

Final Order No. BPR-99-05880 Date 10-21-99
FILED

Department 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: PETITION FOR DECLARATORY
STATEMENT,

DS 99-019

BAHAMA BAY CLUB TOWNHOMES
CONDOMINIUM ASSOCIATION OF
GULF BREEZE, INC.

Docket Number: CD1999130

Petitioner.

DECLARATORY STATEMENT

The State of Florida, Department of Business and Professional Regulation, Division of Florida Land Sales, Condominiums and Mobile Homes (Division), issues this Declaratory Statement on the Petition for Declaratory Statement filed by Bahama Bay Club Townhomes Condominium Association of Gulf Breeze, Inc.

STATEMENT OF THE CASE

On, July 22, 1999, the Division received a Petition for Declaratory Statement from Petitioner, Bahama Bay Club Townhomes Condominium Association of Gulf Breeze, Inc., hereinafter, Petitioner. Notice of receipt of the petition was duly published in the Florida Administrative Weekly, Volume 25, Number 32, on August 13, 1999.

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.

1. Petitioner, Bahama Bay Club Townhomes Condominium Association of Gulf Breeze, Inc., is a Florida not-for-profit corporation organized as a condominium association pursuant to Chapter 718, Florida Statutes, to operate Bahama Bay Club Townhomes Condominium (Bahama Bay).

2. The Declaration of condominium for Bahama Bay was recorded on May 14, 1982, in the official records of Santa Rosa County, Florida.

3. Harbourtown is a non-residential subdivision located adjacent to Bahama Bay. It is governed by Harbourtown Officeowners and Storeowners Association, Inc., (Harbourtown), a not-for-profit corporation.

4. By instrument dated April 29, 1986, Harbourtown and the Petitioner entered into an agreement whereby Bahama Bay granted to Harbourtown certain easements for ingress and egress over portions of the common elements of Bahama Bay and Harbourtown granted Petitioner an easement over property owned by Harbourtown. At the time the agreement was entered into, the Petitioner was in the control of the condominium unit owners and the requisite approvals were obtained from the members of both associations.

5. Under the agreement, Harbourtown agreed to pay Petitioner monthly payments that are increased according to a formula set forth in paragraph 3 of the agreement. Petitioner admits that this clause is an escalation clause. Petitioner is not obligated to pay any payments to Harbourtown for the easement granted to Bahama Bay.

6. A question has arisen as to whether the escalation clause in the agreement is unenforceable pursuant to section 718.4015, Florida Statutes (1997). It is Petitioner's position that the escalation clause prohibition contained in 718.4015, Florida Statutes, is not applicable under these circumstances. In this situation, the condominium association is not burdened by the escalation clause but is actually a beneficiary of the clause and the non-residential subdivision association is burdened with it.

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 this declaratory statement.
3. 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.

Rule 28-105.001, Florida Administrative Code, provides:

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. Section 718.4015, Florida Statutes, effective since 1975, provides that:

(1) It is declared that the public policy of this state prohibits the inclusion or enforcement of escalation clauses in land leases or other leases or agreements for recreational facilities, land, or other commonly used facilities serving residential condominiums, and such clauses are hereby declared void for public policy. For the purposes of this section, an escalation clause is any clause in a condominium lease or agreement which provides that the rental under the lease or agreement shall increase at the same percentage rate as any nationally recognized and conveniently available commodity or consumer price index.

(2) This public policy prohibits the inclusion or enforcement of such escalation clauses in leases related to condominiums for which the declaration of condominium was recorded on or after June 4, 1975; it prohibits the enforcement of escalation clauses in leases related to condominiums for which the declaration of condominium was recorded prior to June 4, 1975, but which have been refused enforcement on the grounds that the parties agreed to be bound by subsequent amendments to the Florida Statutes or which have been found to be void because of a finding that such lease is unconscionable or which have been refused enforcement on the basis of the application of former s. 711.231 or former s. 718.401(8); and it prohibits any further escalation of rental fees after October 1, 1988, pursuant to escalation clauses in leases related to condominiums for which the declaration was recorded prior to June 4, 1975.

