Final Order No. BPR-2004-00136 Date: 1-22-04
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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

GARDEN LAKES COURTYARD ASSOCIATION, INC.
______________________________________/

Case No. 2003078584

DS 2003-030

DECLARATORY STATEMENT

Garden Lakes Courtyard Association, Inc. (Garden Lakes), Petitioner, filed a petition for declaratory statement requesting an opinion as to whether unit owners would be required to pay the costs of a roof replacement as a common expense under section 718.115, Florida Statutes, when the declaration of condominium provides that unit owners who do not give written approval for a substantial alteration and improvement to the common elements do not have to share in the costs for such substantial alteration and improvement.

STATEMENT OF FACTS

The following facts 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 declaratory statement. Petitioner did not request a hearing and none was held.

1. Garden Lakes filed its petition with the Division on August 28, 2003. Notice of the Petition was published in Florida Administrative Weekly on October 10, 2003.

2. Garden Lakes is the condominium "association" as that term is defined by section 718.103(2), Florida Statutes, charged with operating Garden Lakes Courtyard Condominiums, A Condominium, which consists of twenty-nine units and is located in Manatee County, Florida.

3. According to the petition, Garden Lakes wishes to replace the existing cement tile roof, a common element, with an asphalt shingle roof.

4. Article III of the Declaration of Condominium provides in pertinent part:

> 3.1 Assessment: "Assessment" means the share of funds required for the payment of common expenses, from time to time, assessed against the unit owners, and the charges and expenses of the Association which are assessed against the unit owners under authority of the Condominium Act or this Declaration, other than Special Charges.
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> . . . .
>
> 3.6 Common Expenses: "Common Expenses" means those items specified in the Condominium Act as common expenses and all other items of expense specified herein as common expense, and the reasonably necessary cost of carrying out any Association power, duty, or obligation hereunder, including but not limited to:
> (a) expense of operating, maintaining, repairing, and replacement of common elements and of any portion of units to be maintained by the Association.
>
> . . . .

5. Article IV, paragraph 4.4 of the Declaration of Condominium provides in part:

> As provided in Article VIII, each unit owner shall at all times own an equal percentage undivided interest in the common elements then forming a part of the Condominium Property.

6. Article XI of the Declaration of Condominium, paragraph 11.6(a) provides in part:

> [T]here shall be no substantial alternation or further improvement in the common elements or limited common elements without the approval in writing of the owners of not less than 75% of the units in the Condominium. Any such alteration or improvement which is so approved by such requisite majority of owners as provided herein shall not interfere with the rights of any unit owner, without his specific consent. <u>No portion of the cost of such alteration or improvement shall be assessed against any unit owner who did not approve of such alteration in writing.</u> The total cost of any such alteration or improvement so approved shall be assessed against and paid by those unit owners who approved of such alteration or improvement, in proportion to their ownership interests under Article VIII. . . .Notwithstanding the non-liability of owners not approving of such alterations or improvements for the cost of same, all unit owners shall be liable for the common expense of maintenance of the common elements as so altered or improved, whether or not they approve of the alteration or improvement.

(emphasis added).

<u>CONCLUSIONS OF LAW</u>

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

8. Garden Lakes, as a condominium association, is substantially affected by the provisions of chapter 718, Florida Statutes, regulating common expenses and assessments.

9. Section 718.116(9)(a), Florida Statutes, provides in pertinent part:

> A unit owner may not be excused from payment of the unit owner's share of common expenses unless all other unit owners are likewise proportionately excluded from payment.

10. Section 718.111(4), Florida Statutes, provides in pertinent part:

> The association has the power to make and collect assessments and to lease, maintain, repair, and replace the common elements or association property.

11. Section 718.115(1)(a), Florida Statutes, provides:

> Common expenses include the expenses of the operation, maintenance, repair, replacement, or protection of the common elements and association property, costs of carrying out the powers and duties of the association, and any other expense, whether or not included in the foregoing, designated as common expense by this chapter, the declaration, the documents creating the association, or the bylaws.

