

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

IN RE PETITION FOR DECLARATORY STATEMENT

Docket No. 2010009829

PARLIAMENT TOWERS CONDOMINIUM, INC.  
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**DS 2010-012**

**DECLARATORY STATEMENT**

Parliament Towers Condominium, Inc. (Parliament) filed a Petition for Declaratory Statement requesting an opinion as to whether Parliament Towers Condominium, Inc. must get a majority approval of the unit owners under section 718.113(5)(a), Florida Statutes, to replace the exterior windows on the first three floors with hurricane resistant glass, and whether it may use common surplus funds to pay the cost of replacement under section 718.115, Florida Statutes.

**PRELIMINARY STATEMENT**

On March 12, 2010, the Division received a petition for declaratory statement from Parliament. Notice of receipt of the petition was published in Florida Administrative Weekly on March 12, 2010. On March 23, 2010, the Division received a response from Parliament, which also provided the association's governing documents. A hearing was not requested or held.

**FINDINGS OF FACT**

The following findings of fact are based on information submitted by Parliament. 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. Parliament is a condominium “association,” as that term is defined by section 718.103(2), Florida Statutes.<sup>1</sup>

2. The association is the entity responsible for the management and operation of Parliament Towers, a Condominium in Pompano Beach, Florida. The survey and plot plan show a north and south tower with eighteen floors each.<sup>2</sup>

3. Under section 718.111(11), Florida Statutes, and article VII, section K of the declaration, the association is obligated to procure hazard/casualty insurance for the purpose of insuring certain portions of the condominium property against casualties, such as windstorms and hurricanes. The cost of insurance coverage “in an amount equal to the maximum insurable replacement value” of the condominium property is a common expense under article VII, section K(4) of the declaration as originally recorded.

4. In order to qualify for a discount on its insurance premium, the association’s windstorm carrier will require the association to replace the glass in the windows of the units on the first three (3) floors of the condominium with hurricane-resistant glass in order to comply with state building codes regarding large missile impact tests only for the first thirty feet (30’) in building height. The windows on the units on the fourth floor of the condominium and above will not need to be replaced in order to qualify for the discount, since those windows already comply with the state building code for small missile impact tests. If the association does not attend to such window replacement, its insurance premium

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<sup>1</sup> Art. I(3), Declaration for the Creation of a Condo. Pursuant to the Condo. Act, Ch. 711, Fla Stat (1970) (Declaration)

will be considerably more expensive. In fact, the association believes, based on its initial studies into potential savings to be realized on its insurance and the cost of the window replacement, that the association's savings on its insurance premiums will pay for the cost of the window replacement in less than two (2) years and possibly within the first year.<sup>3</sup>

5. The association desires to install hurricane-resistant glass in the windows on the first three floors of the condominium, leaving in place the existing windows for the units located above the third floor.

6. The association's board of directors desires to pay for replacing these windows with the general operating funds of the association, including common surplus funds, without having to charge each affected unit on an individual basis and without the need of being required to replace the windows on the fourth floor of the condominium and above.<sup>4</sup>

7. Article I, section 4 of the Declaration of Condominium of Parliament Towers Condominium, Inc. defines a unit as that part of the condominium subject to private ownership.

8. Article III, section A(1) of the declaration further defines a unit by its interior boundaries and provides:

The unit owner shall not be deemed to own the undecorated and/or unfinished surfaces of the perimeter walls, floors, and ceiling surrounding the respective "condominium unit," nor shall the owner be deemed to own pipes, wires, conduits, or other public utility lines running through said respective "condominium unit," which are utilized for or serve more than one "condominium unit," which items are hereby made a part of the "common elements." Said owner,

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<sup>2</sup> Declaration, exs. B & C, Survey and Plot Plan

<sup>3</sup> In re Pet for Decl Stmt. Parliament Towers Condo., Inc., at 3

<sup>4</sup> Id. at 4.

however, shall be deemed to own the walls and partitions which are contained in said owner's respective "condominium unit," and also shall be deemed to own the inner decorated and/or finished surfaces of the perimeter walls, floors, and ceiling, including plaster, paint, wallpaper, etc. The balconies which are accessible from the individual apartments shall be owned in the entirety by the respective unit owner.

