

Final Order No. BPR-2006-00823 Date: 2-8-06
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By:

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

DS 2005-057

IN RE PETITION FOR DECLARATORY STATEMENT

Docket No. 2005060455

WATERGARDEN CONDOMINIUM ASSOCIATION, INC.
_____ /

DECLARATORY STATEMENT

Watergarden Condominium Association, Inc. (Watergarden), through its attorney, filed a Petition for Declaratory Statement requesting an opinion as to whether section 718.113(5), Florida Statutes, would allow Watergarden to prohibit unit owners from installing hurricane shutters or window film, since the condominium was constructed with hurricane protection, i.e., impact resistant glass. The Division concludes that the board may not prohibit unit owners from installing hurricane shutters that conform to specifications established by the board.

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PRELIMINARY STATEMENT

On November 22, 2005, the Division received a petition for declaratory statement from Watergarden. Notice of receipt of the petition was published in Florida Administrative Weekly on December 16, 2005. The 90 days for the

Division to respond to the petition was stayed while Watergarden clarified its question. The Division received Watergarden's clarification on January 6, 2006.

FINDINGS OF FACT

The following findings of fact are based on information submitted by Watergarden. 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. Watergarden is a condominium "association," as that term is defined by section 718.103(2), Florida Statutes.

2. Watergarden's units were originally constructed with code compliant impact resistant hurricane glass windows.

3. Watergarden's declaration contains the following provision, in part, regarding hurricane protection:

23.14 Hurricane Shutters. The Condominium, as initially constructed by the Developer, shall include windows and glass doors which meet the wind resistance standards required by the applicable building code ("Hurricane Glass"). In addition to such hurricane protection, the Board of Directors shall, from time to time, establish hurricane shutter specifications which comply with the applicable building code, and establish permitted colors, styles and materials for hurricane shutters. While the Association shall not mandate the installation of shutters, nor undertake to shutter the Building itself, the Association shall . . . approve the installation or replacement of hurricane shutters by a Unit Owner conforming with the Board's specifications.

4. As detailed in the above quoted provision, Watergarden's declaration as currently written calls for the association to establish hurricane shutter specifications. However, Watergarden stated in its clarification letter that it "intends to amend the Declaration to delete such provision."

5. The Watergarden board desires to address this hurricane shutter issue at an upcoming board meeting.

6. Watergarden's clarified question asks "whether [s]ection 718.113(5), Florida Statutes[,] would allow the Association to prohibit any additional hurricane protection, including shutters or film, which does not exceed the wind-load capabilities of the hurricane protection currently in place, i.e. impact resistant glass." Letter from Randall K. Roger (Jan. 5, 2006) (clarifying issue). Originally, the association indicated that it wished to adopt code-compliant hurricane screens for sliding glass doors and some windows in lieu of shutters as part of its hurricane shutter specifications.

CONCLUSIONS OF LAW

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

2. Watergarden has standing to seek this declaratory statement.

3. Section 718.113(5), Florida Statutes, provides the following

(emphasis added):

Each board of administration shall adopt hurricane shutter specifications for each building within each condominium operated by the association which shall include color, style, and other factors deemed relevant by the board. All specifications adopted by the board shall comply with the applicable building code. Notwithstanding any provision to the contrary in the condominium documents, if approval is required by the documents, a board shall not refuse to approve the installation or replacement of hurricane shutters conforming to the specifications adopted by the board. The board may, subject to the provisions of s. 718.3026, and the approval of a majority of voting interests of the condominium, install hurricane shutters and may maintain, repair, or replace such approved hurricane shutters, whether on or within common elements, limited common elements, units, or association property. However, where laminated glass

or window film architecturally designed to function as hurricane protection which complies with the applicable building code has been installed, the board may not install hurricane shutters. The board may operate shutters installed pursuant to this subsection without permission of the unit owners only where such operation is necessary to preserve and protect the condominium property and association property. The installation, replacement, operation, repair, and maintenance of such shutters in accordance with the procedures set forth herein shall not be deemed a material alteration to the common elements or association property within the meaning of this section.

