

Final Order No. BPR-2000-01434 Date: **4-13-00**
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

Division Docket
Number CD2000-006

Robert M. Nied, Unit owner and Board member,

SEAPLACE AT ATLANTIC BEACH
CONDOMINIUM ASSOCIATION, INC.,
Petitioner.

DS 2000-003

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 declaratory statement.

1. On January 5, 2000, the Division received a Petition for Declaratory Statement filed by Robert M. Nied, Unit owner and Board member, Seaplace at Atlantic Condominium Association, Inc.

2. Notice of receipt of the petition was duly published in Volume 26, Number 3, (January 21, 2000) Florida Administrative Weekly. The Board of Directors of the Seaplace at Atlantic Beach Condominium Association, Inc., was provided a copy of the Petition for Declaratory Statement in accordance with section 718.501(1)(g), Florida Statutes, and advised that it could file a petition to intervene. No response to the petition was received.

3. Additional information was requested from Petitioner and the 90-day time limit was tolled pending receipt. The information was requested March 13, 2000 and received March 17, 2000.

4. The petition for declaratory statement referenced correspondence between the Petitioner and representatives from the Bureau of Condominiums (Bureau). Specifically, the Petition referenced a letter dated October 15, 1999 in which the Bureau stated:

"Section 718.112(2)(f) 2, Florida Statutes, requires every condominium association in the State of Florida to include fully funded reserves in the proposed annual budget of the association. This subsection requires reserve funds for roof replacement, building painting, and pavement resurfacing, regardless of the deferred maintenance costs, and any other item for which the deferred maintenance exceeds \$10,000. The Association may also maintain "other reserves" which are not listed above.... [A]n association may include a kind of catch-all fund in the reserve account if it is restricted to use. Therefore, a General Deferred Maintenance and Capital Improvement Reserve Fund would be allowed pursuant to Rule 61B-22.001(5), Florida Administrative Code. This subsection defines "reserves" as any funds other than operating funds that are restricted for deferred maintenance and capital expenditures, and any "other " funds restricted to use by the condominium documents."

5. In correspondence from Petitioner to the Bureau dated November 11, Petitioner stated:

"My position is that a contingency line item in the reserves schedule must be subject to all of the requirements of that rule (Rule 61B-22.003(1)(e), Florida Administrative Code) and if those requirements cannot be met that line item is not a reserve line item. That rule, in my opinion, is dispositive of the matter."

6. Prior to filing the instant petition, Petitioner requested a legal opinion on the issue referenced above and was advised that the Division's legal section is not authorized to issue opinions to the general public outside of the declaratory statement process. The Petition for declaratory statement was then filed.

7. The Association, by a majority vote of the unit owners at a meeting, approved the 1999 budget, which contained a \$25,000.00 appropriation for reserves. The Association did not vote to approve any specific line items for which the \$25,000 reserve appropriation could be used.

8. The Board approved the allocation of the \$25,000.00 reserve appropriation to individual line items, including a line item designated in the reserve schedule as "contingency".

9. Petitioner believes that the statute and rule referenced above prevent the creation of a reserve line item designated as "general" or "contingency".

10. Petitioner requests a declaratory statement as to whether, pursuant to section 718.112(2)(f) 2, Florida Statutes, and Rule 61B-22.003 (1)(e), Florida Administrative Code, an association may divert funds from a reserve line item to a line item in the reserve schedule designated as "general" or "contingency".

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 718.112(2)(f)2, Florida Statutes, provides:

(f) Annual budget.–

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2. In addition to annual operating expenses, the budget shall include reserve accounts for capital expenditures and deferred maintenance. These accounts shall include, but are not limited to, roof replacement, building painting, and pavement resurfacing, regardless of the amount of deferred maintenance expense or replacement cost, and for any other item for which the deferred maintenance expense or replacement cost exceeds \$10,000. The amount to be reserved shall be computed by means of a formula which is based upon estimated remaining useful life and estimated replacement cost or deferred maintenance expense of each reserve item. The association may adjust replacement reserve assessments annually to take into account any changes in estimates or extension of the useful life of a reserve item caused by deferred maintenance. This subsection does not apply to budgets in which the members of an association have, by a majority vote at a duly called meeting of the association, determined for a fiscal year to provide no reserves or reserves less adequate than required by this subsection. However, prior to turnover of control of an association by a developer to unit owners other than a developer pursuant to s. 718.301, the developer may vote to waive the reserves or reduce the funding of reserves for the first 2 years of the

operation of the association, after which time reserves may only be waived or reduced upon the vote of a majority of all nondeveloper voting interests voting in person or by limited proxy at a duly called meeting of the association. If a meeting of the unit owners has been called to determine to provide no reserves or reserves less adequate than required, and such result is not attained or a quorum is not attained, the reserves as included in the budget shall go into effect.

