Florida Building Code, condominiums

Number: INFORMAL

Date: September 25, 2008

The Honorable Faye Culp
Representative, District 57
4302 Henderson Boulevard
Suite 105
Tampa, Florida 33629

Dear Representative Culp:

You ask whether Chapter 718, Florida Statutes, preempts the Florida Building Code and local ordinances promulgated pursuant to the Florida Building Code. You refer to section 718.102, Florida Statutes, which provides:

"The purpose of this chapter is:
(1) To give statutory recognition to the condominium form of ownership of real property.
(2) To establish procedures for the creation, sale, and operation of condominiums.
Every condominium created and existing in this state shall be subject to the provisions of this chapter."

The above provision merely sets forth the purpose of the chapter which the courts have stated that the Condominium Act recognizes the condominium form of property ownership and establishes a detailed scheme for the creation, sale, and operation of condominiums.[1] Nothing in the above statute indicates an intent to remove condominiums from the state building codes.[2]

You also ask about a local government's authority to issue certificates of occupancy prior to the completion of the common elements. While this office is authorized to issue opinions to public officials on questions relating to their own official duties, this office will not comment upon the duties of one official or governmental entity at the request of another officer or governmental entity. In an effort to be of assistance, however, I would generally note the following.

Section 718.202(4), Florida Statutes, provides a definition of "completion of construction," stating:

"The term 'completion of construction' means issuance of a certificate of occupancy for the entire building or improvement, or the equivalent authorization issued by the governmental body having jurisdiction, and, in a jurisdiction where no certificate of occupancy or equivalent authorization is issued, it means substantial completion of construction, finishing, and equipping of the building or improvements according to the plans and specifications."

In Attorney General 79-42, this office stated in interpreting the provisions of section 718.202,

"Section 718.202, F.S., impliedly authorizes the developer to sell condominium parcels at any time prior to completion, or even substantial completion. Subsection (1) provides that, if a developer contracts to sell a condominium parcel prior to substantial completion in accordance with the plans, specifications, and representations made by the developer in the disclosure required by Ch. 718, he must pay into an escrow account all payments up to 10 percent of the sale price received from the buyer towards the sale price. This percentage figure presumably represents an earnest money deposit or down payment on the parcel. It can be paid out only under the following conditions: To the buyer with interest if he properly terminates the contract; to the developer with interest if the buyer defaults in the performance of his obligations under the contract of purchase and sale; or to the developer at the closing of the transaction absent a dispute between the developer and buyer. Subsection (2) concerns payments by the buyer in excess of 10 percent of the sale price prior to completion (not substantial completion) of the construction by the developer. Such funds must be placed in escrow and may not be used by the developer prior to closing the transaction unless the contract for sale authorizes him to use them for actual construction and development of the condominium property in which the unit to be sold is located. While s. 718.202 imposes certain requirements on a developer who sells prior to completion of construction of a condominium, it does not prohibit such sale or in any way limit a developer's ability to convey an interest in the property prior to such completion."

While the statute has been subsequently amended since the 1979 opinion was issued, the changes would not appear to substantially alter the statement above.[3]

Section 718.104(4), Florida Statutes, regulates the creation of condominiums within this state and requires that the declaration of a condominium "must contain or provide for" the matters set forth therein.[4] Subsection (4)(e) of the statute provides:

"A survey of the land which meets the minimum technical standards set forth by the Board of Professional Surveyors and Mappers, pursuant to s. 472.027, and a graphic description of the improvements in which units are located and a plot plan thereof that, together with the declaration, are in sufficient detail to identify the common elements and each unit and their relative locations and approximate dimensions. Failure of the survey to meet minimum technical standards shall not invalidate an otherwise validly created condominium. The survey, graphic description, and plot plan may be in the form of exhibits consisting of building plans, floor plans, maps, surveys, or sketches. *If the construction of the condominium is not substantially completed, there shall be a statement to that effect, and, upon substantial completion of construction, the developer or the association shall amend the declaration to include the certificate described below.* The amendment may be accomplished by referring to the recording data of a survey of the condominium that complies with the certificate. *A certificate of a surveyor and mapper authorized to practice in this state shall be included in or attached to the declaration or the survey or graphic description as recorded under s. 718.105 that the construction of the improvements is substantially complete* so that the material, together with the provisions of the declaration describing the condominium property, is an accurate representation of the location and dimensions of the improvements and so that the identification, location, and dimensions of the common elements and of each unit can be determined from these materials. Completed units within each substantially completed building in a condominium development *may be conveyed to purchasers*, notwithstanding that other buildings in the condominium are not substantially completed, *provided that all planned improvements, including, but not limited to,*

