

Final Order No. BPR-2008-03195 Date: **4-11-08**

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Department of Business and Professional Regulation

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By: *Brendan 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 2008-010

2080 OCEAN DRIVE CONDOMINIUM ASSOCIATION, INC.

Docket No. 2008009772

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.

PRELIMINARY STATEMENT

On February 18, 2008, the Division received a Petition for Declaratory Statement from Catherine Adolf, a unit owner at the 2080 Ocean Drive Condominium (Ocean Drive), seeking an opinion as to whether 2080 Ocean Drive Condominium Association, Inc. (Association) maintains the limited common elements in accordance with section 718.113, Florida Statutes, and whether the management contract is fair and reasonable under section 718.302(4), Florida Statutes.

The Division sent a letter to Ms. Adolf on February 28, 2008, informing her that the Division may not issue a declaratory statement where the actions have already taken place, where there is a dispute of fact, or where the remedy sought is to set aside

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a management contract. The Division required Ms. Adolf to send in a complete set of the governing documents of Ocean Drive.

The Division received a copy of the governing documents, and a clarification of the issues from Ms. Adolf on March 21, 2008.

Notice of the receipt of petition was published in Florida Administrative Weekly on March 7, 2008.

FINDINGS OF FACT

The following findings of fact are based on information submitted by Ms. Adolf. 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. Riviera Yacht and Beach Club, Ltd. (Developer) submitted the land and improvements for Ocean Drive to the condominium form of ownership in July 2002. Arts. 1.2, 2.17, Declaration of 2080 Ocean Drive, a Condominium (Declaration). Ocean Drive contains two hundred thirty-three (233) units, consisting of two hundred twelve (212) tower units and twenty-one (21) townhouse units. Prospectus for 2080 Ocean Drive, a Condominium (Prospectus) at 6; Pet. for Dec. Stmt. at 1. The Declaration adopts chapter 718, the Condominium Act. Art. 1.2, Declaration.

2. Association was created to operate and govern Ocean Drive. Art. 3, Articles of Incorporation for 2080 Ocean Drive Condominium Association, Inc. (Art. of Incorp.). "The Association shall have all of the powers and duties set forth in the [Condominium] Act, except as limited by these Articles, the By-laws and the Declaration (to the extent they are not in conflict with the Act), and all of the powers and duties reasonably necessary to operate the Condominium...." Id. at art. 5.2. These powers include the

ability to contract for the management and maintenance of the Condominium by a management agent. Id. at art. 5.2(h).

Limited Common Elements and Annual Budget

3. Limited Common Elements are defined by the Declaration as "those Common Elements the use of which is reserved to a certain Unit or Units to the exclusion of Other Units, as specified in this Declaration." Art. 2.25, Declaration.

4. Article 3.3 of the Declaration discusses Limited Common Elements in detail.

Article 3.3 provides in relevant part that:

(d) Miscellaneous Areas, Equipment. Any fixtures or equipment (e.g., an air conditioning compressor or hot water heater) serving a Unit or Units exclusively and any area (e.g., a closet or ground slab) upon/within which such fixtures or equipment are located shall be Limited Common Elements of such Unit(s). The maintenance (and cost) of any such equipment and/or areas so assigned shall be the sole responsibility of the Owner of the Unit(s) to which it is assigned.

(e) Other. Any other portion of the Common Elements which, by its nature, cannot serve all Units but serves one Unit or more than one Unit (i.e., any hallway and/or elevator landing serving a single Unit or more than one (1) Unit owned by the same owner) shall be deemed a Limited Common Element of the Unit(s) served and shall be maintained by said Owner. In the event of any doubt or dispute as to whether any portion of the Common Elements constitutes a Limited Common Element or in the event of any question as to which Units are served thereby, a decision shall be made by a majority vote of the Board of Directors of the Association and shall be binding and conclusive when so made. To the extent of any area deemed a Limited Common Element hereunder, the Owner of the Unit(s) to which the Limited Common Element is appurtenant shall have the right to alter same as if the Limited Common Element were part of the Owner's Unit, rather than as required for alteration of Common Elements.

