STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
DIVISION OF FLORIDA LAND SALES,)
CONDOMINIUMS AND MOBILE HOMES,)
)
Petitioner,)
)
vs.) CASE NO. 95-5920
)
GUPTA REALTY CORPORATION,)
a New York Corporation, d/b/a)
River Club in the State of Florida,)
)
Respondent.)
)

RECOMMENDED ORDER

Pursuant to notice, Don W. Davis, a duly designated hearing officer of the Division of Administrative Hearings, held a formal hearing in the above-styled cause on June 26, 1996, in Daytona Beach, Florida.

APPEARANCES

For Petitioner: Janis Sue Richardson, Esquire
Department of Business and
Professional Regulation
Division of Florida Land Sales,
Condominiums, and Mobile Homes
1940 North Monroe Street
Tallahassee, Florida 32399-1007

For Respondent: Avinash Gupta, Pro Se 1/
Gupta Realty Corporation
River Club Condominium Association
3131 South Ridgewood Avenue
South Daytona Beach, Florida 32119

STATEMENT OF ISSUES

The primary issue to be determined in this cause is whether Respondent committed violations of Chapter 718, Florida Statutes, and Petitioner's administrative rules, sufficient to justify the imposition of administrative sanctions by Respondent.

Secondarily, that issue includes a determination of whether Respondent is a "developer" as that term is defined by Section 718.103(15), Florida Statutes, and Rule 61B-15.007, Florida Administrative Code.

If Respondent may be considered a developer, then the issues presented are whether Respondent's failure to disclose in the 1991, 1992, 1993, and 1994

proposed budgets for the River Club Association, Inc. (the Association), each reserve account as a separate line item, the estimated useful life, the estimated replacement cost, and the estimated remaining useful life of each item for which reserves are maintained, and failure to show separately the current balance in each reserve account as of the date the proposed budgets were prepared, violates Rule 61B-22.003(1)(e), Florida Administrative Code; whether Respondent violated Rules 7D-23.004(2)(d)(1992) [now 61B-22.0052 (1993), Florida Administrative Code], and Section 718.112(2)(f)2, Florida Statutes, by failing to include statutory reserves in each budget or to obtain a waiver of reserve funding for each of the years 1991, 1992, 1993, and 1994; whether Respondent violated Rule 61B-23.004(1)(a)-(d), Florida Administrative Code [now 61B-22.006(6)(c), (3)(a)1-4], by failing to provide annual financial reports for the years ending December 31, 1990, 1991, 1992, and 1993 that disclosed the beginning balance, the amount of assessments collected and placed in each reserve account during the period covered by the statement, the amount expended or removed from the account, and the balance in the account covered by each financial report; whether Respondent violated Rule 61B-23.004(2), Florida Administrative Code [now 61B-22.006(5)], by failing to separately show the assessments and all other income received by the Association from the developer and from all other unit owners in the financial reports for each of the years 1990, 1991, 1992, and 1993; whether Respondent violated Section 718.112(2)(c), Florida Statutes, by failing to properly notice an October 29, 1990, board of administration meeting in which a $3,360.00 special assessment and a doubling of the monthly maintenance fees were considered and approved; whether Respondent violated Section 718.111(12)(b), Florida Statutes, by failing to maintain the required official records of the Association within the State of Florida; and whether Respondent violated Section 718.111(15), Florida Statutes, by failing to maintain all funds separately in the Association's name.

PRELIMINARY STATEMENT

On or about December 24, 1992, Petitioner received a complaint charging Respondent with several violations of Chapter 718, Florida Statutes, and various administrative rules with regard to Respondent's operation of the Association and Respondent's failure to properly account for the Association's funds.

On October 23, 1995, Petitioner entered a Notice to Show Cause (Notice) against Respondent for failure to adhere to the statutes and administrative rules regarding the budgeting and accounting of Association funds, improperly noticing an October 1990 board meeting at which the developer-controlled board determined to double the monthly maintenance fees of the unit owners, removing Association records outside the State of Florida, and commingling Association funds with a private bank account.

Respondent filed seven motions at the start of the hearing, two of which were denied at the hearing.

Respondent's Motion to Place Documentation on Record, which requested the entry into the record of four documents, was granted in part and denied in part at the final hearing. A letter dated January 23, 1996 from Keith Petteway of James Moore & Co. and a letter dated January 24, 1996 from Lawrence G. Walters, Esquire, documents 1 and 2, were admitted. Admission of other documentation addressed by this motion was denied.

