

Final Order No. BPR-2007-01176 Date: **2-13-07**

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

IN RE PETITION FOR DECLARATORY STATEMENT

**DS 2006-051**

David and Deborah Morgan, Unit Owners,  
Capri Harbor South Condominium Association, Inc.

Docket No. 2006059678

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. The issue is whether an association rule restricting unit owner access to records complies with section 718.111(12), Florida Statutes.

PRELIMINARY STATEMENT

On October 27, 2006, the Division received a petition for declaratory statement from David and Deborah Morgan (the Morgans), unit owners, in Capri Harbor South Condominium. Notice of receipt of the petition was published in Florida Administrative Weekly on December 29, 2006. The Division received a response from Capri Harbor South Condominium Association, Inc. (Capri Harbor) on December 7, 2006. No hearing was requested or held.

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## FINDINGS OF FACT

The following findings of fact are based on information submitted by Petitioner and Capri Harbor. 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. Petitioners, the Morgans, own a unit in Capri Harbor.
2. Capri Harbor is a condominium "association," as that term is defined by 718.103(2), Florida Statutes.
3. Capri Harbor filed its response to the petition on December 7, 2006.
4. Capri Harbor Condominium was created with the filing of its Declaration of Condominium of Capri Harbor – Phase II, a Condominium (Declaration), which incorporated chapter 718, Florida Statutes, in the public records on March 5, 1985.
5. Capri Harbor adopted a set of rules governing unit owner access to the association's records. The rules define a record as "a document or group of documents related to a particular matter." Pet. ex. 1: Capri Harbor So. Rules for Official Records, § I(C) at 1. "The Secretary shall, in his or her sole discretion, determine what constitutes a single record."
6. The association rules provide in part:
  - II. Inspection and Copying:
    - A. A unit owner desiring to inspect the records of this Organization shall submit, on a working day, a written request to the Secretary. The request shall describe each record desired in sufficient specificity to identify it, must specify pertinent dates or time periods, and shall state the purpose of the inspection. . . .
    - B. Each written request to inspect the records shall contain no more than 10 records, or constitute in the whole more than 200 pages of material. Requests exceeding these limits will be denied in their entirety.

C. No more than two (2) written requests to inspect the records shall be permitted from a single unit owner and/or his or her authorized representative, . . . within a thirty (30) day period. . . .

D. No more than one (1) written request shall be permitted per record per six-month period. Once the record has been inspected by the unit owner or by an authorized representative, or a copy obtained by the unit owner or authorized representative, if the record has not changed, it is not subject to further requests for inspection and/or copying by that unit owner or authorized representative for a period of six months. . . .

\* \* \* \*

F. The record inspection session shall not extend beyond two hours. . . .

#### IV. Enforcement of Inspection and Copying Rules.

A. Any violation of these rules shall cause the immediate suspension of the inspection or copying until such time as the violator agrees in writing to comply herewith.

B. Any written requests for inspection or copying not complying with these rules will be denied. . . .

7. The Morgans assert that they requested access to the official records on June 8, 2006. The Morgans asked to view certain financial records, meeting minutes, painting invoices, and a lawn maintenance contract. They assert that the association denied them access to all records because the Morgans' request did not comply with the association's rule requiring them to state the purpose of the inspection. The Morgans request the Division to determine the "legality" of the rule and to "render an opinion on the legality of said denial." Pet. at 2. The Morgans assert that the association's records access rule is unreasonable and contrary to section 718.111(12), Florida Statutes.

8. Capri Harbor disputes the facts asserted by the Morgans. It states that the association has not denied them access to the association records and has provided them with all of the records they sought in compliance with the association's rule. Capri Harbor maintains that its rule is reasonable and the issue is moot because the Morgans have received copies of all of the documents they requested.

## CONCLUSIONS OF LAW

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

2. The Morgans have standing to seek this declaratory statement.

3. Capri Harbor has standing to intervene in this proceeding.

4. Section 120.565, Florida Statutes, 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.

(emphasis added).

