

Final Order No. BPR-99-05655 Date 10-12-99

FILED

Department of Business and Professional Regulation  
AGENCY CLERK

By: Sarah Wachman, Agency Clerk

*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 99-017**

THOMAS F. NOONAN, UNIT OWNER,  
1800 ATLANTIC CONDOMINIUM,

Petitioner, and

Division Docket Number CD1999125

1800 ATLANTIC CONDOMINIUM ASSOCIATION, INC,

Intervenor.

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**DECLARATORY STATEMENT**

The State of Florida, Department of Business and Professional Regulation, Division of Florida Land Sales, Condominiums, and Mobile Homes (Division) enters this Declaratory Statement pursuant to sections 120.565 and 718.501, Florida Statutes.

**FINDINGS OF FACT**

The following findings of fact are based on information submitted by Petitioner. The Division takes no position as to the accuracy of the facts, but merely accepts them as submitted for purposes of this final order. Petitioner did not request and no hearing was held in this matter.

1. On July 8, 1999, the Division received a Petition for Declaratory statement from Thomas F. Noonan, a unit owner in the 1800 Atlantic Condominium. Notice of receipt of the

petition was duly published in Volume 25, Number 31, (August 6, 1999) Florida Administrative Weekly. 1800 Atlantic Condominium Association, Inc. (Association), is the association that operates the condominium, which is located in Key West, Monroe County, Florida.

2. On August 5, the Division received a Response to Petition and Request to Intervene filed by the Association, by and through its counsel. Petitioner filed a Supplementary Statement to Petition and Amendment to Petition (Amendment to Petition) on August 12, 1999.

3. 1800 Atlantic condominium has a total of 168 units, of which 79 are licensed by the City of Key West, Monroe County, and the State of Florida, to engage in transient rental activity.

4. Section 22.01 of the declaration of condominium provides that each unit owner may rent his unit as often as he wishes.

5. Section 24 of the declaration of condominium, as originally recorded, provides that a unit owner may not use or permit his unit to be used for any purpose other than a single family residence for himself and the members of his family or social guests.

6. The board of directors of the Association authorized the expenditure of association funds to hire security personnel whose duties include providing check-in services for patrons of the transient rental units.

7. On September 10, 1996, the board executed an amendment to section 22.06 of the declaration of condominium. The amendment states in relevant part that the members present in person or by proxy at a duly called meeting at which a quorum is present may, by a 66 2/3 vote, approve a change in the transfer fee assessed by the association for each new rental. This provision previously provided that the fee could be set by the board of administration, and the board set such fees at its discretion within the limits permitted by law.

8. On October 6, 1998, the Circuit Court of the Tenth Judicial Circuit, In and For Polk County, Florida, entered Final Summary Judgment determining, in part that transient rental of a single family residential lot constituted a commercial use of the lot. *Teves v. Berry*, 6 Fla. L. Weekly Supp. 492 (Fla. 10th Circ. Ct. October 6, 1998). The lot owners were licensed by the Department of Business and Professional Regulation, Division of Hotels and Restaurants, to operate a transient lodging establishment. The owners entered into a Leaseback Agreement to rent their lot as a transient lodging facility or rooming house. Sales taxes had been paid to the State of Florida to operate a rooming house as defined by section 212.02(10)(c), Florida Statutes, on the lot for every year since construction of the residence thereon. The Court held that the utilization of the lot as a transient rental facility and as a rooming house constituted a non-residential, non-single family, commercial use of the lot, in violation of the Village declaration. Id. Petitioner asserts that for purposes of the petition for declaratory statement, the Division should adopt as its holding the conclusion reached in *Teves*. Petitioner also asserts that the commercial use of some of the units transforms the condominium to a mixed-use condominium within the meaning of section 718.404, Florida Statutes.

9. Petitioner initially sought a declaratory statement on four separate issues. The first issue, that the board of directors changed language in section 22.01 of the declaration of condominium without following proper amendment procedures, was deleted from the petition for declaratory statement in the Amendment to Petition.

10. Petitioner asserts that he is denied the lawful and peaceful use of his residential unit by the failure of the board of administration to enforce the provisions of the declaration and its related documents.

