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

DS 2005-042

IN RE PETITION FOR DECLARATORY STATEMENT

Docket No. 2005047257

WIMBLEDON TOWNHOUSE
CONDOMINIUM III ASSOCIATION, INC.

DECLARATORY STATEMENT

Wimbledon Townhouse Condominium III Association, Inc., through its attorney, filed a petition for declaratory statement requesting an opinion as to whether section 718.111(6), Florida Statutes, permits an association that operates many condominiums to operate on a hybrid basis, meaning all financial matters common amongst the many condominiums would be operated as a single condominium, while certain financial matters that are unique to only one condominium (specifically, reserve accounts and non-routine capital expenditures) would operate on an independent basis so as to avoid any inequities that may arise.

PRELIMINARY STATEMENT

On September 14, 2005, the Division received a petition for declaratory statement from Wimbledon Townhouse Condominium III Association, Inc. Notice

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of receipt of the petition was published in Florida Administrative Weekly on September 30, 2005. No hearing was requested or held.

FINDINGS OF FACT

The following findings of fact are based on information submitted by Wimbledon Townhouse Condominium III. 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. Wimbledon Townhouse Condominium III is a condominium "association," as that term is defined by section 718.103(2), Florida Statutes.
2. Wimbledon Townhouse Condominium III was created in 1974 under chapter 711, Florida Statutes, as a multi-phase development. Arts. I, X, Declaration of Condominium Wimbledon Townhouse Condominium III -4 at 1, 3 (Declaration WTC). The bylaws are to be "interpreted in accordance with the definitions and provisions of Chapter 711, Florida Statutes, and the Condominium Act (The 'Act'), the Declaration to which these By-laws are attached, and the Articles of Incorporation of the Association (the 'Articles')." § 1.4, By-laws WTC (emphasis in original). The association did not provide the other 12 declarations, so it cannot be determined if all 13 condominiums were created before 1977, or if some were created after 1977. The association represents that all 13 declarations are substantially similar. So, for purposes of this declaratory statement, it will be assumed that all of the condominiums were created before 1977. It is also assumed that Wimbledon Townhouse Condominium III is the initial condominium created in this multicondominium for

purposes of section 718.111(6), Florida Statutes, which applies to the recording of the initial condominium declaration.

3. The declaration initially created six townhouse units in one condominium. Art. IV(B), Declaration WTC at 2.

4. The association states that it now operates 13 separate condominiums. See id. at 3. It is a multicondominium association by definition. § 718.103(20), Fla. Stat.

5. Each unit owner is a member of the association. Art. IV, § 1, Art. of Inc.

6. Each unit owner's share of the common expenses and the common surplus is the same as the percentage of the ownership of the common elements in his or her condominium. Art. VI(A), Declaration WTC at 2, Ex. C. Four of the six unit owners in Wimbledon Townhouse Condominium III own a 16.66% share of the common elements, so they own a 16.66% share of the common expenses and surplus. Id. at Ex. C. Two unit owners own a 16.68% share of the common elements and a corresponding percentage share of the common expenses and common elements. Id.

7. The association has the power to make and collect assessments against each member. § 4, Bylaws WTC.

8. The association prepares an annual budget of anticipated common expenses for each year. Art. XIV, Declaration WTC at 7. The budget for common expenses includes the proposed assessment against each member. § 6.2, Bylaws WTC. The declaration permits the board of directors to prepare

individual budgets for each of the 13 condominiums. Article XIV(C) of the declaration provides with emphasis added:

C. Assessments. Assessments shall be made and determined in the following manner:

1. The Board of Directors of the Association shall approve an annual budget in advance for each fiscal year and such budget shall project the anticipated Common Expenses for the ensuing fiscal year. In preparing the annual budget the Board may make up individual budgets for each condominium managed by the Association, or may separate certain Common Expenses for each condominium managed by the Association.

2. After adoption of a budget and determination of the annual assessments against the unit owners in accordance with the shares of the Common Expenses hereinabove set forth, the Association shall assess such sums promptly notifying all owners by delivering or mailing notice thereof to the designated voting owner representing each unit....

9. Article III(B) of the Articles of Incorporation empower the association:

(B) to make, levy and collect assessments against unit owners of the Condominiums to provide the funds to pay for common expenses of each condominium as is provided in the Declarations, the By-laws, and the Act, and to use and expend the proceeds of assessment in the exercise of the powers and duties of the Association.

