

Final Order No. BPR-99-06267 Date 11-15-99  
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

Division Docket  
Number CD1999132

MOON BAY CONDOMINIUM ASSOCIATION, INC.,  
Petitioner.

**DS 99-020**

**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.

1. On August 9, 1999, the Division received a Petition for Declaratory Statement filed by the Moon Bay Condominium Association Inc. (Association), by and through counsel.
2. Notice of receipt of the petition was duly published in Volume 25, Number 34, (August 27, 1999) Florida Administrative Weekly.

3. Moon Bay Condominium Association, Inc., is the entity responsible for the operation of Moon Bay, A Condominium, located in Key Largo, Monroe County, Florida.

4. On August 30, the Division received a Request That Petition For Declaratory Statement Be Declined, filed by certain unit owners in the condominium by and through counsel. The unit owners requested that the petition be denied on the basis that it seeks an interpretation of the condominium documents and seeks legal advice. The unit owners did not expressly request to intervene in the declaratory statement proceeding. No other response to the petition was received.

5 No request was made and no hearing was held in this matter.

6. Article XII (e) of the declaration of condominium provides:

Residential use. Each unit shall be used only for residential purposes. The Association may promulgate such Rules and Regulations pertaining to the use and occupancy of the units as it, in its sole discretion, deems necessary or desirable.

7. Article XII (f) of the declaration of condominium provides:

Leasing or renting. The owner of any condominium unit is permitted to lease his unit, except that any such lease shall not relieve the unit owner of his obligations as provided in the condominium documents...

8. The Association does not maintain a leasing program. Specifically, the Association does not provide a front desk, hotel or lodging services to the unit owners. The Association does not market, promote, advertise, or solicit units within the condominium for leasing.

9. Some of the unit owners have complained to the Association that renting or leasing units constitutes commercial activity prohibited by the declaration of condominium.

10. The Association is unclear as to whether, in light of the fact that it has allowed weekly rentals since its inception, it has a duty to require unit owners to obtain licenses from the

Division of Hotels and Restaurants, and if such licenses are required, if the activity is prohibited by the declaration of condominium.

11. The Association seeks a declaratory statement as to whether, considering the association has approved weekly rentals since its inception, can weekly rentals be prohibited if in fact unit owners are required to obtain licenses to lease their units on a weekly basis.

12. The Division of Hotels and Restaurants is authorized to interpret and enforce the provisions of Chapter 509, Florida Statutes, pertaining to public lodging establishments.

13. As of the date of the petition for declaratory statement, the Division of Hotels and Restaurants has not taken action against any unit owner in the condominium with respect to any rental or leasing activity.

#### **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 Request That Petition For Declaratory Statement Be Declined is in the nature of a Petition to Intervene, which 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. For purposes of responding to the petition for declaratory statement, the Division of Florida Land Sales, Condominiums and Mobile Homes consulted with the Division of Hotels and Restaurants as to the licensure requirements of Chapter 509, Florida Statutes, in instances where condominium units are rented on a weekly basis.

6. Section 509.013 (4)(a), Florida Statutes defines "public lodging establishment" as:

any unit, group of units, dwelling, building, or group of buildings within a single complex of buildings, which is rented to guests more than three times in a calendar year for periods of less than 30 days or 1 calendar month, whichever is less, or which is advertised or held out to the public as a place regularly rented to guests. Licensure classifications of public lodging establishments, and the definitions therefor, are set out in s. 509.242. For the purpose of licensure, the term does not include condominium common elements as defined in s. 718.103.

(b) The following are excluded from the definition in paragraph (a):

\* \* \*  
4. Any unit or group of units in a condominium, cooperative, or timeshare plan and any individually or collectively owned one-family, two-family, three-family, or four-family dwelling house or dwelling unit that is rented for periods of at least 30 days or 1 calendar month, whichever is less, and that is not advertised or held out to the public as a place regularly rented for periods of less than 1 calendar month, provided that no more than four rental units within a single complex of buildings are available for rent.

7. Section 509.241(1), Florida Statutes, provides, in relevant part:

Each public lodging establishment and public food service shall obtain a license from the division (Hotels and Restaurants).

8. Section 509.242 contains classifications for the different types of public lodging establishments. According to the facts of the petition, the condominium units that are rented or leased are best described under the classification of "resort condominium":

**509.242 Public lodging Establishments; classifications.—**

\* \* \*  
(c) Resort condominium.—A resort condominium is any unit or group of units in a condominium, cooperative, or timeshare plan which is rented more than three times in a calendar year for periods less than 30 days or 1 calendar month, whichever is less, or which is advertised or held out to the public as a place regularly rented for periods of less than thirty days or 1 calendar month, whichever is less.

8. Under rules promulgated pursuant to chapter 509, Florida Statutes, a public lodging establishment classified as a resort condominium shall obtain a single, group, or collective license, pursuant to section 509.241, Florida Statutes (1999). The single, group, or collective licenses are explained in Rule 61C- 1.002(4)(c), Florida Administrative Code.

