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

IN RE: PETITION FOR DECLARATORY
STATEMENT

VISTANA SPA CONDOMINIUM
ASSOCIATION, INC.

Petitioner.

Docket No. DS98092

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 § 718.501, §721.26, and §120.565, Florida Statutes.

FINDINGS OF FACT

1. On June 29, 1998, the Division received a Petition for Declaratory Statement from the Vistana Spa Condominium Association, Inc., (Petitioner), through its counsel, Robert L. Taylor,

Esquire.

2. Petitioner is the condominium association responsible for management of the Vistana Spa condominium, a residential timeshare condominium located in Orlando, Florida. The Condominium has a total of 10 phases consisting of 30 buildings, cumulatively containing 248 units. Each unit in the Condominium has two bedrooms and two bathrooms. Since this is a timeshare condominium, no individual unit owner resides there full time but rather has the use of an apartment for a specified period of time, in this case a week. A unit owner's share of ownership is determined by the number of weeks the individual holds. Currently, the Condominium has 12,648 unit week owners who are dispersed world wide.

3. Pursuant to Section 7.B.1 of the Declaration of Condominium for Vistana Spa Condominium (Declaration), limited common elements include the "furniture, furnishings and other tangible personal property (and replacements thereof) submitted to condominium ownership and located within each unit."

4. Section 1.B. of the Declaration states that "the furniture, furnishings, and other tangible personal property and replacements thereof (exclusive of telephone equipment and any other furnishings or equipment not owned by the Developer) **located in each Unit of Phase I as of the date of this Declaration are submitted to condominium ownership.**" (Emphasis added). The amendments to the Declaration adding each of Phases II through X contain similar provisions submitting such property located in each unit of subsequent phases to condominium ownership as of the date of the recording of each amendment to the Declaration.

5. Each unit was initially furnished with a television set connected to cable television. The

existing television sets were located in each unit at the time the Declaration and its phase amendments were recorded. Thus, per the terms of the Declaration, the existing television sets are limited common elements. The Association now wishes to purchase new, larger television sets and to place them in each unit where the existing television sets are now located. The existing television sets would not be disposed of, or replaced, but rather would be relocated to another room in each of the units. Some additional cable (wiring) would be necessary to make the sets in the new location operational.

6. The total cost of the addition of 248 new television sets plus necessary cabling is approximately \$93,000, (\$375 per unit). The cost will be assessed as a common expense of the condominium and will be shared equally by the 12,648 unit week owners in accordance with the Declaration. This equates to a total cost of less than eight dollars per unit week owner.

7. Pursuant to sections 14.C.2 and 14.G. of the Declaration, the Association has the power to maintain repair and replace the common elements, the limited common elements and all property not required to be maintained, repaired and/or replaced by the owners.

8. Article II, Section 2(e) of the Articles of Incorporation of the Association, grants to the Association the power to "make improvements to the common elements of the Condominium and the property of the Association." Article II, Section 2(i) grants the Association the power to "purchase, lease, receive by gift or otherwise acquire possessory or use interests in real and personal property, whether or not contiguous to the lands of the Condominium, and on such terms deemed reasonable by the Board of Directors (Board), intended to provide for the enjoyment, recreation, or other use or benefit of the members of the Association. Section 2(n), grants the Association the power to "expand the common elements."

9. Petitioner requests a declaratory statement as to the following:

Whether pursuant to §718.111(7)(a) and §718.113(2), Florida Statutes, it would constitute a material alteration or substantial addition to the common elements, thereby requiring approval of seventy-five percent (75%) of the unit owners if the Association purchases new larger television sets for each unit, places them where the existing television sets are now located, moves the existing television sets to another room within the unit and performs the necessary cabling (wiring) to make each set operational.

10. On July 2, 1998, the Division notified the Joint Administrative Procedures Committee of the receipt of the Petition. On July 17, 1998 the Division published the Notice of Receipt of the Petition for Declaratory Statement in the Florida Administrative Weekly. On August 4, 1998, by telephone conversation, Petitioner's counsel advised the Division counsel that no hearing on the Petition was necessary. The Division has received no other response to the Petition.

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, (1997) provides that 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.

3. A "Timeshare plan" is defined as "any arrangement ...whereby a purchaser... receives ownership rights in or a right to use accommodations, and facilities, if any, for a period of time less than a full year during any given year, but not necessarily for consecutive years." Section 721.05(32), Florida Statutes. A timeshare unit is "an accommodation of a timeshare plan which is divided into timeshare periods." Section 721.05(5), Florida Statutes. A "timeshare period" means "the period or periods of time when a purchaser of a timeshare plan is afforded the opportunity to use the accommodations or facilities, or both, of a timeshare plan." Section 721.05(31), Florida Statutes.

4. Section 721.03(3), Florida Statutes (1998), provides that:

When a timeshare plan is subject to both the provisions of this chapter and the provisions of chapter 718 or chapter 719, the plan shall meet the requirements of both chapters unless exempted as provided in this section. The division shall have the authority to adopt rules differentiating between timeshare condominiums and nontimeshare condominiums, and between timeshare cooperatives and nontimeshare cooperatives, in the interpretation and implementation of chapters 718 and 719, respectively. In the event of a conflict between the provisions of this chapter and the provisions of chapter 718 or chapter 719, the provisions of this chapter shall prevail.

