

STATE OF FLORIDA  
DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION  
DIVISION OF FLORIDA CONDOMINIUMS, TIMESHARES, AND MOBILE  
HOMES

IN RE: PETITION FOR DECLARATORY STATEMENT  
CLUB ATLANTIS CONDOMINIUM ASSOCIATION, INC.

**DS 2010-054**

Docket No. 2010034373

**DECLARATORY STATEMENT**

The Department of Business and Professional Regulation, Division of Florida Condominiums, Timeshares, and Mobile Homes issues this Declaratory Statement under section 120.565, Florida Statutes (2010).

**PRELIMINARY STATEMENT**

On July 8, 2010, the division received a Petition for Declaratory Statement from David H. Rogel, attorney for Club Atlantis Condominium Association, Inc. (Club Atlantis), seeking an opinion on whether Club Atlantis must insure the limited common element cabanas and whether Club Atlantis may pass along the cost of the insurance to the owners under the amendments to section 718.111(11), Florida Statutes (2010). Club Atlantis did not request a hearing.

The division acknowledged receipt of the petition on July 15, 2010. The division informed Mr. Rogel and Club Atlantis that it would need a complete current set of the governing documents before the petition can be reviewed, and that a copy of the petition must be served on the developer and notice of having done so filed with the division.

On July 21, 2010, the division received a letter from Mr. Rogel and Club Atlantis clarifying the issue as whether Club Atlantis, upon acquiring insurance, may pass along the cost of that insurance to the unit owners to whom the cabanas are appurtenant. The division received a complete set of the governing documents from Club Atlantis on July 30, 2010.

Notice of receipt of the petition was published in Florida Administrative Weekly on July 30, 2010.

#### FINDINGS OF FACT

The following findings of fact are based on information submitted by Club Atlantis. 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. Club Atlantis, a Condominium was created in 1982.<sup>1</sup> The condominium consists of 319 units and 20 limited common element cabanas, which are assigned to various units in the condominium.<sup>2</sup>

2. Club Atlantis is the condominium association that operates the condominium.<sup>3</sup>

3. The cabanas are original improvements to the condominium property installed by the developer. Article 3 of the Club Atlantis declaration allows the developer to assign the cabanas to various units for exclusive use. Section 3.3(d) states that “[e]ach cabana shall be a limited common element of the Unit

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<sup>1</sup> Decl of Club Atlantis, a Condo (recorded Nov 5, 1982).

<sup>2</sup> Pet for Decl Stmt at 1 (July 2, 2010)

<sup>3</sup> Art 2 3, Decl of Club Atlantis

obtaining from the Developer an assignment of the exclusive right to use such cabana ”<sup>4</sup>

4. The board must adopt an annual budget.<sup>5</sup> The association

has the power to specially charge and assess one or more Unit Owners (without being obligated to similarly charge and assess all other Unit Owners) for expenses incurred by the Association solely for the benefit of, or as a result of actions or omissions of, such Owner or Owners as the Board deems appropriate from time to time. Once imposed, such special charges and assessments shall be deemed to be assessments for common expenses in respect of such Unit or Units only for purposes of this Declaration, the Exhibits attached hereto and the Act. Without limiting the generality of the foregoing, such special assessments may be made with respect to expenses relating to the use of specific Owners of the cabanas and cabana area, concession area, boat slip area, if any, valet parking, maid service, switchboard service, room service, concierge service and other services.<sup>6</sup>

This provision appears to relate to expenses resulting from an owner’s use of the cabanas and not to the cost of insuring the cabanas as an expense separate from the cost of insuring the condominium property, which is governed by article 14.

5. Article 14 of the declaration of condominium states that all insurance policies covering the condominium property must be purchased by Club Atlantis and it must maintain replacement value insurance covering the “Building (including all of the Units and the fixtures, installations or additions lying within the boundaries of the Units initially installed and common elements therein, but not including furniture, furnishings, or other personal property supplied or installed by Unit Owners or tenants of Unit Owners) and Improvements on the

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<sup>4</sup> Id. art 3 3(d)

<sup>5</sup> Id. art 12

<sup>6</sup> Id. art 12

common elements from time to time. . . .”<sup>7</sup> Insurance is a common expense.<sup>8</sup> Under this provision, “[u]nit [o]wners may obtain insurance coverage at their own expense and at their own discretion upon their personal property and for their personal liability and living expenses.”<sup>9</sup> The cabanas are limited common elements not unit owner personal property; therefore, the association insures the cabanas under article 14.<sup>10</sup>

