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Sarah Wachman, Agency Clerk
By: Brandon M. Nichols

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

DS 2005-020

IN RE: PETITION FOR DECLARATORY STATEMENT

Docket No. 2005022392

Bay Point Studio Villas III Association, Inc.
_____/

DECLARATORY STATEMENT

Bay Point Studio Villas III Association, Inc. (Bay Point), through its attorney, Timothy J. Sloan, filed a Petition for Declaratory Statement requesting an opinion as to whether Bay Point may convey certain portions of the common elements by sale or by long term lease to individual unit owners for the expansion of their units under Chapter 718, Florida Statutes, and if so, what vote is required under sections 718.110 or 718.113, Florida Statutes.

STATEMENT OF FACTS

The following facts are based on information submitted by Bay Point. The Division takes no position as to the accuracy of the facts, but merely accepts them as submitted for purposes of this declaratory statement.

1. Bay Point filed its petition with the Division on April 18, 2005. Notice of the petition was published in Florida Administrative Weekly on May 6, 2005.

2. Bay Point is an "association," as that term is defined by section 718.103(2), Florida Statutes. The association operates the Bay Point Studio Villas III Condominium, located in Bay County, Florida. The condominium contains 4 residential buildings, each comprising 2 stories. The condominium contains a total of 40 units. The declaration of condominium was recorded in the public records, thereby establishing the condominium in law, on August 21, 1975.

3. An informal proceeding was conducted in this matter on June 9, 2005, with Karl M. Scheuerman presiding. The hearing was attended by Mr. Timothy Sloan, Esquire, on behalf of the petitioner, and Mr. Aycox, the president of the condominium association. Representatives of the Division also attended the informal proceeding. The Division subsequently received certain correspondence from other owners in the condominium which appears in the record attached to the Notice of Filing Communications under certificate of service of July 26, 2005.

4. Over a period of years, all of the first floor unit owners, some with and some without prior association approval, have constructed patios adjacent to their units, thereby encroaching upon the common elements of Bay Point.

5. Additionally, a second floor unit owner has constructed a loft in the common element attic above the owner's unit that is solely accessible through that owner's unit. Several other second floor unit owners are now requesting permission to build lofts in a similar fashion that will accommodate a new finished living space. In order to build a loft, it is necessary to cut a hole in the common element ceiling and to install the loft in the attic of the owner's unit. The attic forms a portion of the common elements of the condominium. It is also planned to install a spare bathroom in the space so provided.

The space that would be occupied by the loft is now used for the mechanical support of the building. It contains insulation, pipes, vents, electric wiring, walls, and trusses.

6. In order to permit second floor unit owners to construct the lofts, Bay Point "seeks to sell or to lease a portion of the common elements to certain second floor owners thereby giving those owners exclusive possession; i.e., excluding other owners from ownership, possession and access in the case of a long term lease."

7. Bay Point's declaration provides the following in Article XVIII:

> The owner of the "Condominium Unit" shall not be deemed to own the undecorated and/or unfinished surfaces of the perimeter walls, floors and ceilings surrounding his respective Condominium Unit, nor shall the Unit Owner be deemed to own pipes, wires, conduits, or other public utility lines running through said Condominium Unit which are utilized for or serve more than one Condominium Unit, which items are hereby declared to be Common Elements. Each Unit Owner, however, shall be deemed to own the walls and partitions which are contained in said Unit Owner's Condominium Unit, as well as the inner decorated and/or finished surfaces of the perimeter walls, floors and ceilings, including the plaster, paint, wallpaper, etc. No alteration or addition to bearing walls shall be made without the written approval of the Association and all applicable mortgagees.

8. Further, the legend to exhibit 1 of Bay Point's declaration provides that "[e]ach condominium unit consists of the space bounded by a vertical projection of the condominium boundary line shown and by the horizontal planes at the floor and ceiling elevations."

CONCLUSIONS OF LAW

1. The Division has jurisdiction to enter this order in accordance with sections 120.565 and 718.501, Florida Statutes.

2. Bay Point has standing to seek this declaratory statement.

3. The association relies in part on Section 718.111(7)(a), Florida Statutes, providing in part:

> The association has the power to acquire title to property or otherwise hold, convey, lease, and mortgage association property for the use and benefit of its members. . . . [N]o association may acquire, convey, lease or mortgage association real property except in the manner provided in the declaration, and if the declaration does not specify the procedure, then approval of 75 percent of the total voting interests shall be required. [emphasis added].

