

Final Order No. BPR-99-00885 Date 2/5/99

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Department of Business and Professional Regulation

AGENCY CLERK

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By: Sarah Wachman

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

IN RE:

DS 98-039

~~PETITION FOR DECLARATORY STATEMENT~~

ST. AUGUSTINE OCEAN AND
RACQUET CLUB CONDOMINIUM
ASSOCIATION INC.,

Docket No. DS98182

Petitioner.

DECLARATORY STATEMENT

The State of Florida Department of Business and Professional Regulation, Division of Florida Land Sales, Condominiums and Mobile Homes (Division) hereby issues this Declaratory Statement pursuant to sections 718.501 and 120.565, *Florida Statutes* (Supp. 1998).

PRELIMINARY STATEMENT

On November 3, 1998, the Division received a Petition for Declaratory Statement from the St. Augustine Ocean and Racquet Club Condominium Association, Inc., (Petitioner or the Association) through Association counsel, Ronald W. Brown. On November 25, 1998, the Division published Notice of Receipt of the Petition in the Florida Administrative Weekly, Volume 24, Number 48. A copy of the Petition was sent to the Joint Administrative Procedures Committee

on November 10, 1998.

At Petitioner's request an informal hearing was scheduled on December 9, 1998. Notice of the informal hearing was published in the Florida Administrative Weekly on November 25, 1998, Volume 24, Number 48. The informal hearing was held before DBPR Hearing Officer William Woodyard. At the conclusion of the hearing, Petitioner agreed to furnish additional documentation which was received by the Division on December 17, 1998.

On December 10, 1998, the Division received a letter in response to the Petition from a Mr. William Clark, Attorney at Law, on behalf of several condominiums and cooperatives. By correspondence dated December 14, 1998, the Division advised Mr. Clark that if he wished to file a petition to intervene, to do so prior to January 4, 1999. To date, no petition or other correspondence has been received.

FINDINGS OF FACT

The following findings of fact are based on information furnished in the Petition for Declaratory Statement. The Division takes no position as to the accuracy of the facts, but merely accepts them as submitted for purposes of this declaratory statement.

1. Petitioner is the entity responsible for the administration of a residential condominium known as St. Augustine Ocean and Racquet Club Condominium located at 880 A1A Beach Boulevard, St. Augustine Beach, Florida, in accordance with chapter 718, *Florida Statutes*, (the Condominium Act).

2. The Association operates a rental program in the Condominium, governed by chapter 509, *Florida Statutes* (Public Lodging and Food Service Establishments) and acts as agent for the rental of the condominium units that participate in the program. The Association is

authorized to operate the rental program by the terms of the Declaration of Condominium. There is no provision in the Declaration or other condominium documents which restricts a unit owner's access to the rental program records.

3. There are individual Rental Agreements executed by the Association and each participating unit owner setting forth the terms and conditions of the Association's rental program. There are no substantive differences among these agreements. All contain the same terms for each unit owner and the only difference is the name of the unit owner and the unit involved. Copies of the contracts are records maintained by the Association and available for inspection by the unit owners.

4. The St. Augustine Ocean and Racquet Club Resort Owner's Rental Agreement provides, in pertinent part that

1. Delegation: Owner agrees to make available for rental, and the Association agrees to offer for rental, Unit No. _____ of the St. Augustine Ocean and Racquet Resort (hereinafter referred to as the Premises), subject to the terms and conditions set forth herein.

2. Rental Operation: The Association agrees to maintain an office at the St. Augustine Ocean and Racquet Resort for contact with and service to renters including reception, reservations and maintenance. The Association agrees to maintain an accounting system from which all accounting for the Premises shall be processed and management services performed.

3. Access to Premises: Owner agrees not to enter the Premises or to permit any person ... to enter the Premises... without prior notification to, approval of and coordination by the Association's rental staff.

4. Reservations: Reservations for the Premises will be made through the Reservations Office. ...

6. Monthly statements: The Association will prepare on a monthly basis and forward to the unit owner, "a statement of rental income giving a summary of rental activity in Owner's property. This statement will indicate both gross and net incomes and document any miscellaneous expenses."

