

DS 2002-017

Final Order No. BPR-2003-00369 Date: **2-24-03**
FILED
Department of Business and Professional Regulation
AGENCY CLERK
Sarah Wachman, Agency Clerk
By: *Brandon M. Nichols*

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

IN RE: PETITION FOR DECLARATORY STATEMENT,

Le Chateau Association, Inc.,

BPR DS 2002-017
DOCKET NO. CD2002-058

Petitioner.

_____ /

DECLARATORY STATEMENT

Petitioner, Le Chateau Association, Inc. (Le Chateau), a condominium association, requests a declaratory statement as to whether section 718.113(2), Florida Statutes (2002), allows Le Chateau's adoption of an amendment to its declaration, which provides a procedure to allow for material alterations to the common elements with a 75% unit owner vote except for those material alterations authorized by the declaration, instances of maintenance, repair, and replacement or protection and alterations to the condominium lobby during 2002 and 2003 approved by two-thirds of the unit owners. The division finds that it does.

STATEMENT OF FACTS

The following facts are based on information submitted by Le Chateau. The Division relies on the statement of facts set out in the petition without taking any position with regard to the validity of the facts.

1. Le Chateau filed a petition with the Division on October 28, 2002. Notice of the Petition was published in the Florida Administrative Weekly on November 15, 2002. Le Chateau submitted the following exhibits to its petition: the current declaration, articles of incorporation and bylaws for Le Chateau, the proposed amendment, the February 6 and February 27, 2002 Senate Staff Analyses, and copies of the appellate decisions in Wellington Property Management v. Parc Corniche Condominium Association, Inc., 755 So. 2d 824 (Fla. 5th DCA 2000) and Woodside Village Condominium Association, Inc. v. Jahren, 806 So. 2d 452 (Fla. 2002).

2. Le Chateau is an "association" as that term is defined in section 718.103(2), Florida Statutes, that operates a condominium, as that term is defined by section 718.103(11), Florida Statutes (2002). Le Chateau consists of 27 individual units and common elements located in Sarasota, Sarasota County, Florida. The condominium was created in 1971.

3. The declaration of condominium does not contain a procedure for alterations or additions to the common elements by the association.

4. The declaration provides the following method of amendment:

AMENDMENT: The Declaration may be amended at any time by affirmative vote of the owners of not less than fifty-one percent (51%) of the units in the Condominium.

5. On October 17, 2002, 15 of the 27 unit owners voted to amend the declaration to add the following provision:

ALTERATIONS BY ASSOCIATION: There shall be no material alteration to the common elements or Association real property except upon the affirmative vote of seventy-five percent (75%) of all members of the Association other than those alterations authorized by the Declaration or necessary for maintenance, repair, replacement or protection; provided however that during the years 2002 and 2003 only, a material alteration to

the common elements of the first floor lobby of the condominium building may be approved by the affirmative vote of six-six [sic] and two-thirds percent (66-2/3%) of all members of the Association.

CONCLUSIONS OF LAW

6. The Division has jurisdiction to enter this order in accordance with sections 120.565 and 718.501, Florida Statutes (2002).

7. Le Chateau is substantially affected by the provisions in chapter 718, which govern the operation of condominium associations and the procedures by which alterations and additions to the common elements are made.

8. The Condominium Act in effect on the date the declaration is recorded is made a part of the declaration. Suntide Condo. Ass'n, Inc. v. Division of Fla. Land Sales & Condo, Dep't of Bus. Reg., 463 So. 2d 314, 317 (Fla. 1st DCA 1984), review denied, 469 So. 2d 750 (Fla. 1985); but see Rothfleisch v. Cantor, 534 So. 2d 823 (Fla. 4th DCA 1988) (limiting Suntide to its facts, the court applied the current version of the act on the policy that no precedent could be set except for condominiums created in the same year).

9. In 1971, the Condominium Act, then chapter 711, Florida Statutes, provided that “[U]nless otherwise provided in the declaration as originally recorded, no amendment shall change any condominium parcel unless the record owner thereof and all record owners of liens thereon shall join in the execution of the amendment.” § 711.10(3), Fla. Stat. (1971); cf. § 718.110(4) (2002). A parcel included a unit with the appurtenances that attached to the unit, which consisted of the undivided share in the common elements, an exclusive right to use a limited common element, exclusive

possession of the unit, and an undivided share in the common surplus. Id. § 711.04.

The association was responsible for maintaining the common elements, but there could be "no material alteration or substantial additions to the common elements except in a manner provided in the declaration." Id. § 711.13(1)-(2).

10. In May 2000, the Fifth District Court of Appeal held that an association could not amend its declaration under the general amendment provision to add a new provision allowing the association to materially alter the common elements. Wellington Property Management v. Parc Corniche Condominium Association, Inc., 755 So. 2d 824 (Fla. 5th DCA 2000). The Wellington court found that section 718.110(4), Florida Statutes (1989) controlled the manner of amending a declaration to allow material alterations to the common elements because section 718.113(2) provided that these types of alterations could only be done in a manner provided for in the declaration. Wellington, 755 So. 2d at 826. Because the Parc Corniche declaration did not have a specific provision allowing alterations to the common elements, the Wellington court found that unanimous consent was required under 718.110(4), Florida Statutes (1989) for the change.

11. The Condominium Act has been amended several times since the condominium was created. The law now allows alterations to the common elements with a seventy-five percent vote. § 718.113(2), Fla. Stat. (2002); ch. 92-49, § 4, at 443, Laws of Fla. ("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."). In 2002, the legislature amended section

718.113(2), Florida Statutes, again to provide for the amendment of a declaration by the general procedures provided in the declaration, as follows:

(2)(a) 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 as originally recorded or as amended under the procedures provided therein. If the declaration as originally recorded or as amended under the procedures provided therein does not specify the procedure for approval of material alterations or substantial additions, 75 percent of the total voting interests of the association must approve the alterations or additions.

