91-103 as passed by the legislature, in discussing the changes to section 718.111(11)(b), stated as follows:

Subsection (11) is amended relating to insurance acquired by the association. Currently, the word "building" as used in insurance contracts does not include floor coverings, wall coverings or ceiling coverings. As to contracts entered into after January 1, 1991, the term "building" would not include unit electrical fixtures, appliances, air conditioner units, water heaters, or built-in cabinets if they were located in the unit and the unit owner is required to repair or replace such equipment.

10. The bill analysis for subsection (11)(b) in ch. 91-103, §4, Laws of Florida, clearly uses the word "contracts" in the phrase "as to contracts entered into after July 1, 1992" to refer to the hazard insurance policy that the statute requires the association to maintain. This is consistent with the definition of "insurance":

A contract whereby, for a stipulated consideration, one party undertakes to compensate the other for loss on a specified subject by specified perils. The party agreeing to make the compensation is usually called the "insurer" or "underwriter;" the other, the "insured" or "assured;" the agreed consideration, the "premium;" the written contract, a "policy".... A contract whereby one undertakes to indemnify another against loss, damage or liability arising from an unknown or contingent event and is applicable only to some contingency or act to occur in future. Blacks Law Dictionary, (Sixth Edition, 1991).

11. The plain meaning of this section is that after July 1, 1992, the word "building" in an insurance contract does not include the listed equipment if it is located within a unit and the unit owner is required to repair or replace such equipment. Presumably, if the declaration provides that the unit owner is required to repair or replace the listed equipment, the declaration is consistent with the current statute. If the declaration provides that the association is responsible to repair or replace those items, then the declaration controls. "Certainly, any such legislation cannot be applied retroactively to affect obligations under pre-existing contracts." See, *Palm Bay Towers, Corp. v. Brooks*, 466 So.2d 1071 (Fla. 3rd DCA 1984). If the declaration is silent, the statute controls and the word "building" in insurance contracts entered into after

1992, as defined by statute, does not include electrical fixtures, appliances, air conditioner or heating equipment, water heaters, or built-in cabinets that are located inside a unit. *See, Rothfleisch.*

12. In the instant case, the language of the Declaration of Condominium is controlling as the declaration specifically designates those items subject to the Association and apartment owner's respective responsibility. The language of the declaration is unambiguous. The Association has the authority to purchase "insurance covering damage to the apartment **building** and its appurtenances...." Casualty coverage to "all buildings and improvements upon land and all personal property included *in* the common elements..." As specifically set forth above in the findings of fact, "common elements" is defined by the Declaration of Condominium not to include personal or tangible property within or affixed within the individual apartments. Declaration, 5.1, 5.2. The Declaration of Condominium squarely places the burden upon the apartment owner to "maintain, repair and replace *at his sole and personal expense,*" the same listed items, the legislature determined not inclusive in the definition of "buildings." Compare Declaration 5.2 and section 718.111(11)(b), Florida Statutes.

13. In conclusion, section 718.111(11)(b), Florida Statutes, is applicable to insurance contracts entered into by the Petitioner Association. Notwithstanding the applicability of section 718.111(11)(b), Florida Statutes, to the Association's documents, Petitioner's documents unequivocally limits casualty insurance to the Association's buildings and common elements, and specifically excludes air-conditioners, heaters, hot water heaters, refrigerators, dishwashers, other appliances, etc. from the coverage to be maintained by the Association.


14. Since the documents are clear, the fact that the Association paid for coverage in

the past, does not preclude the Association from obtaining a proper interpretation. The remainder of Petitioner's issues are incorporated into the discussion above, and need not be addressed further.

WHEREFORE, for the foregoing reasons, the Division declares that the provisions of section 718.111(11)(b), Florida Statutes, (1992), clarifying the term "building" are applicable to insurance contracts entered into by Petitioner after July 1, 1992. Notwithstanding the applicability of section 718.111(11)(b), Petitioner's governing Declaration of Condominium specifically and unambiguously sets out the respective obligations of the Association and unit owner for said casualty insurance.

DONE this 19th day of May, 1998, at Tallahassee, Leon County, Florida.




DELANE ANDERSON
DEPUTY SECRETARY
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, (1996) 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 AGENCY CLERK FOR THE DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, 1940 NORTH MONROE STREET, TALLAHASSEE, FLORIDA 32399-0792, 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 Declaratory Statement has been furnished by U.S. Mail to John D. Fassett, Secretary/Treasurer of Bayway Isles-Point Brittany Two Condominium Corporation, Inc., Petitioner, 5108 Brittany Drive South, Unit 605, St. Petersburg, Florida 33715, this ____ day of _____, 1998.

Kristie L. Harris
Docket Clerk

Copies furnished to:

Theresa M. Bender
Assistant General Counsel

Phil Nowicki, Chief
Bureau of Condominiums

Leann Ramseur, R.E.D.S.