4. Section 718.111(7)(a), Florida Statutes, expressly applies only to "association property," which is defined separately from "common elements" in the Condominium Act. Pursuant to 718.103(3), Florida Statutes, "association property" is "property, real or personal, which is owned or leased by, or is dedicated by a recorded plat to, the association for the use and benefit of its members." Section 718.103(8), Florida Statutes, defines "common elements" as "the portions of condominium property not included in the units." From these definitions it is clear that the term "association property" is not synonymous with the term "common elements." Because section 718.111(7)(a), Florida Statutes, employs the term "association property", the provision only gives the association the power to lease or sell association property.[1] The provision does not authorize in this case the lease or sale of the separately-defined common elements. Therefore, Bay Point cannot rely on section 718.111(7)(a), Florida Statutes, to authorize the sale or lease of a portion of the common elements.[2]

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[1] This is not to suggest that if the attic area constituted association property, the association would be permitted to convey or lease this space without first complying with other portions of the statute deemed applicable. This issue is not decided here.

[2] While the association has not formally advanced this argument, the fact that the association apparently acquiesced when the bottom floor dwellers expanded into the common elements by taking part for their patios does not legally justify the association in failing to act in this instance.

5. The next issue to be examined is whether section 718.111(4), Florida Statutes, permits the association to lease portions of the common elements under the facts presented. This section provides:

> (4) ASSESSMENTS; MANAGEMENT OF COMMON ELEMENTS.--The association has the power to make and collect assessments and to lease, maintain, repair, and replace the common elements or association property; however, the association may not charge a use fee against a unit owner for the use of common elements or association property unless otherwise provided for in the declaration of condominium or by a majority vote of the association or unless the charges relate to expenses incurred by an owner having exclusive use of the common elements or association property. [emphasis added].

The statute set forth above permits the association to lease the common elements. However, this section of the statute does not exist in isolation, but operates in conjunction with other relevant portions of the Condominium Act. For example, while under section 718.111(4), Florida Statutes, an association may lease a portion of the common elements, an association may not lease the common elements in such a manner that a material alteration to the common elements is created, without also complying with section 718.113(2), Florida Statutes. These were essentially the facts in the arbitration case of Barenscheer v. Marina Tower Condominium Association, Inc., Arb. Case No. 99-0559, Final Order (April 26, 1999), where the association sought to rely on its authority to lease the common elements in order to enter into a long term lease with a cellular telephone company to install a cellular communications tower on the roof the condominium building. The arbitrator ruled:

> The association cannot rely on its power to lease the common elements to obtain a de facto exemption from the mandatory requirements of s. 718.113(2), F.S. Where two parts of the declaration find application to a given case, the

> two provisions must be read in pari materia in order to give appropriate meaning to each provision, and each part of the instrument must be given effect. *Loperfido v. Vista St. Lucie Association, Inc.*, Arb. Case No. 92-0274, Final Order (February 4, 1993); *Sweetwater Oaks Condominium Association, Inc. v. Creative Concepts of Tampa, Inc.*, 432 So. 2nd 654 (Fla. 2nd DCA 1983). Here, the association may exercise the leasing authority referenced in s. 718.111(4), F.S., and the documents, in the manner provided for in the documents, but where a given lease will have the effect of materially altering the common elements, the association is also required to comply with s. 718.113(2), F.S., and the corresponding portions of its documents. To rule to the contrary would permit the association to sidestep the protections afforded by s. 718.113(2), F.S., by the simple expediency of entering into a lease.

Therefore, the ability under the statute to lease the common elements does not operate to grant the association an exemption from other parts of the statute that may apply. If a lease will result in a material alteration to the common elements, the association must comply with section 718.113(2), Florida Statutes, and the corresponding portions of its documents. Here, there can no doubt but that the addition of the loft at the very least will result in a material alteration or substantial addition to the common elements. It is unpersuasive to argue that because the improvements are contained in an attic and perhaps not readily observable, it is not material. As stated further by the arbitrator in Marina Tower:

