

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

<b>FILED</b>	
Department of Business and Professional Regulation Deputy Agency Clerk	
CLERK	Brandon Nichols
Date	<b>5/31/2013</b>
File #	<b>2013-03080</b>

IN RE: PETITION FOR DECLARATORY STATEMENT

Docket No. 2013013568

Briny Breezes, Inc., Petitioner.

**DS 2013-024**

**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 27, 2013 from the licensed community association manager for Briny Breezes, Inc. (hereinafter "the association") seeking a declaratory statement as to whether the board of the association may use its reserve funds to repair a seawall to prevent flooding, under section 719.106(1)(j)(3), Florida Statutes, where its bylaws require a majority of the membership vote to approve expenditures over \$30,000.

Division acknowledged the petition on March 29, 2013 and asked the manager to file a motion to appear as a qualified representative or have association counsel appear on the association's behalf. Association counsel refiled the petition as the association's representative on April 15, 2013.<sup>1</sup>

<sup>1</sup> Amend Pet (Apr 15, 2013)

Notice of receipt of the petition was published in the April 2, 2013 issue of the Florida Administrative Register. A hearing was not requested.

### FINDINGS OF FACT

The material facts are set out in the petition. The Division takes no position as to the accuracy of the facts and accepts them as submitted by the petitioner for the purposes of issuing this order.

1. Briny Breezes, Inc., is a cooperative mobile home park governed under chapters 719 and 607, Florida Statutes.<sup>2</sup>

2. Two seawalls, which protect the association's property, are in need of repairs and upgrades. In the past, the common elements and some mobile homes were flooded during high tides and after severe weather.<sup>3</sup>

3. The board of directors engaged an engineer to report on the condition of the seawalls, the flooding, and present a plan to repair and maintain the existing sea walls.<sup>4</sup> Based upon the report, the board determined that further flooding can be mitigated by repairs and upgrades to the seawall at an estimated cost of \$140,000.<sup>5</sup> Without repair, the property is at risk of further flooding and property damage.<sup>6</sup>

4. The association maintains reserve accounts for capital expenditures and deferred maintenance, including an account for the repair of the seawalls that protect the property.<sup>7</sup> There are currently adequate funds in the reserve account to cover the

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<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*, ex B.

<sup>5</sup> *Id.* at 2 & ex B.

<sup>6</sup> Amend Pet

<sup>7</sup> *Id.*

costs of the seawall repair to protect the low lying areas of the community from flooding.<sup>8</sup> The account has a present balance of \$204,939.

5. Articles 7.50 and 7.51 of the association's declaration impose spending limitations on the board of directors as follows:

**Section 7.50: CAPITAL EXPENDITURES LIMITED:** The Board of Directors shall have the power and authority to include in the current fiscal year budget and expend or approve the expenditures of monies of the corporation for Capital Improvements in an amount aggregating not more than Thirty Thousand dollars in any fiscal year. Expenditures in excess of this amount in any fiscal year shall first be approved by an affirmative vote of fifty-one (51) percent of the total number of shares outstanding in the Corporation. For purposes of this section, expenditures for Capital Improvements are defined as capital expenditures, which expand the services and facilities of the Corporation.

**Section 7.51: REPLACEMENT OF CAPITAL ASSETS:** The Board of Directors shall have the power and authority to include in the current fiscal year budget and expend or approve the expenditures of monies of the corporation for the replacement of Capital Assets in an amount aggregating not more than Thirty Thousand (\$30,000) dollars in any fiscal year. Expenditures in excess of this amount in any fiscal year shall first be approved by an affirmative vote of fifty-one (51) percent of the total number of shares outstanding in the Corporation. For purposes of this section, of replacement of Capital Assets are defined as capital expenditures which do not expand the services and facilities of the Corporation.<sup>9</sup>

6. The association submitted a Petition for Declaratory Statement to the Division seeking an opinion as to whether the association may proceed with the repair of the seawalls without first obtaining approval from the membership. The association argues that the members have already approved the expenditure by voting each year to fund the sea wall reserve account.

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<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

## CONCLUSIONS OF LAW

7. The Division has jurisdiction to enter this order pursuant to sections 719.501 and 120.565, Florida Statutes.

8. 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.

9. Rule 28-105.001, Florida Administrative Code (2007), 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.

10. The association has standing to petition for a declaratory statement.<sup>10</sup>

11. Section 719.104(5), Florida Statutes, provides: "The association has the power to make and collect assessments and to lease, *maintain, repair, and replace the common areas* (emphasis added)." The Condominium Act contains substantially the same language.<sup>11</sup> Courts have interpreted similar provisions of section 718, Florida Statutes, which are relevant to this opinion.

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<sup>10</sup> §§ 718 103(28), 120.565, Fla Stat (2012)

<sup>11</sup> § 718 113(1), Fla Stat (2012) ("Maintenance of the common elements is the responsibility of the association")

12. In construing the Florida law governing the authority of an association board to authorize expenditures for repairs to common property, a federal bankruptcy court held: “[A]n association board has both the authority and the duty to maintain the common elements. . . . In fulfilling the duty to maintain the common elements, the board may assess the members for common expenses without a vote of the unit members.”<sup>12</sup> This authority is derived from the statute, and does not require an interpretation of the association’s governing documents.