13. Compensation to Association: Owner agrees that all remuneration from the rental Premises by the company will be collected by the Association, subject to the commission payable to the Association hereunder and all amounts chargeable to the Owner hereunder...

There is no provision in the contract which makes any of the rental information unavailable to other unit owners.

5. According to Petitioner, the same rates are charged for each condominium unit type and the rental rates are posted. The Association maintains a guest roster, reservation records, and financial records. These records are open for inspection by the unit owners.

6. The Association maintains a record of "Unit Income and Expense Activity" for units that participate in the rental program. These individual unit rental records are kept in the regular course of business of the rental program operated by the Association, though not always given to anyone other than the unit's owner. These unit income and expense reports contain detailed information on the frequency of rental for the units and the fees charged, including the amount of rental fees received by the unit owners.

7. The Association prepares financial reports on a periodic basis which are distributed to all unit owners. The Association prepares these financial reports using the information gathered from its records on each unit's income and expense history. The Association does not identify any particular unit or owner name in the financial reports distributed to all the unit owners.

8. On or about September 5, 1998, the Association received a written request for certain Association records from a unit owner. The unit owner requested Association records concerning the rental program. Specifically, the request involved the production of individual rental records identified by unit owner and unit number for each unit owner participating in the Association's rental program.

9. Petitioner asserts that the Association has received threats from other unit owners

that disclosure of the records will cause defections from the rental program and result in legal action against the Association for invasion of the privacy of the owners participating in the rental program.

10. Petitioner requests a declaratory statement on the following issue:

Whether pursuant to sections 718.111(12)(a)(13), and 718.111(12)(b), and (c), *Florida Statutes*, the St. Augustine Ocean and Racquet Club Condominium Association must release to unit owners the records of the rental program operated by the association at the condominium.

CONCLUSIONS OF LAW

1. The Division has jurisdiction to issue this Declaratory Statement pursuant to sections 718.501 and 120.565, *Florida Statutes* (Supp. 1998).

2. Petitioner, as the Condominium Association which operates the St. Augustine Ocean and Racquet Club Condominium rental program, is a substantially affected person within the meaning and intent of section 120.565, *Florida Statutes*, and has standing to seek this declaratory statement.

3. An analysis of the issues raised by the Petition involves the Division's examination of the specific circumstances cited by Petitioner, such as the terms of the condominium's declaration and documents, the provisions of the unit rental agreement between the Association and unit owners, the manner in which the records are kept, and the nature and extent of the financial information maintained by the Association and provided by the Association to the unit owners concerning the rental program. Despite the fact that other condominium associations throughout the state may operate rental programs, the Petitioner has alleged sufficient facts to demonstrate a need to resolve a question or doubt as to how the various provisions of section 718.111, *Florida*

Statutes, apply to this Petitioner in its particular circumstances. § 120.565, *Fla. Stats.* (Supp. 1998); Rule 28-105.001, Florida Administrative Code (1997); *Chiles v. Department of State, Div. of Elections*, 711 So. 2d 151 (Fla. 1st DCA 1998) (A declaratory statement is not transformed into a rule merely because it addresses a matter of interest to more than one person).

4. Petitioner requests a declaratory statement as to whether under the provisions of section 718.111, *Florida Statutes*, the Association must release to a unit owner the names of unit owners or the unit numbers of owners participating in the rental program in conjunction with information indicating the frequency of rentals or the rental fees for those owners or units. Petitioner argues that the Association desires to provide the information without identifying the unit owner or number but showing only the amounts received and the frequency of rental on the unidentified units. The Association bases its desire on the fact that the only legitimate purpose for the request is to determine whether the Association has properly accounted for all rental income. The Petitioner asserts that the name of the owner and the number of the unit is private information and its release serves no purpose to advance the interests of the other unit owners or the corporate Association.