Ruling was reserved on Respondent's remaining four motions. Those remaining motions are denied at this time for the following reasons. Respondent's Motion to Accept Guarantee and Dismiss Proceedings is denied

because the document formed a part of prehearing settlement negotiations, was never authenticated or validated, is not relevant to the issues in this case, and does not cure any of the violations cited in the Notice to Show Cause. Section 90.408, Florida Statutes. For the same reason, an "Agreement" document presented by Respondent is not admissible. Respondent's Motion in Limine, which requests the dismissal of the case based on a repeal of a rule cited in issues 3 and 4 of the Notice to Show Cause is denied on the grounds that the present version of the rule and the prior versions are substantively the same. Respondent had sufficient notice of the nature of the violations to prepare a defense in this case. For the same reason, Petitioner's oral motion to amend the Notice to Show Cause to include a citation to the present version of the rules is granted. Respondent's Motion to Set Aside Proceedings as Respondent Does Not Qualify as a "Developer" (identified as motion 2) is denied. The developer status of Respondent is further addressed in the remainder of this recommended order. Respondent's Motion to Claim Restitution (identified as motion 6) is treated as a motion for attorney's fees and costs pursuant to Section 57.111, Florida Statutes, and is denied inasmuch as Respondent has not prevailed in this matter.

At the final hearing, Petitioner presented the testimony of five witnesses, two by deposition and three by testimony and entered nineteen exhibits into the record. Respondent presented the testimony of two witnesses, including himself, and tendered one exhibit that was not admitted.

The final hearing transcript was filed with the Division of Administrative Hearings on July 10, 1996. Proposed recommended orders submitted by the parties have been reviewed and are addressed in the appendix to this recommended order.

FINDINGS OF FACT

1. Petitioner is the Department of Business and Professional Regulation, Division of Florida Land Sales, Condominiums and Mobile Homes (Division). The Division is authorized by Section 718.501, Florida Statutes, to enforce and ensure compliance with the provisions of the Condominium Act and the administrative rules promulgated by the Division pursuant to Chapter 718, Florida Statutes. The enforcement powers of the Division relate to the development, construction, sale, lease, ownership, operation, and management of residential condominium units. When a complaint is filed with the Division, the Division is required by Section 718.501(1)(n), Florida Statutes, to investigate the complaint, inclusive of preparation of an investigative report.

2. Respondent is Gupta Realty Corporation (Respondent), a New York corporation, registered in the State of Florida to do business in the name of "River Club."

3. Avinash Gupta and Poornima Gupta are the principals of the Respondent corporation. Avinash Gupta is the president of Gupta Realty Corporation.

4. Respondent and Avinash and Poornima Gupta own or control forty-six of forty-eight units in River Club Condominium.

5. Following an investigation conducted by Michael Benz, the Division's investigator, Respondent was notified by letter from Benz, dated November 8, 1993, that Respondent had violated the statutes and rules subsequently cited in the Notice to Show Cause and the factual bases supporting Benz's conclusions.

Issue Number 1: Developer Status

6. In February of 1988, Avinash Gupta, a resident of New York, purchased forty-three of forty-eight units at the River Club Condominium through his Subchapter, "S" corporation, Gupta Realty Corporation. Poornima Gupta, his wife, purchased one unit from John Whelton, an individual owner, in March or April 1994.

7. Avinash Gupta employed Gloria Polinger as an on-site manager to advertise Respondent's units for lease, show his units to prospective tenants, execute lease agreements for his units, collect the rents from his tenants, and arrange for the maintenance of his units. Gloria Polinger also kept the books on his River Club units, as well as Avinash Gupta's other Florida rental properties.

8. Respondent is advertising units for lease and has been leasing units from the date of their initial purchase through the present.

9. River Club Association, Inc. (Association), is a condominium "association" incorporated in this state. River Club Condominium is located in South Daytona, Florida.

10. Respondent controlled the Association's board of administration at all times relevant to the issues raised by the Division's Notice to Show Cause and these proceedings.

11. Section 718.103(15), Florida Statutes, defines a developer to include persons "who offer condominium parcels for sale or lease in the ordinary course of business."

12. Rule 61B-15.007, Florida Administrative Code, defines a developer to include "successor" developers who sell or lease condominiums in the course of business.

13. Respondent is a developer within the definition set forth in both Section 718.103(15), Florida Statutes, and Rule 61B-15.007, Florida Administrative Code.

Issue Number 2: Budgets - Reserve Disclosures

14. Avinash Gupta and Gloria Polinger prepared the Association's accounting records. Avinash Gupta budgeted and expended $30,000 a year in the Association's financial records for the accounting work. As established by testimony of Avinash Gupta, $30,000 a year was budgeted for accounting services and "was allocated" over to Gupta Realty Corporation. The year end financial reports show that the budgeted amount was spent.

15. The budgets for the Association for 1991, 1992, 1993, and 1994 list only operational expenses. None of the budgets list reserve items nor do the budgets include any reserve disclosures.

