

Final Order No. BPR-97-00872 Date 2-24-97

FILED

Dept. of Business and Professional Regulation

AGENCY CLERK

Sarah Wachman, Agency Clerk

By: *Branda L. Moore*

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

IN RE: PETITION FOR DECLARATORY STATEMENT

MARGE P. MCMULLEN,

Docket No. DS95100

Petitioner,

DECLARATORY STATEMENT

This Declaratory Statement is rendered by the State of Florida, Department of Business and Professional Regulation, Division of Florida Land Sales, Condominiums, and Mobile Homes, by and through its undersigned Division Director, pursuant to Sections, 120.565 and 718.501, Florida Statutes.

PROCEDURAL STATEMENT

A Petition for Declaratory Statement was filed with the Division on March 16, 1995 by Marge P. McMullen (Petitioner). Notice of Petition was published in the Florida Administrative Weekly. No requests to intervene were received. By letter dated May 3, 1995, Petitioner requested the Division to abate its

consideration of the Petition. On December 12, 1995, Petitioner requested that the Petition be again taken up for consideration.

FINDINGS OF FACT

1. Petitioner is the Developer of West Wind Village Retirement Community, a cooperative located in Citrus County, Florida.

2. West Wind Village initially began as a mobile home park. The property was owned by Petitioner and Dan McMullen, her late husband. The McMullens established the West Wind Retirement Village Community Association, Inc., as the association responsible for the administration of the West Wind Village cooperative. West Wind Village Retirement Community Association, Inc., a Florida non-profit corporation, was created on October 18, 1995 (Association).

3. In December, 1985, the McMullens filed with the Division of Florida Land Sales, Condominiums and Mobile Homes, cooperative documents to convert the property to a cooperative. The cooperative documents, including the prospectus, were accepted for filing by the Division on December 30, 1985.

4. The McMullens conveyed all of the property of the West Wind Village Mobile Home Park to the association. Article II, Paragraph 2.1 of the Articles of Incorporation of West Wind Village

Retirement Community Association, Inc., describes the terms and conditions of the transfer of the property from the McMullens to the Association and provides in pertinent part:

....THE PROPERTY DESCRIBED ON EXHIBIT "A" BEING COMMITTED TO COOPERATIVE OWNERSHIP OF THE ASSOCIATION [the mobile home park] IS A DEVELOPMENT PROJECT OF DANIEL D. MCMULLEN AND MARGE P. MCMULLEN (THE "DEVELOPER") AND ALL PROCEEDS OF SALES OF ANY AND ALL INTERESTS IN THAT PROPERTY BY THE ASSOCIATION SHALL GO TO THE DEVELOPER (OR ITS SUCCESSOR IN INTEREST) AS CONSIDERATION FOR THE TRANSFER OF THAT PROPERTY TO THE ASSOCIATION FROM THE DEVELOPER.

5. In accordance with Paragraph 3.3 of the Articles of Incorporation, the unsold cooperative property continued under the control of the McMullens as the property's Developers, to wit:

ALL FUNDS AND TITLES OF ALL PROPERTIES ACQUIRED BY THE ASSOCIATION AND THEIR PROCEEDS SHALL BE HELD IN TRUST FOR MEMBERS IN ACCORDANCE WITH THE PROVISIONS OF THESE ARTICLES OF INCORPORATION AND THE BYLAWS OF THE ASSOCIATION. IT IS ACKNOWLEDGED THAT THE COOPERATIVE PROPERTY CONVEYED TO THE CORPORATION BY THE DEVELOPER WILL BE WITHIN THE DEVELOPER'S CONTROL AS TO SALES OR LEASES OF COOPERATIVE UNITS AS NOTED IN ARTICLE 2 ABOVE, AND ALL LEASE REVENUES FROM THE DEVELOPER'S COOPERATIVE UNITS SHALL BELONG SOLELY TO THE DEVELOPER (I.E., THE ONLY REVENUES DERIVED FROM COOPERATIVE UNITS THAT SHALL BELONG TO THIS CORPORATION SHALL BE THOSE REVENUES FROM COOPERATIVE UNITS HELD BY ANYONE OTHER THAN THE DEVELOPER.) [EMPHASIS ADDED]

6. Paragraph 15 of the Purchase Agreement, incorporated as

exhibit three to the Prospectus as recorded in O.R. Book 688, page 0442 of the cooperative documents sets forth the ownership interest of the Developer in the cooperative's property and states:

