STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, DIVISION OF FLORIDA LAND SALES, CONDOMINIUMS, AND MOBILE HOMES,	)	
Petitioner,	)	Case No. 06-4481
vs.	)	
EDEN ISLES CONDOMINIUM ASSOCIATION, INC.,	)	
Respondent.	)	

RECOMMENDED ORDER

This case came before Administrative Law Judge John G. Van Laningham for final hearing by video teleconference on February 1 and 2, 2007, at sites in Tallahassee and Lauderdale Lakes, Florida.

APPEARANCES

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STATEMENT OF THE ISSUE

The issue in this case is whether Respondent condominium association properly assessed unit owners for common expenses based on their respective proportionate shares of such expenses as set forth in the declaration of condominium.

PRELIMINARY STATEMENT

On February 3, 2006, Petitioner Department of Business and Professional Regulation, Division of Florida Land Sales, Condominiums, and Mobile Homes, entered a Notice to Show Cause directing Respondent Eden Isles Condominium Association, Inc., to rebut the charge that it had assessed unit owners for common expenses at rates different than those set forth in the declaration of condominium, in violation of Section 718.115(2), Florida Statutes. Respondent, which disputed the allegations, timely requested a formal hearing.

On November 6, 2006, the case was referred to the Division of Administrative Hearings ("DOAH"), where it was docketed as Case No. 06-4481 and assigned to an administrative law judge ("ALJ"). The ALJ soon consolidated this case with DOAH Case Nos. 06-4482 and 06-4483, finding that the parties and counsel were the same in all three cases, which also presented similar issues.

The final hearing respecting the consolidated cases took place on February 1 and 2, 2007, as scheduled, with all parties

present. Petitioner called two witnesses, its employees Patrick Flynn and Boyd McAdams, and introduced three composite exhibits, which were received in evidence. Respondent presented three witnesses: Louis Claps, a certified public accountant; Suzanna Rockwell, an employee of Respondent; and Jonathon Marks, the president of Respondent's Board of Directors. In addition, Respondent's Exhibits 1 through 7 were admitted.

The two-volume final hearing transcript was filed on February 28, 2007, making the Proposed Recommended Orders due on March 30, 2007, pursuant to the schedule established at the conclusion of the final hearing. At the parties' joint request, this deadline was later enlarged, to April 20, 2007. Thereafter, each party timely filed a Proposed Recommended Order, and these were carefully considered during the preparation of this Recommended Order.

Although the consolidated cases share a common evidentiary record, the undersigned has elected to issue a separate Recommended Order for each one.

Unless otherwise indicated, citations to the Florida Statutes refer to the 2006 Florida Statutes.

FINDINGS OF FACT

1. Respondent Eden Isles Condominium Association, Inc. ("Association") is the entity responsible for operating the common elements of the Eden Isles Condominium ("Condominium").

As such, the Association is subject to the regulatory jurisdiction of Petitioner Division of Florida Land Sales, Condominiums, and Mobile Homes ("Division").

2. The Condominium was created——and continues to be governed by——a Declaration of Condominium ("Declaration"), which has been amended at least once during the Condominium's existence.

3. The Condominium comprises seven identical buildings. Each four-story building contains 52 units. Each unit is laid out according to one of three different floor plans.

4. The Declaration prescribes each unit's proportionate share (expressed as a percentage, e.g. 2.16%, 2.08%, 1.64%, etc.) of the common expenses. These percentages are used to calculate the amounts assessed against each respective unit to collect the funds needed to pay common expenses. For reasons not revealed at hearing, the Declaration——at least in its original form——established a separate and unique schedule of percentages for each building in the Condominium, with the result that similarly situated owners (i.e. those whose units had the same floor plan and comparable locations) did not necessarily pay the same proportionate share of the common expenses.

5. Not surprisingly, owners who were compelled to contribute more toward the common expenses than their similarly

situated neighbors were wont to complain about the seeming unfairness of this.

