

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

IN RE: PETITION FOR DECLARATORY STATEMENT

DS 2005-064

PATRICK J. CARR,

Petitioner,

Docket No. 2005-06-5883

and

OLD PORT COVE PROPERTY OWNERS
ASSOCIATION, INC., and HARBOR
VILLAGE CONDOMINIUM ASSOCIATION, INC.,

Intervenors.

Final Order No. BPR-2006-02763 Date: 4-26-06
FILED
Department of Business and Professional Regulation
AGENCY CLERK
Sarah Wachman, Agency Clerk
By: Brandon M. Nichols

DECLARATORY STATEMENT

Petitioner Patrick J. Carr filed a petition for declaratory statement regarding several related issues involving Chapter 718, Florida Statutes, The Condominium Act.

PRELIMINARY STATEMENT

On February 1, 2006, the Division received the petition for declaratory statement submitted by Mr. Carr. Notice of receipt of the petition was duly published in the Florida Administrative Weekly. The Old Port Cove Property Owners Association, Inc., ("POA") and the Harbor Village Condominium Association, Inc., ("Harbor Village") filed a response to the petition on February 17, 2006, and intervened as parties in this proceeding. Petitioner requested an informal proceeding which was held on March 13, 2006. Petitioner and the associations/intervenors, appeared and presented arguments in the course of the proceeding.

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Petitioner presented three issues for determination. First, petitioner requests entry of an order finding that the POA is an association within the meaning of section 718.103(2), Florida Statutes; second, whether section 718.113(2), Florida Statutes, which describes the procedure by which material alterations to the common elements may be accomplished, applies to the POA; and third, whether the changes undertaken by the POA constitute a material alteration to the common elements within the meaning of section 718.113(2), Florida Statutes. The changes are in the nature of alterations to the entryway of the POA property and involve the addition or substitution of shrubs, plants, and trees.

FINDINGS OF FACT

The following findings of fact are based on information submitted by the parties. The Division takes no position as to the accuracy of the facts, but merely accepts them as submitted for purposes of this final order.

1. The petitioner in this matter is Patrick J. Carr who is a unit owner and member in the Harbor Village Condominium Association, one of the seven associations making up the complex known as Old Port Cove in North Palm Beach.

2. The POA is a not for profit Florida corporation. Membership in the POA is restricted to the seven condominium associations. Each unit owner in each of the seven condominium associations is a member in his or her respective condominium association. The POA is responsible for the operation of certain real property used in common by the unit owners in the several condominium associations. The unit owners have use rights in the property maintained by the

POA. Each of the seven condominium associations appoints or elects one member to the POA Board of Governors.

3. In its response to the petition, the POA stipulates that it is a master condominium association and as such falls within Chapter 718, Florida Statutes. Accordingly, the status of the POA vis a vis the current statute is not in dispute. The POA is the entity responsible for operating real property in which condominium unit owners have use rights.

4. The POA was originally formed under Chapter 711, Florida Statutes, the predecessor to Chapter 718, Florida Statutes. The POA has no declaration of condominium, having come into existence prior to the provision in the current statute prescribing that a condominium is created by recording a declaration in the public records. As such, the POA does not operate an independent residential condominium, but does operate condominium property for the benefit and use of unit owners in the seven residential condominiums.

5. The issue of whether the landscaping improvements to the POA property constitute a material change to the common elements operated by the POA involves disputed issues of material fact. Petitioner asserts that the addition of the planned landscaping improvements constitutes a material alteration to the property. The POA, on the other hand, maintains that the changes are not substantial, and are, in any event, related to hurricane restoration and repair, thereby coming within the case law exception holding that where the board, duty bound to maintain, protect, and preserve the common elements, effects a material change to the

common elements in the process, no vote of the membership is required. This "maintenance doctrine" recognizes that in appropriate cases, the statutory duty of the board to maintain and protect the property and its residents rises above the requirement that the owners approve a material change to the property.¹ The parties were informed prior to and in the course of the informal proceeding that the Division was unable to adjudicate disputed facts in the context of a declaratory statement proceeding. Petitioner was encouraged to withdraw the petition and file instead for mandatory nonbinding arbitration pursuant to section 718.1255, Florida Statutes, but declined to do so.² Whether the changes alleged to have occurred as the basis for this dispute come within the maintenance doctrine will remain for determination in a different forum.

CONCLUSIONS OF LAW

1. The Division has jurisdiction to enter this order pursuant to sections 718.501 and 120.565, Florida Statutes.
2. Petitioner has standing to seek this declaratory statement.

¹ See, for example, Cotrell v. Thornton, 449 So. 2d 1291 (Fla. 2d DCA 1984)(assessment for restoration of a common element canal system, roadway system, and swimming pool did not require an authorizing vote of the unit owners where the canals were filling in due to erosion, the pool floated up from its original foundation and began to crack, and the roadways had severe potholes).

