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. 2006014351

Aloha Kai Association, Inc.

DECLARATORY STATEMENT

Aloha Kai Association, Inc. and Aloha Kai Vacation Rental, Inc. (Aloha Kai), through its board member, Delilah Simmons, filed a petition for declaratory statement requesting an opinion as to whether Aloha Kai is required under section 719.104(3), Florida Statutes, and its governing documents to provide property, casualty, fire, and flood insurance on individual units within the cooperative.

STATEMENT OF FACTS

The following facts are based on information submitted by Aloha Kai. The Division takes no position as to the accuracy of the facts, but merely accepts them as submitted for purposes of this declaratory statement. A hearing was not requested or held.

1. Aloha Kai filed its original petition with the Division on January 14, 2005. Notice of the petition was published in Florida Administrative Weekly on January 24,
2005. An informal hearing was held on April 12, 2005, and Aloha Kai withdrew its original petition with the Division on April 21, 2005.

2. On March 8, 2006, Aloha Kai filed a request with the Division to issue a declaratory statement regarding its original petition. Notice of this second petition was published in the Florida Administrative Weekly on April 7, 2006.

3. Aloha Kai is an “association,” as that term is defined by section 719.103(2), Florida Statutes, which operates Aloha Kai, a cooperative.

4. Aloha Kai does not currently provide insurance or flood insurance on its individual unit structures. The Aloha Kai Board previously found such insurance to be within the discretion of the individual members who had exclusive use of the unit structures. The original petition states that “[t]herefore no uniformity exists on coverage including any actual verification [of] Dwelling Insurance and/or Flood Insurance.”

5. Aloha Kai’s second petition states that the association “has been advised by a qualified insurance agent that a master insurance policy cannot be obtained for flood insurance from the National Flood Insurance Program and that flood insurance policies would still have to be issued separately for individual units.”

6. From the documents submitted by Aloha Kai, it appears that individual members are responsible for the interior of the units as well as a pro rata share of all common expenses. The Restated Bylaws of Aloha Kai Association, Inc. provides for the collection of various common expenses in the following manner:

   The Association, as agent for the members, shall purchase bulk water and sewer services, and garbage collection services, for and on behalf of the individual members upon a per “living unit” basis. For these purposes, a “living unit” is defined as an apartment consisting of a kitchen which includes a functioning sink, refrigerator, and stove, and may include at least one or more bedrooms, one or
more bathrooms, and a living room. The redistributed costs shall be due and payable, and collected as, a common expense. Art. V, § 3.

7. Further, the restated bylaws state that unit and common element ownership is “based on the pro-rata share formula in the standard lease agreement.” Art. IX, § 1.

8. Aloha Kai originally submitted an Aloha Kai Standard Lease Agreement, which provides in relevant parts (emphasis added):

B.2. The Lessee [purchaser/shareholder] shall pay Lessor’s [developer] maintenance fee on the 2nd day of January 1962. Subsequent to the 1st day of January 1968, Lessor shall thereafter promptly pay to the Association such sums or assessments as the Association shall require for maintenance, taxes and insurance, when the same shall become payable.

B.3. . . . If, by reason of any use of said premises by the Lessee, the rate of fire insurance on “The Cottages” or any part thereof, shall be increased; the Lessee shall be personally liable to Lessor . . . for the increased cost of insurance, which will be added to Lessee’s rent or assessment, as the case may be, and collected with the next installment as a part thereof.

C.6. The Directors of the Association shall have the right and authority to make assessments on the first day of January each year, or as soon thereafter as they may conveniently do so, to provide for Pro-Rata Share payments from each cottage unit to cover the expenses of management, maintenance and the operation of “The Cottages”. The scope shall embrace the office, managers living quarters, activity rooms, swimming pool, equipment room, roads, beaches, landscaped areas exclusive of those contained in the individual cottage area, the property taxes and the insurance on improved areas construed to be held in common, the property taxes as assessed on all the property of “The Cottages”, however nothing herein contemplates the maintenance of the interior of the Members’ individual cottage unit or the insuring or the paying of taxes thereon of the Members’ individual chattels.

9. An Aloha Kai Vacation Rentals, Inc. agreement submitted along with original the petition includes the following:

6. INDEMNIFICATION AND INSURANCE
a. The owner agrees to maintain in force at all times during the term of this agreement a liability insurance policy in an amount of at least $100,000 and property insurance policies (including wind and flood) in amounts at least equal to 75% of the current Sarasota County assessment for the unit.
10. In addition to asking whether the Association must provide insurance on the individual units, the Petition also asks for a clarification regarding limited liability corporations and whether the Association can view individual members’ insurance policies on the units to which they have exclusive use rights.

