

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

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| CLERK | Brandon Nichols |
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IN RE: PETITION FOR DECLARATORY STATEMENT

Docket No. 2011033321

SEAWINDS PROPERTY OWNERS ASSOCIATION, INC.

DS 2011-054

DECLARATORY STATEMENT

The Department of Business and Professional Regulation, Division of Florida Condominiums, Timeshares, and Mobile Homes issues this Declaratory Statement under section 120.565, Florida Statutes.

PRELIMINARY STATEMENT

The Division received a Petition for Declaratory Statement from Seawinds Property Owners Association, Inc. June 30, 2011, seeking an opinion on whether its board of directors may authorize entering into a lease agreement for third-party property in accordance with the association's articles of incorporation and bylaws, or whether it must comply with section 718.111(7)(a), Florida Statutes, which requires 75 percent of the total voting interests of the Association to approve a lease when the declaration does not provide a manner for such approval.

The Division responded July 6, 2011, requesting further information regarding the lease. Specifically, the Division asked the association to clarify whether it was purchasing an underlying condominium or recreational property lease or contemplating the purchase of a lease for non-condominium property.

The association responded July 25, 2011, stating that it is a “master association” with two constituent condominium associations and that it seeks to lease as lessee a portion of the common elements of one of the constituent condominiums, Seawinds North Condominium Association, for use as a management office.

The Division received a Petition to Intervene and Response from Seawinds South Condominium Association, Inc. on September 12, 2011. Seawinds South asserted that its intervention is proper because it will be substantially affected by this proceeding. Seawinds South submitted that section 718.111(7)(a), Florida Statutes, prohibits the board of directors from leasing real property without the consent of 75 percent of the unit owners, and that the exception for the manner provided in the declaration does not apply because Seawinds POA's master declaration of covenants and restrictions is not a declaration as defined under section 718.103(15), Florida Statutes. It further argued that even if the master declaration is a declaration as defined by the Condominium Act, it contains no provision for an alternative procedure for approval.

Notice of receipt of the petition was published July 22, 2011, in Florida Administrative Weekly.

A hearing was not requested.

FINDINGS OF FACT

The following findings of fact are based on information submitted by Seawinds POA and Seawinds South. 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. Seawinds POA is a master condominium association comprised of two constituent condominiums, Seawinds North and Seawinds South, located on Singer Island, Palm Beach County, Florida.¹

2. Seawinds South is the condominium association that operates Seawinds South Condominium, a constituent condominium of Seawinds POA, located on Singer Island, Palm Beach County, Florida.²

3. Seawinds POA's membership is composed exclusively of condominium unit owners and their representatives, it operates property in which the unit owners have use rights, and membership in the association is a required condition of unit ownership.³

4. Seawinds POA seeks to enter into an agreement to lease, as lessee, from Seawinds North Condominium Association, Inc., as lessor, part of Seawinds North's common elements for the purpose of establishing a management office for the master association. It asks whether it may do so with only the authorization of the board of directors.⁴

5. Seawinds POA's master declaration of covenants and restrictions does not provide procedures for approval of entering into a lease agreement, but the articles of incorporation provide Seawinds POA with the authority to own, hold, improve, build upon, operate, maintain, convey, sell, lease, transfer, dedicate for public use, or otherwise dispose of real or personal property in connection with the affairs of the

¹ Pet for Decl Stmt at 1, Pet for Inter and Resp at 3-4

² Pet for Inter and Resp at 2

³ *Id* at 2

⁴ *Id*, Supp to Pet for Decl Stmt (July 12, 2011).

association.⁵ In contrast, the Seawinds POA master declaration of covenants and restrictions provides that the declaration may only be amended upon approval of seventy-five percent of the total voting interest.⁶

CONCLUSIONS OF LAW

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

7. Section 120.565, Florida Statutes, provides:

(1) Any substantially affected person may seek a declaratory statement regarding an agency's opinion as to the applicability of a statutory provision, or of any rule or order of the agency, as it applies to the petitioner's particular set of circumstances.

(2) The petition seeking a declaratory statement shall state with particularity the petitioner's set of circumstances and shall specify the statutory provision, rule, or order that the petitioner believes may apply to the set or circumstances.

