

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

IN RE PETITION FOR DECLARATORY STATEMENT

DS 2001-014

EARL E. POLLOCK, UNIT
OWNER, TANGERINE BAY CLUB,

Docket No. CD2001-042

Petitioner,

TANGERINE BAY CLUB ASSOCIATION,
INC, A Florida Not For Profit Corporation,

Final Order No. BPR-2001-05096 Date: 12-11-01
FILED
Department of Business and Professional Regulation
AGENCY CLERK

Intervener.

Sarah Wachman, Agency Clerk
By: Brandon M. Nichole

DECLARATORY STATEMENT

The Petitioner, Earl E. Pollock (Pollock), filed a petition for declaratory statement requesting an opinion as to whether a board may obtain unit owner approval to purchase land or recreation leases through written consent instead of by vote at a meeting where the bylaws expressly provide for written agreement under section 718.112(2)(b), Florida Statutes.

PRELIMINARY STATEMENT

Earl E. Pollock (Pollock), a unit owner in the Tangerine Bay Club, filed his petition with the Division on September 24, 2001. Notice of the Petition was published in the Florida Administrative Weekly on October 19, 2001. Pollock objects to the association's passing a special assessment to repair water damage to the common elements by unit owner written consent rather than at a unit owner meeting.

On October 18, 2001, the Division received a Response to Petition and Request to Intervene and a Motion to Dismiss filed by the Association, challenging the Division's jurisdiction to issue a declaratory statement as to the issue presented in the petition. The Association filed a substantive response to the petition and requested a hearing. The Association did not challenge the facts asserted by Pollock.

On December 4, 2001, Pollock filed a reply to the Association's request to dismiss the petition and answer.

The Division determined that a hearing was not necessary in this case. Fla. Admin. Code R. 28-105.003 (agency may hold an informal hearing where there are no disputed issues of fact).

The Association urged the dismissal of the petition on the following grounds: (1) the declaratory statement would adjudicate the rights of other unit owner members who are not parties; (2) the petition does not contain sufficient facts; and (3) the Division cannot order a refund of the special assessment. The Division rejects each of these points.

The Division has jurisdiction to issue a declaratory statement in response to the specific facts and issue presented in the petition for declaratory statement submitted by Pollock. See Chiles v. Dept. of State, Div. of Elections, 711 So. 2d 151, 154 (Fla. 1st DCA 1998).

Each unit owner is represented in this matter by the Association. It is the Association's method of obtaining unit owner approval under section 718.112(2),

Florida Statutes, that is at issue, not whether all unit owners are required to pay or not pay the assessment.

There are sufficient facts, which are not contested, on which to determine if the Association may obtain the requisite vote by written agreement to levy the special assessment.

To the extent that Pollock desires the Division to declare the specific assessment invalid, the Division declines as the proper place to challenge the validity of a special assessment and seek a refund is in the courts. Grippe v. Fla. Dep't of Bus. and Prof. Reg., 729 So. 2d 459 (Fla. 4th DCA 1999) (affirming Division denial of petition because owner's relief was in court or possibly arbitration). The statement is limited to the specific question raised.

While the Division does not have authority to interpret ambiguous provisions in the governing documents, it has the authority to review unambiguous provisions in light of chapter 718, Florida Statutes. Peck Plaza Condo. v. Division of Fla. Land Sales and Condo., 371 So. 2d 152, 154 (Fla. 1st DCA 1979). Neither party has asserted that the provisions of the bylaws are ambiguous.

The Association's request to intervene is granted.

The Association's challenge to the Division's jurisdiction is denied.

ISSUE PRESENTED

Whether the Association may obtain unit owner approval through written consent instead of by vote at a unit owner meeting where the bylaws expressly provide for written agreement under section 718.112(2)(b), Florida Statutes.

STATEMENT OF FACTS

The following facts are based on information submitted by Petitioner and not disputed by the Association. The Division takes no position as to the accuracy of the facts, but merely accepts them as submitted for purposes of this declaratory statement.

