

DATE 1/31/91
DOCKET NO. DS90042
C. Carr

STATE OF FLORIDA
DEPARTMENT OF BUSINESS REGULATION
DIVISION OF FLORIDA LAND SALES, CONDOMINIUMS AND MOBILE HOMES
725 SOUTH BRONOUGH STREET - THE JOHNS BUILDING
TALLAHASSEE, FLORIDA 32399-1007

IN RE:

PETITION FOR DECLARATORY STATEMENT
PINE RUN ASSOCIATION, INC.

DOCKET NO. DS90042

FINAL DECLARATORY STATEMENT

COMES NOW, the undersigned as director of the Division of Florida Land Sales, Condominiums and Mobile Homes, and pursuant to sections 718.501 and 120.565, Florida Statutes, issues this Declaratory Statement as follows.

FINDINGS OF FACT

1. On or about April 2, 1990, the Division received the petition for declaratory statement filed by the Pine Run Association, Inc. The association is that condominium association responsible for the operation of three separate condominiums, Pine Run, Pine Run II and Pine Run III. Turnover of control of the association occurred in October of 1978.

2. The declaration of condominium for Pine Run, a Condominium, as originally recorded in June of 1974, provided:

6.6) Alteration and Improvements of Common Elements. After the completion of all the improvements included in the common elements which are contemplated by this Declaration, or which may be added or constructed by the Developer prior to December 31, 1978, there shall be no alteration or further improvement of common elements without prior approval in writing of all the Unit Owners; provided,

however, that any alteration or improvement of the common element bearing the approval in writing of not less than 75% of the Unit Owners and which does not prejudice the rights of any owners without their consent, may be done if the owners who do not approve are relieved from the initial cost thereof. There shall be no change in the shares and rights of a Unit Owner in the common elements which are altered or further improved, whether or not the Unit Owner contributes to the cost thereof.

3. According to the petition, by a vote exceeding 75% of the voting interests¹ of Pine Run, a condominium, the declaration of condominium was amended² to give to the board of administration the power to approve certain alterations and additions to the units and the common elements as follows:

10.10 Restrictions. No owner, . . . shall:

(a) paint or otherwise change the appearance of any exterior wall, door, window, patio, or any exterior surface; . . . plant any planting [sic] outside of a unit . . .; erect or attach any structures or fixtures within the common elements; nor any of the foregoing without the prior written consent of the board;

(b) make any structural additions or alterations . . . to any unit or to the common elements; . . .; nor any of the foregoing without prior written consent of the board;

¹The petition appears to recite that the amendment was approved by 75% of the voting interests while the actual amendment text recites that the amendment was approved by in excess of 75%". . . of the entire membership of the Board. . .". This declaratory statement assumes the requisite unit owner vote was taken in accordance with Article 14.3 of the declaration.

²According to the petition, this amendment was executed on October 25, 1990 and sent at that time to be recorded.

(c) erect, construct or maintain . . . other equipment or structures on the exterior of the building or on or in any of the common elements, except with the written consent of the Association board of directors;

(d)

(e) partition, construct cabinets or other appurtenances in the garage area or storage area that is a Limited Common Element, or roof and enclose any patio, sun deck or screened porch except with the written consent of the board of directors.

4. According to the petition, for a period in excess of eight years, the association has allowed unit owners to extend their patios into the common elements up to 15 feet without approval of the unit owners. Approximately 7 units out of 65 have extended patios. Also according to the petition, overhangs have been installed and some of the extended patios have been screened with the knowledge or approval of the board of directors.

5. The petitioner association requests that the Division issue a declaratory statement on the issue of whether the amendment to Article 10 of the declaration allows the board of administration to approve additions or alterations to the common elements, or whether Article 6.6 and Section 718.113(2), Florida Statutes, requires approval of the unit owners before such additions or alterations.³ Also, the association questions whether its failure to enforce the condominium documents for such a lengthy period of time prohibits the board

³It appears that although Article 10.10 was added to the declaration, Article 6.6 was never deleted and is still a part of the declaration.

of administration from now enforcing these portions of the documents.

CONCLUSION OF LAW

1. The Division of Florida Land Sales, Condominiums and Mobile Homes has jurisdiction over this matter pursuant to Section 718.501 and Section 120.565, Florida Statutes.

2. According to Section 718.113(2), Florida Statutes, there shall be no material alteration or substantial additions to the common elements except in the manner provided in the declaration. The issue of whether this type of change would constitute a material alteration to the common elements is answered affirmatively. Review, Schmeck v. Sea Oats Condominium Association, Inc., 441 So.2d 1092 (Fla. 5th DCA 1983); c.f., Roth v. Springlake II Homeowners Association, Inc., 533 So.2d 819 (Fla. 4th DCA 1988). Review also, Vinik v. Taylor, 270 So.2d 413 (Fla. 4th DCA 1972) to the effect that the unit owners may, consistent with the Condominium Act, choose to delegate material alteration decisions to the board of administration.