6. Some time in 2004 the Association's governing Board of Directors ("Board") was made aware of an amendment to the Declaration, which, among other things, had revised the appendix that specified each unit's proportionate share of the common expenses. Due to an absence of evidence, the undersigned cannot determine when this amendment took effect, yet neither its existence (a copy is in evidence) nor its authenticity is in doubt. There is, further, no evidence explaining why the Board had not previously been familiar with the amendment, but——for whatever reason(s)——it was not.

7. After deliberating over the meaning and import of the amendment, the Board voted, during an open meeting, to construe the amendment as providing for the assessment of common expenses against all units in the Condominium according to the percentages assigned to the units located in "Building G," which was the last of the buildings in the Condominium to be completed. In other words, the Board interpreted the amendment as requiring that all similarly situated unit owners be assessed the same amount for common expenses, using only the most recent proportionate shares.

8. Consequently, starting in 2005, the Association assessed unit owners for common expenses pursuant to the Board's

interpretation of the amendment. While this course of action evidently pleased most residents, someone complained to the Division about the change. The Division investigated. Based on its own understanding of the amendment, which differs from the Board's, the Division determined that the Association was not properly assessing the unit owners; accordingly, it demanded that the Association remedy the situation.

9. Under pressure from the Division, which was threatening to impose penalties against the Association for noncompliance with the Division's directives, and for some other reasons not relevant here, the Board eventually decided to "revert back" to the original proportionate shares, beginning in 2006. The Board continues to believe, however, that its interpretation of the amendment (as requiring similarly situated owners to be assessed at the same percentage) is correct.

CONCLUSIONS OF LAW

10. DOAH has personal and subject matter jurisdiction in this proceeding pursuant to Sections 120.569 and 120.57(1), Florida Statutes.

11. Upon finding reasonable cause to believe that a violation of the Condominium Act or any rule promulgated thereunder has occurred, the Division is authorized to institute an administrative enforcement proceeding through which various coercive means of securing compliance may be imposed, including

"a civil penalty [of up to $5,000] against a developer or association, or its assignee or agent . . . ."
§ 718.501(1)(d)4., Fla. Stat.

12. Because the imposition of a fine is (obviously) punitive in nature and implicates significant property rights, the Division has the burden, in an enforcement proceeding brought for that purpose, of proving the alleged violation by clear and convincing evidence. Department of Banking and Finance, Div. of Securities and Investor Protection v. Osborne Stern & Co., 670 So. 2d 932, 935 (Fla. 1996).

13. Regarding the standard of proof, in Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983), the Court of Appeal, Fourth District, canvassed the cases to develop a "workable definition of clear and convincing evidence" and found that of necessity such a definition would need to contain "both qualitative and quantitative standards." The court held that:

> clear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

Id. The Florida Supreme Court later adopted the Fourth District's description of the clear and convincing evidence standard of proof. Inquiry Concerning a Judge No. 93-62, 645 So. 2d 398, 404 (Fla. 1994). The First District Court of Appeal also has followed the Slomowitz test, adding the interpretive comment that "[a]lthough this standard of proof may be met where the evidence is in conflict, . . . it seems to preclude evidence that is ambiguous." Westinghouse Elec. Corp., Inc. v. Shuler Bros., Inc., 590 So. 2d 986, 988 (Fla. 1st DCA 1991), rev. denied, 599 So. 2d 1279 (Fla. 1992)(citation omitted).

14. In this case, the Division has alleged that the Association failed, in 2005, to assess unit owners based on the proportionate shares set forth in the Declaration, in violation of Section 718.115(2), Florida Statutes, which provides:

> Except as otherwise provided by this chapter, funds for payment of the common expenses of a condominium shall be collected by assessments against the units in that condominium in the proportions or percentages provided in that condominium's declaration. In a residential condominium, or mixed-use condominium created after January 1, 1996, each unit's share of the common expenses of the condominium and common surplus of the condominium shall be the same as the unit's appurtenant ownership interest in the common elements.