10. A recreation agreement exists whereby the association is a member of the recreation association. Art. XXIV, Declaration WTC. All unit owners have use rights in the recreation association and the association is their representative member. Wimbledon Townhouse Condominium Associations I and II are also members of the recreation association. The maintenance assessments levied by the recreation association are common expenses of the multicondominium association.

11. The bylaws require the association to "adopt a budget for each calendar year which shall contain estimates of the costs of performing the functions of the association." § 6.2, Bylaws WTC. The budget includes complex-wide expenses for the recreation maintenance assessment, the association's management fees, and the utility services billed to the condominium for the common elements. Id. §§ 4, 6.2. The budget must reflect the annual and special assessments to be made against each unit owner. Id. § 6.2(2). The association is to use the cash basis of accounting. Id. § 6.2(3)(c). The board may maintain reserve funds for deferred maintenance. Id. § 6.2(1)(xiii).

12. The association's petition indicates that it would like to budget on a consolidated basis for complex-wide expenses, but continue to budget reserves on an individual condominium basis.

CONCLUSIONS OF LAW

1. The Division has jurisdiction to enter this order pursuant to sections 718.501 and 120.565, Florida Statutes. These conclusions are limited to WTC and do not have application to other condominium associations in this state.

2. Wimbledon Townhouse Condominium III has standing to seek this declaratory statement.

3. The declaration does not include language that adopts all amendments to the Condominium Act as they are enacted, so it is bound by the law in effect on the date the declaration is recorded. Brooks v. Palm Bay Towers Condo. Ass'n, Inc., 375 So. 2d 348 (Fla. 3d DCA 1979) (law in effect on date

declaration recorded governs its provisions). But see Kaufman v. Shere, 347 So. 2d 626 (Fla. 3d DCA 1977) (finding that declaration adopting all amendments to the Condominium Act as they are from time to time enacted was not retroactive application of prohibition on escalation clauses in recreation agreements).

4. Section 711.11(2)(c), Florida Statutes (1973), required the following provision in the bylaws governing the association:

(c) Manner of collecting from the unit owners their shares of the common expenses.

5. Section 711.14, Florida Statutes (1973), provided:

(2) Funds for the payment of common expenses shall be assessed against unit owners in the proportions or percentages of sharing common expenses provided in the declaration.

(3) The common surplus shall be owned by unit owners in the shares provided in the declaration.

6. Presently, section 718.111(6), Florida Statutes (2005), provides:

(6) OPERATION OF CONDOMINIUMS CREATED PRIOR TO 1977.--Notwithstanding any provision of this chapter, an association may operate two or more residential condominiums in which the initial condominium declaration was recorded prior to January 1, 1977, and may continue to so operate such condominiums as a single condominium for purposes of financial matters, including budgets, assessments, accounting, recordkeeping, and similar matters, if provision is made for such consolidated operation in the applicable declarations of each such condominium or in the bylaws. An association for such condominiums may also provide for consolidated financial operation as described in this section either by amending its declaration pursuant to s. 718.110(1)(a) or by amending its bylaws and having the amendment approved by not less than two-thirds of the total voting interests. Notwithstanding any provision in this chapter, common expenses for residential condominiums in such a project being operated by a single association may be assessed against all unit owners in such project pursuant to the proportions or percentages established therefor in the declarations as initially recorded or in the bylaws as initially adopted, subject, however, to the limitations of ss. 718.116 and 718.302.

7. A multicondominium must maintain separate accounting records for the association and each condominium it operates. Fla. Admin. Code R. 61B-22.002. If the condominium was created before July 1, 2000, and did not create separate ownership interests of the common surplus in the association for each unit, then the association cannot maintain separate fund balances for the association, but must allocate all of the association's revenues and expenses to each condominium as provided in the declaration for each condominium. Id.

8. If the association wants to operate the condominiums created before 1977 in a consolidated fashion, the initial declaration as originally recorded or as amended under section 718.111(6), Florida Statutes, must provide for consolidation of the financial operation of the condominiums. § 718.111(6), Fla. Stat.; Fla. Admin. Code R. 61B-22.003(4)(b).

9. Presently, the association budgets separately for each condominium and does not operate in a consolidated fashion. However, it would like to consolidate routine operating expenses to save money. The association asks whether section 718.111(6), Florida Statutes, permits it to consolidate its budget for the 13 condominiums for those condominium expenses common to all 13 condominiums and budget reserve funds and nonroutine capital expenditures independently for each separate condominium. The association argues that it would be inequitable to require one association that had just paid to replace its roof to pay into a reserve fund for another condominium that will need a new roof in the near future.

