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

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DIVISION OF ADMINISTRATIVE HEARINGS

MWC-C105

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

Petitioner,

v.

ERNI HIRSCH,

Respondent.

DOAH CASE NO. 95-0951
DBPR CASE NO. TS94408

FINAL ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly designated Hearing Officer, Mary Clark, held a formal hearing in the above-styled case on November 14, 1995, by videoconference. The parties, their witnesses, counsel and the court reporter participated from the videoconference center in Miami, Florida; the Hearing Officer presided from the videoconference center in Tallahassee, Florida.

PRELIMINARY STATEMENT

A Recommended Order was filed by Hearing Officer Clark on February 21, 1996. The Petitioner and Respondent filed Exceptions to the Recommended Order on March 12, 1996. An Order on Remand was filed on May 21, 1996, asking the Hearing Officer to clarify what exhibits were admitted into evidence and to what extent they were admitted. A Response To Order On Remand was filed by the Hearing Officer on June 21, 1996.

The following exhibits were received in evidence: Petitioner's 1, 2, 3, 3a, 3b, 3c, 3d, 4, 6, 7, 7a, 8, 8a, 8b, 8c, 8d, 8e, 11 and 12; and Respondent's 1 and 2. At hearing the Petitioner presented testimony of Richard Thrawl, Christina Frank and Elizabeth Baker and Respondent testified on her own behalf and presented the testimony of Jennifer Armstrong West. The deposition of Tom Bell was considered for the limited purpose of establishing how the agency has applied the laws in Mr. Bell's experience in the agency.

STATEMENT OF THE ISSUE

On September 22, 1994, the Department of Business and Professional Regulation, Division of Florida Land Sales, Condominiums and Mobile Homes, Bureau of Timeshare (Division or Petitioner) issued a Notice To Show Cause to Erni Hirsch (Hirsch or

Respondent) alleging that Hirsch violated various provisions of Chapter 721, Florida Statutes, regarding vacation and timeshare plans. Specifically, Hirsch was charged with selling multiple timeshare periods as a "successor developer" or "concurrent developer" without making required filings. The issue is whether the violations occurred and, if so, what penalties and remedial action are appropriate.

RULINGS ON PETITIONER'S EXCEPTIONS TO HEARING OFFICER'S FINDINGS OF FACT

The Petitioner's Exceptions to the Hearing Officer's Findings of Fact were ruled on in the Order on Remand which was issued by the Division on May 29, 1996. These are incorporated into this Final Order, and discussed in detail below.

EXCEPTIONS

The filing of Exceptions to the Conclusions of Law is not specifically authorized by Section 120.57, Florida Statutes, or by the model rules, Rule 28-5.404, Florida Administrative Code. However, the exceptions filed by both parties have been considered and are ruled on as follows:

RULINGS ON PETITIONER'S EXCEPTIONS TO HEARING OFFICER'S CONCLUSIONS OF LAW

1. Petitioner filed exceptions regarding the Hearing Officer's Conclusions of Law numbered 18 and 19, stating that they

did not "accurately characterize the nature of the Respondent's duties under Chapter 721". These exceptions are accepted to the extent that the duties of the Respondent are those as enumerated under Chapter 721, Florida Statutes. The Division hereby adopts and incorporates by reference the Hearing Officer's Conclusions of Law numbered 18 and 19, as modified herein.

2. Petitioner's exception to the Hearing Officer's Conclusion of Law number 20 is accepted and is replaced by stating that the jurisdiction of Chapter 721, Florida Statutes, is as set out in Section 721.03, Florida Statutes.

3. The Division hereby adopts the first two sentences of the Hearing Officer's Conclusion of Law number 31, and specifically rejects the remaining portion of the statement. The accepted sentences state that the Petitioner met its burden of proving that Respondent violated Chapter 721, Florida Statutes. The rejected sentence recommends no civil penalty based on three factors:

(1) the violations were unintended;

(2) the Respondent sought legal advice;

(3) the Respondent voluntarily ceased her activity when it became obvious that the agency's interpretation of the law found her subject to Chapter 721, Florida Statutes.