15. To prevail, therefore, the Division must clearly prove that the Association acted in contravention of the Declaration in collecting common expenses in 2005. As found above, the

Association calculated the assessments according to the Board's interpretation of the pertinent amendment, which means that the Association complied with the statute——unless, that is, the Board's interpretation can be overturned by an administrative order. For its part, the Division contends that the amendment unambiguously provides different schedules of proportionate shares for each building; thus, it asserts that the Association violated the statute by following the Board's allegedly incorrect interpretation of the amendment.

16. In this situation, the question of whether the Association violated Section 718.115(2) depends entirely on the meaning of the amendment to the Declaration, a legal instrument about whose interpretation the parties disagree. This inevitably leads to the question——which the undersigned asked the parties at hearing——whether the Division is authorized to enforce its interpretation of the amendment though the imposition of a monetary penalty against the Association, which latter understands the amendment to have a different meaning. Unless this question is answered *yes*, the Division's case (which seeks precisely to enforce the Division's interpretation of the amendment) is doomed.

17. Yet, if this question is to be answered in the affirmative, it must first be concluded that the Division has jurisdiction authoritatively to construe a legal instrument (and

hence declare the rights of the parties thereto), even though such document is neither a statue nor a rule with whose administration the Division has been charged. If the Division were without such jurisdiction, then the undersigned would be compelled to conclude, of course, that the pending charge against the Association (which requires a finding that the Association disobeyed the amendment) has not been proved, because the dispute over the amendment's meaning could not be decisively resolved in the instant administrative proceeding.[i] Being thus potentially dispositive, this threshold matter concerning the Division's authority to construe legal instruments will be taken up straightaway.

18. The seminal case on this point is Peck Plaza Condominium v. Division of Fla. Land Sales and Condos., 371 So. 2d 152 (Fla. 1st DCA 1979), which happened to be the "first case . . . to test the Division's enforcement powers respecting Chapter 718, Condominium Act." Id. at 153. There, the Division had ordered certain owners individually to pay the cost of electricity for operating a particular elevator, ruling that, under the condominium declaration, such cost was not a common expense to be borne by all owners collectively. Id. at 153. The aggrieved owners appealed, presenting for review a case in which the "whole controversy," according to the court, was "whether the Division [had] the authority to render a valid

interpretation of the articles, bylaws or declaration and determine the intent of the parties as to who should bear the cost of operating expenses for the . . . elevator[.]" Id. at 154. The court's answer to this question was, emphatically, *absolutely not*.

19. The court began its analysis by criticizing the hearing officer, who (we are told) had settled the question of the Division's jurisdiction "to his own satisfaction" based on the "interesting conclusion" that the Division was authorized to enforce its interpretation of the ambiguous documents because the substantially affected parties had not contested the Division's authority to do so.[ii] Id. Following that, the court delivered a short civics lesson:

> It is still the law of the State of Florida that government derives its power by consent of the governed. Under our state system of government the consent of the people is either granted or not granted by their legislative body.

Id.

20. Turning finally to the merits, the court wrote:

> We find no provision in the condominium law that would grant to the respondent Division the authority to interpret and then to enforce its interpretation of the provisions of a condominium contract that is admittedly ambiguous. Jurisdiction to interpret such contracts is, under our system, vested solely in the judiciary. It is to the judiciary that the citizenry turns when

> their rights under a document are unclear and they desire an interpretation thereof.

Id. at 153-54 (emphasis added). Lest anyone miss the court's point about which branch of government is boss when it comes to construing private pacts, the court added the following rhetorical exclamation point to its opinion, taking a parting shot at the Division:

> Such authority [to interpret and enforce the conflicting and ambiguous provisions of a declaration relating to a condominium] may not be brought into existence by agency ambition, insinuation or bureaucratic osmosis.