16. Respondent failed to disclose in the 1991, 1992, 1993, and 1994 proposed budgets for the Association each reserve account as a separate line item, the estimated useful life, the estimated replacement cost, and the estimated remaining useful life of each item for which reserves are maintained; and failed to show separately the current balance in each reserve account as of the date the proposed budgets were prepared.

Issue Number 3: Reserve Funding

17. The appraisal report prepared for Respondent's purchase of the units documents that reserves were established at the time of sale and that it was anticipated that the reserve funds would continue to be funded. As stated in that document, "reserves for the common area will be calculated for 47 units." Reserves for replacement were to include such items as "roof covering, air-conditioning equipment, etc. . . . The reserve items appropriate to the subject are roof covering, and asphalt paving (topping) for the 47 units." 2/ An Association reserve fund existed in 1988.

18. The Association's budgets for 1991, 1992, 1993, and 1994 do not include any listing of reserves.

19. The minutes of Association meetings for 1991, 1992, and 1993 fail to document that a vote to fund or waive reserves was ever taken.

20. In the letters to the other unit owners following the meetings at which the budgets were adopted by Respondent, the management acknowledges that reserves are required and insists that the unit owners increase their monthly maintenance fees to pay for these reserves. In a November 16, 1993 letter addressed to the Division's investigator, Respondent admits that reserves were not funded and states:

> The only reserve that we maintain is the reserve for contingencies and deferred expenditures, like roof and pavement. resurfacing and building walls, painting. We do not maintain any reserve for capital expenditures with any predictable useful life or replacement cost. (p. 1). . .The reserve account was inactive since 1990 as there was no funding as stated above. It was immaterial to mention about the inactive reserve account in the financial statements.

21. The meeting minutes for 1994 shows that Avinash Gupta and Poornima Gupta voted to waive reserves. These minutes show that a majority of the non-developer unit owners did not vote to waive reserves.

22. Respondent failed to fully fund statutory reserves, or obtain a waiver of reserve funding, for each of the years 1991, 1992, 1993, and 1994. Specifically, Respondent stated in a November 2, 1995 to Division personnel:

> [t]here is no need of any reserve as the amount is insignificant. We pay all our expenses as they are incurred. As stated in paragraph 2 above we were paying all our expenses, contingencies and deferred [sic] expenditures on a current basis as they are incurred. The money we set aside in the reserve account by our own 100 percent contribution was left in there. We did

> not add or take out any money from the account. Since the account was inactive it was immaterial to mention about the inactive reserve account in the financial statements.

Issue Number 4: Financial Report Reserve Disclosures

23. As noted in previous findings above, the appraisal report prepared for Respondent's purchase of the units established reserves at the time of sale and it was anticipated that the reserve funds would continue to be funded. An Association reserve fund existed in 1988. Not only did none of the financial reports for 1990, 1991, 1992, and 1993 include any listing of reserves, none of the reports included required reserve disclosures.

24. Respondent failed to provide annual financial reports for the years ending December 31, 1990, 1991, 1992, and 1993, which disclosed the beginning balance, the amount of assessments collected and placed in each reserve account during the period covered by the statement, the amount expended or removed from the account, and the balance in the account covered by the financial report.

Issue Number 5: Financial Report Income Disclosures

25. Respondent owns or controls forty-six units at River Club Condominium. Unit owners pay maintenance fees of $90.00 a month per unit.

26. Gloria Polinger kept a ledger of the maintenance fees paid by the non-developer unit owners, but she did not keep records of the fees paid by the developer (Respondent).

27. Maintenance fee assessments are recorded as income to an association. The financial reports for 1990, 1991, 1992, and 1993, do not show any income or receipts of any kind.

28. Respondent failed to separately show the assessments and all other income received by the Association from the developer and from all other unit owners in the financial reports for each of the years 1990, 1991, 1992, and 1993.

Issue Number 6: Notice of Board Meeting

29. A letter to unit owners, dated October 29, 1990, states, in part, as follows:

> Please be advised that the condominium assessments in the amount of $90.00 per month have been insufficient to compensate the Riverclub [sic] Condominium Association for the common expenses for which each association member is responsible in equal proportions. The average actual common expenses per unit owner have amounted to $180.00 since February 1, 1988. In addition, the association is required to assess deferred maintenance reserves in the amount of $15.00 per month which it has not collected since February 1, 1988.

> This letter shall serve as a formal demand for a special assessment in the amount of $3,360.00 which represents the unreimbursed amount of $105.00 per month x 32 months.

30. One individual unit owner, John Whelton, who sold his unit to Poornima Gupta in 1994, testified that no notice of an association meeting at which a budget or increase in maintenance fees was discussed was sent to him prior to receiving the October 29, 1990 notice. Whelton also stated that he had not received any budgets for association operational expenses prior to receiving this notice.

