

Final Order No. BPR-97-00869 Date 2-24-97

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Dept. of Business and Professional Regulation

AGENCY CLERK

Sarah Wachman, Agency Clerk

By: Brandon L. Rose

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

IN RE:

PETITION FOR DECLARATORY STATEMENT

**KEY WEST BY THE SEA
ASSOCIATION, INC.,**

Petitioner.

Docket No. DS96660

DECLARATORY STATEMENT

The Department of Business and Professional Regulation, Division of Florida Land Sales, Condominiums and Mobile Homes (Division) hereby issues this Declaratory Statement pursuant to sections 718.501 and 120.565, Florida Statutes.

FINDINGS OF FACT

1. On November 27, 1996, the Division received a Petition for Declaratory Statement from the Key West By The Sea Association Inc. (Petitioner).

2. The Petitioner is the condominium association that

operates the Key West By The Sea Condominium, (condominium), a 206 unit condominium located in Monroe County, Florida.

3. According to the Petition, the Board of Directors of the Association is considering the installation of hurricane shutters to protect all windows and doors in the condominium.

4. According to the Petition, there are no provisions in the condominium documents that address hurricane shutters. The only provision that may be relevant is located at Article 8(b) of the Declaration of Condominium for Key West By The Sea Condominium which states in relevant part:

After the completion of any renovation which the Developer may choose to make, **there shall be no alteration or further improvements of the real property constituting the common elements without prior approval in writing by the owners of not less than 75% of the common elements, except as provided in the Bylaws,** but any such alteration or improvement shall not interfere with the rights of an apartment owner. . . There shall be no change in the shares and rights of an apartment owner in the common elements which are altered or further improved, whether or not the apartment owner contributes to the cost thereof. (Emphasis added).

5. The Declaration of Condominium does not have a clause which provides that the provisions of the Condominium Act as amended from time to time automatically become a part of the controlling documents of the condominium.

6. The Petitioner requests a declaratory statement as to:

Whether, in order to install hurricane shutters in the Key West By The Sea Condominium, the Board of Directors of the Association is required to obtain approval from a majority of the unit owners as provided in Section 718.113(5), Florida Statutes, or is required to obtain the written approval of 75% of the unit owners as set forth in the Declaration of Condominium for the Key West By The Sea Condominium.

7. On December 13, 1996, the Division published the Notice of Receipt of the Petition for Declaratory Statement in the Florida Administrative Weekly. To date, the Division has received no response to the Petition.

CONCLUSIONS OF LAW

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

2. The Petitioner is substantially affected by the statutory provisions cited above and has standing to seek this declaratory statement.

3. The Petition seeks a ruling from the Division as to the number of unit owner votes required for its board to install hurricane shutters. The condominium's declaration contains a

general provision requiring a vote of 75% of the unit owners for "alterations or further improvements of the real property constituting the common elements." However, the Petitioner contends, the more specific safety-based provisions of the Florida Condominium Act dealing with hurricane shutters which generally allow for the installation of hurricane shutters by the Association upon approval by a majority of the voting interests of the condominium should control in this situation.

4. In determining whether section 718.113(5), Florida Statutes, (1994), applies to this condominium and serves to override the more general provision in its declaration, the issue arises as to the retroactive application of the statute. Generally, the law governing a particular condominium is the law in existence on the date of recording the declaration of condominium. San Souci v. Division of Florida Land Sales and Condominiums Department of Business Regulation, 421 So.2d 623 (Fla. 1st DCA 1982); Suntide Condominium Association, Inc. v. Division of Florida Land Sales, 463 So.2d at 317 (Fla. 1st DCA 1984); but see Rothfleisch v. Cantor, 534 So. 2d 823 (Fla. 4th DCA 1988) (president's grant of sewer easement to Temple, which was entirely located on condominium property and benefitted unit owners, was held valid. The court applied the statute in effect at the time of board's action not the

1983 statute in effect at time declaration was recorded.) The general rule is that a statute is not to be given retroactive effect unless the statute expressly states that it is to be applied retroactively. Century Village, Inc. v. Wellington, E. F. K. L. H. J. M & G. Condominium Association, 361 So.2d 128 (Fla. 1978).

5. Even in the absence of automatic amendment clauses,¹ certain other types of amendments to the Condominium Act are exceptions to the general rule stated above and will be applied retroactively to all condominiums. A substantive law will not be applied retroactively but a law that relates only to procedure and remedy generally applies to all pending cases. Gupton v. Village Key & Saw Shop, Inc., 656 So.2d 475 (Fla. 1995). Statutes which are remedial or procedural, which do not create new or take away vested rights, but only operate in furtherance of the remedy or confirmation of rights already existing, do not come within the legal concept of a retrospective law, or the general rule against retrospective operation of statutes. City of Lakeland v. Catinella, 129 So.2d 133, 136 (Fla. 1961); City of Orlando v.

