

Final Order No. BPR-98-00640 Date 2-9-98

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Dept. of Business and Professional Regulation

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By: *Sarah Wachman*

**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 97-008

DESTIN GULFGATE OWNER'S)
ASSOCIATION, INC.,)

Docket Number DS97396

PETITIONER.)
_____)

DECLARATORY STATEMENT

The Division of Florida Land Sales, Condominiums, and Mobile Homes (Division) issues this declaratory statement based on the representations and documents submitted by Petitioner, Destin Gulfgate Owner's Association, Inc. (Association or Petitioner):

BACKGROUND

On October 28, 1997, the Division received a petition for Declaratory Statement filed by George Zaiki, as president of Destin Gulfgate Owner's Association, Inc. Notice of receipt of the petition was duly published in Volume 23, Number 47, November 21, 1997, Florida Administrative Weekly. A complete copy of the declaration of condominium was requested by the Division by letter dated December 5, 1997, and was received on December 15, 1997. The

ninety-day time period stated in section 120.565, Florida Statutes, within which an agency must either reject a petition or issue a declaratory statement was tolled during the ten days the Division awaited receipt of the declaration of condominium.

FINDINGS OF FACT

The following findings of fact are based on information in the petition for declaratory statement and the condominium documents submitted by Petitioner. The Division takes no position as to the accuracy of the facts, but merely accepts them as submitted for the purposes of this declaratory statement. No hearing was held in this case.

1. The Petitioner is the association responsible for the operation of Destin Gulfgate Condominium.
2. Destin Gulfgate Condominium, is a condominium as defined by section 718.103(10), Florida Statutes, located in Okaloosa County, Florida.
3. The declaration of condominium for Destin Gulfgate was recorded in 1993 in Official Records Book 1759, page 1074, public records of Okaloosa County.
4. The condominium consists of 65 units . There are 31 covered parking spaces in the condominium building. As an inducement to purchasers, the developer conveyed the 31 covered parking spaces to certain unit owners for their exclusive use.
5. Sometime in 1996, a unit which had the exclusive right to use a covered parking space came up for sale. The Association purchased the parking space to be used as additional storage space.
6. Subsequently the association exchanged the purchased space for another space closer to the storage area. According to the Petition, the attorney who drafted the original

condominium documents handled the purchase and exchange of the parking space.

7. Some of the unit owners have complained that the association was not authorized by the condominium documents to conduct the purchase and exchange of the parking space. The unit owners complained that the transactions were not in compliance with the condominium documents and that the association should have obtained the approval of 100 percent of the unit owners.

8. Petitioner requests a declaratory statement as to whether, pursuant to sections 718.106, 718.107, and 718.110, Florida Statutes, the transactions constituted a material alteration or substantial addition to the common elements that required the approval of 75 percent of the voting interests, or whether the transactions constituted a change in the proportion of ownership which requires 100 percent approval of the voting interests.

9. The developer transferred covered parking spaces to unit owners through a license, which granted the exclusive right to use a designated parking space to the unit owner. For example, the license conveying parking space 19 to the owners of unit 306 provided in relevant part:

This parking space is a "limited common element", which means that this parking space is reserved for the use of apartment/unit 306 DESTIN GULFGATE CONDOMINIUM, to the exclusion of other apartments/units and any transfer of the apartment/unit shall also be a transfer of this parking space as the parking space is an appurtenant (sic) to the apartment/unit and shall not be separated; however, Licensee may grant a temporary privilege of use to another owner of an apartment/unit at DESTIN GULFGATE CONDOMINIUM but such temporary privilege shall terminate upon the sale of the apartment/unit.

10. Section 718.106, Florida Statutes, provides in relevant part:

718.106 Condominium Parcels; appurtenances; possession and enjoyment.--

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- (2) There shall pass with a unit, as appurtenances thereto:
- (a) An undivided share in the common elements and common surplus.
 - (b) *The exclusive right to use such portion of the common elements as may be provided by the declaration.*
 - (c) An exclusive easement for the use of the airspace occupied by the unit as it exists at any particular time and as the unit may lawfully be altered or reconstructed from time to time. An easement in airspace which is vacated shall be terminated automatically.
 - (d) Membership in the association designated in the declaration, with the full voting rights appertaining thereto.
 - (e) Other appurtenances as may be provided in the declaration. [Italics supplied].