10. Under the declaration, each unit owner is assessed his or her share of the common expenses of his or her condominium, not all 13 condominiums. This is evident by the percentage share distribution of the six units, which totals 100%. Declaration WTC, ex. C. The association has maintained separate accounting records for each condominium that it operates. See Chmil v. Mediterranean Manors Ass'n, Inc., 516 So. 2d 1109, 1111 (Fla. 2d DCA 1987) (holding that unit owners were only liable for the expenses of their individual condominium, so association may not consolidate the budget for all 11 condominiums); Pepe v. Whispering Sands Condo. Ass'n, Inc., 351 So. 2d 755 (Fla. 2d DCA 1977) (multicondominium association could not incorporate the budgets of the separate condominiums into one budget and one assessment on an equal basis per unit without properly amending the declaration). The declaration does not provide for consolidated budgeting. Article XIV(C) of the declaration directs the association to budget separately for each condominium or separate the common expenses for each condominium within one master association budget. The result is the same; the association must prepare separate budgets for each condominium.

11. In 1973, the Condominium Act did not provide much guidance for condominium associations in budgeting. The act was silent as to multicondominium association budgeting; it did not require multicondominium associations to budget for complex-wide expenses of the association separately from the individual budgets for each condominium. The governing documents for Wimbledon Townhouse Condominium III are also silent as to whether the

association must budget separately for its expenses from each of the condominiums expenses. The documents do provide for association expenses to be reflected on each of the condominium budgets. For example, complex-wide expenses for association administrative expenses and recreation fees are line items on the WTC budget. § 6.2(1), By-laws WTC. However, the bylaws do not specify how the association's expenses are to be divided among the 13 condominiums.

12. Because Wimbledon Townhouse Condominium III Association was created before 1977 and the declaration provides for assessments based on each individual unit owner's percentage share of the common expenses and surplus within each condominium and does not provide for consolidated operation, the association must allocate its revenues and expenses to each condominium. The annual budget must include each unit's share of the estimated expenses of the association. Fla. Admin. Code R. 61B-22.003(4). If the association wishes to consolidate its budgets, it may amend its documents in accordance with section 718.111(6), Florida Statutes.

13. In 2000, the legislature amended section 718.110(12), Florida Statutes, to permit an association with a vote of its members to create separate ownership interests in the common surplus of the association as described in section 718.104(4)(h), Florida Statutes. Ch. 2000-302, Laws of Fla. Section 718.115(1)(b) and (c), Florida Statutes, was amended to clarify which common expenses are those of the separate condominiums and which are those of the multicondominium association. Id. If the common expense benefits all of the unit

owners, it may appear in the association budget rather than the condominium budget.

14. In order create a separate ownership interest in the common surplus of the association, and include common expenses that are eligible to be included on the association budget because they benefit all of the members, the association would need to amend its governing documents in accordance with sections 718.104(1)(h), 718.110(12) and 718.115(1)(b) and (c), Florida Statutes. If the association wishes to consolidate its budget, it must amend its documents in accordance with section 718.111(6), Florida Statutes.

15. The association has suggested that equity should apply to its budgeting process. A declaratory statement is limited to the application of the statutes and rules to a particular circumstance. Equity is a judicial remedy, requiring a ruling on disputes of fact and law. The Division has limited its opinion to the application of the statute and rules. The Division may not waive a statute and has limited authority to waive a rule. § 120.542, Fla. Stat. If the association seeks an interpretation of its documents based on an ambiguity arising from the lack of specificity in how it should assess for association expenses, it must do so in the proper forum. Peck Plaza Condo. v. Div. Fla. Land Sales, Condominiums, and Mobile Homes, Dep't of Bus. Reg., 371 So. 2d 152 (Fla. 1st DCA 1979).

ORDER

Based upon the findings of fact and conclusions of law, the Division declares that Wimbledon Townhouse Condominium III Association, Inc. must continue to budget separately for each condominium it operates unless it amends

its documents in accordance with section 718.111(6), Florida Statutes, to provide for consolidated budgeting, but may not adopt a hybrid form of budgeting that consolidates complex-wide expenses and assesses condominium specific expenses separately.

DONE and **ORDERED** this 19th day of October, 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
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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 Jonathon S. Miller, Esquire, Randall K. Roger & Associates, P.A., One Park Place, 621 NW 53rd Street, Suite 300, Boca Raton, Florida 33487, this 28th day of October, 2005.

Robin McDaniel

ROBIN MCDANIEL, Division Clerk

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