

Final Order No. BPR-98-02440 Date 4-14-98

FILED

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By: Brandan M. Nichols

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

DS 98-002

IN RE: PETITION FOR DECLARATORY STATEMENT

ROSALIE A. LAMKIN, UNIT OWNER,
FAINE APARTMENTS CONDOMINIUM,

Petitioner, and

Docket Number DS98005

FAINE APARTMENTS ASSOCIATION, INC.,
Intervenor.

DECLARATORY STATEMENT

The Division of Florida Land Sales, Condominiums, and Mobile Homes (Division) issues this declaratory statement on the petition filed by Rosalie A. Lamkin, regarding the Faine Apartments Condominium:

BACKGROUND

On January 9, 1998, the Division received a Petition for Declaratory Statement from Rosalie Lamkin, in regard to the Faine Condominium. The Notice of Receipt of the petition was published in Volume 24, Number 5, January 30, 1998 of the Florida Administrative Weekly. The association

was advised of the petition by letter dated January 20 and given 20 days to submit its notice of intervention. On February 6, 1998, the Division received the Notice of Intervention filed by David Paul Montgomery, Esquire, counsel for the Faine Apartments Association.

FINDINGS OF FACT

The following findings of fact are based on information in the petition for declaratory statement and the documents submitted by petitioner, and on the response submitted by the association. The Division takes no position as to the accuracy of the facts, but merely accepts them as submitted for the purposes of this declaratory statement. No hearing was held in this case.

1. The Petitioner is one of the trustees of the Rosalie A. Lamkin Revocable Living Trust, the record owner of units 7 and 12 in the Faine Apartments Condominium. Unit 7 is the subject of the petition for declaratory statement.

2. The Faine Apartments Condominium ("condominium") is a condominium as defined in Section 718.103 (10), Florida Statutes (1997).

3. The Intervenor is Faine Apartments Association, Inc., the association as defined by section 718.103(1), Florida Statutes, responsible for the operation of the condominium.

4. The declaration of condominium was recorded in January 1972, in the public records of Manatee County, Official Records Book 543 page 300. The declaration submitted twelve units to the condominium form of ownership.

5. The developers of Faine Apartments Condominium were Mary Lou Faine, Henry Cupi and Virginia Cupi. The developers constructed ten of the twelve units that had been recorded.

6. According to Petitioner, the town of Longboat Key, Florida prohibited the developers

from building two of the twelve recorded units, on the basis that the units were over a septic tank.

No improvements were ever made to units 7 and 8.

7. The declaration of condominium contains the following provisions:

(4) Survey, Plat Plan. The Developer will construct upon the above described property apartment buildings and other improvements on the property covered by this Declaration of FAINE APARTMENTS, a Condominium. *Developer has had the property surveyed and divided into 12 units with the intent to create a Condominium apartment project.* This survey of the land and plot plan locating the improvements thereon and identifying the common elements and each condominium Unit and the approximate locations and dimensions of such Units and buildings and other improvements to be placed upon said land, is attached as Exhibit "A."

(5) Undivided Shares in Common Elements and Common Surplus. All property included in this Condominium which is not within any apartment Unit shall be deemed Common Property. *The owner or owners of each Unit shall have a one-twelfth (1/12) undivided interest in said Common Property which includes but is not limited to ground support area, paved area, yard area, foundations, attic areas and substantial portions of the exterior walls, floors, ceilings and walls between Units. The owner or owners of each Unit shall likewise have a one-twelfth (1/12) undivided interest (and where there is more than one owner of a Unit, the percentage ownership of such owners shall be divided among the collective owners in the proportion of their ownership), in any common surplus.* It is recognized that at the date hereof, construction of all the improvements and Units contemplated by the Declaration, survey and plot plan described in Exhibit "A" have not been completed. Developer expressly reserves every right necessary or desirable relating to the common elements and the Condominium property generally, for the purpose of constructing and building said improvements and Units and effecting sale or lease of all of the Condominium Units. Developer also reserves the right to amend this Declaration of Condominium in order to add the Units constructed thereon, to this Declaration and in particular Exhibit "A" thereto by filing of such additional plans or surveys as may be required to adequately describe the improvements of the Condominium, and in order to show the completion of such improvements. Such completion may be shown by a certificate of an architect, engineer or surveyor certifying that the contemplated improvements have been constructed substantially as herein represented, or if not so constructed, then designating the changes made. Such plans or certificate when signed and acknowledged by the Developer shall constitute an amendment of this Declaration, without approval of the Association, Unit Owners or lienors or mortgagees of Units or of the Condominium, whether or not elsewhere required for amendment.

