

FILED

Department of Business and Professional Regulation

AGENCY CLERK

Sarah Wachman, Agency Clerk

By: Sarah Wachman

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

DS 98-031

IN RE: PETITION FOR DECLARATORY)
STATEMENT,)
)
LEISUREVILLE LAKE UNIT E)
CONDOMINIUM ASSOCIATION, INC.,)
)
PETITIONER.)
_____)

Division Docket Number DS98153

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 pursuant to sections 120.565 and 718.501, Florida Statutes.

FINDINGS OF FACT

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

1. The Division received a petition for declaratory statement filed by Geraldine Raph, as Treasurer of the Leisureville Lake Unit E Condominium Association, Inc. The petition was filed on September 25, 1998.

2. Leisureville Lake Unit E Condominium Association, Inc., (Petitioner or Association), is the entity that operates the Leisureville Lake Unit E Condominium located in Boynton Beach, Palm Beach County, Florida. The declaration of condominium was recorded November 4, 1970.

3. The condominium consists of twelve one-bedroom and twelve two-bedroom units, for a total of twenty-four units. The condominium documents provide that assessments for common expenses in a two-bedroom unit are 1/18 and 1/36 for one-bedroom unit.

4. The condominium includes a laundry room, which is designated as part of the common elements.

5. According to Petitioner, there is a concern regarding the water/sewer bill. Petitioner states, "There are two meters and the Association receives two bills. The water and sewer for the laundry room appear on the two-bedroom side of the condominium, raising those monthly assessments. Over a one-year period, the one-bedroom bills total \$957.60, and the two-bedroom bills total \$3,174.14, a significant difference."

6. Pursuant to the declaration, the expense of providing water and sewer services to the condominium unit owners, including the laundry room, is a common expense.

7. According to Petitioner, the Association totals the amounts from the two meters and assesses the one-bedroom units 1/36 of the total, and the two-bedroom units 1/18 of the total.

8. Petitioner states that it does not wish to make any alterations or additions to the common elements.

9. Petitioner seeks a declaratory statement as to whether the Association, by and through its board of directors, may change the unit owners' proportionate share of the

water/sewer bill to a per-unit assessment (1/24), rather than the percentages stated in the declaration of condominium.

10. By letter dated October 16, 1998, the Division requested a copy of the declaration of condominium and advised Petitioner that the 90-day time limit within which an agency must issue a declaratory statement or reject a petition would be tolled from the date of the letter to the date of receipt. The 90-day time limit was tolled from October 16 through October 26, and December 7 through December 10, pending receipt of requested information from Petitioner. Accordingly, the 90-day time limit in section 120.565, Florida Statutes, is extended to January 8, 1999.

11. Notice of the petition was duly published in Volume 24, Number 44, October 30, 1998, issue of the Florida Administrative Weekly. The Division has received no response to the publication.

CONCLUSIONS OF LAW

1. The Division has jurisdiction to issue this declaratory statement pursuant to sections 120.565 and 718.501, Florida Statutes.

2. The Petitioner condominium association is substantially affected by the issue raised in the petition and has standing to seek this declaratory statement.

3. Based on the facts submitted, the Association appears to be collecting assessments from unit owners in the percentages stated in the declaration. If the Association wishes to change the proportion by which the unit owners share the common expenses and own the common surplus, it may do so by complying with the requirements of section 718.110(4), Florida Statutes. The Association may not, however, change the percentage by which unit

owners are assessed for the common expense of the water/sewer, from the current percentages to a per-unit basis.

4. Section 718.115, Florida Statutes (1997), provides, in relevant part:

718.115 Common expenses and common surplus. --

* * *
(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....

Further, section 718.104 (4), Florida Statutes, provides, in relevant part:

(4) The declaration must contain or provide for the following matters:

(g) The proportions or percentages of and manner of sharing common expenses and owning common surplus, which, for a residential condominium, must be the same as the undivided shares in the common elements. [Emphasis Supplied]

5. Condominiums in Florida are strictly creatures of statute. *Suntide Condominium Association, Inc., v. Division of Florida Land Sales and Condominiums*, 463 So.2d 314 (Fla. DCA 1984). The creation, sale, and operation of condominiums in Florida must be in compliance with Chapter 718, Florida Statutes, The Condominium Act. Generally, Chapter 718 does not contemplate that unit owners can be assessed on a per-unit basis for certain common expenses, while being assessed for other common expenses in other proportions or percentages. While it is recognized that an exception to the foregoing exists for the cost of a master antennae television system or duly franchised cable television service obtained under a bulk contract,¹ no

¹ Laws of Florida, Chapter 98-322, provides as follows:
718.115. Common expenses and common surplus

* * *
(b) If so provided in the declaration, the cost of a master antenna television system or duly franchised cable television service obtained pursuant to a bulk contract shall be deemed a common expense. If the declaration does not provide for the cost of a master antenna television system or duly franchised cable television service obtained under a bulk contract as a common expense, the board of administration may enter into such a contract and the cost of the service will be a common expense but allocated on a per-unit basis rather than a percentage basis if the declaration

such exception exists for the provision of utility services. It is axiomatic that where the legislature references one thing in a statute, but excludes others, the exclusion was intended. The expression of one thing necessarily excludes those items not included. *Towerhouse Condominium Association, Inc., v. Millman*, 475 So.2d 674 (Fla. 1985). If condominium associations could utilize different assessment schemes in a condominium as a general principle, there would be no need for the exception for master antennas and cable television bulk contracts. Because only those two items were mentioned as being subject to assessment on a per-unit basis in the manner described, no other items may by implication be included. Therefore, the Association must assess unit owners in the proportions or percentages stated in the declaration.

