

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

STATE OF FLORIDA, DEPARTMENT OF)
BUSINESS AND PROFESSIONAL REGULATION,)
DIVISION OF FLORIDA LAND SALES,)
CONDOMINIUMS AND MOBILE HOMES,)
)
Petitioner,)
)
vs.) Case No. 97-3273
)
PALISADES OWNERS ASSOCIATION, INC.,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Notice was provided and on February 4, 1998, a formal hearing was held in this case. The hearing location was the Bay County Courthouse, Panama City, Florida. Authority for conducting the hearing is set forth in Sections 120.569(1) and 120.57(1), Florida Statutes. The hearing was conducted by Charles C. Adams, Administrative Law Judge.

APPEARANCES

For Petitioner: Theresa M. Bender, Esquire
Department of Business
and Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-1007

For Respondent: William Underwood, Secretary
Palisades Owners Association, Inc.
Qualified Representative
6901 North Lagoon Drive, No. 48
Panama City Beach, Florida 32408

STATEMENT OF ISSUES

Should Petitioner discipline Respondent for failure to make certain disclosures and to maintain certain accounting practices

for the benefit of unit owners at Palisades Condominiums, Phase I, called for in Chapter 718, Florida Statutes, and Rule 61B-22, Florida Administrative Code.

PRELIMINARY STATEMENT

On June 11, 1997, Petitioner served Respondent with a Notice to Show Cause. Through this notice, Petitioner accused Respondent of violations of Chapter 718, Florida Statutes, and Rule 61B-22, Florida Administrative Code. On June 21, 1997, Respondent through its President, Winfred Browning, disputed the factual allegations in the Notice to Show Cause. On July 14, 1997, Petitioner forwarded the case to the Division of Administrative Hearings for conduct of a formal hearing. See Section 120.57(1), Florida Statutes.

The hearing was originally noticed to be held on October 27, 1997. The hearing was continued to allow the parties to engage in a settlement conference. The case was re-noticed and heard on February 4, 1998.

At the commencement of the hearing inquiry was made concerning the opportunity for Respondent to be represented by a person other than an attorney. It was determined that William Underwood, Secretary, Palisades Owners Association, Inc., could serve as the personal representative for Respondent. See Rules 60Q-2.008 and 60Q-2.009, Florida Administrative Code.

Petitioner presented Manuel Rafael DeAgüero as its witness. Petitioner's Exhibits 1 through 9 were admitted. Respondent

presented Winfred O. Browning as its witness. Respondent's Exhibits 1 through 3 were admitted. Administrative Law Judge Exhibit 1 was also admitted.

Petitioner requested official recognition of Chapter 718, Florida Statutes; Rules 61B-22.003 and 61B-22.006, Florida Administrative Code; and former Rule 7D-23.004, Florida Administrative Code. Official recognition was given to those provisions.

A transcript of the hearing was filed on February 26, 1998. Petitioner filed a proposed recommended order on March 9, 1998. Respondent did not avail itself of the opportunity to submit a proposed recommended order. Petitioner's proposed recommended order has been considered in preparing the Recommended Order.

FINDINGS OF FACT

1. Palisades Condominium, Phase I, is a forty-four (44) unit condominium located at 6901 North Lagoon Drive, Panama City Beach, Florida.

2. The condominium is subject to Petitioner's regulatory authority set forth in Chapter 718, Florida Statutes, and related rules within the Florida Administrative Code. Among Petitioner's regulatory opportunities, directed to the condominium, is the establishment of requirements for annual financial reports and annual budgets.

3. Respondent is charged with the responsibility for operating and managing the Palisades Condominium, Phase I, to

include compliance with Chapter 718, Florida Statutes, and related rules in the Florida Administrative Code, that address annual financial reports and annual budgets.

4. This case arose on the basis of an investigation performed by the Petitioner in accordance with Section 718.501, Florida Statutes, pursuant to complaints received by the Petitioner concerning activities by Respondent in conducting the affairs of the Palisades Condominium, Phase I. This investigation led to the disciplinary action taken pursuant to the Notice to Show Cause in Case No. 96-0510-CC-16440.