¹ Future legislative acts may be incorporated as amendments to the original declaration, if the declaration contains express language referring to the Condominium Act as the same may be amended from time to time. See Century Village, San Souci, supra. Declarations of condominium which contain these automatic amendment clauses subject the condominium to the application of all subsequent amendments to the Condominium Act, thus avoiding the general rule against retroactive application of statutes.

Desjardins, 493 So.2d 1027 (Fla. 1986); Young v. Altenhaus, 472 So.2d 1152 (Fla. 1985); St. John's Village I, Ltd. v. Department of State, Division of Corporations, 497 So.2d 990 (Fla. 5th DCA 1986); Ziccardi v. Strother, 570 So.2d 1319 (Fla. 2d DCA 1990).

6. In the instant case, the declaration of condominium does not contain an automatic amendment clause. Petitioner's question should thus be examined in terms of whether section 718.113(5), Florida Statutes (1994) is remedial or procedural such that it may apply to this condominium. First, it would appear that the statute is procedural in nature. The statute did not affect the right of an association or unit owner to alter or improve the common elements because it already existed. In Bonner v. Mirror Lakes Homeowners, 611 So.2d 10 (Fla. 4th DCA 1992), the court held that the part of the condominium's declaration setting forth the voting percentage needed to amend the declaration, did not affect the substantive right to amend the declaration, but rather the procedure to be followed. The Key West Condominium's declaration and the earlier provisions of 718.113, Florida Statutes, required a 75% vote of the unit owners for alterations and improvements. The new statutory provision, 718.113(5), Florida Statutes, (1994), reduced the votes needed from 75% to 51%, a procedural matter. Bonner, supra.

7. The statute also appears to be remedial in nature. In the determination whether this statute is remedial, it is important to examine the legislative history of the section. Prior to 1991, section 718.113(2), Florida Statutes, addressed alterations or improvements to the common elements, and stated:

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.

Thus, if considered a material alteration, unit owner installation of hurricane shutters could be allowed only as authorized in the declaration, which in the case of the Key West Condominium, would require approval of 75% of its voting interests.

8. Case law supports the view that the installation of hurricane shutters by condominium unit owners could be considered a material alteration to the common elements, because such installation would affect the architectural appearance of the condominium building. See Sterling Village Condominium, Inc., v. Breitenbach, 251 So. 2d 685 (Fla. 4th DCA 1971). Since hurricane shutters were considered by many to be aesthetically undesirable, many condominium declarations were drafted with specific restrictions against the installation of hurricane shutters by unit

owners.²

9. In Schmeck v. Sea Oats Condominium Association, Inc., 441 So.2d 1092 (Fla. 5th DCA 1983), the condominium's declaration prohibited installation of hurricane shutters by the unit owners altogether. The unit owners had installed the shutters to prevent water seepage into their units. The court reluctantly affirmed the issuance of an injunction requiring the removal of the hurricane shutters, finding that their installation constituted an alteration or addition to the common elements and that such, despite a well - documented need for their installation, constituted, nonetheless, a violation of the condominium documents and section 718.113(2), Florida Statutes.

10. 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 of a condominium, prompted the Florida Legislature to enact section 718.113(5), Florida Statutes (1992 Supp.). This section, created by chapter 91-103, Laws of Florida, became effective on April 1, 1992, and provided as follows:

(5) Each board of administration shall adopt hurricane

² See Matthew J. Jowanna, 17 NOVA LAW REVIEW 1191, 1193, "Restrictions against the Use of Hurricane Shutters: Are they enforceable after Hurricane Andrew?" (1993).

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 installation, replacement, and maintenance of such shutters in accordance with the procedures set forth herein shall not be deemed a material alteration to the common elements within the meaning of this section.** (Emphasis added).

11. It is clear, then, that the installation of the hurricane shutters by a unit owner prior to 1991 constituted a material alteration to the common elements requiring approval of 75% of the unit owners under the terms of this condominium's declaration, existing case law and of section 718.113, Florida Statutes. However, 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**. In this case, there is no provision in the declaration of condominium prohibiting or authorizing the installation of

hurricane shutters or authorizing the board to adopt a rule permitting the installation of the shutters by the unit owners. Instead, the declaration requires a 75% vote whenever a unit owner plans to make any "alterations or further improvements of the real property constituting the common elements." Since the statute applies to those condominiums whose declarations specifically prohibit the installation of the shutters, it would be unreasonable to conclude that this provision was not applicable to condominium declarations that did not directly address the installation of shutters such as in the instant case.

12. In August of 1992, Hurricane Andrew, the third strongest hurricane in this century to make landfall,³ hit southeast Florida. As a result of the impact of Hurricane Andrew, the desirability of hurricane shutters was revisited. Matthew J. Jowanna, in his article, "Restrictions Against the Use of Hurricane Shutters: Are They Enforceable After Hurricane Andrew?" 17 NOVA LAW REVIEW 1191 (1993), graphically described how homes were damaged by the impact of the storm and the performance of hurricane shutters during a hurricane:

³ "Hurricane Andrew has the notoriety of being the most expensive natural disaster in the history of the United States. The storm damaged 101,242 South Florida Homes and completely destroyed 25,524 others leaving approximately 250,000 people homeless." Jowanna, supra note 2, at 1194.

