

Final Order No. BPR-2003-00666 Date: **3-10-03**
FILED
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, **DS 2002-018**

Gerald M. Avanzian, Unit Owner,
The Commodore Condominium,

DOCKET NO. CD2002-061

Petitioner.
_____ /

DECLARATORY STATEMENT

Petitioner, Gerald M. Avanzian, a unit owner in The Commodore Condominium, requests an interpretation as to whether the association may establish a general maintenance reserve account and transfer funds from this account to a specific reserve account under section 718.112(2)(f)3, Florida Statutes, and Florida Administrative Code Rule 61B-22.003(2). If so, is a majority vote required? If a vote is required, may it be a general grant of approval to transfer funds as needed, or must the vote be for a specific amount of money to be taken from the reserve pool account to be transferred to the specific reserve account to be used for a stated purpose?

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. Gerald M. Avanozian ("Avanozian") filed a petition with the Division on December 4, 2002. Avanozian is a unit owner in The Commodore Condominium ("Commodore"), a "condominium," as that term is defined by section 718.103(11), Florida Statutes (2002), which is located in Broward County, Florida.

2. Notice of the Petition was published in the Florida Administrative Weekly on December 20, 2002.

3. Avanozian submitted the Schedule of Deferred Maintenance & Capital Expenditure Reserves from the association's 2003 budget. The budget is prepared on a calendar year. The reserve schedule includes the statutory reserve fund items for painting, roofing, paving, and those maintenance expenses that exceed \$10,000. The schedule also includes a General Deferred Maintenance & Capital Expenditure Reserves fund as a separate "pool of funds" that are restricted to the deferred maintenance or replacement of items listed in this reserve fund. A few of the items listed in this general reserve category are included in chart form:

<u>Component</u>	<u>Estimated Life</u>	<u>Estimated Cost for Deferred Maintenance or Capital Expenditure</u>	<u>Estimated Remaining Useful Life</u>	<u>Balance on Hand</u>	<u>Total Additional Funding Required</u>
Elevator	28	172,000	26	7,881	164,119
Pumps					
Sump	15	12,110	3-4	3,425	12,215
Fire	28	18,000	3	5,068	12,932
Ventilation					
Fans (5)	15	4,700	12	366	4,334
Pool					
Resurface					
Replace					
Coping	10	12,000	8	6,860	5,140
Heater	15	6,200	3	1,571	4,629

Note: The disclosure for 2003 funding for each item is not included here. Also, a reserve fund for service elevator modernization was budgeted separately. This elevator modernization fund is for the passenger elevator.

4. The Commodore Condominium Board of Governors filed a response to the petition on December 24, 2002. A copy of the association's response was mailed to Avanozian. The board asserts that petitioner's suggestion that it intended to borrow funds or use reserves funds for other purposes is incorrect. The board's budget committee reviewed the statute and rules regarding the pooling of reserve funds and adopted a budget that it believed complied with these regulations.

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.

3. Section 718.112(12)(f)3, Florida Statutes, provides:

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.

4. Florida Administrative Code Rule 61B-22.003(2) provides:

(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.

This rule does not prevent associations from pooling reserve items that are restricted as to use because the pooled funds are restricted to being used for only a pooled reserve asset. A complete explanation of the budgeting process is provided in the educational materials found on the division's website, which is accessed through the state's website (myflorida.com) at

http://www.state.fl.us/dbpr/lsc/condominiums/publications/budgets_and_reserves.pdf.

5. The reserve section of the budget, which is not included in the excerpt, contains funds that are restricted for specific purposes. The Condominium Act requires that reserves be established for certain items including: roof replacement, building painting, pavement resurfacing and any other item of capital expenditure or deferred maintenance that exceeds \$10,000. 718.112(2)(f)2, Fla. Stat.; Fla. Admin. Code R. 61B.22.001(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 a part of the reserve section can only be used for the purpose intended, unless approved by a vote of the unit owners. Id. § 718.112(2)(f)3. If the board identifies a need elsewhere for the funds, the board cannot simply withdraw and use them. Id.

6. All of the capital assets in the general deferred maintenance schedule that are estimated to exceed a cost of \$10,000 to replace or to complete deferred

maintenance are required to be shown as a separate line item in the reserve schedule of the annual budget. § 718.112(2)(f)2, Fla. Stat.; Fla. Admin. Code R. 61B-23.001(e), (f). Therefore, the funds established for the elevator, the pumps, and the pool resurfacing are restricted reserve funds that must be included in the deferred maintenance schedule because these funds exceed \$10,000 in replacement or deferred maintenance costs. The funds for the ventilation fans and the pool heater are not restricted reserves and are not required to be in the budget because the estimated cost is less than \$10,000.

7. On December 23, 2002, the division adopted amendments to the budgeting rules to permit associations to pool reserve funds. Under the amended rules, associations may create a reserve for general deferred maintenance and capital expenditures. Fla. Admin. Code R. 61B-22.003 (budgets), r. 61B.22.005 (reserves). Funds pooled in a general deferred maintenance and capital expenditure account may be used for any deferred maintenance or capital expenditure project listed in the account. Florida Administrative Code Rule 61B-22.003(1)(f) provides:

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

* * * *

(f) If the association maintains a pooled account for reserves required by Section 718.112(2)(f)2., Florida Statutes, the association shall include a separate schedule of any pooled reserves with the following minimum disclosures:

1. The total estimated useful life of each asset within the pooled analysis;
2. The estimated remaining useful life of each asset within the pooled analysis;
3. The estimated replacement cost or deferred maintenance expense of each asset within the pooled analysis; and
4. The estimated fund balance of the pooled reserve account as of the beginning of the period for which the budget will be in effect.

