

Department of Business and Professional Regulation
AGENCY CLERK

Sarah Wachman, Agency Clerk

By Brandon M. Nichols

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

IN RE PETITION FOR DECLARATORY STATEMENT

Docket No. 2005002315

NORM ANDERSON, Unit Owner, and
RIVERPLACE ONE HUNDRED, INC. Intervenor,

DS 2005-001

DECLARATORY STATEMENT

Norm Anderson (Anderson), Petitioner filed a Petition for Declaratory Statement requesting an opinion as to whether unit owners, who were not assigned the exclusive use of a parking space in a carport, must pay a special assessment to repair the carport, which was damaged by a hurricane, under section 718.113(1), Florida Statutes, and whether replacement of the carport, which must meet current building code standards, constitutes a material alteration or substantial addition to the common elements under section 718.113(2), Florida Statutes, and, if so, whether the majority vote to repair the carport complied with section 718.113(2), Florida Statutes.

PRELIMINARY STATEMENT

On January 18, 2005, the Division received a petition for declaratory statement from Anderson, unit owner. Notice of receipt of the petition was published in Florida Administrative Weekly on January 28, 2005. The Division's time to answer the petition was delayed until Anderson submitted additional

documents. The Division received Riverplace One Hundred, Inc.'s response to the Petition on March 7, 2005. No hearing was requested or held.

FINDINGS OF FACT

The following findings of fact are based on information submitted by Anderson. The Division takes no position as to the accuracy of the facts, but merely accepts them as submitted for purposes of this final order.

1. Anderson is a unit owner of Riverplace One Hundred, Inc. (Riverplace), a condominium "association," as that term is defined by section 718.103(2), Florida Statutes.
2. Riverplace contains a limited common element carport, which covers seventy of one hundred and seventeen assigned limited common element parking spaces. While a majority of the Riverplace unit owners are assigned covered parking spaces, some unit owners are assigned parking spaces that are not covered by the carport. Maintenance of the carport is treated as a common expense, and not the expense of the unit owners that have exclusive use of the carport.
3. The unit owners with assigned cover parking maintain that their units' purchase price included an additional cost due to the covered parking accompanying their units.
4. The recent hurricanes damaged the carport. According to the Petition, the Riverplace "Board of Directors with the approval of a majority of unit owners approved a special assessment which includes the replacement of the

carport." All of the unit owners, including the ones not assigned a covered parking place, have been assessed to cover the costs of the carport's replacement.

5. Anderson asserts that "it is inequitable and unfair for them [unit owners not entitled to covered parking] to have to pay for the maintenance, repair, material alteration or replacement of the carport as part of their share of the common expenses. . . ." Anderson believes that such an arrangement is contrary to chapter 718, Florida Statutes. If the arrangement is allowable under chapter 718, Florida Statutes, Anderson asks whether the carport replacement would be considered a material alteration or improvement, necessitating approval by 75% of unit owners pursuant to its condominium declaration and 718.113(2), Florida Statutes.

6. Riverplace in its response states that "[t]he Petitioner's interpretation of fairness and equity cannot alter the Declaration or Florida law." Further, Riverplace disagrees with the claim of inequity since "all issues regarding the parking spaces are clearly disclosed in the Declaration and are obvious after an on site inspection."

7. The Riverplace Declaration contains the following relevant provisions:

2.12 Limited Common Elements mean and include those common elements which are reserved for the use of a certain unit or units to the exclusion of other units.

4.6 Limited Common Elements: Appurtenant to each unit as a limited common element is 1 parking space. Attached hereto as Exhibit 8 is a schedule showing the parking space number (as shown on Exhibit A) appurtenant to each unit.

6.1(a) By the Association. The maintenance and operation of the common elements shall be the responsibility of the Association and the expense associated therewith shall be designated as common expense. . . .

6.1(b) Alteration or Improvement. There shall be no alteration or further improvement of the real property constituting the common elements without prior approval in writing by the owners of not less than seventy-five percent (75%) of the common elements

6.3 Limited Common Elements: The maintenance, repair and/or replacement of the limited common elements appurtenant to each unit shall be the responsibility of the Association, as provided hereinabove in Section 6.1, except that the unit owner shall be responsible for day to day maintenance and cleaning of the balcony or patio appurtenant to his or her unit.

11.5 Assessments for Reconstruction and Repair. If the proceeds of insurance are not sufficient to defray the estimated cost of reconstruction and repair by the Association, or if any time during reconstruction and repair, the funds for payment of the cost of reconstruction and repair are insufficient, assessment shall be made against the unit owners who own the damaged units, and against all unit owners in the case of damage to common elements, in sufficient amounts to provide funds for the payment of such costs. . . . Such assessments on account of damage to common elements shall be in proportion to the owners' shares in the common elements.

Riverplace One Hundred, Inc., Declaration of Condo. (1981) (adopting all amendments to chapter 718, Florida Statutes, and the administrative rules as they are from time to time amended, art. 1.1(a)).

CONCLUSIONS OF LAW

1. The Division has jurisdiction to enter this order pursuant to sections 718.501 and 120.565, Florida Statutes.
2. Anderson has standing to seek this declaratory statement.

3. Riverplace One Hundred, Inc. is a proper party to intervene, and the request to intervene is granted.

4. Section 718.103(19), Florida Statutes (2004),¹ provides:

“Limited common elements” means those common elements which are reserved for the use of a certain unit or units to the exclusion of all other units, as specified in the declaration.