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

A. The Division is urged to declare that in this condominium the owners of non-commercial use units are entitled to elect a majority of the board of administration pursuant to section 718.404(2), Florida Statutes.

B. To the extent that a board member of this condominium, who is engaged in transient rental commercial activity within this condominium and is acting as a board member, participated in the framing of financial policies applicable exclusively to transient rentals, that board member stands in a prohibited conflict of interest within the meaning of sections 718.111(1)(a), Florida Statutes, sections 607.0830(1) and 617.0830(1), Florida Statutes.

C. In the particular factual situation presented by this petition the Division is urged to declare that section 718.303(1) and 718.111(1)(a), Florida Statutes, must be read in the circumstances of this case to require the board of administration to take all reasonable and necessary steps to enforce the provisions of the declaration and its exhibits, particularly subsection 24.03 of the declaration.

### CONCLUSIONS OF LAW

1. The Division has jurisdiction to enter this order pursuant to sections 718.501 and 120.565, Florida Statutes.

2. Petitioner has standing to seek a declaratory statement.

3. The association's request to intervene is granted.

4. The purposes and use of declaratory statements are set out in Chapter 120, Florida Statutes, and Chapter 28-105, Florida Administrative Code:

#### **120.565 Declaratory Statement by agencies. –**

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

(2) The petition seeking a declaratory statement shall state with particularity the petitioner's set of circumstances and shall specify the statutory provision, rule, or order that the petitioner believes may apply to the set of circumstances.

**28-105.001 Purpose and Use of Declaratory Statement.** A declaratory statement is a means for resolving controversy or answering questions or doubts concerning the applicability of statutory provisions, rules, or orders over which the agency has authority. A petition for declaratory statement may be used only

to resolve questions or doubts as to how the statutes, rules, or orders may apply to the petitioner's particular circumstances. A declaratory statement is not the appropriate means for determining the conduct of another person or for obtaining a policy statement of general applicability from an agency. A petition for declaratory statement must describe the potential impact of statutes, rules, or orders upon the petitioner's interests.

5. To the extent that Petitioner is requesting the Division to apply the holding of *Teves v. Berry*, 6 Fla. L. Weekly Supp. 492 (Fla. 10th Circ. Ct. October 6, 1998), the request is denied. That request is improper in a declaratory statement proceeding as it does not involve the application of any of the Division's statutes, rules or orders to the Petitioner's facts, within the meaning of section 120.565, Florida Statutes, and rule 28-105.001, Florida Administrative Code. Petitioner's argument with respect to the application of *Teves* is that since the unit owners in the instant case are licensed to operate public lodging establishments pursuant to Chapter 509, Florida Statutes, the Division should apply the reasoning in *Teves* and determine that the transient rental of some of the units transforms those units into commercial units. Petitioner then urges the Division to conclude that because some of the units are commercial, the condominium is a mixed-use condominium within the meaning of section 718.404, Florida Statutes. The Division is authorized to enforce and ensure compliance with the provisions of Chapter 718, Florida Statutes, as they relate to residential condominiums. *Fla. Stat. §718.501(1)(d) (1997)*. The Condominium Act does not define "commercial units," hence, the Division can offer no resolution as to what constitutes a commercial unit. However, the Condominium Act defines "residential condominium" as:

(22)"Residential Condominium" means a condominium intended for use as a private temporary or permanent residence, except that a condominium is not a residential condominium if the use for which the units are intended is primarily commercial or industrial and not more than three units are intended to be used for private residence and are intended to be used as housing for maintenance, managerial or janitorial or other operational staff of the condominium. ....

Petitioner referenced Section 24.03 of the declaration of condominium, which provides that the units are to be used for single family residential purposes. In its response, the Association agrees that 1800 Atlantic is a residential condominium. Thus, even though the declaration permits unit owners to rent or lease their units on a transient basis, and even though some of the unit owners are licensed by the Division of Hotels and Restaurants to operate transient lodging establishments, the condominium is intended for use as a private temporary or permanent residence. Based on the information submitted by Petitioner, 1800 Atlantic Condominium is a residential condominium within the meaning of section 718.103(22), Florida Statutes (Supp. 1998). Having made that determination, the Division need not address the issue of whether the condominium is a mixed-use condominium pursuant to section 718.404, Florida Statutes.

