

DATE 1/25/91
DOCKET CLERK C. Cannon

STATE OF FLORIDA
DEPARTMENT OF BUSINESS REGULATION
DIVISION OF FLORIDA LAND SALES, CONDOMINIUMS AND MOBILE HOMES
725 SOUTH BRONOUGH STREET - THE JOHNS BUILDING
TALLAHASSEE, FLORIDA 32399-1007

In re:

Petition For Declaratory Statement
J. Paul and Jean Shelton; Twelve
Oaks Condominium Association, Inc.

DOCKET NO. DS90085

FINAL DECLARATORY STATEMENT

COMES NOW, the undersigned as director of the Division of Florida Land Sales, Condominiums and Mobile Homes, and enters this Declaratory Statement pursuant to section 120.565, Florida Statutes and section 718.501, Florida Statutes.

FINDINGS OF FACT

1. On or about May 14, 1990, the Division received a petition for declaratory statement submitted by J. Paul and Jean Shelton, unit owners in the Water Oak Condominium located in North Palm Beach, Florida, and members in the Twelve Oaks Condominium Association, Inc. Although petitioners sought to initiate this action both on their own behalf and on behalf of other unnamed unit owners, petitioners lack standing to represent these other unit owners.

2. The Division subsequently notified the condominium association of the pendency of this proceeding, and the association, through its then-president Robert Siddall, filed certain documents in connection with the petition. Currently the association president is Juanita Demrick.

3. Petitioners seek a declaratory statement from the Division regarding whether pursuant to section 718.115, Florida Statutes, their condominium association may properly assess the unit owners for the expenses associated with trimming certain mangroves located off the common elements of the condominium.¹ The mangroves in question are growing on state owned submerged land which is contiguous to the condominium property. The condominium was created in 1974. During the period 1975 through 1981, the mangroves in question were periodically trimmed and maintained by the developer. Turnover of the association occurred in March of 1981, and the trees were not trimmed in 1981 or 1982 due to new permit requirements. In June of 1982, a mangrove trimming permit was obtained by the condominium association. This permit was subsequently revoked in November of 1983 due to allegedly over-zealous pruning of the mangroves. In October of 1985, a new permit was obtained by the association, and trimming resumed, presumably at less enthusiastic levels. The expenses of mangrove trimming were placed in the association budget.

4. The condominium documents do not provide that the expense of mangrove trimming is a common expense of the condominium.

5. According to the petition, the mangrove area, if not maintained, would:

¹The association also currently maintains a section of mangroves which are located on the condominium property, which is not the subject of this proceeding.

. . . rapidly become a jungle of mangroves, Brazilian pepper and other flora growing to a height of over 25 feet. This would result in . . . compromising of waterfront security [,] infestation of rats, raccoons, snakes and other vermin . . . [and] damage to existing property values for owners. . .

6. The petition also asks whether the association may treat as a common expense the costs of maintaining an area of state owned land lying between state road 703 and the entrance to the condominium, upon which is situated a state owned access road connecting the state road to the condominium entrance. This area is not part of the condominium property. According to the petition, if the state owned access road area is not maintained, the grass would die, shrubs and flowers would not be maintained, and property values would diminish. There is no allegation, however, that the state would not continue to maintain the road or that the state would, in the absence of association efforts, commence a level of maintenance of the road area. It was also not alleged that access to the condominium would be impaired if the association did not maintain the grounds.

CONCLUSIONS OF LAW

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

2. Initially in their petition, petitioners seek to treat mangrove trimming expenses as a common expense pursuant to the 1988 amendment to Section 718.115, Florida Statutes, which, in relevant part, provided:

. . . Common expenses also include reasonable transportation services, insurance for directors and officers, road maintenance and operation expenses, inhouse communications, and security services, which are reasonably related to the general benefit of the unit owners even if such expenses do not attach to the common elements or property of the condominium. However, such common expenses must either have been services or items provided from the date the control of the board of administration of the association was transferred from the developer to the unit owners or must be services or items provided for any condominium documents or bylaws.