Id. 154.[iii]

21. A case somewhat similar to Peck arrived in the Fourth District Court of Appeal about five years later. Styled Point Management, Inc. v. Department of Bus. Regulation, 449 So. 2d 306 (Fla. 4th DCA 1984), this case arose from a final order of the Division directing a condominium association to stop collecting greens fees from the golfers who used the condominium's two golf courses and to start assessing unit owners their proportionate shares of the costs associated with the courses, which the Division had found to be "common expenses" under the condominium documents. Id. at 306.

22. Relying on Peck, the appellant urged that the Division was without authority to enforce its interpretation of the condominium documents, which included, among other instruments,

a settlement agreement that had been reached a few years earlier in compromise of "complex litigation" comprising three separate lawsuits in the circuit court. Id. at 307. The court agreed that the Division had gone too far, explaining:

> The Division construed and interpreted all of these documents in reaching its conclusion in the present administrative proceeding, and in doing so exceeded its jurisdiction as announced in [Peck]. The rationale of the *Peck* case is that courts rather than administrative bodies construe contracts. A settlement agreement between parties to litigation is in fact a contract.

Id. (emphasis added). The court believed that the case before it was "even stronger than the Peck situation" because of the contractual settlement. Id. Finding that "ambiguities existed [in the documents] as to the issues in [dispute]," the court vacated the Division's final order. Id.

23. While the jurisdictional issue might have seemed fairly settled after Point Management, such was not the case. Rather, having once staked a claim to exclusive judicial authority over matters involving contract interpretation, the Fourth District would later cede some of this jurisdictional turf to the Division, in RIS Inv. Group v. Department of Bus. and Professional Regulation, 695 So. 2d 357 (Fla. 4th DCA 1997). The issue in RIS was whether the developer of a condominium was required, pursuant to the declaration of condominium, to pay assessments on "raw land," which term broadly referred to

developer-owned units at any stage of construction before the issuance of a certificate of occupancy. The Division had construed the declaration as requiring the developer (RIS) to pay assessments on raw land and ordered RIS to remit payments purportedly due for the preceding eight years. Id. 357-58.

24. The court devoted the bulk of its opinion to analyzing the pertinent provisions of the declaration, which, the court ultimately found, "could have been more precise" but nevertheless did not "appear" to have "ever meant" to make the developer liable for assessments on raw land. Id. at 359. The court therefore reversed the Division's order. Then the court added:

> We would point out, however, that our decision to reverse is not based on RIS's claim that the [Division] did not have jurisdiction to resolve this issue because it involves the interpretation of a contract, which is a judicial function. We believe the [Division] was acting within its authority to enforce the Condominium Act.

Id.

25. Although the court must have been familiar with Peck and Point Management, it made no attempt to distinguish these seemingly contrary cases or otherwise to explain the legal reasoning and rationale behind its summary disposition of the jurisdictional issue. This is unfortunate, because the point is not self-evident that the Division is empowered to

authoritatively construe instruments——especially in light of Peck and Point Management——and hence it would be helpful to know what was behind the court's conclusion in this regard.[iv]

26. Interestingly, a couple of years later, the Fourth District rediscovered Peck, which it followed in Grippe v. Florida Dep't of Bus. and Prof'l Regulation, 729 So. 2d 459 (Fla. 4th DCA 1999). In Grippe, the court affirmed the Division's denial of a petition requesting interpretation of certain language in a declaration of condominium. "The Division correctly found it lacked authority to interpret ambiguous provisions of a condominium contract," said the court, citing Peck——and making no mention of RIS. Id. at 459.

27. The undersigned concludes that Peck and Point Management, on the one hand, and RIS, on the other, are irreconcilable with regard to the jurisdictional issue at hand. It is further concluded that Peck and Point Management were better reasoned and correctly state the applicable law. The courts in those cases, unlike the RIS court, adhered to the axiom that the only subjects which "an agency may hear and determine [are those] within the framework of the powers conferred upon the agency." Vincent J. Fasano, Inc. v. School Bd. of Palm Beach, County, Fla., 436 So. 2d 201, 202-03 (Fla. 4th DCA 1983)(breach of contract claims are ordinarily matters for judicial rather than administrative or quasi-judicial

consideration); cf. Fleischman v. Department of Professional Regulation, 441 So. 2d 1121, 1122-23 (Fla. 3d DCA 1983)("It is well-settled . . . that, absent clear legislative authorization to the contrary, violations of mere contractual rights are concerns only of the courts, and may not be enforced by disciplinary action undertaken by a regulatory agency . . . .").[v]

