

Final Order No. BPR-98-00008 Date 1-5-98

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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 97-005

TARACOMO TOWNHOMES)
CONDOMINIUM ASSOCIATION, INC.,)

Docket Number DS97338

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, Taracomo Townhomes Condominium Association, Inc. (Association or Petitioner):

BACKGROUND

On September 5, 1997, the Division received a petition for Declaratory Statement filed by Taracomo Townhomes Condominium Association, Inc. Notice of receipt of the petition was duly published in Volume 23, Number 40, October 3, 1997, Florida Administrative Weekly. A complete copy of the declaration of condominium was requested by the Division and was received on November 18, 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 pending the

Division's receipt of a complete copy of the recorded declaration of condominium. The time was tolled thirty days and expires January 5, 1998.

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 condominium association responsible for the operation of Taracomo Townhomes, A Condominium, f/k/a Kendalwood Court Condominium.

2. Taracomo Townhomes, A Condominium, is a condominium as defined by section 718.103(10), Florida Statutes, located in Dade County, Florida.

3. The declaration of condominium for Taracomo is recorded in Official Records Book 8773, page 1036, public records of Dade County.

4. Currently, the water usage of all of the unit owners is measured by a single meter, and the association receives a single bill for water usage from the water company. The water bill is paid by the association with assessments collected from unit owners.

5. The Code of Metropolitan Dade County was recently amended to allow condominium associations to submeter water usage for individual units.

6. If the Association chooses to submeter water, it will still receive one water bill from the water company.

7. Petitioner believes that its current method of using one meter for water encourages waste because there is no incentive for individual unit owners to conserve water. Petitioner believes that

submetering the units will benefit its members and serve the public policy of conserving valuable water resources.

8. The Petitioner intends to submeter the individual units of each member and to assess each member for water usage as reflected by the meter for the unit. The collected funds will then be used to pay the water bill the association will receive from the water company.

9. The Taracomo declaration of condominium contains the following relevant provisions:

3.04 "Common Elements" -

- (1) All of those items stated in the Condominium Act
- (2) Tangible personal property required for the maintenance and operation of the condominium, even though owned by the association.
- (3) All condominium property not included in the town houses or specifically otherwise designated.
- (4) Any interests, rights and liabilities created under restrictions and covenants running with the land.
- (5) *All utility services defined in 3.18 hereof which are located within the area described in 4.05 hereof which are required to furnish the subject utility services.*
[Italics supplied].

3.05 "Common Expenses" include:

- (1) Expenses of administration and management of the Association and of the Condominium property.
- (2) Expenses of maintenance, operation, repair or replacement of the common elements, limited common elements, and of the portions of the town house to be maintained by the Association.
- (3) The cost of carrying out the powers and duties of the Association.
- (4) Expenses declared common expenses by the provisions of this Declaration or by the By-laws of the Association.

(5) Any valid charge against the condominium property as a whole.

3.18 "Utility Services - Shall include but not be limited to electric power, gas, *hot and cold water*, heating, refrigeration, garbage and sewage disposal and air conditioning compressor and air handler and all attendant equipment. [Italics supplied].

10. Section 4.05 sets out the horizontal and vertical boundaries of a town house at Taracomo and exempts the utility services from the boundaries of the unit:

4.05 Town House Dimensions: Each town house shall include that part of the building containing the town house that lies within the boundaries of the unit which boundaries are as follows:

(1) Horizontal Dimension:

* * *

(2) Vertical Dimension:

* * *

(3) Items 4.05 (1) and (2) above shall not include those items previously referred to in 3.04 (5) hereof.

11. Section 718.115, Florida Statutes provides, in relevant part:

(1)(a) *Common expenses include the expenses of the operation, maintenance, repair, replacement, or protection of the common elements and association property*, costs of carrying out the powers and duties of the association, and any other expense, whether or not included in the foregoing, designated as common expense by this chapter, the declaration, the documents creating the association, or the bylaws. ...

* * *

(2) Except as otherwise provided by this chapter, *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 a residential condominium, unit owners' shares of common expenses shall be in the same proportions as their ownership interest in the common elements. [Italics supplied].

12. Section 718.116, Florida Statutes, provides, in relevant part:

718.116 Assessments; liability; lien and priority; interest; collection.--

* * *

(5)(a) The association has a lien on each condominium parcel to secure the payment

of assessments...