3. Reserve funds and any interest accruing thereon shall remain in the reserve account or accounts, and shall be used only for authorized reserve expenditures unless their use for other purposes is approved in advance by a majority vote at a duly called meeting of the association. Prior to turnover of control of an association by a developer to unit owners other than the developer pursuant to s. 718.301, the developer-controlled association shall not vote to use reserves for purposes other than that for which they were intended without the approval of a majority of all nondeveloper voting interests, voting in person or by limited proxy at a duly called meeting of the association.

5. Rule 61B-22.001(5), Florida Administrative Code, defines reserves:

61B-22.001 Definitions.

For the purposes of this chapter the following definitions shall apply:

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(5) "*Reserves*" means any funds, other than operating funds, that are restricted for deferred maintenance and capital expenditures, including the items required by section 718.112(2)(f)2., Florida Statutes, and any other funds restricted as to use by the condominium documents or the condominium association. Funds that are not restricted as to use by Section 718.112(2)(f), Florida Statutes, the condominium documents or by the association shall not be considered reserves within the meaning of this rule. [Emphasis supplied].

6. Rule 61B-22.003, Florida Administrative Code, sets out the requirements for disclosing reserves in the budget:

61B-22.003 Budgets.

(1) Required elements for estimated operating budgets. The budget for each association shall:

(a) State the estimated common expenses or expenditures on at least an annual basis;

(b) Disclose the beginning and ending dates of the period covered by the budget;

(c) Show the total assessment for each unit type according to proportion of ownership on a monthly basis, or for any other period for which assessments will be due;

(d) Include all estimated common expenses or expenditures of the association including the categories set forth in section 718.504(20)(c), Florida Statutes. Reserves for capital expenditures and deferred maintenance required by section 718.112(2)(f), Florida Statutes, must be included in the proposed annual budget and shall not be waived or reduced prior to the mailing to unit owners of a proposed annual budget. If the estimated common expense for any category set forth in the statute is not applicable, the category shall be listed followed by an indication that the expense is not applicable;

(e) *Include a schedule stating each reserve account for capital expenditures and deferred maintenance as a separate line item with the following minimum disclosures:*

1. *The total estimated useful life of the asset;*
2. *The estimated remaining useful life of the asset;*
3. *The estimated replacement cost or deferred maintenance expense of the asset;*

4. *The estimated fund balance as of the beginning of the period for which the budget will be in effect; and*

5. The developer's total funding obligation, when all units are sold, for each converter reserve account established pursuant to section 718.618, Florida Statutes, if applicable.

(f) *Include a separate schedule of any other reserve funds to be restricted by the association as a separate line item with the following minimum disclosures:*

1. *The intended use of the restricted funds; and*
2. *The estimated fund balance of the item as of the beginning of the period for which the budget will be in effect. [Emphasis supplied].*

(2) Unrestricted expense categories. Expense categories that are not restricted as to use shall be stated in the operating portion of the budget rather than the reserve portion of the budget.

7. Petitioner has taken the view that no category of reserves can be established to cover undesignated deferred maintenance or capital improvements, since such a category could not fit into the disclosure required by rule 61B-22.003 (1)(e) Florida Administrative Code, i.e., the estimated useful life, the estimated remaining useful life, the estimated replacement cost or

deferred maintenance expense of the asset, and the estimated fund balance as of the beginning of the budget period.