4. Prior to 1991 and the enactment of the above provision, the installation of hurricane shutters by unit owners was considered a material alteration and could only be allowed as authorized in a condominium declaration, which often required the approval of a large percentage of the condominium's unit owners. In re: Petition for Arbitration: Westgate Blue Tree Orlando, LTD v. Blue Tree Resort at Lake Beuna Vista Condo. Ass'n, Inc., 2005 WL 1490147 (Jan. 7, 2005). "The enactment of section 718.113(5), Florida Statutes, excluded the installation of hurricane shutters from the definition of 'material alteration,' authorized condominium boards to adopt hurricane shutter specifications, and prohibited boards from refusing to approve the installation of shutters that were in compliance with the board's specifications even where the condominium documents contained blanket provisions prohibiting their use." Id.

5. The first sentence of section 718.113(5), Florida Statutes, clearly requires condominium association boards to adopt hurricane shutter specifications. The first sentence utilizes the mandatory language of shall rather than may. The later underlined sentence (stating "where laminated glass or window film architecturally designed to function as hurricane protection . . . has been installed, the board may not install hurricane shutters") does not negate the

board's statutory obligation to adopt hurricane shutter specifications. The later sentence simply provides that when laminated glass or window film has been previously installed, the board itself cannot undertake the installation of hurricane shutters. However, the board still must adopt hurricane shutter specifications and approve installation by individual unit owners of shutters that meet the board's adopted specifications.

6. Watergarden asks "whether window film architecturally designed to function as hurricane protection is a sufficient substitute for hurricane shutters" under section 718.113(5), Florida Statutes. Letter from Randall K. Roger (Jan. 5, 2006) (amending petition). No. Section 718.113(5), Florida Statutes, requires the board to adopt hurricane shutter specifications, not hurricane shutter, glass or window film or hurricane "protection" specifications. Whether glass, screen, or film may be substituted for hurricane shutters under the building code is beyond the scope of this proceeding.

7. Watergarden also asks whether it may "prohibit any additional hurricane protection, including shutters or film, which does not exceed the wind-load capabilities of the hurricane protection currently in place, i.e. impact resistant glass." Letter from Randall K. Roger (Jan. 5, 2006) (amending petition). This question may be answerable in part by the building code requirements for wind-load capabilities and hurricane shutter specifications. Again, this is beyond the scope of this proceeding. However, the association is required to adopt hurricane shutter specifications that include color, style, and other factors considered relevant by the board. Additionally, these specifications must meet

the building code requirements. The other factors that the board deems relevant for hurricane shutters, not glass, film or screen, would include the building code requirements.

8. Therefore, the Watergarden board is not absolved of its statutory obligation to adopt hurricane shutter specifications because the condominium was constructed with impact resistant hurricane glass. The Watergarden board must still adopt hurricane shutter specifications, and the Watergarden board cannot prohibit the installation by individual unit owners of hurricane shutters that comply with such specifications.

ORDER

Based upon the findings of fact and conclusions of law, it is declared that section 718.113(5), Florida Statutes, requires Watergarden to adopt hurricane shutter specifications even though the condominium currently contains impact hurricane resistant glass, and the provision requires Watergarden to allow individual unit owners to install hurricane shutters that comply with the board's shutter specifications.

DONE and ORDERED this 3rd day of February, 2006,
at Tallahassee, Leon County, Florida.




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 Randall K. Roger, Esq., Randall K. Roger & Associates, P.A., One Park Place, 621 NW 53rd Street, Suite 300, Boca Raton, Florida 33487, this 14th day of February, 2006.


ROBIN MCDANIEL, Division Clerk

Copies furnished to:

Janis Sue Richardson,
Chief Assistant General Counsel