8. The declaration of condominium was not amended to reflect the restriction imposed by the city of Longboat Key. In 1976, Petitioner's father, one of the developers of the condominium, was killed in an automobile accident.

9. When the declaration of condominium was recorded in 1972, former chapter 711, Florida Statutes, governed condominiums and cooperative apartments. The statute provided, in relevant part:

711.03 Definitions.-- As used in this law:

* * *

(13) Unit means a part of the condominium property which is to be subject to private ownership.

711.15 Assessments; liability; lien and priority; interest; collection.--

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

(3) Assessments and installments thereon not paid when due shall bear interest from the date when due until paid at the rate provided in the declaration, not to exceed the rate allowed by law, and if no rate is provided then at the legal rate.

(4) The association shall have a lien on any condominium parcel for any unpaid assessments, and interest thereon, against the unit owner of such condominium parcel. If authorized by the declaration said lien shall also secure reasonable attorney's fees incurred by the association incident to the collection of such assessment or enforcement of such lien. Said lien shall be effective from and after the time of recording in the public records in the county in which the condominium is located of a claim of lien stating the description of the condominium parcel, the name of the record owner, the amount due and the date when due, and the lien shall continue in effect until all sums secured by the lien shall have been fully paid. Such claims of lien shall include only assessments which are due and payable when the claim of lien is recorded . . .

* * *

10. According to the Petition and Response, the association has demanded payment from

Ms. Lamkin of assessments owed on the unit she owns and upon which there has been no construction. The association maintains that from February 1993 to the present, the total assessments for unit 7, together with 8% interest, is \$8, 746.22.

11. Petitioner seeks a declaratory statement as to the relationship of several provisions of chapter 718, Florida Statutes, to her circumstances. Petitioner referenced section 718.403, Florida Statutes, which is inapplicable herein as it applies to phase condominiums and Faine is not a phase condominium. Petitioner asked the following specific questions:

a. Whether, pursuant to sections 718.103(11) and (24), Florida Statutes, Petitioner's empty lot is a "unit."

b. Whether, pursuant to section 718.111(9), Florida Statutes, the board should have credited the value of the lot to the amount it requested in payment of past due assessments.

12. Intervenor requests that the Division issue a declaratory statement that the association can collect past due maintenance fees from the owner of unit 7. In addition, the association requests that the Division declare that the association can collect its attorney's fees incurred in connection with this matter from this unit owner.

CONCLUSIONS OF LAW

1. The Division has jurisdiction over the subject matter of the petition and is authorized to issue this declaratory statement pursuant to sections 120.565 and 718.501, Florida Statutes.

2. The purpose of a declaratory statement is to determine the applicability of any statutory provision, or of any rule or order of the agency as it applies to the Petitioner's particular set of circumstances. Section 120.565, Florida Statutes (1997), provides, in relevant part:

120.565 Declaratory Statement by agencies.--

(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 of circumstances.

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3. The petitioner is substantially affected by the issues raised in the petition for declaratory statement, has alleged facts sufficiently limited to Petitioner, and has standing to seek a declaratory statement.

4. Intervenor, as the entity responsible for the operation of the Faine Apartments Condominium, is substantially affected by the issues raised in the petition for declaratory statement and is a proper party to this proceeding.