6. Petitioner next requests a declaratory statement that:

To the extent that a board member of this condominium, who is engaged in transient rental commercial activity within this condominium and is acting as a board member, participated in the framing of financial policies applicable exclusively to transient rentals, that board member stands in a prohibited conflict of interest within the meaning of sections 718.111(1)(a), Florida Statutes, sections 607.0830(1) and 617.0830(1), Florida Statutes.

Petitioner urges that the September 10, 1996, amendment that allows unit owners to change the fee assessed by the association for each new rental by a vote of 66 2/3 of the members present in person or by proxy at a duly called meeting, and the hiring of security personnel by the board to provide, in part, a check-in service for the rental units, in some way constitutes a conflict of interest. The powers and duties of the condominium association include those set forth in Chapter 718, Florida Statutes, the declaration and bylaws, and those set forth in Chapters 607 and 617, as applicable. Section 718.111(1)(a), Florida Statutes, upon which Petitioner seeks a declaratory statement, provides:

**718.111 The association.—**

**(1) CORPORATE ENTITY.—**

(a) The operation of the condominium shall be by the association, which shall be a Florida corporation for profit or a Florida corporation not for profit. However, any association which was in existence on January 1, 1977, need not be incorporated. The owners of units shall be shareholders or members of the association. The officers and directors of the association shall have a fiduciary relationship to the unit owners. It is the intent of the legislature that nothing in this paragraph shall be construed as providing for or removing a requirement of a fiduciary relationship between any manager employed by the association and the unit owners. An officer, director, or manager may not solicit, offer to accept or accept any thing of service or value for which consideration has not been provided for his or her own benefit or that of his or her immediate family from any person providing or proposing to provide goods or services to the association. Any such officer, director, or manager who knowingly so solicits, offers to accept or accepts any thing or service of value is subject to a civil penalty pursuant to s. 718.501(1)(d). However, this paragraph does not prohibit an officer, director, or manager from accepting services or items received in connection with trade fairs or education programs. An association may operate more than one condominium.

Petitioner alleged that because some of the board members are also unit owners who rent their units on a transient basis, such board members should not participate in framing financial policies that relate to the rental units. Petitioner complains that hiring the security guards does not benefit condominium unit owners as a whole, but rather, that the majority of unit owners subsidize the "hotel" operations conducted within the condominium. To the extent that board members who also rent their units participate in board of administration decision-making, such action in and of itself, would not be sufficient to invoke the prohibitions in section 718.111(1)(a), Florida Statutes.

7. As to whether the board of directors breached their fiduciary duty or participated in an impermissible conflict of interest in hiring the security guards, the issue is not properly decided in a declaratory statement proceeding. The determination of whether a breach of fiduciary duty within the meaning of section 718.111(1)(a), Florida Statutes, or a conflict of interest within the meaning of section 617.0832, Florida Statutes, occurred, would, require an

evidentiary hearing. At a minimum, there would have to be a factual determination of whether any board member solicited, offered to accept or accepted any thing of service or value for which consideration was not provided; whether any board member who voted to hire the security service has an interest in the entity; whether such interest was disclosed to the board or unit owners; whether the contract entered into is fair or reasonable; and whether the contract was executed in good faith by the board. In its response, the Association disputes the allegation that a conflict of interest or a breach of duty has occurred. Because the issue necessarily requires the determination of facts in dispute, the issue is more appropriately addressed and resolved in a different forum. The purpose of a declaratory statement proceeding is to remove any question or doubt about the applicability of statutory provisions over which the agency has authority. *Fla. Admin. Code Rule 28-105.001*. A statement on this issue has the potential to determine whether any board member is liable for breach of any duty owed to the unit owners. Issues that require evidentiary findings, such as in the instant case, as to the rights and liabilities of parties, are best determined in a proceeding that would allow a full and fair hearing so that each side can present argument as to the merits of its claim. As a declaratory statement is not adversarial, but rather, a proceeding to determine how the agency intends to act in applying its statutes, rules and orders to particular facts, the proceeding is unsuitable for determining issues of liability between a condominium association and a unit owner. The basis of a declaratory statement should be to clarify whether the agency would take action against a regulated party by applying its statutes, rules, or orders to the party's contemplated conduct. See, Patricia A. Dore, *Access to Florida Administrative Proceedings*, 13 Fla. St. U. L. Rev. 965, 1046 (1986).