11. Section 718.107, Florida Statutes, provides:

718.107 Restraint upon separation and partition of common elements.--

* * *

- (1) The undivided share in the common elements which is appurtenant to a unit shall not be separated from it and shall pass with the title to the unit, whether or not separately described.
- (2) The share in the common elements appurtenant to a unit cannot be conveyed or encumbered except together with the unit.
- (3) The shares in the common elements appurtenant to units are undivided, and no action for partition of the common elements shall lie.

12. Section 718.110(4), Florida Statutes, provides:

718.110 Amendment of declaration; correction of error or omission in declaration by circuit court.--

* * *

- (4) Unless otherwise provided in the declaration as originally recorded, no amendment may change the configuration or size of any condominium unit in any material fashion, materially alter or modify the appurtenances to the unit, or change the proportion or percentage by which the owner of the parcel shares the common expenses and owns the common surplus unless the record owner of the unit and all record owners of liens on it join in the execution of the amendment and unless all the record owners of all other units approve the amendment. The acquisition of property by the association, and material alterations or substantial additions to such property or the common elements by the association in accordance with section 718.111(7) or section 718.113, shall not be deemed to constitute a material alteration or modification of the appurtenances to the units. A declaration recorded after April 1, 1992, may not require less than a majority of total voting interests for amendments under this subsection, unless required by

any governmental entity.

13. The covered parking spaces are limited common elements. Section 4C of the declaration provides, in relevant part:

C. Appurtenances to Apartments.

(1) **Common Elements and Common Surplus.** The owner of each apartment shall own a .0151515 undivided share and certain interest in the condominium land, common elements, and common surplus, which share and interest is appurtenant to each apartment.

(2) **Association Membership.** The membership of each apartment owner in the association and interest of each apartment owner in the funds and assets held by the association is appurtenant to each apartment.

(3) **Automobile Parking Spaces.** *Two (2) parking spaces will be available for each apartment as required by local planning and zoning statutes. However, the developer reserves the right to designate certain spaces, not to exceed sixty-six (66) spaces, as a limited common element. Use of said spaces may be designated and assigned by the developer to certain apartments for the exclusive use of the occupants of said apartment. Spaces so designated shall be identified by displaying on the parking space, a number corresponding to the apartment number to which the space has been assigned. The exclusive right of use of said parking space shall transfer with any transfer of the apartment to which it is assigned. [Italics supplied].*

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CONCLUSIONS OF LAW

1. The Division has jurisdiction over the subject matter of the petition and is authorized to issue this declaratory statement pursuant to sections 120.565 and 718.501, Florida Statutes.

2. The Petitioner is substantially affected by the issues raised in the petition for declaratory statement and has standing to seek a declaratory statement.

3. By the specific provision in section 4C of the declaration, sixty-six parking spaces were designated as limited common elements. The provision specifically states that the use of the spaces would be assigned by the developer for the exclusive use of certain unit owners. The method by which the developer assigned a particular space to a particular unit owner was by a

license. The license repeated the language in the declaration that the parking space is a limited common element reserved for the use of the particular unit owner to the exclusion of all other units. The license also repeated the fact that the parking space was an appurtenance to the unit and could not be separated from the unit. The license granted unit owners who were conveyed a parking space the right to grant a temporary privilege to use the parking space to another unit owner, which privilege would terminate upon the sale of the unit. The license used by the developer to convey the parking spaces did not grant any rights to unit owners other than those that were stated in the declaration. The license did not remove the status of the parking spaces as limited common elements. The license did not conflict with any provision of the declaration in regard to the parking spaces.

