

Department of Business and Professional Regulation
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Brandon M. Nichol

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

IN RE PETITION FOR DECLARATORY STATEMENT

Docket No. 2005020057

PAUL BLOCK & ADAM UNDERWOOD, Unit Owners,
Brickell Town House Association, Inc.

DS 2005-015

DECLARATORY STATEMENT

Paul Block and Adam Underwood (Block and Underwood), Petitioners, filed a Petition for Declaratory Statement requesting an opinion as to whether the association violated sections 718.113(5), 718.115(1)(e), and 718.115(2), Florida Statutes, when it required each unit owner to contract individually for hurricane shutters and when it contracted for shutters on behalf of any unit owners who did not do so and charged those unit owners directly for the hurricane shutters.

PRELIMINARY STATEMENT

On April 18, 2005, the Division received a petition for declaratory statement from Block and Underwood, unit owners. Notice of receipt of the petition was published in Florida Administrative Weekly on June 3, 2005. The 90 days for the Division to respond to the petition was stayed while the petitioners provided additional information. No hearing was requested or held.

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FINDINGS OF FACT

The following findings of fact are based on information submitted by Block, Underwood, and Brickell Town House Association, Inc. (Brickell). 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. Block and Underwood are unit owners of Brickell, a condominium "association," as that term is defined by section 718.103(2), Florida Statutes.
2. On October 15, 2004, the majority of voting interests voted in favor of requiring mandatory hurricane shutters for all units.
3. In a letter dated October 22, 2004, the Brickell Board stated the following:

Dear Owner:

At the Special Meeting held on October 15, 2004, in accordance with Florida Statute, a majority of unit owners at Brickell Town House voted to have mandatory hurricane shutters installed for all apartments.

Therefore, you are asked to please make arrangements to have hurricane shutters installed in your unit.

A copy of a valid signed contract is to be submitted to the management office no later than December 15, 2004.

4. Block's and Underwood's petition alleges that "the Board's requirement that each unit contract for hurricane shutters violates Section 718.113(5) for the Board only has the power to purchase, install and maintain hurricane shutters . . . not the power to require individual unit owners to purchase, install and maintain hurricane shutters."

5. In December 2004, the board posted a letter, stating that Brickell would contract for shutters for those unit owners who had not provided a valid contract and that it would directly charge such individual unit owners.

6. In January 6, 2005, Block's and Underwood's individual unit owners' maintenance account statements indicated a "HURRICANE SHTR" charge.

7. According to Block's and Underwood's petition "the procedure for assessing the payment of these hurricane shutters was not conducted in accordance [with] Section 718.115(2)."

8. On April 26, 2005, Brickell's attorney responded to the petition on behalf of Brickell. Brickell maintains that the association is in compliance. Brickell's response states that "[t]here has been absolutely no charge concerning the common element expense and the Association has only contracted for those remaining units whose owners did not indicate their intentions to comply" Brickell's response indicates that "[t]he accounting for the charges are the actual costs of the installation of the shutters in that particular type of unit. Units with existing shutters were provided an equal credit."

9. Section 5.3(B) of Brickell's declaration provides the following:

The perimetrical boundaries of the condominium unit shall be the vertical planes of the undecorated finished interior of the walls bounding the condominium unit extending to intersections with each other and with the upper and lower boundaries, and where there is attached to the building, a balcony, loggia, terrace or canopy, the perimetrical boundaries shall be extended to include the same.

10. Section 7.1(B)(3) of Brickell's declaration provides the following:

Each unit owner shall be responsible for the maintenance, repair, and replacement of all windows of his unit and also of the doors

leading on to the balconies, if any, adjacent to his unit and all portions of the condominium unit

11. Brickell's declaration also provides, in part, the following in section 8:

Enforcement of Maintenance. In the event the owner of a unit fails to maintain it as required in paragraph 7.1 B above, the Association, Developer or any other unit owner shall have the right to proceed to any appropriate court to seek compliance with the foregoing provisions; or the Association shall have the right to assess the unit owner and the unit for the necessary sums to put the improvement within the unit in good condition.

CONCLUSIONS OF LAW

1. The Division has jurisdiction to enter this order pursuant to sections 718.501 and 120.565, Florida Statutes.
2. Block and Underwood have standing to seek this declaratory statement.
3. Brickell is a proper party to intervene.
4. In 1991, the Condominium Study Commission, concerned that the installation of hurricane shutters by unit owners was being unduly restricted as a material alteration to the common elements, prompted the legislature to enact section 718.113(5), Florida Statutes. Ch. 91-103, Laws of Fla. Then in 1992, Hurricane Andrew hit southeast Florida and the desirability of hurricane shutters was further acknowledged. The below excerpt describes the importance of hurricane shutters during Hurricane Andrew:

. . . Most of the damage caused by Hurricane Andrew was triggered by the failure of windows. But it was not wind pressure that caused windows to break; instead it was the debris blown by the hurricane force winds that smashed through windows like high speed missiles. . . . A single unprotected window can be the weak link that causes the complete destruction of an entire home, not to mention the injury and damage that can be inflicted upon the persons and possessions inside that home.