The Division cannot accept these conclusions because:

(1) there is no requirement in Chapter 721, Florida Statutes, for a finding of intent as a prerequisite to imposition of a civil penalty;

(2) the fact that Respondent sought legal counsel and then ignored the warnings of her own counsel or unreasonably relied on the qualified arguments of such counsel, does not constitute competent or substantial evidence of either Respondent's self-serving statements of reliance, or of any mitigating factor to support the recommendation of no penalty;

(3) there was no competent, substantial evidence presented to support the Hearing Officer's finding that Respondent ceased, either voluntarily or otherwise, her activities after the Division notified her of possible violations. To the contrary, there was evidence presented that Respondent continued with her sales related activities.

The remainder of Petitioner's exceptions are rejected as either subordinate or immaterial to the conclusions as stated below.

RULINGS ON RESPONDENT'S EXCEPTION TO HEARING OFFICER'S CONCLUSIONS OF LAW

4. Respondent filed an Exception to Conclusion of Law number 28 contained in the Recommended Order.

First, the Respondent argues the inapplicability of Rule 61B-15.007(2)(b), Florida Administrative Code. The Division rejects this exception. The rule states that a successor or concurrent developer is one who participates in a common promotional plan and offers at least seven parcels for sale in a period of one year. By offering more than seven timeshare periods in a common promotional plan, the Respondent has shown that she was offering in the ordinary course of business. This is all that is necessary under this definition. The Respondent states in the first part of her Exception that the Division's interpretation of this rule "would suggest that any individual that sold any seven time-share periods (which they did not occupy themselves) within one year would be considered to have sold time-shares in the ordinary course of business and would thus be considered a developer" That is exactly the Division's interpretation of this rule. Additionally, this was later clarified by the 1995 Legislature when it added Sections 721.05(9)(d)1 and 721.05(27)(a), Florida Statutes, (1995), to Chapter 721.

Second, the Respondent argues, in essence, that the word "parcel" in condominium rule 61B-15.007(2)(b), should be transposed to mean "timeshare unit", which literally is every timeshare "period" in one condominium parcel/unit. Her point in

making this argument is that Respondent never owned an entire timeshare unit, only timeshare periods. The Division rejects this exception. There are usually 52 timeshare periods in one condominium parcel/unit. Although Chapters 718 and 721, Florida Statutes, and the attendant rules, apply to timeshare condominiums, when there is a conflict in the definitions or provisions of the two statutes, Chapter 721 prevails. (See Section 721.03(3), Florida Statutes). Rule 61B-15.007(2), Florida Administrative Code, notwithstanding, no where in Chapter 721, Florida Statutes, is the term "parcels" referenced. Respondent relies on In Re: Petition for Declaratory Statement, Alfred S. Scope, 10 FALR 6616 (9/15/88), where the Division concluded that a bank which had acquired timeshare periods, through foreclosures, would be presumed a "developer" if it offered more than seven timeshare periods for sale in a condominium within a period of one year. Scope, does not reference parcels, but instead references periods. Finally, Respondent's interpretation would lead to an absurd result. For Ms. Hirsch to sell 7 timeshare "parcels", she would have had to sell 364 timeshare periods. This is far more than anticipated in Chapter 721, Florida Statutes.

Third, nothing in the rules or statutes implies that a promotional plan must be composed of only one timeshare plan,

therefore, the Division rejects this exception. If a promotional plan had to be composed of only one timeshare plan, then Rule 61B-15.007(2)(a), Florida Administrative Code, would be all that was needed in this rule. However, in order to encompass cases such as this, where 38 timeshare periods were sold in 21 different timeshare plans, (figures from Recommended Order Finding of Fact number 6), subsection (b) was added. The promotional plan in this case led to the sale of the 38 timeshare periods at issue.

The Respondent's exception to Conclusion of Law 28 is hereby rejected.

