

Final Order No. BPR-98-04247 Date 6-29-98

**FILED**

Dept. of Business and Professional Regulation

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By: Brandon M. Nichols

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

IN RE:

**DS 98-011**

PETITION FOR DECLARATORY STATEMENT  
DOROTHY GRAY, UNIT OWNER,  
WINDWARD COVE CONDOMINIUM

Petitioner.

Docket No. DS98050

**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 (1997).

**FINDINGS OF FACT**

1. On April 9, 1998, the division received a Petition for Declaratory Statement from Dorothy Gray, (Petitioner). Petitioner is the owner of unit #112 in the Windward Cove Condominium, (Condominium), a condominium operated under the provisions of chapter 718, Florida Statutes.
2. The Windward Cove Condominium Association, Inc., (Association) is the association

that operates the Windward Cove Condominium, a 69 unit condominium located in New Port Richey, Florida.

3. According to the Petition, the Condominium has docking facilities in addition to condominium units. Some, not all, unit owners purchased, from the developer, the exclusive right to use a particular slip or berth. There were 28 slips sold to unit owners and 2 slips were retained by the Association.

4. According to the Petition, the dock itself is a common element of the Condominium and the slips are limited common elements. Paragraph 8D(3) of the Amended Declaration of Condominium for Windward Cove Condominium provides that:

Common Use. The walkways of the docking structure shall be available for use by all unit owners, their tenants and guests, subject to such rules as the association may from time to time promulgate. No person shall, however, store anything on the dock except pursuant to the authority of the association and no person shall make such use of the dock as may interfere with the boat owner's right to dock his boat in his slip.

5. Paragraph 8D(5) of the Amended Declaration states as follows:

Noninterference with rights. Once the developer has assigned a slip to a unit owner, the association shall take no action which will interfere with that unit owner's right to use the slip so assigned to him. Notwithstanding the slip may be determined a common element of the association, the right of a slip owner who has received assignment of that slip from the developer, shall prevail over any right the association might have to operation of the common elements.

6. Paragraph 8D(3) of the Amended Declaration was amended and recorded on May 30, 1996 to allow the placement of dock boxes on the slips. This amendment did not address the issue of alteration and improvement to the dock area by individual owners. On the same date, an amendment to the Bylaws of the Association was recorded establishing a "Dock Committee," whose members would be appointed by the board. The Dock Committee is to report to the board on the

operation of the docking facilities including enforcing compliance with the Declaration of Condominium.

7. According to the Petition, the Association promulgated no rules for the use of the facilities. As a result, "slip owners placed anything they wanted on the docks and laid claim to part of the dock structure itself, i.e. one-half of the pier/catwalk/finger bordering their slips as their own. Some slip assignees resorted to chasing other members off the docks as trespassers." Some slip owners made unauthorized alterations or improvements to the dock area near their slips.

8. On January 31, 1997, the board issued a Resolution of the Board of Directors of Windward Cove Condominium Association, Inc., Regarding Alterations and Improvements to Common Elements/Dock Areas. The Resolution states, in part:

WHEREAS, the Board has determined that several owners have undertaken alteration and improvements to the dock area without first obtaining the approval in writing of the Board in accordance with Article 9(B) of the Declaration; and WHEREAS, the Board desires to recognize the existence of these alterations as a violation of the Documents, but to "draw a line" as contemplated by the case of Chattel Shipping v. Brickell Place Condominium, 481 So. 2d 29, (Fla. 3d DCA 1985) and the rationale of which is incorporated herein by reference; . . .

The Resolution proceeds to specifically describe the existing alterations to the docking facilities made by the individual unit owners. Paragraph 3 of the Resolution states,

Other than the above described alterations by the owners in question, no other alterations or improvements to the dock areas exist, with or without permission of the Board. In furtherance thereof, the Board hereby resolves that any future violation of the amendments concerning usage of the dock or alterations or otherwise will be strictly dealt with.

