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

IN RE:

PETITION FOR DECLARATORY STATEMENT

PUMPKIN CAY CONDOMINIUM
APARTMENTS NO. 8, INC.,

Petitioner.

Docket No. CD2000-167

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 Section 120.565, Florida Statutes.

STATEMENT OF THE CASE

On September 29, 2000, the Division received a Petition for Declaratory Statement from Pumpkin Cay Condominium Apartments no. 8, Inc., (Pumpkin
Cay). Petitioner provided a copy of the Petition to Edward Roncarelli, a unit owner in the condominium. On October 12, 2000, copies of the Petition were sent to the Joint Administrative Procedures Committee. On October 27, 2000, the Division published the Notice of Receipt of the Petition for Declaratory Statement in the Florida Administrative Weekly, Volume 26, Number 43. No hearing on the matter was requested and none was held.

**FINDINGS OF FACT**

The following findings of fact are based on information submitted by Petitioner. 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. Petitioner, Pumpkin Cay Condominium Apartments No. 8, Inc., (Pumpkin Cay), is a non-profit corporation duly organized under the laws of the State of Florida and is the association that operates Pumpkin Cay Condominium Apartments No. 8, a thirty two unit condominium located in Key Largo, Florida.

2. The Declaration of Condominium for Pumpkin Cay Condominium #8 (Declaration) was recorded on or about September 7, 1973 in the public records of Monroe County, Florida. A copy of the Declaration and its amendments was attached to the Petition as exhibit "A".

3. The 32 condominium units are located in 6 separate buildings, with each
building containing either 4 or 6 units.

4. Four unit owners of one of the 6 buildings, (Roncarelli), are requesting the Association's approval to permit them to extend the boundary lines of their units onto the condominium's common property. The unit owners have proceeded to obtain architectural renderings and proposed amendments to the Declaration to reflect the contemplated changes. The unit owners are limiting their request to change building boundaries to the specific building in which their units are located, not the other 5 buildings in the condominium. A copy of the plans for the proposed alteration to the building was attached as Exhibit "B" to the Petition. The plans show a substantial material change to the exterior boundaries and appearance of the building.

5. Article II of the Declaration incorporates, as the Declaration's "Exhibit A." Exhibit A consists of a 9 page survey of the land and graphic improvements constituting the condominium property and identifies the "private dwellings" and "common property" and their respective locations and approximate dimensions.

6. Article III of the Declaration defines the term "private dwellings" as the 32 separate designated dwelling units contained in the condominium, which are designated in Exhibit "A" to this Declaration of Condominium, excluding, however, all spaces and improvements lying beneath and undecorated and/or unfinished inner surfaces of the
perimeter walls and floor, and above the undecorated and/or unfinished inner surfaces of the ceilings of each dwelling unit and further excluding all spaces and improvements lying beneath the undecorated and/or all unfinished inner surfaces of all interior bearing walls and/or bearing partitions, and further excluding all pipes, ducts, wires, conduits and other facilities running through any interior wall or partition for the furnishing of utility or other services to PRIVATE DWELLINGS and COMMON PROPERTY and including connecting areas designated balconies and patios.

7. Article III of the Declaration defines "common property" as:

all of the real property, improvements, and facilities of the CONDOMINIUM other than the PRIVATE DWELLINGS, as same are herein above defined, and shall include easements through private dwellings for conduits, pipes, ducts, plumbing, wiring and other facilities...

8. Article IV of the Declaration, concerning ownership of private dwellings and appurtenant interests in common property, provides that the owners of each private dwelling shall own, as an appurtenance to the ownership of the private dwelling an undivided interest in the common property. The section further provides that the percentage of undivided interest and common property assigned to each condominium unit will not be changed except with the unanimous consent of all of the unit owners of the condominium. The proposed changes do not contemplate changing the percentages of undivided interest appurtenant to each unit.

9. Article V of the Declaration provides that the undivided interest in the common property, (common elements), declared to be an appurtenance to each
condominium unit shall not be conveyed, devised, encumbered, or otherwise dealt with separately from the condominium unit. Article VI of the Declaration provides that the units and common elements of the condominium are declared to be subject to the restrictions, easements, conditions and covenants set forth in the Declaration and its amendments governing the use of the units and common elements.

10. Article VII of the Declaration provides that the common property is subject to "a non-exclusive easement in favor of all of the owners of PRIVATE DWELLINGS in the CONDOMINIUM for their use and the use of their immediate families, guests and invitees for all proper and normal purposes... for the enjoyment of said owners of PRIVATE DWELLINGS."

11. Article IX provides that:

Recognizing that the proper use of a PRIVATE DWELLING by any owner or owners is dependent upon the use and enjoyment of the COMMON PROPERTY in common with the owners of all other PRIVATE DWELLINGS, and that it is in the interest of all owners of PRIVATE DWELLINGS that the ownership of the COMMON PROPERTY be retained in common by the owners of PRIVATE DWELLINGS of the CONDOMINIUM, it is declared that the percentage of the undivided interest in the COMMON PROPERTY appurtenant to each PRIVATE DWELLING shall remain undivided and no owner of any PRIVATE DWELLING shall bring or have any right to bring any action for partition or division. (Emphasis added).