5. Article 7 of the Declaration, which governs maintenance and repairs, provides that:

7.1 Units and Limited Common Elements. All maintenance, repairs and replacements of, in or to any Unit and Limited Common Elements appurtenant thereto, whether structural or nonstructural, ordinary or extraordinary, foreseen or unforeseen, including, without limitation, maintenance, repair and replacement of windows, window coverings, interior nonstructural walls, the interior side of any entrance door and all other doors within or affording access to a Unit, and the electrical (including wiring), plumbing (including fixtures and connections), heating and air-conditioning equipment, fixtures and outlets, appliances, carpets and other floor coverings, all interior surfaces and the entire interior of the Unit lying within the boundaries of the Unit or the Limited Common Elements or other property belonging to the Unit Owner, shall be performed by the Owner of such Unit at the Unit Owner's sole cost and expense, except as otherwise expressly provided to the contrary herein.

7.2 Common Elements and Association Property. Except to the extent (i) expressly provided to the contrary herein, or (ii) proceeds of insurance are made available therefore, all maintenance, repairs and replacements in or to the Common Elements (other than those Limited Common Elements to be maintained by the Unit Owners as provided above) and Association Property shall be performed by the Association and the cost and expense thereof shall be charged to all Unit Owners as a Common Expense, except to the extent arising from or necessitated by the negligence, misuse or neglect of specific Unit Owners, in which case such costs and expenses shall be paid solely by such Unit Owners.

7.3 Specific Unit Owner Responsibility. The obligation to maintain and repair any air conditioning equipment, plumbing or electrical fixtures or other items of property which service a particular Unit or Units (to the exclusion of other Units) shall be the responsibility of the applicable Unit Owners, individually, and not the Association, without regard to whether such items are included in the boundaries of the Units.

6. Article 10.1 of the By-laws of 2080 Ocean Drive Condominium Association, Inc.

(Bylaws) provides in relevant part that:

The Board of Directors shall from time to time, and at least annually, prepare a budget for all Condominiums governed and operated by the Association (which shall detail all accounts and items of expense and contain at least all items set forth in Section 718.504(21) of the Act, if applicable), determine the amount of Assessments payable by the Unit Owners to meet the expenses of such Condominium(s) and allocate and assess such expenses among the Unit Owners in accordance with the provisions of the Declaration. In addition, if the Association maintains limited common elements with the cost to be shared only by those entitled to use the limited common elements, the budget or a schedule attached thereto shall show amounts budgeted therefore. (emphasis added).

7. Ms. Adolf asserts that Association is violating section 718.113(1), Florida Statutes by including limited common elements in the annual budget of Association, where those limited common elements are required by the declaration to be maintained solely by the unit owner(s) entitled to use them. Pet. for Dec. Stmt. at 1. Ms. Adolf notes that the townhouse units, among other things, have no elevators for which service and maintenance is required and have individual air conditioning/heating units and water heating units for which they pay individually for maintenance, service and electricity; while the tower unit owners have a common air conditioning system and a hot water system that expenses of which are included in the common expenses paid for by the townhouse owners as well as the tower unit owners. Id. at 1-2. Ms. Adolf seeks a clarification on whether Association maintains the limited common elements in accordance with section 718.113(1), Florida Statutes, and whether the budget structure used by Association, which does not contain a schedule detailing any limited common elements maintained by the Association but expensed to the unit owners entitled to

exclusive use, is in accordance with the declaration and Florida Statutes. Id.; Letter from Catherine Adolf to Janis Sue Richardson, Chief Attorney (March 14 Letter) (Mar. 14, 2008) at 1.

Management Contracts

8. Association entered into a management agreement with Miami Management, Inc., on November 21, 2006, for a one-year term beginning January 1, 2007 and ending December 31, 2007. Mgmt. Agreement Between 2080 Condo. Ass'n and Miami Mgmt., Inc. (Agreement) at 1. The Agreement provided that Miami Management, Inc. would provide general administration and community service management to Ocean Drive, including services for the supervision of the maintenance of the common areas, improvements and equipment of the Association. Id. at 1-2. The Agreement gave Miami Management, Inc. the authority to solicit, review, negotiate, and supervise contracts on behalf of Association for services reasonably necessary for the operation, maintenance, upkeep, repair, replacement, and preservation of the property of Ocean Drive. Id. at 2.