12. Section 718.113(2)(a), Florida Statutes, 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 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.

13. The first issue that must be resolved in this case is whether the proposed change in roof tile from cement to asphalt shingle constitutes <u>mere</u> maintenance, repair, or replacement of condominium common elements or property under sections 718.111(4) and 718.115(1)(a), Florida Statutes, or whether the change constitutes a material alteration under section 718.113(2)(a), Florida Statutes.

14. In <u>Sterling Village Condominium, Inc. v. Breitenbach</u>, the Fourth District Court of Appeal defined "material alteration" as "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 or influence its function use, or appearance." 251 So. 2d 685, 687 (Fla. 4th DCA 1971). Pursuant to this definition, the Third District Court of Appeal found that changing a condominium roof from cedar shingles to terracotta tiles constituted a material alteration. George v. Beach Club Villas Condo. Ass'n, 833 So. 2d 816 (Fla. 3d DCA 2002). In that case, the condominium association was warned that it would be fined by the city of North Miami Beach if the condominium roof was not painted and repaired. Id. at 818. After researching the issue, the association made the determination that changing to terracotta tiles would be half the cost of replacing the existing cedar shingles. Id. A unit owner challenged the assessment for the roof replacement charged to the unit owners on the basis that is should have been put to a unit owner vote. Id. The trial court concluded that the change was a substantial alteration and should have been put to a unit owner vote. Id. The Third District Court of Appeal affirmed this determination, finding it was supported by competent, substantial evidence. Id. at 819.

15. George can be contrasted to cases where the court found that certain changes to the common elements--albeit material or substantial--when necessary for the maintenance, repair, or replacement of common elements, did not require compliance with section 718.113(2) or the corresponding portions of the condominium documents. In Tiffany Plaza Condo. Ass'n, Inc. v. Spencer, the Second District Court of Appeal held that construction of a rock revetment to protect the condominium beachfront from damage was not a material alteration, but was reasonable for the maintenance of the condominium property. 416 So. 2d 823 (Fla. 2d DCA 1982). In so holding, the court stated that a provision in the condominium declaration, almost identical to the provision

for material alterations in the declaration of Garden Lakes, "is not intended to relieve an objecting unit owner of the pro rata assessments for the cost of an alteration or improvement when it is reasonably necessary for the maintenance, repair or replacement of the common element." Id. at 826.

16. The facts here are similar to the facts in George. Garden Lakes wishes to change the type of shingles used on the condominium roof from cement to asphalt. Pursuant to the court's determination in George, changing the type of shingles on a condominium roof constitutes a material alteration to the condominium property. While simply replacing the roof with the same roofing material would doubtless constitute mere maintenance not requiring compliance with section 718.113(2), Florida Statutes, changing the composition of the roof shingles would perceptively change the elements or specifications of the building from its original design in such a manner as to appreciably affect its function, use and appearance within the meaning of material change as provided by the Sterling Village court.[1]

17. Because changing the type of material used to tile the roof of a condominium building is a material alteration, section 718.113(2)(a), Florida Statutes, controls the board's decision as to whether it may replace the tile with shingles. This section provides that an association may not make a material alteration to the common elements of the condominium except as provided in the declaration of condominium. Therefore, provisions in the declaration of condominium control how a material alteration to the

[1] There is no evidence presented that the change in roofing material was necessary because the original roofing material was no longer manufactured or available, or that the original roofing material used is obsolete or no longer a viable construction alternative. Cf. A.N. Inc. v. Seaplace Association, Inc., Arb. Case No. 98-4251, Final Order (November 19, 1998) (replacement of window systems, while a substantial upgrade to the existing window system, did not require a vote of the owners.); see also, Bronstein v. Hills of Inverrary Condominium, Inc., Arb. Case No. 94-0147, Final Order (March 24, 1995) (holding that

common elements can occur (section 718.113(2)(a), Florida Statutes, provides a default provision as to how these alterations may be made if the declaration does not so provide). Accordingly, paragraph 11.6 of the Declaration of Condominium for Garden Lakes provides that there must be a vote of seventy-five percent of the unit owners approving the alteration before such material alteration can be made. Therefore, before a material alteration can occur, seventy-five percent of the unit owners of Garden Lakes must approve the alteration.