12. Article XVIII of the Declaration prohibits an unit owner from making any structural modifications to the "Private Dwellings" or causing any improvements
or changes to the "Private Dwellings" which would "protrude through the walls or roof of the CONDOMINIUM or in any manner change the appearance of any portion of the PRIVATE DWELLING or CONDOMINIUM" without first obtaining the written consent of the Association.

13. Article XIX, of the Declaration concerning the right of the association to alter and improve property and assessment therefor, provides that the association has the right to make such alterations or improvements to the COMMON PROPERTY which do not prejudice the rights of the owner of any PRIVATE DWELLING, in the use and enjoyment of his PRIVATE DWELLING unless such owner's written consent has been obtained.

14. Roncarelli asserts that under Articles XVIII and XIX of the Declaration an affirmative vote of the majority of the Board of Directors is all that is required to permit the proposed changes to the exterior of their building, i.e.: to extend the boundary lines of their building onto the Association common property.

15. "Exhibit A" to the Declaration contains the plot plans of the condominium development and the unit boundaries. The unit boundaries and those of the common elements are also specifically described in Articles II and III of the Declaration. A change of the boundaries originally set in the Declaration and its exhibits is an amendment to the Declaration, as originally recorded.
16. Article XXX of the Declaration provides that the Declaration may be amended by the approval of an affirmative vote of the "Members owning no less than twenty (20) PRIVATE DWELLINGS in the CONDOMINIUM." Further, section (a) of Article XXX provides that:

No alteration in the percentage of ownership in COMMON PROPERTY appurtenant to each PRIVATE DWELLING, or alteration to the basis for sharing common expense and other apportionment of assessments which may be levied by ASSOCIATION in accordance with the provisions hereof, or alteration of the voting interest, shall be made without written consent of all the owners of all PRIVATE DWELLINGS and their respective mortgagees, being first had and obtained.

17. The Association has taken the position that pursuant to Article XXX(a) of the Declaration and section 718.110, Florida Statutes, a 100% vote of all the unit owners is necessary in order for the proposed changes in the boundary lines to proceed. It is the position of the Association that 718.110(4), Florida Statutes prohibits the amendment to the configuration or size of an unit without 100% unit owner approval. However, according to the Petition, Roncarelli alleges that the provisions of section 718.110(4), Florida Statutes are not applicable to this Condominium's Declaration because the Condominium was not formed pursuant to Chapter 718, Florida Statutes and that the Declaration does not make any references to future amendments of the Condominium Act. Roncarelli, citing Kaufman v. Shere, 347 So. 2d 627 (Fla. 3d DCA 1977), asserts that subsequent amendments to the
Condominium Act are not incorporated by reference into the Declaration.

18. At the time the Declaration was recorded 711.10(3), Florida Statutes (1973) provided that:

Unless otherwise provided in the Declaration as originally recorded, no amendment shall change any condominium parcel unless the record owner thereof and all the record owners of liens thereon shall join in the execution of the amendment.

19. According to the Petition, in arguing that only the approval of the board of directors of the Association is required for the proposed change, Roncarelli asserts that the unit owners are not seeking to alter their percentage interests in the common property, nor attempting to alter the basis for sharing expense, nor alter the basis of ownership of common surplus, nor voting rights. The Petition further states that the unit owners assert that the provisions of Article XXX(a) of the Declaration are inapplicable to the proposed alteration.

20. According to the Petition, in the event that an amendment to the Declaration is required, Roncarelli asserts, in the alternative, that the unit owners need only obtain the affirmative vote of twenty unit owners because section 718.110, Florida Statutes. does not apply and they are not modifying the exceptions set forth in Article XXX(a) of the Declaration. Thus, the unit owners have demanded that the Board of Directors of the Association consider their proposal and vote upon the same;
alternatively, they have proposed that the matter be submitted to a vote of the unit owners and approved upon receipt of an affirmative vote of twenty unit owners.

21. Petitioner, the Association, in reliance upon the provisions of Article XXX(a) of the Declaration and the provisions of section 718.110, Florida Statutes, has refused said request and demanded that 100% of all unit owners approve the proposed change. Roncarelli and the other unit owners proposing the alteration to the boundaries have been unable to obtain the approval of 100% of all the unit owners.

22. The Petitioner requests a declaratory statement as to whether pursuant to the Declaration of Condominium and section 718.110, Florida Statutes, the owners of the units in one of the six buildings comprising the condominium may extend the boundary lines of their building onto the Condominium's common property with the approval of the Board of Directors only, or whether the request must be brought before a vote of the entire membership; and if such a vote is required, whether an affirmative vote of twenty unit owners or of 100% of the unit owners, must be obtained to approve the requested boundary line change.

CONCLUSIONS OF LAW

1. The Division has jurisdiction to enter this order pursuant to sections 718.501, and 120.565, Florida Statutes.
2. The Association has standing to seek this declaratory statement.