8. Associations may also include in the budget other reserve funds to be restricted by the association as separate line items with a disclosure as to the intended use of the fund and the estimated fund balance of the item at the beginning of the budget period. Fla. Admin. Code R. 61B-22.003(1)(g). The pool heater and the ventilation fan reserve funds fall within this category.

9. If a pooled fund is established, then the funding formulas are based on a pooled analysis rather than a separate analysis of each reserve item. Florida Administrative Code Rule 61B-22.005 provides:

(3) Calculating reserves required by statute. Reserves for deferred maintenance and capital expenditures required by Section 718.112(2)(f), Florida Statutes, shall be calculated using a formula that will provide funds equal to the total estimated deferred maintenance expense or total estimated replacement cost for an asset or group of assets over the remaining useful life of the asset or group of assets. Funding formulas for reserves required by Section 718.112(2)(f), Florida Statutes, shall be based on either a separate analysis of each of the required assets or a pooled analysis of two or more of the required assets.

* * * *

(b) If the association maintains a pooled account of two or more of the required reserve assets, the amount of the contribution to the pooled reserve account as disclosed on the proposed budget shall be not less than that required to ensure that the balance on hand at the beginning of the period for which the budget will go into effect plus the projected annual cash inflows over the remaining estimated useful lives of all of the assets that make up the reserve pool are equal to or greater than the projected annual cash outflows over the remaining estimated useful lives of all of the assets that make up the reserve pool, based on the current reserve analysis. The projected annual cash inflows may include estimated earnings from investment of principal. The reserve funding formula shall not include any type of balloon payments.

10. These amendments do not permit associations to establish a reserve called "Contingency Reserve" to fund items for which reserves have not been established or to cover unanticipated operating expenses. This is not permitted because a contingency reserve does not have a restriction on its use. Consequently, it

does not meet the definition of a reserve, and associations that desire to have a contingency fund should maintain a contingency surplus in the operating fund. The Commodore board has not established a contingency fund.

11. The Commodore has established a pooled reserve fund for general maintenance and capital expenditure items that includes both required and optional reserve fund items. The schedule includes the required disclosures. Any fund in the pooled analysis may be used for any of the other items in the pooled analysis. In our budget excerpt, the association may use the funds identified for the elevator to replace the pool heater.

12. The association may establish a general maintenance reserve account but may not transfer funds from this account to any specific reserve account that is also provided for in the budget unless the use of the general reserve funds to pay the cost of replacing or performing deferred maintenance of a statutory reserve item is “approved in advance by a majority vote at a duly called meeting of the association.” § 718.112(2)(f)3, Fla. Stat. (2002); Fla. Admin. Code R. 61B-22.003(2). The vote is to transfer a specific amount of money from the reserve pool account to the separate reserve account for the replacement or deferred maintenance of the separate reserve asset. Id. If the association wanted to transfer \$12,000 from the general reserve pool fund in our excerpt to pay for painting the building, which it separately budgeted as a statutory reserve item, then it would need a majority vote of the unit owners to do so.


13. However, the information and budget presented do not indicate that the board of directors intends to use funds from the general maintenance reserve pool account to fund a statutory required reserve account. There is no indication that the

board intends to use the general reserve pool fund (elevator, pool, fan) to pay for the roof replacement or for painting the building. The board may draw from the reserve pool to fund the replacement or pay for the deferred maintenance costs for any item within the pool. So, the board may use the pooled funds to replace the elevator, the ventilation fan, or resurface the pool. This appears to be the board's stated intent.

ORDER

WHEREFORE, based upon the findings of facts and conclusions of law, it is declared that, in accordance with section 718.112(2)(f)3, Florida Statutes (2002) and Florida Administrative Code Rules 61B-22.003(1)-(2) and 61B-22.005(3), The Commodore Condominium Association may establish a general maintenance reserve account to pool funds for specific reserve items and may transfer funds from this account to a separate deferred maintenance reserve account if a majority of the unit owners vote to approve the use of the general reserve funds to pay the cost of replacing or performing deferred maintenance of a separately budgeted reserve item by transferring a specified amount of money from the general reserve fund to a separately budgeted reserve asset for that purpose.

DONE and ORDERED this 7th day of March 2003.


[Signature]

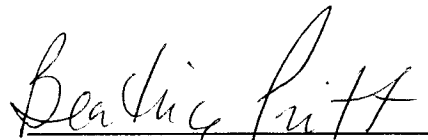
FLEETWOOD, Director
Department of Florida Land Sales,
Condominiums, and Mobile Homes
Department of Business and
Professional Regulation
40 North Monroe Street
Tallahassee, FL 32399-1030

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 Gerald M. Avanozian, Petitioner, 3430 Galt Ocean Drive, Apt. 608, Fort Lauderdale, Florida 33308, and Jack J. Friedman, President, The Commodore Condominium Association, 3430 Galt Ocean Drive, Fort Lauderdale, Florida 33308, this 10th day of March, 2003.


Beatrice Pruitt,
Docket Clerk

Copies furnished to:

Ross Fleetwood
Director

Janis Sue Richardson
Chief Assistant General Counsel
Office of General