9. An addendum to the Agreement, dated December 28, 2007, provides that effective January 1, 2008, certain modifications to the original Agreement would become effective and that all terms and conditions of the original Agreement would remain in full force and effect. Third Addendum to Mgmt. Agreement Between 2080 Condo. Ass'n and Miami Mgmt., Inc. at 1.

10. Ms. Adolf asserts that the management agreement and other contracts entered into by the Association, some entered into prior to turnover of control to unit owners other than the developer, are not fair and reasonable to unit owners. Pet. for Dec. Stmt.

at 1. She seeks an opinion as to whether the contracts made by Association for the operation and maintenance of the limited common elements are fair and reasonable to all members of the association under section 718.302(4), Florida Statutes. March 14 Letter at 1.

CONCLUSIONS OF LAW

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

12. Ms. Adolf has standing to seek this declaratory statement.

13. Section 120.565, Florida Statutes, provides:

(1) Any substantially affected person may seek a declaratory statement regarding an agency's opinion as to the applicability of a statutory provision, or of any rule or order of the agency, as it applies to the petitioner's particular set of circumstances.

(2) The petition seeking a declaratory statement shall state with particularity the petitioner's set of circumstances and shall specify the statutory provision, rule, or order that the petitioner believes may apply to the set or circumstances.

14. Rule 28-105.001, Florida Administrative Code (2007), provides:

A declaratory statement is a means for resolving a controversy or answering questions or doubts concerning the applicability of statutory provisions, rules, or orders over which the agency has authority. A petition for declaratory statement may be used to resolve questions or doubts as to how the statutes, rules, or orders may apply to the petitioner's particular circumstances. A declaratory statement is not the appropriate means for determining the conduct of another person.

Limited Common Elements and Annual Budget

15. Section 718.113(1), Florida Statutes, provides that:

Maintenance of the common elements is the responsibility of the Association. 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, and the association may use the provisions of s. 718.116 to enforce payment of the shares of such costs by the unit owners entitled to use the limited common elements.

16. Section 718.112(2)(f)1, Florida Statutes, provides that "if the association maintains limited common elements with the cost to be shared only by those entitled to use the limited common elements as provided for in s.718.113(1), the budget or a schedule attached thereto shall show amounts budgeted therefore."

17. The essence of Ms. Adolf's argument appears to be that because the townhouse owners must pay for the maintenance and repair of their separate air conditioning and water heater units, which are considered limited common elements under article 3.3 of the Declaration, the tower unit owners should exclusively share the maintenance and repair costs for the common air conditioning and heating unit serving the tower building used by only those unit owners.

18. Ms. Adolf's argument is misguided because the tower building contains, among other things, the main lobby, business center, and management administration area; which are all common elements of Ocean Drive. See Plot Plan and Survey, ex. 2 to Prospectus at sheet 11 of 48. Therefore, the common air conditioning and heating units of the tower building cannot be limited common elements under article 3.3 of the Declaration because they do not exclusively serve units.

19. Based on the information provided by Ms. Adolf and the analysis provided above, the actions of the Association are not inconsistent with the provisions of the Condominium Act or the Declaration. The items complained of by Ms. Adolf do not meet the definition of limited common element provided by the Declaration, and therefore the treatment of the maintenance of these items as common expenses is not inconsistent with section 718.113(1), Florida Statutes. Furthermore, because the Division has not been given examples of limited common elements that are maintained by the Association but expensed to only those unit owners granted the exclusive right to use them, the budget structure of Association is not inconsistent with the Condominium Act or the Declaration.

Management Contracts

20. Section 718.302(3), Florida Statutes, provides that:

Any grant or reservation made by a declaration, lease, or other document, and any contract made by an association, whether before or after assumption of control of the association by unit owners other than the developer, that provides for operation, maintenance, or management of a condominium association or property serving the unit owners of a condominium shall not be in conflict with the powers and duties of the association or the rights of the unit owners as provided in this chapter. This subsection is intended only as a clarification of existing law.

21. Section 718.302(4), Florida Statutes, provides that "[a]ny grant or reservation made by a declaration, lease, or other document, and any contract made by an association prior to assumption of control of the association by unit owners other than the developer, shall be fair and reasonable."