FINDINGS OF FACT

5. The Division hereby adopts and incorporates by reference the Findings of Fact as stated by the Hearing Officer in the Recommended Order numbered 1 - 7, 9, 12, and 15.

Section 120.57(1)(b)10, Florida Statutes, states that

> . . . an agency may not reject or modify the findings of fact . . . unless the agency first determines from a review of the complete record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence . . .

A thorough review of the record has been made. As stated in the Division's Order on Remand, executed by the Division Director on May 21, 1996, the following Findings of Fact have been either modified or stricken, for the reasons stated.

6. The Hearing Officer's Finding of Fact 8 is accepted, as modified (the modifications are underlined): "At all times material to the allegations of the Notice to Show Cause, each of the timeshare plans was comprised of more than seven timeshare periods over a period of at least three years. The initial purchase price was $1,000 or more in thirty-four of the timeshare periods sold by Ms. Hirsch; in four periods the initial purchase price was less than $1,000. For each timeshare period the purchaser from Ms. Hirsch was contractually and statutorily obligated to pay a recurring maintenance fee."

["Notice" is more accurate than "Order". "Initial" was added for consistency with earlier sentence, and is more accurate.]

7. The Hearing Officer's Finding of Fact 10 is accepted, except that subparagraph "f" is stricken in its entirety as not being supported by competent, substantial evidence. Subsection f. read as follows: [Ms. Hirsch] "did not provide Petitioner with the names and addresses of the persons to whom she had sold timeshare periods".

[This action is only statutorily required of a Managing Entity, and Respondent is not a Managing Entity, and therefore could not have violated this section of the statute. Petitioner did not present evidence at the hearing relating to any vicarious liability on the

part of the Respondent, therefore this finding is stricken.]

8. The Hearing Officer's Finding of Fact 11 is accepted as follows: "During the relevant period Ms. Hirsch did not incorporate as a business, maintain an office outside of her home, maintain a business telephone, or otherwise operate in other than her own individual capacity."

[The Hearing Officer's last sentence is not accepted and is stricken in its entirety because it is not probative of any material issue of fact and is not supported by competent substantial evidence. The last sentence read as follows: "Where she lives she is not permitted to operate an office out of her home."]

9. The Hearing Officer's Finding of Fact 13 is accepted as follows: "After being informed of the agency's concern, Ms. Hirsch contacted someone in Orlando with the Department of Business and Professional Regulation's Division of Real Estate. She also contacted an attorney whom she understood specialized in condominium and timeshare law. She received an opinion letter from another attorney in the same firm, Becker and Poliakoff, P.A. The letter stated that arguably she was not a successor or concurrent developer because she purchased her timeshare periods from individuals who were not themselves developers. The letter

concluded there were no cases directly on point and the agency might claim that her sales in the ordinary course of business qualified her as a developer."

[The Hearing Officer's second sentence is not accepted, and is stricken, because it is inadmissible hearsay and was objected to by the Department at the hearing. The Hearing Officer incorrectly reserved ruling on the evidence at hearing and finally did consider such evidence in her ruling. Therefore, the finding is not supported by competent substantial evidence. The stricken sentence reads: "From that contact {telephone call to the Florida Division of Real Estate} she understood that she was not subject to regulation as long as she was selling timeshare periods that she owned herself."

10. The first sentence of the Hearing Officer's Finding of Fact 14 is stricken. There is no competent, substantial evidence to support the finding that the Respondent ceased buying and selling timeshare periods when the Division started enforcement action, and indeed, the finding is contrary to the evidence. At the Respondent's deposition taken on May 18, 1995, Respondent stated that she still owned nine (9) timeshare periods. In July of 1995, records show that she owned twenty-one (21) timeshare periods. The conclusion must be drawn that Respondent purchased

additional timeshare periods between May and July. Additionally, at the hearing, Respondent stated that she had advertised and sold timeshare periods after the May 1995 deposition, which was well after the Notice To Show Cause was issued. The last sentence of the Hearing Officer's Finding of Fact 14 is accepted. The stricken sentence is: "When the agency did, indeed, pursue its administrative enforcement action, Ms. Hirsch ceased buying and selling timeshare periods".

