

STATE OF FLOR
DEPARTMENT OF BUSINESS AND PRO
DIVISION OF FLORIDA LAND SALES
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IN RE PETITION FOR DECLARATORY STATEMENT

Docket No.
LS036496,
2003065160

WALTER GROVER, unit owner,
Portofino Condominium Apartments of Palm Beach, Inc.

DS 2003-032

DECLARATORY STATEMENT

Walter Grover (Grover), Petitioner, filed a petition for declaratory statement requesting an opinion as to whether an association may assess unit owners in accordance with their percentage interests for repair work in a manner that permits owners the option of paying the assessment in full without interest or paying the assessment with interest over a period of months under section 718.116(9), Florida Statutes (2002).

STATEMENT OF FACTS

The following facts are based on information submitted by the 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. Grover filed his petition with the Division on May 16, 2003. Notice of the petition was published in the Florida Administrative Weekly on June 13, 2003.
2. Portofino Condominium Apartments of Palm Beach, Inc. (Association), is a condominium "association" as that term is defined by section 718.103(2), Florida Statutes (2002).

3. On February 20, 2003, the Board of Directors for the Association adopted a special assessment for replacement of the roof and roof accessories, repair of the balconies, exterior painting, and fees for a line of credit.

4. On April 29, 2003, the Board voted to modify the special assessment, giving the unit owners a choice of paying the assessment in a one time lump sum payment without interest or over thirty months with interest assessed.

5. The Association filed a Notice of Intervention with the Division on June 13, 2003. The Association explains that in 2002 the Board of Directors, including Grover as President, determined that several major maintenance projects needed to be completed on the condominium property. Because the reserves had been waived for several years, the Association did not have the funds to cover the maintenance and special assessments would be needed. The Board members were recalled by petition because of debates over these maintenance projects. After the recall, the newly elected Board members voted to proceed only with the roof work and concrete restoration projects, and reduced the special assessment fees to \$680,000.

6. During the Board meetings at issue, one segment of the unit owners indicated they wanted to pay in a lump sum payment to avoid financing charges, while another segment of the unit owners indicated that they did not have the means to pay the lump sum payment and would prefer paying installments.

7. The Association asserts that the special assessments approved by the Board treat everyone equally because all unit owners have the same option to either pay in the lump sum or make monthly installments.

CONCLUSIONS OF LAW

8. The Division has jurisdiction to enter this order in accordance with sections 120.565 and 718.501, Florida Statutes (2002).
9. Section 718.116(9), Florida Statutes (2002) provides:
 - (a) A unit owner may not be excused from payment of the unit owner's share of common expenses unless all other unit owners are likewise proportionately excluded from payment...
10. Section 718.116(9), Florida Statutes, has applied where a unit owner refuses to pay for the cost of alteration or improvement that he or she did not approve. E.g., In re Petition for Declaratory Statement Fairwinds Cove Condo. Ass'n of Hutchinson Island, Inc., DPBR Final Order No. BPR-95-05820 (October 16, 1995) (on file with clerk, DPBR) (concluding that unit owners cannot be exempted from paying the proportional share or cost of an alteration or improvement of the common elements because they do not approve). Section 718.116(9) has also been cited in litigation over when a developer must begin paying assessment fees. Neither the plain statutory language nor the case law interpreting the statute indicates that section 718.116(9), Florida Statutes, precludes a condominium association from providing a choice of payment, either a lump sum payment or monthly installments with interest, where the unit owners are given a choice of payment.
11. Additionally, disallowing the Association from providing this choice would constitute a hardship on the Association (where the Association is unable to secure the special assessment from all unit owners in order to procure the needed maintenance and restoration projects), and possibly the unit owners (where not all unit owners are financially able to pay the assessment fee in one lump sum).

ORDER

Based on the findings of fact and conclusions of law, it is declared that section 718.116(9) does not prohibit a condominium association from assessing unit owners in accordance with their percentage interests for repair work in a manner that permits owners the option of paying the assessment in full without interest or paying the assessment with interest over a period of months.

DONE and ORDERED this 11 day of September, 2003.



A handwritten signature in black ink, appearing to read "Ross Fleetwood", written over a horizontal line.

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 Walter Grover, 2600 North Flagler Drive, West Palm Beach, Florida 33407, this 16th day of September, 2003.

