

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

IN RE: PETITION FOR DECLARATORY STATEMENT

Docket No. 2010051738

STAYSKY VACATION MEMBERSHIP CLUB
DEVELOPMENT, LLC

DS 2010-080

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 October 14, 2010, the division received a Petition for Declaratory Statement from William C. Guthrie of Foley & Lardner, LLP, attorney for staySKY Vacation Membership Club Development, LLC ("staySKY"), seeking an opinion on whether staySKY, which will have an initial term of thirty-five (35) months with terminable thirty-five (35) month renewal terms, is a timeshare plan under sections 721.05(39) and 721.52(4), Florida Statutes. staySKY did not request a hearing.

The division acknowledged receipt of the petition on October 15, 2010 and notice of receipt of the petition was published in Florida Administrative Weekly on November 19, 2010.

FINDINGS OF FACT

The following findings of fact are based on information submitted by staySKY. 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. staySKY is a proposed (2010) multiple location club product which has yet to offer its product for sale. The club will be a membership plan established in accordance with the staySKY Vacation Membership Club Trust ("Trust"). staySKY intends to transfer a lease or title to certain units (condominium units or other real property interests) that are subject to exclusive ownership or use by one or more persons to an independent trustee committed to the Trust.¹

2. A person may enter a membership agreement with staySKY and thereby become a "member" of the club. Members are then assigned "staySKY points" which are symbolic units of use comparison signifying each member's use rights in the Trust Property. "staySKY Points for Use" means the "number of staySKY points that are required to reserve a particular unit at a particular time in accordance with the Guide to Use."²

3. Members are obligated to pay annual assessments for the expenses incurred in operating and maintaining the Trust Property.³

4. The club will have four (4) classes of membership (A, B, C, and D):

The initial term of each class is thirty-five (35) months (the "**Initial Term**") and commences on the first (1st) day of the month immediately following the date on Member's Membership

¹ Pet for Decl Stmt at 1-2 (Oct 13, 2010)

² *Id* at 3

³ *Id* at 4

Certificate. The Member will be under no obligation to renew Member's Membership in the Club after the Initial Term, and will receive notice ("the **Renewal Notice**") no less than thirty (30) days and no more than sixty (60) days prior to the date of renewal, informing the member of the right to terminate at any time prior to the date of automatic renewal. . . . *Because the Club is structured so that the Initial Term and any Renewal Term of a Membership is less than three (3) years and members have the right to terminate their membership at the end of each application term, the Club is not a timeshare plan regulated under chapter 721, Florida Statutes.*⁴

The four classes have quite a few differences, but the general structure is that Class A members may renew the terms of the agreement on five (5) occasions, Class B members may renew on ten (10) occasions, Class C members may renew on fifteen (15) occasions, and the Class D member is the developer.⁵

5. staySKY also provides: (1) that all accommodations committed to the Trust shall be free and clear or nondisturbed; (2) that there is a ten (10) day rescission period available to all purchasers; (3) that all funds received from Members are placed in an escrow account, and (4) that there is a "One-to-One" member to accommodation ratio⁶

6. The developer has formed an association, staySKY Vacation Membership Club Association I, Inc., a Florida corporation not-for-profit, for the purpose of

⁴ Art 8 3(a), Membership Agreement for staySKY (emphasis added)

⁵ *Id* at art 8 3(a)(i), (ii), (iii), (iv)

⁶ Pet for Decl Stmt at 6-7

maintaining and operating the Club and Trust Property. The association will be “comprised of all members of the Club from time to time.”⁷

7. The club operates a reservation system which is first come, first served. A member may not reserve a unit for more than thirty (30) consecutive nights. A member requesting a reservation more than 180 days prior to the intended stay date is currently obligated to a minimum stay of seven (7) nights. A member requesting a reservation 180 days or less from the date of intended stay may have a minimum stay of less than seven (7) nights. The club manager has reserved the right to increase or reduce the maximum stay periods.⁸

8. Section 6.1(d) of the Trust Agreement provides: “No Timeshare. A membership shall not constitute a timeshare estate as that term is defined in chapter 718, *Florida Statutes*, and neither the Club nor the Association shall be governed by Chapter 721, *Florida Statutes*.”⁹

9. staySKY asks the division to either confirm or deny its contention that it falls within an exception provided for in the Florida Vacation Plan and Timeshare Act, section 721.52(4), and is therefore not a “timeshare plan” as defined in section 721.05(39), Florida Statutes. If the division agrees with Petitioner’s contention, then staySKY will not be subject to the restrictions and regulations of chapter 721

CONCLUSIONS OF LAW

10. The division has jurisdiction to enter this order pursuant to sections 721.26 and 120.565, Florida Statutes:

11. Section 120.565, Florida Statutes, provides:

⁷ Art II, sec 2 4, staySKY Trust Agreement

⁸ Sec 4(b) of Offering Circular for staySKY

⁹ Art VI, sec 6 1(d), staySKY Trust Agreement

(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.

