

Final Order No. BPR-2006-00517 Date: 1-27-06
FILED

Department of Business and Professional Regulation
AGENCY CLERK

Sarah Wachman, Agency Clerk

By:

Brandon M. Nichol

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. 2005051331

PRINCESS DEL MAR CONDOMINIUM
OWNERS ASSOCIATION, INC.

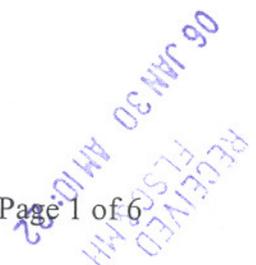
DS 2005-046

DECLARATORY STATEMENT

Princess Del Mar Condominium Owners Association, Inc. (Princess), through its attorney, filed a Petition for Declaratory Statement requesting an opinion as to whether sections 718.110(4) and 718.113(2)(c), Florida Statutes, allow Princess to remove a catwalk in its lobby with an affirmative unit owner vote of less than one hundred percent of the unit owners.

PRELIMINARY STATEMENT

On October 6, 2005, the Division received a petition for declaratory statement from Princess. Notice of receipt of the petition was published in Florida Administrative Weekly on October 21, 2005. No hearing was requested or held.



FINDINGS OF FACT

The following findings of fact are based on information submitted by Princess. 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. Princess is a condominium "association," as that term is defined by section 718.103(2), Florida Statutes.

2. Princess Del Mar Condominium is a twelve story building. Its lobby is open to the second floor and contains a catwalk. The catwalk provides access from the second floor outside to a tennis court, which sits atop the parking garage. Pursuant to a unit owner vote, at least two-thirds of the Princess ownership have approved a lobby renovation project that includes the removal of the catwalk.

3. A second floor unit owner has objected to removing the catwalk, stating that it provides additional access to his disabled wife in the event of a power outage.

4. This declaratory statement only addresses the unit owner vote needed for Princess to materially alter its Common Elements; it does not address any possible disability arguments.

5. Princess's Declaration of Condominium was filed in April 1977 and states that the development was submitted to condominium ownership "pursuant to Chapter 718, Florida Statutes, 1977, as amended to the date hereof." Art. 1, Princess Declaration.

6. Section 11 of the Princess declaration provides, in relevant part, the following:

11. AMENDMENT OF DECLARATION.

C. ADOPTION. The proposed amendment [to the declaration] may be adopted, and shall become effective, by and upon the affirmative vote at such meeting of members owning Units to which not less than 66 - 2/3rds percent of the Common Elements are appurtenant; provided, that any amendment so proposed may be adopted, without a formal meeting of the members, by an instrument executed and acknowledged with the formalities of a deed by members owning Units to which not less than 66 - 2/3rds percent of the Common Elements are appurtenant. Notwithstanding the foregoing provisions for adoption of amendments to this Declaration or any other provisions for amendment in the Condominium Act, no amendment shall:

(1) Change any "Condominium Parcel" (as defined in the Condominium Act) unless the record owner(s) thereof and all record owners of liens thereon shall join in the execution and acknowledgment of the amendment, or

(2) Discriminate against any Unit owner or against any Unit or building comprising part of the Condominium Property, unless the record owners of all affected Units and record owners of all liens thereon shall join in the execution and acknowledgment of the amendment, or

(3) Change the share of Common Elements appurtenant to any Unit or Units, or the share of any Unit owner in the Common Surplus.

7. Section 19 of the Princess declaration provides in relevant part the following:

19. ALTERATIONS OF AND IMPROVEMENTS TO UNITS AND COMMON ELEMENTS.

* * * *

A. There shall be no material alterations or substantial improvements or additions to the Common Elements except in the following manner: subject to the foregoing restrictions against changing the exterior appearance of Units and/or building, the Association shall have the right to make or cause to be made alterations, improvements and/or additions to the Common Elements (except the acquisition of additional real property) which have been approved by the owner of Units to which 66 - 2/3rds percent of the Common Elements are appurtenant. The cost of such alterations, improvements and/or additions shall be assessed against and collected from the owners of all Units as Common Expenses.