31. Despite Gloria Polinger's testimony that she sent a notice for a 1990 meeting, no notice was ever produced by Respondent, and Polinger's testimony in this regard is not credited.

32. Meeting notices are official association records and must be kept by the Association. Absent credible testimony or documentation of such notice, it is found that Respondent failed to properly notice the October 29, 1990, board of administration meeting at which a $3,360.00 special assessment and a doubling of the monthly maintenance fees were considered and approved.

Issue Number 7: Out-of-State Records

33. The River Club Maintenance Account opened by Avinash Gupta has a New York address.

34. Gloria Polinger testified that certain accounting and tax records were mailed to Avinash Gupta at his New York address. Avinash Gupta also admitted that some records were sent to him at his New York address. Records of the bank account where unit owner maintenance checks were deposited were unavailable to the Division's investigator during a June 22, 1993 site visit by the investigator because the records were with Gupta in New York.

35. The testimony of Polinger on this point, and that of Investigator Benz, establishes that Respondent failed to maintain required official records of the Association within the State of Florida. Specifically, on or about June 22, 1993, Respondent failed to maintain within the State of Florida, the Association's bank records, including but not limited to, canceled checks and monthly account statements for both of the Association's operating and reserve accounts, as well as tax bills for the Association.

Issue Number 8: Commingling

36. From the beginning of Respondent's control of the Association, unit owners were directed to pay their condominium assessments to Respondent's Gupta Realty Corporation account. When the unit owners continued to write their checks to River Club, Respondent filed a fictitious name affidavit changing its name to River Club for purposes of doing business in this state.

37. Rent checks from Avinash Gupta's units at River Club and his other Florida properties were then deposited into the Gupta Realty Corporation account. The maintenance fees paid by the unit owners of the Association were also deposited to this same account. Gloria Polinger paid the bills for maintenance work done on Avinash Gupta's units from this account, paid the

Association's utility bills and maintenance bills from this account, paid her salary from this account, and paid bills related to Avinash Gupta's other Florida properties from this same account.

38. Respondent failed to maintain all funds separately in the Association's name. Specifically, Respondent commingled funds of the River Club Association, Inc. into a bank account opened in the names of Gloria Polinger and Poornima Gupta, and commingled funds in its corporate account held in the name of River Club, the fictitious name under which Gupta Realty Corporation does business in Florida.

Mitigation

39. Avinash Gupta testified that the Respondent has paid more than its share of the common expenses, has lost money on its investment, and that the Division's enforcement action is "frivolous."

40. Avinash Gupta recorded approximately $30,000 in accounting fees on the annual budgets for the Association. Those funds were "allocated over" to Respondent, according to Gupta, to pay accounting fees. Gloria Polinger testified that Avinash Gupta, who is or has been a certified public accountant, was the Association's accountant.

CONCLUSIONS OF LAW

41. The Division of Administrative Hearings has jurisdiction over this subject matter and the parties to this action pursuant to Section 120.57(1), Florida Statutes.

42. The Division is the agency authorized by law to enforce Chapter 718, Florida Statutes. The Division's interpretation of its regulatory statutes "will normally be accorded great deference, unless there is clear error or conflict with the intent of a statute." Sans Souci v. Division of Fla. Land Sales and Condo., Dep't of Bus. Reg., 421 So. 2d 623, 626 (Fla. 1st DCA 1982); Bishop Assoc. Ltd. Partnership v. Belkin, 521 So. 2d 158, 163 (Fla. 1st DCA 1988) (deferring to Division's expertise in regulating condominiums).

43. Pursuant to Section 718.501(1)(d), Florida Statutes, the Division is authorized to pursue enforcement proceedings against any developer, association, officer, or member of a board of administration. The Division is authorized to impose civil penalties against a developer, association, officer, or board member for any violation of Chapter 718, Florida Statutes, or any rule promulgated thereto.

44. River Club Condominium Association is an "association" as defined by Section 718.103(2), Florida Statutes.

Issue Number 1: Developer Status

45. The Division maintains that Respondent is a "developer" as that term is defined by Section 718.103(15), Florida Statutes, and Rule 61B-15.007(1)(b), (2), Florida Administrative Code.

46. A "developer" is one "who creates a condominium or offers condominium parcels for sale or lease in the ordinary course of business." Section 718.103(15), Florida Statutes. A "successor developer" is one "who succeeds to the interests of a developer by sale, lease, assignment, foreclosure of a

mortgage or other transfer and who offers condominium parcels for sale or lease in the ordinary course of business." Rule 61B-15.007(1)(b), Florida Administrative Code. Respondent purchased its units in bulk from the creating developer in February 1988. Respondent employed an on-site manager to advertise its units for lease in the local newspaper, show units to prospective tenants, execute leases for the rental of its units, collect the monthly rent checks for its units, and arrange for the maintenance of its units. Respondent is a developer. Bishop Assoc. Ltd. Partnership v. Belkin, 521 So. 2d 158 (Fla. 1st DCA 1988).