The expenses of mangrove trimming do not fall within the 1988 amendment to Section 718.115, Florida Statutes. They are not transportation services, insurance, road maintenance or operation expenses, in-house communications, or security service. Moreover, that amendment was construed in Scudder v. Green Briar Condominium Association, Inc., 15 F.L.W. 2219 (Fla. 4th DCA September 5, 1990) to require that such services must have been continuously provided by the association to the unit owners from the date of turnover of control. According to the facts of this petition, mangrove trimming service was not provided at turnover which occurred in 1981, and trimming did not resume until June of 1982. Accordingly, under the 1988 amendments, mangrove trimming is not an appropriate common expense.

3. Under an amendment to the Condominium Act effective October 1, 1990, as enacted by the legislature in Chapter 90-151, Laws of Florida, Section 718.115 was amended to provide, and currently provides as follows:

718.115. Common expenses and common surplus.
(1) Common expenses include the expenses of the operation, maintenance, repair, replacement or protection of the common elements and association property, costs of carrying out the powers and duties of the association, and any other expense, whether or not included in the foregoing, designated as common expense by this chapter, the declaration, the documents creating the association, or the bylaws. If approved by the board of administration, the cost of mangrove trimming and the cost of a master television antenna system or duly franchised cable television service obtained pursuant to a bulk contract are common expenses. Common expenses also include reasonable transportation services, insurance for directors and officers, road maintenance and operation expenses, in-house communications, and security services, which are reasonably related to the general benefit of the unit owners even if such expenses do not attach to the common elements or property of the condominium. However, such common expenses must either have been services or items provided from the date the control of the board of administration of the association was transferred from the developer to the unit owners or must be services or items provided for in the condominium documents or bylaws.

4. It might be helpful to consider the amended Section 718.115, Florida Statutes, as creating certain classes of common expenses. First, the initial category contains those traditional items of common expense relating to the operation, maintenance, repair, replacement, or protection of the common elements and association property.² A second class of common

²While this subclass purports to include any other expense designated in the condominium documents, it is worth noting that the pre-amendment language of Section 718.115, Florida Statutes, contained a similar open-ended designation of common expenses, the literal interpretation of which was resisted by certain courts. See, for example Rothenberg v. Plymouth #5 Condominium Association, 511 So.2d 651 (Fla. 4th DCA 1987), rev. den., 518 So.2d 1277 (Fla. 1987). However, the issue of whether the documents may be properly amended to designate mangrove expenses or access road expenses as a common expense is not decided here as the documents are silent in this regard.

expense items includes the cost of mangrove trimming and the cost of cable television, if approved by the board of administration. Thirdly, common expenses by statute also include certain items not attached to the common elements including reasonable transportation services, insurance, road maintenance and operation expenses, in-house communications, and security services, which are reasonably related to the general benefit of the unit owners. However, this third group of common expense items must either have been services provided from the date of transfer of control or must be services provided for in the condominium documents.

5. It is not perceived that the expenses associated with trimming mangroves trees which are located off the condominium property are appropriate common expenses under any portion of the current Section 718.115(1), Florida Statutes. First, as to those trees which are located off the condominium property, it cannot be said that the expenses thereof directly involve the operation, maintenance, repair, replacement or protection of the common elements or association property. While at times a nexus may exist between conditions extrinsic to the condominium property (i.e., the proliferation of assorted vermin adjacent to the condominium property) and the protection of the common elements and of the unit owners, it is not believed that the statute, in identifying the traditional areas of association responsibility, extends to include the maintenance of property not located within the confines of the condominium property. Accordingly, while there may be salient

reasons presented to extend the traditional category of common expense to include maintenance of an area not within the condominium property, in the absence of express legislative or judicial³ support, the statute is not extended here.