8. The common elements are defined as the part of the condominium not included within the units.<sup>5</sup> Under the declaration, the exterior windows, including those that the association wishes to replace with hurricane-resistant glass, are common elements of the condominium.<sup>6</sup>

9. Article III, section D of the declaration provides that "[t]he maintenance of all outside doors and windows shall be a part of the common expenses of the Condominium Property." Therefore, the association maintains the windows as a common expense. The association insures the windows as a common expense.<sup>7</sup>

10. Article VII, section 6 of the declaration as amended provides:

Shutters. The Board of Directors may make reasonable rules and regulations as to material, color and type of shutters to be permitted. No hurricane shutters shall be affixed to the outside doors or windows of any unit without the prior written approval of the Board of Directors.

11. The association has not paid for the installation of hurricane shutters.<sup>8</sup> About half of the windows have hurricane shutters installed by unit owners in accordance with the hurricane shutter specifications adopted by the

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<sup>5</sup> Art I, sec 5, Declaration

<sup>6</sup> The association confirmed this by letter from counsel dated April 15, 2010 Letter to J S. Richardson from A P. Speranzini (Apr 15, 2010) (supplementing petition).

<sup>7</sup> Art. VII, sec K(4), Declaration.

<sup>8</sup> Letter to J S Richardson from A P. Speranzini (Apr 15, 2010) (supplementing petition).

board under article VII.<sup>9</sup> The owners have paid for the installation of shutters, which has been treated as a unit owner expense by the association.<sup>10</sup>

12. The association amended article VII, section L(2) of the declaration to require unit owner approval of material alterations and capital improvements made by the board to provide:

There shall be no material alterations or capital improvements to the common elements in excess of \$5,000.00 except as the same are authorized by a specifically delineated line item in the budget, or in an assessment adopted according to the provisions of ARTICLE V, Section 3A of the By-Laws, or as ratified by the affirmative vote of Two-thirds (2/3s) of units represented at a meeting at which a quorum is present. A material alteration shall be defined as a change to any property which shall require the expenditure of corporate funds in any amount greater than that required to restore the property to its original condition. A Capital improvement shall be defined as an addition to existing property which shall require the expenditure of corporate funds.<sup>11</sup>

13. Article V, section 3(A) of the bylaws provide the board's assessment and budgetary authority to "fix and determine from time to time the sum or sums necessary and required for the common expenses of the condominium."<sup>12</sup> Common expenses include operating costs, maintenance costs, taxes, repair costs, rental expenses, and "any other expenses designated as common expenses from time to time by the Board of Directors."<sup>13</sup> The board is empowered to collect regular assessments "to lease, maintain, repair, and replace the common elements."<sup>14</sup> The board's annual budget must include non-

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<sup>9</sup> The board adopted hurricane shutter specifications by rule on September 25, 2007. Only accordion style shutters matching the color of the door and window are permitted. Rule XVII  
<sup>10</sup> See letter to J.S. Richardson from A.P. Speranzini (Apr. 15, 2010) (supplementing petition).

<sup>11</sup> Art VII, sec L, Declaration (amend. Oct. 4, 1993).

<sup>12</sup> Art V, sec 3(A), Bylaws (amend Apr. 1979).

<sup>13</sup> Id

<sup>14</sup> Id

recurring anticipated expenses and capital improvements.<sup>15</sup> If section 718.113(5), Florida Statutes, does not resolve the issue, then the board must determine whether it may declare the replacement of the windows to be a common expense and approve the cost under its assessment authority, rather than approving the cost under its budget authority or by a two-thirds unit owner vote under article V, section 3A of the bylaws.

