

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

FILED	
Department of Business and Professional Regulation Deputy Agency Clerk	
CLERK	Brandon Nichols
Date	5/30/2012
File #	2012-03581

IN RE: PETITION FOR DECLARATORY STATEMENT

Docket No. 2012010861

WATERCREST OWNERS ASSOCIATION, INC.

DS 2012-023

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 March 7, 2012 from Watercrest Owners Association, Inc. seeking clarification of sections 718.113 and 718.110, Florida Statutes. Specifically the petition requests a Division statement on whether the association's plan to change a common element exercise room to a manager's office and designating the men's exercise room as a shared exercise room is a material alteration requiring a unit owner vote under section 718.113(2) or 718.110(4), Florida Statutes.

The Division responded March 9, 2012 to acknowledge receipt of the petition and to alert Petitioner the Division would advise them upon a completion of a review of the question. Copies of the Petition and the acknowledgment were furnished to the association.

Notice of the petition was published March 23, 2012 in the *Florida Administrative Weekly*.

A hearing was not requested.

FINDINGS OF FACT

These findings of fact are based on information set forth in the petition and accepted by the Division as submitted for the purposes of this order. The Division takes no position as to their accuracy.

1. Watercrest Owners Association, Inc. is the association which operates Watercrest Condominium in Panama City Beach, Bay County, Florida.¹

2. Association's condominium consists of "one seventeen story building" which includes residential units and among other areas, a men's exercise room on the second floor and a women's exercise room on the third floor.²

3. Association proposes to "convert the major portion of the women's exercise room into a manager's office . . . and to convert the men's exercise room into a unisex exercise room."³

4. Common elements at Watercrest include recreational areas and facilities and "tangible personal property required for the maintenance and operation of the condominium, as well as the items stated in the Condominium Act."

5. The two exercise rooms are recreational common elements of the condominium.⁴

¹ Pet for Decl Stmt

² *Id.*

³ Pet for Decl Stmt Petition further notes that the women's bathroom and sauna would remain in place.

⁴ Ex F, Decl. of Condo.

6. The current office and both men's and women's restrooms are common elements of the condominium.⁵

7. Owners of each apartment own an undivided share of the common elements as an appurtenance to their units.⁶

8. Any substantial alteration of the common elements must be approved by two-thirds (2/3) of the voting interests except as provided in the by-laws.⁷

CONCLUSIONS OF LAW

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

10. 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.

11. 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

⁵ *Id.*

⁶ Decl. of Condo. at 8. ("The owner of each apartment shall own a share and certain interest in the condominium property, which share and interest is appurtenant to the several apartments as [c]ommon [e]lements . . ."); see § 718.106(2)(a), Fla. Stat.

⁷ Decl. of Condo. at 12 ("[T]here shall be no substantial alteration of the real property constituting the common elements without prior approval in writing of not less than two-thirds of the voting interests except as provided in the By-laws.") No alternate provision for material alteration exists in the By-laws

statement is not the appropriate means for determining the conduct of another person.

12. Watercrest Owners Association has standing to petition for a declaratory statement.⁸

I. Change of the Exercise Room as Material Alteration

13. 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.⁹

14. Applying the material alteration standards from *Sterling Village Condominium, Inc. v. Breitenbach*, the conversion of the women's exercise room into an office represents a material alteration.¹⁰ However, the men's exercise room remains an exercise room--just one shared by all unit owners, so there is not a material alteration of the men's exercise room.¹¹

15. Under *Sterling*, a material alteration is one that "palpably or perceptively var[ies] or change[s] the form, shape, elements or specifications of a building from its

⁸ §§ 718.103(2), 120 565, Fla Stat (2011)

⁹ § 718 113(2), Fla Stat. (2011) (emphasis added).

¹⁰ *Sterling Village Condo Inc. v Breitenbach*, 251 So 2d 685, 687 (Fla 4th DCA 1971)

¹¹ If the only change were to convert a unisex gym to a gym for use by all, this would not be a material alteration of the common elements or the appurtenances. See *Long v. Ocean Harbour of Islamorada Condo. Ass'n., Inc.*, Arb. Case No 2004-02-8316, Final Order (Aug. 16, 2005) (holding that a change in exercise equipment did not "substantially affect the use of or function of the clubhouse").

original design or plan, or existing condition, in such a manner as to appreciably affect or influence its function, use, or appearance.”¹²

16. In *Sterling*, the defendants replaced the screens on their porch with glass jalousie, without the consent of the association.¹³ The court held that this change constituted a material alteration.¹⁴ It reasoned that the glass functioned differently than the screens, particularly in keeping out rain and dust, which could lead to a different use of the room.¹⁵ The proposed change in *Watercrest*, much like *Sterling*, would change the function, use, and appearance of a common element. Changing the women’s exercise room into an office will necessarily change the function and use as it can no longer be used for exercising. Further, the change will alter the appearance as office furniture will replace the exercise equipment.