If all the residential windows in Dade County had been protected by hurricane shutters during Hurricane Andrew, the resulting damage would have been significantly less. . . . [E]ven improperly built homes would have survived Hurricane Andrew in better condition had they been protected by hurricane shutters, for it is hurricane shutters that protect windows from projectile impact.

. . . during a hurricane, a home without hurricane shutters could be totally destroyed, due to wind propelled debris smashing through the windows, while the home next to it, protected by hurricane shutters, would remain generally undamaged.

Matthew J. Jowanna, Restrictions Against the Use of Hurricane Shutters: Are They Enforceable After Hurricane Andrew?, 17 Nova L. Rev. 1191, 1194-96 (1993).

5. In 1994, the Florida Legislature strengthened section 718.113(5), Florida Statutes, by amending it to its current form. Ch 94-350, Laws of Fla. Section 718.113(5), Florida Statutes, currently provides (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.

6. Section 718.115(1)(e), Florida Statutes, provides (emphasis added):

The expense of installation, replacement, operation, repair, and maintenance of hurricane shutters by the board pursuant to s. 718.113(5) shall constitute a common expense as defined herein and shall be collected as provided in this section. Notwithstanding the provisions of s. 718.116(9), a unit owner who has previously installed hurricane shutters in accordance with s. 718.113(5) or laminated glass architecturally designed to function as hurricane protection which complies with the applicable building code shall receive a credit equal to the pro rata portion of the assessed installation cost assigned to each unit. However, such unit owner shall remain responsible for the pro rata share of expenses for hurricane shutters installed on common elements and association property by the board pursuant to s. 718.113(5), and shall remain responsible for a pro rata share of the expense of the replacement, operation, repair, and maintenance of such shutters.

7. In summary, section 718.113(5), Florida Statutes, provides that an association, with the approval of a majority of the total voting interests, may choose to install hurricane shutters whether the shutters are situated on or within the common elements, limited common elements, units, or association property. This provision does not indicate that this is the only method an association and its unit owners can use in requiring the installation of hurricane shutters. However, section 718.115(1)(e), Florida Statutes, specifies that if an association chooses to proceed under 718.113(5), Florida Statutes, the expense must be considered a common expense.

8. Brickell's declaration provides that unit owners are responsible for the maintenance of windows and doors in or adjoining their units. At the October 2004 special meeting, a majority of Brickell's total voting interests decided on the window maintenance requirement of installing hurricane shutters in each and every unit's windows.

9. Brickell's response to Block and Underwood's petition explains that the charge for hurricane shutters appearing on individual unit owners' maintenance accounts is not the individual unit owners' proportional share of the common expense of hurricane shutters assessed under section 718.115, Florida Statutes. Rather, Brickell's response indicates that "the charges are the actual costs of the installation of the shutters in that particular type of unit."

10. Thus, it appears that Brickell treated the failure of unit owners to contract for hurricane shutters as a failure of the unit owners' maintenance obligations under its declaration. Brickell's declaration allows the association to directly charge unit owners for the costs incurred by the association to cure the failure of a unit owner's maintenance obligation.

11. This section of Brickell's declaration is not preempted by the requirement in section 718.115(1)(e), Florida Statutes, that all association hurricane installation costs incurred under section 718.113(5), Florida Statutes, are to be treated as common expenses. The method Brickell used and the method detailed in section 718.113(5), Florida Statutes, are independent, meaning the association and its unit owners can choose to proceed under either

its declaration or section 718.113(5), Florida Statutes, when installing hurricane shutters.

12. Brickell unit owners chose to treat the expense of the installation of hurricane shutters as a failed unit owner maintenance expense under its declaration rather than as a common expense under sections 718.113(5), 718.115(1)(e), and 718.115(2), Florida Statutes. Brickell's choice is not contrary to chapter 718, Florida Statutes.

13. The hurricane shutter charge is a mandatory maintenance charge under Brickell's declaration and not a common expense assessment. Therefore, Brickell cannot utilize the lien and foreclosure provisions of section 718.116(5)(a), Florida Statutes, to collect the cost incurred by the association related to the installation of the hurricane shutters from unit owners who failed to abide by the unit owners' decision to require unit owners to install the hurricane shutters. However, the association is not precluded from seeking to collect these charges through other legal means.

ORDER

Based upon the findings of fact and conclusions of law, it is declared that Brickell Town House Association, Inc. did not violate sections 718.113(5), 718.115(1)(e) and 718.115(2), Florida Statutes, when it required each unit owner to contract individually for hurricane shutters, when it contracted for shutters on behalf of any unit owner who did not do so, and when it charged those unit owners directly for the hurricane shutters under the unit owner maintenance obligation provision of its declaration of condominium.

DONE and ORDERED this 11th day of July, 2005, at
Tallahassee, Leon County, Florida.



Michael T. Cochran

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 Paul Block, 2451 Brickell Avenue, Unit 16D, Miami, Florida 33129, to Adam Underwood, 2451 Brickell Avenue, Unit CUB-2, Miami, Florida 33129, and to Steven J. Lachterman, 848 Brickell Avenue, Suite 750, Miami, Florida 33131, this 15th day of July, 2005.

Robin McDaniel
ROBIN MCDANIEL, Division Clerk

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