...THE PARTIES FURTHER ACKNOWLEDGE THAT SELLER IS ACTING FOR THE BENEFIT OF THE DEVELOPER OF THE COOPERATIVE PROPERTY. THE DEVELOPER IS DANIEL D. MCMULLEN AND MARGE P. MCMULLEN AND IS ACTING THROUGH WEST WIND RETIREMENT VILLAGE COMMUNITY ASSOCIATION, INC. AS THE PROPER ENTITY TO BE CONVEYING INTERESTS IN THE PROPRIETARY LEASES AND AS SUCH THE DEVELOPER IS A BENEFICIAL PARTY TO THIS PURCHASE AGREEMENT, WITH ACTUAL PROCEEDS PAYABLE TO SELLER UNDER THIS AGREEMENT BEING PAYABLE TO DEVELOPER

7. In accordance with the paragraph 2.1 of the By-Laws of the Association, the Board of Directors shall be composed of not less than five or more than seven members. The By-Laws provide that "The Developer and any designee of the Developer shall be deemed an owner for purposes of this provision." The Association's Board consists of five directors. Three directors are appointed by Petitioner, who is the Developer and the President of the Association. The other two directors are elected by unit owners other than the Developer. Thus, at all relevant times, the Board of Directors of the Association has been under Petitioner's control or that of her husband, Dan McMullen.

8. In Paragraph 16.2 of the Association's By-Laws, the

Developer guaranteed each purchaser that the purchaser's share of the annual assessment would not increase from the amount specified in the purchase agreement (\$240), for a period of at least two years from the date of the first closing of the sale of a cooperative unit. Additionally, in Article 16.2, the Developer obligated itself, during the guarantee period, "to pay any amount of common expenses incurred during that period that are not able to be paid out of the assessments at the guaranteed level from all cooperative unit owners (other than the Developer)". Paragraph 14 of the prospectus also contains the Developer's guarantee of the maximum annual assessment each unit owner would pay for two years after the first unit was sold, and states:

THE DEVELOPER GUARANTEES TO EACH PURCHASER THAT HIS ANNUAL ASSESSMENT AND MAINTENANCE COSTS WILL NOT INCREASE OVER THE AMOUNT SPECIFIED IN HIS PURCHASE AGREEMENT AND PROPRIETARY LEASE (INITIALLY \$240 PER YEAR). THESE GUARANTEES SHALL CONTINUE UNTIL A PERIOD OF TWO YEARS FROM THE DATE OF THE FIRST CLOSING OF THE SALE OF A COOPERATIVE UNIT....

9. Paragraph 17 of the By-Laws, provides as follows:

... THE PERCENTAGE OF OWNERSHIP OF THE ASSOCIATION IS BASED ON THE TOTAL NUMBER OF COOPERATIVE HOMESITES. THERE BEING 136¹ HOMESITES. EACH

¹Through error or inadvertence, the survey of the cooperative property, which is part of the cooperative documents, identifies 137 mobile homesites. Whether there are 137 or 136 sites or

HOMESITE REPRESENTS A 1/136 INTEREST. THE PERCENTAGE INTEREST ALSO DETERMINES THE PERCENTAGE ASSESSMENT TO BE PAID BY EACH COOPERATIVE UNIT OWNER AND SHALL FURTHER CONTROL IN CASE OF ANY DISTRIBUTIONS MADE TO UNIT OWNERS. (emphasis added).

10. Article 9.3 of the Association's Articles of Incorporation, concerning amendments to the Articles, states that "No amendment shall be made that is in conflict with the Cooperative Act."

11. Through 1992, only 26 proprietary leases were issued by the Developer, (Petitioner and/or her husband) for units within the cooperative property. Despite the language of the cooperative documents, the Developer established the assessments to be paid by each cooperative unit owner by dividing the total budget amount (for common expenses) by the total number of cooperative homesites (136). Each of the 136 units were assessed an equal amount (1/136). The 44 rented units and the 26 proprietary units would each pay the 1/136 portion of the assessment. However, the Developer would then proceed to determine the number of unoccupied homesites (i.e., those units that were neither leased nor rented). The Developer would then multiply the number of unoccupied homesites by the amount of the individual assessment for each unit

parcels is irrelevant to this declaratory statement.

and would spread that amount over the lots that were either the subject of proprietary leases or rented. This amount was paid equally by owners of proprietary leases as well as by the Developer for each rented lot.

12. Upon the death of Daniel McMullen in August of 1990, Marge McMullen, as personal representative of the Estate of Daniel McMullen, and as the survivor of Daniel McMullen, continued on as the Developer of West Wind Village Retirement Community Cooperative, and proceeded to operate the Association. Petitioner continued the practice of setting assessments in the manner instituted by the McMullens as described above.