5. The investigation opened on May 10, 1996, and was concluded by the investigator on August 5, 1996.

6. To resolve the issues framed by the Notice to Show Cause, Petitioner examined documents maintained by the Respondent that relate to annual financial reports and annual budgets of common expenses in the years in question.

7. Pursuant to the by-laws of the Respondent, the fiscal year for the organization is the calendar year.

8. The documents maintained by Respondent depicting the annual financial reports in the years 1993, 1994, and 1995 fail to disclose the beginning balance for each reserve account, fail to reflect the amount of money added to each reserve account, fail to describe the amount removed from each reserve account, and fail to describe the ending balance in each reserve account for the years in question. Moreover, during the years 1993,

1994, and 1995, the documents maintained by the Respondent, in reference to financial reporting, fail to describe the manner in which reserve items were estimated, the dates the estimates were last made, the association's policy for allocating reserve fund interest and whether reserves had been waived during those years.

9. In the years 1992, 1993, 1994, 1995, and 1996, Respondent's proposed annual budgets failed to set forth each reserve account as a separate item, failed to show the estimated life of the reserves, failed to disclose the estimated replacement cost of the reserves, and failed to estimate the remaining useful life for the reserves. Additionally, the proposed annual budgets in the years in question did not separate the current balance in each reserve account as of the date the proposed budget was prepared. Finally, during the years 1994, 1995, and 1996, the annual budgets prepared by Respondent did not disclose the beginning and ending dates of the period covered by the budgets.

10. Although unit owners of the Palisades Condominium, Phase I, voted in September, 1996, to waive the requirement for reserves, the proposed annual budget for 1996 does not reflect that decision.

CONCLUSIONS OF LAW

11. The Division of Administrative Hearings has jurisdiction of the subject matter and the parties to this case

in accordance with Sections 120.569(1) and 120.57(1), Florida Statutes.

12. Section 718.501, Florida Statutes, creates the opportunity for Petitioner to impose a civil penalty against Respondent for violations of that chapter or any rule promulgated pursuant to that chapter. Given this authority, Petitioner brought a Notice to Show Cause against Respondent. To prove the accusations in that complaint, the Petitioner must do so by clear and convincing evidence. See Department of Banking & Finance vs. Osborne, Stern & Son, Co., 670 So. 2d 932 (Fla. 1996).

13. Rule 61B-22.006(3)(a), Florida Administrative Code, states in pertinent part:

(3) Disclosure requirements. The financial statements required by Sections 718.111(14) and 718.301(4), Florida Statutes, shall contain the following disclosures within the financial statements, notes, or supplementary information:

(a) The following reserve disclosures shall be made regardless of whether reserves have been waived for the fiscal period covered by the financial statements:

1. The beginning balance in each reserve accounts as of the beginning of the fiscal period covered by the financial states;
2. The amount of assessments and other additions to each reserve account including authorized transfers from other receive accounts;
3. The amount expended or removed from each reserve account, including authorized transfers to other reserve accounts;
4. The ending balance in each reserve account as of the end of the fiscal period covered by the financial states;
5. The manner by which reserve items were estimated, the date the estimates were last made, the association's policies for

allocating reserve fund interest, and whether reserves have been waived during the period covered by the financial statements; and
6. If the developer has established converter reserves pursuant to Section 718.618(1), Florida Statutes, each converter reserve accounts shall have identified and include the disclosures required by this rule.

14. Rule 61B-22.006(c), Florida Administrative Code, states
in pertinent part:

Financial reports required by Section 718.111(13), Florida Statutes. The financial report required by Section 718.111(13), Florida Statutes, shall meet the following requirements:

* * *

(c) The report shall contain the reserve disclosures required by Rule 61B-22.006(3)(a), Florida Administrative Code, and

15. In the years 1993, 1994, and 1995, Respondent's annual financial reports failed to comply with the aforementioned rules by not disclosing the beginning balance in each reserve account, the amount of additions to each reserve account, the amount removed from each reserve account, the ending balance in each reserve account as of the end of the fiscal period covered by the financial statements, the manner by which the reserve items were estimated, the date the estimates were last made, the association's policies for allocating reserve fund interest, and whether reserves had been waived during the period covered by the financial statements in violation of Rules 61B-22.006(3)(a) and (6)(c), Florida Administrative Code.