9. The Petition asserts that, under the condominium documents, only the record owners of a majority of the units has authority to approve alteration or improvements of common elements, not the Board of Directors. Paragraph 9B of the Declaration states:

**Alteration and Improvement:** Except as reserved to the Developer herein, neither a unit owner nor the association shall alter any portion of a unit or the condominium building which is to be maintained by the association or remove, or replace any portion thereof or make any additions thereto, or do anything which would jeopardize the safety or soundness of the condominium building or impair any easement without first obtaining approval in writing of the Board of Directors of the Association.

10. Paragraph 9C2 of the Declaration states:

C. Common Elements:

(2) Alterations and improvement. Except as reserved to the Developer, after the completion of the improvements included in the common elements, there shall be no alteration nor further improvement of common elements without the prior approval in writing by the record owners of a majority of the units.

11. The Petition describes the history of the previous board of directors of the Association. This history reveals that some alterations may have been approved by previous Boards and that any efforts by any of the previous Boards to control the situation at the docks was sketchy and ineffectual.

12. Petitioner requests a declaratory statement as to whether *the Board of Directors of Windward Cove Condominium, under section 718.303, Florida Statutes, has the authority to issue the January 31, 1997 Resolution.*

13. On April 16, 1998, the division referred the Petition to the Florida Administrative Weekly for publication, sent a copy of the Petition to the Joint Administrative Procedures Committee and a copy of the Petition to the Association. No response has been received to date.

14. On May 1, 1998, the Notice of Receipt of the Petition for Declaratory Statement was published in the Florida Administrative Weekly.

15. In making the foregoing statements of fact, the division has relied on the statements of fact set out in the Petition and accompanying documents without taking any position with regard

to the validity of the facts.

### **CONCLUSIONS OF LAW**

1. The Division has jurisdiction to enter this order pursuant to sections 718.501, and 120.565, Florida Statutes (1997).

2. Section 120.565(1), Florida Statutes, (1997) provides that any substantially affected person may seek a declaratory statement regarding an agency's opinion as to the applicability of a statutory provision, or of any rule or order of the agency, as it applies to the Petitioner's particular set of circumstances.

3. Rule 28-105.001, Florida Administrative Code (1997) provides that:

A declaratory statement is a means for resolving a controversy or answering questions or doubts concerning the applicability of statutory provisions, rules, or orders over which the agency has authority. A petition for declaratory statement may be used only to resolve questions or doubts as to how the statutes, rules or orders may apply to the petitioner's particular circumstances. A declaratory statement is not the appropriate means for determining the conduct of another person or for obtaining a policy statement of general applicability from an agency. A petition for declaratory statement must describe the potential impact of statutes, rules, or orders on the petitioner's interests.

But see: *Chiles v. Division of Elections*, 23 F.L. W. LD1255 (1st DCA May 12, 1998).

4. The petition seeks an adjudication of rights under section 718.303(1), Florida Statutes which states, in part:

Obligations of owners; waiver; levy of fine against unit by association

(1) Each unit owner, each tenant and other invitee, and each association shall be governed by, and shall comply with the provisions of, this chapter, the declaration, the documents creating the association, and the association bylaws and the provisions thereof shall be deemed expressly incorporated into any lease of a unit. Actions for damages or for injunctive relief, or both, for failure to comply with these provisions

may be brought by the association or by a unit owner against:

- (a) The association.
- (b) A unit owner.
- (c) Directors designated by the developer, for actions taken by them prior to the time control of the association is assumed by unit owners other than the developer.
- (d) Any director who willfully and knowingly fails to comply with these provisions.
- (e) Any tenant leasing a unit, and any other invitee occupying a unit.

5. The Petition seeks a declaratory statement on the issue of whether pursuant to 718.303, Florida Statutes, the Board has the authority to issue the resolution. Petitioner argues that the effect of the resolution is to allow unauthorized alterations made by individual unit owners to the dock area, so it constituted an approval of the alterations. Petitioner argues that the issue of the alterations should have been put to a vote of the unit owners and that the Board's resolution deprived the membership of a vote to which the membership was entitled by the declaration of condominium.

