

Department of Business and Professional Regulation
AGENCY CLERK

Sarah Wachman, Agency Clerk

STATE By: Brenda M. Nikol

DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION
DIVISION OF FLORIDA LAND SALES, CONDOMINIUMS, AND MOBILE HOMES

IN RE PETITION FOR DECLARATORY STATEMENT **DS 2007-033**

TOWNHOUSES AT JACARANDA CONDOMINIUM ASSOCIATION, INC.

Docket No. 2007040095

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 how Townhouses at Jacaranda Condominium Association, Inc. (Association), a multicondominium association, may comply with section 718.3026, Florida Statutes, in its competitive bidding process for roof repair.

PRELIMINARY STATEMENT

On July 12, 2007, the Division received a petition for declaratory statement from Association, the association in charge of managing Townhouses at Jacaranda, a multicondominium development. Notice of receipt of the petition was published in Florida Administrative Weekly on August 10, 2007.

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. Cadillac Southern Developments Limited and Wex Corporation submitted the land and property for Townhouses at Jacaranda to the condominium form of ownership. Townhouses at Jacaranda is a 47 building, 340 unit multicondominium development governed by Association. Pet. for Dec. Stmt. at 1; art. IX, sec. B, Declaration of Condominium of Islandia Condominium (Townhouses at Jacaranda Condominium) 20 (Declaration)¹. The declaration adopts the Condominium Act. Declaration at 1.

2. In November 2001, the declarations, bylaws, and articles of incorporation were amended to change the names of Association, the condominiums, and the community. Certificate of Amendment at 2-3. The name of the condominium association changed from "Islandia Condominium Association, Inc." to "Townhouses at Jacaranda Condominium Association, Inc."; the condominium name changed from "Islandia Condominium" to "Townhouses at Jacaranda Condominium"; and the community name changed from "Islandia" to "Townhouses at Jacaranda." Id.

3. Association was created to operate and govern Townhouses at Jacaranda. Art. IX, sec. B, Declaration; sec. 1, By-laws of The Townhouses at Jacaranda Condo. Ass'n (By-laws). Association is a condominium "association," as that term is defined by section 718.103(2), Florida Statutes (2004).

4. Association has all the statutory and common law powers given to a not-for-profit corporation, and all the powers of a condominium association under the Condominium Act, including the right to maintain, repair, replace, and operate the condominium property, and to reconstruct improvements within the condominium property. Art. III,

¹ The Declaration of this condominium was submitted as being representative, and identical to, the declarations of all condominiums in the Townhouses at Jacaranda community. The date of recording of Islandia 20 is not certain, but appears to have been in January 1978. Declaration at 23.

Articles of Incorporation of The Islandia Condominium Association, Inc. (Townhouses at Jacaranda Condominium Association, Inc.) (Art. of Incorp.).

5. Article 5.2 of the Bylaws requires that "[a]ny work performed in excess of \$999.99 must go out for a minimum of three (3) written bids," and that "[a]ll contracts for an amount exceeding \$2999.99 must og [sic] out for a minimum of three (3) written bids and must be awarded by a vote of the Board taken at a Board of Director's meeting."

6. Association created a process for obtaining bids from qualified contractors to replace the roofs for the entire community. Pet. at 1. Association wants to know how section 718.3026 applies to multicondominium associations. Id. at 2. Particularly, Association wants to know whether the 5% rule provision in section 718.3026 applies to the entire Association budget with reserves or upon the individual budgets for each condominium as required to be prepared by In Re: Pet. for Dec. Stmt. Islandia Condo. Ass'n, BPR-94-00001318 (Mar. 16, 1994). Pet. at 2.

7. The Division has previously concluded that Association must maintain separate financial records and a separate budget for each condominium it operates. In Re: Pet. for Dec. Stmt. Islandia Condo. Ass'n at 7. The Division reasoned the intent of this requirement was to prohibit an association which operates more than one condominium from combining the expenses of multiple condominiums and the association and then dividing the combined costs among the unit owners in all condominiums operated by the association. Id. Association seeks clarification on whether this requirement for separate budgets means each condominium should be considered as a separate entity with regards to the 5% rule in section 718.3026. Pet. at 2.

CONCLUSIONS OF LAW

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

9. Association has standing to seek this declaratory statement.

10. 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.

11. An association must maintain separate accounting records for the association and for each condominium which the association operates. § 718.111(12)(a)(11), Fla. Stat.; Fla. Admin. Code R. 61B-22.002.

12. "An association shall adopt a separate budget of common expenses for each condominium the association operates and shall adopt a separate budget of common expenses for the association." § 718.112(2)(f)(1), Fla. Stat.; see also Fla. Admin. Code R. 61B-22.003(4)(a). The budgets must contain:

1. Estimated expenses specific to a condominium such as the maintenance, deferred maintenance or replacement of the common elements of the condominium...;

2. Estimated expenses of the association that are not specific to a condominium such as the maintenance, deferred maintenance or replacement of the property serving more than one condominium ...; and

3. Multicondominium associations created after June 30, 2000, or that have created separate ownership interests of the common surplus of the association for each unit as provided in Sections 718.104(4)(h) and 718.110(12), Florida Statutes, shall include each unit's share of the estimated

expenses of the association, referred to in subsection (2) of this rule, which shall be shown on the individual condominium budgets. Multicondominium associations created prior to July 1, 2000, that have not created separate ownership interests of the common surplus of the association for each unit as provided in Sections 718.104(4)(h) and 718.110(12), Florida Statutes, shall include each condominium's share of the estimated expenses of the association, referred to in subsection (2) of this rule

Fla. Admin. Code R. 61B-22.003(4)(a). (emphasis added).