47. The Division has jurisdiction over Respondent for the purpose of enforcing Chapter 718, Florida Statutes.

48. During all times at issue, Respondent controlled the Association. Respondent is responsible for all violations occurring while it controlled the Association. Section 718.301(5), Florida Statutes, provides as follows:

> If, during the period prior to the time that the developer relinquishes control of the association pursuant to subsection (4), any provision of the Condominium Act or any rule promulgated thereunder is violated by the association, the developer is responsible for such violation and is subject to the administrative action provided in this chapter for such violation or violations and is liable for such violation or violations to third parties. This subsection is intended to clarify existing law.

Issue Number 2: Budgets-Reserve Disclosures

49. Rule 61B-22.003(1)(e), Florida Administrative Code, provides that each condominium association budget shall:

> Include a schedule stating each reserve account for capital expenditures and deferred maintenance as a separate line item with the following minimum disclosures:
> 1. The total estimated useful life of the asset;
> 2. The estimated remaining useful life of the asset;
> 3. The estimated replacement cost or deferred maintenance expense of the asset;
> 4. The estimated fund balance as of the beginning of the period for which the budget will be in effect; and
> 5. The developer's total funding obligation, when all units are sold, for each converter reserve account established pursuant to section 718.618, Florida Statutes, if applicable.

50. Respondent's failure to disclose in the 1991, 1992, 1993, and 1994 proposed budgets for the River Club Association, Inc., each reserve account as a separate line item, the estimated useful life, the estimated replacement cost, and the estimated remaining useful life of each item for which reserves are maintained, and failure to show separately the current balance in each reserve

account as of the date the proposed budgets were prepared, violates Rule 61B-22.003(1)(e), Florida Administrative Code. Each violation for each year constitutes a separate violation of the rule.

Issue Number 3: Reserve Funding

51. Section 718.112(2)(f)2, Florida Statutes, provides, in pertinent part, as follows:

> In addition to annual operating expenses, the budget shall include reserve accounts for capital expenditures and deferred maintenance. These accounts shall include, but are not limited to, roof replacement, building painting, and pavement resurfacing, regardless of the amount of deferred maintenance expense or replacement cost, and for any other item for which the deferred maintenance expense or replacement cost exceeds $10,000. . . .This subsection does not apply to budgets in which the members of an association have by a majority vote at a duly called meeting of the association, determined for a fiscal year to provide no reserves or reserves less adequate than required by this subsection. However, prior to turnover of control of an association by a developer to unit owners other than a developer pursuant to s. 718.301, the developer may vote to waive the reserves or reduce the funding of reserves for the first 2 years of the operation of the association, after which time reserves may only be waived or reduced upon the vote of a majority of all nondeveloper voting interests voting in person or by limited proxy at a duly called meeting of the association. If a meeting of the unit owners has been called to determine to provide no reserves or reserves less adequate than required, and such result is not attained or a quorum is not attained the reserves included in the budget shall go into effect.

52. Rule 7D-23.004(2)(d), Florida Administrative Code, [now Rule 61B-22.0052 (1993)] provides that "[r]eserves . . . are common expenses and must be fully funded unless properly waived or reduced." See also Rule 61B-22.0052, Florida Administrative Code (1993) ("[r]eserves included in the adopted budget are common expenses and must be fully funded unless properly waived or reduced."). The legislature requires condominium associations to maintain reserves for at least three categories of expenses: roof replacement, pavement resurfacing, and building painting. Section 718.112(2)(f)2, Florida Statutes. As noted above, these reserves can only be waived by members other than the developer. If members other than the developer do not attend a meeting to vote on reserves, then the reserves in the budget go into effect.

53. Respondent violated Rule 7D-23.004(2)(d)(1992) [now Rule 61B-22.0052 (1993)], Florida Administrative Code, and Section 718.112(2)(f)2, Florida Statutes, by failing to fully fund statutory reserves, or obtain a waiver of

reserve funding, for each of the years 1991, 1992, 1993, and 1994. Each failure constitutes a separate violation of those provisions.

Issue Number 4: Financial Report Reserve Disclosures

54. Respondent violated Rule 61B-23.004(1)(a)-(d) [now 61B-22.006(c), (3)(a)1-4], Florida Administrative Code, by failing to provide annual financial reports for the years ending December 31, 1990, 1991, 1992, and 1993, which disclosed the beginning balance, the amount of assessments collected and placed in each reserve account during the period covered by the statement, the amount expended or removed from the account, and the balance in the account covered by the financial report. Each violation for each year constitutes a separate violation of the rule.

