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Final Order No. BPR-2002-03149 Date: 8/29/2002
FILED

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STATE OF FLORIDA By: Sarah Wachman

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

IN RE: PETITION FOR DECLARATORY STATEMENT,

DS 2002-015

Wilson & Karen Wallace, River Run of Sebastian
Condominium Association, Inc.,

DOCKET NO. CD2002-043

Petitioner.
_____ /

DECLARATORY STATEMENT

Petitioner, Wilson and Karen Wallace (Wallace), unit owners in River Run of Sebastian Condominium Association, Inc. (River Run), request a declaratory statement as to the number of units in River Run for assessment purposes under sections 718.103(1) and 718.501(2)(a), Florida Statutes.

STATEMENT OF FACTS

The following facts are based on information submitted by the Petitioner and the association. The Division relies on the statement of facts set out in the petition without taking any position with regard to the validity of the facts.

1. Wallace filed a petition with the Division on July 16, 2002. Notice of the Petition was published in the Florida Administrative Weekly on August 9, 2002. On July 24, 2002, the Division, through its attorney, wrote to Wallace, requesting a copy of the governing documents. The Division received the articles of incorporation and bylaws for River Run and the bylaws for River Run of Sebastian Building "E" on August 8, 2002. Wallace did not provide the declarations of condominium for condominiums A through

D.

2. The Division mailed a copy of the petition to the association on July 29, 2002. On August 6, 2002, the association filed its request to intervene. On August 19, the association filed its response to the petition. The association is assessing unit owners in accordance with its governing documents.

3. River Run is an "association" as that term is defined in section 718.103(2), Florida Statutes, that operates a multicondominium, as that term is defined by section 718.103(20), Florida Statutes (2001), of five condominiums, each of which is designated as a building A through E. The association and the condominiums were created pursuant to chapter 718, Florida Statutes, and are located in Sebastian, Indian River County, Florida. The first condominium, A, appears to have been created with the association in 1984 or 1985 with the last condominium E being created in 1989. There are a total of 132 units.

4. Wallace asks the Division to determine the total number of units in the association for purposes of sections 718.103(1) and 718.501(2)(a), Florida Statutes, where the association pays statutory annual fees for 132 units, but the accountant calculates each unit's percentage share of assessments using an analogy to an "equivalent of 136 units."

5. The declaration of condominium for building E provides that the building contains 31 units. § 7, Declaration of Condominium Establishing River Run E Condominium (Declaration). The declaration also provides that each owner acquires a 1/32 interest in the common elements "except that owners of Penthouse unit #6059 shall each own an undivided two-thirty seconds (2/32) share" of the common elements. Id. § 10. Wallace owns the penthouse unit. Each owner is assessed for common

expenses in the same proportionate share as ownership of the common elements. Id. From the plot plans, it appears that the penthouse unit is roughly equivalent to two units in size. Each unit is assigned the use of one parking space except that the penthouse unit has been assigned the use of two parking spaces.

6. Wallace submitted a general ledger that reportedly shows 132 units billed for the statutory \$4 annual fee for the condominiums A through E at River Run. The general ledger indicates that there are 29 units in A, 24 units in B, 36 units in C, 12 units in D, and 31 units in E.

7. Wallace also submitted page 7 of the annual financial report for River Run. Page 7 of the annual report contains note A, which is a summary of the accounting policies. This section contains a chart showing the number of units in each condominium with an "equivalent number of units" used by the accountant for determining proportionate share of assessments for each condominium within the association. A reproduction of the chart shows:

<u>Condominium</u>	<u>Actual # Units</u>	<u>Equivalent # Units</u>	<u>Percentage of Ass'n Expenses</u>
A	29	32	23.529% (3 Penthouses)
B	24	24	17.647%
C	36	36	26.471%
D	12	12	8.824%
E	31	32	23.529% (1 Penthouse)

The accounting notes indicate that each condominium pays the common expenses in the percentages shown based on the declaration of condominium.

8. The declarations for each of the buildings A through D have the number of units indicated by the accountant's report as actual units. Condominium A has three penthouse units with a provision similar to condominium E, assigning the penthouse

units a greater percentage share of ownership of the common elements and the same percentage share for purposes of paying assessments for common expenses.

Presumably, the developer determined the percentage share of ownership based on the penthouse units being approximately twice the size of the other units.

9. The association asserts that the condominium declarations provide "an equitable allocation for the distribution of assessments for those four (4) Penthouse Owners within the River Run community which is based on the total proportional share in the common expenses of one hundred and thirty-six units (136); that being that those Penthouse Unit Owners each have a 2/32's interest in the Common Property and Common Expenses of the Condominium and Association and a 2/136's share each of the Association." Letter from William F. Miller (Aug. 19,2002) (association's response to petition) (emphasis in original).