> Review also, *Sabal Chase Condominium Association, Inc. v. Summes*, Arb. Case No. 98-3846, Final Order (June 25, 1998), in which the arbitrator ruled that the installation of an air conditioning line that extended under the door of the unit to the air compressor on the common elements constituted a material alteration, despite the fact that the line was run underground and was therefore not readily observable. The arbitrator noted that carving out an exception where the alteration was not readily observable would permit owners to modify the common elements at

> will so long as the condition was hidden from view; such an exception is not provided for in the statute. Likewise, there is no authority for the view that the lack of visual impact or orientation renders the modification nonmaterial as a matter of law. This school of thought overlooks the fundamental concepts embodied in *Sterling Village Condominium, Inc. v. Breitenbach*, 251 So. 2nd 685 (Fla. 4th DCA 1971, to wit:
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> ...We hold that as applied to buildings the term "material alteration or addition" means to palpably or perceptively vary or change the form, shape, elements or specifications of a building from its original design or plan, or existing condition, in such a manner as to appreciably affect or influence its function, use, or appearance. [Id. at 687].
>
> While the definition set forth above contains certain visual elements, there is no indication that the court intended a visual change to be a prerequisite to a finding that a material alteration has occurred. In other words, evidence that the visual appearance of a structure has changed may be relevant in deciding whether a change is material. However, the definition also contains references to function and use, such that the conclusion is warranted that where a given alteration changes the use or function of the condominium property, even without a corresponding and obvious visual impact, the change may be considered material depending on the facts of the particular case. Here, the association has permitted the roof area to be changed in a substantial manner. The appearance, form, shape and specifications of the roof and of the building have been changed from the building's original design in such a manner as to appreciably affect the building and roof's function, use, and appearance. Therefore, a material change has resulted.

6. Here, the addition of the proposed lofts under the facts presented will result in a material alteration to the common elements, as the appearance, function, form, shape, and specifications of the roof and components existing in the attic will be materially changed. Therefore, in order to modify the attics, the association would be required at a minimum to comply with section 718.113(2), Florida Statutes.

7. The next issue is whether the proposed leases or proposed sales would also trigger a 100% vote of the owners under section 718.110(4), Florida Statutes, which prohibits material changes to the appurtenances to the units.[3] The court decisions and supporting arbitration final orders have held as a general matter that where an owner takes a portion of the common elements and converts it for his or her personal use, an amendment in accordance with the requirements of section 718.110(4), Florida Statutes, must be accomplished. In the declaratory statement In re: Hawthorne Residents Cooperative Association, Inc., Docket No. 89L-188 (February 18, 1991), the Division held that where the association planned to create a number of cooperative units on previously-open cooperative property, the right to use the common areas would be impaired, requiring compliance with section 718.110(4), Florida Statutes,. In Bogikes v. Windmill by the Sea Condominium No. 1 Association, Inc., Arb. Case No. 97-0159, Final Order (June 12, 1998), the arbitrator held that a rule permitting the individual owners to construct boat docks on the common elements violated both sections 718.113(2) and 718.110(4), Florida Statutes, by changing the use and function of the common elements, and by changing all owners' appurtenant right to use the common elements by permitting some owners to, in effect, colonize portions of the common elements. In Villas at Eagle Point Condominium Association, Inc. v. Kahn, Arb. Case No. 94-0391, Final Order (July 10, 1995) affirmed Kahn v. Villas at Eagles Point Condominium Association, Inc., 693 So. 2d 1029 (Fla. 2d DCA 1997), the arbitrator

[3] For a more comprehensive discussion of the differences between material changes to the common elements and material changes to those interests made an appurtenance to the units, see, Westgate Blue Tree Orlando, LTD. v. Blue Tree Resort at Lake Buena Vista Condominium Association, Arb. Case No. 2004-03-9446, Summary Final Order (January 7, 2005) and In re Petition for Declaratory Statement D.W. Tardif, DC 95-441 (July 30, 1996)(a common element is not in and of itself an appurtenance to the unit, but *use* of the common element is an appurtenance.)

found that the addition of a patio deck constituted a material alteration to the common elements "while simultaneously disturbing the rights appurtenant to the units." In Gimore v. Ciege Verde Condominium Association, Inc., 601 So. 2d 1325 (Fla. 2d DCA 1992), the court held that the association impermissibly changed the appurtenances to the units when it sought to convert a tennis court into a parking area.