5. Rule 28-105.001, Florida Administrative Code, 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 only 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 or for obtaining a policy statement of general applicability from an agency. A petition for declaratory statement must describe the potential impact of statutes, rules, or orders upon the petitioner's interests.

(emphasis added).

6. Section 718.111(12)(c), Florida Statutes, provides in pertinent part:

(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. The right to inspect the records includes the right to make or obtain copies, at the reasonable expense, if any, of the association member. The association may adopt reasonable rules regarding the frequency, time, location, notice, and manner of record inspections and copying.

§ 718.111(12)(c), Fla. Stat. (emphasis added).

7. A declaratory statement is not the proper forum to resolve disputes of fact. § 120.565, Fla. Stat.; Fla. Admin. Code R. 28-105.003 (only hearings not involving disputes of fact may be held). Capri Harbor disputes the Morgans' factual statements that the association did not provide them access to the association's records. This dispute may not be resolved in this proceeding. The Morgans may petition for arbitration of their dispute over the denial of their request to view the records if it has not been resolved. § 718.1255(1)(b)4, Fla. Stat.

8. A declaratory statement is a limited proceeding. No fact-finding hearing may be held; therefore, a petition where facts are disputed must be denied. § 120.565, Fla. Stat.; Fla. Admin. Code Rule 28-105.001; In re: Pet. Declaratory Stat. Greene, Commodore Plaza Condo. Ass'n, Inc., BPR-2005-07251 (Dec. 29, 2005). Additionally, where the dispute is made moot by the actions of the parties in resolving the factual dispute, a declaratory statement will be denied. See Sutton v. Dep't of Env'tl. Protection, 654 So. 2d 1047 (Fla. 5th DCA 1995). The Morgans' request to resolve the dispute over their access to the records is moot or disputed. Therefore, this issue may not be resolved in this proceeding.

9. The Morgans are also requesting an opinion on the reasonableness of the association's rule as to the Secretary's discretion to determine what constitutes a single record, as to the limit of 10 records to each request, the limit of 1 request per six-month period, a requirement that the unit owner state the purpose of the request, and the suspension of a unit owner's right of access for violation of the records rule. The Morgans

argue that these provisions are not reasonable and are not contained in the frequency, time, location and manner restrictions contemplated by section 718.111(12), Florida Statutes.

10. The association asserts that the rule is reasonable and complies with section 718.111(12), Florida Statutes. The association asserts that it is based on arbitration decisions, corporate law,<sup>1</sup> and one publication's proposed set of condominium model rules. The association provided a copy of the model rules.<sup>2</sup> The association rules at issue are substantially similar if not identical to these model rules. See In re: Pet. Arb., Slovenski v. Paradise Shores Apts., Inc., 1999 WL 33920340 (Fla. DBPR Arb. 1999) (finding that rule restricting a unit owner to one request a month, 20 records at a single inspection, a limit of no more than 200 pages at one time, and a time limit of 2 hours per viewing was unreasonable); In re: Pet. Arb., Brin v. Nobel Pt. Condo. Ass'n, Inc., 2001 WL 3478694, n.1 (Fla. DBPR Arb. 2001) (finding rule restricting owner's inspection to once a month and 3 records invalid); In re: Pet. Arb., Porta Bella Yacht & Tennis Club Condo. Ass'n, Inc. v. Mechler, 1998 WL 34312417 (Fla. DBPR Arb. 1998) (suggesting that an association rule restricting access to 3 or 4 times a month for a period of 4 hours per viewing would be reasonable).

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<sup>1</sup> The association cites to section 607.1602(3)(a), Florida Statutes, allowing the for profit corporation to deny a shareholder's request to view records if it is not made in good faith or for a proper purpose. See Slovenski, 1999 WL 33920340 at n.2 (distinguishing condominium absolute right of access to records with a corporation's right to deny access if made for an improper purpose).

<sup>2</sup> The association cites to William D. Clark, D&S Florida Practice Series, Managing the Florida Condominium. Response to Pet. for Dec. Stmt. at 4.

11. The Morgans' request to determine the validity of the association's rule under section 718.111(12), Florida Statutes, may be resolved in this proceeding as the wording of the rule itself is not contested. The validity of the rule provision is contested.