9. Based on the foregoing, the condominium units in the Moon Bay condominium that are rented more than three times in a calendar year for periods of less than 30 days or 1 calendar month, meet the definition of a "public lodging establishment" as defined in section 509.013 (4)(a) Florida Statutes (1999) and the classification of "resort condominium" as defined in section 509.242 (1)(c), Florida Statutes. Accordingly, the units are subject to the licensure requirements of chapter 509, Florida Statutes, and the administrative rules promulgated thereunder.

10. In accordance with section 509.241, Florida Statutes, the Association is not required to obtain a public lodging establishment license unless it owns units classified as resort condominiums under section 509.242(2)(c), Florida Statutes (1999). However, as stated above,

the owners of units that are rented more than three times in a calendar year for periods of less than 30 days or 1 calendar month are required to be licensed by the Division of Hotels and Restaurants pursuant to chapter 509, Florida Statutes.

11. Petitioner also seeks a declaratory statement as to whether, if licenses are required by the Division of Hotels and Restaurants, the rental and leasing activity is prohibited by the declaration of condominium. As stated in the petition, a unit owner has complained that the rental activity is in violation of the declaration because it constitutes commercial activity. The Association has taken the position since its inception that renting and leasing of units is not prohibited by the declaration. This dispute between the unit owner and the Association as to the interpretation of the terms of the declaration of condominium does not involve any of the Division's statutes, rules, or orders. The issue is therefore not properly determined in a declaratory statement proceeding. Moreover, the Division declines to answer this question because it would involve the interpretation of ambiguous terms of the declaration—the condominium contract. *Peck Plaza Condominium v. Division of Florida Land Sales and Condominiums, Dep't of Business Regulation*, 371 So.2d 152, (Fla. 1st DCA 1979); *Grippe v. Florida Department of Business and Professional Regulation*, 729 So. 2d 459 (Fla. 4th DCA 1999).

12. Notwithstanding the foregoing, nothing herein is intended as a declaration that Moon Bay, A Condominium, by virtue of the fact that some of the units are rented or leased on a transient basis, is not a "residential condominium" within the meaning of the Condominium Act. Section 718.103 (22), Florida statutes (1999), provides:

"Residential condominium" means a condominium consisting of condominium units, any of which are 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

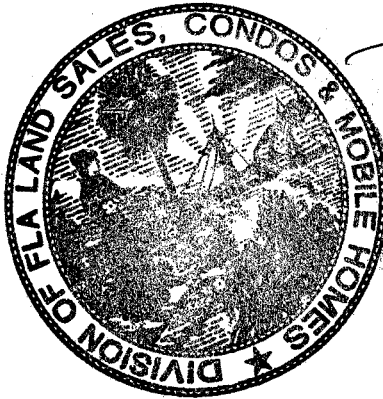
commercial or industrial and not more than three units are intended to be used for private residence, and are intended to be used as housing for maintenance, managerial, janitorial, or other operational staff of the condominium. With respect to a condominium that is not a time share condominium, a residential unit includes a unit intended for a private temporary residence as well as a unit not intended for commercial or industrial use. With respect to a timeshare condominium, the timeshare instrument as defined in s. 721.05(30) shall govern the intended use of each unit in the condominium. If a condominium is a residential condominium but contains units intended to be used for commercial or industrial purposes, then, with respect to those units which are not intended for use as private residences, the condominium is not a residential condominium. A condominium which contains both commercial and residential units is a mixed-use condominium subject to the requirements of s. 718.404.

The units at moon Bay are intended for use as a private temporary or permanent residence, as stated in section XII(e) of the declaration of condominium. The mere fact that some of the units are leased or rented on a transient basis, such that licensing under chapter 509 Florida Statutes is required, does not remove Moon Bay from the definition of "residential condominium " set out above. *Accord*, Declaratory Statement, In Re: Petition for Declaratory Statement, 1800 Atlantic Condominium Association, Inc., Petitioner (Suarez, October 12, 1999).

Wherefore, the Division declares that the units in Moon Bay, A Condominium, that are rented more than three times in a calendar year for periods of less than 30 days or 1 calendar month, meet the definition of "public lodging establishment" and may be further classified as "resort condominiums" within the meaning of chapter 509, Florida Statutes. The Division further declares that such units are subject to the licensure requirements of chapter 509, Florida Statutes, and the rules promulgated thereunder. On these facts, the Association need not obtain a license under chapter 509, Florida Statutes, unless it owns units classified as "resort condominiums" under section 509.242(1)(c), Florida statutes. Finally, the division declares that

Moon Bay, A Condominium is a "residential condominium" as defined by section 718.103(22), Florida Statutes (1999).

DONE AND ORDERED this 8 day of, November 1999.



*Robin L. Suarez*

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 Samuel A. Persaud, Persaud & Decker, 1450 Madruga Avenue, Suite 300 Coral Gables, FL 33146 and Nancy Kram, Esquire, Hershoff & Lupino, L.L.P., 90130 Old Highway, Tavernier, FL 33070, this \_\_\_\_\_ day of \_\_\_\_\_, 1999.

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Kristie Harris  
Docket Clerk

Copies furnished to:

Kathryn E. Price  
Assistant General Counsel

Gail Hoge  
Assistant General Counsel

Susan McKinley, Director  
Division of Hotels and Restaurants

Julie Baker, Chief  
Bureau of Condominiums

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

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