8. Rule 28-105.001, Florida Administrative Code, provides:

A declaratory statement is a means for resolving a controversy or answering questions or doubts concerning the applicability of statutory provisions, rules, or orders over which the agency has authority. A petition for declaratory statement may be used to resolve questions or doubts as to how the statutes, rules, or orders may apply to the petitioner's particular circumstances. A declaratory statement is not the appropriate means for determining the conduct of another person.

9. Seawinds POA has standing to petition for a declaratory statement.⁷

10. Seawinds South has standing to intervene and respond.⁸

⁵ *Id.* at 3, Art IV, Sec 4 4, Arts of Incorp ; see Arts. of Incorp ; Master Decl of Covenants and Restrictions for Seawinds, Ass'n Bylaws.

⁶ Sec 9 5, Master Decl of Covenants and Restrictions for Seawinds POA

⁷ §§ 718 103(2), 120 565, Fla Stat. (2010)

11. Seawinds POA is a master condominium association under both the “function” and “constituency” tests of *Downey v. Jungle Den Villas Recreational Ass’n*, 525 So 2d 438 (Fla. 5th DCA 1988), subsequently codified as part of section 718.103(2), Florida Statutes.⁹

12. Section 718.111(7)(a), Florida Statutes, provides:

The association has the power to acquire title to property or otherwise hold, convey, lease, and mortgage association property for the use and benefit of its members. The power to acquire personal property shall be exercised by the board of administration. Except as otherwise permitted in subsections (8) and (9) and in section 718.114, no association may acquire, convey, lease, or mortgage association real property except in the manner provided in the declaration, and if the declaration does not specify the procedure, then approval of 75 percent of the total voting interests shall be required.

13. Section 718.111(7)(a), Florida Statutes, gives associations the power to execute property transactions for the benefit of their members. But such power is limited by the terms of the provision: “Except as otherwise permitted in subsections (8) and (9) and in s. 718.114, no association may acquire, convey, lease, or mortgage association real property except in the manner provided in the declaration, and if the declaration does not specify the procedure, then approval of 75 percent of the total voting interest shall be required.”

14. Associations have the power to engage in such transactions, but they may only exercise that power with approval, except in the case of subsection (8), the

⁸ §§ 718 103(2), 120 565, Fla Stat (2010) See *Chiles v Dep’t of State, Div. of Elections*, 711 So 2d 151, 155 (Fla. 1999)

⁹ The division determined that Seawinds POA was a master condominium association during its investigation in *Seawinds Property Owners’ Ass’n, Inc*, DBPR Case No 2010003610

purchase of leases, subsection (9), purchase of units, and section 718.114, agreements for recreational land leases and use rights, none of which apply here. Thus, the Seawinds POA board of directors can act only in the manner provided by the declaration of condominium, or in the absence of such a provision, by the 75 percent approval requirement of section 718.111(7)(a), Florida Statutes. The Seawinds POA master declaration does not provide the association with the power to lease other real property or a method of approving leases or other property transactions.

15. Despite the absence of such a provision in the master declaration, Seawinds POA asserts that its articles of incorporation authorize the board to acquire property. However, the statute is unambiguous: “if the *declaration* does not specify the procedure, then approval of 75 percent of the total voting interests shall be required.”¹⁰ Furthermore, articles of incorporation cannot stand in place of a declaration by way of incorporation. “The declaration, which some courts have referred to as the condominium’s ‘constitution,’ strictly governs the relationships among the condominium unit owners and the condominium association.”¹¹ The declaration, not the articles of incorporation, establish “mutual rights and obligations of the parties thereto” and “the true extent of the . . . use interest granted therein.”¹² Without consent, an amendment to the declaration, or a statutory provision provided in such an absence, “this enjoyment

¹⁰ § 718.111(7)(a), Fla Stat (emphasis added) Articles and bylaws may not be inconsistent with the statute, so where the statute requires a 75% vote or other vote required in the declaration, then the articles and bylaws may not lower the vote required. §§ 718.112(3)(d), 718.104(4)(m), Fla. Stat. *See also Palm Beach Leisureville Community Ass’n, Inc. v Raines*, 398 So 2d 471 (Fla 4th DCA 1981) (distinguishing between a condominium association, which derives its powers from the declaration of condominium, and a home owners’ association, which derives its powers from its corporate articles rather than its declaration of covenants).

