

DS 2006-050

Final Order No. BPR-2007-01389 Date: 2/19/2007

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Department of Business and Professional Regulation
AGENCY CLERK

Sarah Wachman, Agency Clerk

By: Sarah Wachman

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

IN RE: PETITION FOR DECLARATORY STATEMENT

Docket No. 2006056833

THE SANCTUARY AT BLUE HERON ASSOCIATION, INC.
_____ /

DECLARATORY STATEMENT

The Sanctuary at Blue Heron Association, Inc. (Sanctuary) filed a petition for declaratory statement requesting an opinion as to whether water and sewer charges and the cost of installing fire extinguishers are common expenses under sections 718.103(9) and 718.115, Florida Statutes.

STATEMENT OF FACTS

The following facts are based on information submitted by Sanctuary. The Division takes no position as to the accuracy of the facts, but merely accepts them as submitted for purposes of this declaratory statement. A hearing was not requested or held.

1. Sanctuary filed its original petition with the Division on October 13, 2006. Notice of the petition was published in Florida Administrative Weekly on November 9, 2005. Sanctuary filed an Amended Petition on December 21, 2006.

2. Sanctuary is an "association," as that term is defined by section 719.103(2), Florida Statutes, which operates The Sanctuary at Blue Heron, A Condominium. Art. 1.4, Dec. of Condo. for The Sanctuary at Blue Heron, A Condo. [hereinafter Declaration]

3. The Declaration was recorded in the public records on November 8, 2002. Pet. at 1. Declaration at 1, 48. The land was submitted to condominium ownership under chapter 718, Florida Statutes, "as it exists on the date hereof." Art. 1.2, Declaration.

4. The first phase of the condominium contains 42 units in 21 buildings. All three phases contain 238 units in 119 buildings of 2 units each. Art. 1.3, Declaration; Pet. at 2. Units are similar to single-story duplexes or town homes. Ex. B: Plot plans at 9, Declaration.

5. Lucky Strike M.K., Inc., a Florida corporation (Lucky Strike), was the developer of Sanctuary. Dec. at 1.

6. The declaration defines "common expenses" as "all expenses incurred by the Association for the Condominium and charges assessed or imposed against Units in the Condominium by the Association as set forth in this Declaration and the Act." Art. 2.10, Declaration.

7. Each owner owns 1/238 share of the common elements, common expenses and common surplus. Art. 7.1(c), Declaration.

8. The association is responsible for operating the condominium, assessing unit owners for the payment of common expenses and operating costs, and budgeting for operating costs annually. Art. 14, Declaration; art. II2(a), Art. of Incorpor. The association has the power to assess for expenses of maintaining, repairing, replacing and operating the condominium property and insuring the property for the protection of the association

and its members. Art. II(2), Art. of Incorpor. The association has a lien on a unit for the payment of common expense assessments. Art. 15, Declaration.

9. The association also has the power to make improvements to the condominium, to exercise common law and statutory powers that are reasonably necessary to perform its purpose, and to enact rules concerning the use and enjoyment of the units and common elements. Art. 2, Art. of Incorpor.

10. The declaration provides that the board is authorized to take action without the consent of unit owners under its authority to operate the condominium unless a unit owner vote is specifically required by the governing documents or law. Art. 13.5, Declaration.

11. The association has the power to make capital improvements to the condominium subject to approval of a majority of the unit owners if the cost exceeds \$300 per unit in a calendar year. If the cost is less than \$300 per unit in a calendar year, then the board is authorized to make the improvement without a unit owner vote. The cost is assessed as a common expense of the association. Art. 10, Declaration.

12. The board of directors is responsible for "interpreting the provisions hereof and of any of the exhibits attached" to the declaration. Art. 25.2, Declaration. The board's interpretation "shall be binding upon all parties unless wholly unreasonable." Id. If the association's attorney renders a legal opinion that the board's interpretation is "not unreasonable" then the board's interpretation is "conclusively establish[ed]." Id. The declaration controls over any exhibits where there is a conflict between the documents. Art. 25.4, Declaration.