14. The association questions whether it may install the hurricane glass without a vote of the unit owners under section 718.113, Florida Statutes, which governs material alterations to and maintenance of common elements and installation of hurricane shutters and hurricane protection. It believes a unit owner vote is not required because of its responsibility to maintain the windows, but is uncertain if the responsibility of maintenance is the same as a responsibility to install hurricane protection. The governing documents do not expressly provide for the installation of hurricane shutters or hurricane protection by either the association or the unit owners.

#### CONCLUSIONS OF LAW

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

2. Parliament, is a condominium association and has standing to petition for a declaratory statement.

3. Historically, installing hurricane shutters or hurricane protection in the absence of clear authority in the declaration was viewed as a possible material

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<sup>15</sup> Id.

alteration or substantial addition to the common elements.<sup>16</sup> “The term ‘material alteration or addition’ means to 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.<sup>17</sup> In 1983 one court determined that installation of hurricane shutters was a material alteration or substantial addition to the common elements.<sup>18</sup> Another court refused to equate the installation of hurricane shutters with the full enclosure of a balcony as a material alteration or substantial addition to the common elements.<sup>19</sup>

4. The legislature declared that installing hurricane shutters was not a material alteration, but did not include “other hurricane protection,” “laminated glass,” or “window film” within the exemption from material alterations.<sup>20</sup> Replacing window glass with hurricane-resistant glass may or may not alter the function, use or appearance of the windows. It might be argued that the function of the window changes from a simple window to hurricane protection or that the appearance of the color and opacity of the glass may be changed with the hurricane-resistant

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<sup>16</sup> In re Pet Decl Stmt., Brickell Townhouse Association/Block & Underwood, Case No. 2005020057/DS2005-015/BPR-2005-03774, at 4-5, (July 13, 2005) (discussing the 1991 Condominium Study Commission review leading to the legislature’s adoption of § 718 113(5), Fla Stat.)

<sup>17</sup> Sterling Vill. Condo, Inc. v Breitenbach, 251 So 2d 685, 687 (Fla. 4th DCA 1971) (replacing wire screens with glass jalousies was a material alteration).

<sup>18</sup> Schmeck v Sea Oats Condo Ass’n, Inc., 441 So 2d 1092, 1094-95 (Fla 5th DCA 1983) (requiring removal of hurricane shutters because installed without board approval in violation of the restriction on material alterations).

<sup>19</sup> Schmidt v. Sherrill, 442 So 2d 963 (Fla. 4th DCA 1983) (holding that unit owners’ enclosing balconies with glass doors and windows to extend the interior of the unit was a material alteration to the common elements, but that installation of white hurricane shutters when extended to enclose the balcony was not sufficiently similar to support a selective enforcement defense)

<sup>20</sup> § 718 113(5)(c), Fla Stat, St George Island, Ltd v Rudd, 547 So 2d 958, 961 (Fla 1st DCA 1989) (“Moreover, the presence of a term in one portion of a statute and its absence from another argues against reading it as implied by the section from which it is omitted ”)

glass. It is unknown if the window frame as well as the glass will be replaced, which raises the same questions. The glass replacement may or may not be a material alteration or a capital improvement under case law or the declaration.<sup>21</sup> However, no facts have been provided on which to base this conclusion, so the Division refrains from reaching this as a conclusion.

5. If the glass replacement was found to be a material alteration or substantial addition to the common elements, the question is whether subsection 718.113(2)(a) or subsection 718.113(5)(a) controls. If section 718.113(2)(a) controls, then the replacement may only be made in accordance with the declaration, or if the declaration is silent, by a seventy-five percent vote of the total voting interests.<sup>22</sup> The declaration does provide the vote required to make material alterations or substantial additions to the common elements. Under article VII, section L(2), the board must get a two-thirds vote of the owners to spend more than \$5,000 on a capital improvement or material alteration of the common elements. If the association determines that replacing the glass in the windows is a capital improvement or a material alteration to the common elements under the declaration, then a vote may be required under the declaration. However, the division does not reach this conclusion because subsection 718.113(5)(a), the more specific provision, controls and provides for a majority vote where the board

