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

IN RE: PETITION FOR DECLARATORY STATEMENT

LANDMARK HOLIDAY BEACH RESORT
CONDOMINIUM ASSOCIATION, INC.,

Petitioner, and

VACATION TRUST, Inc.,

Intervenor.

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 and Intervenor. 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. On January 25, 2000, the Division received a Petition for Declaratory Statement filed on behalf of Landmark Holiday Beach Resort Condominium Association, Inc., by and through counsel. The petition involved, in relevant part, a document entitled Exclusive
Assignment of Occupancy Rights. The document was executed between the owners of a timeshare interest in Landmark Holiday Beach Resort, and Vacation Trust, Inc. (Vacation Trust).

2. Notice of receipt of the petition was published in Florida Administrative Weekly, Volume 26, Number 7, February 18, 2000.

3. The Division advised both the owner of the timeshare interest and Vacation Trust that they could seek intervention in this declaratory statement proceeding by filing a response to the Petition for Declaratory Statement. On May 10, 2000, the Division received a Response to the Petition for Declaratory Statement, filed by Anthony Polvino, Esquire, on behalf of Vacation Trust. Mr. Polvino is not licensed to practice law in the State of Florida, but is licensed in the State of Georgia. No response was received from the owners of the timeshare interest.

4. Petitioner objected to Mr. Polvino's appearance in this proceeding on the basis that he is not a member of the Florida Bar and was not determined by the Division to be a qualified representative. Subsequently, a request to allow Mr. Polvino to appear as the qualified representative of Vacation Trust, Inc., was filed with the Division.

5. Petitioner and Intervenor agreed that the ninety-day time limit in which an agency must issue a declaratory statement or deny the petition would be tolled pending receipt of the Response to the Petition. Subsequent to filing the Response to Petition, Vacation Trust submitted copies of the Declaration of Condominium, Amended RDI Vacation Club Trust Agreement (Trust Agreement); Bluegreen Converting Owner Beneficiary Agreement and Reciprocal Quitclaim Deed (Deed). The documents were received June 19, 2000; copies were provided and the Association was given an opportunity to respond to the documents. By letter dated June 29, 2000, the Association declined further response to the documents.
6. Landmark Holiday Beach Resort is a timeshare condominium consisting of 95 units located in Panama City Beach, Bay County, Florida. The condominium was created by recording the declaration of condominium in the public records of Bay County, Florida on November 2, 1982.

7. Landmark Holiday Beach Resort Condominium Association, Inc., (Association or Petitioner) is the entity responsible for the operation of Landmark Holiday Beach Resort.

8. The Association has approximately 4800 members who are owners of timeshare interests in the timeshare plan. Certain members of the Association converted their timeshare interest into membership in Bluegreen Vacation Club (Bluegreen or Vacation Club), a multi-site timeshare plan as defined in section 721.52(4), Florida Statutes. These converting members executed a document entitled "Exclusive Assignment of Occupancy Rights" and certain other documents further described below, in connection with transferring their timeshare interest to Bluegreen and converting into the Vacation Club.

9. Vacation Trust is Trustee of Bluegreen Vacation Club. Vacation Trust is registered with the Florida Department of Business and Professional Regulation, Bureau of Timeshare. As Trustee, Vacation Trust holds title to timeshare interests that have been converted into the Vacation Club.

10. Converting unit owners of a timeshare interest must execute a Reciprocal Quitclaim Deed (Deed). The Deed provides that the timeshare interest holder "desires to transfer the property to Bluegreen and desires that Bluegreen thereafter transfer the property to owner for, among other purposes, compliance with section 721.57(2)(a), Florida Statutes." The Deed also provides that Bluegreen's acceptance of the property is not an acceptance of any obligations, debts, dues, taxes, assessments, mortgages, liabilities or claims owed by owner prior to the date
of transfer. In the Deed, the parties agree that the purpose of the Deed is to allow Bluegreen to own the property so that it can provide the owner entry into the vacation club. In the same instrument, Bluegreen deeds to the owner membership in the vacation club. In addition, the owner agrees to assign occupancy rights in the vacation club membership to Vacation Trust.