A. Water and Sewer Charges.

13. In its prospectus, Lucky Strike disclosed that it would “provide a separate meter for each Unit so that each Unit will be responsible to pay for the amount of water and sewer used by that Unit, since some Unit Owners will undoubtedly consume more water than others.” Art. 3.12, Prospectus for The Sanctuary at Blue Heron. The developer planned for the unit owners to pay the association for all water and sewer charges. The association was then to pay these funds to Collier County Utilities. Id. The prospectus disclosed that “these charges will NOT be a part of the Budget for Common Expenses.” Id.

14. The developer did not provide a separate meter for each unit. There are now combined meters for all 238 units. The utility company bills the association for the water and sewer charges for the units.

15. The 2002, 2003 and 2004 estimated operating budgets provide for the common element utility expenses to be assessed as a common expense. Est. Op. Budget, 2002 at 1, 2003 at 1, 2004 at 1. The notes to the 2003 budget includes, among the expenses to individual unit owners, an itemization for “services and items contracted for and billed separately to individual Unit owners such as . . . water and sewer consumption inside the Unit. . .” Id. 2003 at 2; 2004 at 2 (includes the 2004 budgets for phase II and phase III). The 2002 estimated budget included this notation and added the following: **“NOTE: Unit Owners’ individual water consumption will be separately metered, but it will be billed by and paid to the Association due to Collier County Utilities requirements. This charge is not a common expense and is not contained in the above Budget, nor is it within the Developer Guarantee.”** (emphasis in original).

16. Collier County notified the engineering and design company for the development that it approved the utility connection plan but this did not constitute approval of the meter size, which had to be approved by the public works division. Letter from Thomas E. Kuck to Gina Green (Dec. 23, 2001).

17. The declaration does not expressly mention individual billing for water and sewer services or the installation of individual meters. Only the Prospectus and the budgets provide notice that water and sewer charges are individual unit owner charges and are not common expenses. The developer controlled association prorated the water and sewer bills and assessed each unit owner for his or her estimated usage. Pet. at 2. No vote was taken on this procedure and it was not placed on the agenda of any meeting. Pet. at 2.

18. The management company for the developer controlled association also provided a letter to all unit owners announcing that turnover from the developer was imminent. Letter from The Sanctuary to All Sanctuary at Blue Heron Owners (Feb. 24, 2006). The letter informed the unit owners that, in its preparation for turnover, the water billing was a problem. The association explained:

Your documents require that the billing of water be separate from the quarterly assessment. As you know, all past bills were paid from your operating account and we must make a correction to this problem by billing each owner for the water that was used and reapplying that money to the operating account. . . . The sum will be determined by an average water cost per month per unit based on last 2005 bills. The cost was determined to be \$14.47 per unit/per month.

19. The association provided a sample billing for water service to a unit owner for \$535.39 for the water service for the entire period of ownership to date. Invoice (Feb. 24, 2006).

B. Fire Extinguishers.

20. While the developer controlled the association, the insurance company informed the association that its casualty insurance policy required the installation of fire extinguishers at each unit. Pet. at 2; Amend. Pet. ex. 1: Letter from Angela M. Potash to Guardian Prop. Mgmt. In response to the insurance company's demand, the board had fire extinguishers installed at each unit without a meeting or approval of the unit owners.

21. The association assessed unit owners \$76.12 each for the installation of fire extinguisher cabinets with break glass fronts and a 5 lb. fire extinguisher at each unit. Invoice (July 10, 2006). Based on this fact as presented, the total cost of fire extinguisher installation for 238 units equals \$18,116.56.

22. The association is required to insure the condominium property. Art. 16, Declaration. The association annually budgets for the cost of all common expenses, which includes the cost of insurance. Arts. 14, 16.4, Declaration. The declaration does not specifically mention the installation of fire extinguishers.

CONCLUSIONS OF LAW

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

2. Sanctuary has standing to seek this declaratory statement.

3. Section 718.103(9), Florida Statutes, provides:

"Common expenses" means all expenses properly incurred by the association in the performance of its duties, including expenses specified in s. 718.115.