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<sup>21</sup> It is assumed, however, it meets the \$5000 cap set in article VII, section L(2) of the Declaration, but it is not clear if it meets the definition provided in that section. Also see, Brickell Townhouse Ass'n, Inc. v. Bagdan, Arb. Case No. 00-1683 (Summ Final Order, Nov. 2000) (finding association has authority under its duty to repair §§ 718 111(4) and 718.113(1), Fla Stat , to replace windows with upgrade windows matching other new windows replaced after hurricane)

<sup>22</sup> § 718 113(2)(a), Fla. Stat.



installs hurricane shutters, hurricane protection or laminated glass.<sup>23</sup> So, neither the statutory seventy-five percent vote nor the declaration's two-thirds vote controls the vote required to install hurricane-resistant glass.<sup>24</sup>

6. The board says it is uncertain if replacement of existing glass with hurricane-resistant glass is a maintenance issue falling under its authority to maintain the common element windows.<sup>25</sup> If so, the replacement would fall within the board's budgetary and assessment authority in article V, section 3 of the bylaws. The Division cannot reach a conclusion without facts to support it. The board would need to determine if the glass must be replaced because its condition is degraded, such as a broken window, a fogged double paned window, damaged, or whether it must be replaced to prevent deterioration to the common elements, so that replacement would fall under the board's authority to maintain the common elements.<sup>26</sup> The board has not provided facts to reach this conclusion, so the Division refrains from doing so.

7. Section 718.113(5), Florida Statutes, requires a board to adopt hurricane shutter specifications that meet building code requirements.<sup>27</sup> Once the specifications are adopted, if the owners want to install hurricane shutters at their

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<sup>23</sup> Ortiz v Dep't of Health, Bd. of Medicine, 882 So 2d 402, 405-06 (Fla. 4th DCA 2004) (finding that specific statute controls over more general law on the subject) See also In re Pet Decl Stmt, Brickell Townhouse Association/Block & Underwood, Case No 2005020057/DS2005-015/BPR-2005-03774, at 4-5, (July 13, 2005) (historically hurricane shutter installation had been unduly restricted under material alteration provisions, so legislature adopted § 718.113(5), Fla. Stat )

<sup>24</sup> Id. § 718 113(5)(a)

<sup>25</sup> Pet Decl Stmt at 4

<sup>26</sup> Maintenance means to maintain property in an existing state to preserve it from failure or decline Webster's Ninth New Collegiate Dict. 718 (1983). See Brickell Townhouse Ass'n, Inc v Bagdan, Arb Case No. 00-1683 (Summ. Final Order, Nov 2000) (finding association has authority under its duty to repair §§ 718 111(4) and 718.113(1), Fla Stat., to upgrade deteriorated windows to match other new windows replaced after hurricane)

<sup>27</sup> Id.

own expense, the board must approve the installation regardless of any restriction on material alterations to the common elements in the governing documents as long as the shutters meet the specifications.<sup>28</sup> This is what Parliament Towers has done. About half of the exterior windows have hurricane shutters, which meet board specifications, installed at unit owner expense.

8. The declaration controls whether a vote is required to install hurricane-resistant glass, hurricane protection and hurricane shutters in a condominium. If the declaration requires the association to install and maintain hurricane shutters, then no unit owner vote is required, and the cost is a common expense.<sup>29</sup> If the declaration does not require the board to install and maintain hurricane shutters, then a unit owner vote is required.<sup>30</sup>

9. Parliament Towers' declaration is silent on responsibility for hurricane shutters, hurricane protection, and hurricane-resistant glass. It has not amended its declaration to place responsibility for the installation or maintenance of hurricane shutters or hurricane protection or hurricane-resistant glass on the association or on the owners. Under section 718.113(5)(a), Florida Statutes, the association is required to get a majority vote of the owners to install hurricane-resistant glass.<sup>31</sup> It may do so even though some windows have hurricane shutters as the legislature

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<sup>28</sup> Id. § 718.113(5)(d)

<sup>29</sup> Id. §§ 718.113(5)(a) and 718.115(1)(e).