5. Sections 718.111(12)(a) 9., 11., 13., and 15., *Florida Statutes*, provide:

(12) Official records.--

(a) From the inception of the association, the association shall maintain each of ~~the following items, when applicable, which shall constitute the official records of~~ the association:

9. A current copy of any management agreement, lease, or other contract to which the association is a party...

11. Accounting records for the association... according to good accounting practices. ...the accounting records shall include, but are not limited to:

a. Accurate, itemized, and detailed records of all receipts and expenditures.

b. A current account and a monthly, bimonthly, or quarterly statement of

the account for each unit designating the name of the unit owner, the due date and amount of each assessment, the amount paid upon the account, and the balance due.

c. All audits, reviews, accounting statements, and financial reports of the association or condominium.

13. All rental records, when the association is acting as agent for the rental of condominium units.

15. All other records of the association not specifically included in the foregoing which are related to the operation of the association.

6. Section 718.111(12)(b), *Florida Statutes* (Supp. 1998), provides that:

The official records of the association shall be maintained within the state. The records of the association shall be made available to a unit owner within 5 working days after receipt of written request by the board or its designee. This paragraph may be complied with by having a copy of the official records of the association available for inspection or copying on the condominium property or association property.

7. Section 718.111(12)(c), *Florida Statutes* (Supp. 1998), provides that the official records of the association are open to inspection by any association member or the authorized representative of such member at all reasonable times and that the failure of an association to provide the records requested may subject the association to liability for damages of a minimum of \$50 per day, payable to the aggrieved unit owner.

8. The foregoing provisions set forth in plain and unambiguous language the intent of the legislature to establish the right of a condominium unit owner to access association records, including rental records when the association, as in this case, operates a rental program. In this case, there is no conflicting language in any of the condominium documents or the Rental Agreement that would create a conflict with these provisions of the Condominium Act.

9. The Division has previously declared that pursuant to section 718.111(12)(a)13.,

Florida Statutes, another association that operated a rental program could not preclude any unit owner from accessing the Association's rental records. *In re: Petition For Declaratory Statement Commodore Owners' Association, Inc.*, Case No. 88L-52, Declaratory Statement issued April 18, 1989.

10. Petitioner argues that the request for the records may not be "legitimate" and questions the validity or intent of the request. However, the right of access to association records is unfettered by any conditions precedent. Association members may inspect and copy such documents upon request. § 718.111(12)(c), *Fla. Stats.* (Supp. 1998). The records must be made available regardless of the reason for the request. *Monte Carlo Towers Association, Inc., v. Wertz, et al.*, Case No. 89L-105 Declaratory Statement issued October 20, 1989. In *Commodore Owners' Association, Inc.*, Case No. 88L-52, Declaratory Statement issued April 18, 1989, the Division declared that there is no "good faith" requirement placed on a requesting unit owner by section 718.111(12), Florida Statutes. *Commodore Owners* involved a request from a unit owner for official records of a condominium association that operated a rental program. The Association petitioned for a declaratory statement on the basis that the unit owner would use the information in direct business competition with the Association. The Division stated:

The right to access Association records enures to the benefit of the unit owners and nothing in the statute gives the Association any interest superior to the individual unit owners in the books and records of the Association. *In re: Commodore Owners' Association, Inc.*, Case No. 88L-52, Declaratory Statement issued April 18, 1989.

11. Petitioner argues that providing access to the Association's rental records to a unit owner somehow violates the right to privacy of the other unit owners. In *Department of Business and Professional Regulation, Division of Florida Land Sales, Condominiums and*

Mobile Homes v. Vantage View, Inc., d/b/a Vantage View Condominium, DOAH case number 97-0837, Recommended Order (Parrish, April 6, 1998), the Division issued a Notice to Show Cause seeking civil penalties and other relief against an association for failure to disclose to the unit owners official records of the association. The records specifically sought to be inspected consisted of a "building block diagram" and a "unit owner roster," which identified the unit number, the names of the unit's owners, the owners' telephone numbers and assigned parking spaces. The Vantage View Association appealed citing the unit owner's right to privacy. The Administrative Law Judge concluded that "there was no right to privacy to be asserted by a corporate condominium entity that supercedes the unambiguous mandate of the condominium law" and ordered the Vantage View Association to pay a \$875 civil penalty. This Recommended Order was adopted by the Division. *Division v. Vantage View, Inc.*, Final Order, Division Docket Number CC97033. (Anderson, May 19, 1998).