² In proceedings conducted pursuant to section 718.1255, Florida Statutes, the arbitrator is able to conduct a formal fact finding hearing in order to resolve disputes regarding the facts. Review Chapter 61B-45, Florida Administrative Code. It is true that the arbitration decisions provide a caveat when determining materiality in the context of landscaping changes. See, for example, Girsch v. Whisper Walk Section E Association, Inc., Arb. Case No. 97-0305, Order Dismissing Arbitration Petition (November 26, 1997)(board decisions regarding what shrubbery to plant or how to replace existing shrubs particularly implicate the business judgment of the board, and rarely grow to the dimensions necessary to implicate the provision of the documents or statute regarding material alterations.)

3. The POA is an association governed by Chapter 718, Florida Statutes.

4. Section 718.113(2), Florida Statutes, applies to the POA regardless of whether its bylaws address the subject of material changes to the common elements. This statute provides:

718.113 Maintenance; limitation upon improvement; display of flag; hurricane shutters.--

(1) Maintenance of the common elements is the responsibility of the association. The declaration may provide that certain limited common elements shall be maintained by those entitled to use the limited common elements or that the association shall provide the maintenance, either as a common expense or with the cost shared only by those entitled to use the limited common elements. If the maintenance is to be by the association at the expense of only those entitled to use the limited common elements, the declaration shall describe in detail the method of apportioning such costs among those entitled to use the limited common elements, and the association may use the provisions of s. 718.116 to enforce payment of the shares of such costs by the unit owners entitled to use the limited common elements.

(2)(a) Except as otherwise provided in this section, there shall be no material alteration or substantial additions to the common elements or to real property which is association property, except in a manner provided in the declaration as originally recorded or as amended under the procedures provided therein. If the declaration as originally recorded or as amended under the procedures provided therein does not specify the procedure for approval of material alterations or substantial additions, 75 percent of the total voting interests of the association must approve the alterations or additions.

(b) There shall not be any material alteration of, or substantial addition to, the common elements of any condominium operated by a multicondominium association unless approved in the manner provided in the declaration of the affected condominium or condominiums as originally recorded or as amended under the procedures provided therein. If a declaration as originally recorded or as amended under the procedures provided therein does not specify a procedure for approving such an alteration or addition, the approval of 75 percent of the total voting interests of each affected condominium is required. This subsection does not prohibit a provision in any declaration, articles of incorporation, or bylaws as originally recorded or as amended under the procedures provided therein requiring the approval of unit owners in any condominium operated by the same association or requiring board approval before a material alteration or substantial addition to the common elements is permitted. This paragraph is intended to clarify existing law and applies to associations existing on the effective date of this act.

(c) There shall not be any material alteration or substantial addition made to association real property operated by a multicondominium association, except as provided in the declaration, articles of incorporation, or bylaws as originally recorded or as amended under the procedures provided therein. If the declaration, articles of incorporation, or bylaws as originally recorded or as amended under the procedures provided therein do not specify the procedure for approving an alteration or addition to association real property, the approval of 75 percent of the total voting interests of the association is required. This paragraph is intended to clarify existing law and applies to associations existing on the effective date of this act.

Thus, the statute above prohibits material alterations or substantial additions to the common elements except in the manner provided for in the declaration, and if the declaration is silent, the statute requires the approval of at least 75% of the total

voting interests for a material alteration. The association argues that since it lacks a declaration, it should be exempted from the 75% residual figure in the statute set forth above. The association states that in the absence of a declaration, its operation is controlled by its bylaws which, in the association's estimation, provide a material alteration provision.³

Section 718.102, Florida Statutes, provides as follows:

718.102 Purposes.--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 Legislature, as set forth, above confirmed the statutory nature of condominiums⁴ and declared its intent that the statute was to be applied to every condominium existing in the state. Notwithstanding this intent, the associations argue that there is no intent expressed that the amendments to Chapter 718, Florida Statutes, that speak to material alterations, should apply to the pre-existing

³ It is not plain that the bylaws actually address the topic of material alterations, but this issue need not be reached due to the disposition of the issues presented herein. Article VI of the bylaws simply allows the board to "reconstruct improvements after casualty, and to improve the property further." The bylaws further allow the board to "[do] any other things necessary or desirable, in the opinion of the Board of Governors, to keep the property neat and in good order." If, as a factual matter, the board is simply restoring the gate area after a casualty loss caused by a hurricane, it would be consistent with the case law to state that no vote of the members is required.