11. The Hearing Officer's Finding of Fact 16 is stricken in its entirety. The finding is not probative of any material issue in this case. The statute does not require a finding of intent in order to establish liability or impose administrative fines. Further, the statement that "she never considered herself a 'developer' of any sort" was countered by voluminous evidence presented in the case relating to her business savvy, her long-term, repetitious advertising, the inducement to sale that she offered, and the manner in which she presented herself via her promotional materials. Respondent's self-serving statements at the hearing as measured against the overwhelming evidence in this case cannot be considered competent or substantial <u>even if</u> the issue of intent were material. Finally, there is no explanation pointing to any competent, substantial evidence to support the findings.

CONCLUSIONS OF LAW

In accordance with Section 120.57(1)(b)10, Florida Statutes, an agency in its final order may reject or modify the conclusions of law and interpretation of administrative rules in the recommended order. In this instance, the majority of the conclusions of law of the Hearing Officer have been used, however, several additional conclusions of law have been added to clarify the Division's interpretation of Chapter 721, Florida Statutes. It is a well-settled principle that the interpretation of a statute by the agency responsible for its enforcement is entitled to great weight, and will not be overturned unless clearly erroneous. Department of Environmental Regulation v Goldring, 477 So.2d 532 (Fla. 1985); Shell Harbor Group, Inc. v Department of Business Regulation, 487 So.2d 1141 (Fla 1st DCA 1986); Escambia County v Trans Pac, 584 So.2d 603 (Fla. 1st DCA 1991). It is also well-settled that a Hearing Officer's legal conclusions, as opposed to factual determinations, are not clothed with a presumption of correctness and thus, an agency is free to substitute its own conclusions of law for those of the Hearing Officer. Harloff v City of Sarasota, 575 So.2d 1324 (Fla. 2d DCA 1991); Bustillo v Department of Professional Regulation, 561 So.2d 610 (Fla 3rd DCA 1990).

12. The Division of Florida Land Sales, Condominiums and Mobile Homes has jurisdiction in this proceeding pursuant to Section 120.57, Florida Statutes.

13. The activities of Respondent in selling timeshare periods are within the regulatory jurisdiction of the Division of Florida Land Sales, Condominiums and Mobile Homes of the Department of Business and Professional Regulation. More specifically, Respondent was a "successor developer" and had the following duties:

Section 721.07, Florida Statutes: requires the filing and dissemination of public offering statements, prior to offering any timeshare plan;

Section 721.08(1), Florida Statutes: requires that all developers establish an escrow account prior to filing a public offering statement;

Section 721.08(2), Florida Statutes: requires that all funds received from or on behalf of purchasers be deposited in an escrow account;

Section 721.08(8), Florida Statutes: which states that any seller who initially fails to comply with the escrow provisions is guilty of a felony of the third degree;

Section 721.10, Florida Statutes: requires that all sellers give all purchasers cancellation rights in regard to a purchase;

Section 721.11, Florida Statutes: requires all advertising be filed with the Division 10 days prior to use;

14. Section 721.05, Florida Statutes (1993), provides these relevant definitions:

> (9) "Developer" includes:
> (a) A "creating developer," which means any person who creates the time-share plan;
> (b) A "successor developer," which means any person

who succeeds to the interest of the persons in this subsection by sale, lease, assignment, mortgage, or other transfer, but the term includes only those persons who offer time-share periods for sale or lease in the ordinary course of business and does not include an owner of a time-share period who has acquired his unit for his own occupancy;

or

(c) A "concurrent developer," which means any person acting concurrently with the persons in this subsection with the purpose of creating, selling, or leasing time-share periods in the ordinary course of business, but the term does not include a person who has acquired a unit for his own occupancy.

(21) "Offer to sell," "offer for sale," "offered for sale," or "offer" means the solicitation, advertisement, or inducement, or any other method or attempt, to encourage any person to acquire the opportunity to participate in a time-share plan.