6. Section 718.111(11)(g)(1), Florida Statutes (2008), stated that “[A]ll improvements or additions to the condominium property that benefit fewer than all unit owners shall be insured by the unit owner or owners having the use thereof, or may be insured by the association at the cost and expense of the unit owners having the use thereof.” The legislature amended the statute and deleted this provision from section 718.111(11), Florida Statutes (2010).<sup>11</sup> Chapter 2010-174, Laws of Florida, went into effect on July 1, 2010.<sup>12</sup>

7. Club Atlantis is in doubt as to its rights and obligations under the governing documents and the amendments to section 718.111(11), Florida Statutes (2010), and seeks the division’s opinion on whether it must insure the limited common element cabanas and whether it may pass along the cost of that insurance to the owners of the units to whom the cabanas are appurtenant.<sup>13</sup>

### CONCLUSIONS OF LAW

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<sup>7</sup> Id. art 14

<sup>8</sup> Id. art 14 4

<sup>9</sup> Id. art 14 1(f)

<sup>10</sup> The association agrees that it is responsible for insuring the cabanas Letter from David H Rogel, Esq to Janis Sue Richardson, Esq (July 21, 2010)

<sup>11</sup> Ch 2010-174, § 9, Laws of Fla

<sup>12</sup> Id. at § 29

<sup>13</sup> Pet for Decl Stmt at 4.

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

9. 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.

10. 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.

11. As a condominium association, Club Atlantis has standing to petition for a declaratory statement.<sup>14</sup>

12. Section 718.111(11), Florida Statutes, as amended in 2010<sup>15</sup> provides in pertinent part:

(11) INSURANCE.—In order to protect the safety, health, and welfare of the people of the State of Florida and to ensure consistency in the provision of insurance coverage to condominiums and their unit owners, this subsection applies to every residential condominium in the state, regardless of the date of its declaration of condominium. It is the intent of the Legislature to encourage lower or stable insurance premiums for associations described in this subsection.

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<sup>14</sup> §§ 718 103(2), 120 565, Fla Stat (2009)

<sup>15</sup> Ch 2010-174, § 9, Laws of Fla (emphasis in original).

(f) Every property hazard insurance policy issued or renewed on or after January 1, 2009, for the purpose of protecting the condominium ~~must~~ shall provide primary coverage for:

1. All portions of the condominium property as originally installed or replacement of like kind and quality, in accordance with the original plans and specifications.

2. All alterations or additions made to the condominium property or association property pursuant to s. 718.113(2).

3. The coverage must ~~shall~~ exclude all personal property within the unit or limited common elements, and floor, wall, and ceiling coverings, electrical fixtures, appliances, water heaters, water filters, built-in cabinets and countertops, and window treatments, including curtains, drapes, blinds, hardware, and similar window treatment components, or replacements of any of the foregoing which are located within the boundaries of the unit and serve only such unit. Such property and any insurance thereupon is the responsibility of the unit owner.

(g) A condominium unit owner's policy must conform to the requirements of s. 627.714. ~~Every hazard insurance policy issued or renewed on or after January 1, 2009, to an individual unit owner must contain a provision stating that the coverage afforded by such policy is excess coverage over the amount recoverable under any other policy covering the same property. Such policies must include special assessment coverage of no less than \$2,000 per occurrence. An insurance policy issued to an individual unit owner providing such coverage does not provide rights of subrogation against the condominium association operating the condominium in which such individual's unit is located.~~

~~1. All improvements or additions to the condominium property that benefit fewer than all unit owners shall be insured by the unit owner or owners having the use thereof, or may be insured by the association at the cost and expense of the unit owners having the use thereof.~~

~~2. The association shall require each owner to provide evidence of a currently effective policy of hazard and liability insurance upon request, but not more than once per year. Upon failure of an owner to provide a certificate of insurance issued by an insurer approved to write such insurance in this state within 30 days after the date on which a written request is delivered, the association may purchase a policy of insurance on behalf of an owner. The~~

~~cost of such a policy, together with reconstruction costs undertaken by the association but which are the responsibility of the unit owner, may be collected in the manner provided for the collection of assessments in s. 718.116.~~

....