CONCLUSIONS OF LAW

1. The Division has jurisdiction to enter this order in accordance with sections 120.565 and 718.501, Florida Statutes (2001).

2. Petitioner is substantially affected by the provisions in chapter 718, which govern the operation of condominium associations and the assessment of common expenses by a condominium association.

3. The Condominium Act has been amended several times since these condominiums and association were created. One of the most recent amendments was to define a multicondominium as a "real estate development containing two or more condominiums, all of which are operated by the same association." § 718.103(20), Fla. Stat. (2001); ch. 2000-302, §48 at 3131, Laws of Fla. (2000). In the same amendment,

multicondominiums created after 2000 were required to "provide a specific formula for determining, the fractional or percentage shares of liability for the common expenses of the association and of ownership of the common surplus of the association to be allocated to the units in each condominium to be operated by the association." Id. § 718.104(4)(h); ch. 2000-302, § 49 at 3133, Laws of Fla. (2000); see § 718.405(1), Fla. Stat. (2000). If the declaration did not do so, then the share of common expenses was equal to a fraction, which was 1 for the unit over the total number of units in all of the condominiums. Id. This amendment does not apply to those associations that were created before 2000.

4. "Assessment" has been defined as the "share of funds which are required for the payment of common expenses, which from time to time is assessed against the unit owner." § 718.103(1), Fla. Stat. (1984)-(2001). Section 718.115(2), Florida Statutes (1984) required assessments for common expenses to be made against the unit owners in the same proportions or percentages as stated in the declaration. The division bills associations for annual fees based on the number of units in the condominium. § 718.501(2), Fla. Stat. (1984), (2001). The division collects the annual fees from the association on a per unit basis for 132 units that are operated by the association. The association collects assessments for common expenses based on the ownership interest of each unit.

5. The Condominium Act requires assessments for River Run to be made in accordance with the declaration. The declaration assigns a percentage share to each unit. Penthouse units are assigned a greater percentage share than the other, smaller units. Ostensibly, a penthouse pays twice the share of the other units because it is

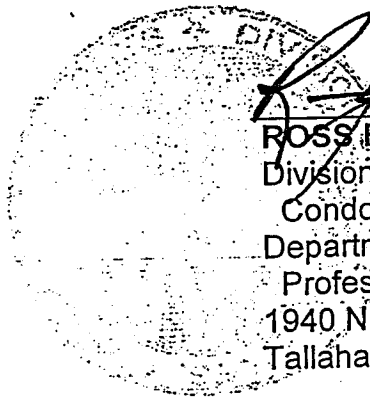
about twice the size of the other units, has two parking spaces instead of one, and owns a greater share of the common elements, common expenses and common surplus. This may be the basis for the accountant's description of "equivalent" number of units.


6. Wallace asserts that the association is double assessing the penthouse units, counting each unit twice, contrary to section 718.110(5), Florida Statutes. That section provides that, if through a scrivener's error, the shares of the ownership of the common elements, common expenses, and common surplus exceeds 100%, the association may file an amendment to the declaration. The percentage share in the declaration is 1/32 for each of 30 units and 2/32 for one unit, which equals 32/32 or 100% for condominium E. As shown on the accounting notes, the percentage share of all of the units, based on the declarations, totals 100%.

ORDER

WHEREFORE, it is concluded that River Run of Sebastian Condominium Association, Inc. is assessing for common expenses in accordance with its declaration, which is consistent with sections 718.103(1) and 718.115(2), Florida Statutes.

DONE and ORDERED this 27th day of August 2002.



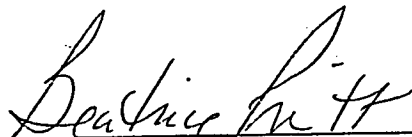

ROSS FLEETWOOD, Director
Division of Florida Land Sales,
Condominiums, and Mobile Homes
Department of Business and
Professional Regulation
1940 North Monroe Street
Tallahassee, FL 32399-1030

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 RULE 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 Wilson and Karen Wallace, 234 N.W. 70th Street, Boca Raton, Florida 33487, and River Run of Sebastian Condominium Association, Inc., c/o William F. Miller, Registered Agent, 1717 20th Street, Suite #102, Vero Beach, Florida 32960, this 30th day of August, 2002.


Beatrice Pruitt,
Docket Clerk

Copies furnished to:

Ross Fleetwood
Director

Janis Sue Richardson
Chief Assistant General Counsel
Office of General Counsel