12. The Division finds certain of the rule restrictions unreasonable. The Condominium Act guarantees to each unit owner a right of access to the association's official records. § 718.111(12), Fla. Stat. An association has the right to adopt reasonable rules governing the frequency, time, location, notice, and manner of record inspections and copying. Id. An association is also a corporation. Capri Harbor is incorporated as a Florida not for profit corporation. Art. 7, Declaration of Condominium for Capri Harbor – Phase II, A Condominium<sup>3</sup> (Declaration); Articles of Incorporation of Capri Harbor Phase II Condominium Association (Art. of Incorp.). The association has all of the powers of a Florida corporation and those powers granted by the Condominium Act. Id.; art. II, § (2)(o), Art. of Incorp. This includes the power of the board to adopt rules concerning the condominium. Art. II, § (2)(p), Art. of Incorp.; Art. III, § 6, art. VI, § 1, By-Laws of Capri Harbor Phase II Condominium Association, Inc. (By-Laws).

13. The association argues that it may require a unit owner to state his or her purpose in requesting access to records as a condition of viewing the records under its corporate powers. The corporation law authorizes a shareholder to inspect the corporation's records conditioned upon a written request describing the records, which is made in "good faith and for a proper purpose." § 617.1602(3), Fla. Stat. The corporation may deny requests that are made for an improper purpose. Id. § 617.1602(5). The list of

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<sup>3</sup> The name of the condominium was changed by the First Amendment to Condominium Declaration of Capri Harbor – Phase II, A Condominium, section 2. The name of the association was also changed by amendment to article I of the Articles of Incorporation.

corporate records that must be kept and open for inspection is far fewer in number than for a condominium association. Cf. §§ 617.1601(5) and 617.1602(2) with § 718.111(12)(a), Fla. Stat.

14. The association's powers under the Florida corporation laws are restricted and limited by the Condominium Act. § 718.111(2), Fla. Stat. The Condominium Act requires the association to provide unit owners with access to the official records; therefore, the association may not rely upon the general corporation laws to restrict that access. Id.; In re: Pet. Dec. Stmt. Monte Carlo Towers Ass'n, Inc. v. Wertz, BPR 89L-105 (Oct. 20, 1989) (declaring that association may not impose a condition of good faith or proper purpose on a unit owner's access to records); In re: Pet. Arb., Alan v. Boca Cove Home Condo. Ass'n, Inc., Arb. Case No. 92-0263 (Mar. 22, 1993) (Condominium Act does not require a unit owner to specify the purpose for the request or that the purpose be proper); In re: Pet. Arb. Kilgore v. Ciega Verde Unit Owners Ass'n, Inc., 2000 WL 34475727 (Fla. DBPR Arb. 2000) (owner's political motivation or ill will is irrelevant). While the association may enact reasonable rules, it may not adopt rules that "substantially erode or eliminate the right of access." Slovenski, 1999 WL 33920340.

15. The association rule that permits the Secretary to determine what constitutes a single record is reasonable. The association's secretary is authorized to keep the official records of the association and "shall make the minute books available for inspection by the members and directors at all reasonable times." Art. IV, By-Laws. The association is responsible for maintaining the records and providing access to unit owners. In order for it to fulfill this responsibility uniformly for all owners, an officer must be able to determine what constitutes a record. see In re: Pet. Arb. Malone v. Pebble Springs



Condo. Ass'n, Inc., 2000 WL 34618789 (Fla. DBPR Arb. 2000) (finding that rules must permit uniform application to all owner requests).

16. The association rule that requires a unit owner to “describe each record desired in sufficient specificity to identify it, must specify pertinent dates or time periods” is reasonable as long as the identification is general, such as financial reports for 2005, current bylaws, insurance policies for 2004 and 2005, etc. While arbitration decisions have found that in the absence of a rule, a unit owner’s request to view all of the “official records” satisfies section 718.111(12), Florida Statutes,<sup>4</sup> and that associations may ask but may not require a specification of records in order to efficiently identify and provide the records sought,<sup>5</sup> the Division finds that a rule that requires a unit owner to identify the type of records sought is a reasonable restriction on the manner of inspection. An association maintains its accounting records for 7 years. § 718.111(12)(a)11, Fla. Stat. All of the official records may be voluminous. It will assist both the association and the unit owner if the requester identifies the type of record sought and the time frame if known. A request to view all accounting records for the past 7 years would satisfy the law and the association rule. § 718.111(12)(a)11, Fla. Stat. (identifying what records constitute accounting records and the period of retention).

