

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

FILED	
<small>Department of Business and Professional Regulation</small>	
Deputy Agency Clerk	
CLERK	Brandon Nichols
Date	9/11/2014
File #	2014-06890

IN RE: PETITION FOR DECLARATORY STATEMENT

Docket No. 2014024764

JEAN MESLER, Unit Owner
CAROL TABAKA, Unit Owner
SUSAN PIKUS, Unit Owner

DS 2014-073

ISLA MERITA HOMEOWNERS' CONDOMINIUM ASSOCIATION II, INC.

DECLARATORY STATEMENT

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

PRELIMINARY STATEMENT

The Division received a Petition for Declaratory Statement on June 11, 2014 from Jean Mesler, Carol Tabaka, and Susan Pikus (hereinafter Petitioners) seeking a declaratory statement as to whether Isla Merita Homeowners' Condominium Association II, Inc. (hereinafter Association) may convert common element association property to limited common elements upon an amendment to the declaration without the approval of all unit owners pursuant to section 718.110(4), Florida Statutes, where the property at issue is a portion of the ground around all units.

Division counsel responded June 18, 2014 to confirm receipt of the petitioners' petition for a declaratory statement. Division counsel notified the petitioners that the Division would serve a copy of the petition on the Association, as required by section 718.501(1)(g), Florida Statutes, allowing it to intervene and file a response if it so chose to do so.

Notice of receipt of the petition was published in the June 19, 2014 issue of the Florida Administrative Register.

Petitioners did not request a hearing.

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 declaratory statement.

1. Isla Merita is a Florida condominium governed by chapter 718, Florida Statutes.
2. Isla Merita Homeowners' Condominium Association II, Inc. is the Association that operates the condominium.
3. The Association sent out a newsletter in March 2014, informing unit owners of an upcoming amendment to the Association's governing documents.
4. The amendment would convert a portion of the ground around all units from common to limited common elements.
5. The Association's declaration of condominium provides:

Unless otherwise provided herein, no amendment shall change the configuration or size of any condominium unit in any material fashion, materially alter or modify the appurtenances to such unit...unless the recorded owners of such unit and all record owners of mortgages or other voluntarily placed liens thereon shall join in the execution of the amendment.¹

6. The exact dimensions of the conversion will be presented on the actual amendment.
7. There is limited space between Petitioners' units.
8. The space between units is currently common area used for ingress and egress throughout the community.
9. Petitioners believe the amendment cannot be passed without 100 percent of unit owners voting "yes."

CONCLUSIONS OF LAW

10. The Division has jurisdiction to enter this order pursuant to sections 718.501 and 120.565, Florida Statutes.
11. Section 120.565, Florida Statutes, provides:

(1) Any substantially affected person may seek a declaratory statement regarding an agency's opinion as to the

¹ Decl. of Condo., Isla Merita Homes XIII and XI, A Condo. § VII.

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.

12. 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.

13. Petitioners have standing to petition for a declaratory statement as unit owners.²

14. Several sections of chapter 718, Florida Statutes, are relevant to this petition. Section 718.113(2), 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 interest of the association must approve the alterations or additions.

15. Section 718.103(8), Florida Statutes, defines common elements as "the portions of the condominium property not included in the units."

16. Notwithstanding 718.113(2), numerous 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%

² § 120.565, Fla. Stat.

unit owner vote under 718.110(4), Florida Statutes. This section reads in pertinent 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 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.

17. However, section 718.110(14), Florida Statutes, 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).

18. The common elements in question are the grounds between units currently used for ingress and egress by all unit owners throughout the Isla Merita community.³

19. Based on the statutory language of section 718.110(14), Florida Statutes, common elements may only be converted to limited common elements using the same vote required to amend the declaration only if they are serving one unit or a group of units. Here, the common elements in question serve all unit owners in their ingress and egress around the community. Since these common elements are used by all unit owners, rather than one or a group of units, section 718.110(14), Florida Statutes, does not apply.

³ Pet. for Decl. Stmt.

20. Section 718.110(4), Florida Statutes, contemplates conversion of common elements to limited common elements. It specifies that such conversion, unless otherwise provided in the declaration, requires a one hundred percent unit owner vote. Thus, the analysis turns to section 718.110(4), Florida Statutes, rather than section 718.110(14), Florida Statutes.

21. In order to trigger the 100 percent unit owner vote requirement, a change to a common element must be material.⁴

22. In the Division's *Cascades* arbitration decision, the arbitrator held:

Where a common element area is utilized in a way that essentially forecloses its use by unit owners generally, a material alteration of the appurtenances to the units occurs.

It is only material changes to the appurtenances that are implicated by [718.110(4), Florida Statutes].⁵

23. Here, the grounds between units that are designated as common areas for ingress and egress throughout the community would be converted to limited common elements.⁶

24. Limited common elements, by definition, allow any unit owner with use rights to the limited common element to exclude all other unit owners from using it.⁷

25. Converting the common area between units currently used for ingress and egress throughout the community to limited common elements would essentially foreclose its use by unit owners because it would give the unit owner with use rights to that limited common element the ability to exclude all other unit owners.

26. Therefore, converting the common areas between units is a material alteration to the appurtenance of the affected units, and triggers the voting requirements within the Association's declaration that echo the 100% unit owner vote requirement of section 718.110(4), Florida Statutes.

⁴ § 718.110(4), Fla. Stat.

⁵ *Cascades of Falling Waters, Inc. v. Rafuse*, Arb. Case No. 00-1625, Summary Final Order (May, 2001).

⁶ Pet. for Decl. Stmt.

⁷ § 718.103(19), Fla. Stat.

For the reasons stated above it is hereby:

ORDERED that Isla Merita Homeowners' Condominium Association II, Inc. must obtain 100 percent unit owner approval before converting the grounds between units from common elements to limited common elements.

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



for *Kenn Sells*
RONNIE WHITAKER, 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:

Jean Mesler, 3654 East Bell Drive, Unit 88, Davie, FL 33328

Carol Tabaka, 3634 East Bell Drive, Unit 78, Davie FL 33328

Susan Pikus, 3649 West Bell Drive, Unit 48, Davie, FL 33328 and to

Jerome Schechter, Registered Agent for Isla Merita Homeowners' Condominium

Association II, Inc., 1995 East Oakland Park Boulevard, Ft. Lauderdale, FL 33306.

on this 11th day of September 2014.



Agency Clerk's Office

Copies furnished to:

Brittany Finkbeiner
Chief Attorney