13. Under the assessment methodology used by Petitioner, assessments on unsold units were borne in equal proportions by the owners of the 26 units which had been sold (that is, for which proprietary leases had been issued by the association) and by the Developer for the 44 unsold units that she rents out. Purchasers of cooperative parcels, therefore, pay a greater share of the common expenses than the 1/136th portion set out in the cooperative documents and the Developer pays no assessments on the sites that are unrented and unsold, (except for the amount charged through the 44 rented lots).

14. Petitioner conducted the business of the association as

she understood it was handled in the past, until 1992, when in closing the Estate of Daniel McMullen, she retained counsel to advise her as to conducting the association's affairs, and retained an accounting firm to assist in the preparation of the association's budget.

15. At the time of the preparation of the annual budget for 1992, twenty-six (26) proprietary leases had been issued and forty-four (44) homesites were occupied by renters. The methodology previously described in paragraph 11 above, was utilized by the Board of Directors of the association in determining assessments for common expenses, as it appeared to reflect the procedures followed in the past.

PETITIONER'S QUESTIONS

Petitioner presents three questions²:

- 1) May the Petitioner, who is in control of the board of directors, continue to utilize the assessment methodology described in paragraph 11 [of the Petition and of this Statement] without amending the By-Laws, if the members approve and ratify the action?
- 2) Can any legislative enactment to Chapter 719, Florida Statutes, adopted after 1986, the effective date of this prospectus filing with the Division, impair the contract obligation between the Petitioner and West Wind Village Retirement Community Association, Inc., (which provides that the Developer shall have a right to receive

²The questions are as presented in the Petition.

all proceeds from the sale of cooperative units or rental units as consideration for the conveyance of the property to the association without any payment for property which had value believed to be in excess of \$300,000.00 in 1986, at which time all of the property comprising the mobile home park, including improvements, was conveyed to the association.)?

3) May the Board of Directors adopt the following as an amendment to the Corporation's By-Laws to conform the By-Laws to the assessment procedure that has been followed in the past:

16.1 Budget. The Board of Directors shall adopt a budget for each calendar year that shall include the estimated funds required to defray the common expenses and to provide and maintain funds for the foregoing accounts and reserves according to good accounting practices as follows: Notwithstanding the unit owner's equity as set forth in By-Law 17, the Board, in adopting its budget shall determine the percentage assessment to be paid by each cooperative unit owner by dividing the total budget amount by the total number of cooperative homesites, then determine the number of unoccupied cooperative homesites and multiply this number by the percentage assessment computed above. This amount, the percentage assessment on unoccupied lots, shall then be allocated amongst the lots that are either the subject of proprietary leases or rented, which shall be considered to be the fair allocation of the amounts to be assessed, insofar as the provisions of Chapter 719, Florida Statutes, and the Articles of Incorporation provide no guidance as to the manner of assessing lots that are owned by the Association but not the subject of leases, but many of which are in fact the subject of rental arrangements, and an appropriate manner of allocating the total budget against the

properties deriving the benefits must be made.³

CONCLUSIONS OF LAW

1. The Division has jurisdiction over this matter pursuant to Sections 719.501, and 120.565, Florida Statutes.

2. Section 719.107(2), Florida Statutes (1985), provides that "[f]unds for the payment of common expenses shall be collected by assessments against unit owners in the proportions or percentages of sharing common expenses provided in the cooperative documents." The By-Laws of the association provide that "[e]ach homesite represents a 1/136 interest" and "the percentage interest also determines the percentage assessments to be paid by each

³As to question #3, above, the Petitioner asserts that the assessment methodology described has been "ratified at the meeting of the Membership on January 20, 1993" and attaches a copy of the minutes of that meeting to the petition. The minutes reflect only that the membership discussed the need to formalize the activities of the cooperative, and in particular the need for a formal waiver of reserves each year, as the budget for the cooperative had apparently not included funding for reserves as required by Chapter 719, Florida Statutes. In addition a resolution was adopted by the membership to "ratify and approve the past actions of the Board and its officers, including the action or inaction of Dan McMullen pertaining to the waiving of the reserves as part of the adoption of the annual budget, with the understanding that future actions of the Board and its Officers will be consistent with, and pursuant to, the Florida laws governing cooperatives." In that the resolution does not cite the assessment methodology prior to the adoption of this resolution, it cannot be said that the membership ratified the methodology as asserted by the petitioner.

cooperative unit owner." The By-Laws provide that "The Developer and any designee of the Developer shall be deemed an owner for purposes of this provision." The statute and By-Laws clearly mandate that a unit owner in the West Wind Retirement Village Cooperative is responsible for a 1/136 portion of the common expenses of the cooperative. In this case, the Developer is the owner of the unsold cooperative units. Therefore, the Developer is liable for a 1/136 portion of the common expenses for each unit under her control.