5. Section 721.05(16), Florida Statutes, defines "Facility" as

any amenity, including any structure, furnishing, fixture, equipment, service improvement or real or personal property, improved or unimproved, other than the accommodation of the timeshare plan, which is made available to the purchasers of a timeshare plan.

6. Section 718.113(2), Florida Statutes, provides, in pertinent part, as follows:

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

7. Pursuant to Section 718.103(7), Florida Statutes, common elements are defined as the

portions of the condominium property which are not included in the units. Condominium property includes personal property that has been submitted to condominium ownership. Section 718.103(12), Florida Statutes. In this case, the television sets that were originally purchased by the developer are part of the original furnishings of the units which were submitted to condominium ownership and, as such, are considered part of the common elements. However, the new television sets are not common elements. The only furnishings that were submitted to condominium ownership by the terms of the Declaration were those that were already located in the units at the time the Declaration and its phase amendments were recorded.

8. Section 718.103(3), Florida Statutes, defines Association property as personal property that is owned or leased by the Association for the use and benefit of its members. Since the new television sets are not common elements, and are being purchased by the association for the use and benefit of its members, these new television sets would be association property. Thus, the purchase of the additional television sets would not constitute a material alteration or substantial addition to the common elements of the Condominium. *In Re Petition for Declaratory Statement: Ocean Monarch Condominium Association*, Division Case No: DS93118, (Solares 10/29/93). (Washers and dryers initially leased by the association for the use and benefit of its members are association property, therefore, the purchase of the washers and dryers would not be a material or substantial addition to the common elements).

9. Further, even if the new television sets were considered common elements, it is doubtful that the purchase and installation could be considered a material alteration or substantial addition to the common elements of this timeshare condominium. The seminal case on material alterations or substantial additions is *Sterling Village Condominium, Inc. v. Breitenbach*, 251 So.2d 685 (Fla. 4th DCA 1971). There, the court held that, as applied to buildings, the term "material alteration or addition" means to "palpably or perceptively vary or change the form, shape, elements or 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". The units are already furnished with one television set and cable hook up. The addition of a second television set does not change the character of the unit or of its amenities to such a degree that it would amount to a substantial or material change. In a timeshare condominium, the unit owners do not reside there full time. Most spend as little as a week in the unit. Spending a week or so with an extra television set in the apartment does not appreciably affect or influence the apartment's function, use or appearance. Accordingly, the purchase of new television sets would not constitute a material alteration or substantial addition to the common elements. *In Re Petition for Declaratory Statement: Ocean Monarch Condominium Association*, Division Case No. DS93118, (Solares 10/29/93) (The purchase of washers and dryers does not constitute a material alteration or substantial addition to the association property since Section 718.113(2), Florida Statutes, only discusses material alterations and substantial additions to real property which is association property); *Belardo v Four Sea Suns Condominium*, Arb. Case No. 972186, (Scheuerman, 2/24/98) (Immaterial alterations are not governed by the statute but may be spoken to in the documents). Thus, a vote of 75% of the 12,648 timeshare unit owners is not

required

10 Petitioner also asks what is the authority of the Association to purchase the television sets. Section 718.111(7)(a), Florida Statutes, provides, in pertinent part, as follows:

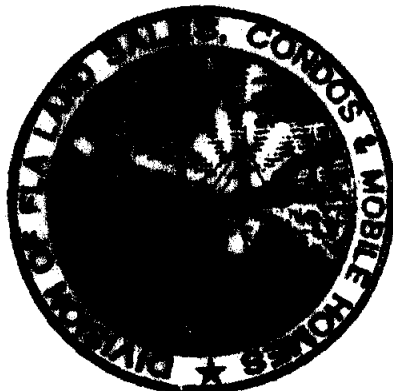
TITLE TO PROPERTY. --The association has the power to acquire title to property or otherwise hold, convey, lease, and mortgage association property for the use and benefit of its members. The power to acquire personal property shall be exercised by the board of administration.

Thus, section 718.111(7), Florida Statutes, allows the Association to acquire property for the use and benefit of its members, subject to any applicable documentary restrictions.

For the reasons stated above, the Division hereby DECLARES that:

The purchase of a new television set and additional cable connection (wiring) for each of the 284 apartments in the Condominium by the Association is not a substantial addition or material alteration of the common elements of this Timeshare Condominium and does not require approval of seventy five percent of the owners of timeshare units.

DONE this 25th day of September, 1998, at Tallahassee, Leon County, Florida.



Philip Nowicki

PHILIP NOWICKI, Ph.D., DIRECTOR
Division of Florida Land Sales, Condominiums and
Mobile Homes
Department of Business and Professional Regulation
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RIGHT TO APPEAL

THIS DECLARATORY STATEMENT CONSTITUTES FINAL AGENCY ACTION AND MAY BE APPEALED BY PETITIONERS 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 Declaratory Statement has been furnished by U.S. Mail to Robert L. Taylor, Esquire, Attorney for Petitioner, 1900 Summit Tower Boulevard, Suite 800, Orlando, Florida 32810, on this ____ day of September, 1998.

Kristie Harris
Docket Clerk

Copies furnished to:
Martha F. Barrera,
Assistant General Counsel

Laura Glenn, Bureau Chief
Bureau of Timeshare

Jeri Ricord, Education Supervisor
Leann B. Ramseur, R.E.D.S
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