22. Ms. Adolf seeks a petition as to whether the terms of the contract are fair and reasonable under section 718.302(4), Florida Statutes. Section 718.302(4) pertains to

contracts made by an association prior to assumption of control by unit owners other than the developer. While Ms. Adolf has implied that turnover has occurred from her statement that there are contracts still in use that were made prior to assumption of control of association by unit owners other than the developer, the Division has not been given information regarding when turnover occurred in order to make a comment on section 718.302(4), Florida Statutes. Section 718.302(1), Florida Statutes provides methods for the cancellation of any contract entered into by an association prior to the assumption of control by owners other than the developer. However, because the Division has not been provided with a turnover date, it cannot be determined whether the initial management agreement or subsequent addendum extending the term of the management agreement falls under the provisions of 718.302(1) or (4). Therefore, the Division declines to address whether the management contract is fair and reasonable under section 718.302(4). See Sun Coast Home Care, Inc. v. Dep't of Ins., 710 So. 2d 120, 121 (Fla. 2d DCA 1998) (finding agency may decline to issue a declaratory statement where it is not supported by specific facts).

23. Furthermore, the Division does not have the authority to issue a declaratory statement where the issue requires a fact-finding proceeding or involves the rights of a third party, like the management company, who are not parties to this proceeding. See Fla. Admin. Code R. 28-105.003 (providing that agency may not take position on validity of the facts). Since the issue of whether the management agreement is fair and reasonable would require a determination based on all the facts and circumstances, the Division declines to answer this question. See Hidden Harbour Estates, Inc. v. Norman,

309 So. 2d 180, 182 (Fla. 4th DCA 1975) (stating that whether a rule is reasonable depends upon the "peculiar facts and circumstances" pertaining to each case).

24. Finally, the Division cannot issue a declaratory statement concerning events that have already taken place. "[A] petition for declaratory statement which seeks approval or disapproval of conduct which has already occurred is properly denied." Novick v. Dep't of Health, Bd. of Med., 816 So. 2d 1237, 1240 (Fla. 5th DCA 2002) (citing Chiles v. Dep't of State, Div. of Elections, 711 So. 2d 152 (Fla. 1st DCA 1998)); see also In Re: Pet. for Dec. Stmt. Royal Arms Villas Condo., Inc., BPR-2002-03050 (Aug. 21, 2002) (concluding that the Division was without authority to determine the validity of amendments to the declaration recorded 8 years earlier). "The purpose of a declaratory statement is to allow a petitioner to select a proper course of action in advance." Novick, 816 So. 2d at 1240. Because the management agreement was extended by agreement on December 28, 2007, a determination on the reasonableness of the contract and the rights of the parties must be made by a court. See In Re: Pet. for Dec. Stmt. Five Towns of St. Petersburg #305, Inc. (Burritt), BPR-2005-05677 (Oct. 5, 2005) (concluding that only a court may invalidate or alter a privately executed contract). Therefore this issue is properly denied.

ORDER

Based on the findings of fact and conclusions of law, it is ordered that the actions of Association in maintaining the limited common elements of Ocean Drive is not inconsistent with the provisions of section 718.113, Florida Statutes. Furthermore, the Division declines to address the issue of whether the management contract is fair and reasonable under section 718.302(4), Florida Statutes.

DONE and ORDERED this 8th day of April, 2008,

at Tallahassee, Leon County, Florida.



Michael T. Cochran

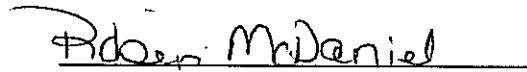
MICHAEL T. COCHRAN, Director
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Division of Florida Land Sales,
Condominiums & Mobile Homes: **NOTICE OF RIGHT TO APPEAL**

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.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Catherine Adolf, 2069 S. Ocean Dr. TH#15, Hallandale Beach, FL 33009 on this 16th day of April, 2008.


Robin McDaniel, Division Clerk

Copies furnished to:

Janis Sue Richardson
Chief Assistant General Counsel

Glazer & Associates, P.A.
Registered Agent for 2080 Ocean Drive Condominium Association, Inc.
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