4. Chapter 718 defines "limited common elements" as those common elements which are reserved for the use of a certain condominium unit or units to the exclusion of other units, as specified in the declaration of condominium. *Fla. Stat. §718.103(17) (1997)*. The declaration provides that each of sixty-six parking spaces is a limited common element reserved for the exclusive use of the unit to which it was conveyed. A parking space that is a limited common element cannot be conveyed or encumbered separately from the unit to which it is appurtenant. *Fla. Stat. §718.107(2); Mayfair Engineering Co. v. Park*, 318 So.2d 171 (Fla. 4th DCA 1975; *Juno By the Sea North Condominium Association v. Manfredonia*, 397 So.2d 297 (Fla. 4th DCA 1980). Therefore, the association had no authority to purchase a covered parking space separately from the unit, as the parking space is an appurtenance that passes with the unit. Further, as the association had no authority under the condominium documents or Chapter 718, Florida Statutes, to purchase the parking space, it had no authority to then trade the purchased

space to another unit owner.

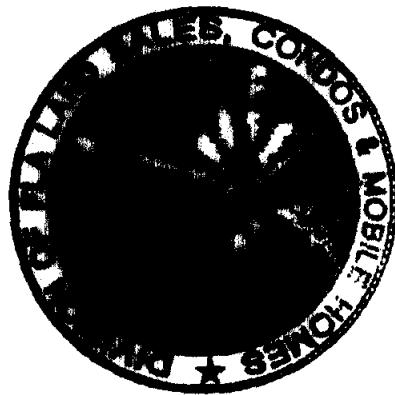
5. Chapter 718 Florida Statutes, contemplates that a change to the appurtenances to a unit may be accomplished by amendment of the declaration of condominium. The procedure for amendment may be stated in the declaration as originally recorded , or if not stated, the declaration may be amended in accordance with section 718.110, Florida Statutes. In the instant case, section 13 of the declaration specifically addresses amendments, but does not address material alterations or modifications to the appurtenances to a unit. Because the declaration does not address the issue, section 718.110 (4), Florida Statutes, must be followed in amending the declaration to materially alter or modify the appurtenances to a unit.

6. Section 718.110(4), Florida Statutes, provides that amendments that materially alter or modify the appurtenances to a unit must be approved by having the record owner of the unit in question and all record owners of liens on the unit join in the execution of the amendment, and the record owners of all other units approving the amendment. As the association did not obtain this approval before modifying the appurtenances to the units, the purchase of the parking space and the transfer of the space constitute unauthorized acts of the association, in conflict with both the declaration of condominium and Chapter 718, Florida Statutes.

Wherefore the Division declares that the association, by purchasing the parking space and subsequently trading the space with another unit owner without obtaining the approval required by section 718.110(4), Florida Statutes, violated section 4C of the declaration of condominium and sections 718.106, 718.107, and 718.110(4), Florida Statutes. The parking space appurtenant to the unit that is the subject of the petition for declaratory statement passed upon conveyance of the unit to the purchaser of the unit. In accordance with the declaration of condominium and

Chapter 718, Florida Statutes, the parking space is reserved for the exclusive use of the present owner of the unit that is the subject of the petition for declaratory statement.

DONE this 4th day of February, 1998.



Robert H. Ellzey, Jr.
Robert H. Ellzey, Jr., DIRECTOR
Division of Florida Land Sales
Condominiums, and Mobile Homes
Northwood Centre
1940 North Monroe Street
Tallahassee, Florida 32399-1030

NOTICE OF RIGHT TO APPEAL UNLESS WAIVED

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, FLORIDA RULES OF APPELLATE PROCEDURE, BOTH WITH THE APPROPRIATE DISTRICT COURT OF APPEAL ACCOMPANIED BY THE APPROPRIATE FILING FEE, AND WITH THE AGENCY CLERK, DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, NORTHWOOD CENTRE, 1940

NORTH MONROE STREET, TALLAHASSEE, FLORIDA 32399-0792.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing declaratory statement was sent by certified U.S. Mail to George Zaiki, President, Destin Gulfgate Owner's Association, Inc., 1180 Highway 98 East, Destin, Florida 32541, this ____ day of _____, 1998.

Kristie L. Harris, Docket Clerk

copies furnished:

Kathryn E. Price
Assistant General Counsel

Philip Nowicki, Chief
Bureau of Condominiums

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