12. Rule 28-105.001, Florida Administrative Code (2010), 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.

13. Section 721.26, Florida Statutes, provides that the division has jurisdiction over any "regulated party" falling under parts I and II of chapter 721 to enforce and ensure compliance with the Act.¹⁰ Furthermore, chapter 721 applies to "all timeshare plans consisting of more than seven (7) timeshare periods over a period of at least three (3) years in which the accommodations and facilities, if any, are located within this state or offered within this state"¹¹

14. As the developer, starSKY has standing to petition for a declaratory statement.¹²

15. Section 721.05(39), Florida Statutes, provides in pertinent part:

"Timeshare plan" means any arrangement, plan, scheme, or similar device, other than an exchange program, whether by membership, agreement, tenancy in common, sale, lease, deed, rental agreement, license, or right-to-use agreement or by any other means, whereby a purchaser,

¹⁰ § 721.26, Fla Stat (2010)

¹¹ § 721.03(1), Fla Stat (2010)

¹² §§ 721.26(5)(a), 120.565, Fla Stat (2010)

for consideration, receives ownership rights in or a right to use accommodations, and facilities, if any, for a period of time less than a full year during any given year, but not necessarily for consecutive years. The term "timeshare plan" includes:

(a) A "personal property timeshare plan," which means a timeshare plan in which the accommodations are comprised of personal property that is not permanently affixed to real property; and

(b) A "real property timeshare plan," which means a timeshare plan in which the accommodations of the timeshare plan are comprised of or permanently affixed to real property. § 721.05(39), Fla. Stat. (2010).

16. Section 721.52(4), Florida Statutes, provides in pertinent part

"Multisite timeshare plan" means any method, arrangement, or procedure with respect to which a purchaser obtains, by any means, a recurring right to use and occupy accommodations or facilities of more than one component site, only through use of a reservation system, whether or not the purchaser is able to elect to cease participating in the plan. However, the term "multisite timeshare plan" shall not include any method, arrangement, or procedure wherein:

(a) The contractually specified maximum total financial obligation on the purchaser's part is \$3,000 or less, during the entire term of the plan; or

(b) *The term is for a period of 3 years or less, regardless of the purchaser's contractually specified maximum total financial obligation, if any.* For purposes of determining the term of such use and occupancy rights, the period of any optional renewals which a purchaser, in his or her sole discretion, may elect to exercise, whether or not for additional consideration, shall not be included. For purposes of determining the term of such use and occupancy rights, *the period of any automatic renewals shall be included unless a purchaser has the right to terminate the membership at any time and receive a pro rata refund or the purchaser receives a notice no less than*

30 days and no more than 60 days prior to the date of renewal informing the purchaser of the right to terminate at any time prior to the date of automatic renewal. §721.52(4), Fla. Stat. (2010) (emphasis added).

17. While staySKY would ordinarily fall into the traditional statutory definition of a “multisite timeshare plan” in that it has created a procedure in which a purchaser obtains a recurring right to use or occupy parts of the Trust Property through the use of a reservation system, the exceptions enumerated in section 721.52(4)(b) precludes staySKY from the “multisite timeshare plan” terminology. Considering that the legislature has carved out exceptions for vacation plans with a period of less than three (3) years, it is axiomatic that a thirty-five (35) month plan fits into this statutory exception.

18. There is a caveat, however, to the less than three year exception. The caveat is that a plan which provides for automatic renewals, as staySKY’s plan does, may exceed the three year threshold if certain notice requirements are not met. In this case, staySKY has provided for compliance with all notice requirements in that it intends to provide the purchaser with a notice no less than thirty (30) days and no more than sixty (60) days prior to the date of renewal informing staySKY purchasers of the right to terminate at any time prior to the date of automatic renewal. Thus, the automatic renewal provision does not serve to extend staySKY’s 35 month plan over the three year threshold.

19. It is also important to consider whether or not staySKY could fall under any other definitions within the Timeshare Act. Considering that staySKY includes the term “Vacation Club” in its corporate name, an analysis into the statutory definition of that term is pertinent. A “vacation club” means a multisite timeshare plan. However,

notwithstanding any other provisions of this chapter, the use of the term 'vacation club' by a person or entity as part of a company, brand, or product name shall not, in and of itself, subject the person, entity, or product being offered to the provisions of this part unless the product offered otherwise meets the definition of a 'multisite timeshare plan' as defined in subsection (4)."¹³ Thus, the mere fact that staySKY includes the term "Vacation Club" in its corporate name does not serve to counteract the fact that staySKY falls into the subsection (4) term of years exception.

20. Therefore, staySKY does not represent the type of vacation plan, and will not be selling the type of vacation product, contemplated in chapter 721, Florida Statutes. While staySKY does incorporate much of the Timeshare Act in its policies and provisions, compliance with the Act is not mandatory on staySKY.

For the reasons stated above it is hereby:

ORDERED that staySKY may begin offering the "multiple location club product" without registering its units with the division; staySKY does not fall under The Florida Vacation Plan and Timesharing Act.

DONE and **ORDERED** this 9th day of November 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

¹³ § 721 52(8), Fla Stat (2010)

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 William C. Guthrie, Esq., Foley & Lardner, LLP, 111 North Orange Avenue, Suite 1800, Orlando, FL 32801-2386.

for: 
Robin McDaniel, Division Clerk

12-10-2010

Copies furnished to:
Janis Sue Richardson
Chief Attorney