11. Incorporated into the Deed are the Trust Agreement between Bluegreen and Vacation Trust and the Bluegreen Converting Owner Beneficiary Agreement. In the Trust Agreement, Bluegreen transfers title to the converting owner's timeshare interest to Vacation Trust to hold as Trustee. In the Bluegreen Converting Owner Beneficiary Agreement, the owner agrees to purchase beneficiary rights which include vacation points and the right, subject to the terms of the Trust Agreement, to be re-conveyed the timeshare interest upon termination of the trust. The converting owner agrees to execute an "Exclusive Assignment of Occupancy Rights" (Assignment) assigning to the Trustee certain specified rights, including the right to exclusive use, occupancy and enjoyment of the vacation club membership. The Assignment contains the following provision:

4. Appointment of Proxy. Owner revokes any previous proxies in the Component Site owner's association as relates to the Resort Interest. Owner irrevocably appoints the Assignee as the owner's agent and true proxy, and authorizes the Assignee to vote and act as such (and to designate the Vacation Club Managing Entity to vote and act as such) with respect to all matters which may come before the Component Site owner's association and any meetings thereof, relating to the resort interest described. This proxy is granted with rights of substitution. This appointment is coupled with an interest such interest being the rights conveyed to the Assignee hereunder, and is irrevocable.

12. At the Association annual meeting held November 13, 1999, Vacation Trust used the Assignment to vote the timeshare interests it held in trust. The votes were not counted by Petitioner Association on the basis that the provisions of the Assignment are invalid as they relate to the irrevocable appointment of proxy. Petitioner asserts that the irrevocable
appointment of proxy provision conflicts with the provisions of section 718.112(2)(b)3, Florida Statutes.

13. Petitioner requests a declaratory statement as to whether an owner of a timeshare plan in a timeshare condominium may make an irrevocable appointment of proxy, notwithstanding the provisions of section 718.112(2)(b)3, Florida Statutes.

14. Intervenor, Vacation Trust, asserts that the petition should be denied because the Association is not a proper party to a declaratory statement proceeding as the statute in question impacts only the individual association members. Intervenor also asserts that the petition for declaratory statement should be denied on the basis that Petitioner has drawn the issue in the petition too narrowly, such that a response from the Division to the question as presented in the petition would not be representative of the true issues involved.

15. Intervenor alleges that there is no prohibition in chapters 718 or 721 against a unit owner granting the rights, privileges, and entitlements under the declaration, including the right to vote on behalf of the unit. Intervenor contends that the execution of the Assignment, in and of itself, conveys voting rights to Vacation Trust. According to Intervenor, the execution of the irrevocable proxy serves only to give "common parlance to certain of the rights, privileges and entitlements converting members are conveying [to Vacation Trust]."

CONCLUSIONS OF LAW

1. The Division has jurisdiction to enter this order pursuant to sections 718.501 and 120.565, Florida Statutes.

2. The Petitioner Association has standing and is a proper party to seek a declaratory statement. Chiles v. Department of State, Division of Elections, 711 So. 2d 151 (Fla. 1st DCA
1998). In Chiles, the First District crystallized the impact of the deletion of the word "only" from section 120.565, Florida Statutes. The Court stated:

Prior versions of the Administrative Procedures Act support the ...position that a declaratory statement must be based on a unique set of facts. Section 120.565, Florida Statutes, provided, in part that "[a] declaratory statement shall set out the agency's opinion as to the applicability of a specified statutory provision or of any rule or order of the agency as it applies to the petitioner in his or her particular set of circumstances only." This statute limited the use of a declaratory statement to an issue that could only apply to the party seeking the declaration. See, e.g. Florida Optometric Association v. Department of Professional Regulation, Board of Opticianry, 567 So. 2d 928 (Fla. 1st DCA 1990). However, the present case is subject to a less restrictive provision in the Administrative Procedures Act ...The deletion of the word "only " signifies that a petition for declaratory statement need not raise an issue that is unique. While the issue must apply in petitioner's particular set of circumstances, there is no longer a requirement that the issue apply only to petitioner.

