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

IN RE: PETITION FOR DECLARATORY STATEMENT

Alfred J. And Mary A. Venclik, Unit owners,
Schooner Bay Condominium, Docket Number DS96444

Petitioners.
_____/

DECLARATORY STATEMENT

The Division of Florida Land Sales, Condominiums, and Mobile Homes (Division) issues this declaratory statement based on information and documents submitted by the Petitioners:

BACKGROUND

On July 22, 1996, the Division of Florida Land Sales, Condominiums, and Mobile Homes, received a Petition for Declaratory Statement filed by Alfred J. And Mary A. Venclik, unit owners in the Schooner Bay Condominium. Petitioners requested an interpretation as to the application of sections 718.110(4), and 718.113(2) to their facts. The Division requested the Petitioners to provide a copy of the Schooner Bay Condominium documents. The documents were received August 6, 1996.

FINDINGS OF FACT

The following findings of fact are based on information in the Petition for Declaratory Statement and the condominium documents submitted by the Petitioners. The Division takes no position as to the accuracy of the facts, but merely accepts them as submitted for the purposes of this Final Declaratory Statement. No hearing was held in this case.

1. The Petition for Declaratory Statement was filed July 22, 1996. A letter notifying the Petitioners of the receipt of the Petition and of the need for the condominium documents was mailed July 29, 1996. The association was advised of the filing of the petition by letter dated September 10, 1996[1] directed to Charles W. Roth as registered agent of the condominium association. The Division did not receive any request to intervene.

2. Notice of receipt of the Petition for declaratory statement was published in Volume 22, Number 33 of the Florida Administrative Weekly on August 16, 1996.

3. The Petitioners, Alfred J. And Mary A. Venclik, are unit owners in the Schooner Bay Condominium.

4. Schooner Bay Condominium is a phase condominium community consisting of the Columbia phase and the Enterprise phase. The condominium is located in North Fort Myers, Lee County, Florida.

5. The Schooner Bay Condominium Association of North Fort Myers, Inc. (Association), is the condominium association that operates the condominiums.

6. The original declaration of condominium for both phases was recorded in the public

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[1]The original letter notifying the association of the petition was mailed August 27, 1996. The letter was inadvertently sent to the wrong person and was returned September 3, 1996.

records of Lee County, Florida, on February 26, 1976. The revised declaration of condominium was recorded in the public records of Lee County, Florida, in 1990.

7. Turnover of control of the association from the developer to unit owners other than the developer occurred in 1979 At that time the common elements included a clubhouse which contains a pool.

8. At the annual meeting of unit owners in 1995, the board of directors of the association presented Proposed Amendment #1 to the declaration of condominium of the Schooner Bay condominiums. The proposed amendment provides :

> ARTICLE 24 USE RESTRICTIONS FOR CONDOMINIUM UNITS
>
> 24.8 Notwithstanding any documentary provisions to the contrary, by the adoption of this amendment the Membership approves the installation of solar heating panels onto the clubhouse roof, for the purpose of heating the pool. Said panel will meet the specifications adopted by the Board of Directors. The cost of acquisition, installation, and ongoing maintenance, repair and replacement of the pool heating system will be a common expense.

9. According to Petitioners, the cost for installing the solar panels is about $12,000.00. The board indicated to unit owners that the proposed amendment would require the approval of 66 2/3 of the unit owners voting.

10. The declaration of condominium provides, in relevant part:

> ARTICLE 29 AMENDMENT OF THE DECLARATION
>
> 29.4 Any change in this Declaration which shall affect the rights, use, or ownership of properties used in common with the Columbia and Enterprise phases shall require approval of 66 2/3rds (sic) percent (123 minimum) of the voting members of the Association.
>
> 29.5 Changes in this Declaration affecting only the rights or interests of owners of one phase shall require approval of 66 2/3rds (sic) percent (62 minimum of the voting members of that phase only.

29.6 No amendment of the Declaration shall be made which shall change the configuration or size of any condominium unit in any material fashion or alter the appurtenances of such unit without the consent of the unit owner.