8. Moreover, the Division could not issue a declaratory statement to the effect that any board member's conduct constitutes a violation of sections 718.111(1)(a), or 617.0832,



Florida Statutes. A declaratory statement proceeding is not the proper method of challenging the conduct of another person. *Fla. Admin. Code Rule 28-105.001*. Declaratory Statements are not proper where the petitioner seeks a ruling not only for himself but for a third party. *Manasota-88, Inc., v. Gardinier, Inc.*, 481 So. 2d 948 (Fla. 1st DCA 1986).

9. Petitioner next requests a declaratory statement that:

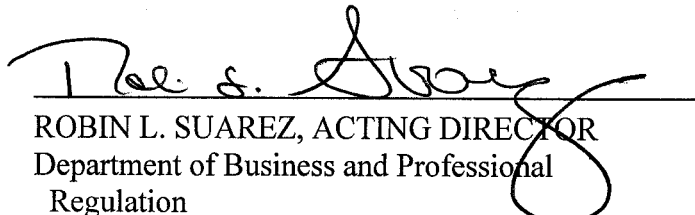
In the particular factual situation presented by this petition the Division is urged to declare that section 718.303(1) and 718.111(1)(a), Florida Statutes, must be read to infer an affirmative obligation of the board of directors to take all reasonable and necessary steps to enforce the provisions of the declaration and exhibits, particularly subsection 24.03 of the declaration.

Under this request, Petitioner argues that because the specific language of section 24.03 of the declaration of condominium restricts the use of the units to owners, family member of owners, and guests, that language should control over the general provisions of section 22.01, which permits unit owners to rent their units as often as they wish. Petitioner urges the interpretation that "rentals are restricted to family members; a guest by definition does not pay rent." The Association responds that interpreting section 24.03 in the manner advanced by Petitioner would negate all of the provisions relating to rentals, such that the provisions would be superfluous. Petitioner's request for declaratory statement does not equate to an interpretation of sections 718.303 and 718.111(1)(a), Florida Statutes, or any of the Division's statutes, rules, or orders, but rather, is a request to interpret the provisions of the declaration of condominium. Petitioner and Intervenor, by advancing different interpretations of sections 24.03 and 22.01 of the declaration, illustrate the ambiguity in the provisions. The Division lacks authority to interpret ambiguous provisions of a condominium contract. *Peck Plaza Condominium v. Division of Florida Land Sales and Condominiums, Department of Business Regulation*, 371 So. 2d 152 (Fla. 1st DCA 1979); *Grippe v. Department of Business and professional Regulation, Division of Florida Land*

*Sales, Condominiums, and Mobile Homes*, 729 So.2d 459 (Fla. 4th DCA 1999.) Accordingly, Petitioner's third request for declaratory statement is denied.

Wherefore, the Division declares that 1800 Atlantic Condominium is a residential condominium as defined by section 718.103(22), Florida Statutes. The other issues presented by the petition are denied for the reasons discussed above.

DONE AND ORDERED this 4 day of, October 1999.

  
ROBIN L. SUAREZ, ACTING DIRECTOR  
Department of Business and Professional  
Regulation  
Division of Florida Land Sales Condominiums, and  
Mobile Homes  
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, 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, 1940 NORTH MONROE STREET, NORTHWOOD CENTRE, TALLAHASSEE, FLORIDA 32399-2217, 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 has been furnished by U.S. mail to Thomas F. Noonan, 1800 Atlantic Blvd., C324, Key West, Florida 33040, and David Rogel, Esquire, Becker & Poliakoff, P.A., 5201 Blue Lagoon Drive, Suite 100, Miami, Florida 33126, this \_\_\_\_\_ day of \_\_\_\_\_, 1999.

\_\_\_\_\_  
Kristie Harris  
Docket Clerk

Copies furnished to:

Kathryn E. Price  
Assistant General Counsel

Julie Baker, Chief  
Bureau of Condominiums

Suzanne Schmidt, R.E.D.S.  
Bureau of Condominiums

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