

Final Order No. BPR-95-05580 Date 10-6-95

FILED

Dept. of Business and Professional Regulation

AGENCY CLERK

Sarah Wachman, Agency Clerk

By: Brandon Simon

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

IN RE: PETITION FOR DECLARATORY STATEMENT

ELDORADO TOWERS CONDOMINIUM
ASSOCIATION, INC.,

Petitioner.

DBPR Docket No. DS95233

DECLARATORY STATEMENT

Pursuant to Section 120.565, Florida Statutes, the Department of Business and Professional Regulation, Division of Florida Land Sales, Condominiums, and Mobile Homes (Division), issues the following Declaratory Statement:

FINDINGS OF FACT

1. Petitioner is the Eldorado Towers Condominium Association ("Eldorado Towers" or "Association").
2. On May 23, 1995, the Division received a request from petitioner for a declaratory statement. The petition seeks advice as to whether an amendment to the declaration of condominium which adopts all prospective amendments to Chapter 718, Florida Statutes, has the effect of automatically increasing a transfer fee from \$50.00 to \$100.00 pursuant to Section 718.112(2)(i), Florida Statutes, or whether it is necessary for the association to amend the declaration of condominium to provide for an increase in the transfer fee assessed



3. A copy of the declaration of condominium of Eldorado Towers was not provided by petitioner. Petitioner represents that the amended declaration of condominium provides for the association to approve transfers of interests in condominium units and for an assessment of a transfer fee. Petitioner states that the following is the specific wording of that provision: "the fee or charge to process the aforesaid application shall be \$50.00, and shall accompany the applicant."

4. The petitioner also represents that the amended declaration of condominium provides:

The By-Laws of the Association are hereby amended in whatever respects may be necessary to conform them to and make them consistent with the Condominium Act, (Chapter 718 of the Florida Statutes) as it now exists and any Amendments thereto subsequent to the original filing of the By-Laws, to the end that nothing contained in the By-Laws exceeds or excludes the authority granted a Condominium Association by law.

5. Section 718.112(2)(i), Florida Statutes, provides in pertinent part, as follows:

Transfer Fees.—No charge shall be made by the association or any body thereof in connection with the sale, mortgage, lease, sublease, or other transfer of a unit unless the association is required to approve such transfer and a fee for such approval is provided for in the declaration, articles, or bylaws. Any such fee may be preset, but in no event may such fee exceed \$100 per applicant other than husband/wife or parent/dependent child, which are considered one applicant.

6. A notice of the petition for declaratory statement was published in the Florida Administrative Weekly on July 28, 1995.

CONCLUSIONS OF LAW

The Division is the state agency responsible for the enforcement of Chapter 718, Florida Statutes, and the rules promulgated pursuant thereto, and has jurisdiction over petitions for declaratory statements regarding that Chapter, pursuant to Section 120.565, Florida Statutes, and Rule 7-3.001, Florida Administrative Code.

Section 718.112(2)(i), Florida Statutes, permits associations to charge a fee for approving

the transfer of an interest in a condominium unit *if* the condominium documents require the association to approve such transfers *and* the documents provide for the levy of a transfer fee. The section does not require a fee, and does not set a fee; it only sets a cap of \$100.00 on the amount of a transfer fee that may be charged. Any fee assessed must be specifically mandated by the association's governing documents.

It is presumed, since the declaration was not submitted, that the declaration requires the association to approve transfers of interest in condominium units. Therefore, the first requirement of section 718.112(2)(i), Florida Statutes is satisfied. The declaration of condominium for Eldorado Towers does provide the levy of a transfer fee in the amount of \$50.00, so the second requirement of section 718.112(2)(i), Florida Statutes, is satisfied. The declaration provision clearly sets a cap on the fee to be assessed at \$50.00.

The amendment to the declaration, which incorporates all changes to Chapter 718, Florida Statutes, does not operate to increase the fee. Section 718.112(2)(i), Florida Statutes, does not *require* the assessment of any transfer fee; it merely allows one to be assessed if the governing documents provide for one. So, incorporation of the statutory fee provision into the declaration does not alter the fee amount set by the declaration. Additionally, the declaration provision adopting changes to Chapter 718, Florida Statutes, is general, while the provision setting a transfer fee is specific. The specific provision governs over the general provision. *Raines v. Palm Beach Leisureville Community Ass'n*, 317 So. 2d 814, 817 (Fla. 4th DCA 1975), *rev'd*, 413 So. 2d 30 (Fla. 1982). Therefore, the provision adopting all amendments to Chapter 718, Florida Statutes, has not changed the \$50.00 transfer fee provided by the declaration.

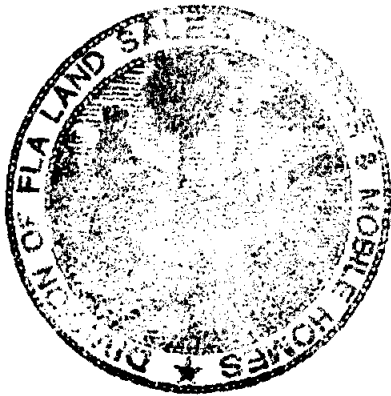
The association further questions whether these provisions allow it to raise the transfer fee

from \$50.00 to \$100.00 by vote of the board of directors, or whether an amendment to the declaration is required. Neither of the declaration provisions cited by the association purport to allow the association's board of directors to set the amount of the transfer fee. Rather, the specific provision clearly states that the transfer fee "shall" be \$50.00. Section 718.112(2)(i), Florida Statutes, does not authorize a board of directors to set a fee. That section clearly states that such a fee must be provided for in the condominium documents. If the declaration had authorized the board to set a fee within the limits allowed by statute, then the board might arguably have the authority to do so. This is not the case on the facts and provisions quoted by the association. Therefore, the association would be required to amend its declaration before it may increase the transfer fee, which is presently set at \$50.00.

DONE and ORDERED this 3rd day of October, 1995.



W. JAMES NORRED, Acting Director
Division of Florida Land Sales, Condominiums
and Mobile Homes
Department of Business and Professional
Regulation
Northwood Centre
1940 North Monroe Street
Tallahassee, Florida 32399-1030



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(d), FLORIDA RULES OF APPELLATE PROCEDURE, BOTH WITH THE APPROPRIATE DISTRICT COURT OF APPEAL, ACCOMPANIED BY THE APPROPRIATE FILING FEE, AND WITH CAROLYN HOWARD, DOCKET CLERK FOR THE DIVISION OF FLORIDA LAND SALES, CONDOMINIUMS, AND MOBILE HOMES, 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 declaratory statement has been furnished by U.S. Mail to Michael K. Feldman, Esq., Nelson & Feldman, P.A., 1135 Kane Concourse, Bay Harbour Islands, Florida 33154-2025 on this _____ day of _____, 1995.

CAROLYN HOWARD, DOCKET CLERK

Copies furnished to:

Janis Sue Richardson,
Senior Attorney

Faye Mayberry, Chief
Bureau of Condominiums

Eldorado.FO