Robin Bradwell

Robin Bradwell, Docket Clerk

Copies furnished to:

Ross Fleetwood, Director

Janis Sue Richardson, Senior Attorney

Office of the General Counsel

DICKER, KRIVOK & STOLOFF, P.A.

ATTORNEYS AT LAW

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September 2, 2003
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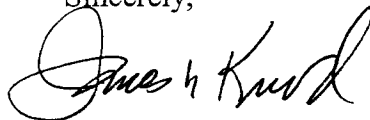
State of Florida-Dept. of Business
and Professional Regulation
Office of the General Counsel
1940 N. Monroe St.
Tallahassee, FL 33399-2202

**Re: In Re: Petition for Declaratory Statement, Walter Grover, Unit Owner,
Portofino Condominium Apartments, Petitioner; Docket Number 2003065160**

Dear Sir or Madam:

In accordance with the request made by Joseph Garwood, I have enclosed the memorandum of law being submitted on behalf of the Respondent, Portofino Condominium Apts. of Palm Beach, Inc. Should your office require any further information relative to this matter, please contact me.

Sincerely,



JAMES N. KRIVOK
For the Firm

JNK/jsa
cc: David Thompson, Property Manager (w/ encl., via fax)
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**In Re: Petition for Declaratory Statement, Walter Grover, Unit Owner,
Portofino Condominium Apartments, Petitioner; Docket Number 2003065160**

MEMORANDUM OF LAW

INTRODUCTION

The Portofino Condominium Apartment's Board of Directors passed a special assessment against all unit owners in the total amount of \$680,000 to fund major maintenance projects including roof replacement and balcony restorations. Each unit owner is required to pay his/her share of the assessment in the percentage specified in the Declaration of Condominium. A large number of unit owners had the ability and desire to pay the assessment in one lump sum. A similarly large number of owners expressed their inability to do so and desired a payment plan. To accommodate all unit owners, the assessment levied by the Association allowed unit owners to choose from two payment methods. Owners could elect to pay the assessments in a lump sum or pay the assessment in monthly payments amortized over thirty months with interest at the rate of 4.75% APR. Unit owners who elected to pay in installments may pay off the remaining balance of the special assessment at anytime and avoid further interest payments.

The State of Florida-Dept. of Business and Professional Regulation has been asked to issue a Declaratory Statement on whether a Condominium Association may levy an assessment that offers different payment methods including payments with interest. Because no unit owner is exempt from paying the assessment and all unit owners are being offered the same payment options (choosing the payment method is determined solely by the individual unit owner), the Association contends that alternative payment plans should be allowed. Law and arguments in support of the Association's contention are set forth below.

LAW AND ARGUMENT

Florida Statute §718.115(f)(2) provides that “funds for payment of the common expenses of a condominium shall be collected by assessments against the units in that condominium in the proportions or percentages provided in the condominium declaration.” It is well established in Florida that no unit owner can be excused from paying any portion of an assessment unless all unit owners are also excused from payment. See *Glynn v. Siegal*, 637 So. 2d 324 (Fla. 4th DCA 1994). Furthermore, associations cannot treat different groups of owners dissimilarly or pass rules which discriminate against one group of owners. See *Juno by the Sea North Condominium Association v. Manfredonia*, 397 So. 2d 297 (Fla. 4th DCA 1981).

However, Florida Courts recognize that where the end result of an association’s actions are the same for all owners and the actions or rule promulgated is reasonable and not arbitrary, such action or rule is not discriminatory. See *Glynn v. Siegal*, 637 So. 2d 324 (Fla. 4th DCA 1994) and *Juno by the Sea North Condominium Association v. Manfredonia*, 397 So. 2d 297 (Fla. 4th DCA 1981).

In *Glynn v. Siegal*, all unit owners at the Seacrest Tower Condominium were required to pay monthly rent on the community facilities lease. Unit owners who purchased an interest in the lease received a warranty deed plus monthly rental income payments in an amount equal to the monthly rent. To avoid duplicative check writing, the purchasing owner was exempt from actually sending the monthly rent payment to the lessor and the lessor would not send the corresponding monthly rental income payment to the owner. The Fourth District Court of Appeals held that because all owners, including the purchasing owners, continue to have the obligation to pay the monthly rent, the owners were not being treated dissimilarly. The Fourth District Court recognized that the end

result to the owners was the same as if the purchasing owners mailed their monthly rent payment to the lessor and received an equal payment back from the lessor.