CONCLUSIONS OF LAW

1. The Division has jurisdiction to enter this order in accordance with sections 120.565 and 719.501, Florida Statutes.

2. Aloha Kai has standing to seek this declaratory statement.

3. Section 719.104(3), Florida Statutes, provides (emphasis added):

INSURANCE. – The association shall use its best efforts to obtain and maintain adequate insurance to protect the association property. The association may also obtain and maintain liability insurance for directors and officers, insurance for the benefit of association employees, and flood insurance. A copy of each policy of insurance in effect shall be made available for inspection by unit owners at reasonable times.

4. In regards to flood insurance, section 719.104(3), Florida Statutes, employs the term “may” rather than “shall.” Thus, from a plain reading of the provision, a cooperative association is permitted to maintain flood insurance (including flood insurance on the units to which individual members have exclusive use rights), but it is not required by statute to do so.

5. However, under section 719.104(3), Florida Statutes, cooperative associations must maintain or use best efforts in attempting to obtain insurance to protect “association property.” The issue here is whether the term “association property” includes the units to which individual members have exclusive use. The statute does not define the term “association property,” but its definitions of “association” and “cooperative” are instructive.
6. Section 719.103(12), Florida Statutes, defines “cooperative” as

(emphasis added):

that form of ownership of real property wherein legal title is vested in a corporation or other entity and the beneficial use is evidenced by an ownership interest in the association and a lease or other muniment of title or possession granted by the association as the owner of all the cooperative property.

7. Section 719.103(2), Florida Statutes, defines “association” as:

the corporation for profit or not for profit that owns the record interest in the cooperative property or a leasehold of the property of a cooperative and that is responsible for the operation of the cooperative.

8. Pursuant to the above statutory definitions, the cooperative association holds leasehold interest in the cooperative real property and is responsible for its operation. Art. II, Art. of Incorp. The cooperative unit owners are conveyed the exclusive use of their units and a shareholder interest in the cooperative association. Since the cooperative association holds a record interest in the cooperative real property, the term “association property” includes all the units to which individuals are given exclusive use rights. Therefore, pursuant to section 719.104(3), Florida Statutes, cooperative associations must use best efforts to obtain and maintain insurance for the individual units as such units are association property.

9. The Aloha Kai Vacation Rentals, Inc. agreement is a private contract between unit owners and a rental management company. Even though the petition states that Aloha Kai Vacation Rentals, Inc. is a “cooperative,” no evidence was provided to show that the rental company meets the definition of a residential cooperative under section 719.103(21), Florida Statutes. Therefore, this contract is not subject to interpretation by the Division under chapter 719, Florida Statutes.
10. The rental agreement provides for the unit owner who contracts with Aloha Kai Vacation Rentals, Inc. to rent his or her cottage, to maintain liability, wind and flood insurance on the unit and to indemnify the cooperative association for any loss under these policies. Any ambiguity caused by this provision in relation to the terms of the cooperative documents, must be resolved by a court. See Peck Plaza Condo. v. Division of Florida Land Sales, 371 So. 2d 152 (Fla. 1st DCA 1979).

11. Petitioner also sought clarification of the insurance provisions for units owned by limited liability corporations. Petitioner did not cite to any statute, rule, or order when requesting the agency’s opinion regarding limited liability corporations and the Association’s ability to view individuals’ insurance policies or the corporation’s liability for insuring the property. Section 120.565, Florida Statutes, states that a petition for declaratory statement “shall specify the statutory provision, rule, or order that the petitioner believes may apply to the set of circumstances.” Therefore, the Division cannot address those questions in this proceeding.

ORDER

Based upon the findings of fact and conclusions of law, it is declared the cooperative association is required by section 719.104(3), Florida Statutes, to use its best efforts to insure all cooperative association property, which includes the units but not the interiors under the cooperative agreement, that are used exclusively by cooperative lessees.
DONE and ORDERED this 4th day of May, 2006.

MICHAEL T. COCHRAN, Director
Department of Business and Professional Regulation
Division of Florida Land Sales, Condominiums, and Mobile Homes
1940 North Monroe Street
Tallahassee, Florida 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 Delilah Simmons, 1030 Lakeshore Lane, Chattanooga, Tennessee 37415 and William Freund, 6020 Midnight Pass Road, Sarasota, Florida 34242 on this 15th day of May, 2006.

Robin McDaniel, Division Clerk

Copy furnished to:
Janis Sue Richardson,
Chief Assistant General Counsel