12. In this case, as in *Vantage View and Commodore Owners*, there is no competent substantial evidence to support Petitioner's statement that the disclosure of the information would provide otherwise private information. This is not a case where the information sought is a private contractual matter between a unit owner and its tenant. Rather, in this case, the evidence is undisputed that the Association operates the rental program through a rental agreement between the unit owner and the Association. The tenants or guests of the units make their reservations directly through the Association. The information sought may be available through other sources. A unit owner has access to the daily rental rate per unit, the financial reports which show the expenses of the rental of the units and the income from the unit rentals, the guest register and reservation schedules and the total amounts paid to unit owners from the rental

income minus expenses. The information sought to be maintained confidential by the Association is the name of the unit owners and the unit numbers in connection with their participation in the rental program, which includes each unit's earnings and expenses. These records are available for inspection upon demand by a unit owner pursuant to the clear mandate of section 718.111(12), *Florida Statutes* (Supp. 1998).

13. There are only three types of Association records that are exempt from disclosure to a unit owner. These are certain records prepared by an association attorney, information obtained by an association in connection with the approval of the lease, sale or other transfer of a unit and the medical records of unit owners. §§ 718.111(12)(c)(1)(2) and (3), *Fla. Stats.* (Supp. 1998). Petitioner argues that the rental program records fall under the section 718.111(12)(c)2., *Florida Statutes*, exemption because these records are akin to information obtained by the ~~Association in connection with the approval of the lease, sale or other transfer of a unit.~~ This exemption is limited to those instances where the condominium association is involved in approving a prospective lessee or purchaser of the units in the condominium. Commonly in those situations, the Association requires personal information of prospective lessors and unit purchasers prior to authorizing the transfer of the particular unit. The information that is sought to be protected is that submitted by the applicants as a result of the approval process. Nothing in the record indicates that the Association's rental program in this case involves the collection and maintenance by the Association of otherwise personal information in order to approve prospective short term rentals.

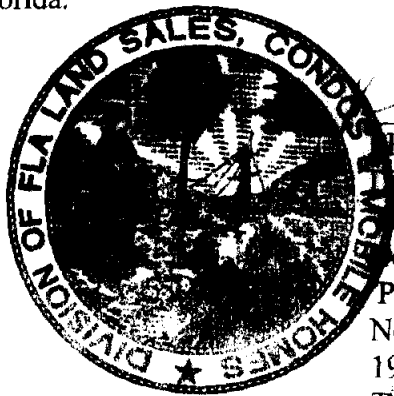
14. Further, the exception applies to the lease, sale or other transfer of a unit. There is no evidence that the records requested involve leasing, sales or other transfer of condominium

units. On the contrary, the record shows that the St. Augustine Ocean and Racquet Club Condominium's rental program is licensed as a public lodging establishment under chapter 509, *Florida Statutes*. A public lodging establishment by definition applies to units that are "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..." § 509.013(4)(a), *Florida Statutes* (1997). Thus, the records sought are subject to disclosure as they constitute rental records of the Association and are not private landlord-tenant agreements or leases. § 718.111(12)(a)(13), *Fla. Stats.* (Supp. 1998).

WHEREFORE, The Division declares that pursuant to section 718.111(12), *Florida Statutes* (Supp. 1998), the St. Augustine Ocean and Racquet Club Condominium Association may not preclude any unit owner from accessing all of the Association's rental records, including the unit/unit owner identifying and financial information such as contained in the "Unit Income Expense Activity" reports.

DONE AND ORDERED this 1st day of February, 1999, at Tallahassee,

Leon County, Florida.



Philip Novicki
PHILIP NOVICKI, Ph.D., DIRECTOR
Division of Florida Land Sales,
Condominiums and Mobile Homes
Department of Business and
Professional Regulation
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 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 SARAH WACHMAN, AGENCY CLERK FOR THE DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, 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 Ronald W. Brown, 66 Cuna Street, Suite A. St. Augustine, Florida 32084 on this _____ day of _____, 1999.

Kristie L. Harris
Docket Clerk

Copies furnished to:
Martha F. Barrera
Assistant General Counsel

William Woodyard, Acting General Counsel
Informal Hearing Officer

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