

Final Order No. BPR-2001-00226 Date: 1-18-01
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Department of Business and Professional Regulation
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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

Docket No. CD2000-181

VICTORIA SUITES INVESTMENTS, INC.

DS 2000-022

DECLARATORY STATEMENT

Victoria Suites Investments, Inc. (Victoria Suites), Petitioner, filed a petition for declaratory statement requesting an opinion as to whether section 718.301, Florida Statutes, requires a developer of a planned phased condominium to transfer control of the association to the unit owners at the completion of phase I before phase II is declared where the developer has sold the last unit in phase I and is no longer selling units in the ordinary course of business.

STATEMENT OF FACTS

The following facts 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. Petitioner did not request a hearing and none was held.

1. Victoria Suites filed its petition with the Division on November 13, 2000. Notice of the Petition was published in the Florida Administrative Weekly on December 15, 2000.
2. Victoria Suites is a "developer" as that term is defined by section 718.103(16), Florida Statutes (2000). Victoria Suites is the developer of Palm Crest Villas, a Condominium, (Condominium) located in Miami, Florida.

3. The Condominium, Inc. is a "condominium" as that term is defined by section 718.103(11), Florida Statutes (2000).

4. The copy of the Declaration of Condominium (Declaration) for the Condominium filed with the petition indicates that the declaration was recorded in the public records of Miami-Dade County in February 1999 at OR 18485, Page 2316.

5. The Declaration provides for the Condominium to be developed in two phases. Art. XXV, Declaration. Phase I is a conversion from an apartment building--a residential building with 32 units, a guardhouse and a clubhouse. Petition at 1; art. XXVIII, Declaration. Victoria Suites is not obligated to develop the second phase and the Declaration does not submit the land for the second phase to condominium ownership; however, Victoria Suites must declare the second phase within 7 years of recording the Declaration, which establishes the first phase. Art. XXV, Declaration. So, Victoria Suites must declare the second phase by 2006. If the second phase were added, the Condominium would have between 129 units and 153 units. Petition at 1.

6. Victoria Suites has not submitted the second phase to condominium ownership, has not begun construction on the second phase, has completed construction on the first phase, and is not offering for sale any units in the second phase. Petition at 1. No sales or construction activities are occurring at this time.

7. Victoria Suites has sold 31 of the 32 units in the first phase and is scheduled to close on the sale of the last unit "within the next few weeks." Petition at 2. Once this unit is sold, Victoria Suites does not plan to offer any condominium units for sale in the ordinary course of business until and unless it decides to develop the second phase. Petition at 2.

CONCLUSIONS OF LAW

8. The Division has jurisdiction to enter this order in accordance with sections 120.565 and 718.501, Florida Statutes.
9. The transfer of control provisions of chapter 718, Florida Statutes and the Division's rules substantially affects Victoria Suites.
10. At some point, unit owners other than the developer have the right to assume control of the association and manage the affairs of their condominium. *See Bishop v. Belkin*, 521 So. 2d 158 (Fla. 1st DCA 1988). Section 718.301, Florida Statutes (2000) provides:

(1) When unit owners other than the developer own 15 percent or more of the units in a condominium that will be operated ultimately by an association, the unit owners other than the developer shall be entitled to elect no less than one-third of the members of the board of administration of the association. Unit owners other than the developer are entitled to elect not less than a majority of the members of the board of administration of an association:

- (a) Three years after 50 percent of the units that will be operated ultimately by the association have been conveyed to purchasers;
- (b) Three months after 90 percent of the units that will be operated ultimately by the association have been conveyed to purchasers;
- (c) When all the units that will be operated ultimately by the association have been completed, some of them have been conveyed to purchasers, and none of the others are being offered for sale by the developer in the ordinary course of business;
- (d) When some of the units have been conveyed to purchasers and none of the others are being constructed or offered for sale by the developer in the ordinary course of business; *or*
- (e) Seven years after recordation of the declaration of condominium; or, in the case of an association which may ultimately operate more than one condominium, 7 years after recordation of the declaration for the first condominium it operates; or, in the case of an association operating a phase condominium created pursuant to s. 718.403, 7 years after recordation of the declaration creating the initial phase,

whichever occurs first. The developer is entitled to elect at least one member of the board of administration of an association as long as the developer holds for sale in the ordinary course of business at least 5

percent, in condominiums with fewer than 500 units, and 2 percent, in condominiums with more than 500 units, of the units in a condominium operated by the association. Following the time the developer relinquishes control of the association, the developer may exercise the right to vote any developer-owned units in the same manner as any other unit owner except for purposes of reacquiring control of the association or selecting the majority members of the board of administration.

§ 718.301, Fla. Stat. (2000) (emphasis added).