landscaping, utility services and access to the unit, and common-element facilities serving such building, as set forth in the declaration, are first completed and the declaration of condominium is first recorded and provided that as to the units being conveyed there is a certificate of a surveyor and mapper as required above, *including certification that all planned improvements, including, but not limited to, landscaping, utility services and access to the unit, and common-element facilities serving the building in which the units to be conveyed are located have been substantially completed*, and such certificate is recorded with the original declaration or as an amendment to such declaration. *This section shall not, however, operate to require development of improvements and amenities declared to be included in future phases pursuant to s. 718.403 prior to conveying a unit as provided herein.* For the purposes of this section, a "certificate of a surveyor and mapper" means certification by a surveyor and mapper in the form provided herein and may include, along with certification by a surveyor and mapper, when appropriate, certification by an architect or engineer authorized to practice in this state. Notwithstanding the requirements of substantial completion provided in this section, nothing contained herein shall prohibit or impair the validity of a mortgage encumbering units together with an undivided interest in the common elements as described in a declaration of condominium recorded prior to the recording of a certificate of a surveyor and mapper as provided herein." (e.s.)

The certificate referenced in the above statute would not appear to be the certificate of occupancy issued by the local government. Rather, the statute provides that if a condominium is not substantially completed at the time a declaration is filed, a statement to that effect is required and that upon substantial completion of construction, however, the developer or the condominium association must amend the declaration to include a certificate from a surveyor authorized to practice in Florida that the construction is substantially complete. Thus, the statute does not appear to address the issuance of a certificate of occupancy by a local government but rather provides when completed units within each substantially completed building in a condominium development may be conveyed to purchasers. The analysis of the 1979 legislation which added the language in question states:

"Prior to the 1978 session, the statutes required that a certificate of a surveyor be recorded showing substantial completion of the entire condominium property before any unit could be validly created for conveyancing purposes. Then, in 1978, the Legislature deleted that provision, based upon alleged title problems created by the language, leaving the statutes silent as to the requirements for completion prior to the conveying of a unit.

Section 1 of the Omnibus Condominium Bill amends s. 718.104(4)(e), F.S., to state that a unit may be conveyed only after the building containing that unit, and the improvements and amenities serving that building, have been completed and the declaration is recorded. It is clarified that this does not require construction in a planned future phase.

Additional provisions are added to the paragraph to clarify technical points: that the certification of a surveyor may be partly that of an architect or engineer, and that nothing in the section shall operate to impair the validity of a mortgage prior to the specified substantial completion."[5]

I hope that the above informal observations are of assistance.

Sincerely,

Joslyn Wilson
Assistant Attorney General

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[1] *See, e.g., Neuman v. Grandview At Emerald Hills, Inc.*, 861 So. 2d 494 (Fla. 4th DCA 2003); *Raines v. Palm Beach Leisureville Community Association, Inc.*, 413 So. 2d 30 (Fla. 1982) (purposes of Ch. 718, Fla. Stat., are to give statutory recognition to condominium form of ownership and to establish procedures for creation, sale, and operation of condominiums).

