

Final Order No. BPR-99-05656 Date 10-12-99
FILED

Department of Business and Professional Regulation
AGENCY CLERK

By: *Sarah Wachman*, Agency Clerk

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

IN RE: PETITION FOR DECLARATORY)
STATEMENT,)
)
VISTANA FALLS CONDOMINIUM)
ASSOCIATION, INC.,)
)
Petitioner,)
_____)

DS 99-016

Division Docket Number

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 section 120.565, Florida Statutes.

PRELIMINARY STATEMENT

On July 8, 1999, the Division received a petition for declaratory statement from Vistana Falls Condominium Association, Inc., (Petitioner), through its counsel, Robert L. Taylor, Esquire. Notice of receipt of the petition was duly published in Volume 25, Number 30 (July 30, 1999), Florida Administrative Weekly. No hearing was held on the petition.

FINDINGS OF FACT

1. Petitioner is the condominium association for Vistana Falls Condominium, a residential timeshare condominium located in Orlando, Florida. The condominium consists of

four phases, with 28 buildings and a total of 112 units (4 units per building). Each unit has two bedrooms and two bathrooms. There are 5,712 unit week owners dispersed world-wide.

2. Pursuant to Section 7.B.1. of the Declaration of Condominium for Vistana Falls Condominium (Declaration), limited common elements include the "furniture, furnishings, and other tangible personal property (exclusive of the telephone equipment and any other furnishings or equipment not owned by the Developer) located within the units as of the date of this declaration and replacements thereof."

3. Section 1.B. of the Declaration states that "the furniture, furnishings, and other tangible personal property and replacements thereof (exclusive of telephone equipment and any other furnishings or equipment not owned by the Developer) located [within the Phase I improvements] as of the date of this Declaration and replacements thereof" are submitted to condominium ownership. The amendments to the Declaration adding Phases II, III, and IV contain similar provisions submitting such property located in each unit of subsequent phases to condominium ownership as of the date of the recording of each amendment to the Declaration.

4. Each unit has an existing television set connected to cable television. Each unit also has a trash compactor that was furnished by the developer and submitted to condominium ownership.

5. The Association wishes to purchase additional television sets and place them in the guest bedroom of each unit. The existing television sets would remain in their present location in each unit. Additional cabling would be necessary to make the new television sets operational. The total cost of the proposal (112 new television sets

plus necessary cabling) is approximately \$39,000, which will be shared equally by the 5,712 unit week owners. This equates to approximately less than seven dollars (\$7.00) per unit week owner.

6. In addition to the televisions, the Association wishes to replace existing trash compactors in the kitchen of each unit with garbage disposals. The total cost of the proposal (112 new garbage disposals plus installation costs) is approximately \$35,000, which will be shared equally by the 5,712 unit week owners. This equates to a total cost of approximately six dollars (\$6.00) per unit week owner.

7 The declaration provides that each unit week owner is responsible for paying the proportionate share of the unit week maintenance expenses and other charges including maintenance, repair and replacement of all appliances, furniture, carpeting, fixtures, utensils, and other personalty.

8. Article II, Section 2(c) of the Articles of Incorporation of the Association, grants to the Association the power to "maintain, repair, replace, administer, and operate all property owned by the Association and the common elements of the Condominium..." Article II, Section 2(e) grants the Association the power to "make improvements to the common elements of the Condominium and the property of the Association...." Article II, Section 2(n), grants the Association the power to "expand the common elements."

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

Whether it would constitute a material alteration or substantial addition to the common elements, thereby requiring approval of seventy-five percent (75%) of the unit owners, if the Association installs an additional television set in each unit and performs the necessary cabling (wiring) to make the new set operational in the guest bedroom, and also replaces the kitchen trash compactor with a garbage disposal.

10. On July 15, 1999, the Division notified the Joint Administrative Procedures Committee and the Petitioner of the receipt of the Petition. The Division has received no response to the Petition.

11. The Division previously issued a declaratory statement on substantially similar facts. The statement was issued in In Re: Petition for Declaratory Statement, Vistana Spa Condominium Association, Inc., Division Docket Number DS98092 (Nowicki, September 25, 1998). The declaratory statement determined that new television sets purchased by the association would not be common elements, but rather, association property purchased for the use and benefit of the members. Thus, the purchase of new television sets was determined not to be a material alteration or substantial addition to the common elements.

CONCLUSIONS OF LAW

1. The Division has jurisdiction over this matter pursuant to sections 718.501 and 120.565, Florida Statutes (1997).
2. Petitioner has standing to seek a 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.

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.