28. The undersigned's conclusions that Peck and Point Management constitute good law, are applicable, and should be followed are reinforced by the observation that, in the instant case, the Division's putatively authoritative interpretation of the amendment is indistinguishable, in its effect, from a declaratory judgment.[vi] Broadly speaking, declaratory relief is available "to settle and to afford relief from insecurity and uncertainty with respect to rights, status, and other equitable or legal relations . . . ." § 86.101, Fla. Stat. Among other purposes, declaratory relief is appropriately sought when the meaning of a legal instrument, such as a declaration of condominium, is in dispute:

> Any person claiming to be interested or who may be in doubt about his or her rights under a deed, will, contract, or other article, memorandum, or instrument in writing or whose rights, status, or other equitable or legal relations are affected by a statute, or any regulation made under statutory authority, or by municipal ordinance, contract, deed, will, franchise, or other article, memorandum, or instrument in writing may have determined any question

> of construction or validity arising under such statute, regulation, municipal ordinance, contract, deed, will, franchise, or other article, memorandum, or instrument in writing, or any part thereof, and obtain a declaration of rights, status, or other equitable or legal relations thereunder.

§ 86.021, Fla. Stat. Jurisdiction to render declaratory judgments is vested exclusively in the courts. § 86.011, Fla. Stat.

29. Where, as here, there exists between interested parties a bona fide, present dispute about the rights, powers, or privileges obtaining under an instrument in writing, an action for declaratory judgment is maintainable. See, e.g., Lambert v. Justus, 335 So. 2d 818, 821 (Fla. 1976)(quoting May v. Holley, 59 So. 2d 636 (Fla. 1952)). Moreover, to state a claim for declaratory relief, it need not be alleged that the instrument at issue is ambiguous. See, e.g., American Equity Ins. Co. v. Van Ginhoven, 788 So. 2d 388, 392 (Fla. 5th DCA 2001)("Because we hold that the policy exclusions are clear and unambiguous, [the insurer] should have prevailed in its declaratory judgment action."). Rather, if the instrument were determined to be clear and unambiguous, then that ruling, together with the exposition of the writing's clear meaning, would comprise the merits of the declaration.[vii] Id.

30. Among the enumerated powers of the Division is the authority to "bring an action in circuit court on behalf of a

class of unit owners, lessees, or purchasers for declaratory relief, injunctive relief, or restitution." § 718.501(1)(d)3., Fla. Stat. (emphasis added). Thus, before initiating the instant proceeding, the Division could have——and should have——brought an action for declaratory relief on behalf of the malcontents who opposed the Board's interpretation of the amendment. By skipping that step and relying on its own unwarranted, unenforceable interpretation of the amendment as a predicate for vindicating Section 718.115(2), the Division has presented a fatally defective case.

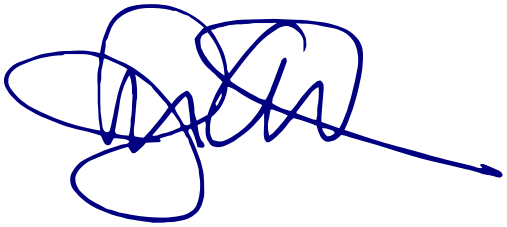
31. The bottom line, then, is as follows. The Division has the authority to prosecute the instant enforcement proceeding against the Association. In other words, this case is within the Division's (and DOAH's) jurisdiction. The Division, however, has failed to carry its burden of proving that the Association acted in contravention of the Condominium's Declaration, as amended, because there exists a bona fide controversy over the meaning of the applicable instrument, which dispute the Division is without jurisdiction to resolve. Absent a judicial determination of the "proportions or percentages provided in [the] condominium's declaration," as amended, it cannot be concluded, in this administrative proceeding, that the Association violated Section 718.115(2), Florida Statutes, in the year 2005, when it assessed unit owners for common expenses

in accordance with the Board's interpretation of the pertinent amendment.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Division enter a final order rescinding the Notice to Show Cause and exonerating the Association of the charge of failing to assess for common expenses in the appropriate percentages as set forth in the Declaration, as amended.