[2] *Cf. Swire Pacific Holdings, Inc. v. Zurich Insurance. Company*, 845 So. 2d 161 (Fla. 2003) (owner and developer of a high-rise condominium building sued the successor in interest to insurance company which had issued a builder's risk policy when the city investigated the project for failure to comply with appropriate governmental building codes and ordinances and had halted the issuance of a certificate of occupancy; as a result of the design defects, owner altered plans and construction to bring the building into compliance with appropriate governmental building codes and sought to recover such costs under its builder's risk policy); *Stone's Throw Condominium Association, Inc. v. Sand Cove,* 749 So. 2d 520 (Fla. 2nd DCA 1999) (condominium association brought action against architect and others for violation of state minimum building codes and for negligent misrepresentation); *St. Augustine Pools, Inc. v. James M. Barker, Inc*., 687 So. 2d 957 (Fla. 5th DCA 1997) (owner brought action against contractor, alleging breach of warranties, breach of fiduciary responsibility, and violation of applicable building codes in connection with construction of condominium, and contractor filed third-party complaint against subcontractor. *And see* s. 718.507, Fla. Stat., stating:

"All laws, ordinances, and regulations concerning buildings or zoning shall be construed and applied with reference to the nature and use of such property, without regard to the form of ownership. No law, ordinance, or regulation shall establish any requirement concerning the use, location, placement, or construction of buildings or other improvements which are, or may thereafter be, subjected to the condominium form of ownership, unless such requirement shall be equally applicable to all buildings and improvements of the same kind not then, or thereafter to be, subjected to the condominium form of ownership. This section does not apply if the owner in fee of any land enters into and records a covenant that existing improvements or improvements to be constructed shall not be converted to the condominium form of residential ownership prior to 5 years after the later of the date of the covenant or completion date of the improvements. Such covenant shall be entered into with the governing body of the municipality in which the land is located or, if the land is not located in a municipality, with the governing body of the county in which the land is located."

[3] Section 718.202 was amended by s. 3, Ch. 80-323, Laws of Fla., which inserted in the first sentence of s. 718.202(1) "any financial lending institution having a net worth in excess of 5 million dollars." Section 3, Ch. 81-185, Laws of Fla., interpolated the third and fourth sentences of subsection (1) and rewrote subsection (6). Section 9, Ch. 84-368, Laws of Fla., revised the section which had provided:

"(1) If a developer contracts to sell a condominium parcel and the construction, furnishing, and landscaping of the property submitted to condominium ownership has not been substantially completed in accordance with the plans and specifications and representations made by the developer in the disclosures required by this chapter, the developer shall pay into an escrow account established with a bank or trust company having trust powers, an attorney who is a member of The Florida Bar, a real estate broker registered under chapter 475, any financial lending institution having a net worth in excess of $5 million, or a title insurance company authorized to insure title to real property in the State of Florida, all payments up to 10 percent of the sale price received by the developer from the buyer towards the sale price. The escrow agent shall give to the purchaser a receipt for the deposit, upon request. In lieu of the foregoing, the division director shall have the discretion to accept other assurances, including, but not limited to, a surety bond or an irrevocable letter of credit in an amount equal to the escrow requirements of this section. Default determinations and refund of deposits shall be governed by the escrow release provision of this subsection. The escrowed funds may be deposited in separate accounts or in common escrow or trust accounts or commingled with other escrow or trust accounts handled by or received by the escrow agent. The escrow agent may invest the escrow funds in securities of the United States or any agency thereof or in savings or time deposits in institutions insured by an agency of the United States. Funds shall be released from escrow as follows:
(a) If a buyer properly terminates the contract pursuant to its terms or pursuant to this chapter, the funds shall be paid to the buyer together with any interest earned.
(b) If the buyer defaults in the performance of his obligations under the contract of purchase and sale, the funds shall be paid to the developer together with any interest earned.
(c) If the contract does not provide for the payment of any interest earned on the escrowed funds, interest shall be paid to the developer at the closing of the transaction.
(d) If the funds of a buyer have not been previously disbursed in accordance with the provisions of this subsection, they may be disbursed to the developer by the escrow agent at the closing of the transaction, unless prior to the disbursement the escrow agent receives from the buyer written notice of a dispute between the buyer and developer.
(2) All payments in excess of the 10 percent of the sale price described in subsection (1) received prior to completion of construction by the developer from the buyer on a contract for purchase of a condominium parcel shall be held in a special escrow account by the developer or his agent and may not be used by the developer prior to closing the transaction, except as provided in subsection (3) or except for refund to the buyer. If the money remains in this special account for more than 3 months and earns interest, the interest shall be paid as provided in subsection (1).
(3) If the contract for sale of the condominium unit so provides, the developer may withdraw escrow funds in excess of 10 percent of the purchase price from the special account required by subsection (2) when the construction of improvements has begun. He may use the funds in the actual construction and development of the condominium property in which the unit to be sold is located. However, no part of these funds may be used for salaries, commissions, or expenses of salesmen or for advertising purposes. A contract which permits use of the advance payments for these purposes shall include the following legend conspicuously printed or stamped in boldfaced type on the first page of the contract and immediately above the place for signature of the buyer:
ANY PAYMENT IN EXCESS OF 10 PERCENT OF THE PURCHASE PRICE MADE TO DEVELOPER PRIOR TO CLOSING PURSUANT TO THIS CONTRACT MAY BE USED FOR CONSTRUCTION PURPOSES BY THE DEVELOPER.