17. Moreover, changing a common element recreational room into an office or meeting room represents a material alteration; therefore, changing the women’s exercise room into an office would be a material alteration.¹⁶ *Ladolcetta* and *Goodman* both dealt with the conversion of a recreational room into an office or meeting room.¹⁷ The arbitrator in *Ladolcetta* found that the change of a game room into a manager’s office altered the function, use, and appearance of the common element.¹⁸ Much like in *Ladolcetta*, this case deals with removing items that were in a recreational room and moving in office furniture. Further, as the arbitrator found in *Ladolcetta*, converting the

¹² *Sterling*, 251 So 2d at 687.

¹³ *Id* at 686

¹⁴ *Id* at 688

¹⁵ *Id.* at 687

¹⁶ See *Ladolcetta v Carlton Condominium Ass’n., Inc.*, Arb Case No 94-0499, Summary Final Order (Apr 24, 1995), *Goodman v. Winston Towers 300 Ass’n., Inc.* Arb Case No 93-0368, Final Order (June 16, 1994).

¹⁷ *Ladolcetta*, Arb Case No. 94-0499; *Goodman*, Arb Case No 93-0368.

¹⁸ *Ladolcetta*, Arb Case No 94-0499 at 9.

space into an office necessarily restricts access.¹⁹ The resulting limitation of access and change in appearance indicated in *Ladolcetta* shows that the conversion of the women's exercise room into an office would be a material alteration of a common element.

18. This case is also factually similar to *Goodman*, where the arbitrator held that subdividing a hospitality room to build a meeting room was a material alteration of the common elements.²⁰ The arbitrator noted that the construction of the subdividing wall changed the appearance of the room and affected the use of the room since it had no more access to natural light.²¹ Much like *Goodman*, the use and the appearance of the exercise room would change, taking the form of an office.

19. Even though the association's proposed alterations would result in a material alteration, the alterations would not be subject to the seventy-five percent (75%) vote requirement of section 718.113(2)(a), Florida Statutes, because Watercrest's Declaration of Condominium provides for material alterations to the common elements.²²

20. Since the conversion of the women's locker room into an office would change the function, use, and appearance of a common element as it exists today, such a conversion would be considered a material alteration subject to a vote of two-thirds (2/3) of the voting interests, as required in the Declaration of Condominium²³

II. Change of the Exercise Room as Change to Appurtenances

21. Section 718.110(4) Florida Statutes, provides:

¹⁹ *Id.*

²⁰ *Goodman*, Arb Case No 93-0368 at 7.

²¹ *Id.* The residents used the hospitality room for art classes and the loss of natural light affected the class

²² Decl of Condo at 12

²³ *Id.*

Unless otherwise provided in the declaration as originally recorded, no amendment may change the configuration or size of any unit in any material fashion, materially alter or modify the appurtenances to the unit, or change the proportion or percentage by which the unit owner shares the common expenses of the condominium and owns the common surplus of the condominium unless the record owner of the unit and all record owners of liens on the unit join in the execution of the amendment and unless all the record owners of all other units in the same condominium approve the amendment. The acquisition of property by the association and *material alterations or substantial additions to such property or the common elements by the association in accordance with s. 718.111(7) or s. 718.113*, and amendments providing for the transfer of use rights in limited common elements pursuant to s. 718.106(2)(b) *shall not be deemed to constitute a material alteration or modification of the appurtenances to the units.*²⁴

22. Since the beneficial use of the common elements will not change and since the shares of the common elements will not change, converting the women's exercise room into an office will not represent a material alteration of the appurtenances.²⁵ Under this reasoning, changing the unisex men's exercise room into a shared exercise room is also not a material alteration of an appurtenance.

23. The conversion of the women's exercise room into an office will not change the beneficial use of the common elements and therefore will not result in a material alteration of the appurtenances.²⁶ In *Ladolcetta*, the arbitrator held that conversion of a game room into a manager's office did not represent a material change to the appurtenances.²⁷ The arbitrator reasoned that because the common element was

²⁴ § 718.110(4), Fla. Stat. (2011) (emphasis added)

²⁵ See *Ladolcetta*, Arb. Case No. 94-0499, *Berger v. Island's End Condo. Ass'n., Inc.*, Arb. Case No. 96-0341, Summary Final Order (Dec. 18, 1997).

²⁶ See *Ladolcetta*, Arb. Case No. 94-0499

²⁷ *Id.*

not being used in a way that “essentially forecloses its use by unit owners generally”²⁸ and because unit owners still had access to other recreational areas, there was no material alteration to the appurtenances.²⁹ Much like in *Ladocetta*, office space in Watercrest is considered part of the common elements.³⁰ Further, just as the unit owners in *Ladolcetta* still had access to other recreational areas that served primarily the same function, so too would the Watercrest unit owners have access to essentially the same services. The unit owners would still have access to exercise equipment and since the women’s sauna and bathroom facilities would remain in place, there would be no real loss of any recreational service.³¹