Ch. 2002-27, §10, at 651, Laws of Fla.

9. The Senate staff analysis of the bill proposing this amendment explains the legislature's intention behind this change as follows:

Section 7. Amends s. 718.113, F.S., relating to material alterations or substantial additions to the condominium property. Prior to 1992, material alterations or substantial additions to common elements or association property were prohibited unless provided for in the declaration. In 1992, this section was amended to provide that 75 percent of the total voting interests of the association could approve such alterations if not contained in the declaration. s. 3, Ch. 92-49, L.O.F. In 2000, this was made applicable to multicondominium associations. s. 53, Ch. 2000-302, L.O.F. Case law holds, however, that declarations recorded prior to the 1992 statute that are silent regarding material alterations cannot be subsequently amended. See, *Wellington Property Management v. Parc Corniche Condominium Association, Inc.*, 755 So. 2d 824 (Fla. 5th DCA 2000). In *Wellington*, unit owners attempted to amend their declaration based upon a general power in the declaration that allowed for amendment by a 51% vote of the owners and that retroactive application of the 1992 amendments to s. 718.113, F.S., would be a substantive change that would unconstitutionally interfere with the unit owners' vested contractual rights regarding the original use of the common elements. *Wellington*, at 828.

The bill allows amendment of declarations to provide procedures for amendments to authorize approving material alterations to common elements. It states that the changes are intended to clarify existing law and apply to existing associations.

Fla. S. Comm. on Reg. Indus., CS/SB 694, (2002) Staff Analysis (Feb. 6, 2002) (available at Fla. Dep't of State, Div. of Library Servs., Tallahassee, Fla.) [hereinafter Staff Analysis I].

12. The staff analysis for the final version of the bill contained the same analysis without a reference to the Wellington case. Fla. S. Comm. on Reg. Indus., CS/CS/SB 694, (2002) Staff Analysis (Feb. 27, 2002) (available at Fla. Dep't of State, Div. of Library Servs., Tallahassee, Fla.) [hereinafter Staff Analysis II]. The bill was still intended to clarify existing law. Staff Analysis II.

13. The Florida Supreme Court found that the Condominium Act provided broad authority to associations to adopt amendments to declarations. Woodside, 806 So. 2d at 464 (citing § 718.110(1), Fla. Stat). The supreme court determined that unit owners did not have a fundamental property right to leasing restrictions found in the declaration at the time they purchased, but were on notice that the leasing restriction could be amended under the general amendment provision of the declaration. Id. at 461. The supreme court did not decide the issue of amendments that allowed material alterations to the common elements. Id. at 457.

14. The legislature has determined that an association's alterations to the common elements are not a material alteration or modification of the appurtenances to a unit and were never intended to be by expressly overruling the Wellington decision. The legislature has determined that these types of amendment are not within section 718.110(4), Florida Statutes, but within the general amendment authority of section 718.110(1), Florida Statutes, which the supreme court has interpreted as allowing amendments on "all matters" other than subsections (4) and (8). Woodside, 806 So. 2d

at 457. The bill analysis indicates that the legislature is clarifying existing law, which means that this is not a substantive change to any fundamental property interests acquired under declarations recorded prior to 2002. See Palma Del Mar Condo. Ass'n #5 of St. Petersburg, Inc. v. Commercial Laundries of W. Fla., Inc., 586 So. 2d 315, 371 (Fla. 1991) (“courts may consider subsequent legislation to determine the intended result of a previously enacted statute. . . particularly since there had been a judicial interpretation . . . contrary to its original intent.”). Therefore, amendments passed under the general amendment provisions of a declaration that authorize an association to materially alter or modify the common elements do not fall within the class of amendments that may implicate fundamental property interests, such as a change in the percentage share of ownership of the common elements under section 718.110(4), Florida Statutes.

15. Le Chateau’s amendment does not fall within section 718.110(4), Florida Statutes, because it is one authorizing a material alteration or addition to the common elements under section 718.113(2), Florida Statutes. § 718.110(4), Fla. Stat. (2002). Therefore, Le Chateau may adopt this amendment in accordance with sections 718.110(1) and 718.113(2), Florida Statutes (1971-2002).

ORDER

WHEREFORE, it is concluded that Le Chateau Association, Inc. may adopt an amendment to its declaration, which provides a procedure to allow for material alterations to the common elements with a 75% unit owner vote except for those material alterations authorized by the declaration, instances of maintenance, repair, and replacement or protection and alterations to the condominium lobby during 2002 and

2003 approved by two-thirds of the unit owners pursuant to section 718.113(2), Florida Statutes (2002).

DONE and ORDERED this 24th day of February 2003.



[Handwritten Signature]

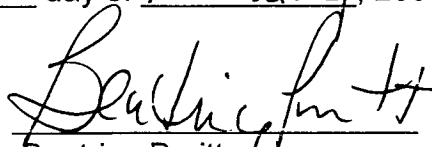
MISS FLEETWOOD, Director
Division of Florida Land Sales,
Condominiums, and Mobile Homes
Department of Business and
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1940 North Monroe Street
Tallahassee, FL 32399-1030

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 Daniel J. Lobeck, Esquire, Lobeck & Hanson, P.A., 2033 Main Street, Suite 403, Sarasota, Florida 34237, this 24th day of February, 2003.


Beatrice Pruitt,
Docket Clerk

Copies furnished to:

Ross Fleetwood
Director

Janis Sue Richardson
Chief Assistant General Counsel
Office of General Counsel