

Final Order No. BPR-2004-00016 Date: 1-15-04
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By: Brandan 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. 2003066719

LEONARD LEOPOLD, Unit Owner,
Waterview, A Condominium.

DS 2003-016

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.

PRELIMINARY STATEMENT

On June 6, 2003, the Division received a Petition for Declaratory Statement from Leonard Leopold (Leopold), unit owner, requesting an opinion as to whether the Board's action regarding the use of parking spaces contradicts a provision in the declaration of condominium and section 718.106(2), Florida Statutes. The Division finds that the association's action are consistent with the declaration and the Condominium Act.

Notice of receipt of the petition was published in Florida Administrative Weekly on October 3, 2003. No hearing was requested or held. The Waterview Condominium Association, Inc., of Aventura, filed a letter of intervention on October 29, 2003.

FINDINGS OF FACT

The following findings of fact are based on information submitted by Leopold and the association. 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. Leopold is a unit owner of Waterview Condominium Association, Inc. of Aventura (Association), a condominium “association” as that term is defined by 718.103(3), Florida Statutes.
2. Waterview Condominium consists of 197 units in each of the two towers. § 3.1, Declaration of Condominium for Waterview, A Condominium (1981) [Declaration] and First Amendment to Declaration of Condominium of Waterview, A Condominium (1982).
3. Parking spaces are limited common elements. § 3.3, Declaration. Section 3.3(c), of the Declaration provides:
 - ii. Assignments. Each Unit shall be entitled to the exclusive use of one (1) unsheltered parking space which the Developer shall assign at or about the time the Developer closes c: the title to the Unit. Thereafter, the Board of Directors of the Association shall be empowered to change said assignment, provided the Unit Owner affected by such change consents thereto, and provided that no changes may be made without the prior consent of the Developer so long as the Developer owns any Units. ...
 - iii. Additional Provision. An assignment of a parking space grants only the exclusive use thereof and does not convey any title thereto. A parking space is a limited common element appurtenant to the Unit to which it is assigned and any transfer of title to the Unit (including transfer by operation of law) shall operate to transfer the exclusive use of the Unit’s then appurtenant parking space.
 - iv. Guest Parking. Parking spaces designated for guest parking shall be for use of guests of Unit Owners. In the event a Unit Owner leaves his space vacant while he is

away for an extended period, the Board of Directors shall be authorized to allow others to use same.

4. According to the petition, section 3.3(c)(ii) of the Declaration of Condominium was construed by the Board, prior to 1996, to mean that unit owners had the right to allow other individuals to use their assigned parking place temporarily. In 1996, a new Board construed this section to grant the Association the right to temporarily assign the use of a space to someone other than the unit owner while the unit owner was away.

5. Leopold filed a Petition for Arbitration in 1998, alleging that the Association was not allowing another unit owner, Rosalie Siegel, to temporarily assign the right to use her parking space to Leopold. Leopold also challenged two of the Association's parking rules which allowed the Board of Directors to temporarily assign a unit owner's parking space when the unit owner was absent, but would not allow the unit owner to authorize another individual to use the assigned space unless the unit owner obtained written permission from the board.

6. The Division issued a Final Order Dismissing Petition for Arbitration (Case No. 98-5122) on November 2, 1998. The Order found that the parking rules in question were consistent with the parking restrictions contained in section 3.3(c)(iv) of the Declaration of Condominium. The Order directed that arbitration be dismissed for failure to state a cause of action. No appeal was taken from this final order.

7. According to the petition, approximately six months before the petition was filed with the Division, the Association issued a notice to the unit owners that stated:

The Association cannot assign use of a parking space without the written authorization of the unit owner. . . .
Please note that you have three choices: You may authorize

the Association to assign your space, you may authorize the Association to permit a named Waterview resident to use your space, or you may not complete the form below in which case the Association cannot permit anyone else to use your space.

8. Leopold alleges that the Board's actions constituted a reversal of the arbitrator's order and an amendment to the Declaration. Leopold requests that a declaratory statement be issued determining whether the Board's actions were valid under the Declaration.

9. The Association's letter of intervention states that the use of the parking space authorization form was "made necessary as the result of the Association's resolution of a housing discrimination complaint" after negotiations with the Florida Commission on Human Relations (FCOHR). The resolution requires the Association to make reasonable accommodations for parking for handicapped residents. The letter also states that the Association believes Leopold's interpretation of the condominium documents is incorrect.

10. The Rules and Regulations of the Association provide that the board of directors or its designated committee may "modify or waive any of the Rules and Regulations" under special circumstances. A-5, Rules and Regulations (Sept. 20, 1985). Complying with federal regulations requiring accommodating disabled persons and settling a complaint would qualify as special circumstances. The rules also provide that the board or the committee has the right to temporarily assign or use a permanently assigned parking space if the owner is away for an extended period of time, which comports with section 3.3(c)(iv) of the Declaration. G-13, Rules and Regulations. The parking rules prohibit an owner from allowing other owners to use their space unless the

owner receives written permission from the board or the committee. G-15, Rules and Regulations.