11. Victoria Suites asserts that all of the units in phases I and II should be counted to arrive at the percentages designated by the statutory transfer scheme. In other words, to determine 15%, 50% or 90%, the total of either the minimum number of proposed units of 129 or the maximum of proposed units 153 should be used to determine the number of units conveyed to purchasers "that will be operated ultimately by the association." § 718.301(1)(a)-(c), Fla. Stat. (2000).

12. Victoria Suites argues that even though it has not declared the second phase and will not be offering any units for sale in the ordinary course of business, it may retain control of the association for seven years because section 718.301(1)(e), Florida Statutes, and rule 61B-23.003(9), Florida Administrative Code, allow a developer seven years to record an additional phase. In summary, Victoria Suites states that it is not required to transfer control to the association because "Section 718.301(1)(d), Florida Statutes, does not apply to phase condominiums and [] a developer may cease both construction and sales without triggering the transfer of control requirement of that Section." Petition at 3-4.

13. Victoria Suites is incorrect. A plain reading of section 718.301(1), Florida Statutes, indicates that it is required to transfer control of the association to the unit owners. Once it has transferred control, it may not reacquire control if it submits an additional phase to

the Condominium. See *Hamptons Development Corp. of Dade v. Division of Fla. Land Sales, Condo., and Mobile Homes*, 519 So. 2d 661 (Fla. 3d DCA 1988) (turnover is irreversible).

14. The transfer of control provisions, also referred to as the "turnover" statute, provides a gradual process of transferring control from the developer to unit owners. This gives the unit owners an opportunity to become familiar with governing the association and the many regulations controlling the board's actions before having to assume full control of the association. Turnover is triggered by one of the five events identified in section 718.301(1), Florida Statutes, the percentage sellout provisions of subsections (a) and (b), the cessation of sales or construction provisions of subsections (c) and (d), or through the phase provision of subsection (e). See *In re: Sylak*, BPR 94-06872 (12/30/94) (declaratory statement). The phrase "whichever occurs first" modifies the preceding subparagraphs (a) through (e). This phrase has been a part of the turnover provision since its enactment in 1976. Ch. 76-222, Laws of Fla. Subsection (e) was added in 1991 as just one of the triggering events, not a separate stand-alone event. Ch. 91-103, § 12, Laws of Fla. (the amendment clearly inserted (e) as one of the list of triggering events when it struck the connector "or" from the end of (c) and moved it to the end of (d) immediately preceding (e)). Had the legislature intended the creation of a phase condominium to control when the developer transfers control of the association regardless of the number of sales or whether any construction is occurring, then it would have said so. Instead, it placed the creation of a phase condominium within the list of triggering events without any statement of priority over the other events. All of the events may trigger a turnover. The first event to occur triggers the turnover provisions.


15. This statement does not address Victoria Suites assertion that the units in both phases must be counted for purposes of the percentage of sales events even though the

Declaration did not submit the second phase to the Condominium. Review *Miceli v. Gilmac Developers, Inc.*, 467 So. 2d 404 (Fla. 2d DCA 1985) in which the appellate court determined under section 718.403, Florida Statutes (1984) that the second phase contemplated by the declaration did not exist because it had never been submitted to condominium ownership. *Also see Sylak* (developer submitted six phases to the condominium when it recorded the declaration but never filed an amendment submitting the last phase).

ORDER

Based upon the findings of fact and conclusions of law, it is ORDERED that Petitioner must transfer control of the association to the non-developer unit owners in accordance with section 718.301(1)(d), Florida Statutes.

DONE and ORDERED this 16th day of January, 2001.



ROSS FLEETWOOD, Director
Division of Florida Land Sales,
Condominiums, and Mobile Homes
Department of Business and
Professional Regulation
1940 North Monroe Street
Tallahassee, FL 32399-1030

NOTICE OF RIGHT TO APPEAL

THIS FINAL ORDER CONSTITUTES FINAL AGENCY ACTION AND MAY BE APPEALED BY PETITIONER PURSUANT TO SECTION 120.68, FLORIDA STATUTES, AND RLE 9.110, FLORIDA RULES OF APPELLATE PROCEDURE BY FILING A NOTICE OF APPEAL CONFORMING TO THE REQUIREMENTS OF RULE 9.110(c), 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 THIRTY (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 Leonard Lubart, Greenspoon, Marder, Hirschfeld, Rafkin, Ross & Berger, P.A., Trade Centre South, Suite 700, 100 West cypress Creek Road, Ft. Lauderdale, Florida 33309, this _____ day of _____, 2001.

Kristie Harris, Docket Clerk

Copies furnished to:
Ross Fleetwood, Director

Janis Sue Richardson, Senior Attorney
Office of General Counsel