13. As stated in In Re: Pet. for Dec. Stmt. Islandia Condo. Ass'n, the plain intent of the requirement that an association operating multiple condominiums must prepare a separate budget for each condominium is to ensure that the expenses for various condominiums are not divided among all the condominiums operated by the association. See also Chmil v. Mediterranean Manors Ass'n, 516 So. 2d 1109, 1110 (Fla. 2d DCA 1987) (holding unit owners in a multicondominium were liable only for their share of the common expenses in their individual condominium).

14. Section 718.3026, Florida Statutes (2005), covers contracts for products and services. Associations with less than 100 units may opt out of the provisions of this section with approval by two-thirds of the unit owners. Id. Section 718.3026(1) provides that:

All contracts as further described herein or any contract that is not to be fully performed within 1 year after the making thereof, for the purchase, lease, or renting of materials or equipment to be used by the association in accomplishing its purposes under this chapter, and all contracts for the provision of services, shall be in writing. If a contract for the purchase, lease, or renting of materials or equipment, or for the provision of services, requires payment by the association on behalf of any condominium operated by the association in the aggregate that exceeds 5 percent of the total annual budget of the association, including reserves,

the association shall obtain competitive bids for the materials, equipment, or services. Nothing contained herein shall be construed to require the association to accept the lowest bid. (emphasis added).

15. Section 718.3026, Florida Statutes, contains the language "on behalf of any condominium operated by the association." (emphasis added). The statute on its face clearly applies to multicondominiums. Furthermore, because the 5% provision refers to the "total annual budget of the association, including reserves," the plain language of the statute requires in the case of multicondominiums consideration of the total annual amount budgeted for all the condominiums managed by the association and the total annual budget for the association; not the individual budgets of each affected condominium. The canons of statutory interpretation require a presumption that the "legislature says in a statute what it means and means in a statute what it says there." Broz v. Rodriguez, 891 So. 2d 1205, 1207 (Fla. 4th DCA 2005) (quoting Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992)). The legislature specifically chose for the 5% threshold to be compared to the total annual budget of the association, including reserves; not the individual budgets of any affected condominiums.² The statute must be given the meaning required by the plain language.

16. The statutes and rules requiring separate budgets for each condominium of a multicondominium are procedural requirements intended to ensure that unit owners in multicondominiums are assessed for only those common expenses pertaining to their individual condominiums. However, this does not mean that in the case of contracts

² Note that the term "annual budget" implies that the contract must be bid in relation to the year the expense is to be incurred. See In Re: Pet. for Dec. Stmt. Lewis L. Larson (Cedar Pointe Vill. No. 8 Ass'n), BPR-2004-04235 (Sept. 17, 2004) (stating association with more than 100 units cannot use bids from a previous year's project, and must obtain competitive bids for the new project).

under section 718.3026, the 5% provision is to be considered from an individual condominium's budget. Association is responsible for repairing, maintaining, and replacing the common elements of the entire Townhouses at Jacaranda community. Art. XIV, section B, Declaration. Association must abide by the provisions of section 718.3026 any time a contract falls under its provisions. Association, because it governs 340 condominium units, may not opt-out of the provisions of section 718.3026, which only allows for an opt out when an association governs less than 100 units.³ Therefore, contracts exceeding 5% of the total annual budget of the association, including reserves, require the association to obtain competitive bids under section 718.3026. It is recommended that in addition to creating separate budgets for each condominium and for the association, Association create a combined budget, including reserves, for all condominiums and the association. This will aid in the determination of whether any contract falls within the 5% threshold of section 718.3026.

ORDER

Based on the findings of fact and conclusions of law, it is ordered that under section 718.3026, Florida Statutes, Townhouses at Jacaranda Condominium Association, Inc. must obtain competitive bids for any contracts for materials, equipment, or services that in the aggregate exceed 5% of the total annual budget of

³ Association expressed concern that in the past individual condominium buildings have waived the competitive bid requirement and selected the contractors they wanted to work on their units. Pet. at 3. Unless the provisions of section 718.3026, Florida Statutes, do not apply to a contract, Association may not opt out of the requirements contained in section 718.3026.

Association, including reserves, which includes all the budgets of all individual condominiums and the budget of the association.⁴

DONE and **ORDERED** this 30 day of August, 2007,

at Tallahassee, Leon County, Florida.



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

Division of Florida Land Sales,
Condominiums & Mobile Homes


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.

⁴Note that section 5.2 of the By-laws requires that Association obtain three written bids for any work performed in excess of \$999.99 and all contracts exceeding \$2999.99, and all contracts exceeding \$2999.99 must be awarded by vote of the Board. This provision is more restrictive than section 718.3026, as it is likely that \$2999.99 will be less than 5% of the total annual budget of an association governing 47 condominium buildings.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Jonathon S. Miller, 621 NW 53rd Street, Ste. 300, Boca Raton, Florida 33487, on this 14th day of September, 2007.


Robin McDaniel, Division Clerk

Copies furnished to:

Janis Sue Richardson
Chief Attorney