

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	3/5/2015
File #	2015-02094

IN RE: PETITION FOR DECLARATORY STATEMENT

Docket No. 2014051926

WINTER RIDGE CONDOMINIUM HOMEOWNERS
ASSOCIATION, INC.

DS 2014-159

DECLARATORY STATEMENT

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

PRELIMINARY STATEMENT

The Division received a Petition for Declaratory Statement on December 15, 2014, from Winter Ridge Condominium Homeowners Association, Inc. (hereinafter "Petitioner") seeking a declaratory statement as to whether Petitioner may, under section 718.113, Florida Statutes, amend its Declaration to remove the unit owners' approval requirement in regard to certain material alterations, specifically landscape and aesthetic improvements on the common property surrounding each unit, and instead authorize the Board of Directors to approve these alterations.

The Division counsel responded on January 5, 2015, to confirm receipt of Petitioner's request for a declaratory statement.

Notice of receipt of the Petition was published in the January 6, 2015, issue of the Florida Administrative Register.

FINDINGS OF FACT

The following findings of fact are based on information submitted by Petitioner. The Division takes no position as to the accuracy of the facts and accepts them as submitted by Petitioner for the purposes of issuing this declaratory statement.

1. Petitioner is a condominium association located at 90 Winter Ridge Road, Winter Haven, Florida, 33881.
2. Petitioner is an association governed by the Declaration of Condominium filed on December 26, 1991.
3. Article XIX, Section B, of Petitioner's Declaration authorizes the Board of Directors to approve material structural additions or alterations to common elements; however, once approved by the Board, the material alterations must also be ratified by the affirmative vote of a majority of the unit owners.
4. Article IX of Petitioner's Declaration provides that a proposed amendment to the Declaration will be effective upon an affirmative vote of 67% of the members of the association.
5. Petitioner is requesting a declaratory statement as to whether Petitioner may, under section 718.113, Florida Statutes, amend its Declaration to remove the unit owners' ratification requirement in regard to material alterations such as landscape and aesthetic improvements on the common property surrounding each unit, and instead authorize the Board of Directors to approve these material alterations.

CONCLUSIONS OF LAW

1. The Division has jurisdiction to enter this order pursuant to sections 718.501 and 120.565, Florida Statutes.
2. Section 120.565, Florida Statutes, provides in part:
 - (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.

3. 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.

4. Petitioner has standing to petition for a declaratory statement as a condominium association.¹

5. Section 718.113(2)(a), Florida Statutes, provides in the pertinent 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.

Section 718.113(2)(b) sets similar restrictions on alterations to the common elements of any condominium operated by a multicondominium association.

6. Petitioner's Declaration, Article XIX, Section B, as originally recorded, provides that material additions or alterations are subject to the approval of the Board of Directors and subsequent affirmative vote of a majority of the unit owners. Section 718.113(2), Florida Statutes, specifically mentions that the provision on material alterations and additions may be amended under the procedures provided for in the declaration.

¹ § 120.565, Fla. Stat. (2014).

7. Section 718.110(1)(a), Florida Statutes, provides the default amendment procedure where the declaration fails to specify the method of amendment. In Petitioner's case, Article IX of the Declaration specifically states the method of amendment, which requires an affirmative vote of 67% of the members of the association in order for the proposed amendment to become effective. The Declaration provides for a different amendment procedure if an amendment purports to alter the percentage of ownership in common elements or with respect to apportionment of assessments.
8. According to sections 718.113(2) and 718.110(1)(a), Florida Statutes, Petitioner may amend its Declaration to authorize the Board of Directors to approve certain material alterations, such as landscape and aesthetic improvements on the common property surrounding each unit, without further ratification by the unit owners, provided Petitioner follows the amendment procedure set forth in the Declaration.
9. Florida law provides that it is not uncommon for governing documents to authorize a board of directors of a community association some latitude in making decisions in regard to common elements without the approval of the unit owners.² Where the unit owners approved the amendment to authorize the board of directors to materially alter common elements without any ratification by the unit owners, they delegated the discretion and authority in regard to the common elements to their elected Board of Directors.³

For the reasons stated above it is hereby:

ORDERED that Petitioner may amend its Declaration under section 718.113, Florida Statutes, to authorize the Board of Directors to approve certain material alterations, such as landscape and aesthetic improvements on the common property surrounding each unit, without further ratification by the unit owners, provided Petitioner follows the amendment procedure set forth in the Declaration.

² *Albertson v. Evanston park Condo. Ass'n, Inc.*, No. 09-CA-005415, 2011 WL 9933653, (Fla. Cir. Ct. Aug. 2, 2011). See also *Vinik v. Taylor*, 270 So. 2d 413, 417 (Fla. 4th DCA 1972) (the unit owners clearly delegated to the board of directors the authority to approve proposed material alterations and additions to common elements); *Fountains of Palm Beach Condo., Inc. No. 5 v. Farkas*, 355 So. 2d 163, 164 (Fla. 4th DCA 1978) (the unit owner failed to comply with the declaration which required approval of the association before any material alterations could be made to common elements).

³ *Albertson*, 2011 WL 9933653.

DONE and ORDERED this 3rd day of March 2015, at
Tallahassee, Leon County, Florida.



Kevin Stanfield

KEVIN STANFIELD, 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; AGC.FILING@MYFLORIDALICENSE.COM; FAX (850) 488-5761, 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 Tara L. Barrett, Esq., Brown, Garganese, Weiss & D'Agresta, P.A., 111 N. Orange Avenue, Suite 2000, Post Office Box 2873, Orlando, FL 32802-2873 on this 5th day of March 2015.

A handwritten signature in black ink that reads "Brandon M. Nibbel". The signature is written in a cursive style and is positioned above a horizontal line.

Agency Clerk's Office

Copies furnished to:

Thomas Morton
Chief Attorney