55. Rule 61B-23.004(1)(a)-(d),Florida Administrative Code, 3/ requires the financial statements to contain the following disclosures "regardless of whether reserves have been waived" for the period covered by the statement:

> (a) Each reserve account shall be identified, and each such account shall appear as a line item;
> (b) As to each reserve account, the beginning balance and the amount of assessments collected and placed in that account during the period covered by the statement shall be shown;
> (c) As to each reserve account, the amount expended or removed from that account shall be shown, including but not limited to transfers to other association accounts; and
> (d) As to each reserve account, the balance in that account at the end of the period covered by the financial report shall be shown.

56. Respondent failed to include the required disclosures in any of the financial reports. The financial reports are no more than a listing of the operational expenses of the Association broken down into three categories: estimated, actual, and variance (the difference between the estimated and actual). The financial reports do not disclose the income from the monthly maintenance fees paid by the unit owners and the developer (Respondent) into the Association's account. The financial reports do not include any of the required reserve disclosures. It is impossible for other unit owners to determine the financial health of their association based only upon a sketchy itemization of an association's operational expenses. This is even more troublesome when it is considered that this Association's expenses have been "separated" out by Respondent and Polinger, the manager, from all the other expenses paid from a single account used to pay all of Respondent's bills for all of Respondent's Florida properties.

57. The Association has lien rights against each unit for the failure to fully pay assessments when they are due and owing. Section 718.116, Florida Statutes. To allow a developer to take full control of an association's financial accounts, confuse an association's finances with its other holdings, and fail to disclose an association's financial activity within those accounts, places the other unit owners at the mercy of the developer, who controls the association and, thus, controls the lien rights on each owner's unit. The statute and rules regarding the disclosure of an association's accounts must be strictly adhered to by the Association in this instance and the controlling developer in order to protect every owner's interest. On the other side of the

coin, a developer who has fully complied with the accounting procedures, is protected when a unit owner fails to pay his or her proportionate share of expenses. The developer then has a clear right to protect its investment by foreclosing on the unit. Furthermore, the developer can clearly show any overpayment of assessments and place the overpayment against any liability found to be due from it for the common expenses at the time of turnover of control.

58. The developer-controlled board is still obligated to properly propose and adopt annual budgets that cover an association's expenses, provided that a developer-controlled "board shall not impose an assessment for any year greater than 115 percent of the prior fiscal or calendar year's assessment without approval of a majority of all the voting interests." Section 718.112(2)(e), Florida Statutes.

59. Without adequate financial reports, it is impossible to determine who is liable for common expenses and in what amount. Respondent claims to have provided the only funding for a reserve account that by Respondent's own admission is "inactive." This does not excuse Respondent from complying with the statute and rule regarding the proper preparation of financial reports.

60. Respondent budgeted approximately $30,000 in salary for preparation of the Association's accounting records, which includes the subject financial reports. 4/ That money was subsequently paid over to Respondent. There was sufficient funds budgeted to have a certified public accountant familiar with the preparation of condominium financial reports and budgets to do so. Respondent has failed to show any mitigating circumstances that would allow him to avoid the clear statutory and rule directives for preparation of the Association's financial reports.

Issue Number 5: Financial Report Income Disclosures

61. Respondent violated rule 61B-23.004(2) [now 61B- 22.006(5)], Florida Administrative Code, by failing to separately show the assessments and all other income received by the Association from the developer from all other unit owners in the financial reports for each of the years 1990, 1991, 1992, and 1993. Rule 61B-23.004(2), Florida Administrative Code, 5/ provides as follows:

> The annual financial report of actual receipts and expenditures required by Section 718.111(13), Florida Statutes, shall show separately assessments and all other income received by the association from the developer and from all other unit owners.

Each year constitutes a separate violation of the rule.

62. The financial reports only show certain operational expenses and do not include any statement of Association income. The monthly assessments paid by the unit owners other than the developer are not shown, nor are any assessments paid by the developer (Respondent) shown. These reports only tell half the financial story for the Association. These reports make it appear that the Association has only expenses and no income to meet those expenses. Respondent claims that it has paid all of the Association's expenses as they come due. It is not possible to verify this from the financial reports. It has also been established that the other unit owners have consistently and timely paid their share of the common expenses. The Respondent, who owns or controls forty-six of forty-eight units, is responsible for paying the assessments on

those units. Payment of those assessments are the Respondent's share of the common expenses. Accurate financial reports would show such income. Respondent has not offered any valid mitigation for its failure to prepare adequate financial reports.

