

Department of Business and Professional Regulation
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By:

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

DS 2005-022

IN RE PETITION FOR DECLARATORY STATEMENT

Docket No. 2005023579

Smuggler's Landing at Cortez Condominium Association, Inc.

DECLARATORY STATEMENT

The Assessment Committee of Smuggler's Landing at Cortez Condominium Association, Inc. (Smuggler's Landing), Petitioner, filed a Petition for Declaratory Statement requesting an opinion as to whether the unit owners of Smuggler's Landing may amend the declaration to change the percentage shares by which the unit owners share the common expenses and own the common surplus to a square footage method, a combination of percentage share and flat fee, or a combination of percentage share and square footage by less than a 100 percent vote under section 718.110, Florida Statutes.

PRELIMINARY STATEMENT

On April 22, 2005, the Division received a petition for declaratory statement from Smuggler's Landing. Notice of receipt of the petition was published in Florida Administrative Weekly on June 24, 2005. Smuggler's Landing agreed to allow additional time for the Division to review his petition. No hearing was requested or held.

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FINDINGS OF FACT

The following findings of fact are based on information submitted by Smuggler's Landing. 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. Smuggler's Landing is a condominium "association," as that term is defined by section 718.103(2), Florida Statutes.

2. According to the petition, the unit owners of Smuggler's Landing are considering amending the declaration "to change ownership and maintenance fee assessments from a square footage basis to a formula partly determined by square footage and partly an equal fractional basis."

3. Smuggler's Landing is currently using square footage as the basis for levying assessments for common expenses pursuant to its original declaration.

4. According to its petition, Smuggler's Landing will most likely not put an amendment to a vote if the Division indicates in this declaratory statement that a 100 percent vote is required to change the basis for levying assessments.

5. Smuggler's Landing's declaration as originally recorded contains the following in part (emphasis added):

9.1 Share of common expenses. Each unit owner shall be liable for a proportionate share of the common expenses, and shall share in the common surplus, those shares being the same as the undivided share in the common elements appurtenant to the units owned by him.

19. Percentage of Ownership of Common Elements. The ownership of common elements shall be based on a percentage of ownership of the total square feet of living area. Living area refers to the area in a unit that is air conditioned and heated.

6. For example, a unit of Unit Type I in Phase I of Smuggler's Landing contains 1858.50 square feet, resulting in 7.2 percentage ownership. A unit of Unit Type II in Phase I of Smuggler's Landing contains 2115.00 square feet, resulting in 8.2 percentage ownership. Exhibit B, Fifth Amendment to the Declaration of Condominium for Smuggler's Landing.

7. The declaration of Smuggler's Landing as originally recorded also provides the following with regards to general amendments to the declaration:

21. Amendment of Declaration. An amendment of this Declaration may be made with the approval of not less than a two-thirds vote according to this Declaration and the Association Bylaws except as set out in Florida Statutes Chapters 718.104 (Creation of Condominiums; Contents of Declaration) and 718.403 (Phase Condominium).

8. The declaration now includes five amendments, but none of the five amendments changed provisions 9.1, 19, and 21 as quoted above.

CONCLUSIONS OF LAW

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

2. Smuggler's Landing has standing to seek this declaratory statement.

3. In Novick v. Department of Health, the court stated that the purpose of a declaratory statement "is to allow a petitioner to seek a proper course of action in advance." 816 So. 2d 1237, 1238 (Fla. 5th DCA 2002). Thus, this declaratory statement will be prospective in nature and will not address any previous methods of assessment.

4. The Condominium Act governs every condominium created and existing in the State of Florida. The law governing a particular condominium is

the law in existence on the date of recording the declaration of condominium.

Sans Souci v. Dep't of Bus. Reg., 421 So. 2d 623 (Fla. 1st DCA 1982); Suntide

Condo. Ass'n v. Dep't of Bus. Reg., 463 So. 2d 314, 317 (Fla. 1st DCA 1984).

Future legislative acts may be incorporated automatically as amendments to the original declaration if the declaration contains express language referring to the Condominium Act as the same may be amended from time to time. Smuggler's Landing's declaration does not include this automatic amendment language.

5. Smuggler's Landing's original declaration, which was filed in 1983, is governed by the Condominium Act of 1983. Section 718.110, Florida Statutes (1983), provides in part (emphasis added):

(1) If the declaration fails to provide a method of amendment, the declaration may be amended as to all matters except those described in subsection (4) or subsection (8) if the amendment is approved by the owners of not less than two-thirds of the units.

(4) Unless otherwise provided in the declaration as originally recorded, no amendment may change the configuration or size of any condominium unit in any material fashion, materially alter or modify the appurtenances to the unit, or *change the proportion or percentage by which the owner of the parcel shares the common expenses and owns the common surplus unless the record owner of the unit and all record owners of liens on it join in the execution of the amendment and unless all the record owners of all other units approve the amendment.*

6. In Woodside Village Condominium Association, Inc. v. Jahren, the court distinguished the general authority to amend from the more specific and restrictive power to amend the items addressed in subsection (4).

[C]ourts have recognized the authority of condominium unit owners to amend the declaration on a wide variety of issues, including restrictions on leasing. Of course, section 718.110(1)(a) itself contains some restrictions on the amendment process. For example, pursuant to subsections (4) and (8), all unit owners must consent to amendments which materially

alter or modify the size, configuration or appurtenances to the unit, change the percentage by which the unit owner shares the common expenses and owns the common surplus of the condominium, or permit timeshare estates to be created in any unit of the condominium, unless otherwise provided in the declaration as originally recorded. 806 So. 2d 453, 457 (Fla. 2002).

7. Smuggler's Landing's declaration only contains a provision regarding a general power to amend. Because Smuggler's Landing's declaration does not expressly address the process for amending the unit owners' share of the common elements and the common expenses, the 100 percent vote of unit owners and lien holders required by section 718.110(4), Florida Statutes (1983), governs.

8. Therefore, pursuant to section 718.110(4), Florida Statutes (1983), all of the unit owners and lien holders of Smuggler's Landing must approve any amendment that changes the basis by which unit owners share the common expenses and/or own the common elements, which amendment must be consistent with section 718.104(4)(f), Florida Statutes.

9. Because its petition indicates that Smuggler's Landing most likely will not seek to amend its declaration if a 100 percent vote is required, it is unnecessary to address whether Smuggler's Landing can amend its declaration, with the required 100 percent vote, to change the basis by which unit owners share the common expenses to a combination of percentage share and flat fee basis, or a combination of percentage share and square footage basis. Because such an amendment would require a 100 percent vote, the issue is now moot.

ORDER

Based upon the findings of fact and conclusions of law, it is declared that the unit owners of Smuggler's Landing may amend the declaration to alter the percentage shares by which the unit owners share the common expenses and own the common surplus with a 100 percent vote and joinder of lien holders pursuant to section 718.110(4), Florida Statutes (1983).

DONE and ORDERED this 11th day of July, 2005, 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 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 Peter Durant, Unit 410, 4212 126th Street W., Cortez, FL, 32415 and Gramer Foster, Unit 304, 4129 199th Street W., Cortez, FL, 34215, this 15th day of July, 2005.

Robin McDaniel
ROBIN MCDANIEL, Division Clerk

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