17. The association rule limiting the number of times a unit owner may view the same record is reasonable. The rule provides: “[o]nce the record has been inspected . . . , or a copy obtained . . . if the record has not changed, it is not subject to further requests for inspection . . . for a period of six months.” The association may restrict the frequency of

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<sup>4</sup> Nobel Pt., 2001 WL 34728694 (citing Di Renzo, 1998 WL 34311874.

<sup>5</sup> Pebble Springs, 2000 WL 34618789.

inspection. The association has balanced an owner's right of access to inspect records with its need to operate the association efficiently and effectively. The rule does not prohibit re-inspection, which would be invalid. See Pebble Springs, 2000 WL 34618789 (association may not condition access based upon previous access to record). If a unit owner needs more time to review the record, he or she may request a copy.

18. The association rule limiting unit owner access to "two (2) written requests to inspect the records . . . within a thirty (30) day period. . . and one (1) written request . . . per record per six-month period" is not a reasonable restriction on the manner or frequency of access. Slovenski, 1999 WL 33920340 (finding rule restricting unit owners to 1 request a month, to 20 records or 200 pages per inspection for 2 hours unacceptable and a denial of an owner's right of inspection). An association may adopt a rule that sets quantitative and substantive restrictions on an owner's right of inspection. Porta Bella Yacht, 1998 WL 34312417 (association may adopt a reasonable rule limiting access of unit owners who abuse the right thereby causing the association to expend great amounts of time and money to comply with the law).

19. The enforcement provision, which allows the association to refuse a unit owner's right of access based upon a failure to strictly comply with the rule, is unreasonable. Unit owners have an absolute right of access under section 718.111(12), Florida Statutes. Only reasonable rules regarding frequency, manner, time, location and notice may restrict that right. § 718.111(12)(c), Fla. Stat. An absolute denial of the statutory right is unreasonable. The association must make those records it can identify from the unit owner's request available

within the 5 working days. Id. § 718.111(12)(b). It may seek to have the unit owner refine his or her request to meet the requirements of a reasonable rule, but may not deny access outright. See Slovenski, 1999 WL 33920340 (finding association's refusal of access for failure to comply with newly enacted rule that is substantially similar to the rule at issue in this case was a willful denial of access).

For the reasons stated above it is hereby:

ORDERED that Capri Harbor South Condominium Association, Inc.'s rule limiting a unit owner's right to inspect the official records of the association complies with section 718.111(12)(c), Florida Statutes, as to the secretary's designation as to what constitutes a single record and as to re-inspection, but does not comply with section 718.111(12)(c), Florida Statutes, as to the provisions taken together related to the requirement that a unit owner state the purpose of the inspection, the number of records a month, the number of times per year, the amount of time per inspection, and the enforcement provisions of the rule.

DONE this 31<sup>st</sup> day of January, 2007, at Tallahassee, Leon County, Florida.



  
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, Florida 32399-1030

NOTICE OF RIGHT TO APPEAL

THIS ORDER DENYING PETITION FOR DECLARATORY STATEMENT CONSTITUTES FINAL AGENCY ACTION AND MAY BE APPEALED BY THE PARTIES 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 David and Deborah Morgan, Capri Harbor South Condominium, 12156 Capri Circle South, Treasure Island, Florida 33706-4907, and to Richard A. Zacur, Esq., P.O. Box 14409, St. Petersburg, Florida, 33733, this 16<sup>th</sup> day of February, 2007.

  
Robin McDaniel, Docket Clerk

Copies furnished to:

Janis Sue Richardson,  
Chief Assistant General Counsel