⁴ This principle has been acknowledged and applied in the court cases applying Chapter 718, Florida Statutes. See, e.g., Woodside Village Condominium Association, Inc. v. Jahren, reported at 806 So. 2d 452 (Fla. 2002).

association. However, in the arbitration decision of Westgate Blue Tree Orlando v. Blue Tree Resort at Lake Buena Vista Condominium Association, Arb. Case No. 2004-03-9446, Summary Final Order (January 7, 2005),⁵ the Division arbitrator, upon examining case law, the history of the statute, and prior Division declaratory statements, held precisely the opposite in stating:

That section 718.113(2), Florida Statutes, in addressing material alterations to the common elements and providing a default 75% provision, is procedural or remedial in nature and may properly be applied to existing condominiums and does not impair any vested property rights or interest.

The Division accordingly concludes here that section 718.113(2), Florida Statutes, properly applies to this association. Moreover, the Division arbitration section has previously rejected the argument that where the bylaws affirmatively address material alterations, and the declaration is silent, the 75% residual figure contained in section 718.113(2), Florida Statutes, does not apply. In Long v. Ocean Harbour of Islamorada Condominium Association, Inc., Arb. Case No. 2004-02-8316, Partial Summary Final Order (February 1, 2005),⁶ the arbitrator ruled that where the bylaws provided that the board may make alterations not exceeding the amount of its current reserve funds without a vote of the membership, and the declaration incorporated the bylaws but was otherwise silent regarding material alterations, the

⁵ The final order may be reviewed at the Division's web site at:
http://www.state.fl.us/dbpr/lsc/arbitration/case_alert_section/2004039446sfo.pdf

⁶ The order may be reviewed at:
http://www.state.fl.us/dbpr/lsc/arbitration/case_alert_section/2004028316psfo.pdf

residual 75% requirement contained in section 718.113(2), Florida Statutes, applied:

However, this argument is not persuasive as the statute clearly states that unless the declaration specifies voting requirements on material alterations or additions, 75% approval from the association membership is required. Even when reading the bylaws in conjunction with the declaration, the statute does not state or even imply that other governing documents, such as articles of incorporation, bylaw or rules and regulations may be considered. The unambiguous language of the statute only authorizes provisions contained in an association's declaration to be followed. If the Legislature had intended for voting procedures included in an association's bylaws to be controlling where the declaration is silent, such an intent would have been reflected in the statute. In fact, section 718.113(2)(c), Florida Statutes, providing for voting policies contained in the declaration, articles or incorporation or bylaws to be evaluated when involving material alterations to real property in a condominium operated by a multi-condominium association. As the articles of incorporation and bylaws are not included in section 718.113(2)(a), Florida Statutes,...it can logically be construed as an intentional and purposeful omission that must be enforced.

5. Whether the changes to the entryway of the POA property constitute material alterations to the common elements involves disputed issues of material fact, and therefore cannot be decided in a declaratory statement proceeding. Section 120.565, Fla. Stat.; Fla. Admin. Code R. 28-105.003 (only hearings not involving disputed issues of fact may be conducted).

ORDER

Based upon the findings of fact and conclusions of law, it is declared that the POA is an association within Chapter 718, Florida Statutes; that section 718.113(2), Florida Statutes, applies to this association and requires, in the absence of any controlling provision in its declaration, that material alterations to the condominium property be approved by not less than 75% of the total voting interests; and that the Division may not properly decide in this proceeding whether the changes to the entryway of the POA property constitute a material alteration to the property.

DONE and ORDERED this 13th day of April, 2006, at Tallahassee, Leon County, Florida.



A handwritten signature in black ink, appearing to read "M. Cochran", written over a horizontal line.

MICHAEL T. COCHRAN, Director
Department of Business and
Professional Regulation
Division of Florida Land Sales, Condominiums
and Mobile Homes
Northwood Centre
1940 North Monroe Street
Tallahassee, Florida 32399-1030

NOTICE OF RIGHT TO APPEAL

THIS FINAL ORDER CONSTITUTES FINAL AGENCY ACTION AND MAY BE APPEALED BY PETITIONER PURSUANT TO SECTION 120.68, FLORIDA STATUTES, AND RULE 9.110, FLORIDA RULES OF APPELLATE PROCEDURE BY FILING A NOTICE OF APPEAL CONFORMING TO THE REQUIREMENTS OF RULE 9.110(c), FLORIDA RULES OF APPELLATE PROCEDURE BOTH WITH THE APPROPRIATE DISTRICT COURT OF APPEAL ACCOMPANIED BY APPROPRIATE FILING FEES AND WITH THE AGENCY CLERK, 1940 NORTH MONROE STREET, NORTHWOOD CENTRE, TALLAHASSEE, FLORIDA 32399-2217 WITHIN THIRTY (30) DAYS OF THE RENDITION OF THIS FINAL ORDER.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to the following persons on this 28th day of April, 2006:

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