16. Section 718.112(2)(f), Florida Statutes, creates the requirement that Respondent's annual budget include a reserve account for capital expenditures and deferred maintenance. Those accounts specifically include, but are not limited to, roof replacement, building painting, and pavement resurfacing.

17. In association with the proposed annual budget former Rule 7D-23.004(2)(b), Florida Administrative Code, states in pertinent part:

In the proposed annual budget, each reserve account shall be stated as a separate item, and the budget shall show the estimated life, estimated replacement cost, and the estimated remaining useful life for each item for which reserves are maintained. Additionally, each budget shall separate the current balance in each reserve account as of the date the proposed budget is prepared.

18. In 1994, Rule 7D-23.004(2)(b), Florida Administrative Code, was replaced by Rule 61B-22.003(1)(e), Florida Administrative Code, which states in pertinent part:

(1) Required elements for estimated operating budgets. The budget for each association shall:

* * *

(e) 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 accounts established pursuant to Section 718.618, Florida Statutes, if applicable.

19. For the years 1992, 1993, 1994, 1995, and 1996, Respondent, through the proposed annual budgets it prepared,

failed to state each reserve account as a separate item, failed to disclose the estimated life of the items, failed to estimate the remaining useful life of the items, failed to estimate the replacement cost of the items, and failed to separate the current balance in each reserve account as of the date the proposed budget was prepared in violation of Rule 7D-23.004(2)(b), Florida Administrative Code, and Rule 61B-22.003(1)(e), Florida Administrative Code, respectively. Respondent also violated Section 718.112(2)(f), Florida Statutes, by not identifying the reserve accounts within the budgets as described in the statute.

20. Rule 61B-22.003(1)(b), Florida Administrative Code, in pertinent part states:

(1) Required elements for estimated operating budgets. The budget for each association shall:

* * *

(b) Disclose the beginning and ending dates of the period covered by the budget;

That rule has application to the annual budget years 1994, 1995, and 1996. The proposed budgets prepared by Respondent in those years failed to disclose the beginning and ending of the period covered by the budgets in violation of Rule 61B-22.003(1)(b), Florida Administrative Code.

21. The manner in which Respondent waived reserves in September 1996 does not excuse the shortcomings in the details of the proposed budget it prepared for 1996, which did not include reference to the waiver of reserves, leading to the conclusion

that the waiver occurred at a time beyond the preparation of the proposed 1996 budget.

22. The history of agency penalties for violations of a type similar to those found here, has been considered. Nonetheless, Respondent's awareness of the problems in its financial reports and annual budgets only occurred at the point in time where they were commented on by the investigator in the spring and summer of 1996. While the Respondent is not absolutely excused from the violations, given the expectation that Respondent should know and abide by the law, the continuing nature of the violations in a setting where Respondent did not appear to be aware of those violations, before 1996, mitigates against the seriousness of Respondent's continuing improper practice.

RECOMMENDATION

Upon consideration of the facts found and the conclusions of law reached, its is,

RECOMMENDED:

That a Final Order be entered which imposes a civil penalty in the amount of \$500.00. That amount shall be remitted by certified check payable to the Division of Florida Land Sales, Condominiums, and Mobile Home Trust Fund, at 1940 North Monroe Street, Tallahassee, Florida 32399-1007, to be delivered by United States Certified Mail, Return Receipt Requested, within thirty (30) days of the entry of the Final Order.

DONE AND ENTERED this 27th day of March, 1998, in
Tallahassee, Leon County, Florida.

CHARLES C. ADAMS
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
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Filed with the Clerk of the
Division of Administrative Hearings
this 27th day of March, 1998.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within
15 days from the date of this recommended order. Any exceptions to
this recommended order should be filed with the agency that will

issue the final order in this case.