

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,

Castillo Grand Residences,

DOCKET NO. CD2002-064

Petitioner.

DS 2002-020

DECLARATORY STATEMENT

Petitioner, Castillo Grand Residences, requests an interpretation as to whether an escrow agent may release interest earned on deposits to the developer for use in construction prior to closing under section 718.202, Florida Statutes.

STATEMENT OF FACTS

The following facts are based on information submitted by the Petitioner. 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. Castillo Grand Residences ("Castillo"), filed its petition with the Division on December 13, 2002. Notice of the Petition was published in the Florida Administrative Weekly on January 10, 2003.

2. Castillo is the "developer" as that term is defined in section 718.103(16), Florida Statutes, of Castillo Grand Residences, A Condominium ("Condominium"), located in Broward County, Florida, which is currently under construction and was created pursuant to chapter 718, Florida Statutes.

3. To date, Castillo has entered several purchase contracts to sell units in the Condominium for which Castillo received deposits for up to twenty percent of the purchase price. Castillo is holding the deposits for purchasers in escrow, pursuant to section 718.202(1), Florida Statutes. Castillo has been holding some of the deposits for approximately two years.

4. Castillo understands that, pursuant to Florida Statutes and the purchase contracts, it may release any payment in excess of ten percent of the purchase price made to the developer for construction purposes.

5. The purchase contract for the Condominium provides that:

Any payment in excess of 10 percent of the purchase price made to developer prior to closing pursuant to this contract may be used for construction purposes by the developer.

6. Section I. C. of the Condominium's Standards for Real Estate

Transactions states that :

Purchaser shall be entitled to any interest earned on the deposit while same is being held in escrow. Such deposit shall be credited to Purchaser at the Closing. Notwithstanding the foregoing, in the event Purchaser defaults hereunder and Seller is entitled to retain the deposit, Seller shall also be entitled to all interest earned thereon. Purchaser shall be required to deliver to Escrow Agent a Form W-9 before the deposit can be placed into an interest bearing account.

7. Section IV.B. of the Standards for Real Estate Transactions states, in relevant part:

B. Sellers Default: If Seller defaults in the performance of this Contract, Purchaser shall give Seller written notice of such default, and if Seller within seven (7) days from receipt of such written notice shall fail to take action that would cure the default within a reasonable period of time, and if Purchaser has performed all his obligations hereunder, Purchaser shall have the option to cancel this Contract by giving written notice thereof to seller and upon such cancellation Seller shall refund to

Purchaser all monies paid by Purchaser to Seller hereunder plus such interest as is prescribed by the Act.

8. Castillo would like to know whether the escrow agent may release the interest that has accrued on the initial ten percent deposits and the interest on the deposits above ten percent to the developer for use in construction of the project.

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 sales or reservation deposits for incomplete condominiums prior to closing.

3. Section 718.202(1), Florida Statutes, requires that the interest accrued on escrow deposits held for purchasers of incomplete condominiums before closing must be held in escrow accounts: 1) until closing; 2) until the buyer properly terminates the contract; or 3) the buyer defaults. These three conditions also apply to interest earned on payments in excess of 10 percent of the sales price if the excess deposit remains in escrow for more than three months. Fla. Stat. §718.202(2). Therefore, interest on the funds in this special escrow account may not be released to the developer for use in construction.

4. Section 718.202(1)(a), Florida Statutes, provides, in relevant part, as follows:

Sales or reservation deposits prior to closing

(1) [T]he developer shall pay into an escrow account all payments up to 10 percent of the sale price received by the developer from the buyer towards the sale price. The escrow agent shall give to the purchaser a receipt for the deposit, upon request. . . . Default determinations and refund deposits shall be governed by the escrow release provision of this subsection. Funds shall be released from escrow as follows:

(a) If the buyer properly terminates the contract pursuant to its terms or pursuant to this chapter, the funds shall be paid to the buyer together with any interest earned.

This section requires that up to ten percent of the purchase price must be deposited into an escrow account. Subpart (a) provides one of three conditions in which the escrow funds may be released. It states that the buyer of the condominium unit, upon the proper termination of the contract for purchase of the unit, is entitled to a refund of the moneys paid into the escrow account *with any interest earned.*

5. Section 718.202(1)(b), Florida Statutes, provides the second manner that funds may be released from escrow. It states that:

(b) If the buyer defaults in the performance of his or her obligations under the contract of purchase and sale, the funds shall be paid to the developer together with any interest earned.

This provision provides that the developer is entitled to any interest earned on the deposit at the time the buyer defaults.

6. Section 718.202(1)(c), Florida Statutes, provides for the release of interest earned on the escrowed funds at the time of the closing. It states:

(c) If the contract does not provide for the payment of any interest earned on the escrowed funds, interest shall be paid to the developer at the closing of the transaction.