(26) "Seller" means any developer or any other person, or agent or employee thereof, who is offering time-share periods for sale to the public in the ordinary course of business, except a person who has acquired a time-share period for his own occupancy and later offers it for resale. The term "seller" does not include a person who is conveyed, assigned, or transferred more than seven time-share periods from a developer in a single voluntary or involuntary transaction and who subsequently conveys, assigns, or transfers all of the time-share periods received from the developer to a single purchaser in a single transaction.

(30) "Time-share period" means the period or periods of time when a purchaser of a time-share plan is afforded the opportunity to use the accommodations or facilities, or both, of a time-share plan.

> (31) "Time-share plan" means any arrangement, plan, scheme, or similar device, other than an exchange program, whether by membership, agreement, tenancy in common, sale, lease, deed, rental agreement, license, or right-to-use agreement or by any other means, whereby a purchaser, in exchange for a consideration, receives ownership rights in or a right to use accommodations, and facilities, if any, for a period of time less than a full year during a given year, but not necessary for consecutive years.
>
> (33) "Time-share unit" means an accommodation of a time-share plan which is divided into time-share periods.
>
> (Emphasis added)

15. The core legal issue for resolution is whether Hirsch was a successor or concurrent developer. She concedes that she did not file the notices and statements.

16. The Respondent offered timeshare periods in the ordinary course of business and did not acquire them for her own occupancy, and was thus a successor or concurrent developer.

17. Strictly read, the definitional exemption in Section 721.05(9), Florida Statutes (1993), applies to "units", not "periods," and Ms. Hirsch is not alleged to have purchased or sold an entire timeshare "unit," as defined above. Even if the exemption can be read to include the purchase and sale of timeshare "periods," Ms. Hirsch, as found above, did not herself occupy all

of the periods. Rather, she initially acquired some for herself and family, but based on the volume of sales, advertising and gross income her hobby grew into an enterprise, or business.

18. The Respondent never sold more than seven periods in a single year in a single condominium with more than 70 units. Rule 61B-15.007(2), Florida Administrative Code (formerly, Rule 7D-15.007, Florida Administrative Code), provides:

> (2) For purposes of the above definitions (of successor and concurrent developers), one is presumed to offer condominium parcels for sale or lease in the ordinary course of business where that person:
> (a) Offers more than 7 parcels, or for condominiums comprised of less than 70 parcels, where that person offers more than 5 parcels in the condominium within a period of 1 year; or
> (b) Participates in a common promotional plan which offers more than seven parcels within a period of 1 year.

19. Although this rule addresses condominiums, the Division has applied the rule, pursuant to Section 721.03, Florida Statutes, in a declaratory statement regarding the sale of timeshare periods. In Re: Petition for Declaratory Statement, Alfred S. Scope, 10 FALR 6616 (9/15/88) concluded that a bank which had acquired timeshare periods, through foreclosures or otherwise, would be presumed a "developer" if it offered more than seven timeshare periods for sale in a condominium within a period of one year.

20. The rule both advances and frustrates Ms. Hirsch's argument. Even though she would be excluded from the definition of developer under subsection (2)(a), she plainly sold more than seven timeshare periods in a single year. The terms of Rule 61B-15.007(2)(b), Florida Administrative Code, do not require the seven parcel/periods to be in a single condominium of any size.

21. Clearly, the timeshare periods at issue are neither "timeshare units," "condominium units," nor "condominium parcels." Therefore, the provisions of Rule 7D-15.007(2), Florida Administrative Code, limiting the scope of "ordinary course of business" for purposes of Chapter 718, Florida Statutes, do not apply to the timeshare periods at issue in the Notice.

22. Based on the foregoing, neither In Re Scope nor Rule 7D-15.007(2)(a), Florida Administrative Code, preclude the Division from concluding that Respondent was offering timeshare periods in the ordinary course of business.

