

Final Order No. BPR-2000-02504

Date: 6-29-00

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

**DS 2000-009**

River Run of Sebastian Condominium  
Association, Inc.,

Docket Numbers CD2000-071  
and CD 2000-072

Petitioner.

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**DS 2000-010**

**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 718.501 and 120.565, Florida Statutes.

**PRELIMINARY STATEMENT**

On March 30, 2000, the Division received two petitions for declaratory statement from River Run of Sebastian Condominium Association, Inc. Notice of receipt of the petitions was published in Florida Administrative Weekly, Volume 26, Number 16, April 21, 2000. The dockets are consolidated for purposes of this final order. No hearing was requested or held.

**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. River Run of Sebastian Condominium Association, Inc. (Association or River Run), is the association that operates six condominiums—River Run A Condominium, River Run B Condominium, River Run C Condominium, River Run D Condominium, River Run E Condominium, and River Run Dock Condominium. The condominiums are located in Sebastian, Indian River County, Florida.

2. River Run Condominiums A-E are intended and are used for residential purposes. River Run Dock condominium is not intended or used for residential purposes. Each unit in the dock condominium is restricted to use as a docking facility for one boat. No boat may be used as a live-aboard boat while occupying condominium space.

3. The dock condominium contains 45 boat slips, 20 docks and navigable waterways. The limited common elements consist of docks adjacent to the boat slips that are limited to the use of the adjoining slip owner.

4. Each owner of a unit in the dock condominium must own a unit in one of the five residential condominiums.

5. The declaration of condominium for the dock condominium provides that each dock unit owner automatically becomes a member of the Association upon his, their, or its acquisition of an ownership interest in, or title to any unit in the condominium.

6. The definition of common expenses in paragraph 2.d of the declaration of condominium for the dock condominium makes reference to "additional facilities." Paragraph 2.a describes additional facilities as being defined in paragraph 12 of the declaration. Paragraph 9 states that the condominium common property includes an interest in property owned by the Association as set forth in Paragraph 12 of the declaration. Paragraph 10 describes the

ownership interest in the common elements as being referred to in paragraph 12. Paragraph 18.a states that each unit owner shall be liable for the payment to the Association of that portion of the common expenses as each unit shares in the common property as set forth in paragraphs 10 and 12.

7. Paragraph 6 of the by-laws of the Association provides that the cost and expense of maintenance and upkeep of any additional facilities, as described in paragraph 12, shall be assessed against each condominium unit for which the association has operating responsibility for its pro-rata share of such cost and expense based upon the number of units in each of said condominiums as that number bears to the total number of units in all condominiums established and operated by the Association.

8. The declaration of condominium for the dock condominium does not contain a paragraph 12.

9. The declarations for the other five condominiums operated by the Association contain paragraph 12, which provides:

12. Additional Facilities. The association may own and hold fee simple title to lands within reasonable proximity to the condominium property, or may otherwise be responsible for operating, maintaining and/or servicing certain facilities located on the Condominium Property, on the property of other condominiums for which the Association has operating responsibilities, or on lands owned by the Association within reasonable proximity to the Condominium Property, which Association-owned lands, or facilities for which the Association may have operating responsibilities, will be for the use and benefit of the members of the Association, of Unit Owners in all of the condominiums for which the Association has operating responsibilities, of institutional mortgagees, and/or tenants in the several condominiums for which the Association shall have operating responsibilities, or members of their respective families and their social guests. Such facilities may include, without limitation, recreational facilities including a swimming pool, docking facilities, a clubhouse, roadways, for access to and from public ways, entranceways, walkways, automobile parking areas and other like facilities. **The Association shall assess each condominium for which it has operating responsibilities, when completely constructed, for such condominium's pro-rata share of**