6. The former Condominium Act, Chapter 711, Florida Statutes, which was effective at the time the Leisureville Lake Unit E declaration of condominium was recorded, could be construed to allow an association to have more than one assessment scheme, if the declaration of condominium so provided. Specifically, former section 711.14, Florida Statutes, (1969), provided, in relevant part:

711.14 Common expenses and common surplus.--

* * *

(2) Funds for the payment of common expenses shall be assessed against unit owners in the proportions or percentages of sharing common expenses provided in the declaration.

The above provision prescribed only that assessments for common expenses be collected in accordance with the percentages provided in the declaration of condominium. Conceivably, under the above provisions, the condominium documents could provide a manner of sharing certain common expenses that did not coincide with the ownership percentages stated in the

provides for other than an equal sharing of common expenses and any contract entered into before July 1, 1998, in which the cost of the service is not equally divided among all unit owners, may be

declaration. *See, Suntide Condominium Association, Inc., v. Division of Florida Land Sales and Condominiums*, 463 So.2d 314 (Fla. 1st DCA 1984); *In re: Petition for Declaratory Statement, Daytona Beach Ocean Towers, Inc., Petitioner*, Docket Number DS89486 (Nichols, April 17, 1990). However, beginning in 1975, the Condominium Act was amended to clarify the original intent of the legislature with respect to the proportions or percentages of ownership of common elements and the payment of common expenses. Former section 711.14, Florida Statutes, was amended as follows:

(2) In a residential condominium, funds for the payment of common expenses shall be assessed against unit owners in the proportions or percentages of ownership of the common elements provided in the declaration.

*

*

*

(4) The proportions or percentages of ownership of the common elements and the payment of common expenses as specified herein above, is intended to clarify the original intent of the legislature with regard to the same.

1975 Fla. Laws ch. 224.

7. The declaration of condominium in the instant case, which was recorded November 4, 1970, does not contain a provision that certain common expenses would be assessed on a basis other than the percentages stated in the declaration. Accordingly, the Association may not change the percentages by which the water/sewer common expense is currently assessed. Notwithstanding the foregoing, the Association may, in accordance with the procedures outlined in section 718.110(4), Florida Statutes, obtain the requisite vote of the unit owners to change the percentage by which unit owners own the common elements and common surplus and pay common expenses.

8. Petitioner's reliance on the declaratory statement issued in *In re: Petition for Declaratory Statement, Taracomo Townhomes Condominium Association, Inc., Petitioner*,

changed by vote of a majority of the voting interests present at a regular or special meeting of the association, to allocate the cost equally among all units.....

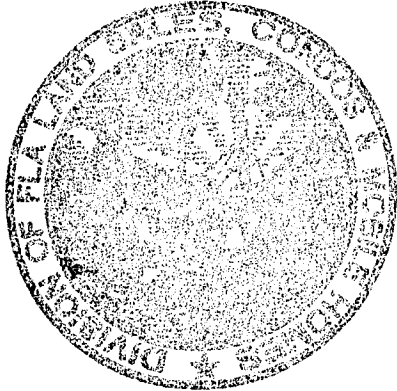
Docket Number DS97338 (Ellzey, January 5, 1998), is erroneous. In that case, the Association sought to change the manner in which unit owners were assessed for their water service, by installing individual submeters on the common elements. The Division held that the Association could accomplish the submetering by amending the declaration to reflect that the provision of water to the units would be a limited common element, for which each unit owner would be responsible for his individual use of water, in addition to his share of the water supplied to the common elements.

9. The *Taracomo* declaratory statement is distinguished from the instant case because the Petitioner herein is seeking to assess unit owners on a per-unit basis for a common expense, without the addition of the individual submeters. In Petitioner's scenario, each unit owner would not be responsible for his individual consumption of water, but would share equally in every unit owner's consumption of water. The submetering issue is not presented herein as Petitioner specifically stated that it did not intend to make any additions or alterations to the common elements. These facts are therefore distinguished from the facts of *Taracomo*.

Wherefore, the Division declares that the Leisureville Lake Unit E Condominium Association may not change the proportion or percentages by which unit owners are assessed for the water/sewer common expense to a per-unit basis. The Association may, however, elect to change the proportion or percentages by which the unit owners own the common elements and thereby change the assessment for common expenses, in the manner prescribed by section 718.110(4), Florida Statutes.

DONE AND ORDERED this 30th day of DECEMBER, 1998, at

Tallahassee, Leon County, Florida.



PHILIP NOWICKI, Ph.D., 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 Geraldine B. Raph, Treasurer, Leisureville Lake Unit E Condominium, 1115 Lake Terrace, Boynton Beach, Florida 33426, on this _____ day of _____, 199_.

Kristie Harris
Docket Clerk

Copies furnished to:

Kathryn E. Price
Assistant General Counsel

Julie Baker, Acting Chief
Bureau of Condominiums

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