13. State courts have recognized that the board’s statutory duty and authority to maintain the common elements trumps any provisions in the association’s governing documents requiring member approval for expenditures that are necessary for maintenance. In *Tiffany Plaza Condominium Association, Inc. v. Spender, et al.*, 416 So. 2d 823 (Fla. 2d DCA 1982), the court held that the board had authority to authorize the construction of a rock revetment necessary to protect the common elements without the consent of unit owners. Similarly, in *Ralph v. Envoy Point Condominium Ass’n, Inc.*, 455 So. 2d 454, 455 (Fla. 2d DCA 1984), the court stated: “Simply because necessary work for maintenance may also constitute alterations or improvements does not nullify a condominium board’s authority and duty to maintain the condominium common elements.” Relying on the court’s guidance, the arbitrator in *A.N. Inc. v. Seaplace Ass’n, Inc.*, Arb. Case No. 98-4251, at 6 (1998) (Powell, Arb.) held that expenditures which are “reasonably necessary for maintenance” do not require a vote of the members.<sup>13</sup>

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<sup>12</sup> *In re Colony Beach & Tennis Club Ass’n, Inc.*, 456 B R 545, 561-62 (Bankr. M.D. Fla 2011)

<sup>13</sup> See also *Farrington v. Casa Solana Condo. Ass’n, Inc.*, 517 So 2d 70 (Fla 3d DCA 1987) (holding that board action approving repairs to a building’s stucco exterior to seal cracks causing water damage was not a material alteration to common elements, which would have required unit owner approval, but a reasonable exercise of board’s business judgment in making necessary repairs to maintain common elements), *Cottrell v Thornton*, 449 So 2d 1291 (Fla 2d DCA 1984) (holding that a vote of the unit

14. Further, decisions regarding the maintenance of common elements fall within the board's discretion,<sup>14</sup> and are generally upheld as long as there is a reasonable basis for the decision.<sup>15</sup> Therefore, the board's decision that it is necessary to repair the common elements will not be questioned in this proceeding, which accepts the facts as stated.<sup>16</sup> As recognized in *Ralph*, even if expenditures result in alterations or improvements to the common elements, it is within the board's authority to authorize those expenditures without member approval where they are necessary to protect the common elements.<sup>17</sup> However, if the contemplated upgrades to the sea wall constitute a material alteration to the common elements that go beyond the necessary repair to protect the common elements, the board's decision is open to challenge in arbitration or court where the question of fact as to the extent of the change may be determined.<sup>18</sup>

15. The association argues that the members' annual approval and funding of a reserve account for a sea wall repair satisfies the vote required under the bylaws. One interpretation of the cap on expenditures would be a cap on all expenditures for assets; however, another interpretation offered by the association is that the bylaw cap

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owners is not required where the work is necessary to maintain the common elements and is not a material or substantial alteration or addition to the common elements)

<sup>14</sup> *A.N Inc v Seaplace Ass'n, Inc.*, Arb Case No 98-4251, at 6 (1998) (Powell, Arb )

<sup>15</sup> *Hollywood Towers Condo. Ass'n, Inc. v. Hampton*, 40 So 3d 784, 787-88 (Fla 4th DCA 2010) ("[T]he association had the authority to repair the concrete on [unit owner's] balcony, which is a common element under the declaration of condominium. The association may repair and maintain common elements as long as its decision to do so is reasonable"), see also *Lake Region Packing Ass'n, Inc v Furze*, 327 So 2d 212, 216 (Fla 1976) ("In Florida, corporate directors generally have wide discretion in the performance of their duties and a court of equity will not attempt to pass upon questions of the mere exercise of business judgment, which is vested by law in the governing body of the corporation" (citing *Orlando Orange Groves v Hale*, 161 So. 284 (Fla 1935)))

<sup>16</sup> However, if the question is later tried and the facts show that the sea wall repair constituted a material alteration to the common elements beyond just a necessary repair, then this statement would no longer apply because the facts would have changed. See *Seaplace*, Case No 98-4251, at 9-11 (changing asphalt tennis court to clay was a material alteration and not just a repair and required unit owner approval)

<sup>17</sup> *Ralph v. Envoy Point Condo. Ass'n, Inc.*, 455 So. 2d 454, 455 (Fla. 2d DCA 1984)

<sup>18</sup> See *Seaplace*, Case No. 98-4251, at 9-11 (changing asphalt tennis court to clay was a material alteration and not just a repair, so unit owner approval was required)

excludes those assets for which reserves have been set aside and act as a cap for repairing those assets for which no reserves are set aside. Another interpretation would limit the two provisions to their stated intention of either "improvement" or "replacement." Repairing the seawalls is not replacing the seawalls or adding a new improvement to the property. The upgrade, however, might be. The division declines to interpret the bylaw provision in this proceeding.<sup>19</sup>

16. The safest course for the board is to get a unit owner vote. However, one is not required to simply repair the sea wall to protect the common elements.

For the reasons stated above it is hereby:

**ORDERED** that the Briny Breezes, Inc. may use its reserve funds to make the necessary repair to its common element seawall to prevent flooding, under section 719.106(1)(j)(3), Florida Statutes, without a unit owner vote to approve the expenditure under its bylaws, which require a majority of the membership vote to approve expenditures over \$30,000.

**DONE and ORDERED** this 28<sup>th</sup> day of May 2013, 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

<sup>19</sup> See *Peck Plaza Condo. v. Div. Fla. Land Sales, Condominiums, and Mobile Homes, Dep't of Bus. Reg.*, 371 So. 2d 152 (Fla. 1st DCA 1979) (§ 718.501 does not vest jurisdiction in the Division to interpret and enforce ambiguous provisions in declarations of condominiums as interpretation of contracts is strictly a judicial function)

**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 Mark D. Friedman, Esq., 3111 Stirling Road, Fort Lauderdale, FL 33312, on this 31<sup>st</sup> day of may 2013.

  
Agency Clerk's Office

Copies furnished to:

Janis Sue Richardson  
Chief Attorney