As in *Glynn v Siegal*, the Association's payment options do not treat different groups of owners dissimilarly or discriminate against any owner or group of owners. The special assessment was passed and levied by the Association in accordance with Florida Statute §718.115(f)(2) and is calculated in accordance with the percentages designated in the Declaration of Condominium. Each unit owner is obligated to pay the Assessment. However, because the Association anticipated that a large number of unit owners would not be able to pay the special assessment in one lump sum and would become delinquent, unit owners were given an opportunity to pay the amount due on a payment plan.

Article XXVII(F) of Amended and Restated Declaration of Condominium for Portofino Condominium Apartments of Palm Beach, Inc. permits the Association to collect interest on delinquent assessments. The end result of offering the assessment payment plan is no different than if the Association required all owners to pay in one lump sum, declared those who failed to pay delinquent, and then settled the delinquency by agreeing to accept a payment plan which includes interest on the delinquent amount. By providing two payment options the Association is simply saving time and unnecessary expense of having to declare owners delinquent and then enter into a payment plan with interest.

Furthermore, in *Juno by the Sea North Condominium Association v. Manfredonia*, 397 So. 2d 297 (Fla. 4th DCA 1981) the Fourth District Court of Appeal applied equitable principals in determining whether an association's regulation was reasonable and non-discriminatory. In *Juno By The Sea North*, fifty of seventy unit owners purchased a covered parking space which was then

considered a limited common element. Fifty other parking spaces were available to all owners as a common element. The Juno By the Sea North Condominium Association passed a regulation assigning parking spaces only to the fifty unit owners who did not purchase covered parking spaces. The association had the authority and duty to regulate and maintain of all the parking spaces, covered or uncovered and all the unit owners shared in the expense. In light of this fact and because twenty owners who were not assigned parking spaces already had a specified parking space, the Court held that the Association's assignment of the fifty spaces to the fifty unit owners without covered parking was fair and reasonable, and did not violate the Condominium Act.

Similar to *Juno by the Sea North Condominium Association v. Manfredonia*, the Association's resolution offering two payment methods is fair and reasonable. The special assessment was necessary because significant work on the condominium is immediately needed. A large number of unit owners are on a fixed income and did not have the financial means to pay their share of the special assessment in one lump sum. A similarly large number of unit owners had the financial ability to pay in one lump sum and did not want to pay interest. Requiring one method of payment (i.e. lump sum over payment plan) would result in a hardship to one of the groups of unit owners. In an effort to accommodate all unit owners, the Association offered two different payment methods at the unit owners option. All unit owners still have the obligation to pay their share of the special assessment. No unit owner is being discriminated against as each unit owner has the sole option of choosing the payment method desired.

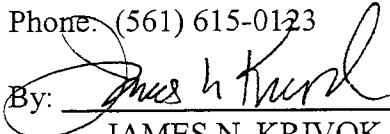
Finally, a declaratory statement that a condominium board of administrators cannot provide reasonable payment options when levying a special assessment will work an unnecessary hardship on condominium boards and their unit owners. It is contrary to sound public policy to issue a

declaratory statement that would prohibit condominium board's from having the flexibility to allow alternate payment plans for special assessments.

CONCLUSION

Permitting unit owners to choose between alternate payment methods when paying a substantial special assessment does not treat unit owners dissimilarly nor does it discriminate against any unit owner. Furthermore, the offering of two optional payment methods is both fair and equitable. Each unit owner has the option of choosing the method of payment that is the least burdensome and most desirable. It is totally illogical to prohibit associations from levying a special assessment with an optional payment plan at a reasonable interest rate, when the association has the clear legal power to accept payment plans with interest from delinquent owners. The end result is the same. Accordingly, public policy weighs heavily in favor of allowing an association's board of directors to offer alternative methods of payment so long as all unit owners are obligated to pay the assessment and are treated equally.

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By: 

JAMES N. KRIVOK
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PORTOFINO CONDOMINIUM APTS. OF
PALM BEACH, INC.