

Department of Business and Professional Regulation
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DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION
DIVISION OF FLORIDA LAND SALES, CONDOMINIUMS, AND MOBILE HOMES

IN RE PETITION FOR DECLARATORY STATEMENT

DS 2007-034

ALTAMIRA AT N. HUTCHINSON ISLAND CONDOMINIUM ASSOCIATION, INC.

Docket No. 2007042090
/

DECLARATORY STATEMENT

The Department of Business and Professional Regulation, Division of Florida Land Sales, Condominiums, and Mobile Homes (Division) hereby issues this Declaratory Statement pursuant to sections 120.565 and 718.501, Florida Statutes. The issue is whether Altamira at N. Hutchinson Island Condominium Association, Inc. (Association) may amend the declaration of its two condominiums to change the allocation of the common expenses assessed for the limited common elements assigned to each separately with a two-thirds vote under section 718.110(4) and combine the reserves for these expenses under section 718.112(2)(f), Florida Statutes.

PRELIMINARY STATEMENT

On July 23, 2007, the Division received a petition for declaratory statement from Association, the association in charge of managing Altamira at North Hutchinson Island, A Condominium (Altamira). Notice of receipt of the petition was published in Florida Administrative Weekly on August 24, 2007.

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FINDINGS OF FACT

The following findings of fact are based on information submitted by Association. The Division takes no position as to the accuracy of the facts, but merely accepts them as submitted for purposes of this final order.

1. The developer submitted the land and property for Altamira to the condominium form of ownership in February 2003. Declaration of Condominium of Altamira at North Hutchinson Island, a Condominium (Declaration) at 1. Altamira is a phase condominium governed under the provisions of section 718.403, Florida Statutes. Art. 3.5, Declaration. The declaration adopts the Condominium Act, as it may be amended after the date of recording. Declaration at 1.

2. Association was created to operate and govern Altamira. Art. 11, Declaration; art. II, Articles of Incorporation of Altamira at North Hutchinson Island Condominium Association, Inc. (Art. of Incorp.) Association is a condominium "association," as that term is defined by section 718.103(2), Florida Statutes (2004).

3. Altamira consists of a North building and a South building. Pet. for Dec. Stmt. at 1. The North building, Phase I, was submitted in February 2003. Declaration at 1, art. 3.3. The South building, Phase II, was submitted by amendment in January 2004. Amendment to Declaration of Condominium for Altamira at North Hutchinson Island, a Condominium at 1.

4. Article 5.1 of the Declaration provides that "[e]ach Unit shall own an equal undivided interest in the Common Elements and Common Surplus, and an equal share of the Common Expenses. Each Unit's undivided interest is an equal fractional share and is based on the total number of Units in the Condominium."

5. Article 3.2 of the Declaration defines the limited common elements appurtenant to the units. Article 3.2(d) provides that:

The North and South Building's individual roof structures, exterior walls, elevators, stairways and ground floor rooms (presently designated as a fitness room, card room, party room, library, boiler room, lobby, vestibule, electrical room, generator room, bathrooms, trash room, sauna and hallways) are designated as Limited Common Elements for the exclusive use and benefit of each Building's Unit Owners; the maintenance, repair and replacement costs shall be limited common element expenses shared only by the Unit Owners of that Building who are entitled to the use and benefit of those Limited Common Elements. (emphasis added).

6. The maintenance of the garage parking spaces and each building's exterior walls, roof structures, and elevators are the responsibility of Association. Art. 7.1, Declaration. Article 7.1 further provides that:

The maintenance, repair, and replacement cost for each Building's exterior walls, roof structures and elevators shall be borne on an equal fractional basis by the Unit Owners entitled to the use of those Limited Common Elements, based on the total number of Units sharing those Limited Common Elements. The maintenance, repair, and replacement cost for the parking garages shall be a common expense. (emphasis added).

7. Except as otherwise provided, proposed amendments may be approved "by affirmative vote of Unit Owners owning in excess of 66 2/3% of the Units." Art. 6.1, Declaration. However, any amendment which changes the configuration or size of any unit in any material fashion, materially alters or modifies the appurtenances to any unit, or changes the equal fractional shares by which a unit owner shares the common expenses and owns the common elements and common surplus, must be approved by

all affected unit owners, all record owners of mortgages or liens, and the owners of a majority of all other units. Art. 6.4, Declaration.

8. The North and South building share a swimming pool, the power for both the buildings and the common power, a parking lot, the garages, insurance, and water for both the buildings and for the common elements. Pet. at 1-2. The two buildings share the reserve and maintenance funds for the parking lot and garages. Id. at 2.

9. There are certain reserve accounts that are separate for the two buildings. Id. Association finds keeping two reserve fund accounts is more time consuming and expensive, and wishes to combine the funds. Id. at 1-2.