¹¹ *Woodside Vill Condo. Ass’n v. Jahren*, 806 So 2d 452, 456 (Fla 2002)

¹² *Pepe v. Whispering Sands Condo. Ass’n*, 351 So 2d 755, 757 (Fla 2d DCA 1977)

and use cannot be impaired or diminished.”¹³ If the association wishes to acquire property, whether by lease or otherwise, it must gain approval from 75% of the total unit owner voting interests.

16. In *Towerhouse Condominium, Inc. v. Millman*, 475 So. 2d 674 (Fla. 1985), the Florida Supreme Court held that the association lacked the power to purchase real property. The court found that the property was not an appurtenance to the condominium parcels, because the declaration was not amended to submit the land to the condominium form of ownership.¹⁴ The legislature amended section 718.110(4), Florida Statutes, to address this holding: the “acquisition of property by the association and material alterations or additions to such property or the common elements in accordance with [sections] 718.111(7) or 718.113, [Florida Statutes], are not a material alteration or modification of the appurtenances to the units. The Legislature adopted a definition for “association property” to distinguish property acquired but not made a part of the common elements by amending the declaration.¹⁵ The Legislature thus intended for acquisitions of association property to not be appurtenances to the units.

17. Because the Seawinds POA master declaration of covenants and restrictions does not contain a provision specifying the procedures for approval of the acquisition of a lease, and because such a lease would materially alter or add to the association property, the board’s proposal must be approved by at least 75 percent of the total voting interests as required under section 718.111(7)(a), Florida Statutes.

¹³ *Id* at 757-58

¹⁴ 475 So 2d at 677


¹⁵ Association property is real or personal property that is not part of the common elements. See § 718.103(3), Fla Stat ; Final Staff Analysis of Ch 90-151 Laws of Fla , Fla House of Reps Comm on Judiciary, at 1 (July 12, 1990) (“As amended, association property would also include real and personal property leased by the association and not part of the common elements.”) (on file with Fla State Archives, Dep’t of State) The amendment addressed the question raised in *Tower House*

For the reasons stated above it is hereby:

ORDERED that Seawinds Property Owners Association, Inc. may not acquire a lease of property for the purpose of a management office without approval of at least seventy-five percent of the total voting interests, as required by section 718.111(7)(a), Florida Statutes.

DONE and **ORDERED** this 5th day of October 2011, at Tallahassee, Leon County, Florida.





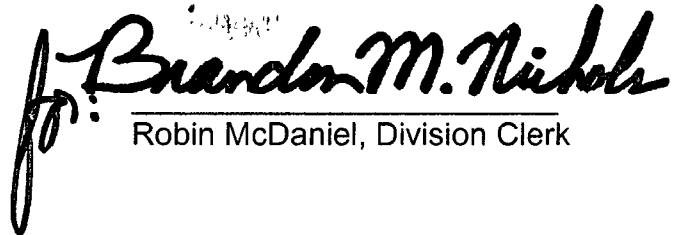
MICHAEL T. COCHRAN, Director
Department of Business and
Professional Regulation
Division of Florida Condominiums, Timeshares,
and Mobile Homes
Northwood Centre
1940 North Monroe Street
Tallahassee, FL 32399-1030

NOTICE OF RIGHT TO APPEAL

THIS FINAL ORDER CONSTITUTES FINAL AGENCY ACTION AND MAY BE APPEALED BY ANY PARTY ADVERSELY AFFECTED 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 Seawinds Property Owners Association, c/o Tatiana B. Yaques, Esq., 250 Australian Avenue South, 5th Floor, West Palm Beach, FL 33401, and Allen M. Levine, Esq., Becker & Poliakof, P.A., 3111 Stirling Road, Fort Lauderdale, FL 33312, on this 10th day of October 2011.


Robin McDaniel, Division Clerk

Copies furnished to:

Janis Sue Richardson
Chief Attorney