5. The issue of whether property submitted to condominium and upon which no improvements have been made constitutes a "unit " for purposes of assessments has been a much litigated issue in Florida. Currently, the law is not settled, as there are different opinions in the Second and Fourth Appellate districts. *Hyde Park v. Estero Island*, 486 So.2d 1 (Fla. 2d DCA 1986); *Estancia Condominium Association v. Sunfield Homes*, 619 So.2d 1008 (Fla. 2d DCA 1993); *Welleby Condominium Association One v. W. Lyon Co.*, 522 So.2d 35 (Fla. 4th DCA 1987); *Winkelman v. Toll*, 661 So.2d 102 (Fla. 4th DCA 1995); *RIS Investment Group, Inc., v. Department of Business and Professional Regulation, Division of Florida Land Sales, Condominiums, and Mobile Homes*, 695 So.2d 357 (Fla. 4th DCA 1997). The Division of Florida Land Sales, Condominiums and Mobile Homes has consistently interpreted and enforced the Condominium Act

as providing that once a condominium unit is recorded in the county records as being submitted to condominium, that unit exists for all purposes.¹ In 1990, the Florida Legislature enacted language amending section 718.104(2), Florida Statutes, that clarifies the intent of the statute. That section now provides:

A condominium is created by recording a declaration in the public records of the county where the land is located, executed and acknowledged with the requirements for a deed. All persons who have record title to the land being submitted to condominium ownership, or their lawfully authorized agents, must join in the execution of the declaration. *Upon the recording of the declaration, or an amendment adding a phase to the condominium under s. 718.403(6), all units described in the declaration as being located in or on the land then being submitted to condominium ownership shall come into existence, regardless of the state of completion of planned improvements in which the units may be located.*

6. Central to the determination of whether the Petitioner owes assessments on the lot she owns is whether said lot constitutes a condominium unit within the meaning of the Condominium Act. The Faine declaration of condominium does not contain a definition of "unit." Section 1 of the Faine declaration provides that the lands described in the declaration are submitted to condominium ownership pursuant to the Condominium Act, chapter 711, Florida Statutes, as amended. At the time the declaration of condominium was recorded, section 711.03 provided, in relevant part:

¹ Most recently, the Division held that developers were liable for assessments on recorded but unconstructed units in the Final Orders in *Department of Business Regulation, Division of Florida Land Sales, Condominiums and Mobile Homes v. Steffens Development Corporation* Docket Number CC90060 (Solares, September, 1991); *Department of Business and Professional Regulation v. RIS Investments Inc.*, Docket Number CC95148 (Norred, January, 1996); and *Department of Business and Professional Regulation, Division of Florida Land Sales, Condominiums and Mobile Homes v. Sports Shinko, Inc.*, Docket Number CC 96016 (Ellzey, December, 1997).

(4) Common elements mean the portions of the condominium property not included in the units.

(13) Unit means a part of the condominium property which is to be subject to private ownership.

(14) Unit owner or owner of a unit means the owner of a condominium parcel.

The above definition of "unit" is indistinguishable from the definition of "unit" in *Hyde Park Condominium Association, Inc. v. Estero Island Real Estate*, 486 So.2d 1 (Fla. 2d DCA 1986). In that case, the Court determined that based on the statutory definition of "unit," the Hyde Park condominium association was entitled to assessments that were due from 1970 to 1983 on units that had been recorded but not constructed. The court stated:

Under the 1969 Act, condominium property includes land, all improvements on the land, and all easements and rights with the condominium. A "unit" is that part of the condominium property "which is to be subject to private ownership." §711.03(4) (emphasis added). Therefore, under the 1969 Act, the only type of private ownership available within a condominium is a "unit." For this court to hold otherwise would, in effect, create property ownership rights which were not contemplated by either the legislature or the Hyde Park Condominium declaration. *Id* at 2.

In *Estancia Condominium Association, Inc. v. Sunfield Homes, Inc.*, 619 So.2d 1008 (Fla. 2d DCA 1993), the Second Appellate District Court again determined that certain undeveloped land that had been recorded and submitted to condominium constituted condominium "units." The Estancia declaration defined "unit" as the part of the condominium property which is to be subject to exclusive ownership. The Court found that definition indistinguishable from the definition in Hyde Park and held that the appellee owned units.

