

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	
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Date	9/11/2014
File #	2014-06889

IN RE: PETITION FOR DECLARATORY STATEMENT

Docket No. 2014024560

Roger and Pam Young, Petitioners
Bonita Beach Club Association, Inc.

DS 2014-072

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 June 9, 2014 from Roger and Pam Young (hereinafter "the Youngs") seeking a declaratory statement as to whether Bonita Beach Club Association, Inc. (hereinafter "the association") may convert common element association property to limited common elements upon the vote required to amend the declaration pursuant to section 718.110(14), Florida Statutes, where the property at issue is a dock facility that is currently exclusively claimed and operated by a private, third-party corporation and its assignees.

Division counsel responded June 13, 2014, to inform the petitioners that a declaratory statement is a limited administrative proceeding and that a declaratory statement would not be issued if the facts are in dispute.

Notice of receipt of the petition was published in the June 16, 2014 issue of the Florida Administrative Register. Notice of the petition was served on the association, but the Division did not receive a response. The petitioners requested a hearing, but the Division declined to hold a hearing pursuant to its discretion under Rule 28-105.003, Florida Administrative Code.

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 petitioners for the purposes of issuing this declaratory statement.

1. Bonita Beach Club, A Condominium is a condominium governed by chapter 718, Florida Statutes, consisting of 198 condominium units in Lee County, Florida.¹
2. Bonita Beach Club Association, Inc. is the condominium association responsible for the operation of Bonita Beach Club, A Condominium.²
3. The condominium was originally constructed in the 1970s. At that time, there was no dock facility on the property.³
4. Around 1981, BBC Club Boat Slips, Inc. began constructing a dock facility in the Big Hickory waterway just to the east of the condominium buildings. BBC Club Boat Slips, Inc. is a Florida not-for-profit corporation formed for the purpose of constructing, maintaining, possessing, and selling exclusive use rights in and to the dock facility.
5. The submerged lands on which the dock facility was built belong to the State of Florida, but the riparian rights and uplands adjacent to the dock are common elements of the association and belong to all of the condominium unit owners in undivided shares.

¹ Amended and Restated Decl. of Condo., Bonita Beach Club, A Condo., Art. 1.

² Id. at Art. 3.

³ Pet. Decl. Stmt.

The dock facility was built with the necessary permits and authorization from the State of Florida. The initial construction of the dock facility was done with the knowledge of the association's board.

6. BBC Club Boat Slips, Inc. operates and maintains the dock facility, and costs of construction, maintenance, and repair are paid by BBC Club Boat Slips, Inc. Although the boat slips are exclusively claimed by BBC Club Boat Slips, Inc. and its assignees, they have never been converted to limited common elements. Unit owners in the association are allowed to retain their boat slips upon sale of their units.

7. In addition to the boat slips, the dock facility contains a fishing pier and access walkway that has been utilized by unit owners at the condominium as a common element by permission of BBC Club Boat Slips, Inc.

8. The board of directors of the association has circulated a proposed amendment to the declaration of condominium which, if approved, would convert common elements including riparian rights, sovereign submerged lands, access walkways, finger piers, and thirty-four boat slips to limited common elements appurtenant to a unit at the condominium. The proposed amendment amends article 22 of the association's declaration to read (in part):

- A. For the purpose of this Section 22 of the Declaration, Section 718.110(14), Florida Statutes (2013) is hereby incorporated into the Declaration.
- B. Adjacent and continuous to the westernmost part of the Common Element uplands of the Condominium is a waterway known as Big Hickory Pass. Riparian rights in these waters are part of the Common Elements of the Condominium. Pursuant to and as depicted in the Sovereignty Submerged Lands Lease, as renewed, amended, or modified from time to time, there has been constructed upon said submerged lands that are riparian on the Common Element uplands a dock facility that is comprised of common element dock, common

element fishing pier, limited common element dock and thirty-four (34) limited common element boat slips (hereinafter collectively the "dock facility"). The initial construction and ongoing maintenance of the dock facility is hereby approved as a material alteration of the Common Elements pursuant to Section 718.113(2)(a), Florida Statutes, and Section 7.4 of this Declaration, as amended from time to time.

- C. Use rights in the thirty-four (34) individual boat slips are and shall continue to be assigned to individual units as a Limited Common Element appurtenant to the unit to which they are assigned. The individual boat slips shall initially be assigned to the unit owners who currently hold the use rights as reflected in the boat slip layout map and list to be maintained by the Association. . . .
- D. The fishing pier portion of the dock facility and the shore-perpendicular portion of the dock facility that provides access to the fishing pier portion of the dock facility shall be part of the Common Elements for the general non-exclusive use of the Unit Owners, their family members, guests and tenants. The shore-parallel portions of the dock facility, the shore-perpendicular portions of the dock facility providing access to the shore-parallel portions of the dock facility, and the finger piers, pilings, and other improvements which constitute the individual boat slips and access to the boat slips shall be limited common element for the exclusive use of the unit or units to which the boat slips are assigned. . . .
- E. The right of exclusive use of each limited common element boat slip passes with title to the Unit to which it is assigned, whether or not separately described, and cannot be separated from it except as provided herein. . . .

