

Final Order No. BPR-98-01989 Date 3-30-98

FILED

Dept. of Business and Professional Regulation

AGENCY CLERK

Sarah Wachman, Agency Clerk

By: Brandon M. Nichols

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

IN RE:

DS 97-016

**PETITION FOR DECLARATORY STATEMENT
LOUIS B. MILLER, (TANGERINE WOODS
OWNERS ASSOCIATION, INC.,)**

Petitioner.

Docket No. DS97423

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 December 22, 1997, the Division received a Petition for Declaratory Statement from Louis B. Miller, unit owner at Tangerine Woods Condominium, (Condominium), a condominium operated under the provisions of chapter 718, Florida Statutes.

2. The Tangerine Woods Owners Association, Inc., (Association), is the association for the Tangerine Woods Condominium.

3. According to the Petition, the Petitioner questioned the board of directors authority to place eight particular capital expenditure items on the 1998 proposed budget for the condominium because, in Petitioner's opinion, such items were additions to the condominium common elements that were not in place when the condominium was established. Petitioner asserts that those eight items were material alterations to the common elements under section 718.113(2), Florida Statutes. Petitioner asserts that the eight items should be categorized as capital expenditures, not everyday expenses; that reserves should be set up for the items and that these items required the approval of 75% of the voting interests of the condominium. The proposed operating budget for 1998 listed under the heading "Expenses" the following 8 items:

	Approved 1997 Budget	9 months actual + 3 estimated	Proposed 1998 budget
Capital Improvement			
Floor Lighting			450
Golf Cage			1530
Treadmill			3100
RV	2500	2329	
Storage Trailer	2000	2000	
Special Proj			
Closed Circuit Monitor Encl.			500
Concrete Bicycle Area			600
Decorations			1500
Park Benches			400
Street Lights.			3500
Total Capital Improvement	4500	4329	11580.

4. In support of his position, Petitioner states that the subject items are additions to the condominium common elements that were not in place when the condominium was established.

5. The Petition cites passages from the By-laws of the Tangerine Woods Owners Association, specifically Article XII, "Budget Assessments" sections 1 and 3. According to Petitioner, these provisions state:

Section 1:

The Board of Directors shall prepare annually a proposed operating budget of common expenses reflecting the sums estimated for the forthcoming calendar year required to provide the services and facilities herein after mentioned. Said budget shall be detailed and shall show the amounts budgeted by accounts and expense classification, including, if applicable, but not limited to those expenses listed in section 718.504 and section 718.112 of the Florida Statutes as amended from time to time. The same shall be construed to mean and include Reserve Accounts for Capital Expenditures and deferred maintenance. These accounts shall include, but not limited to, Recreation Hall Roof Replacement, Recreation Hall painting and street pavement resurfacing. . .

Section 3:

All expenditures, including maintenance, repair, replacement or preventive maintenance in excess of five thousand dollars ... about thirteen dollars and sixty six cents ... for each unit which were not approved in the budget must be approved by not less than a majority of the unit owners at a Special meeting of the members called for that purpose. At such Special meeting all members shall have the right to vote in person or by proxy on ratification of such expenditures. No such expenditure shall be made unless so ratified. Assessments for satisfying these special expenditures shall be payable in ninety (90) days after making such assessments unless earlier payment is provided for by the board.

6. On January 7, 1998 the division sent the Notice of Receipt of the Petition for Declaratory Statement to the Florida Administrative Weekly for publication, to the condominium association and to the Joint Administrative Procedures Committee.

7. Also on January 7, 1998, the division sent a letter to Petitioner acknowledging receipt

of the petition. The division requested a copy of the condominium documents, and identification of the eight items referenced in the Petition.

8. On January 14, 1998, the division received a letter from Petitioner that a copy of the documents would not be forthcoming as he assumed that the association was required to furnish the division a photocopy of the documents.

9. Condominium documents are required to be filed with the division before contracts are made for the sale of the condominium units. There is no provision in chapter 718, Florida Statutes which requires that copies of the recorded condominium documents be sent to the division. The division does not maintain copies of the condominium documents for every residential condominium in the state.

10. By the January 14, 1998 correspondence, Petitioner advised the division that the eight items were those listed in the budget document attached to the original letter under the heading "capital improvements/special projects," in the manner listed in paragraph 3 of these Findings of Fact. Petitioner further advised that the unit owners voted down items 2 and 3, the golf cage and the treadmill.