**the costs and expenses of operation, maintenance, and/or servicing the above-described facilities; such pro-rata share to be equivalent to the product of the total cost and expense and a fraction the numerator of which shall be the number of Units in each such separate condominium and the denominator of which shall be the total number of units for which the Association has operating responsibilities; provided, however, that all of the expenses involved in the ownership, maintenance and operation of the docking facilities, if such is added by the Developer, shall be divided among those Unit Owners having the right to use the docking facilities and shall not form a burden or charge assessable against or payable by Unit Owners in condominiums operated by the Association who do not have such right. Such assessed expenses shall be considered a general Common Expense of each such condominium so assessed, except in the case of docking facility expenses as aforesaid, if any. That same proportion of assessed expense shall also represent each separate condominium's interest in any Association-owned property, which interest shall be deemed Common Property of each condominium, to be shared by the Unit Owners of each condominium in accordance with such Unit Owners' individual shares in the Common Property of such individual condominium. [Emphasis supplied].**

10. Section 2.d of the declaration of condominium for the dock condominium

provides:

d. Common Expenses include:

- (1) Expenses of administration and expenses of maintenance, operation, repair or replacement of the Common Property or Additional Facilities, if any, and of those portions of the Docks, walkways, boat slips, dolphins and waterways to be maintained by the Association.
- (2) Expenses declared to be common expenses by provisions of this Declaration or of the By-laws of the Association.

11. In a general letter of explanation dated May 16, 1999, the developer of the condominiums stated that paragraph 12 was intentionally left out of the declaration of condominium for the dock condominium to show that dock owners were not responsible for the additional facilities as only the residential unit owners owned a proportionate share of the facilities.

12. The developer and the boards of administration elected after turnover of control of the Association never levied an assessment against River Run Dock condominium units for the cost of maintaining the additional facilities.

13. River Run Dock Condominium unit owners are solely responsible for maintenance and other common expenses of the dock condominium. The dock unit owners pay a proportionate share of liability insurance, management fees and other administrative expenses of the Association.

14. Petitioner asserts that if the declaration of condominium for the dock condominium is interpreted to require dock owners to pay a pro rata share of the cost of maintaining the additional facilities, it will also have to be interpreted as giving the owners of docks an ownership interest in a pro-rata share of the additional facilities and reducing the ownership interest in the additional facilities of owners of residential units.

15. The Division received a complaint filed by fifteen unit owners as to the failure of the Association to assess the dock unit owners for common expenses. In case number 19990429CV11603, the Division issued a warning letter as authorized by Rule 61B-21.002(3), Florida Administrative Code, advising the Association to address, correct, or dispute the allegations that the association excused certain unit owners from the payment of assessments in the proportions stated in the declaration of condominium and that the Association failed to adopt an annual budget of common expenses for the year 1989, in violation of section 718.112(2)(e), Florida Statutes.

16. After further review of the declarations of condominium, articles of incorporation of the Association and bylaws of the Association by legal staff, the Division rescinded the Warning Letter and advised the Association that while the Division has jurisdiction over the

Association, the unique manner in which the documents address the dock owner's membership in the Association made the case unsuitable for a strict application of chapter 718, Florida Statutes.

17. The petitioner seeks a declaratory statement as to the following:
  - a. Do sections 718.501(1) and 718.103(22), Florida Statutes, give the Division jurisdiction over River Run Dock Condominium issues?
  - b. Are the owners of units in the River Run Dock Condominium responsible for paying a pro-rata share of the cost of maintaining the additional facilities even though the Declaration of Condominium for the River Run Dock Condominium contains no such requirement?

### 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 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.

4. Section 718.501, Florida Statutes, provides, in relevant part, that the Division of Florida Land Sales, Condominiums, and Mobile Homes is authorized to enforce and ensure compliance with the provisions of chapter 718 and administrative rules promulgated thereunder relating to the development, construction, sale, lease, ownership, operation, and management of *residential condominium units*.

5. Section 718.103(22) defines "residential condominium" as follows:

(22) "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 timeshare condominium, a residential unit includes a unit intended as a private temporary or permanent 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 or used 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. [Emphasis supplied].