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13. The Petitioner seeks a declaratory statement as to whether, if it submeters water usage by the unit owners, it may collect payments for individual water usage from each unit owner without violating the requirement contained in section 718.115, Florida Statutes, that common expenses be collected by assessments against members in the proportions or percentages provided in the declaration of condominium. Further, Petitioner seeks a declaratory statement as to whether, if it submeters water, it may use the provisions of section 718.116, Florida Statutes, to secure a lien for the nonpayment of any unit's water bill.

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 the declaratory statement.

3. Petitioner indicates that it wishes to assess individual units for water usage while retaining the right to file a claim of lien against a unit for nonpayment of assessments. The declaration describes utility services, including hot and cold water, as a common element and lists it as a common expense. Currently, the expense for all of the water used at the condominium is assessed as a common expense in the proportion or percentage stated in the declaration. If the association submeters and assesses for water usage in the amount shown on the submeters, the

assessment would not be in proportion to the unit owner's share in the common elements. That would obviously violate section 718.115, Florida Statutes. If the association amends the declaration to reflect that the water utility service is no longer a common element and is not a common expense, then the provisions of section 718.116, Florida Statutes, would not be available to the association in the event of a unit owner's nonpayment of the water bill, because water would not be a common expense subject to assessments. The association has a lien on a unit only for nonpayment of assessments. Fla. Stat. §718.116(5)(a) (1995).

4. The declaration appears to characterize the water utility service as a common element. This characterization is troublesome. The service is neither owned nor provided by the association, but rather, the association is billed by the provider for all of the water usage at the condominium. Unlike other common elements, the unit owners do not possess an ownership interest in the water service. For example, a clubhouse, a pool or a parking lot is a permanent, fixed common element, which can be owned by the unit owners in undivided shares. In contrast, the provision of hot and cold water is merely a service provided to unit owners which is incapable of ownership. *Scudder v. Greenbrier Condominium Association*, 663 So.2d 1362 (Fla. 4th DCA 1995) (Transportation service not capable of ownership).

5. Notwithstanding the above, the declaration appears to describe the service as common elements, and the association has assessed all water usage as a common expense. The association cannot assess unit owners for their individual use of water if the service remains a common element, because funds for the payment of common element expenses must be assessed in the proportions or percentages stated in the declaration. Fla. Stat. §718.115 (1995). As individual water consumption will vary, the assessment for water would also vary from unit to unit and from one billing cycle to

another. In order to assess unit owners for each unit's consumption of water, the association must install the submeters and change the designation of the water service from a common element to a service that is assessed in accordance with each unit's use, i.e., a limited common element.

6. It is likely that the physical placement of the submeters on the common elements would constitute a material alteration of the common elements, because it would be a visible change to the common elements. The term material alteration or addition with respect to buildings means to:

Palpably or perceptively vary or change the form, shape, elements, specifications of a building from its original design or plan, or existing condition, in such a manner as to appreciably affect or influence its function, use, or appearance.

Sterling Village v. Breitenbach, 251 So.2d 685 (Fla. 4th DCA 1971), *cert. denied*, 254 So.2d 789 (Fla. 1971). The definition applies equally as well to changes in common elements. *Tower House Condominium v. Millman*, 410 So.2d 926 (Fla. 3d DCA 1981). (Acquisition of property to be added to parking area would constitute a material alteration to the common elements). The association in this case would subtract the water utility service from the common elements and convert it to a service provided to each unit owner to the exclusion of every other unit owner. The association would, in effect, be converting a common element into a limited common element. Such an alteration of the common elements is subject to the requirements of section 718.113(2), Florida Statutes. That section provides:

Except as otherwise provided in this section, there shall be no material alteration or substantial addition to the common elements or to real property which is association property, except in a manner provided in the declaration. *If the declaration does not specify the procedure for approval of alterations or additions, 75 percent of the total voting interests of the association must approve the alterations or additions.* [Italics supplied].

The Taracomo declaration of condominium does not specify the procedure for approval of alterations

or additions. Thus, in accordance with section 718.113(2), the association must obtain the approval of 75 percent of the total voting interests of the association in order to install the submeters on the common elements.