7. The definition of "unit" applicable to the facts in the instant case are also

indistinguishable from the definition of "unit" applied in Hyde Park and Estancia. Therefore, the Petitioner is the owner of a condominium "unit" within the meaning of the Condominium Act, regardless of the fact that no improvements were made to the units. The association is therefore entitled to those past due assessments on Petitioner's unit that are not barred by the statute of limitations or other affirmative defenses. *Hyde Park v. Estero Island Real Estate*, 486 So.2d at 2 (Fla. 2d DCA 1986).

8. In the Fourth Appellate District, the Court has taken a position inconsistent with that of the Second Appellate District. In fact, the argument is made that the Fourth Appellate District has issued conflicting opinions on the issue in its own district. In *Welleby Association One v. W. Lyon Co.*, 522 So.2d 35 (Fla. 4th DCA 1987) the court held that the term "condominium parcel" as used in the declaration of condominium in that case, did not include undeveloped land. The Court based its opinion on the definition of "unit" effective in 1974: Unit means a portion of the condominium property which is to be subject to private ownership. A unit may be in improvements, land, or land and improvements together, as specified in the declaration. From that definition, the Welleby court held that the developer, as scrivener of the declaration, could specify in the declaration how a unit is to be defined. The developer in that case used the term "condominium parcel" as the object of assessments, which term was further defined as an apartment and an individual private dwelling. The court held that because the developer defined a unit as a private dwelling, the unit did not consist of raw, unimproved property. In *Winkelman v. Toll*, 661 So.2d 102 (Fla. 4th DCA 1995), the Fourth District, seemingly contradicting its opinion in Welleby, held that condominium units in a phase condominium which had been submitted to condominium by amendment to the declaration of condominium constituted "units" subject to assessments, even

though no improvements were ever made to the land. The court stated that it is the recording of the declaration that subjects the property to condominium ownership. *Id at 105*. In *RIS Investments, Inc., v. Division of Florida Land Sales, Condominiums and Mobile Homes*, 695 So.2d 357 (Fla. 4th DCA 1997), the Court returned to its analysis in *Welleby* and held that the developer was allowed to describe a unit any number of different ways under the Condominium Act, and the Division should have looked at the declaration of condominium in that case to see how a unit was defined before deciding that RIS was responsible for assessments from the date the declaration was recorded. The instant case is not governed by the cases referenced above.

9. The Division's prior final orders on the issue and the decisions from the Second Appellate District, which includes Manatee County, govern this case. Both the final orders and the cases from the Second Appellate district support the argument that under the Condominium Act, there can be but two forms of ownership in a condominium -- units and common elements. The unit is subject to exclusive ownership, while the common elements are owned in undivided shares by all of the unit owners. Therefore, because Petitioner holds property that has been submitted to condominium by recording in the public records and that is subject to private or exclusive ownership, Petitioner is a Condominium unit owner within the meaning of the Condominium Act.

10. Any other interpretation of the issue would render portions of the Condominium Act invalid. For example, section 718.116, Florida Statutes, provides that a unit owner is liable for all assessments that come due while she is the unit owner. That section provides that in certain instances, a developer may be excused from payment of assessments on the units he owns if he guarantees that the other unit owner's assessments will not increase above a stated level for a stated period of time. If the statute were interpreted to excuse a developer from paying assessments on

recorded units based on how that developer defined "unit," the developer guarantee provision would be rendered meaningless. Also, the Condominium Act requires that the declaration disclose the unit owners' percentages or proportions of owning the common elements and of paying common expenses. In the instant case, the declaration provides for assessments in the proportions of 1/12. That percentage is what was disclosed to prospective purchasers when the Faine condominium units were being offered. Unless all of the unit owners agree, that percentage ownership of the common elements and by which assessments are paid cannot be changed. §718.110(4), Fla. Stat. (1997). If the documents were now interpreted to mean that the two lots upon which there are no improvements are not condominium "units," it would render the percentages stated in the declaration meaningless.

11. In a circuit court, Petitioner's equitable considerations, i.e., the fact that the city of Longboat Key would not allow any construction on the units; the fact that her father died in an automobile accident in 1976 before seeking an amendment to the declaration to reflect the city's restriction on building; and the fact that Petitioner offered to turn her unit over to the association could be determined. However, such facts are not relevant to the legal issue of whether the Petitioner's unimproved lot constitutes a condominium "unit" under the Condominium Act.