18. The second issue of how the association assesses for the cost of the replacement of the tile roof with a shingle roof if 75% of the unit owners approve it is addressed by sections 718.115 and 718.116(9), Florida Statutes. Installation of a new roof, whether with the same type of roofing material or new material, is also maintenance, repair and replacement of a common element when the old roof has reached or exceeded its useful life. No unit owner may be excused from paying a proportional assessment for repair and replacement of the common element roof. Tiffany Plaza, 416 So. 2d at 826.

19. A similar question of whether some unit owners could be excused from payment for the common expenses of a material alteration approved by 75% of the unit owners was addressed by the Division in Fairwinds Cove Condominium Association of Hutchinson Island, Inc., DS95219 (Oct. 16, 1995). In Fairwinds, the Division found that a provision in the condominium declaration "reliev[ing] from the initial cost of such alteration or improvement" those owners not approving the installation of a security gate

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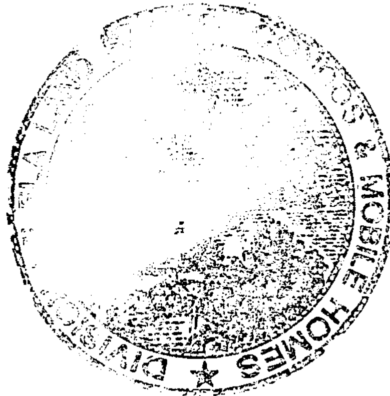
section 718.113(2), Florida Statutes, was not violated where the board determined without an owner vote to replace worn chattachoochee pool decking material with paver bricks).

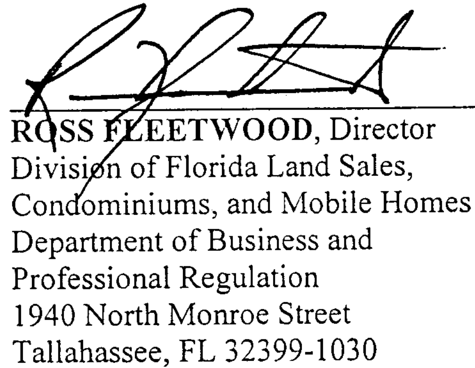
and guardhouse would be unenforceable under section 718.116(9), Florida Statutes. Because the roof is a common element and it must be replaced, the association is required to replace it in accordance with the same type of roof unless at least 75% of the unit owners vote to replace it with a different type of roof. If 75% of the unit owners vote to replace the roof with a different type of roof, then all owners are required to pay the common expenses for the replacement under section 718.116(9), Florida Statutes.

ORDER

Based upon the findings of fact and conclusions of law, it is declared that changing the type of roof shingles used on a condominium building is a material alteration, which may be made by a 75% unit owner vote under the declaration pursuant to section 718.113(2)(a), Florida Statutes, with the common expenses being assessed against all unit owners in their proportionate share pursuant to sections 718.115 and 718.116(9)(a), Florida Statutes.

DONE and **ORDERED** this 29th day of December, 2003.





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 Richard A. Ulrich, Esq., Judd, Shea, Ulrich, Oravec, Wood & Dean, P.A., 2940 South Tamiami Trail, Sarasota, Florida, 34239, this 20th day of January, 2004.

Robin McDaniel
ROBIN BRADWELL, Docket Clerk

Copies furnished to:
Ross Fleetwood, Director

Janis Sue Richardson,
Chief Assistant General Counsel