7. The question now becomes whether, if the association amends the condominium documents to provide for submeters and to assess in accordance with individual usage of water, it may retain its lien rights pursuant to section 718.116, Florida Statutes. Though Chapter 718 does not specifically address how the submetering of utility services may be accomplished, the statute contemplates converting a common element into a limited common element, and having each unit owner who uses the limited common element responsible for assessments thereon. Section 718.113(1), Florida Statutes, provides, in relevant part:

718.113 Maintenance; limitation upon improvement; display of flag; hurricane shutters.--

(1) Maintenance of the common elements is the responsibility of the association. The declaration may provide that certain limited common elements shall be maintained by those entitled to use the limited common elements or that the association is to provide the maintenance, either as a common expense or with the cost shared only by those entitled to use the limited common elements. If the maintenance is to be by the association at the expense of only those entitled to use the limited common elements, the declaration shall describe in detail the method of apportioning such cost among those entitled to use the limited common elements, and the association may use the provisions of s. 718.116 to enforce payment of the shares of such costs among those entitled to use the limited common elements .

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Though the water service in this case is not like a patio, balcony, or parking space, which are usually the subjects of limited common elements, the water service, if submetered, can be characterized as a limited common element for the exclusive use of each unit owner, in that water usage will be

measured and paid for in direct relation to the amount stated on the submeters. No other unit will be billed for the water usage of any other unit, and no unit owner will have to subsidize any other unit's consumption of water. This result would not be violative of chapter 718, Florida Statutes; would more accurately describe the water service; and would retain the association's right to file a claim of lien against any unit for nonpayment of its water bill.

Based on the foregoing, the Division declares that if the association installs submeters and assesses each unit owner for its individual use of water, it would be violative of sections 718.113(2) and 718.115(2), Florida Statutes. The Association may, however, amend the declaration to reflect that the provision of water to the units is a limited common element and that members will be responsible for their use of water as reflected by the readings on the submeters. The amendment must be in compliance with sections 718.113 (1) and (2), Florida Statutes. Nothing herein shall be construed as preventing the association from retaining all other water usage at the condominium that is not submetered as a common expense of the association.

DONE this 5th day of January, 1998




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 regular U.S. Mail to Gracian A. Celaya, Esquire, Seigfried, Rivera, Lerner, De La Torre and Sobel, P.A., 201 Alhambra Circle, Suite 1102, Coral Gables, Florida 33134, this ____ day of _____, 199_.

Kristie L. Harris, Docket Clerk

Copies furnished:

Kathryn E. Price
Assistant General Counsel

Philip Nowicki, Chief
Bureau of Condominiums

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STATE OF FLORIDA
DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION

Lawton Chiles
Governor

Richard T. Farrell
Secretary

September 18, 1997

Mrs. Liz Cloud
Florida Department of State
Florida Administrative Weekly
401 South Monroe Street
Tallahassee, Florida 32399-0250

Re: Notice of Receipt of Petition for Declaratory Statement
In Re: Taracomo Townhomes Condominium Association, Inc.
DBPR Docket No. DS97338

Dear Mrs. Cloud:

Please find enclosed a Notice of Receipt of Petition for Declaratory Statement for publication in the next Florida Administrative Weekly regarding the above-referenced petition. *I would appreciate it if you would fax to our office a copy of the ad for our records as confirmation after it has been published in the Florida Administrative Weekly.*

The invoice for this publication should be directed to Robert H. Ellzey, Jr., Director, Division of Florida Land Sales, Condominiums and Mobile Homes, Department of Business and Professional Regulation, Bureau of Condominiums.

Sincerely,

Kathryn E. Price
Assistant General Counsel
(904) 487-1137

KEP\ptf

Enclosure

cc: ✓ Robert H. Ellzey, Jr., Director
Chief, Bureau of Condominiums
Pia Lehtonen, Bureau of Condominiums

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RECEIVED
BPR/FLSC&MM
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OFFICE

NOTICE OF RECEIPT OF PETITION FOR DECLARATORY STATEMENT

NOTICE IS HEREBY GIVEN that the Division of Florida Land Sales, Condominiums, and Mobile Homes, Department of Business and Professional Regulation, State of Florida, has received a Petition for Declaratory Statement in the matter of Taracomo Townhomes Condominium Association, Inc., Petitioner. The Petitioner requests a declaratory statement as to the following:

Whether it may, if it submeters water usage by the Petitioner members ("Members"), collect payment for water usage from each Member pursuant to such submetering without violating the requirement contained in section 718.115(2), Florida Statutes, that common expenses shall be collected by assessments against Members in the proportions or percentages provided in the Petitioner's declaration of condominium.

A copy of the Petition for Declaratory Statement, Docket No. DS97338, may be obtained by writing to the Docket Clerk, Division of Florida Land Sales, Condominiums, and Mobile Homes, Department of Business and Professional Regulation, 1940 North Monroe Street, Tallahassee, Florida 32399-1030.