Final Order No. BPR-2004-03520 Date: 8-10-04
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Department of Business and Professional Regulation
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Sarah Wachman, Agency Clerk
By: Brandon M. Nichols

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. 2004013080

EDNA PANZINI, unit owner,
GREENWAY VILLAGE CONDOMINIUM NO. ONE, INC.
_____/

DS 2004-011

DECLARATORY STATEMENT

Edna Panzini (Panzini), Petitioner, unit owner member of Greenway Village Association, No. One, Inc. A Condominium Association (Greenway), filed a Petition for Declaratory Statement requesting an opinion as to whether the association may assess unit owners for common expenses instead of applying excess funds in the common surplus under section 718.116(10), Florida Statutes (2003) as a credit against the assessment.

STATEMENT OF FACTS

The following facts are based on information submitted by Panzini and Greenway. The Division takes no position as to the accuracy of the facts, but merely accepts them as submitted for purposes of this declaratory statement. Panzini requested a hearing at the Division's discretion, and none was held.

1. Panzini filed her petition with the Division on March 9, 2004. Notice of the petition was published in Florida Administrative Weekly on March 29, 2004. The Division received Greenway's response to the petition on April 6, 2004.

2. Panzini is a unit owner member of Greenway, a condominium "association" as that term is defined by section 718.103(2), Florida Statutes.

3. Greenway is substantially affected by this declaratory statement.

4. Greenway Village Condominium No. One was created in 1967. Condo. Declaration, Greenway Village Condo. No. One (Declaration).

5. Greenway is a member of Greenway Village Recreational Association, Inc. (Recreational Association), which is made up of three associations. There are 223 members of the Recreational Association, of which Greenway has 79 unit owner members. The Declaration created 84 units. Art. I, Declaration at 1. No other information was provided as to the status of the Recreational Association or its relationship to Greenway except that it apparently has the authority to assess the members directly or through the association for expenses of maintaining the pool and other common areas.

6. Under the Declaration, Greenway has the authority to assess the unit owners annually for the payment of common expenses budgeted for the year and to pass other assessments approved by the board during the year. Art. XII, Declaration at 12; art.III, Art. of Incorp.; art. IV(J)(1), art. VI(2), Bylaws. The board of directors may in its "sole discretion" levy additional assessments not covered by the adopted budget as needed for the operation and maintenance of the condominium. Art. VI(2), Bylaws. Any assessments or funds are "expended, held or used" by Greenway for the benefit of the membership and for the purposes authorized. Art. III, Art. of Incorp. at 3.

7. The "common surplus" is the "excess of all receipts of the Association, including but not limited to assessments, rents, profits and revenue on account of the

Common Elements, over the amount of the Common Expenses." Art. II(F), Declaration. "All income received by the Association from the rental or licensing of any part of the Common Elements (as well as such income anticipated) shall be used for the purpose of reducing prospective Common Expenses prior to establishing the annual assessment for Common Expenses." Art. VIII(F), Declaration.

8. In May 2003, Panzini asserts and Greenway admits that the Recreational Association assessed its members for kitchen repairs, which Greenway paid for its unit owners from excess funds it had in the common expense account.

9. In December 2003, the Recreation Association assessed the unit owners for $14, 495 to resurface and retile the pool. The association did not pay this amount because it did not have enough money in the assessment account to pay for all of the unit owners, so the owners were individually assessed by the Recreation Association for the expense.

10. The association states that it had $27,000 in the assessment account, but of that amount $15,000 was set aside for resolution of the court case. The board transferred $5,000 to the general account to be applied to the next year's common expenses.

11. Panzini asserts that the association had $75,000 in the assessment account in March 2004. The association agrees but states that $55,000 of these funds were for the repair of the carports roofs and $15,000 was for roof cleaning over the next 2 ½ years as required by the court order. This leaves $5,000 in the assessment account.

12. After receiving her assessment for the pool repairs, Panzini filed a complaint against Greenway with the Division. The Division reviewed the complaint and determined that the board's business decision complied with the statute.