8. There have been distinctions made to the above line of authorities where the use to which the area will be subject has not *appreciably* changed. Foremost among these are the parking cases. As stated by the court in Juno by the Sea North Condominium v. Manfredonia, 397 So. 2d 297 (Fla. 4th DCA 1980) (opinion on rehearing), the association, by assigning individual spaces in a common element parking lot, thereby giving a specific owner exclusive use of the space, did not materially alter the common elements because parking spaces are by their nature exclusive. In recognition of these principles, the arbitrator in Stegman v. Harbour Towers Owners Association, Inc., Arb. Case No. 99-1036, Summary Final Order (August 24, 1999) held that the association's lease of pre-existing common element parking spaces on a long term basis to individual owners did not violate section 718.110(4), Florida Statutes:

> The question is whether the proposed use of the existing parking spaces will interfere with the other unit owners' use of the common elements such that the appurtenances to their units are materially altered or modified...See also, Enright v. Sea Towers Owners' Association, Inc., 370 So.2d 28, 30 (Fla. 2d DCA 1979)(placement of a building on the common area "effectively deprives the residents . . . of the use of that area.").
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> In the instant case, the area covered by the Carport Lease is already a parking area. Constructing carports on the area, and granting the right to exclusive use of the area to an owner, does not interfere with the other owners' right, under the declaration, to use this area.... And in the

> arbitration case Kreitman v. The Decoplage, Arb. Case No. 98-3495, Final Order (Aug. 5, 1999) the arbitrator addressed the precise question presented here--whether the association's lease of a common element parking space to a single owner converted the space into a limited common element. The question was answered in the negative. See also, Brazlavsky v. Admiral Towers Condominium, Inc., Arb. Case No. 95-0460, Final Order (Nov. 1, 1996)(common element parking spaces that were not described in the declaration as limited common elements did not become limited common elements when the association assigned use of the individual spaces to specific unit owners). Thus it can be seen that the lease of a common element parking space for the exclusive use of a unit owner does not result in a material alteration of the appurtenances to the units. [Emphasis added.]

In Cascades of Falling Waters, Inc. v. Rafuse, Arb. Case No. 00-1625, Summary Final Order (May 4, 2001), the unit owner who had installed concrete pavers to form a patio outside his unit similarly argued that section 718.110(4), Florida Statutes, did not apply because other owners were not deprived of any beneficial use of the property since other owners did not commonly use the area directly outside his sliding glass doors. The case law discussion in the arbitration case is illuminating:

> See also, Ladolcetta v. Carlton Condominium Association, Inc., Arb. Case No. 94-0499, Final Order (April 19, 1995), where the board converted a portion of the game room into a manager's office, the arbitrator ruled that a material alteration to the common elements had occurred, because "the function, use and appearance of this area has changed", but nonetheless held that s. 718.110(4), F.S., was not implicated:
>
> > Where a common element area is utilized in a way that essentially forecloses its use by unit owners generally, a material alteration of the appurtenances to the units occurs....In this case, the unit owners have not been deprived of the use of any area... The areas are still used for common purposes generally acceptable on the condominium property... While this may be an alteration or modification to the

appurtenances to the units, it is not a material alteration or modification. [emphasis in original; citations omitted]....

Another case which should be recalled in this context is Cravitz v. Lake Laura Condominium Association, Inc., Arb. Case No. 93-0277, Final Order (June 28, 1994), in which the arbitrator held that the fact that a unit owner constructed a fence around a limited common element area, the exclusive use of which was an appurtenance to his unit, did not implicate s. 718.110(4), F.S., as the other owners had no use rights in the property...

The cases above suggest that not all changes to the appurtenances to the units will necessitate the unit owner approval called for by s. 718.110(4). It is only material changes to the appurtenances that are implicated by the statute. A determination of "materiality" will depend on the facts of each situation, and in a given case it may be appropriate to consider factors such as the intended use of any of the property, the relative size and significance of the parcel involved, whether the intended or actual use will change significantly and permanently, whether the owners have a legitimate basis for expecting that the current use of the property will remain unchanged, whether the property at issue constitutes limited common elements or other circumstances exist such that the other owners should have no expectation of use rights in the property, and whether overall, the beneficial use of the property will change. The reason for the change may also find relevance.

