

DS 2001-007

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

Final Order No. BPR-2001-02725 Date: **6-25-01**
FILED

IN RE: PETITION FOR DECLARATORY STATEMENT

Department of Business and Professional Regulation
AGENCY CLERK

KENNETH R. FEHRIBACH,

Sarah Wachman, Agency Clerk

Petitioner,
_____ /

By: *Brandon M. Nichols*
Case Number: CD 2001-017

DECLARATORY STATEMENT

The Department of Business and Professional Regulation, Division of Florida Land Sales, Condominiums, and Mobile Homes (Division), enters this declaratory statement pursuant to sections 718.501 and 120.565, Florida Statutes:

PRELIMINARY STATEMENT

On April 9, 2001, the Division received a Petition for Declaratory Statement from Kenneth R. Fehribach. Notice of the petition was duly published in Florida Administrative Weekly, Volume 27, Number 17, April 27, 2001. No hearing was requested or held.

FINDINGS OF FACT

The following Findings of Fact are based on information submitted by Petitioner. 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. Windjammer Condominium Association, Inc., is a Florida not-for profit corporation and condominium association as that term is defined by section 718.103(2), Florida Statutes. The association operates the Windjammer Condominium.
2. Kenneth R. Fehribach owns unit 207 in the condominium.

3. Association legal counsel Elizabeth P. Bonan, Esq., wrote a letter dated February 1, 2001 to John Hannan, president of the board of directors, in response to his questions: 1) whether a meeting of the association's Rules Committee to consider amendments to the rules was properly conducted when it was held in the president's apartment and unit owners were prohibited from attending the meeting on account of lack of room; and 2) whether the failure to conduct an open committee meeting invalidates the amendments, which were adopted at a subsequent unit owners' meeting.

4. The February letter advised that the failure to open the committee meeting to unit owners constituted a violation of section 718.112(2)(c), Florida Statutes, but that the amendments developed at the meeting, and adopted by the unit owners at a subsequent meeting, were not invalid as a result. The letter contains a note at the top: "This correspondence includes privileged communications between attorney and client. This letter should not be placed in the official association records until such time as the board of directors has determined to make its contents public."

5. The petitioner requested that the board of directors provide him with a copy of the letter. At a board meeting, then-association president Harvey Thompson stated that access to letters from the association's attorney would not be made available to unit owners.

6. The unit owner is in doubt as to his rights in this instance, and requests a declaratory statement as to whether, pursuant to section 718.111(12), Florida Statutes, the association is permitted to refuse to disclose to unit owners such a letter from its attorney.

CONCLUSIONS OF LAW

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

2. Petitioner has standing to seek a declaratory statement.

3. The purposes and use of declaratory statements are set out in Chapter 120, Florida Statutes:

120.565 Declaratory Statement by agencies. —

(1) Any substantially affected person may seek a declaratory statement regarding the agency's opinion as to the applicability of a statutory provision, or of any rule or order of 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.

4. Certain records of a condominium association must be maintained and made available to unit owners upon request. See section 718.111, Florida Statutes.

718.111(12) Official Records.—

(a) From the inception of the association, the association shall maintain each of the following items, when applicable, which shall constitute the official records of the association:

* * *

15. All other records of the association not specifically included in the foregoing which are related to the operation of the association.

* * *

(c) The official records of the association are open to inspection by any association member or the authorized representative of such member at all reasonable times...