(4) 'Completion of construction' means issuance of a certificate of occupancy for the entire building or improvement, or the equivalent authorization issued by the governmental body having jurisdiction, and, in jurisdictions where no certificate of occupancy or equivalent authorization is issued, it means substantial completion of construction, finishing, and equipping of the building or improvements according to the plans and specifications.
(5) Failure to comply with the provisions of this section renders the contract voidable by the buyer, and, if voided, all sums deposited or advanced under the contract shall be refunded with interest at the highest rate than being paid on savings accounts, excluding certificates of deposit, by savings and loan associations in the area in which the condominium property is located.
(6) If a developer enters into a reservation agreement, the developer shall pay into an escrow account established with a trust company, a bank having trust powers, an attorney who is a member of The Florida Bar, a real estate broker registered under chapter 475, or a title insurance company authorized to insure title to real property in this state all reservation deposit payments. Reservation deposits shall be payable to the escrow agent, who shall give to the prospective purchaser a receipt for the deposit, acknowledging that the deposit is being held pursuant to the requirements of this subsection. Funds shall not be deposited out of state unless the out-of-state party holding such escrow funds submits to the jurisdiction of the division and the courts of this state for any cause of action arising from the escrow. The funds may be placed in either interest-bearing or non-interest-bearing accounts, provided that the funds shall at all reasonable times be available for withdrawal in full by the escrow agent. The developer shall maintain separate records for each condominium or proposed condominium for which deposits are being accepted. Upon written request to the escrow agent by the prospective purchaser or developer, the funds shall be immediately and without qualification refunded in full to the prospective purchaser. Upon such refund, any interest shall be paid to the prospective purchaser, unless otherwise provided in the reservation agreement. A reservation deposit shall not be released directly to the developer except as a down payment on the purchase price simultaneously with or subsequent to the execution of a contract. Upon the execution of a purchase agreement for a unit, any funds paid by the purchaser as a deposit to reserve the unit pursuant to a reservation agreement, and any interest thereon, shall cease to be subject to the provisions of this subsection and shall instead be subject to the provisions of subsections (1)-(5).
(7) Any developer who willfully fails to pay all required funds into the escrow accounts required by this section is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084."

Section 5, Ch. 87-117, Laws of Fla., amended s. 718.202(8), authorizing title insurers to act as escrow agents in condominium transactions, while s. 14, Ch. 90-151, Laws of Fla., added subsection (10). Chapter 97-102, Laws of Fla., removed gender-specific references.

[4] *See Hovnanian Florida, Inc. v. Division of Florida Land Sales and Condominiums, Department of Business Regulation*, 401 So. 2d 851, 854 (Fla. 1st DCA 1981) (declaration of condominium is the instrument by which a condominium is created). *See also Suntide Condominium Association, Inc. v. Division of Florida Land Sales and Condominiums, Department of Business Regulation*, 463 So. 2d 314, 317 (Fla. 1st DCA 1984).

[5] Analysis of Proposed Omnibus Condominium Bill (PCS/SB 717), available at the Florida State Archives, Department of State, Series 18, Carton 1323.