3. The fact that the Developer deeded the cooperative property to the association is irrelevant as a matter of law and fact. In both the statute and the cooperative documents, Petitioner, as Developer, is the legal owner of the cooperative units that are not sold. (See Hyde Park Condominium Ass'n v. Estero Island Real Estate, Inc., 486 So. 2d 1 (Fla. 2nd DCA 1986). In the cooperative form of ownership of real property, legal title to the real property forming the cooperative is vested in a corporate entity and the beneficial use of the property is evidenced by an ownership interest in the association as a "lease or other muniment of title or possession granted by the association as the owner of all the cooperative property." Section 719.103(9), Florida Statutes. The cooperative documents indisputably delineate

the grant of possession to the Developer of the unsold units and clearly describe the nature and extent of the Developer's ownership interest in the cooperative property. The Developer through the association holds and sells the cooperative parcels, leases the unsold parcels and receives all revenues from the sales or rentals of the unsold parcels. The Developer's ownership interest is spelled out in detail in the cooperative documents:

All funds and titles of all properties acquired by the association and the proceeds shall be held in trust for members...the cooperative property conveyed to the corporation by the Developer will be within the Developer's control as to sales or leases of cooperative units as noted in Article 2 above, and all lease revenues from the Developer's cooperative units shall belong solely to the Developer ...the only revenues derived from cooperative units that shall belong to this corporation shall be those revenues from cooperative units held by anyone other than the Developer. [emphasis added], (Paragraph 3.3, Articles of Incorporation.)

4. Section 719.108(1), Florida Statutes (1985), provides in pertinent part that:

A unit owner, regardless of how title is acquired, including, without limitation, a purchaser at a judicial sale, shall be liable for all rents and assessments coming due while he is the owner of a unit.

Section 719.108(2), Florida Statutes (1985), further provides that

The liability for rents and assessments may not be

avoided by waiver of the use or enjoyment of any common areas or by abandonment of the unit for which the rents and assessments are made.

At the time this Cooperative was created, Florida law provided no waiver or excuse from the payment of assessments by any member of the cooperative, including the Developer. Therefore, the methodology for apportioning assessments that has been employed by the Developer-controlled Board of Directors apparently since the inception of the cooperative, which Petitioner wishes to formalize through action by the Board of Directors or amendment to the By-Laws, contravenes the statute. Payment of the Developer's share of the common expenses on the Developer's units cannot be waived by ratification by the Developer-controlled Board of Directors or By-Laws amendment.

5. In 1986, section 719.108, Florida Statutes, was amended and added section 719.108(8)(a) which states:

(8)(a) No unit owner may be excused from the payment of his share of the rents or assessments of a cooperative unless all unit owners are likewise proportionately excused from payment, except as provided in subsection (6) and in the following cases:

2. A developer, or other person with an ownership interest in cooperative units or having an obligation to pay common expenses, may be excused from the payment of his share of the common expenses which would have been assessed against those units during the period of time that he shall

have guaranteed to each purchaser in the purchase contract or in the cooperative documents, . . . that the assessment for common expenses of the cooperative imposed upon the unit owners would not increase over a stated dollar amount and shall have obligated himself to pay any amount of common expenses incurred during that period and not produced by the assessments at the guaranteed level receivable from other unit owners.

6. In accordance with the foregoing statutory provisions, even though an amendment of the By-Laws would generally be required in order to increase a unit owner's proportional responsibility for common expenses, the change in apportionment of the responsibility for common expenses suggested by the Petitioner may not be accomplished because an owner of one of the 26 cooperative parcels that were purchased would pay a greater share of the common expenses than the Developer would for a parcel, in violation of section 719.108, Florida Statutes. The Developer/Petitioner would pay no assessments on any of the Developer's units that are not rented or sold and a portion of the assessments on Petitioner's units would be passed on to the owners of the 26 purchased units and to the Developer (through her 44 rented units).