4. Section 718.115, Florida Statutes, provides:

(1)(a) Common expenses include the expenses of the operation, maintenance, repair, replacement, or protection of the common elements and association property, costs of carrying out the powers and duties of the

association, and any other expense, whether or not included in the foregoing, designated as common expense by this chapter, the declaration, the documents creating the association, or the bylaws. Common expenses also include reasonable transportation services, insurance for directors and officers, road maintenance and operation expenses, in-house communications, and security services, which are reasonably related to the general benefit of the unit owners even if such expenses do not attach to the common elements or property of the condominium. However, such common expenses must either have been services or items provided on or after the date control of the association is transferred from the developer to the unit owners or must be services or items provided for in the condominium documents or bylaws.

A. Water and Sewer Charges.

5. “Common expenses include the expenses of the operation, maintenance, repair, replacement, or protection of the common elements and association property.” § 718.115(1), Fla. Stat. The developer identified the water and sewer charges as services provided to the unit owners for their units, so the declaration does not relate these service charges to the association’s operation, maintenance, repair, replacement, or protection of the common elements and association property. See Rothenberg v. Plymouth #5 Condo. Ass’n, 511 So. 2d 651 (Fla. 4th DCA 1987) (holding that transportation service costs were not a common expense because not directly related to the operation, maintenance, repair or replacement of the condominium property under § 718.115, Fla. Stat.), review denied, 518 So. 2d 1277 (Fla. 1987) (overturned as to transportation services by statutory amendment to § 718.115, Fla. Stat. (1988)).

6. Common expenses include the “costs of carrying out the powers and duties of the association.” § 718.115(1), Fla. Stat.; § 718.111, Fla. Stat. (enumerated powers and duties). The duties of the association include assessing for common expenses. Water and sewer charges are not expressly identified as common expenses under the declaration. The developer intended to install meters and have the association

pass on the costs of the water and sewer charges to the unit owners, collect the money from the unit owners to pay the bill, and pay the utility company as separate individual unit owner charges, not as part of the common expenses. Under this plan, these charges are not part of the cost of carrying out the powers and duties of the association.

7. Common expenses include “any other expense, whether or not included in the foregoing, designated as common expense by this chapter.” Water and sewer charges are not expressly defined as common expenses under sections 718.103(9) or 718.115, Florida Statutes. These charges do not fall under this part of the definition.

8. Common expenses include “any other expense” designated as a common expense by “the declaration, the documents creating the association, or the bylaws.” The declaration does not identify water and sewer charges as a common expense.¹ The declaration generally defines all “charges assessed or imposed against Units in the Condominium by the Association as set forth in the Declaration and the Act.” Art. 2.10, Declaration. The developer’s prospectus and budget expressly state that the association will bill the unit owners for these services, collect the charges, and pay the utility company, but these charges are individual use charges and are not common expenses. Art. 3.12, Prospectus; 2002 budget. The articles of incorporation and the bylaws do not identify water and sewer charges as a common expense. The prospectus expressly declares these charges to not be a common expense. Water and sewer charges are not common expenses under this part of section 718.115, Florida Statutes.

¹ A different result is reached where the declaration identifies these charges as a common expense. See Leisureville Lake Unit E Condominium Association, Inc., DS98-031/DS98153/BPR-99-00061 (Jan. 6, 1999) (declaring that the association may not change the proportion or percentages by which unit owners are assessed for the water/sewer common expense to a per-unit basis, but may elect to change the proportion or percentages by which the unit owners own the common elements and thereby change the assessment for common expenses, in the manner prescribed by section 718.110(4), Fla. Stat.); Taracomo

9. The developer intended to install separate meters for each unit, so that the water and sewer charges could be determined for each unit's use and billed accordingly. The individual meters were not installed. The developer controlled association apparently assessed each unit a prorated share of the water and sewer charges along with the common expense assessment and paid the utility bills from the association's operational accounts.