1. Pollock is a "unit owner" of a condominium unit at Tangerine Bay Club, A Condominium formed under chapter 718, Florida Statutes. § 718.103(28), Fla. Stat.

2. Tangerine Bay Club Association, Inc. (Association) is the "association," as that term is defined in section 718.103(2), Florida Statutes, for the Tangerine Bay Club, A Condominium, located in Longboat Key, Florida, which is a 90 unit condominium.

3. On July 6, 2001, the Board of Directors of the Tangerine Bay Club Association approved a special assessment of four thousand eight hundred dollars (\$4800) per unit "to repair the common element deficiencies pertaining to water intrusion." The minutes of the meeting indicate that water intrusion through or around windows and doors has caused damage to the common elements. Under the declaration of condominium, the Association is responsible for repairing the common elements and the unit owners are responsible for repairing the windows or patio doors. Minutes of Bd. Dir. Meeting, July 6, 2001; § 8, Declaration of Condominium of Tangerine Bay Club (Declaration).

4. The Board of Directors subsequently mailed each unit owner a "Consent Form For Special Assessment," requesting that unit owners vote in

favor or against the special assessment to be used for repairing the common element deficiencies pertaining to water intrusion by checking a box and mailing in the consent form.

5. At a duly noticed meeting, held on August 21, 2001, the consent forms were tallied with 50 unit owners in favor and 27 unit owners against the special assessment.

6. Section 10.11 of the Declaration of Condominium states, "The owner(s) of each Unit shall be entitled to cast (1) vote (have (1) Voting Interest) for each Unit owned as provided in the Bylaws." There are a total of 90 votes, one for each of the 90 units.

7. As required by section 718.111(1), Florida Statutes, the Association is incorporated under chapter 617, Florida Statutes. Tangerine Bay Club Ass'n, Inc. Art. of Incorp. Article 4.4 of the Articles of Incorporation states that, "[t]he exact manner of exercising voting rights shall be determined by the Bylaws of the Association."

8. Section 2.5 of the Bylaws states that a quorum at a members' meeting consists of "a majority of the Voting Interests of all Units in the Condominium. All decisions at a members' meeting shall be made by a majority of the Voting Interests represented at a meeting at which a quorum is present. . ."

9. Section 2.10 of the Bylaws states that, "[t]he members may also act by written agreement without a meeting."

10. Section 6.4 of the Bylaws requires that any special assessment exceeding five hundred dollars (\$500) be approved by "at least one-half of the Voting Interests."

11. There were a sufficient number of consents (50 is more than one-half of 90) to approve the assessment.

CONCLUSIONS OF LAW

12. The Division has jurisdiction to enter this Order in accordance with sections 120.565 and 718.501, Florida Statutes.

13. Petitioner is substantially affected by the special assessment levied against his unit through mail-in consent voting.

14. Section 718.112(2)(d)(4), Florida Statutes (2001) states:

Any approval by unit owners called for by this chapter or the applicable declaration or bylaws, including, but not limited to, the approval requirement in s. 718.111(8), shall be made at a duly noticed meeting of unit owners and shall be subject to all requirements of this chapter or the applicable condominium documents relating to unit owner decisionmaking, except that unit owners may take action by written agreement, without meetings, on matters for which action by written agreement without meetings is expressly allowed by the applicable bylaws or declaration or any statute that provides for such action.

(emphasis added).

15. Petitioner contends that this section does not allow unit owners to vote through mail-in consents because the Condominium Act requires that the special assessment be approved through a "duly noticed meeting of unit owners."

16. Petitioner is incorrect. This section does not mandate that a unit owner meeting be held to approve every issue decided by an association.