DONE AND ENTERED this 11th day of May, 2007, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
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ENDNOTES

[i]/ If the Division lacks jurisdiction to declare the meaning of the amendment, so too does DOAH, whose role in a case such as this is to make a recommendation to the referring agency regarding the appropriate disposition of the dispute. Plainly, DOAH cannot properly recommend that the Division exercise authority that the Division does not possess.

[ii]/ The court did not say whether the appellants——who had conceded the Division's jurisdiction at the trial level——raised the jurisdictional issue on appeal.

[iii]/ The court's tone hints at a certain displeasure over what it apparently perceived as a flagrant usurpation of judicial authority.

[iv]/ While one can only speculate, it is possible that the RIS court believed Peck and Point Management were inapposite because the documents at issue in those cases were determined to be ambiguous, whereas in RIS the document was (perhaps) found unambiguous. (The court never explicitly ruled, one way or the other, on the question of ambiguity, but it found the relevant language to be, despite a lack of precision, susceptible of application without resort to principles of interpretation, which is consistent with a conclusion of unambiguity. On the other hand, the Division had studied the same "clear and unambiguous" document and reached a much different conclusion about its meaning.) This would not have been a meaningful or persuasive distinction, however, for reasons that will be discussed later.

[v]/ The undersigned is mindful that at stake here is more than an alleged violation of "mere" contractual rights. This is because Section 718.115(2), Florida Statutes, requires that assessments for common expenses be made in accordance with the proportions set forth in the declaration. Thus, if an association makes assessments in percentages other than the ones provided in the declaration, it not only violates the "mere" contractual rights of unit owners (arising under the declaration), but also a statutory duty. However, the contractual rights must be fixed before a violation of the statutory duty can be found to exist, and determining contractual rights, where such are in doubt, is a concern only of the courts. Indeed, where, as in this case, the party charged with a violation of § 718.115(2) does not dispute its duty to comply therewith but only opposes the Division's interpretation of the condominium's declaration,

there is really no need to "enforce" the statute, which is the nominal purpose of the regulatory proceeding; in such event, rather, all that the Division would enforce, as a practical matter, are the "mere" contractual rights of the dissenting owners.

[vi]/ The procedure that the Division followed in arriving at the interpretation, however, differed markedly from a declaratory judgment action. For one thing, the Association was not given an opportunity to be heard on the question of interpretation, as such, apart from the instant regulatory enforcement proceeding, which rests on the Division's interpretation of the operative document. And even if the Association had been afforded a hearing specifically to contest the question of interpretation, no jury trial would have been available under any circumstances, as it might be in a declaratory judgment action. See § 86.071, Fla. Stat. With such considerations in view, it is worth noting that if, contrary to the undersigned's conclusion herein, the Division possesses the authority to decisively interpret an instrument such as the amendment, then all persons having rights and interests arising under the instrument should be given a clear point of entry to challenge the Division's interpretation thereof qua interpretation before the initiation of an administrative proceeding to enforce such interpretation. That way, judicial review of the agency's interpretation can be had ahead of the imposition of sanctions for failure to comply with the agency's interpretation of the operative instrument.

[vii]/ Thus, even if, in RIS, the only reasonable understanding of the subject document was that which the appellate court articulated, declaratory relief in a court of law would have been no less available to the parties there as to those in Peck and Point Management. For that reason, RIS cannot effectively be distinguished from Peck and Point Management on the ground that the document at issue in RIS, unlike those under consideration in the other cases, was clear and unambiguous.

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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.