*                             *                             *

A party who obtains a statement of the agency's position may avoid costly administrative litigation by selecting the proper course in advance. Moreover, the reasoning employed by the agency in support of a declaratory statement may offer useful guidance to others who are likely to interact with the agency in similar circumstances. Another party can expect the agency to apply the rationale for its declaratory statement consistently, or to explain why a different application is required. Section 120.565(2), Florida Statutes, requires the agency give notice of the filing of each petition for declaratory statement in the Florida Administrative Law Weekly. This provision accounts for the possibility that a declaratory statement may, in a practical sense, affect the rights of other parties.

711 So. 2d at 154-155. Based on the foregoing, the Division rejects the Intervenor's argument that the petition should be denied on the basis that it also applies to Intervenor and other converting members.

3. Any party who appears in any agency proceeding has the right, at his or her own expense, to be represented by counsel or a qualified representative. *Fla. Admin. Code R. 28-106.106.* In accordance with rule 28-106.107, Florida Administrative Code, the Division has
reviewed Vacation Trust's request and determined that Anthony Polvino, Esquire, has the necessary qualifications to appear in this proceeding as the representative of Vacation Trust, Inc.

4. The Response to Declaratory Statement is in the nature of a Request to Intervene and is granted.

5. 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.

6. A timeshare condominium is subject to certain requirements of chapter 718, as well as chapter 721, Florida Statutes. Section 721.03(3) provides:

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 non-timeshare condominiums, and between timeshare cooperatives and non-timeshare 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 719, the provisions of this chapter shall prevail. [Emphasis supplied].

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7. Petitioner Association seeks a declaratory statement as to its rights, duties, and obligations under section 718.112(2)(b)3, Florida Statutes, with respect to a provision in the Exclusive Assignment of Occupancy Rights (Assignment) executed between owners of an interest in the timeshare plan and Vacation Trust. The Assignment provides, in relevant part:

WHEREAS, Owner is the owner of a resort interest, as defined hereinbelow;

WHEREAS, Owner pursuant to the terms of the Bluegreen Converting Owner Beneficiary Agreement, desires to assign Occupancy Rights, and the rights set forth herein, as relate to the Resort Interest, to the Assignee;

NOW THEREFORE, FOR AND IN CONSIDERATION OF Ten Dollars ($10.00) and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged by Owner, Owner does hereby grant, convey, transfer, bargain, sell, remise, and assign to the Assignee and its lawful successors and assigns in interest (i) occupancy Rights in respect to the Resort Interest; (ii) all of Owner's rights, privileges and entitlements set forth in the underlying Declaration, as the same relate to the Resort interest, and (iii) an exclusive easement over, on, in and across the Resort Interest, which exclusive easement shall include but not be limited to the exclusive rights of ingress, egress, access, occupancy, use and enjoyment of the Resort Interest and all of its appurtenances. The terms of the appointment are as follows:

4. **Appointment of Proxy**. Owner revokes any previous proxies in the Component Site owner's association as relates to the Resort Interest. Owner irrevocably appoints the Assignee as the owner's agent and true proxy, and authorizes the Assignee to vote and act as such (and to designate the Vacation Club Managing Entity to vote and act as such) with respect to all matters which may come before the Component Site owner's association and any meetings thereof, relating to the resort interest described. This proxy is granted with rights of substitution. This appointment is coupled with an interest such interest being the rights conveyed to the Assignee hereunder, and is irrevocable. [Emphasis Supplied].

8. Section 718.112(2)(b)3, Florida Statutes, provides:

3. Any proxy given shall be effective only for the specific meeting for which originally given and any lawfully adjourned meetings thereof. In no event shall any proxy be valid for a period longer than 90 days after the date of the first meeting for which it was given. Every proxy is revocable at any time at the pleasure of the unit owner executing it.
Section 718.112(2)(b)3, Florida Statutes, is intended to apply to the use of proxies for purposes of voting in condominium association matters. In the usual case, a condominium unit owner would execute a proxy to allow another to vote at a specific meeting in the owner's place. The statutory provision preserves the integrity of the voting process by prohibiting the unlimited use of proxies, and limiting any proxy given to use for a specific meeting or meetings held within 90 days of the date of the first meeting for which the proxy was given. The provision specifically prohibits the use of an irrevocable proxy, as it states that any proxy given is revocable at any time at the pleasure of the unit owner executing the proxy.