Rather, this section requires a unit owner meeting when a declaration of condominium or bylaws of an association or the Condominium Act require approval of the unit owners. As Pollock pointed out in his petition, the Condominium Act requires unit owner meetings to garner enough votes to approve certain actions, such as approving a budget that exceeds the prior year budget by 115% or waiving reserves. § 718.112(2)(e), (f), Fla. Stat. The Condominium Act does not require a unit owner vote to approve an association's passing a special assessment to pay for repair and maintenance of the common elements. Farrington v. Casa Solana Condo. Ass'n, Inc., 517 So. 2d 70 (Fla. 3d DCA 1987) (board action approving repairs to stucco exterior to seal cracks causing water damage was not a material alteration to common elements, which would have required unit owner approval, but a reasonable exercise of board's business judgment in maintaining common elements), review denied, 525 So. 2d 878 (Fla. 1988); Ralph v. Envoy Pt. Condo. Ass'n, Inc., 455 So. 2d 454 (Fla. 2d DCA 1984) (board had authority to collect assessment for vertical seawall extension without unit owner approval because this was necessary maintenance not alteration or addition to common elements). Further, section 718.112(2)(d)4, Florida Statutes, authorizes unit owners to take action by written agreement where the bylaws expressly permit it.

17. The Tangerine Bay Club Association's Bylaws permit members to act by written agreement without a meeting. § 2.10, Bylaws. Where the Condominium Act does not expressly require a unit owner meeting, the necessity of calling a unit owner meeting is governed by the bylaws. The Bylaws do not

require a unit owner meeting to approve a special assessment to authorize the board to pay for repairs to the common elements. Rather, the Bylaws require unit owner "approval" of special assessments exceeding \$500. The requirement of unit owner "approval" has been met by the written consent of 50 percent of the unit owners.

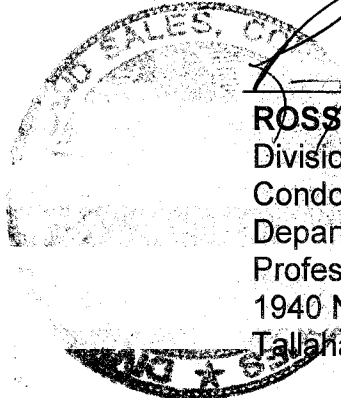
18. Section 718.112(2)(d)4, Florida Statutes, also permits unit owner consent in writing instead of by vote at a meeting where the procedure is permitted by any statute. The Association points out that section 617.0701(4)(a), Florida Statutes, permits unit owners to approve actions to be taken "without a meeting, without prior notice, and without a vote" if the requisite number of unit owners approve the action. Pollock argues that this section does not apply. However, it is not necessary to resolve this point because the question presented is answered by section 718.112(2)(d)4, Florida Statutes, and the Association's bylaws.


ORDER

Based upon the findings of fact and conclusions of law, it is ORDERED that the Tangerine Bay Club Association, Inc. may obtain unit owner approval for a special assessment through written consent, as set forth in its bylaws, instead of by vote at a duly noticed meeting in accordance with section 718.112(2)(d)4, Florida Statutes (2000).

DONE and ORDERED this 10th day of December,

2001.




ROSS FLEETWOOD, Director
Division of Florida Land Sales,
Condominiums, and Mobile Homes
Department of Business and
Professional Regulation
1940 North Monroe Street
Tallahassee, FL 32399-1030

NOTICE OF RIGHT TO APPEAL

THIS FINAL ORDER CONSTITUTES FINAL AGENCY ACTION AND MAY BE APPEALED BY PETITIONER 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(c), FLORIDA RULES OF APPELLATE PROCEDURE BOTH WITH THE APPROPRIATE DISTRICT COURT OF APPEAL ACCOMPANIED BY APPROPRIATE FILING FEES AND WITH THE AGENCY CLERK, 1940 NORTH MONROE STREET, NORTHWOOD CENTRE, TALLAHASSEE, FLORIDA 32399-2217 WITHIN THIRTY (30) DAYS OF THE RENDITION OF THIS FINAL ORDER.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to: Earl E. Pollock, 340 Gulf of Mexico Drive #116, Longboat Key, FL 34228 and Chad M. McClenathen, Esq., 1820 Ringling Boulevard, Sarasota, FL 34236, this _____ day of _____, 2001.

Beatrice Pruitt, Docket Clerk

Copies furnished to:

Janis Sue Richardson
Chief Assistant General Counsel