6. Secondly, it is not perceived that the legislature, by including mangrove trimming as a permissible common expense, intended to authorize treatment of these expenses as a common expense regardless of the location of the particular mangroves in question. Compare the language utilized by the legislature in its creation of the third category of common expenses, to the effect that those expenses are appropriate "...even if such expenses do not attach to the common elements..." This language is absent from that portion of s.718.115 dealing with mangroves. The better position is that the legislature, through the inclusion of mangrove trimming in the statute, merely intended to authorize the trimming of mangroves located on the condominium property for which proper permitting had been obtained by the association. Thirdly, the expenses of mangrove trimming do not fall within the third category of common

³While there is significant case law development in this area, such development falls short of authorizing the association action in this case. Review, in this respect, Tiffany Plaza Condominium Association, Inc. v. Spencer, 416 So.2d 823 (Fla. 2nd DCA 1982) and subsequent related cases in which the courts affirmed that irrespective of portions of the condominium documents or Condominium Act requiring unit owner votes prior to substantial alterations to the common elements, where the action taken by the association was necessary to protect the common elements, a vote of the unit owners was not required prior to assessing for the repair or improvement. However, it appears that the alterations and repairs made in these cases were situated within the common elements of the condominiums.

expenses including transportation, insurance, road maintenance, and other designated items.

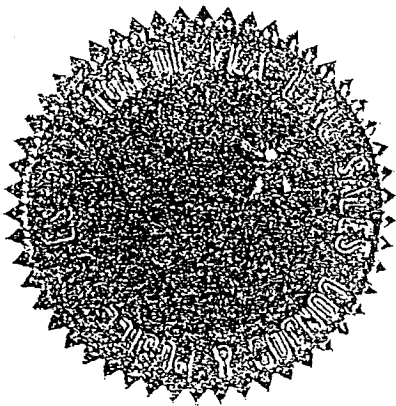
7. Accordingly, it is the conclusion of the Division that Section 718.115(1), Florida Statutes does not include the expenses of trimming mangrove trees not located on the condominium property as a common expense, and accordingly, the association is foreclosed from collecting this expense as a common expense from the unit owners.

8. Since in this context no reason is presented to differentiate the mangrove expenses from the access area expenses, the conclusions contained herein relating to mangrove expenses apply equally as to access area expenses. First, the access area expenses do not involve the operation, maintenance, repair, replacement, or protection of the common elements or association property, and are not included in the condominium documents as a common expense. Secondly, the access area expenses (which do not include a road maintenance function to the road surface itself), are not included in the enumerated statutory items for which no attachment to the common elements is required, such as reasonable transportation services, insurance, road maintenance and operation expenses, and in-house communication. The statutorily designated expense of "road maintenance and operation expenses" is not implicated where the expense item does not relate to or include the road itself and is located on state owned property.

9. In conclusion, the expenses generated for the maintenance of the access road area and for mangrove trimming,

with such trimming to occur off-the condominium property, are not common expenses under Section 718.115(1), Florida Statutes. The Division does not address the issue of whether this conclusion would remain the same if these expenses were specified in the condominium documents.

DONE AND ORDERED this 25th day of January, 1991.



A handwritten signature in cursive script, reading "Matthew M. Carter II".

MATTHEW M. CARTER II, DIRECTOR
Department of Business Regulation
Division of Florida Land Sales,
Condominiums and Mobile Homes
State of Florida

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to JUANITA DEMRICK, 11353 Twelve Oaks Way, North Palm Beach, Florida 33408 and J. PAUL SHELTON and JEAN SHELTON, 1660 Twelve Oaks Way, North Palm Beach, Florida 33408 this 25th day of January, 1991.

A handwritten signature in cursive script, reading "Carolyn Cannon".

CAROLYN CANNON, DOCKET CLERK

RIGHT TO APPEAL

THIS DECLARATORY STATEMENT CONSTITUTES FINAL AGENCY ACTION AND MAY BE APPEALED 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(d), FLORIDA RULES OF APPELLATE PROCEDURE, BOTH WITH THE APPROPRIATE DISTRICT COURT OF APPEAL, ACCOMPANIED BY THE APPROPRIATE FILING FEE, AND WITH CAROLYN CANNON, DOCKET CLERK FOR THE DIVISION OF FLORIDA LAND SALES, CONDOMINIUMS AND MOBILE HOMES, WITHIN 30 DAYS OF THE RENDITION OF THIS FINAL ORDER.

Copies furnished to:

Karl M. Scheuerman
Deputy General Counsel

Alex Knight, Chief
Bureau of Condominiums

Robert Siddall