Notwithstanding the provisions of this paragraph, the following records shall not be accessible to unit owners:

1. Any record protected by the lawyer-client privilege as described in s. 90.502; and any record protected by the work-product privilege, including any record prepared by an association attorney or prepared at the attorney's express direction; which reflects a mental impression, conclusion, litigation strategy, or legal theory of the attorney or the association, and which was prepared exclusively for civil or criminal litigation or for adversarial administrative proceedings, or which was prepared in anticipation of imminent civil or criminal litigation or imminent

adversarial administrative proceedings until the conclusion of the litigation or adversarial administrative proceedings. (emphasis supplied)

5. Section 90.502, Florida Statutes, provides that certain communications between a lawyer and his or her client are confidential:

Section 90.502 Lawyer-client privilege.—

(1) For purposes of this section:

* * *

(c) A communication between lawyer and client is "confidential" if it is not intended to be disclosed to third persons other than:

1. Those to whom disclosure is in furtherance of the rendition of legal services to the client.

2. Those reasonably necessary for the transmission of the communication.

(2) A client has a privilege to refuse to disclose, and to prevent any other person from disclosing, the contents of confidential communications when such other person learned of the communications because they were made in the rendition of legal services to the client.

6. In Skorman v. Hovnanian of Florida, Inc., 382 So. 2d 1376 (Fla. 4th DCA 1980), the court held that the attorney-client privilege applied to correspondence between a party and his lawyer to his client in which legal advice was given in response to the client's inquiries.

Citing Wigmore, the court described the communications to which the privilege attaches:

(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived. 8 Wigmore, Evidence § 2292 (McNaughton rev. 1961)

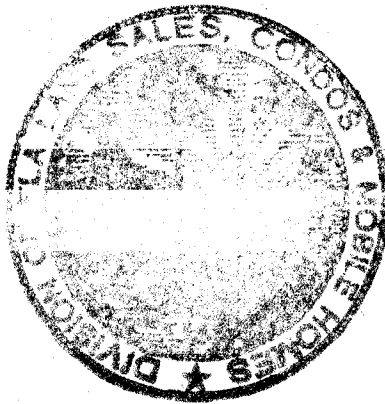
7. The February letter contains confidential communications between the association's attorney and the president of the association.¹ The privilege may be waived by the voluntary disclosure of the person holding the privilege. See Section 90.507, Florida Statutes.

¹ Even prior to the 2000 amendment expressly recognizing the attorney-client privilege in s. 718.111(12), F.S., Division arbitration decisions have recognized the privilege as an exemption from the disclosure requirements of s. 718.111(12), F.S. See Philistin v. Shaker Village Condo. Assn., Inc., Arb. Case No. 98-2858, Order Following Status Conference (April 9, 1998).

That situation is not the case here, however, as the petitioner indicated that the board president denied him access to the letter.

Wherefore, the Division declares that section 718.111(12), Florida Statutes, applies to the facts herein, such that the petitioner does not have the right to access the letter from the association's attorney in which legal advice is provided, as the letter is exempt from disclosure pursuant to section 718.111(12)(c)1., Florida Statutes.

DONE AND ORDERED this 24th day of May, 2001.



A handwritten signature in black ink, appearing to read "Ross Fleetwood", written over a horizontal line.

ROSS FLEETWOOD, DIRECTOR
Department of Business and Professional
Regulation
Division of Florida Land Sales Condominiums,
and Mobile Homes
Northwood Centre
1940 North Monroe Street
Tallahassee, Florida 32399-1030

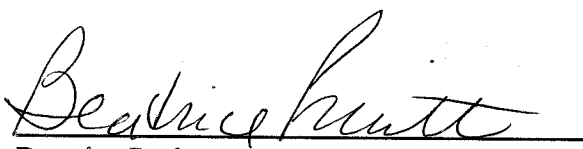
RIGHT TO APPEAL

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, 1940 NORTH MONROE STREET, NORTHWOOD CENTRE, TALLAHASSEE, FLORIDA 32399-2217, 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 has been furnished by U.S. mail to Kenneth R. Fehribach, 1868 SW Palm City Road, #207, Stuart, Florida 34994 this

24th day of May, 2001.


Beatrice Pruitt
Docket Clerk

Copies furnished to:

Patricia A. Draper
Senior Attorney

Tracy Corbitt, Chief
Bureau of Customer Service

Laura Glenn, Chief
Bureau of Standards and Registration

Pete Butler, Chief
Bureau of Compliance