3. A "Timeshare plan" is defined as "any arrangement ...whereby a purchaser... receives ownership rights in or a right to use accommodations, and facilities, if any, for a period of time less than a full year during any given year, but not necessarily for consecutive years." Fla. Stat. §721.05(33), (Supp. 1998). A timeshare unit is "an accommodation of a timeshare plan which is divided into timeshare periods." Fla. Stat. §721.05(35), (Supp. 1998). A "timeshare period" means "the period or periods of time when a purchaser of a timeshare plan is afforded the opportunity to use the accommodations or facilities, or both, of a timeshare plan." Fla. Stat. §721.05(32), (Supp. 1998).

4. Section 721.03(3), Florida Statutes (1998), provides that:

When a timeshare plan is subject to both the provisions of this chapter and the provisions of chapter 718 or chapter 719, the plan shall meet the requirements of both chapters unless exempted as provided in this section. The division shall have the authority to adopt rules differentiating between timeshare condominiums and nontimeshare condominiums, and between timeshare cooperatives and nontimeshare cooperatives, in the interpretation and implementation of chapters 718 and 719, respectively. In the event of a conflict between the provisions of this chapter and the provisions of chapter 718 or chapter 719, the provisions of this chapter shall prevail.

5. The petition in the instant case has facts regarding the addition of television sets that are substantially similar to the facts alleged in the Petition for

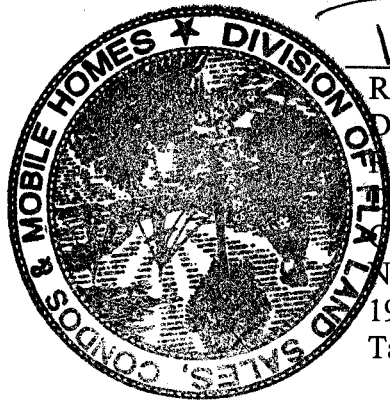
Declaratory Statement in Division Docket Number DS98092. The Division hereby adopts and incorporates by reference the reasoning of the Declaratory Statement issued in In Re: Petition for Declaratory Statement, Vistana Spa condominium Association, Inc., Petitioner, Division Docket Number DS 98092 (Nowicki, September 25, 1998) (Exhibit A), regarding the purchase of additional television sets. Accordingly, on the facts of the instant case, the purchase of additional television sets and the necessary cabling would not constitute a material alteration or substantial addition to the common elements within the meaning of section 718.1113(2), Florida Statutes (Supp. 1998).

6. The trash compactors that are currently in the units are limited common elements pursuant to section 7.B.1 of the declaration. Replacement of the trash compactors with garbage disposals would not constitute a material alteration or substantial addition to the common elements within the meaning of section 718.1113(2), because the change does not appreciably affect or influence the function, use or appearance of the units. In *Sterling Village Condominium, Inc., v. Breitenbach*, 251 So. 2d 685 (Fla. 4th DCA 1971), the court held that as applied to buildings, the term "material alteration or substantial addition means to palpably or perceptively vary or change the form, shape, elements or specifications of a building from its original design or plan, or existing condition, in such a manner as to appreciably affect or influence its function, use or appearance." In the instant case, each unit has been furnished a trash compactor for the disposal of trash. A garbage disposal, though not performing exactly the same function as a trash disposal, will still be available to unit owners to dispose of garbage. In a timeshare condominium, unit week owners are not full-time residents. Most owners spend no more than a week in the units. Spending a week in the unit with a

garbage disposal as opposed to a trash compactor will not appreciably affect the character of the unit or its amenities to such a degree as would amount to a substantial or material change. Neither would the change appreciably affect the function, use or appearance of the timeshare condominium units. Therefore, replacement of the trash compactors with garbage disposals does not constitute a material alteration or substantial addition to the common elements within the meaning of section 718.113(2), Florida Statutes (Supp. 1998). It is not necessary for the Association to obtain the vote of seventy-five percent (75%) of the unit owners in order to effect the change from trash compactors to garbage disposals.

Wherefore, the agency declares that the addition of television sets and the replacement of trash compactors with garbage disposals do not constitute material alterations or substantial additions to the common elements as contemplated by section 718.113(2), Florida Statutes.

DONE AND ORDERED this 6 day of October, 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
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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 declaratory statement was furnished by certified U.S. Mail to Robert Taylor, Esquire, Taylor & Carls, 1900 Summit Tower Boulevard, Suite 820, Orlando, Florida 32810, this _____ day of _____, 1999.

Kristie Harris, Division Docket Clerk

Copies furnished:

Laura Glenn, Chief
Bureau of Timeshare

Julie Baker, Chief
Bureau of Condominiums

Kathryn E. Price
Assistant General Counsel

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