CONCLUSIONS OF LAW

10. The Division has jurisdiction to enter this order pursuant to sections 718.501 and 120.565, Florida Statutes.

11. Association has standing to seek this declaratory statement.

12. Condominiums are created and governed by statute. See, e.g., Suntime Condo. Ass'n, Inc. v. Div. of Fla. Land Sales and Condo., Dep't of Bus. Reg., 463 So. 2d 314 (Fla. 1st DCA 1984). In Florida, the governing statutes are in chapter 718, known as the Condominium Act.

Proposed Amendment

13. Section 718.113(1), Florida Statutes, provides in part that:

The declaration may provide that certain limited common elements shall be maintained by those entitled to use the limited common elements or that the association shall provide the maintenance, either as a common expense or with the cost shared only by those entitled to use the limited common elements. If the maintenance is to be by the association at the expense of only those entitled to use the limited common elements, the declaration shall describe in

detail the method of apportioning such costs among those entitled to use the limited common elements

14. Section 718.110(1)(a), Florida Statutes, provides that:

If the declaration fails to provide a method of amendment, the declaration may be amended as to all matters except those described in subsection (4) or subsection (8) if the amendment is approved by the owners of not less than two-thirds of the units. Except as to those matters described in subsection (4) or subsection (8), no declaration recorded after April 1, 1992, shall require that amendments be approved by more than four-fifths of the voting interests. (emphasis added).

15. Section 718.110(4), Florida Statutes, provides that:

Unless otherwise provided in the declaration as originally recorded, no amendment may change the configuration or size of any unit in any material fashion, materially alter or modify the appurtenances to the unit, or change the proportion or percentage by which the unit owner shares the common expenses of the condominium and owns the common surplus of the condominium unless the record owner of the unit and all record owners of liens on the unit join in the execution of the amendment and unless all the record owners of all other units in the same condominium approve the amendment. (emphasis added).

16. Section 718.103(1), Florida Statutes, defines assessment as the "share of the funds which are required for the payment of common expenses, which from time to time is assessed against the unit owner." Common expenses include "the expenses of the operation, maintenance, repair, and replacement or protection of the common elements...." § 718.115(1)(a), Fla. Stat. (2007). Limited common elements are a "subset" of the common elements and therefore are considered a common expense. Cedar Cove Efficiency Condo. Ass'n v. Cedar Cove Properties Inc., 558 So. 2d 475, 479 (Fla. 1st DCA 1990). An association has the authority to assess all unit owners for the operation, maintenance, repair, and replacement of limited common elements units.

See In Re: Pet. for Dec. Stmt. Norm Anderson (Riverplace One Hundred, Inc.), BPR-2005-01549 (Mar. 29, 2005) (finding association that assessed the costs of maintaining limited common elements as a common expense to all unit owners complied with Condominium Act).

17. The proposed amendment seeks to assess the costs for the maintenance, repair, and replacement of the limited common elements listed in Article 3.2 of the Declaration as a common expense to all unit owners instead of to only those given exclusive use. The proposed amendment seeks not to change the exclusivity of the limited common elements or change the limited common elements to common elements; it merely seeks to change who pays the cost of maintaining, repairing, and replacing the limited common elements.

18. Furthermore, the amendment does not change the unit owner's percentage share of the common elements or common expenses, which would require an amendment under the provisions of section 718.110(4), Florida Statutes. See In Re: Pet. for Dec. Stmt. Smuggler's Landing at Cortez Condo. Ass'n, BPR-2005-03775 (July 13, 2005) (concluding an amendment seeking to change the percentage shares by which unit owners share the common expenses and own the common surplus from a square footage method to a formula based partly on square footage and partly on an equal fractional basis would require approval under section 718.110(4), Florida Statutes). Article 5.1 of the Declaration provides that each unit has an equal fractional share based on the number of units in the condominium in the common elements, common surplus, and common expenses. The proposed amendment will not change

this equal fractional share; it merely changes who is responsible for the costs associated with maintaining, repairing, and replacing the limited common elements.

19. While section 718.113(1) gives the association the authority to allocate the costs of the limited common elements to only those given exclusive use, it is not required to do so. In Re: Pet. for Dec. Stmt. Norm Anderson (Riverplace One Hundred, Inc.), BPR-2005-01549 (March 29, 2005). Section 718.113(1) provides that the costs of the limited common elements may be assessed as a common expense to all unit owners. Section 718.110 provides a broad authority to an association to amend the declaration of a condominium. Woodside Vill. Condo. Ass'n v. Jahren, 806 So. 2d 452, 457 (Fla. 2002). The legislature placed limitations on the authority of unit owners to amend a declaration by including provision 718.110(4), which requires approval by all unit owners and lien holders when a proposed amendment materially alters or modifies the appurtenances of a unit or changes the percentage share of the common elements or common surplus. See Woodside, 806 So. 2d at 464 (discussing the provisions of section 718.110(1)(a), (4), and (8) in showing legislative intent to place limitations on the ability to amend a declaration). However, Association's proposed amendment neither materially alters nor modifies the appurtenances to a unit or changes the percentage share of the common elements or common surplus; it merely changes who is assessed for the maintenance, repair, and replacement of the limited common elements. Therefore, section 718.110(4) does not apply, and we must look to section 718.110(1)(a) to determine the amendment procedures.