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

12. The petitioners have standing to petition for a declaratory statement as unit owners.⁴

13. There are several sections of chapter 718, Florida Statutes that are relevant to this petition. First, section 718.113(2), Florida Statutes, states, in part:

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.

14. Notwithstanding section 718.113(2), Florida Statutes, several Division arbitration decisions and declaratory statements have held that certain changes to the common elements constitute a modification to the appurtenances to the unit which trigger a 100% unit owner vote under section 718.110(4), Florida Statutes. That section provides, in part:

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

⁴ § 120.565, Fla. Stat.

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.

15. Under the relevant arbitration decisions and previous Division declaratory statements, whether a proposed change to the common elements triggers the 100% vote required by section 718.110(4), Florida Statutes, depends on the nature and character of the change. For example, in Bogikes v. Windmill by the Sea Condominium No. 1 Association, Inc., Arb. Case No. 97-0159, Final Order (June 12, 1998), the Division arbitrator held that an association rule that permitted unit owners to construct private docks on common element association property required 100% unit owner approval under section 718.110(4), Florida Statutes, because it would allow “owners to colonize portions of the common elements for their exclusive use as docks, [which] changes the unit and the appurtenant right to use the common elements by making less common elements available for use by the membership generally.”⁵ However, after a lengthy review of the relevant law, the arbitrator in Cascades of Falling Waters, Inc. v. Refuse, Arb. Case No. 00-01625, Summary Final Order (May 4, 2001), found that “Section 718.110(4), F.S., only addresses *material* changes to the appurtenances to the units. Nonmaterial changes are not regulated by the statute.” Nonetheless, in that case, the arbitrator found that the construction of a patio on the common elements adjacent to an owner’s unit required compliance with section 718.110(4), Florida Statutes, because a single unit owner “asserted permanent dominion and control over a 140 square foot portion of the common elements.” Thus, while not all changes to the common elements

⁵ See also Gilmore v. Ciega Verde Condo. Ass’n, 601 So. 2d 1325 (2d DCA 1992) (holding that tennis court was an appurtenance to the unit within the meaning of 718.110(4) and the association’s governing documents that could not be converted to a parking lot without 100% unit owner vote); In re: Pet. for Decl. Stmt., Bay Point Studio Villas II Ass’n, Inc., DS 2005-020, No. 2005022392 (2005) (holding that individual unit owners could not convert common element attic space into private lofts without complying with 718.110(4)).

will trigger the statute and require a 100% vote, a permanent, physical invasion of the common elements by an individual unit owner to the exclusion of the other owners, which in effect allows a single owner to colonize the common elements without the consent of all of the other owners, is not permissible.

16. In this case, the association intends to rely on section 718.110(14), Florida Statutes, which the Florida Legislature added in 2010—after the decisions cited above.⁶

That section provides:

Except for those portions of the common elements designed and intended to be used by all unit owners, a portion of the common elements serving only one unit or a group of units may be reclassified as a limited common element upon the vote required to amend the declaration as provided therein or as required under paragraph (1)(a), and shall not be considered an amendment pursuant to subsection (4). This is a clarification of existing law.

17. In effect, section 718.110(14), Florida Statutes, provides that only the vote required to amend the declaration—not a 100% unit owner vote—is required where the association is merely “reclassifying” a portion of the common elements that are “serving only one unit or a group of units.” While it may be the case that, in its current form, the dock facility is serving only a limited number of unit owners, it is not disputed that the dock is built on common element property to which all of the unit owners have use rights under the association’s governing documents. As such, the property was “designed and intended to be used by **all** unit owners,” and this section does not apply. Further, by its own terms, section 718.110(14), Florida Statutes, was intended merely to clarify the law as it existed in 2010. The law when section 718.110(14), Florida Statutes, was adopted did not permit individual unit owners to colonize the common elements to the exclusion of other unit owners (see *supra*), and section 718.110(14), Florida Statutes, does not change that result.

18. The Division recognizes that this case is unique in that the property has been treated as a limited common element for several decades. However, there appears to be little dispute that the initial invasion of the common elements by a limited number of unit owners was improper, and the Division cannot approve a violation of the statute

⁶ See ch. 2010-174, Laws of Fla. (2010).


merely because of the passage of time. While other legal or equitable remedies may be available to unit owners who have invested in the dock facility, the Condominium Act does not provide a summary procedure for approving the wrongful invasion of the common elements by a handful of unit owners.

For the reasons stated above it is hereby:

ORDERED that Bonita Beach Club Association, Inc. may not reclassify the common element dock facility to limited common elements with the vote required to amend the declaration under section 718.110(14), Florida Statutes.

DONE and **ORDERED** this 10th day of September 2014, at Tallahassee, Leon County, Florida.





RONNIE WHITAKER, Director
Department of Business and
Professional Regulation
Division of Florida Condominiums, Timeshares,
and Mobile Homes
Northwood Centre
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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.