11. On January 27, 1998, the association filed a response to the Petition for Declaratory Statement. In its response, the association provided copies of pages 7 and 8 of the declaration of condominium for Tangerine Woods as recorded. The association asserts that paragraph (b) of Article XI on page 8 was "quite clear as to the manner in which the association can and does conduct the questioned performance of budgetary functions." The association further stated that of the 8 items referred to by Mr. Miller, items 2 and 3 were voted down by the majority of unit owners during a line item review and discussion of the budget conducted during the 1997 annual meeting.

12. The six items in the proposed 1998 budget which remained as expenditures approved by a majority of the members of the association were: Floor Lighting, \$450; Closed Circuit Monitor Encl., \$500; Concrete Bicycle Area, \$600; Decorations, \$1500; Park Benches, \$400 and Street Lights, \$3500.

13. According to the association, Article XI, paragraph b of the Declaration of Condominium for Tangerine Woods states:

The maintenance, repair and replacement of the common elements shall be the responsibility of the association. The association shall also maintain all lawn areas within unit boundaries but excluding shrubbery and other landscaping improvements.

There shall be no material alteration or substantial additions to the common elements, association property, units or improvements located on units except in a manner provided herein.

(b) The Association through the Board of Directors, may alter, add or improve the common elements or association property provided that any expenditures except as noted below, for an alteration, addition or improvement in excess of ...\$5000... shall require the prior approval of the owners of a majority of all units. Approval shall not be required for expenditures related to maintenance, repair, replacement, preventative maintenance, compliance with valid governmental orders or for security measures necessitated by conditions or events.

14. No other information was submitted by either party as to the nature of the six remaining items, all items were approved by a majority of the unit owners and appear to be well under the \$5000 threshold required by the documents.

15. The Petitioner requests a declaratory statement as to whether under section 718.113(2), Florida Statutes and Rule 61B-22.001(2) & (3), Florida Administrative Code, the eight items under the capital improvements/special projects section of the proposed 1998 budget were for material alterations to the common elements which require approval of 75% of the voting

interests of the condominium.

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 718.113(2), Florida Statutes (1997) states:

Except as otherwise provided in this section, there shall be no material alteration or substantial additions 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% of the total voting interests of the association must approve the alterations or additions.

3. Rule 61B-22.001(2)& (3), Florida Administrative Code, states:

(2) "Capital expenditure" means any expenditure of funds for:

- (a) the purchase of an asset whose useful life is greater than one year in length;
- (b) the replacement of an asset whose useful life is greater than one year in length;
- (c) the addition to an asset that extends the useful life of the previously existing asset for a period greater than one year in length.

(3) "Deferred maintenance" means any maintenance or repair that:

- (a) will be performed less frequently than yearly; and
- (b) will result in maintaining the useful life of an asset.

4. Article XI(b) of the Declaration of Condominium for Tangerine Woods Condominium requires a majority vote for any " **alteration, addition or improvement in excess of ...\$5000.**" None of the six items in the Proposed 1998 Budget, are in excess of \$5,000. Therefore, it is not necessary for the division to determine whether the six items complained of are

material alterations, additions or improvements to the common elements of the condominium. According to the declaration, if the items were additions, alterations or improvements to the common elements of the condominium costing in excess of \$5,000, a majority of the voting interests, not 75%, is required to approve the items.

WHEREFORE, for the foregoing reasons, the Division declares that section 718.113(2), Florida Statutes,(1997),¹ is not applicable in this situation because the declaration of the Tangerine Woods Condominium specifies the procedure for approval of alterations or additions. The provisions of Article XI (b) of the Declaration of Condominium allow such expenditures to be made by the board if the expenditures were less than \$5,000, or by a majority vote of the unit owners of Tangerine Woods Condominium if such expenditures are in excess of \$5,000.

DONE this 27th day of March, 1998, at Tallahassee, Leon County, Florida.



Robert H. Ellzey, Jr.
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

¹ The section provides that any material alteration or substantial additions to the common elements or to real property which is association property shall not be made except in a manner provided in the declaration.

RIGHT TO APPEAL

THIS DECLARATORY STATEMENT CONSTITUTES FINAL AGENCY ACTION AND MAY BE APPEALED BY PETITIONERS 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 ORDER DENYING PETITION FOR 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 Louis B. Miller, Tangerine Woods Owners Association, Inc., 801 Seabrooke Drive, Unit 259, Englewood, Florida, 34223; and to John V. Russ, President, Tangerine Woods Owners Association, Inc., 756 Tangerine Woods Blvd., Englewood, Florida, 34223, this _____ day of _____, 1998.

Kristie L. Harris
Docket Clerk

Copies furnished to:

**Martha F. Barrera,
Assistant General Counsel**

**Phil Nowicki, Chief
Bureau of Condominiums**

**Leann Ramseur, R.E.D.S.
Bureau of Condominiums**