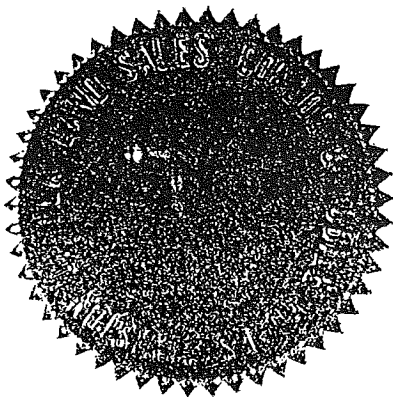
3. Based on the foregoing authority, there shall be no material alteration to the common elements except in the manner provided in the declaration. Material alterations include patio extensions onto the common elements. A declaration of condominium may properly delegate to the association's board of administration the authority to approve material alterations to the common elements. However, if that was the intention of the association in adding Article 10.10 to its declaration, that intention was not fulfilled because Article 6.6 of the declaration, requiring a unit owner vote for these types of

changes, was never deleted from the declaration. The only effect of the addition of Article 10.10 to the declaration was to require, in addition to the unit owner vote otherwise required by Article 6.6, written consent of the board of directors of the condominium association. The condominium documents, as originally drafted and as subsequently amended, read in their totality, currently prohibit alterations or improvements to the common elements without prior approval in writing of all of the unit owners (with the exception of certain types of alterations to the common elements which require only 75% concurrence of the unit owners) as well as the affirmative consent of the board of administration.

4. The petitioner association, having been lax in enforcement of the restrictions contained in the declaration of condominium for a period of approximately eight years, inquires whether it would be estopped from now enforcing the provisions of Article 6.6 requiring unit owner votes with reference to certain material changes to the common elements. According to the the facts contained in the petition, the association has allowed approximately seven unit owners out of a total of sixty-five units to extend their patios into the common elements up to fifteen feet without compliance with the declaration. However, the petition fails to allege that the association is currently attempting to enforce these restrictions against any unit owner, and accordingly, this issue is not squarely presented. The defense of selective enforcement, which if successful would estop the association from enforcing these restrictions, would more appropriately be presented in an action

instituted by the association to enforce this restriction against a unit owner. Nonetheless, based on the facts presented in this petition, the association would appear to come within those cases determining that an association is estopped from selectively enforcing restrictions in the documents where that association has failed to uniformly enforce those same restrictions. Review, White Egret Condominium, Inc. v. Franklin, 379 So.2d 346 (Fla. 1979); Star Lake North Commodore Association, Inc. v. Parker, 423 So.2d 509 (Fla. 3rd DCA 1982). Compare, Ladner v. Plaza del Prado Condominium Association, 423 So.2d 927 (Fla. 3rd DCA 1982) pet. for rev. den. (Fla. 1983) and Scarfone v. Culver House, 443 So.2d 122 (Fla. 3rd DCA 1983) pet. for rev. den. (Fla. 1984). Accordingly, a review of the case law suggests that a unit owner may well be successful in presenting a case of selective enforcement based on the facts stated in this petition to the effect that compliance with this provision of the declarations has consistently been ignored by the association.

DONE AND ORDERED this 31st day of January, 1991.



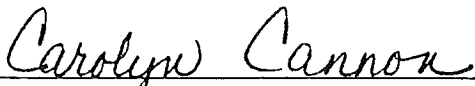
MATTHEW M. CARTER II, DIRECTOR
Division of Florida Land Sales,
Condominiums and Mobile Homes
Department of Business Regulation
State of Florida

RIGHT TO APPEAL

THIS DECLARATORY STATEMENT 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(d), FLORIDA RULES OF APPELLATE PROCEDURE, BOTH WITH THE APPROPRIATE DISTRICT COURT OF APPEAL, ACCOMPANIED BY THE APPROPRIATE FILING FEE, AND WITH CAROLYN CANNON, DOCKET CLERK FOR THE DIVISION OF FLORIDA LAND SALES, CONDOMINIUMS AND MOBILE HOMES, WITHIN 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 ROBERT L. MOORE, Kanetsky, Moore & DeBoer, P.A., 227 Nakomis Avenue, South, Venice, Florida 34285, this 31st day of January, 1991.



CAROLYN CANNON, DOCKET CLERK

Copies furnished to:

Alexander M. Knight, Chief
Bureau of Condominiums

Kark M. Scheuerman
Deputy General Counsel