20. Section 718.110(1)(a) provides that "[i]f the declaration fails to provide a method of amendment, the declaration may be amended as to all matters except those

described in subsection (4) or subsection (8) if the amendment is approved by the owners of not less than two-thirds of the units.” Article 6.1 of the Declaration contains the requirements for proposed amendments. Therefore, because the declaration provides methods of amendment, the declaration controls and not section 718.110(1)(a). Article 6.1 provides that proposed amendments may be approved by an excess of two-thirds of the unit owners. The proposed amendment seeking to change the allocation of the common expenses assessed for the limited common elements can be approved by an excess of two-thirds of the unit owners under article 6.1 of the Declaration.

Reserve Fund

21. Section 718.112(2)(f)(2), Florida Statutes, provides that:

In addition to annual operating expenses, the budget shall include reserve accounts for capital expenditures and deferred maintenance. These accounts shall include, but are not limited to, roof replacement, building painting, and pavement resurfacing, regardless of the amount of deferred maintenance expense or replacement cost, and for any other item for which the deferred maintenance expense or replacement cost exceeds \$10,000. The amount to be reserved shall be computed by means of a formula which is based upon estimated remaining useful life and estimated replacement cost or deferred maintenance expense of each reserve item. The association may adjust replacement reserve assessments annually to take into account any changes in estimates or extension of the useful life of a reserve item caused by deferred maintenance.

21. Funding formulas for reserves can be based on either a separate analysis for each required asset or a pooled account for two or more required assets. Fla. Admin. Code R. 61B-22.005(3). An association may group similar or related assets together, but is not required to do so. Id. at R. 61B-22.005(1).

22. If an association does not maintain a pooled account, the budget must include a schedule stating each reserve account for capital expenditures and deferred maintenance as a separate line item and disclose: the total estimated useful life of the asset; the estimated remaining useful life of the asset; the estimated replacement costs or deferred maintenance expense of the asset; the estimated fund balance as of the beginning of the budget period; and the developer's total funding obligation, when all units are sold, for each converter reserve account established, if applicable. Id. at R. 61B-22.003(1)(e).

23. If an association maintains a pooled account for reserves, the budget must include a separate schedule of any pooled reserves disclosing: the total estimated useful life of each asset within the pooled analysis; the estimated remaining useful life of each asset within the pooled analysis; the estimated replacement cost or deferred maintenance expense of each asset within the pooled analysis; and the estimated fund balance of the pooled reserve account as of the beginning of the budget period. Id. at R. 61B-22.003(1)(f).

24. Florida Administrative Code Rule 61B-22.003(5) (2002) provides that:

If an association maintains limited common elements at the expense of only those unit owners entitled to use the limited common elements pursuant to Section 718.113(1), Florida Statutes, the budget shall include a separate schedule, or schedules, conforming to the requirements for budgets as stated in this rule, of all estimated expenses specific to each of the limited common elements, including any applicable reserves for deferred maintenance and capital expenditures. The schedule or schedules may group the maintenance expense of any limited common elements for which the declaration provides that the maintenance expense is to be shared by a group of unit owners.

25. There are currently separate reserve accounts for certain components of the North and South buildings, and Association would like to combine the funds for the reserves. Pet. at 1-2. Florida Administrative Code Rule 61B-22.003(5) requires separate reserve schedules for any limited common elements designated by section 718.113(1) to be at the expense of only those unit owners entitled to use the limited common elements. Association's proposed amendment would change the allocation of the expenses for the limited common elements from only those unit owners given exclusive use to all unit owners. If the proposed amendment was approved according to the amendment provisions of the Declaration, Association would no longer be required to provide a separate schedule to account for the reserves for deferred maintenance and capital expenditures of the limited common elements under 61B-22.003(5). Association may then collect reserve funds based on assessments for all items under the percentages for common expenses stated in article 5.1 of the Declaration. However, Association must still abide by the funding, reporting, and disclosure requirements of section 718.112(2)(f) and Florida Administrative Code Rules 61B-22.003 and 61B-22.005.

ORDER

Based on the findings of fact and conclusions of law, it is ordered that if Association amends the declaration to change the allocation of common expenses for limited common elements with an excess of two-thirds vote pursuant to the amendment provisions of its declaration, it may combine the reserve funds under section 718.112(2)(f), Florida Statutes.

DONE and ORDERED this 5th day of October, 2007,

at Tallahassee, Leon County, Florida.



Division of Florida Land Sales,
Condominiums & Mobile Homes

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

MICHAEL T. COCHRAN, Director
Department of Business and
Professional Regulation
Division of Florida Land Sales, Condominiums
and Mobile Homes
Northwood Centre
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 Jane L. Cornett, Cornett, Googe & Associates, P.A., P.O. Box 66, Stuart, Florida 34995-0066, on this 10th day of October, 2007.

Robin McDaniel
Robin McDaniel, Division Clerk

Copies furnished to:

Janis Sue Richardson
Chief Attorney