Issue Number 6: Notice of Board Meeting

63. Respondent violated Section 718.112(2)(c), Florida Statutes, by failing to properly notice a board of administration meeting, held on or about October 29, 1990, at which a $3,360.00 special assessment and a doubling of the monthly maintenance fees were considered and approved. Section 718.112(c), Florida Statutes, provides in pertinent part as follows:

> [W]ritten notice of any meeting at which nonemergency special assessments . . .will be considered shall be mailed or delivered to the unit owners and posted conspicuously on the condominium property not less than 14 days prior to the meeting. Evidence of compliance with this 14-day notice shall be made by an affidavit executed by the person providing the notice and filed among the official records of the association.

64. A copy of the meeting notice at which the special assessment was passed is required to be kept by the Association. Section 718.111(12)(a)6, Florida Statutes. Absence of the notice in the official records is presumptive proof that no notice was ever mailed or delivered to the unit owners. Section 90.803(7), Florida Statutes. Neither Avinash Gupta nor his on-site manager Gloria Polinger could explain its absence. Whelton testified that notice of the October 1990 meeting was never sent to him. The Department's investigator testified that the notice was not in the Association's files. Avinash Gupta has failed to provide a copy of the notice. Therefore, the fact that no notice was sent is established.

65. This was a very important meeting to the unit owners other than the developer. Respondent decided that the monthly assessment being paid by the other unit owners was not enough to cover the Association's expenses. Respondent, along with its on-site manager, decided to increase the monthly expenses from $90 a month to $195 per month. This was done without notice to the other unit owners that an increase in monthly maintenance fees was being considered. Further, this unilateral action was taken without any valid accounting being given for the Association's reserve accounts and income. Respondent has not offered any valid mitigation for its failure to properly notice an association meeting at which it unilaterally decided to more than double the other unit owners' monthly assessments. 6/

Issue Number 7: Out-of-State Records

66. Respondent violated Section 718.111(12)(b), Florida Statutes, by failing to maintain the required official records of the Association within the State of Florida. Specifically, on or about June 22, 1993, Respondent failed to maintain within the State of Florida, the Association bank records, including the monthly account statements for the River Club bank account containing the Association's reserve funds, and certain tax bills. Section 718.111(12)(b), Florida Statutes, provides that "[t]he official records of the association shall be maintained within the state." The purpose of this statute is to ensure that

unit owners have access to an association's books and records. This is not possible if an association's books and records are taken out of the state. The statute is mandatory, not discretionary.

Issue Number 8: Commingling

67. Respondent violated Section 718.111(15), Florida Statutes, by failing to maintain all funds separately in the Association's name. Specifically, Respondent commingled funds of the River Club Association, Inc., into a bank account opened in the names of Gloria Polinger and Poornima Gupta, and commingled funds in its corporate account held in the name of River Club, which is the fictitious name under which Gupta Realty Corporation does business in Florida. Section 718.111(15), Florida Statutes, provides, in pertinent part, as follows:

> All funds shall be maintained separately in the association's name. Reserve and operating funds of the association shall not be commingled.

68. This is perhaps the most serious of the violations listed. Respondent ran its real estate investments, including the units it owned at River Club Condominium, as though these properties were all rental properties and a part of its private corporate holdings, without any regard for River Club's status as a condominium. The Association's funds were lumped together with Respondent's funds for its other properties. The rent checks from Respondent's River Club units were deposited to this account. The monthly assessments paid by the other unit owners were deposited to this account. Respondent's manager paid the expenses for its other Florida properties from the same account used to pay the Association's expenses. The manager paid the maintenance expenses on Respondent's River Club rental units from this same account.

69. Clearly, the purpose of the statute prohibiting commingling of association funds with any other funds is to keep an association's books and accounts unmuddied by the accounts of other entities. Maintenance of separate association accounts is mandatory, not discretionary. Respondent has clearly committed this violation.

70. There is significant potential harm in allowing violations of this statutory prohibition, such as an association's not having access to its funds if the developer's accounts were frozen, e.g. death of account holder, or succession in board leadership, inability to track accounts for unit owners, and diversion of unit owner funds for non-association purposes by the developer. Respondent has not offered any adequate mitigation for this violation.

Requested Relief

71. The Division is authorized by Section 718.501(1)(d)2, Florida Statutes, to take such affirmative action as necessary to "carry out the purposes of" the Condominium Act, Chapter 718, Florida Statutes. Specifically, the Division seeks compliance by Respondent with the statutes and rules governing a developer's control of a condominium association, inclusive of Respondent's calling an election for a board of directors to effect a turnover of control of the board to non-developer unit owners and the performance of an audit of the Association's accounts for the time Respondent controlled the Association to the present. Such an audit must be done by an independent certified public accountant and comply with the accounting requirements of

Section 718.301, Florida Statutes, 7/ and Rule 61B-22.0062, Florida Administrative Code. See Bishop Assoc. Ltd. Partnership v. Belkin, 521 So. 2d 158 (Fla. 1st DCA 1988) (upholding the Division's requiring successor developer that was leasing its units to turnover control to unit owners other than the developer as comporting with the statutory scheme set out in Section 718.301, Florida Statutes).