3. Pumpkin Cay Condominium was duly created upon the recording of the Declaration in 1973 pursuant to the Condominium Act, Chapter 718, Florida Statutes (formerly Chapter 711, Florida Statutes (1973)).

4. The first issue that must be resolved is whether Roncarelli's request to extend the boundary lines of their individual units into the common property of the Condominium constitutes a change to the terms of the Declaration. It is clear from the language of the Declaration submitting all the legally described property to condominium form of ownership that, at the time the declaration was recorded in 1973, the unit owners purchased, as an appurtenance to their unit, a 1/32 share of the common elements of the condominium. See: Article I, Exhibit B, Declaration. It is also clear that the boundaries of each individual unit and the common owned areas are set forth both in a plot plan and unit plans attached to and incorporated as part of the Declaration. See: Article II and Exhibit A, Declaration. The boundaries of each unit and the common elements are also defined and described in the Declaration's Article III. Thus, the proposed alterations constitute a change in the plot plans and unit plans as originally recorded and reduce the common property of the Condominium by transferring the common property into the individual privately owned units. The proposed change is a material alteration to the common property
of the Condominium.

5. Since the proposed change extending the unit boundaries into and reducing the area of common elements constitutes a change to the terms of the Declaration as well as a material alteration to the common elements of the condominium, an amendment to the Declaration is required. The Board of Directors does not have the power to unilaterally approve an amendment to the Declaration. See: Article XXX, Declaration of Condominium.

6. Under the clear language of the Declaration, the Board does not have the power to unilaterally amend the Declaration without the consent of the other unit owners. This proposed change would, in effect, change the unit owners' ownership rights in the common elements appurtenant to each condominium unit, without the approval in writing of the other unit owners. See: Article XIX, Declaration. In other words, the Board does not have the power to dispose of property it does not own.

7. Petitioner's next question is whether the vote of all the unit owners or only the vote of 20 of the 32 unit owners is required to amend the declaration to extend individual unit boundaries into the condominium common elements. The law in existence on the date of recording the declaration is as controlling as if engrafted onto the documents. *Sans Souci v. Division of Florida Land Sales & Condominiums*, 421 So.2d 623 (Fla. 1st DCA 1982); *Suntide Condominium Asso. v. Division of Florida Land Sales & Condominiums, Dept. of Business Regulation*, 463 So. 2d 314 (Fla. 1st DCA 1984); *Wellingotn Property Management v Parc Corniche Condominium Association*, 755 So. 2d 824 (Fla. 5th DCA 2000). At the time the Declaration was recorded, section 711.10(3), Florida Statutes (1973) provided that:

> Unless otherwise provided in the Declaration as originally recorded, no amendment shall change any condominium parcel unless the record owner thereof and all the record owners of liens thereon shall join in the execution of the amendment.

8. Section 711.03(8), Florida Statutes (1973), defines a "condominium parcel" as a unit together with the undivided share in the common elements which is appurtenant to the unit. Under Article IV of the Declaration, the "common property" of the Condominium is appurtenant to the condominium units and comprises a condominium parcel.
9. Article IX of the Declaration recognizes that the use and enjoyment of the condominium units is dependent upon the use and enjoyment of the property owned in common with the other unit owners. The Article further provides that since it is in the interest of all the unit owners that the common property remain undivided, "no owner of any PRIVATE DWELLING shall bring or have any right to bring any action for partition or division". Under Article XIX, the Board of Directors has the power to alter and improve the common elements so long as those alterations or improvements "do not prejudice the rights of the owner of any PRIVATE DWELLING in the use and enjoyment of his PRIVATE DWELLING, unless such owners' written consent has been obtained." The proposed alteration to the unit boundaries materially changes the common elements as well as affects the ownership rights of individual unit owners in the common property of the condominium, which is appurtenant to each unit, i.e.: "the condominium parcel". Thus, in accordance with the Declaration as originally recorded, the proposed amendment to extend unit boundaries requires the vote of all the record owners of the units. *Wellingotn Property Management v Parc Corniche Condominium Association*, 755 So. 2d 824 (Fla. 5th DCA 2000).
For the reasons stated above it is hereby:

DECLARED that Pumpkin Cay Condominium Association #8 Inc., may not unilaterally amend its Declaration to extend the boundaries of condominium units into the common property of the Condominium without the consent of 100% of the unit owners of the Condominium.

DONE this 14th day of December 2000, at Tallahassee, Leon County, Florida.

ROBERT WOOD, DIRECTOR
Division of Florida Land Sales
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(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, DIVISION OF FLORIDA LAND SALES, CONDOMINIUMS AND MOBILE HOMES, 1940 NORTH MONROE STREET, TALLAHASSEE, FLORIDA 32399 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 to Samuel A. Persaud, Persaud & Decker, Attorneys for Petitioner, 1450 Madruga Avenue Suite 300 Coral Gables, Florida 33146 by U.S. Mail to on this _____ day of __________, 2000.

______________________________
Kristie Harris, Docket Clerk

Copies furnished to:
Martha F. Barrera,
Chief Attorney

Jim Mullins, Chief
Bureau of Condominiums

Michelle Schmidt, R.E.D.S
Bureau of Condominiums