11. Section 718.110(4), Florida Statutes (1995), provides, in relevant part:

Unless otherwise provided in the declaration as originally recorded, no amendment may change the configuration or size of any condominium unit in any material fashion, materially alter or modify the appurtenances to the unit, or change the proportions or percentage by which the owner of the parcel shares the common expenses and owns the common surplus unless the record owner of the unit and all record owners of liens on it join in the execution of the amendment and unless all the record owners of all other units approve the amendment. The acquisition of property by the association, and material alterations or substantial additions to such property or the common elements by the association in accordance with s. 718.111(7) or s. 718.113, shall not be deemed to constitute a material alteration or modification of the appurtenances to the units

12. Section 718.113(2), Florida Statutes (1995), provides :

Except as otherwise provided in this section, 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. If the declaration does not specify the procedure for approval of alterations or additions, 75 percent of the total voting interests of the association must approve the alterations or additions.

13. The issue presented by the facts is whether the declaration of condominium must be amended in accordance with section 718.110(4), Florida Statutes, and if so, whether the amendment would require the approval of all of the unit owners and the lienholders, or whether the approval of 66 2/3 of the voting members of the Association is sufficient. Further, the facts present the issue of whether section 718.113, Florida Statutes, is applicable herein.

CONCLUSIONS OF LAW

1. The Division has jurisdiction over the subject matter of the petition for declaratory statement and is authorized to issue this declaratory statement pursuant to section 120.565,

Florida Statutes.

2. The Division provided notice to the Schooner Bay Condominium Association that it had received the petition and was considering the issuance of a declaratory statement.

3. Section 718.110(4), Florida Statutes, is not applicable to these facts because the proposed amendment does not purport to change the configuration or size of any condominium unit in any material fashion; it does not purport to materially alter or modify the appurtenances to the unit; and it does not purport to change the proportions or percentage by which the owner of the parcel shares the common expenses and owns the common surplus. The above provision addresses changes to a condominium unit and the appurtenances thereto, and changes in the percentage shares of the common expenses and common surplus. The Petitioners in this case indicated that the clubhouse is part of the common elements. This does not mean, however, that the clubhouse is an appurtenance to a condominium unit within the meaning of section 718.110(4), Florida Statutes. Appurtenances are described in section 718.106, Florida Statutes, as follows:

> (a) An undivided share in the common elements and common surplus.
>
> (b) The exclusive right to use such portion of the common elements as may be provided by the declaration.
>
> (c) An exclusive easement for the use of the airspace occupied by the unit as it exists at any particular time and as the unit may lawfully be altered or reconstructed from time to time. An easement in airspace which is vacated shall be terminated automatically.
>
> (d) Membership in the association designated in the declaration, with the full voting rights appertaining thereto.
>
> (e) Other appurtenances as may be provided in the declaration.

Obviously, paragraphs (a), (c), and (d), do not find application to these facts. Paragraph (b) is not applicable in that no unit owner has the exclusive right to use the clubhouse. Consequently, the addition of the solar panels to the clubhouse roof would not constitute a modification of the exclusive right to use the clubhouse or pool. Paragraph (e) is inapplicable because the declaration at Article 13 (Appurtenances to the unit) does not describe any other appurtenances to the condominium units that would apply to these facts.

According to the foregoing, the clubhouse itself, which is the subject of the proposed amendment, is part of the common elements; the right to use the clubhouse is an appurtenance to unit ownership in Schooner Bay Condominium. See, In Re: Petition for Declaratory Statement, D.W. Tardif, unit owner, Petitioner, DBPR Docket Number DS95441 (Declaratory Statement, August 2, 1996). The addition of solar panels to the clubhouse roof would not constitute a modification of the appurtenances to the unit. Therefore, section 718.110 (4), Florida Statutes, is inapplicable to the Petitioners' facts.