23. Even if Rule 7D-15.007(2), Florida Administrative Code, were controlling and even if the Division substituted the words "timeshare period" for the rule's term "condominium parcel", the volume, frequency, and manner of promotion and sale in Respondent's activities, and other evidence in this case, demonstrates a common promotional plan within the meaning of Rule 7D-15.007(2)(b),

Florida Administrative Code. Further, Petitioner's Exhibit 7A shows that Respondent sold more than seven timeshare periods within a period of one year. By its terms, Rule 7D-15.007(2)(b), Florida Administrative Code, does not require that the requisite number of parcels all be offered within the same condominium. Therefore, the Division correctly concludes that Respondent's activities met the criteria for "ordinary course of business".

24. The 1995 Legislature has helped clarify the regulatory scope of Chapter 721 by adding this language to the definition of "developer":

> (d) The term "developer" does not include:
> 1. An owner of a timeshare period who has acquired the timeshare period for his own use and occupancy and who later offers it for resale; provided that a rebuttable presumption shall exist that an owner who has acquired more than seven timeshare periods did not acquire them for his own use and occupancy;
>
> (Emphasis added)

25. Every developer who offers timeshare periods in a given timeshare plan to the public in the ordinary course of business must do certain things required by Chapter 721, Florida Statutes, with respect to the promotion and sale of timeshare plans. Each such developer must comply with the provisions relating to advertising material, purchase contracts, escrow agreements, and public offering statements prior to purchase, to ensure fair,

meaningful, and effective disclosure to consumers.

26. It is not the creation of the timeshare plan that triggers the disclosure and consumer protection requirements of Chapter 721, it is a developer's offering of timeshare periods in the timeshare plan to the public, in the ordinary course of business.

27. The person originally creating a timeshare plan, the creating developer, may create a timeshare plan within a condominium structure, either committing all or some part of the whole condominium units to the timeshare plan. But a condominium is not the same as a timeshare plan. The condominium structure is governed by Chapter 718 while the timeshare plan is governed by Chapter 721.

28. Pursuant to Section 721.03, Florida Statutes (1993), the provisions of both Chapters 718 and 721, Florida Statutes, apply to a condominium timeshare plan but in the event of a conflict between the two Chapters, the provisions of Chapter 721 prevail.

29. Pursuant to Section 721.03, Florida Statutes (1993), the determination of the Division's jurisdiction over the offering of a particular timeshare plan is governed by whether the timeshare plan is comprised of more than seven timeshare periods over a period of at least three years and whether each purchaser's total

financial obligation is $1,000 or more over the entire term of the timeshare plan. This is a separate inquiry from whether an individual is a "successor developer" as provided in Section 721.05, Florida Statutes, and the latter inquiry is not determined by the number of timeshare periods offered for sale or actually sold in any one given timeshare plan but is governed by the standard of ordinary course of business.

30. "Total financial obligation" as used in Section 721.03(9), Florida Statutes (1993), is used and described throughout Chapter 721 and refers to financial payments and charges that the purchaser is obligated to pay by reason of purchasing the timeshare period including recurring maintenance fees and ad valorem taxes.

31. "Total financial obligation over the entire term of the timeshare plan" as used in Section 721.03(9), Florida Statutes (1993), may reasonably be determined by adding the "initial purchase price" as defined in Rule 39.001, Florida Administrative Code, plus any other financial payments and charges that the timeshare purchaser is obligated to pay by reason of purchasing the timeshare period.

32. Each timeshare plan offered by Respondent was comprised of more than seven timeshare periods over a period of at least 3 years. Each timeshare plan was located in the state of Florida and the total financial obligation of each purchaser of each timeshare period that Respondent sold is $1,000 or more over the entire term of the timeshare plan. Therefore, the Division has jurisdiction over the timeshare plans and timeshare periods that Respondent offered.

33. The determination of whether a person has offered timeshare periods "in the ordinary course of business" may reasonably be made by judging the totality of the facts and circumstances surrounding the offering including whether the person has derived significant or continuing income from the offering and whether the timeshare offering was a regular, normal, or common activity of the person. See In Re Petition for Declaratory Statement of N.I.S. Development Corp., Case No. 85A-54 (dated March 31, 1986) and Bishop Associates Limited Partnership v. Belkin and State, Dep't of Business Regulation, 521 So.2d 158 (Fla. 1st DCA 1988).