(3) The provisions of this section do not apply if the lessor is the Government of the United States or this state or any political subdivision thereof or any agency of any political subdivision thereof.

6. Petitioner is correct in its assessment that the long line of cases dealing with escalation clauses in condominiums have dealt only with leases in which the condominium association and the unit owner were burdened by the escalation clauses. The issue presented here, however, is whether the statute applies to any escalation clause in a lease or other agreement in which a condominium association is the lessor, and where the burden under the clause is borne not by the condominium association and the unit owners but by the other party to the lease agreement.

7. Section 718.401, Florida Statutes, specifically applies to leaseholds relating to condominiums where the property upon which the condominium is built or the recreational

facilities or other common elements or commonly used facilities are on a leasehold. Thus, in these situations, the lessor is the developer or other entity and the lessees are the condominium association and the unit owners. This statute clearly does not apply to cases where the condominium association is not the lessor. It is a consumer protection measure for the protection of condominium unit owners.

8. Section 718.4015, Florida Statutes, is also a consumer protection measure for the protection of unit owners and condominium associations and was originally part of section 718.401, Florida Statutes. See for example, section 718.401(8)(a), Florida Statutes, (1981); Cartwright Declaratory Statement (Mainlands of Tamarac By the Gulf), Division Case No. 83A-6 (Kearney., 4/19/83). These sections were enacted along with section 718.3025, Florida Statutes to protect the condominium unit owners from unconscionable contracts and "sweetheart" management deals entered into while the condominium association was under developer control. Section 718.4015, Florida Statutes was specifically enacted for the purpose of "controlling abuses in the condominium trade." Schlytter v. Baker, 580 F.2d 848 (5th Cir. 1978).

9. Section 718.4015, Florida Statutes, applies to escalation clauses in land leases or other leases or agreements for recreational facilities, land, or other commonly used facilities *servicing residential condominiums*. In this case the lease or easement agreement that includes the escalation clause serves the commercial association, not the condominium. The commercial association is burdened with the escalation clause, not the condominium unit owners. The property that is the subject of the easement is serving the commercial entity, not the unit owners. The same or similar language, "property serving unit owners of a condominium" in section 711.66(5), Florida Statutes (1975), has been interpreted to be "protective of condominium associations" and was held to apply to contracts to supply and service laundry equipment to


condominium associations by third parties. Wash and Dry, Inc. v. Bay Colony Club Condominium, Inc., 368 So.2d 50 (Fla. 4th DCA 1979); Wash-bowl Vending Co. v. No. 3 Condominium Association, Village Green, Inc., 485 So. 2d 1307, 1311 (Fla. 3 DCA 1986).

10. To the extent that the Petitioner requests a statement on whether Harbourtown is liable for payments under the agreement, the petition is denied because the issue sought to be resolved affects the rights of a third person not a party to the proceedings. The Division has no authority to issue a declaratory statement adjudicating the rights or obligations of persons who are not parties to the petition. *Florida Optometric Association, Inc., v. Department of Professional Regulation*, 399 So.2d 6 (Fla. 1st DCA 1981) (Associations were not proper parties and could not obtain declaratory statement on behalf of their individual members who were not party to the petition). 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).

Wherefore, the Division DECLARES that section 718.4015, Florida Statutes, does not apply to the Bahama Bay agreement with Harbourtown.

DONE AND ORDERED this 20 day of October, 1999.




ROBIN L. SUAREZ, 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 FINAL ORDER 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 FINAL ORDER.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Jeffrey T. Sauer, Esq., Smith, Sauer & DeMaria, 510 East Zaragoza, Pensacola, Florida 32501, this _____ day of _____, 1999.

Kristie Harris
Docket Clerk

Copies furnished to:

Martha F. Barrera
Assistant General Counsel

Julie Baker, Chief
Bureau of Condominiums

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

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