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

DS 2008-024

IN RE: PETITION FOR DECLARATORY STATEMENT

Docket No. 2008020983

MICHAEL J. VENEZIA, Unit Owner, in
THE HALLMARK OF HOLLYWOOD CONDOMINIUM ASSOCIATION, INC.

DECLARATORY STATEMENT

The Department of Business and Professional Regulation, Division of Florida Land Sales, Condominiums, and Mobile Homes (Division) hereby issues this Declaratory Statement pursuant to section 120.565, Florida Statutes (2007).

PRELIMINARY STATEMENT

On April 1, 2008, the Division received a Petition for Declaratory Statement from Michael J. Venezia requesting an opinion as to whether section 718.404, Florida Statutes, may be retroactively applied to The Hallmark of Hollywood, a condominium, to change the percentages of ownership shares of common expenses assigned to residential and commercial units under the declaration, and whether the association may redistribute the developer assigned parking spaces from commercial owners to residential owners.

Notice of receipt of the petition was published in Florida Administrative Weekly on April 25, 2008. No hearing was requested.

On May 8, 2008, Aaron Resnick, attorney for the association, notified the Division in writing that the association would not intervene in the proceeding.

FINDINGS OF FACT

The following findings of fact are based on information submitted by Michael J. Venezia. 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. Petitioner, Michael J. Venezia, is a unit owner in The Hallmark of Hollywood, a mixed-use condominium in Hollywood, Florida. According to Mr. Venezia, the condominium was created in the 1980s.

2. Mr. Venezia filed a request for declaratory statement on April 1, 2008, for a change to the percentage of ownership and common expenses to be apportioned between the residential and commercial units in Declaration of Condominium of The Hallmark of Hollywood and the redistribution of particular parking spaces from commercial to residential owners.

3. Mr. Venezia states that the common expense apportionment, as defined in the Hallmark of Condominium Bylaws, is incorrect because it overstates the residential ownership in the condominium—and, as a result, residential unit owners are overcharged for the common expenses. Mr. Venezia attached a page from the declaration that explains how the ownership share of the common elements is determined. The declaration provides: “[a]ll Residential Units of the same type, regardless of square feet of floor area, are given the identical interest in the Common Elements.” Pet. (unmarked exhibit). Mr. Venezia also included a marketing brochure with estimated square footage of some of the 375 units and his calculations to show the

perceived inequity in the apportionment of the common expenses under this method. He argues that the percentage share assigned in the declaration should be recalculated based on square footage under section 718.404, Florida Statutes. Mr. Venezia asserts that the developer simply erred in its mathematical calculations and no amendment to the declaration is required to reapportion the percentage shares in the manner he considers to be correct.

4. The declaration assigns each unit's share of the common expense as a percentage share. Ex. B, Declaration. The percentage share is based on the type of unit described by the numbers of bedrooms and bathrooms. For example, a one-bedroom, one and a half bath condominium unit has a percentage interest of .1984% while two bedroom, two bath condominium units range from .2563%, .3206%, to .3786% shares. Id. Each commercial unit also is assigned a percentage share of the common expenses.

5. Mr. Venezia states that some parking spaces should be reassigned to balance residential and commercial tenant interests in The Hollywood of Hallmark. According to Mr. Venezia, the developer assigned the spaces. The developer assigned 100 garage and 75 outside parking spaces to the commercial owners, but did not create any handicap parking spaces.

6. The Hallmark of Hollywood Condominium Association, Inc., did not intervene.

7. The commercial unit owners have not responded.

CONCLUSIONS OF LAW

1. Section 120.565, Florida Statutes, (emphasis added) provides:

(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.

2. Rule 28-105.001, Florida Administrative Code (2007), (emphasis added)

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.

3. Section 718.404(3), Florida Statutes, provides with emphasis added:

In a declaration of condominium for mixed-use condominiums created after January 1, 1996, the ownership share of the common elements assigned to each unit shall be based either on the total square footage of each unit in uniform relationship to the total square footage of each other unit in the condominium or on an equal fractional basis.

4. By its terms, section 718.404(3), Florida Statutes, does not apply to The Hallmark of Hollywood, which according to the information provided by Mr. Venezia was created in 1980, long before January 1, 1996. The law may not be retroactively applied to change the percentage share of ownership in declarations recorded before January 1, 1996. Fleeman v. Case, 342 So. 2d 815 (Fla. 1976) (§ 711.231 prohibiting escalation clauses in recreation leases and management contracts is not retroactive in application); In re: Pet. Dec. Stmt., Cofield, Venetia Condo. Ass'n, Inc., Case No. 2005048159; Docket No. DS 2005-044 (Dec. 7,

2005) (finding that § 718.404 may not be retroactively applied to condominiums existing before its effective date).

5. The Division does not have the authority to amend or authorize amendments to declarations that have been recorded in the public records, and that govern the owners' legal interests. The declaration of a condominium is a public record and places all persons on notice of the exact ownership interest held by every owner. Changing the percentage interest stated in the declaration requires an amendment to that document. § 718.110(4), Fla. Stat. The declaration cannot be changed without amendment and consent by the owners affected.

6. More specifically to the facts, absent a statement in the declaration that an owner's condominium parcel can be changed without his consent, an owner is entitled to rely on the fact that his proportionate share in common expenses cannot be altered unless he agrees to it. Thiess v. Island House Ass'n., Inc., 311 So. 2d 142 (Fla. 2d DCA 1975). The method of sharing common expenses can be altered only by an amendment to the declaration. Norris v. Edwin W. Peck, Inc., 381 So. 2d 353, 355 (Fla. 5th DCA 1980); Pepe v. Whispering Sands Condo. Assoc., Inc., 351 So. 2d 755 (Fla. 2d DCA 1977).

7. A declaratory statement cannot be issued where there are facts in dispute or where there are owners who will be affected by the decision and who are not parties to the petition. § 120.565 Fla. Stat.; Fla. Admin. Code R. 28-105.001. The commercial owners, who are likely to protest the loss of parking spaces, are not parties to this petition. Thus, a declaratory statement may not be issued. Id.

For the reasons stated above it is hereby:

ORDERED that section 718.404, Florida Statutes, may not be retroactively applied to The Hallmark of Hollywood, a condominium, to change the percentages of ownership shares of common expenses assigned to residential and commercial units under the declaration, and the Division declines to answer whether the association may redistribute the developer assigned parking spaces from commercial owners to residential owners because these persons are not parties.

DONE and **ORDERED** this 24th day of June, 2008,

at Tallahassee, Leon County, Florida.



**Division of Florida Land Sales,
Condominiums & Mobile Homes**

A handwritten signature in black ink, appearing to read "Michael T. Cochran", written over a horizontal line.

MICHAEL T. COCHRAN, Director
Department of Business and
Professional Regulation
Division of Florida Land Sales, Condominiums
and Mobile Homes
Northwood Centre
1940 North Monroe Street
Tallahassee, FL 32399-1030

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 Michael J. Venezia, The Hallmark, 3800 South Ocean Drive, #420, Hollywood, FL 33019 on this 2nd day of July, 2008.

Robin McDaniel
Robin McDaniel, Division Clerk

Copies furnished to:

Janis Sue Richardson
Chief Assistant General Counsel

Aaron Resnick, P.A.
Attorney for Association
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Miami Beach, FL 33139