72. Once a proper audit has been completed, the Division seeks to require Respondent to pay to the Association funds sufficient to cover any liability found to be due from the developer to the Association.

73. Finally, the Division is seeking a penalty of $43,000 for the violations listed. The maximum penalty that could be assessed by the Division is $5,000 per violation. Section 718.501(1)(d)4, Florida Statutes. Respondent has a minimum of nineteen violations. The Division is entitled to seek a total of $95,000 in penalties from Respondent.

RECOMMENDATION

Based upon the findings of fact and the conclusions of law, it is,

RECOMMENDED:

That a final order be entered requiring:

a.) Respondent to immediately begin complying with Chapter 718, Florida Statutes, and applicable administrative rules, specifically, to immediately unbundle the association's funds from its corporate funds and establish the required accounts in the name of River Club Association, Inc.;

b.) Respondent to have an audit of the association accounts performed by an independent certified public accountant in accordance with the statutes and rules;

c.) Hold an election for directors to the board of the association within 60 days;

d.) Imposition of a penalty of $43,000 upon Respondent, payable to the Division of Florida Land Sales, Condominiums, and Mobile Homes Trust Fund within 30 days of the rendition of a final order in this case, upon terms and conditions to be determined by the Division.

DONE and ENTERED this 13th day of August, 1996, in Tallahassee, Leon County, Florida.

____

DON W. DAVIS, Hearing Officer
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-1550
(904) 488-9675 SUNCOM 278-9675

Filed with the Clerk of the
Division of Administrative Hearings
this 13th day of August, 1996.

ENDNOTES

1/ On May 21, 1996, Robert Riggio, Esquire, on behalf of Respondent, and Petitioner's counsel participated in a telephone conference hearing to discuss a continuance of the formal hearing to allow the Respondent time to conclude a settlement agreement. Mr. Riggio did not appear at the final hearing.

2/ Based upon his observed demeanor at final hearing, Avinash Gupta's testimony that he did not see the appraisal report until after closing on his purchase at $1.8 million dollars is not credited. Further, the report indicates that he was placed on notice that reserves were being funded for this condominium.

3/ This Rule was repealed November 14, 1995; it was renumbered and re-adopted as part of Rule 61B-22.006(3)(a)1-4 as applied to this case by Rule 61B-22.006(6)(c), Florida Administrative Code.

4/ Note that Section 718.112(2)(a), Florida Statutes provides that officers and directors are to serve without compensation unless the bylaws provide otherwise. This was not an issue raised by the Notice.

5/ This Rule was repealed in November 1995; the substantive requirements of this rule were readopted and incorporated as Rule 61B-22.006(5), Florida Administrative Code.

6/ Note that Section 718.112(2)(e), Florida Statutes, requires a board that has the authority to adopt a proposed budget to properly notice and call a special unit owner meeting to consider a budget that increases assessments by 115 percent over the prior year.

7/ Respondent is not holding its units for sale, but for lease, so the exemption for a developer who is offering its units for sale, does not apply.

APPENDIX

In accordance with provisions of Section 120.59, Florida Statutes, the following rulings are made on the proposed findings of fact submitted on behalf of the parties.

Petitioner's Proposed Findings of Fact

(all paragraph's of Petitioner's proposed factual findings were numbered beginning with 18 and continuing through 62.)

18.-30. Accepted, not verbatim.
31. Last sentence rejected as conclusion of law. Remainder accepted.
32.-36. Accepted, though not necessarily verbatim.
37. Last sentence rejected as conclusion of law, remainder accepted.
38.-39. Accepted, though not necessarily verbatim.
40. Last sentence rejected as conclusion of law, remainder accepted.
41.-44. Accepted.
45. Last sentence rejected as conclusion of law, remainder accepted.
46.-59. Accepted.
60.-62. Rejected, subordinate to HO findings or argumentative.

Respondent's Proposed Findings of Fact

1.-3. Accepted.
4.-9. Rejected, subordinate to HO findings.
10. Rejected, unnecessary to result reached.
11. Rejected, subordinate to HO findings or argumentative.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions to this Recommended Order. All agencies allow each party at least 10 days in which to submit written exceptions. Some agencies allow a larger period within which to submit written exceptions. You should contact the agency that will issue the final order in this case concerning agency rules on the deadline for filing exceptions to this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the final order in this case.