The Castillo contract does provide for the payment of interest earned on the escrowed funds to the buyer at the time of closing in the form of credit. The contract states that "Purchaser shall be entitled to any interest earned on the deposit while same is being

held in escrow. Such deposit shall be credited to Purchaser at the Closing [unless the purchaser defaults].” If the contract did not entitle the buyer to the interest, section 718.202(1)(c) provides that the interest would be paid to the developer *at the closing*. As long as the buyer has not properly terminated the contract, or has not defaulted, and the transaction closing has not occurred, pursuant to sections 781.202(1) and (2), any interest may not be released to the developer.

7. Section 718.202(2), Florida Statutes, requires that any deposit payments in excess of 10 percent of the sale price received before completion of construction by the developer must be placed in a special escrow account. The account must be:

established as provided in subsection (1) and controlled by an escrow agent and may not be used by the developer prior to closing the transaction, except as provided in subsection (3) or except for refund to the buyer. If the money remains in this special account for more than 3 months and earns interest, the interest shall be paid as provided in section (1).

Fla. Stat. §718.202(2) (emphasis added). If the special escrow account funds earn interest, and if the money remains in the account for more than three months, the interest is paid to the buyer upon proper termination of the contract, to the developer if the buyer defaults, or to the developer at closing if the buyer is not entitled to interest on the deposit under the terms of the purchase and sale contract, as prescribed in subsections 1(a), (b), and (c), respectively. In this case, the contract provides that the interest is to be credited to the purchaser at the closing. In its petition, Castillo stated that it has held some deposits for approximately two years. Because section 718.202(2) dictates that subsection (1) governs the payments of any interest earned on the funds in the special escrow account after they have remained in escrow for three months, the interest earned on payments in excess of the 10 percent of the sale price

may not be released from escrow unless one of the three requirements in subsection (1) are met. Therefore, in the Castillo case, the developer is only entitled to the interest on the deposits that have been held for more than three months if the purchaser defaults in the performance of his or her obligations under the contract.

8. Pursuant to section 718.202(3), Florida Statutes, the funds in excess of ten percent of the purchase price may be withdrawn from the special account by the developer for use in the actual construction and development of the condominium property if the purchase contract so provides. This provision allows the developer to request the release of the excess funds from the special escrow account only after construction has begun. The Castillo contract repeatedly provides that payments in excess of 10 percent of the sale price made to the developer prior to closing may be used for construction purposes. However, the interest earned on the funds in the special escrow account may be released only as provided in 718.202(1), Florida Statutes, which, as discussed above, does not allow for the release of the interest upon request by the developer, even for construction purposes. Fla. Stat. §718.202(2).

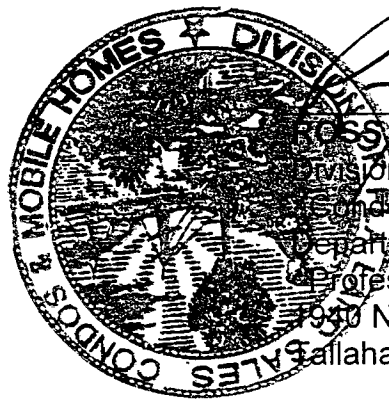
9. Florida courts have found section 718.202, Florida Statutes to be clear on its face. The court in Barrack v. State, 462 So.2d 1196, 1197 (Fla. 4th DCA 1985), held that the escrow provision in section 718.202, Florida Statutes, “provides in precise and easily understood terms a condominium developer’s obligations with reference to receiving and handling condominium parcel purchase funds.” In First Sarasota Service Corp. v. Miller, 450 So.2d 875, 878 (Fla. 2d DCA 1984), the court followed what it termed the “plain meaning” of the statute and the express legislative intent and found that the purpose of section 718.202, Florida Statutes, was to “protect purchasers under


preconstruction condominium contracts from loss of their deposits should the developer fail to perform its contractual obligations." Given that the developer here has agreed in the contract to credit the individual purchasers with any interest accrued on the deposits while in escrow at closing, and following the purpose of the statute to protect purchasers from loss of their deposits, as stated in Miller, the only reasonable outcome requires that all interest on the entire payment to the developer be kept in an escrow account until closing, or until one of the conditions in section 718.202 are met.

ORDER

WHEREFORE, based upon the findings of facts and conclusions of law, it is ORDERED that an escrow agent may not release interest earned on deposits to the developer for use in construction prior to closing under section 718.202, Florida Statutes.

DONE and ORDERED this 26 day of March 2003.



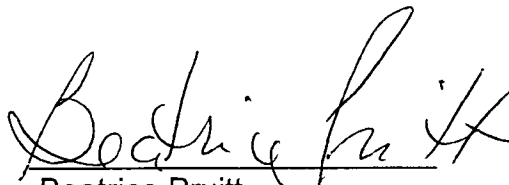

ROSS FLEETWOOD, Director
Division of Florida Land Sales,
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NOTICE OF RIGHT TO APPEAL

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 F. Ronald Mastriana, Attorney for Petitioner, Mastriana & Christiansen, P.A., 1500 North Federal Highway, Suite 200, Fort Lauderdale, Florida 33304, this 26th day of March, 2003.


Beatrice Pruitt,
Docket Clerk

Copies furnished to:

Ross Fleetwood
Director

Janis Sue Richardson
Chief Assistant General Counsel
Office of General