24. Further, since there is no change to the shares in the common elements, 718,110(4), Florida Statutes, is not violated.³² In *Berger* the change at issue was a conversion of a dock into a fishing pier.³³ The arbitrator in the case held that this was not a material change to the appurtenances, noting:

[T]he unit owners continued to share in the common expenses in the same proportion or percentage, and no appurtenance identified in the statute or documents was disturbed [P]etitioners' position that the dock structure itself is an appurtenance is without support in the declaration and leads to a result which fatally blends 718.113(2) into 718.110(4), ignoring the intended distinction between the two statutory sections. If, as urged by the petitioners, physically changing the common elements, or one component of the common elements, requires a 100% vote, then an association would never be able to make any material alteration to the common elements without 100% vote, and section 718.113(2), Florida Statutes, with its typically lower vote requirement, would exist without a

²⁸ *Id.*, at 11.

²⁹ *Id.* at 12

³⁰ Ex F, Decl of Condo.

³¹ Pet for Decl Stmt This further alleviates any problems under § 718.106(3), Fla Stat (2011) since there is no change in the purpose of the common elements

³² *Berger*, Arb Case No. 96-0341.

³³ *Id.* at 3

purpose, since the higher vote required by section 718.110(4), would always apply. An association would effectively be precluded from performing any of the changes described by section 718.113(2) without the vote required by section 718.110(4), Florida Statutes³⁴

Much like in *Berger*, there is no indication in this case that the change of the women's exercise room into an office would change the ownership shares of the common elements.

25. There is no indication that common elements will be replaced by limited common elements, nor is there evidence of any exclusion, therefore this case is like neither like *Bogikes v. Windmill Village by the Sea Condominium*³⁵ nor *Kamfjord v. Harbour Green Condominium*.³⁶ *Bogikes* dealt with a construction of docks on the common elements.³⁷ The arbitrator found that this changed the rights to the common elements since certain unit owners could effectively exclude others from certain areas.³⁸ This does not seem to be the case in *Watercrest*. There is no indication any individual unit owners would have exclusive access, or even effectively exclusive access, to the office. Further, unlike *Kamfjord*, where the unit owner attempted to extend a limited common element patio onto the common elements, there is no conversion of common

³⁴ *Id* at 9, 16 *But see Wellington Prop. Mgmt. v. Parc Corniche Condo. Ass'n, Inc.*, 755 So. 2d 824 (Fla 5th DCA 2000) (holding that where the declaration was silent as to the vote required to alter the common elements, it could not be amended by a bare majority to allow a material alteration to the appurtenances with less than a 100% vote under § 718 110(4)). *Wellington* does not apply because its declaration was silent and the court found § 718 113(2) immaterial as the vote was less than 75% 755 So. 2d at 826 n 2

³⁵ *Bogikes v. Windmill Village by the Sea Condominium No.1 Ass'n., Inc* , Arb Case No 97-0159, Final Order (June 12, 1998)

³⁶ *Kamfjord v. Harbour Green Condominium Ass'n , Inc.*, Arb Case No 93-0173, Summary Final Order (Oct 28, 1993)

³⁷ *Bogikes*, Arb Case No 97-0159, at 7

³⁸ *Id.*

elements into limited common elements here.³⁹ The new office would be considered a common element and therefore, would not cause the conversion at issue in *Kamfjord*.

26. Therefore, since the conversion of the women's exercise room into an office would neither change the beneficial use of the common elements, nor change the ownership shares of common elements, such a conversion would not constitute a material alteration to the appurtenances.

III. Conclusion

27. The conversion of the men's exercise room is considered part of the project to convert the women's exercise room into an office. Because it does not change the use of the room--it remains an exercise room--it is not a material alteration to the common elements or a change to an appurtenance by itself; however, as an integral part of the project, the vote required is a vote on the project. The project is a material alteration to the common elements but not a material alteration to the appurtenances.

28. Therefore, this project would require the two-thirds (2/3) vote under the declaration of condominium for a material alteration to the common elements.

For the reasons stated above it is hereby:

ORDERED that Watercrest Owners Association, Inc.'s plan to convert the men's exercise room into a shared exercise room and change the women's common element exercise room to a manager's office is a material alteration of the common elements requiring a two-thirds unit owner vote under its declaration as provided by section 718.113(2)(a), Florida Statutes, and not a vote under 718.110(4), Florida Statutes, because it does not represent a material alteration of the appurtenances.

³⁹*Kamfjord*, Arb Case No. 93-0173, at 9, 10, See Ex F, Decl of Condo (showing the items to be converted as common elements).

DONE and ORDERED this 25th day of May 2012, at Tallahassee, Leon County, Florida.



A handwritten signature in black ink, appearing to read "Michael T. Cochran", written over a horizontal line.

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 Watercrest Owners Association, c/o Timothy J. Sloan, Esq., Timothy J. Sloan, P.A., Post Office Box 2327, Panama City, FL 32402-2327 on this 30th day of may 2012.

for: Brandon M. Nichols
Robin McDaniel, Division Clerk

Copies furnished to:

Janis Sue Richardson
Chief Attorney