34. Based upon the income figures shown in the parties' prehearing stipulation, Respondent derived significant and continuing gross income from the offering and sale of the timeshare

periods.

35. Based upon the volume, frequency, and manner of promotion and sale, Respondent's offering and sale of the timeshare periods was a regular, normal, and common activity on her part.

36. Based on the volume, frequency, and manner of promotion and sale, Respondent offered each of the Timeshare Plans in the ordinary course of business.

37. The determination of whether a person has "acquired his unit for his own occupancy" for purposes of Section 721.05(9), Florida Statutes, may reasonably be made by judging from the totality of facts and circumstances surrounding acquisition and ownership of the unit, including the volume, frequency, or manner of promotion and sale, and is not determined solely by a person's actual or sporadic occupancy after the purchase.

38. The "ordinary course of business" criteria is designed to ensure that ordinary timeshare purchasers who acquire a timeshare period for their own occupancy can resell it without being subject to Chapter 721, Florida Statutes, just as homeowners can sell their own homes without obtaining a real estate license. This criteria prevents a person who otherwise meets the definition of a developer from exempting herself by occupying a few timeshare periods while heavily promoting and offering them to the public.

39. Based upon the volume, frequency, and manner of promotion and sale and the statements contained in both the promotional materials and the letters written by Respondent's former attorneys, Respondent did not purchase each of the thirty-eight Timeshare Periods at issue for her own occupancy, and so is not exempt from the "successor developer" category under Section 721.05(9), Florida Statutes, (1993). To the contrary, the evidence shows that she purchased the timeshare periods with an intent to sell them in the ordinary course of business.

40. The Legislature's purpose in regulating the activities of a "successor developer" is not to forever regulate the sale of each and every timeshare period as Respondent would argue but only to regulate those timeshare periods offered to the public in the ordinary course of business. If every person who offered in the ordinary course of business could simply occupy or use each timeshare period briefly before selling it to the public, the Legislature's regulatory intent with respect to successor developers would be rendered meaningless.

41. The First District Court of Appeal has approved a broad and liberal construction of Chapter 721. In Smith v. Department of Business Regulation, 504 So.2d 1285 (Fla. 1st DCA 1986), the Court stated:

> We are persuaded to apply the rule that a statute enacted for the public benefit should be construed liberally in favor of the public even though it contains a penal provision. In this posture a reasonable construction should be applied giving full measure to every effort to effectuate the legislative intent . . . The intent of the act as reflected by its language and legislative setting is absorbed into and becomes part of the law itself.
>
> (Emphasis added)

42. In the case of Associated Mortgage Investors and AMI Realty Corp. v. DBR, 503 So.2d 379 (Fla. 1st DCA 1987), and Sans Souci v. DBR, 421 So.2d 623 (Fla. 1st DCA 1982), the Court affirmed that the Division's interpretation of a consumer-protection statute "made by the agency charged with enforcing a statute, should be accorded great deference unless there is clear error or conflict with the intent of the statute."

43. When violations of Chapter 721, Florida Statutes, are found, the Division has the authority to issue an order requiring a developer, seller or other person to cease and desist from the unlawful practice and to take appropriate affirmative action. The Division also has the authority to impose civil penalties of up to $10,000.00 for each offense. Section 721.26,(5)(d)1, Florida Statutes (1993).

44. In enacting Chapter 721, Florida Statutes, the

Legislature expressly intended that the chapter be interpreted broadly to "protect the quality of Florida timeshare plans and the consumers who purchase them . . . ." Section 721.02(5), Florida Statutes.

45. The Division's statutory interpretations in this case are in accord with the plain meaning of the statutory provisions in question and do not present any clear error or conflict with Chapter 721, Florida Statutes.