4. The issue now becomes whether the change contemplated by the proposed amendment would constitute a material alteration or substantial addition to the common elements within the meaning of section 718.113, Florida Statutes. The clubhouse roof would necessarily have to be altered from its present condition to include the solar panels required to heat the pool. As applied to buildings, the term "material alteration or substantial 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 its function, use or appearance. Sterling Village Condominium, Inc., v. Breitenbach, 251 So.2d 685 (Fla. 4th DCA 1971). The appearance of the clubhouse would be changed from its present

condition to include the solar panels. The use of the clubhouse may be affected in that unit owners may utilize the heated pool on a more frequent basis than before.

5. As the addition of the solar panels to the clubhouse roof would constitute a material alteration within the meaning of section 718.113, Florida Statutes, the association must first obtain the requisite vote of the membership. Pursuant to section 718.113, if the declaration provides the manner in which material alterations and substantial additions to the common elements may be made, the association must follow the provisions of the declaration, and the inquiry would end there.

6. The declaration submitted by Petitioners does not address material alterations and substantial additions to the common elements. Petitioners indicate that the board of directors stated that the amendment to add the solar panels would require the approval of 66 2/3 of the voting interests pursuant to Article 29 of the declaration. Article 29 provides that amendments to the declaration affecting the rights, use or ownership of properties used in common with the Columbia and Enterprise phases shall require approval of 66 2/3 percent of the voting members of the association. That provision further states that changes in the declaration affecting only the rights or interests of owners of one phase shall require the approval of 66 2/3 percent of the voting members of that phase only.

7. Article 29 of the Schooner Bay declaration of condominium does not govern the alteration of the common elements. First, the provision describes how the declaration may be amended. As previously indicated, no amendment of the declaration is necessary to add the solar panels to the clubhouse. Next, Article 29 does not apply because the addition of the solar panels to the clubhouse is not a change affecting the rights, use or ownership of the clubhouse. Unit

owners would still be entitled to use the clubhouse for whatever uses are currently available. Ownership of the clubhouse is not affected by the addition of the solar panels. The association may not use the lower percentage stated in Article 29 to effect this material alteration to the common elements, as it would violate section 718.113, Florida Statutes. By the wording of section 718.113(2), Florida Statutes, if the declaration does not describe the procedure for approval of alterations or additions, the association must obtain the approval of 75 percent of the total voting interests of the association for the alterations or additions. As the declaration in this case does not address material alterations or additions to the common elements, the association must obtain the percentage required by section 718.113, Florida Statutes--75 percent of the total voting interests of the association.

CONCLUSION

Based on the foregoing, the Division concludes that section 718.110(4) does not apply to these facts. The Division further concludes that the Schooner Bay Condominium Association must obtain the approval of 75 percent of the total voting interests of the association to add the solar panels to the clubhouse.

DONE AND ORDERED this 7th day of January, 1997 in Tallahassee, Leon County, Florida.

Robert H. Ellzey, Jr., Director
Division of Florida Land Sales,
Condominiums and Mobile Homes
Department of Business and Professional Regulation
Northwood Centre
1940 North Monroe Street
Tallahassee, Florida 32399-1030

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, FLORIDA RULES OF APPELLATE PROCEDURE, BOTH WITH THE APPROPRIATE DISTRICT COURT OF APPEAL ACCOMPANIED BY APPROPRIATE FILING FEES, AND WITH THE DOCKET CLERK FOR THE DIVISION OF FLORIDA LAND SALES, CONDOMINIUMS, AND MOBILE HOMES, WITHIN THIRTY (30) DAYS OF THE RENDITION OF THIS FINAL ORDER.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing declaratory statement in DBPR Docket Number DS96444 was sent by U.S. Mail to Alfred J. and Mary A. Venclik, 3490 North Key Drive, Apt. 517-C, North Fort Myers, Florida 33903, and Charles W. Roth, as registered agent, 3460 N. Key Drive, North Fort Myers, Florida 33903, this _____ day of _____, 199_.

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Kristie Harris, Docket Clerk

Copies furnished:

Kathryn E. Price
Senior Attorney

Pia Lehtonen
Bureau of Condominiums

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