8. Petitioner's view is not consistent with the statute and rules governing reserves. Section 718.112(2)(f) provides that the annual budget must include reserve accounts for capital expenditures and deferred maintenance. The term "reserves" is defined by rule 61B-22.001(5), Florida Administrative Code, as any funds, other than operating funds, that are restricted for deferred maintenance and capital expenditures, including the items required by section 718.112(2)(f)2, Florida Statutes, and any other funds restricted as to use by the condominium documents or the condominium association. In accordance with the administrative rule, reserves may include any funds restricted as to use by the condominium documents or the condominium association. This portion of the rule is intended to provide autonomy to condominium associations in determining whether funds in addition to those statutorily required should be reserved to accommodate those capital expenditures that would occur over a period of time longer than one year. This category could include, by way of example, a three-year flood insurance premium fund. Establishing such a fund would avoid the association's having to impose a special assessment at the time the premium is due. By funding the insurance over a period of time, unit owners may be spared a one-time assessment that would be higher than dividing the payment over a period of time. Such a fund, if established, could only be used to pay the flood insurance premium, unless its use for another purpose is approved in advance by a majority vote at a duly called meeting of the association.

9. The flood insurance premium reserve comes under the category of "other reserves" as referenced in rule 61B-23.001(5), Florida Administrative Code. Therefore, the budget must disclose the use for which the fund is restricted and the balance in the fund at the

beginning of the period for which the budget will be in effect, in accordance with rule 61B-22.003(2), Florida Administrative Code.

10. Notwithstanding the foregoing, the category of "other reserves" authorized by rules 61B-22.001(5) and 61B-22.003(1)(f), Florida Administrative Code, is not intended to allow an association to establish a catch-all reserve fund for unexpected expenses of the association. While the category of "other reserves" is intended to allow an association to establish a reserve fund for general, deferred maintenance or capital expenditures, rule 61B-22.003(1)(f) requires the budget to reflect such a fund as a separate line item disclosing at a minimum, *the intended use of the restricted funds and the estimated fund balance as of the beginning of the period for which the budget is in effect.* The foregoing is consistent with the statements made in the October 15, 1999 letter Petitioner received from the Bureau of Condominiums.

11. Applying the foregoing to Petitioner's set of circumstance, Rule 61B-22.003(1)(f) would require that the reserve fund designated as "contingency" be restricted as to use. The budget must disclose the intended use of the funds and the estimated fund balance as of the beginning of the period for which the budget will be in effect. Since the line item is designated only as "contingency," it does not disclose the use for which the funds are restricted, and does not meet the requirements of Rule 61B-22.003(1)(f). However, the foregoing does not mean that the association cannot establish such a fund, as alleged by Petitioner, rather, it means only that there must be sufficient disclosure as to the use of the funds to include a line item on the reserve schedule. In any event, the association could establish such a fund on its operating budget in accordance with rule 61B-22.003(2), Florida Administrative Code.

12. Rule 61B-22.003(2) specifically states that unrestricted expense categories shall be stated in the operating portion of the budget rather than the reserve portion of the budget.

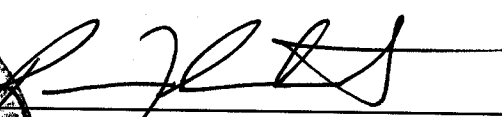
Since the funds in the item designated as "contingency" are not restricted to use, but may be used for any contingency, rule 61B-22.003(2) would apply, and the funds would have to be reflected on the operating budget.

13. To the extent that petitioner is requesting a statement as to the validity or invalidity of either the board's action in designating \$5,001.60 of the \$25,000.00 reserve appropriation to the "contingency" line item or any agency rule, the request is denied. A declaratory statement is not the appropriate means for determining the conduct of another person. Fla. Stat. §120.565 (1999). Nor is the declaratory statement process the proper forum in which to challenge an agency rule.

Wherefore, the Division declares that Section 718.112(2)(f)2 and Rule 61B-22.003 (1)(f), would allow an association to include in the budget reserve schedule a separate line item for general deferred maintenance and capital expenditures *so long as the use for which the funds are intended is restricted, and the restriction as to use is disclosed as well as the balance in the fund at the beginning of the budget period.* For non-designated, general or contingent items for which the use of the funds is not restricted, rule 61B-22.003(2), Florida Administrative Code, requires that they be placed in the operating budget, as opposed to the reserve schedule.

DONE AND ORDERED this 6th day of April, 2000.




G. S. 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 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 Robert M. Nied, 2348 Smullian Trail N., Jacksonville, Florida, 32217-3535, this
_____ day of _____, 2000.

Kristie Harris
Docket Clerk

Copies furnished to:

Kathryn E. Price
Assistant General Counsel

Jim Mullins, Acting Chief
Suzanne Schmidt, R.E.D.S.
Bureau of Condominiums