.....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..even 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.

Jowanna, supra at 1194-1196.

13. In the wake of Hurricane Andrew, any discussion on the architectural aesthetics of hurricane shutters became trivial, at best, and the vital importance of the shutters to the **protection** of property rose to paramount significance. Even in Schmeck, a case where hurricane shutters were ordered removed, the court was concerned about being compelled to order the removal of the shutters in the face of undisputed facts that showed the shutters prevented water damage to the units in question. In his article,

Matthew J. Jowanna reasoned:

Critical to the issue at hand is the court's indication that the hurricane shutters would have been allowed to remain permanently had the unit owners expressed a more compelling reason for installing them. The devastation caused by Hurricane Andrew is that compelling reason.

...In the aftermath of Hurricane Andrew's devastation, the Florida Judiciary must now follow and expand upon the belief demonstrated by the Florida Legislature, that hurricane shutter restrictions are unreasonable, by holding that restrictions which prohibit the use of hurricane shutters are unenforceable... .

Jowanna, supra at 1200.

14. In 1994, the Florida Legislature continued its expansion of section 718.113(5), Florida Statutes. The section was amended in 1994 to read as follows:

(5) 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 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. (Emphasis added).

Ch. 94-350, § 8, at PG#, Laws of Fla.

15. In Andrew's wake, hurricane shutters, have proven to be indispensable to the protection of the condominium property. It is reasonable and prudent, then, that the Petitioner, an association whose condominium is located in Key West, would desire to install hurricane shutters, rather than wait for unit owners to install their own. Petitioner's argument, that the more specific safety-based provisions of the Florida Condominium Act dealing with hurricane shutters which generally allow for the installation of hurricane shutters by the Association upon approval by a majority of the voting interests of the condominium should control, is certainly persuasive especially when looked at from the perspective of the association's duty to maintain and protect a condominium's common elements. See sections 718.113(1); 718.111(4); 718.115(1)(a); Florida Statutes.

16. Courts have determined that, in certain cases, action could be taken by an association to protect common elements where it was demonstrated that such action was required to protect the

common elements from further damage, even if the activity would at the same time constitute a material alteration or substantial addition to the common elements. See Tiffany Plaza Condominium Association, Inc., v. Spencer, 416 So.2d 823 (Fla. 2d DCA 1982); Cottrell v. Thorton, 449 So.2d 1291 (Fla. 2d DCA 1984); Ralph v. Envoy Point Condominium Association, Inc., 455 So.2d 454 (Fla. 2nd DCA 1984).

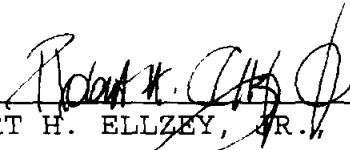
17. Thus, the new section 718.113(5), Florida Statutes(1994), is remedial in nature since the statute's provision that the installation of hurricane shutters, by a condominium association's board in accordance with the procedures set forth in the statute and the approval of a majority of the voting interests of the condominium, is excluded from the definition of a material alteration to the common elements, does not affect vested rights, and does not create or impose a new obligation or duty. Rather, it provides yet another way in which the association can protect the common elements through the use of hurricane shutters.

WHEREFORE, for the foregoing reasons, the Division declares that the provisions of section 718.113(5), Florida Statutes, (1994), authorizing the installation of hurricane shutters by the condominium association's board, in accordance with the

procedures set forth in the statute, require the approval of a majority of the voting interests of the condominium, and overrides the provisions of Article 8(b) of the Declaration of Condominium for Key West By The Sea.

DONE this 20th day of February, 1997, at Tallahassee, Leon County, Florida.




ROBERT H. ELLZEY, JR., DIRECTOR
Division of Florida Land Sales,
Condominiums and Mobile Homes
Department of Business and
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RIGHT TO APPEAL

THIS DECLARATORY STATEMENT CONSTITUTES FINAL AGENCY ACTION AND MAY BE APPEALED BY PETITIONERS 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 APPROPRIATE FILING FEES, AND WITH SARAH WACHMAN,

AGENCY CLERK FOR THE DEPARTMENT OF BUSINESS AND PROFESSIONAL
REGULATION, WITHIN 30 DAYS OF THE RENDITION OF THIS ORDER
DENYING PETITION FOR DECLARATORY STATEMENT.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Declaratory Statement has been furnished by U.S. Mail to Anthony A. Kalliche, Esq., Counsel for Petitioner, Becker & Poliakoff, P.A., 5201 Blue Lagoon Drive, Suite 100, Miami, Florida, 33126, on this _____ day of _____, 1997.

Kristie L. Harris
Docket Clerk

Copies furnished to:

Martha F. Barrera,
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Faye Mayberry, Chief
Bureau of Condominiums