6. The plain language of the Board's Resolution does not contain any statement that would purport to show that the alterations were proper or authorized. On the contrary, the Resolution specifically refers to the alterations made to the dock area whether there was approval or not. The Resolution specifically provided that the existence of these alterations was a violation of the Documents. The Resolution was the Association's notice to the unit owners that henceforth no alteration would be tolerated. It was done as a buffer against a defense of selective enforcement. The Board was within its powers to issue a Resolution concerning how to proceed to enforce this particular set of violations. In *Chattel Shipping and Inv., Inc. v. Brickell Place Condominium Ass'n, Inc.*, 481 So.2d 29, (Fla. 3rd DCA 1985) the Court upheld just such an action by a condominium association. The Court held that prospective enforcement only of a restriction against balcony enclosures was not unequal and arbitrary. No vote by the unit owners was required since the Board has the authority to determine how to go about enforcing the condominium documents without a

vote of the unit owners. §718.111(2), Florida Statutes (1997).

7. Petitioner's dispute also appears to be with the unit owners in question. However, in this case none of the individual unit owners who made the alterations to the dock area are parties to this Petition. To the extent that the Petition seeks a ruling which affects the rights of these particular unit owners, the Petition must be denied. The Division has no authority to issue a declaratory statement adjudicating the rights or obligations of persons who are not parties to the petition. *Florida Optometric Association, Inc., v. Department of Professional Regulation*, 399 So.2d 6 (Fla. 1st DCA 1981) (Associations were not proper parties and could not obtain declaratory statement on behalf of their individual members who were not party to the petition). *Manasota-88, Inc., v. Gardinier, Inc.*, 481 So.2d 948 (Fla. 1st DCA 1986)(Declaratory statements are not proper where the petitioner seeks a ruling not only for himself but for a third party).

8. To the extent that the Petition seeks an interpretation as to whether under the Condominium's documents, the alterations to the dock area could only be done by approval of a majority of voting members of the Condominium, the Petition must be denied because it does not seek a declaratory statement that would interpret any statute, rule, or order of the Division. This is essentially a contractual dispute involving the interpretation of the condominium documents. The Division has no authority to interpret ambiguous provisions of a condominium declaration and then enforce its interpretation. Jurisdiction to construe and interpret what are essentially the terms of a contract is vested solely in the judiciary. Peck Plaza Condominium v. Division of Florida Land Sales, 371 So.2d 152 (Fla. 1st DCA 1979); Point Management, Inc. v. Dept. of Business Regulation, 449 So.2d 306 (Fla. 4th DCA 1984) (The Division has no jurisdiction to construe and interpret a settlement agreement and other condominium documents involved in prior litigation. A

settlement agreement between parties to litigation is a contract).

WHEREFORE, for the foregoing reasons, the Division declares that the Board of Directors of the Condominium Association did not exceed its authority or violate the provisions of section 718.303(1), Florida Statutes, by issuing the January 31, 1997 Resolution.

DONE this 26<sup>th</sup> day of June, 1998 at Tallahassee, Leon County, Florida.



*Melane Anderson*  
MELANE ANDERSON, DEPUTY SECRETARY  
Department of Business and Professional Regulation  
Division of Florida Land Sales, Condominiums and  
Mobile Homes  
1400 Wood Centre  
North Monroe Street  
Tallahassee, Florida 32399-1030

#### RIGHT TO APPEAL

**THIS DECLARATORY STATEMENT CONSTITUTES FINAL AGENCY ACTION AND MAY BE APPEALED BY PETITIONER PURSUANT TO SECTION 120.68, FLORIDA STATUTES, (1997) 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 THE AGENCY CLERK FOR THE DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, 1940 NORTH MONROE STREET, TALLAHASSEE, FLORIDA 32399-0792, WITHIN 30 DAYS OF THE RENDITION OF THIS 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 Dorothy Gray, 5157 Silent Loop #112, New Port Richey, Florida, 34652, and to the Winward Cove Condominium Association, Inc., c/o David Kall, President, 5157 Silent Loop #314, New Port Richey, Florida 34652 on this \_\_\_\_ day of \_\_\_\_\_, 1998.

\_\_\_\_\_  
Kristie L. Harris  
Docket Clerk

Copies furnished to:  
Martha F. Barrera,  
Assistant General Counsel

Philip Nowicki, Chief  
Bureau of Condominiums

Leann Ramseur, REDS  
Bureau of Condominiums