<sup>30</sup> Id.

<sup>31</sup> The 75% vote required for material alterations if the declaration is silent or the two-thirds vote under this association's declaration do not override the specific statutory majority vote required for installation of hurricane shutters and other hurricane protections. Compare § 718.113(2)(a) with art VII, sec L(2), Declaration.

has provided that the board may . . . install hurricane shutters or hurricane protection . . . *or both*.”<sup>32</sup>

10. The windows are common elements that are maintained, repaired, replaced and insured by the association as a common expense while the installation, maintenance, repair and replacement of the hurricane shutters has been imposed as a unit owner expense. Replacing the window glass with hurricane-resistant glass on the first three floors is a common expense under the declaration and section 718.115(1)(e), Florida Statutes.

11. The association asks if it may use common surplus funds to pay for the replacement. Common surplus funds are the amount of all receipts or revenues, including assessments, rents and profits that exceed the total common expenses.<sup>33</sup> Unit owners own the common surplus in the same shares as they own the common elements and pay the common expenses.<sup>34</sup> The association may use common surplus funds for operational expenses, maintenance of the common elements, for installation of hurricane shutters and protection, and approved capital improvements.<sup>35</sup>

12. The association is replacing the glass in the common element windows without removing or replacing the hurricane shutters. The window replacement is a common expense to be paid by all of the owners in their proportionate shares.<sup>36</sup>

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<sup>32</sup> § 718.113(5)(a), Fla. Stat.

<sup>33</sup> § 718.103(10), Fla. Stat.

<sup>34</sup> § 718.115(3), Fla. Stat., art. III, sec. B, ex. D, Declaration

<sup>35</sup> §§ 718.113, 718.115, 718.112(2)(e)-(f), Fla. Stat. If as the association asserts, the cost of installing hurricane-resistant glass on the first three floors will be recouped from lower insurance costs in two years, then it is reasonable to expect that the association would be able to get a majority vote of the owners to approve the installation.

<sup>36</sup> § 718.115(3)(e), Fla. Stat. (“However, such unit owner shall remain responsible for the pro rata share of expenses for hurricane shutters or other hurricane protection installed on common

**ORDER**

Based upon the findings of fact and conclusions of law, it is declared that in the absence of an amendment to its declaration making the association responsible for installing and maintaining hurricane shutters, hurricane protection or hurricane-resistant glass, Parliament Towers Condominium Association, Inc. must have a majority vote of unit owners to install hurricane-resistant glass in the windows of the first three floors of the condominium under section 718.113(5)(a), Florida Statutes, and must assess the cost as a common expense, which includes the use of common surplus funds, under section 718.115(1)(e) and (3), Florida Statutes.

**DONE** and **ORDERED** this 26<sup>th</sup> day of April, 2010,  
at Tallahassee, Leon County, Florida.



  
MICHAEL T. COCHRAN, Director  
Department of Business and  
Professional Regulation  
Division of Florida Condominiums,  
Timeshares, and Mobile Homes  
Northwood Centre  
1940 North Monroe Street  
Tallahassee, Florida 32399-1030

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elements and association property by the board pursuant to s 718 113(5)”), In re Pet Decl Stmt, Brickell Townhouse Association/Block & Underwood, Case No. 2005020057/DS2005-015/BPR-2005-03774, at 6, (July 13, 2005) (finding that § 718.115(1)(e), Fla Stat. (2004) makes installation of hurricane shutters under board’s authority under § 718 113(5), Fla Stat a common expense) (section later amended to require if declaration made it a common expense)

**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 Andrew Speranzini, Esquire, Randall K. Roger & Associates, P.A., One Park Place, 621 NW 53<sup>rd</sup> Street, Suite 300, Boca Raton, FL 33487, this 13<sup>th</sup> day of May, 2010.

for:   
ROBIN MCDANIEL, Division Clerk

Copies furnished to:  
Janis Sue Richardson,  
Chief Assistant General Counsel