9. By virtue of section 721.03(3), Florida Statutes, which requires a timeshare condominium to comply with the requirements of chapter 718, section 718.112(2)(b)3 is applicable to the facts of the instant case. The obvious conclusion is that the owner of the timeshare interest cannot employ an irrevocable proxy for purposes of allowing Vacation Trust to exercise the voting rights appertaining thereto.

10. Notwithstanding the foregoing, Intervenor is correct, in that this declaratory statement involves more than the use of the irrevocable proxy. The ultimate issue is whether Vacation Trust is authorized to exercise the voting rights appurtenant to the timeshare interest it holds in trust. Intervenor states that the Assignment grants all of the unit owner's interest in the timeshare plan under the declaration of condominium, which grant would include the owner's voting rights.

11. In addition to the Assignment, the express terms of the Quitclaim Deed, Converting Owner Beneficiary Agreement and Trust Agreement, provide that the converting member irrevocably places the timeshare interest in the trust, with Vacation Trust as Trustee. The Trustee is given broad powers under the Trust Agreement to act on behalf of the beneficiaries. Although
voting rights are not specifically addressed, the Quitclaim Deed, Converting Owner Beneficiary Agreement, Trust Agreement and Assignment evince an intent that the owner of the timeshare interest is transferring all of that interest to Bluegreen, which transfers it to Vacation Trust. The converting owner receives membership in the Vacation Club, while the Trustee, which now holds title to the timeshare interest, retains all rights the converting owner had in that interest, including the right to exercise the vote formerly held by the converting owner. The owner retains the duty to pay taxes and assessments by virtue of the vacation club interest conveyed from Bluegreen, which club interest corresponds to the same use period that the owner originally had in the timeshare plan.

12. Section 721.53(1)(c), Florida Statutes, contemplates the trust arrangement described herein between a converting owner of a timeshare interest and a vacation club. Neither the current provisions of that statute nor the recent amendments thereto\(^1\) specifically address how the voting rights appurtenant to a converting owner's timeshare interest may be exercised. However, there is no provision in either chapter 718 or chapter 721 that would prohibit an interpretation that Vacation Trust, as Trustee holding title to the converting owner's timeshare interest, is authorized to exercise the voting rights appurtenant thereto. Accordingly, the Division declares that Sections 721.53(1)(c) and 718.106, Florida Statutes, would not prohibit Vacation Trust, pursuant to the terms of the Converting Owner's Beneficiary Agreement, the Reciprocal Quitclaim Deed, the Trust Agreement and Assignment, from exercising the voting rights for the timeshare interest that has converted into the Vacation Club. However, the Trustee must exercise the voting rights in the manner prescribed by the condominium documents and chapter 718, Florida Statutes.

\(^1\) Ch. 2000-302, § 36, 2000 Fla. Sess. Law Serv. (West)
13. WHEREFORE, the Division declares that section 718.112(2)(b)3, Florida Statutes is applicable to the facts herein and prohibits the use of an irrevocable proxy to vote in a timeshare condominium. The Division further declares that Sections 721.53(1)(c) and 718.106, Florida Statutes, would not prohibit Vacation Trust, pursuant to the terms of the Converting Owner's Beneficiary Agreement, the Reciprocal Quitclaim Deed, the Trust Agreement and Assignment, from exercising the voting rights for the timeshare interest that has converted into the Vacation Club. However, the Trustee must exercise the voting rights in the manner prescribed by the condominium documents and chapter 718, Florida Statutes.

DONE AND ORDERED this ______ day of ______, 2000.

[Signature]

FLEETWOOD, DIRECTOR
Department of Business and Professional Regulation
Division of Florida Land Sales Condominiums, and Mobile Homes
Northwood Centre
440 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 Raymond F. Newman, Esquire, Becker and Poliakoff, P.A., 348 Miracle Strip Parkway, SW-Suite 7, Ft. Walton Beach, Florida 32548 and Anthony Polvino, Weinstock and Scavo, P.C. Suite 300, 3405 Piedmont Road NE, Atlanta, Georgia 30305, this __________ day of _________________________, 2000.

________________________________________
Kristie Harris
Docket Clerk
Copies furnished to:

Laura Glenn, Chief
Bureau of Timeshare

Kathryn E. Price
Assistant General Counsel

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