10. Common expenses "also include reasonable transportation services, insurance for directors and officers, road maintenance and operation expenses, in-house communications, and security services, which are reasonably related to the general benefit of the unit owners even if such expenses do not attach to the common elements or property of the condominium." 718.115(1), Fla. Stat. Water and sewer services are not among those services—transportation, security, road maintenance, director liability insurance, and in-house communication services--expressly identified in section 718.115, Florida Statutes, that may be assessed as common expenses even though not directly related to the common elements or identified as common expenses in the declaration. Scudder v. Greenbrier C Condo. Ass'n, Inc. [Scudder II], 663 So. 2d 1362, 1366-67 (Fla. 4th DCA 1995).

11. The language in the statute is specific and clear. There is no need to resort to principles of statutory construction. Fla. Legal Servs., Inc. v. State, Dep't of Labor and Employment Sec., 381 So. 2d 1120 (Fla. 1st DCA 1979) ("judicial interpretation is not appropriate to displace the expressed [legislative] intent"). While the word "includes" generally is one of enlargement and not limitation, the legislature expressly listed those

Townhomes Condo. Ass'n, Inc., Docket No. Ds97338; BPR-98-00008 (Jan. 5, 1998) (declaring that water and sewer services were common expenses under declaration).

services that could be assessed even though not identified as common expenses in the declaration. See Pottsburg Util., Inc. v. Daugharty, 309 So. 2d 199, 201 (Fla. 1st DCA 1975); accord Argosy Ltd. v. Hennigan, 404 F.2d 14, 20 (5th Cir. 1968). The legislature did not use "included but not limited to" as a preface for this list of services to make it clear that the listed services were not the only services that could be included within this provision. This section does not include a general catchall category, such as "an all other services" to include other related types of services that are reasonably related to general benefit of the unit owners but are not attached to the condominium property. The division declines to expand the statutory list of services identified in this sentence. Moonlit Waters Apts., Inc. v. Cauley, 651 So. 2d 1269 (Fla. 4th DCA 1995) (applying rule of statutory construction "expressio unius est exclusio alterius" to find that the exclusion of "land lease" from "recreational lease" provision means section does not apply to land leases), aff'd, 666 So. 2d 898 (Fla. 1996); see also Op. Att'y Gen. Fla. 86-65 (1986) (finding that statutory term "employee shall include volunteer firefighter" does not include parents who volunteer to drive students to school events under the rule of "exclusio unius est exclusio alterius"²). Therefore, the water and sewer services provided to unit owners are not common expenses identified by section 718.115, Florida Statutes.

12. Water and sewer services provided to the units are not a common expense under the declaration, the articles of incorporation, or the bylaws, or section 718.115, Florida Statutes.

² Generally meaning that the mention of one thing excludes the inclusion of another.

B. Fire Extinguishers.

13. The installation of fire extinguishers is related to the association's responsibility to insure the common elements. Art. 16, Declaration; art. II(2), Art. of Incorp. The association's insurer required the installation of the fire extinguishers as part of the association's insurance coverage. The association installed the fire extinguishers at a cost of \$76.15 a unit. The association is authorized to make capital improvements without a unit owner vote if the improvement is less than \$300 per unit. Art. 10, Declaration. Because the fire extinguishers are related to the cost of insuring the common elements, the cost is a common expense. §§ 718.111(11), 718.115, Fla. Stat. The cost of installation is authorized by the declaration without a unit owner vote.

ORDER

Based upon the findings of fact and conclusions of law, it is declared the expense of installing the fire extinguishers was a common expense under section 718.115, Florida Statutes, and the water and sewer charges for the units are not a common expense under section 718.115, Florida Statutes.

DONE and ORDERED this 31st day of January, 2007.




MICHAEL T. COCHRAN, Director
Department of Business and
Professional Regulation
Division of Florida Land Sales,
Condominiums, and Mobile Homes
1940 North Monroe Street
Tallahassee, Florida 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 Cheryl R. Kraus, Esq., Kraus & Ballenger, P.A., 1072 Goodlette Road North, Naples, Florida 34102 on this 22nd day of February, 2007.

Robin McDaniel
Robin McDaniel, Division Clerk

Copy furnished to:
Janis Sue Richardson,
Chief Assistant General Counsel