7. In Article 16.2, of the Association's By-Laws, Petitioner was obligated during the guarantee period, "to pay any amount of common expenses incurred during that period that are not able to be paid out of the assessments at the guaranteed level from all

cooperative unit owners (other than the Developer)". Paragraph 14 of the prospectus also contains the Developer's guarantee of the maximum annual assessment each unit owner would pay for two years after the first unit was sold. The assessment methodology proposed by Petitioner and apparently employed to date, makes the Developer's guarantee a nullity since it forces unit owners other than the Developer not only to pay their 1/136 share of the assessments as specified in the By-Laws but also to pay a portion of the assessments due from the units that had not been rented or purchased which the Developer controls.⁴

8. Thus, the Board of Directors may not adopt the proposed amendment to the cooperative's By-Laws set forth in Petitioner's question #3, to conform the By-Laws to the assessment procedure that has been followed in the past, because the proposed assessment methodology would relieve the Petitioner/Developer of the responsibility for common expenses that she is responsible for under the statute by passing on a disproportionate share of the

⁴The developer guarantee/exception provision of section 719.108(8)(a), Florida Statutes, was not in effect at the time this cooperative was established (See: 87-175, Laws of Florida, effective July 1985). Therefore, it could be argued that Petitioner also owes assessments on unsold, unrented units for the two-year guarantee period.

budget to the non Developer-owned units in violation of sections 719.107 and 719.108, Florida Statutes.

STATEMENT

Based on the foregoing findings of fact and conclusions of law, the Division hereby declares that:

1. Petitioner's question #1 is answered in the negative. Petitioner, who is in control of the board of directors, may not continue to utilize the proposed assessment methodology even if the members approve and ratify the action, because section 718.108(2), Florida Statutes prohibits the waiver of payment of the Developer's share of the common expenses on the Developer's units.

2. Petitioner's question #2 is dismissed as vague. Question #2 in the Petition For Declaratory Statement fails to cite the specific statute, rule, and/or policy which Petitioner seeks to have interpreted.

3. Petitioner's question #3 must also be answered in the negative since the Board of Directors may not adopt an amendment to the cooperative's By-Laws that relieves the Petitioner/Developer of the responsibility for common expenses by passing on a disproportionate share of the budget to the non Developer-owned

units in violation of sections 719.107 and 719.108, Florida Statutes.

DONE AND ORDERED this 20th day of February, 1997, at Tallahassee, Leon County, Florida.



Robert H. Ellzey, Jr.
ROBERT H. ELLZEY, JR., 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 REJECTING PETITION FOR DECLARATORY STATEMENT
CONSTITUTES FINAL AGENCY ACTION AND MAY BE APPEALED BY PETITIONER
PURSUANT TO SECTION 120.68, FLORIDA STATUTES, AND RULE 9.110(d),
FLORIDA RULES OF APPELLATE PROCEDURE, BOTH WITH THE APPROPRIATE
DISTRICT COURT OF APPEAL, ACCOMPANIED BY THE APPROPRIATE FILING
FEES, AND WITH SARAH WACHMAN, AGENCY CLERK FOR THE DEPARTMENT

OF BUSINESS AND PROFESSIONAL REGULATION, 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
was furnished by U.S. Mail to Carl A. Bertoch, Esquire, 537 East
Park Avenue, Post Office Box 3106, Tallahassee, Florida 32315-3106
this ____ day of _____, 1997.

KRISTIE L. HARRIS, DOCKET CLERK

Copies furnished to:
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Senior Attorney

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CARL A. BERTOCH
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OF COUNSEL:
ROBERT L. UNDERWOOD, III
(MEMBER D.C. BAR ONLY)

May 3, 1995

HAND DELIVERED

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9:40 AM
DIRECTOR'S
OFFICE

Ms. Sharon Malloy, Assistant Bureau Chief
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Condominiums and Mobile Homes
Bureau of Condominium
Northward Centre
1940 North Monroe Street
Tallahassee, Florida 32399-1031

DS95100


RE: West Wind Village Retirement Community Association, Inc., a Cooperative
PR2L007719

Dear Ms Malloy:

This is to express my appreciation for the opportunity to meet with you and members of your staff along with members of the Mobile Bureau with regard to the referenced project and advise you that we are in the process of attempting to move forward with the dissolution of the cooperative and have the property operated as a mobile home park.

On behalf of the Developer, we have received a proposal from all of the proprietary lease holders and members of the cooperative expressing a desire to dissolve the cooperative. A meeting of the membership is scheduled for May 13, 1995 and, therefore, we would request that the Petition for Declaratory Statement that has been filed with your office be put on hold until we determine how we are to proceed with this matter. We are requesting this as the matter may become moot as a result of this program to dissolve.

Your patience and understanding in this matter is appreciated

Sincerely yours,


Carl A. Bertoch

CAB/g

cc Mr. Mike Benz