46. Based on all of the foregoing, Respondent violated Sections 721.07, 721.08(1), (2), and (8), 721.10, and 721.11, Florida Statutes, and has committed a total of 159 offenses under those sections.

As stated above, the Petitioner filed an exception to the Hearing Officer's recommendation that no administrative penalty be given, based on her finding that Respondent did not intend to violate the law. Section 120.57(1)(b)8, Florida Statutes, requires a hearing officer to submit to the agency a "recommended penalty, if applicable". As concluded by the Hearing Officer, Section 721.26, Florida Statutes, authorizes the agency to impose a civil penalty of up to $10,000 per offense. (Recommended Order, Conclusion of Law 30.) Therefore, Petitioner did not exceed its authority under Chapters 120 and 721, Florida Statutes, in

recommending an administrative penalty and the Hearing Officer should not have summarily rejected Petitioner's proposed administrative penalty and recommended no administrative penalty. See Sheffield v Dep't of Business Regulation, 504 So.2d 470 (Fla. 1st DCA 1987). The Hearing Officer's use of the evidence of intent in this case was a misapplication of the law because Chapter 721, Florida Statutes, contains no requirement of intent. Additionally, the Hearing Officer did not make any specific finding that any of the evidence of intent was considered as a mitigating factor as opposed to a legal standard. Therefore, the findings of intent included by the Hearing Officer in this regard are not supported by competent, substantial evidence and could not support a finding of mitigation.

Additionally, this is not a case in which only one or two statutory violations were found, but rather a pattern of statutory violations over a period of several years.

Based on the foregoing, and a through review of the record, it is the finding of the Division that the Respondent was a successor developer within the meaning of Section 721.05(9)(b), Florida Statutes (1993), during the period relevant to the Notice To Show Cause, and has violated the provisions of Sections 721.07, 721.08(1), (2), and (8), 721.10, and 721.11, Florida Statutes

(1993).

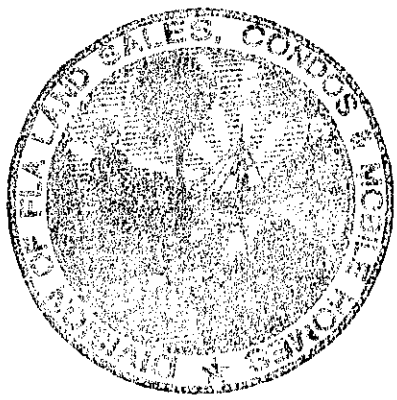
IT IS HEREBY ORDERED that the Respondent:

1. Pay an administrative penalty of $37,400;

2. Cease and desist from any similar or continuing violations of Chapter 721, Florida Statutes;

3. Come into compliance with Chapter 721, Florida Statutes, and the rules promulgated thereunder, including, but not limited to obtaining all applicable approvals from the Division, and furnishing all purchasers with a Public Offering Statement.

DONE AND ORDERED, this _____ day of _____, 1996.



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Northwood Centre
1940 North Monroe Street
Tallahassee, Florida 32399-1030

RIGHT TO APPEAL

THIS ORDER CONSTITUTES FINAL AGENCY ACTION AND MAY BE APPEALED PURSUANT TO THE FLORIDA RULES OF APPELLATE PROCEDURE AND SECTION 120.68, FLORIDA STATUTES, 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 THE APPROPRIATE FILING FEES AND WITH THE DOCKET CLERK FOR THE DIVISION OF FLORIDA LAND SALES, CONDOMINIUMS AND MOBILE HOMES, WITHIN THIRTY (30) DAYS OF THE RENDITION OF THIS ORDER.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed by U.S. Mail, postage prepaid, to Tracy Hirsch, Esquire and John Militana, Esquire; Militana, Militana and Militana, P.A.; 8801 Biscayne Boulevard, Suite 101; Miami Shores, Florida 33138, the _____ day of _____, 1996.

_____
Docket Clerk

Copies to:
Mary Clark, Hearing Officer
Laura Glenn, Bureau Chief
Denise Bryant, Senior Attorney