5. Section 718.113(1), Florida Statutes, provides (in part):

Maintenance of the common elements is the responsibility of the association. The declaration may provide that certain limited common elements shall be maintained by those entitled to use the limited common elements or that the association shall provide the maintenance, either as a common expense or with the cost shared by those entitled to use the limited common elements. If maintenance is to be by the association at the expense of only those entitled to use the limited common elements, the declaration shall describe in detail the method of apportioning such costs among those entitled to use the limited common elements

6. As quoted above, the Riverplace declaration specifies the covered parking spaces as limited common elements. The declaration also specifies that the association is to maintain, repair, or replace limited common elements (including the covered parking spaces) and that the associated costs are common expenses shared among all unit owners. While section 718.113(1), Florida Statutes, expressly states that a declaration may provide that only those unit owners with exclusive use rights of limited common elements are to pay for

¹ The declaration for Riverplace expressly adopts all amendments to the Condominium Act and rules as they are from time to time enacted, so present law applies. Century Village, Inc. v. Wellington E. F. K. L. H. J. M. & G. Condo. Ass'n, Inc., 361 So. 2d 128, 133 (Fla. 1978) (holding that clause in declaration adopting amendments to law incorporated all future amendments into the declaration).

the costs of the maintenance of such limited common elements, it does not require the declaration to do so. Therefore, Riverplace's practice under its declaration of assessing all unit owners for the maintenance, repair, and replacement costs of the limited common element carport as a common expense complies with section 718.113(1), Florida Statutes.

7. The next issue is whether the replacement of the carport damaged by the recent hurricanes constitutes mere maintenance, repair, or replacement of condominium common elements under section 718.115(1)(a), Florida Statutes, or whether it constitutes a material alteration or improvement under section 718.113(2)(a), Florida Statutes.

8. Section 718.115(1)(a), Florida Statutes (2004), provides (in part):

Common expenses include the expenses of the operation, maintenance, repair, replacement, or protection of the common elements and association property. . .

9. Section 718. 113(2)(a), Florida Statutes (2004), 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.

10. In Sterling Village Condominium, Inc. v. Breitenbach, the court defined "material alteration" as "palpably or perceptively vary or change the form,

shape, elements or specifications of a building from its original design or plan, or existing condition, in such a manner as to appreciably affect or influence its function or appearance.” 251 So. 2d 685, 687 (Fla. 4th DCA 1971).

11. The definition of material alteration can be contrasted to cases where the court found that certain changes to common elements, albeit material or substantial, when necessary for maintenance, repair, or replacement of common elements, did not require compliance with section 718.113(2), Florida Statutes, or the corresponding portions of the condominium documents. In Tiffany Plaza Condominium Association v. Spencer, the court held that construction of a rock revetment to protect a condominium beachfront from damage was not a material alteration, but reasonable maintenance. 416 So. 2d 823 (Fla. 2d DCA 1982). The Tiffany Plaza court stated that the provision in the declaration requiring approval of material alterations “is not intended to relieve an objecting unit owner of the pro rata assessments for the cost of an alteration or improvement when it is reasonably necessary for the maintenance, repair or replacement of the common element.” Id. at 826.

12. The facts here indicate that the carport is being maintained, repaired or replaced under section 718.115(1)(a), Florida Statutes, rather than materially altered or improved under section 718.113(2)(a), Florida Statutes. Riverplace is replacing the carport that was damaged during the summer hurricanes rather than materially altering or improving the structure. Just because the replaced carport must meet current building code standards does not mean that such replacement of the damaged structure is a material alteration

or improvement, necessitating the need for 75% unit owner approval under the Riverplace declaration. See A.N., Inc. v. Seaplace Ass'n, Inc., Arb. Case No. 98-4251, Final Order (Nov. 19, 1998) (replacement of window systems, while a substantial upgrade to the existing window system, did not require a vote of the owners). See, also, Loveland, Jr. et al. v. Harbor Towers and Marina Condominium Association, Inc., Arb. Case No. 2003-08-0632, Summary Final Order (September 3, 2004) where the arbitrator ruled that the association's decision to replace weathered garage doors with doors that complied with current building code requirements constituted required maintenance and did not constitute a material alteration to the common elements.

13. Therefore, Riverplace may assess all unit owners, including those who have no use rights to the structure, for the replacement of the limited common element carport without obtaining approval of 75% of its unit owners.

ORDER

Based upon the findings of fact and conclusions of law, it is declared that unit owners, who are not assigned the exclusive use of a parking space in a carport, must pay a special assessment to repair the carport, which was damaged by the hurricane, under section 718.113(1), Florida Statutes, and that the replacement of the carport, which must meet current building code standards, does not constitute a material alteration or substantial addition to the common elements under section 718.113(2), Florida Statutes.

DONE and ORDERED this 24th day of March, 2005, at Tallahassee,
Leon County, Florida.




MICHAEL T. COCHRAN, Director
Department of Business and
Professional Regulation
Division of Florida Land Sales, Condominiums,
and Mobile Homes
Northwood Centre
1940 North Monroe Street
Tallahassee, Florida 32399-1030

NOTICE OF RIGHT TO APPEAL

THIS FINAL ORDER CONSTITUTES FINAL AGENCY ACTION AND
MAY BE APPEALED BY PETITIONER 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 Norm Anderson, 100 Silver Beach Avenue #214, Daytona Beach, Florida, 32118 and Jeffrey C. Sweet, Korey, Sweet, McKinnon, Simpson & Vukelja, Suite A, Granada Oaks Professional Building, 595 West Granada Boulevard, Ormond Beach, FL 32174, this 31st day of March, 2005.

Robin McDaniel
ROBIN MCDANIEL, Division Clerk

Copies furnished to:
Janis Sue Richardson,
Chief Assistant General Counsel