CONCLUSIONS OF LAW

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

12. Leopold has standing to seek this declaratory statement. In a cover letter filed with the petition, Leopold alleges that the board's actions violate section 718.106(2)(a), (e), and (3), Florida Statutes. These sections are not relevant to the inquiry. However, section 718.106(2)(b), Florida Statutes, is relevant. That section provides:

2) There shall pass with a unit, as appurtenances thereto:

* * * *

(b) The exclusive right to use such portion of the common elements as may be provided by the declaration, including the right to transfer such right to other units or unit owners to the extent authorized by the declaration as originally recorded, or amendments to the declaration adopted pursuant to the provisions contained therein. Amendments to declarations of condominium providing for the transfer of use rights with respect to limited common elements are not amendments that materially modify unit appurtenances as described in s. 718.110(4). However, in order to be effective, the transfer of use rights with respect to limited common elements must be effectuated in conformity with the procedures set forth in the declaration as originally recorded or as amended under the procedures provided therein. This section is intended to clarify existing law and applies to associations existing on the effective date of this act.

13. The parking provisions provide that a limited common element parking space is appurtenant to the unit to which it was assigned when the unit was purchased from the developer and is transferred with title to the unit. § 3.3(c). Declaration. This is consistent with section 718.106(2)(b), Florida Statutes, which provides that the exclusive right to use a limited common element is transferable by the unit owner "to the extent authorized by the declaration as originally recorded" or as amended. See Brown v. Rice, 716 So. 2d

807 (Fla. 5th DCA 1998) (unit owner cannot convey garage parking space that has been made a limited common element appurtenant to the unit without conveying title to unit) (clarified by later amendments to § 718.106, Fla. Stat.).

14. The transfer of a parking space from the unit to which it was originally assigned to another unit is governed by the declaration. § 718.106(2)(b), Fla. Stat. The Declaration permits the board to transfer the assignment of a parking space to another unit owner with the unit owner's permission as long as the unit retains at least one limited common element parking space. § 3.3(c)(ii), Declaration. If the unit is sold, the "Unit's then appurtenant parking space" is transferred with the title to the unit. *Id.* § 3.3(c)(iii); Brown, 716 So. 2d at 809. So, if the board and the unit owner agree, the originally assigned parking space may be transferred to another unit provided that the unit retains one assigned parking space as an appurtenance to the unit.

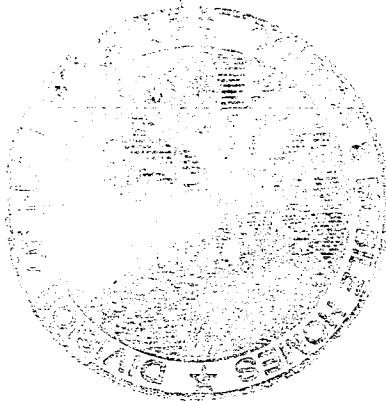
15. In addition to a parking space assigned to each of the 394 units, the Declaration contemplates additional parking spaces for guests. § 3.3(c)(iii), Declaration. It cannot be determined if any guest parking spaces actually exist from a review of the documents provided, so it is presumed guest parking spaces do exist based upon this provision. Guest parking spaces are not appurtenant to any unit and persons parking in guest parking spaces are given a "license to use" the space. As explained by the Brown court, a license to use a parking space is a personal privilege that may be withdrawn by the owner at any time and does not effectuate a transfer of a limited common element parking space assigned to a unit. Brown, 716 So. 2d at 809. The Declaration designates a unit parking space as a guest space if the unit owner is absent from the condominium for an extended period of time. § 3.3(c)(iii), Declaration. In effect, the Declaration as


originally recorded grants to the association a license from the unit owner to assign the temporary use of his or her assigned parking space when he or she will be absent from the unit for an extended period of time.

16. The Association's agreement with the FCOHR, resolving a parking complaint brought by a disabled unit owner, reaches the same result. The agreement acknowledges that "[p]arking spaces at Waterview Condominium Association are limited common elements and are permanently assigned to a specific unit; they cannot be transferred from one unit owner to another, except with the transfer of the appertaining unit." *Negin v. Waterview*, FCOHR Complaint no. 21-90209H, Terms of Agreement at 1 (July 3, 2002). Under the agreement, a unit owner who will be absent more than 15 days may consent to the association's temporary assignment of the space to another unit owner with a verified disability. *Id.* at 1-2. An absence of 15 days equates to an absence of an "extended period" of time. The association has the right under the Declaration to grant a license to another unit owner to use these vacant spaces or any of the guest spaces. This is consistent with the decision reached by the arbitrator. Under the FCOHR agreement, the association will do so for disabled persons with the permission of unit owners. In any event, a unit owner who will be absent for an extended period does not have the right to grant a license to use his or her space to another owner without the association's agreement and may not assign the parking space to another owner without the association's agreement and consequent assignment of a different space to the unit as an appurtenance so that the unit continues to retain a limited common element parking space.

WHEREFORE, it is declared that the Association's assignment of parking spaces in accordance with the terms of the declaration of condominium is consistent with section 718.106(2)(b), Florida Statutes.

DONE this 5th day of January, 2004, at Tallahassee, Leon County, Florida.




ROSS FLEETWOOD, 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

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(d), 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 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 Leonard Leopold, 20515 E. Country Club Drive, Apartment 2244, Aventura, Florida 33180 and Steven A. Fein, Fein & Meloni, 900 S.W. 40th Avenue, Plantation, Florida 33317, this 20th day of January, 2004.

Robin McDaniel
ROBIN MCDANIEL, Docket Clerk

Copies furnished to:
Ross Fleetwood, Director

Janis Sue Richardson,
Chief General Counsel