(j) Any portion of the condominium property ~~that must~~ required to be insured by the association against property casualty loss pursuant to paragraph (f) which is damaged by ~~casualty~~ shall be reconstructed, repaired, or replaced as necessary by the association as a common expense. All property hazard insurance deductibles, uninsured losses, and other damages in excess of property hazard insurance policies maintained by the association are a common expense of the condominium, except that:

1. A unit owner is responsible for the costs of repair or replacement of any portion of the condominium property not paid by insurance proceeds, if such damage is caused by intentional conduct, negligence, or failure to comply with the terms of the declaration or the rules of the association by a unit owner, the members of his or her family, unit occupants, tenants, guests, or invitees, without compromise of the subrogation rights of the any insurer ~~as set forth in paragraph (g).~~

2. The provisions of subparagraph 1. regarding the financial responsibility of a unit owner for the costs of repairing and replacing other portions of the condominium property also apply to the costs of repair and replacement of personal property of other unit owners or the association, as well as other property, whether real or personal, which the unit owners are required to insure ~~under paragraph (g).~~

....

(n) The association is not obligated to pay for any reconstruction or repair expenses due to property casualty loss to any improvements installed by a current or former owner of the unit or by the developer if the improvement benefits only the unit for which it was installed and is not part of the standard improvements installed by the developer on all units as part of the original construction, whether or not such improvement is located within the unit. This paragraph does not relieve any party of its obligations regarding recovery due under any insurance implemented specifically for ~~any~~ such improvements.

13. The amendment changes unit owner homeowner's insurance coverage. First, the amendment repeals much of subsection (g) requiring unit owners to insure the limited common elements. It also creates section 627.714<sup>16</sup>, Florida Statutes (2010), which requires loss assessment coverage to be included in unit owner insurance policies.

14. The cost of insurance and any deductibles under the association's insurance policy for the condominium remains a common expense.<sup>17</sup> Unit owners pay common expenses in their assigned shares of ownership.<sup>18</sup>

15. The Florida Senate Bill Analysis and Fiscal Impact Statement for Senate Bill 1196 clarifies the desired effect of the amended bill as it relates to condominium insurance.<sup>19</sup> The bill amends section 718.111(11)(g), Florida Statutes, by deleting the provision that provides that "[a]ll improvements or additions to the condominium property that benefit fewer than all unit owners must be insured by the unit owner or owners having the use thereof, or may be

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<sup>16</sup> Section 627.714 provides in part:

(1) For policies issued or renewed on or after July 1, 2010, coverage under a unit owner's residential property policy must include at least \$2,000 in property loss assessment coverage for all assessments made as a result of the same direct loss to the property, regardless of the number of assessments, owned by all members of the association collectively if such loss is of the type of loss covered by the unit owner's residential property insurance policy, to which a deductible of no more than \$250 per direct property loss applies. If a deductible was or will be applied to other property loss sustained by the unit owner resulting from the same direct loss to the property, no deductible applies to the loss assessment coverage.

(4) Every individual unit owner's residential property policy must contain a provision stating that the coverage afforded by such policy is excess coverage over the amount recoverable under any other policy covering the same property.

<sup>17</sup> § 718.115(1)(f), Fla Stat

<sup>18</sup> § 718.115(2), Fla Stat

<sup>19</sup> Fla S Comm on Judiciary, CS for CS for CS for SB's 1196 & 1222 (2010) Staff Analysis 5 (Apr 9, 2010) (on file with Senate) (available at myflorida.com) [hereinafter Staff Analysis]



insured by the association at the cost and expense of the unit owners having such use.” Under this repealed provision, since the cabanas were original improvements to the condominium property that benefit only those unit owners who have cabanas assigned to them, it was the responsibility of those unit owners to insure the cabanas, or pay to the association the cost and expense of insuring them. However, the amended bill deletes this provision from the statute. This repealed provision when read together with section 718.111(11)(f), Florida Statutes, evidence an intention that Club Atlantis must insure the limited common elements because they are original improvements installed by the developer under the declaration.<sup>20</sup>

16. Section 718.111(11)(f)(3), Florida Statutes, as amended, provides certain property that must be excluded from association coverage. The coverage must exclude all personal property within the unit or limited common elements. The amended section clarifies that the property that is excluded from the association's coverage is unit owner personal property that is located within the boundaries of the unit or limited common element and serves only the unit.<sup>21</sup> Under the amendment, a Club Atlantis unit owner is responsible for insuring only personal property located inside the unit or a limited common element cabana.