Pursuant to the foregoing provision, the dock condominium does not meet the definition of a residential condominium because the units are not intended for use as a private temporary or permanent residence. Since the declaration does not allow any dock owner to use a boat as a live-aboard while docked at the condominium, the intended use of the dock units is not residential. Accordingly, the dock condominium is not a residential condominium within the

meaning of sections 718.103(22), and 718.501, Florida Statutes. However, the foregoing does not mean that the Division's enforcement authority as set out in section 718.501, Florida Statutes will not impact the dock condominium unit owners. Because the Association operates the five residential condominiums, the Association is subject to section 718.501(1), Florida Statutes.

6. Regarding Petitioner's second inquiry, the Division declines to answer the question on the basis that the request does not involve the applicability of any of the Division's statutes, rules, or orders to Petitioner's set of facts, but rather, requires an interpretation of whether, under the documents, the dock condominium unit owners are responsible for paying a proportionate share of the cost of maintaining the additional facilities. The response to that inquiry depends on the manner in which the condominium documents disclose how the expense of maintaining the property defined as additional facilities is to be assessed against unit owners.

Section 718.115, Florida Statutes, provides, in relevant part:

**Common Expenses and common surplus.**

(1)(a) Common expenses include the expenses of the operation, maintenance, repair, replacement, or protection of the common elements and association property, costs of carrying out the powers and duties of the association, and any other expense, whether or not included in the foregoing, designated as common expense by this chapter, the declaration, the documents creating the association, or the bylaws. Common expenses also include reasonable transportation services, insurance for directors and officers, road maintenance and operation expenses, in-house communications, and security services, which are reasonably related to the general benefit of the unit owners even if such expenses do not attach to the common elements or property of the condominium. However, such common expenses must either have been services or items provided from the date the control of the board of administration of the association was transferred from the developer to the unit owners or must be services or items provided for in the condominium documents or bylaws.

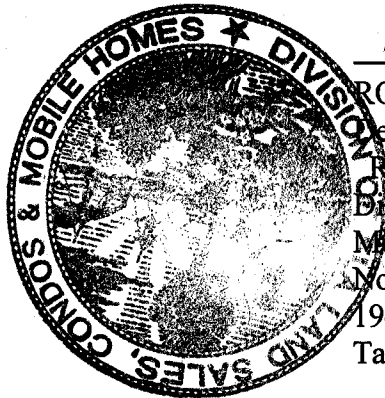
Pursuant to the foregoing provision, the issue of whether the additional facilities are a common expense assessable against the dock unit owners can be answered only by interpreting the




declaration of condominium, the articles of incorporation of the Association, and the Association bylaws. Those documents contain innumerable references to additional facilities, as is noted by Petitioner. However, Petitioner has not pointed to any statute, rule, or order of the agency upon which a declaratory statement on this issue could be based. Accordingly, the request for a declaratory statement on this issue is denied.

Wherefore, the Division declares that River Run Dock Condominium is not a residential condominium within the meaning of sections 718.103(22), and 718.501(1), Florida Statutes. However, because the Association operates the five residential condominiums, the Association is subject to section 718.501(1), Florida Statutes.. The Division declines to answer the issue of whether the dock owners must pay a proportionate share of the maintenance expense for the additional facilities, as the issue does not involve the applicability of any of the Division's statutes, rules, or orders to Petitioner's facts.

DONE AND ORDERED this 28th day of, June 2000.



  
ROSS FLEETWOOD, 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 FINAL ORDER 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 FINAL ORDER.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Richard Marco, President, River Run of Sebastian Condominium Association, Inc., 6522 North River Run Drive, Sebastian, Florida 32058 this \_\_\_\_\_ day of \_\_\_\_\_, 2000.

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Kristie Harris  
Docket Clerk

Copies furnished to:

Kathryn E. Price  
Assistant General Counsel

Jim Mullins, Acting Chief  
Bureau of Condominiums

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