12. Based on the foregoing, in response to Petitioner's first question as to whether Petitioner's unit 7 is a "unit" under the Condominium Act, the Division declares that the Condominium Act does not distinguish between units that have been recorded and upon which improvements have been made, and units that have been recorded but have no improvements thereon. The Faine declaration describes twelve units as being submitted to condominium. As no amendment was recorded to reflect a change in that recordation, all of the recorded units continue to exist. Petitioner is therefore the owner of a condominium "unit" as that term is defined in the

Condominium Act.

13. Petitioner's second question as to whether the association is required to purchase her unit pursuant to section 718.111(7), Florida Statutes, must be answered in the negative. That section states:

(7) TITLE TO PROPERTY.--

The association has the power to acquire title to property or otherwise hold, convey, lease, and mortgage association property for the use and benefit of its members. The power to acquire personal property shall be exercised by the board of administration. Except as otherwise permitted in subsections (8) and (9), and in s. 718.114, no association may acquire, convey, lease or mortgage association real property except in the manner provided in the declaration, and if the declaration does not specify the procedure, then approval of 75 percent of the total voting interests shall be required.

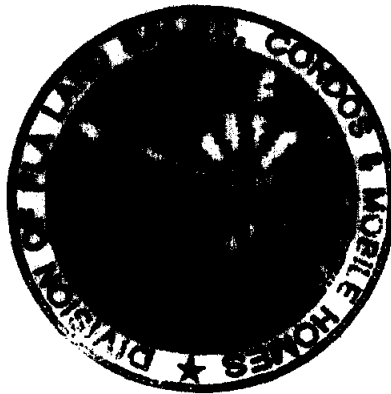
The above provision relates to the association's general powers to acquire title to property, and does not apply in this case. In any event, the provision does not require the association to purchase condominium units, but merely recognizes its authority to do so.


14. This situation is specifically governed by section 718.116, Florida Statutes, and paragraph 9 of the Faine declaration of condominium governing the association's right to a claim of lien for unpaid assessments. Former chapter 711, Florida Statutes, established the right of the association in this case to file a claim of lien against a condominium unit for unpaid assessments. The current version of the provision is section 718.116, Florida Statutes, which sets out the procedures to be followed in collecting past due assessments. Under those provisions, the association may file a claim of lien for past due assessments, or may sue to recover a money judgment for unpaid assessments. The association may recover reasonable attorney's fees incurred in either a lien foreclosure or an action to recover a money judgment. §718.116(6)(a). Petitioner's condominium documents provide that the association may recover all costs, including attorney's fees

for filing any action or a suit enforcing or foreclosing a lien, and the lien shall be deemed to cover and secure such costs and fees. Accordingly, pursuant to the terms of the declaration, former chapter 711, Florida Statutes, and chapter 718, Florida Statutes, the association is not required to accept Petitioner's unit for past due assessments, but may follow the procedures set out in section 718.116, Florida Statutes, for the collection of past due assessments.

Wherefore, the Division declares that the Petitioner is the owner of a condominium "unit" subject to assessments for which the association may seek payment pursuant to section 718.116, Florida Statutes, and paragraph 9 of the declaration of condominium.

DONE this 8th day of April, 1998, at Tallahassee, Leon County, Florida.




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 DECLARATORY STATEMENT 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 APPROPRIATE FILING FEES, AND WITH THE AGENCY CLERK FOR THE DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, 1940 NORTH MONROE STREET, TALLAHASSEE, FLORIDA 32399-0792, WITHIN 30 DAYS OF THE RENDITION OF THIS DECLARATORY STATEMENT.

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 Rosalie A. Lamkin, 2518 Lofberg Dr., Jacksonville, Florida 32216, and David Paul Montgomery, Esquire, The Montgomery Walch Law Firm, 2103 Manatee Avenue West, Bradenton, Florida 34205, this ____ day of _____, 1998.

Kristie Harris
Docket Clerk

Copies furnished to:

Kathryn E. Price
Assistant General Counsel

Philip R. Nowicki, Chief
Bureau of Condominiums

Leann B. Ramseur, Real
Estate Development Specialist