13. Panzini then filed a petition for Declaratory Statement as to whether Greenway may assess unit owners for common expenses rather than applying excess funds in the common surplus under section 718.116(10), Florida Statutes (2003) as a credit against the assessment.

CONCLUSIONS OF LAW

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

2. Panzini, as a condominium unit owner, is substantially affected by the special assessment provisions of section 718.116(10), Florida Statutes.

3. Greenway is entitled to intervene in this proceeding as a substantially affected party. § 120.565, Fla. Stat.

4. Under section 718.111(4), Florida Statutes, Greenway has the ability to make and collect assessments for the maintenance of the common elements.

5. Section 718.116(10), Florida Statutes, provides:

> The specific purpose or purposes of any special assessment approved in accordance with the condominium documents shall set forth in a written notice of such assessment sent or delivered to each unit owner. The funds collected pursuant to a special assessment shall be used only for the specific purpose or purposes set forth in such notice. However, upon completion of such specific purpose or purposes, any excess funds will be considered common surplus, and <u>may, at the discretion of the board</u>, either be returned to the unit owners or applied as a credit toward future assessments.

(emphasis added).

6. Assessment is "a share of the funds which are required for the payment of common expenses, which from time to time is assessed against the unit owner." § 718.103(1), Fla. Stat.

7. Common surplus is the "amount of all receipts or revenues, including assessments, rents, or profits, collected by a condominium association which exceeds common expenses. § 718.103(10), Fla. Stat.

8. Reading the plain language of section 718.116(10), Florida Statutes, Greenway "may" return excess funds from special assessments to unit owners or apply excess funds toward future assessments. See Brooks v. Anastasia Mosquito Control Dist., 148 So. 2d 64 (Fla. 1st DCA 1963) ("may" is permissive not mandatory). This leaves the decision to the board's business judgment, which it must exercise as a fiduciary for the unit owners. § 718.111(1)(a), Fla. Stat. The board may apply the funds toward current expenses. In any event, this becomes a question of timing. The funds are being applied to the common expenses of the association for Panzini and all other owners' benefit. Panzini's issue is really a question of when and to what the excess funds will be applied. Panzini argues the funds should be immediately applied to defray the cost of the pool assessment, while the board has held the funds to meet this fiscal year's expenses. This is a board decision. Unit owners are entitled to disagree with the board's decision, but the statute gives the board the discretion to make it. § 718.116(10), Fla. Stat.

9. Given that the statute does not require the application of excess funds to any and all future assessments, the way the excess funds in the common surplus are applied toward future assessments is a business decision left to the discretion of the Greenway Board of Directors. Cf. Tiffany Plaza Condo. Ass'n, Inc. v. Spencer, 416 So. 2d 823 (Fla. 2d DCA 1982) (upholding board's business judgment in assessing all unit owners for construction of rock revetment to protect beachfront common element from erosion). In any event, the amount of the excess appears to be at most $5,000. The $15,000 for roof

cleaning over the next 2 ½ years is not excess or common surplus because the purpose designated has not yet been completed—the roof cleaning is not completed and won't be for another 2 ½ years. The board is authorized to hold the common surplus or apply it as a credit to any assessment. Art. VII(F), Declaration; art. III, Art. of Incorp. Therefore, Greenway may levy an assessment rather than apply excess funds in the common surplus as a credit to that particular assessment, and such a decision does not constitute a violation of section 718.116(10), Florida Statutes.

ORDER

Based upon the findings of fact and conclusions of law, it is declared that Greenway Village Condominium No. 1 Association, Inc. may assess unit owners for common expenses instead of applying excess funds in the common surplus under section 718.116(10), Florida Statutes (2003), as a credit against the assessment.

DONE and **ORDERED** this 4th day of August, 2004.

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 Edna Panzini, 122 West Court, Royal Palm Beach, Florida 33411, and to Ronald Pick, 140 West Court, Royal Palm Beach, Florida 33411, on this 12th day of August, 2004.

Robin McDaniel
Robin McDaniel, Docket Clerk

Copies furnished to:

Janis Sue Richardson,
Chief Assistant General Counsel