Respondent argues that the addition of the stone patio has not materially affected the other owners' use rights in that part of the common elements. The photograph jointly submitted by the parties, attached hereto as Exhibit A, shows that the patio which comprises approximately 140 square feet, is situated immediately adjacent to the sliding glass doors forming the rear exit to the respondent's unit. One side of the patio runs alongside the screened lanai, one side opens onto the common elements, and the other side forms a border with the adjacent flower bed. Respondent argues that prior to the placement of the stones, other unit owners had the right to pass over the grassy area, and perhaps had the right to sit in or occupy the area by bringing their own lawn chairs, so long as they did not intrude on Mr. Rafuse's right to privacy by facing towards the glass sliding doors leading to the living room. Respondent argues that after the placement of the stones, the use rights of the other owners did not change

in the least. The area, given that it is up against the building and contiguous to the respondent's unit, is not used as a thoroughfare by other owners. According to respondent, the use of the parcel by other owners has been enhanced by the improvements. Ingress and egress have become easier presumably because it is easier to traverse a stone surface than a grassy area. Respondent further argues that although the area is not a limited common element, the other owners could have no use rights or very limited use rights in the area immediately behind the unit. Respondent seeks to distinguish the other cases involving patios on the basis that this patio is not intrusive or raised as were the patios involved in the other cases, but is formed simply with a low profile by a series of pavers sitting on top of the ground.

Section 718.110(4), F.S., only addresses material changes to the appurtenances to the units. Nonmaterial changes are not regulated by the statute. It is certainly true speaking in a social sense that the other residents would have less of a use expectation in the area immediately in contact with the unit belonging to another owner because the area is located in such close proximity to the unit and perhaps because it is customary for an owner to exercise control or dominion over the area outside the unit for recreation or cooking purposes, to the exclusion of the other owners. However, this diminished use does not find its basis in the statute which instead only recognizes common elements, limited common elements, units, and association property. The only areas in a condominium capable of being exclusively owned or occupied are units and limited common elements...

No one would argue with great appeal that the placement of a lawn chair in the grass behind a unit changes the appurtenances to the units. The chair would lead to a temporary and inconsequential change to the ability of the other owners to use the property. Likewise, changes to limited common elements in which the other owners have no use rights would not in the ordinary case modify any appurtenances to the units... By way of contrast, the owners have the right to occupy and pass through the common elements in question here. Respondent by his actions has asserted permanent dominion and control over a 140 square foot portion of the common elements. Although the modification is more easily traversed than would be the case with a raised wooden deck with railings, and although there is no

> physical impediment to ingress and egress crated, the placement of the stones along with the items of personal property has made it less likely that the use rights granted to the other owners to pass through or in close proximity to the area will be exercised. [Emphasis added].

9. These cases are distinguishable from the case at hand because the use to which the space in question will be put will be changed from the present use. While owners other than the owner constructing the loft may currently have limited day-to-day access to the common element area above the individual unit, the use of the space will change from being available for common element pipes, wiring, cables, building structural components including trusses serving all owners, to a common element area dedicated to the living quarters of a single unit owner. This cannot be done without complying with section 718.110(4), Florida Statutes, and the corresponding portions of the condominium documents, whether the association leases or purports to sell[4] the property outright to the individual owners.

ORDER

Based upon the findings of fact and conclusions of law, it is declared Bay Point Studio Villas III Association, Inc. may not convey certain portions of the common elements by sale or by long term lease to individual unit owners for the expansion of their units under section 718.111(7)(a), Florida Statutes, or other applicable portion of Chapter 718, Florida Statutes, without first complying with section 718.110(4), Florida Statutes.

[4] There is no provision in the statute that permits the association under these circumstances to convey a portion of the common elements to individual owners. Compare, section 718.112(2)(m), Florida Statutes, giving the association a limited right to convey a portion of the common elements to a condemning authority for public purposes.

DONE and **ORDERED** this 11th day of August, 2005.

MICHAEL T. COCHRAN, Director
Department of Business and
Professional Regulation
Division of Florida Land Sales,
Condominiums, and Mobile Homes
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 Timothy J. Sloan, Harmon & Sloan, P.A., Post Office Box 2327, 427 McKenzie Avenue, Panama City, Florida 32402 on this 11th day of August, 2005.

Robin McDaniel

Robin McDaniel, Division Clerk

Copy furnished to:
Janis Sue Richardson,
Chief Assistant General Counsel