CONCLUSIONS OF LAW

1. The Division has jurisdiction to enter this order pursuant to sections 718.501 and 120.565, Florida Statutes.
2. Princess has standing to seek this declaratory statement.
3. The Condominium Act governing a particular condominium is the act in existence on the date of recording the declaration of condominium. Sans Souci v. Dep't of Bus. Regulation, 421 So. 2d 623 (Fla. 1st DCA 1982); Suntide Condo. Ass'n v. Dep't of Bus. Regulation, 463 So. 2d 314, 317 (Fla. 1st DCA 1984). Because Princess's Declaration was filed in 1977, the Condominium Act effective in 1977 is applicable.

4. Section 718.110(4), Florida Statutes (1977), provides the following:

Unless otherwise provided in the declaration as originally recorded, no amendment may change the configuration or size of any condominium unit in a material fashion, materially alter or modify the appurtenances to the unit, or change the proportion or percentage by which the owner of the parcel shares the common expenses and owns the common surplus unless the record owner of the unit and all record owners of liens on it join in the execution of the amendment and unless all the record owners of all other units approve the amendment.

5. Section 718.113(2), Florida Statutes (1977), provides the following:

There shall be no material alteration or substantial additions to the common elements except in a manner provided in the declaration.

6. The one hundred percent unit owner approval requirement in section 718.110(4), Florida Statutes (1977), does not apply in this situation because the lobby renovation plan was not an amendment to the Princess declaration under article 11 of the declaration. The change is to the common elements and does not affect the appurtenances to the units under section 718.110(4), Florida

Statutes. Later amendments to section 718.110(4), Florida Statutes, clarifies that this section does not apply to material alterations to the common elements. § 718.110(4), Fla. Stat. (2005) (“The acquisition of property by the association and the 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, ...shall not be deemed to constitute a material alteration or modification of the appurtenances to the units.”).

7. Section 718.113(2), Florida Statutes (1977), which is applicable to this situation, simply requires any material alteration to the common elements to be accomplished according to the condominium’s declaration, which is governed by article 19 of the declaration. Princess’s declaration requires material alterations of the common elements to be approved by “the owner of units to which 66 – 2/3rds percent of the Common Elements are appurtenant.” Art. 11A, Princess Declaration. Thus, in order to comply with section 718.113(2), Florida Statutes (1977), Princess needed to follow its declaration’s requirements for the approval of material alterations of the common elements.

8. According to its petition, Princess unit owners approved the lobby renovation plan, including the removal of the catwalk, in a vote pursuant to the requirements of its declaration. Therefore, Princess’s removal of the catwalk as part of the lobby renovation is not inconsistent with section 718.113(2), Florida Statutes (1977).

9. Whether the association may remove the catwalk under article 11(C)2 of its declaration is beyond the scope of this declaratory statement. The

unit owner appears to have a raised a claim of discrimination on the basis of disability if the catwalk is removed. The division is without authority to determine fair housing complaints or discrimination claims under section 760.23, Florida Statutes, in declaratory statement proceedings. These are matters for the Florida Commission on Human Relations, the Department of Housing and Urban Development, or the courts. See Woodside Vill. Condo. Ass'n, Inc. v. Jahren, 806 So. 2d 452, 462-65 (Fla. 2002) (reviewing association's settlement of fair housing complaint in lease restriction amendment).

ORDER

Based upon the findings of fact and conclusions of law, it is declared that section 718.113(2), Florida Statutes (1977), allows Princess Del Mar Condominium Owners Association, Inc. to remove a catwalk in its lobby, with an affirmative unit owner vote of less than one hundred percent of the unit owners.

DONE this 24th day of January, 2005, at Tallahassee, Leon County, Florida.



Michael T. Cochran

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 Jamie B. Greusel, Esq., 1104 North Collier Boulevard, Marco Island, Florida 34145 31st day of January, 2005.6


ROBIN MCDANIEL, Division Clerk

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