17. The cabanas, as originally installed by the developer, are covered by section 718.111(11)(f)(1), Florida Statutes (2010). The amended provision provides that the association must provide primary coverage for “[a]ll portions of the condominium property as originally installed or replacement of like kind and

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<sup>20</sup> See Staff Analysis at 5

<sup>21</sup> *Id.* at 18-19

quality, in accordance with the original plans and specifications.”<sup>22</sup> The cabanas were original improvements installed by the developer, and thus the association must insure these portions of the condominium property.

18. Moreover, it does not appear that the intent of the amendment was to have the association insure the improvements and pass along the cost of insurance to the unit owners who have been assigned the cabanas. The amendment deleted the provision in section 718.111(11)(g)(1), Florida Statutes, that provided that improvements to the condominium property that benefit fewer than all unit owners must be insured by the unit owners or by the association at the cost and expense of the unit owners having such use. In doing so, the legislature intends the association to insure the improvements to the condominium property and not allow the association to pass on the cost of insuring limited common elements to those unit owners who have the exclusive use of the limited common elements.<sup>23</sup> By deleting this provision, the amendment results in unit owners no longer having to pay for the cost of insuring the limited common element improvements to the condominium property.

19. Section 718.111(11)(n), Florida Statutes, states that the association is not obligated to pay to reconstruct any unit owner improvements to the limited common elements or by the developer unless the improvement was a standard improvement for all units. Unit owners who install upgrades to their units as a condition of contract with the developer or as approved by the association under section 718.113(5), Florida Statutes, pay the cost of the upgrade if the property

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<sup>22</sup> § 718.111(11)(f)(1), Fla Stat (2010).

<sup>23</sup> Staff Analysis at 1

must be reconstructed after a loss. Otherwise, reconstruction costs are limited to replacing the standard improvements that the developer installed in all the units and limited common elements. This does not allow an association to pass on the full replacement cost of the cabanas to the unit owners. The section provides that it “does not relieve any party of its obligations regarding recovery due under any insurance implemented specifically for such improvements.”<sup>24</sup> It is the responsibility of Club Atlantis to provide insurance for the limited common element cabanas. The unit owners who have exclusive use of the cabanas must pay the reconstruction costs for any upgrades and improvements made over the standard original installation.<sup>25</sup>

20. The issue of who pays for insuring and reconstructing the limited common elements was first addressed under a 2003 amendment to section 718.111(11), Florida Statutes, in In re: Petition for Declaratory Statement, Costa del Sol Association, Inc., Docket No. 2006027924 (Nov. 29, 2006). In Costa del Sol, the division found the improvements to the limited common elements to be structural fixtures that the association was required to insure. The appellate court overturned the declaratory statement in Costa del Sol Association, Inc. v. Department of Business and Professional Regulation, 987 So. 2d 734 (Fla. 3d DCA July 2, 2008) on the grounds that the upgrades were personal property of the unit owners and not part of the condominium property originally installed by the developer. Following this decision, the legislature amended section

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<sup>24</sup> § 718.111(11)(n), Fla. Stat. (2010)

<sup>25</sup> See ch. 2003-14, § 4, Laws of Fla.

718.111(11), Florida Statutes, again in 2008<sup>26</sup> to include subsection 718.111(11)(g)(1), which required unit owners to pay the cost of insuring the limited common elements. This subsection is repealed by 2010-174, Laws of Florida. Now unit owners insure and pay the cost of reconstruction for personal property located in the limited common elements and any upgrades to that property. The association insures the limited common element property as originally installed and is responsible for the cost of reconstructing the limited common elements as originally installed.

For the reasons stated above it is hereby:

**ORDERED** that Club Atlantis Condominium Association, Inc. must insure the limited common element cabanas and may not pass along the cost of the insurance for the cabanas to the unit owners who have exclusive use of the cabanas under the amendments to section 718.111(11), Florida Statutes (2010).

**DONE and ORDERED** this 26<sup>th</sup> day of August 2010, at Tallahassee, Leon County, Florida.



  
MICHAEL T. COCHRAN, Director  
Department of Business and  
Professional Regulation  
Division of Florida Condominiums, Timeshares,  
and Mobile Homes  
Northwood Centre  
1940 North Monroe Street  
Tallahassee, FL 32399-1030

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<sup>26</sup> See ch. 2008-240, § 5, Laws of Fla

**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 David H Rogel, Esq., Becker and Poliakoff, 121 Alhambra Plaza, 10th floor, Coral Gables, FL 33134, on this 8<sup>th</sup> day of September 2010.

*for: Brandon M. Nichols*  
Robin McDaniel, Division Clerk

Copies furnished to:  
Janis Sue Richardson  
Chief Attorney