

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

FILED
DIVISION OF FLORIDA
LAND SALES, CONDOMINIUMS
AND MOBILE HOMES
DATE 7-22-92
DOCKET CLERK Howard

In Re:

Petition for Declaratory Statement
DAVID and BETTY SULFRIDGE

DOCKET NO. DS91161

AMENDED
DECLARATORY STATEMENT

A Declaratory Statement was rendered by the State of Florida, Department of Business Regulation, Division of Florida Land Sales, Condominiums and Mobile Homes, by and through its undersigned Division Director, pursuant to sections 120.565 and 718.501, Florida Statutes, on July 10, 1992. This Amended Declaratory Statement is filed under the authority of Rule 7-4.005(2), Florida Administrative Code, for the purpose of correcting a clerical mistake contained in the initial Declaratory Statement.

DBRF - '92 - 0087

FINDINGS OF FACT

1. On May 31, 1991, the Division received a Petition for Declaratory Statement from David and Betty Sulfridge (Petitioners), owners of unit A-108 in the Emerald Pointe Condominium, Punta Gorda, Florida. By letter dated September 26, 1991, the Division notified the Emerald Pointe Condominium Association, Inc. (Association) that it had received the Petition. The Association moved to intervene and an Order authorizing intervention was issued

January 22, 1992. Neither the Petitioners nor the Association requested a hearing. Both the Petitioners and the Intervenor filed a memorandum of law.

2. The Petitioners seek a declaratory statement regarding whether an Association rule, which permits the Board of Directors (Board) to impose a forfeiture of the right to use dock space in the marina for "persistent and continued non-compliance" with marina rules, violates the right of Petitioners under sections 718.106(3) and 718.303(2), Florida Statutes, to use the common elements.

3. In October of 1989, the Petitioners were assigned a dock space in channel C, pilings 31 and 34. The Marina Policy in effect on the date Petitioners received their assignment (Original Marina Policy) provided for assignment of dock spaces to unit owners who owned a boat on a "first-come, first-served" basis. Assignees were required to moor boats in their assigned spaces for at least 95 days each year and to comply with all state registration and safety requirements. Three causes for termination of an assigned dock space were provided: (1) sale of boat and intent not to replace the boat (as well as failure to notify the Manager of the unit owner's intent to replace); (2) sale of boat and failure to replace boat within six months of sale; and (3) sale of the condominium unit.

4. Paragraph 23 of the Original Marina Policy authorized the Board to levy a fine against a dock assignee for a rule violation, as follows:

Violation of the rules and regulations, disorder, depredations or indecorous conduct that may cause disruption of the tranquility and enjoyment, damage to the property or harm [sic] the reputation of the Emerald Pointe Marina may be cause for a fine being levied by the Board of Directors pursuant to Paragraph 13 of the Declaration of Condominium.

5. On January 8, 1991, the Board adopted a revised Marina Policy (Amended Marina Policy) with an effective date of March 1, 1991. The Board deleted language authorizing the imposition of a fine for rule violations and inserted a "self-help remedy" (section VII) which provides:

To the extent provided by law, the Association shall have self-help remedies available to it for the protection of property and persons and for the successful enforcement of this Marina Policy. Persistent and continued non-compliance of this Marina Policy by any owner, lessee or guest, subject to advance notification by the Board, shall result in forfeiture of the right to use the marina facilities.

6. By letter dated January 23, 1991, the Board advised unit owners of the Amended Marina Policy, and requested each boat owner to fill out a new application and return it to the office in order to update all the current records. The application form contained the following language: "Applicant has received and read a copy of the . . . Marina Policy and acknowledges that he will agree to comply with the terms and conditions as set forth in the Marina Policy."

The minutes of the Board meeting of April 2, 1991, reflect that ". . . a great number of the applications for dockage that

were sent out with the Marina Policy have not been returned" As a result, notices were re-sent. The Board decided that assignees who did not respond to the second mailing would receive a third letter, advising them that their dock assignments would be relinquished within fifteen (15) days if they did not return a signed dock application.

7. The Petitioners assert that while they submitted a new application for dock space, they did not sign the application because they did not agree to comply with the Amended Marina Policy. Rather, they thought that the "self-help remedy" authorizing the Board to impose a forfeiture of the right to use the marina facilities violated their statutory right to use the common elements. They feared that by executing the application they would waive their right to contest any decision of the Board which deprived them of their right to use the marina.

8. In September, 1991, the manager of the condominium sent a fourth letter to the Petitioners advising them that if they did not sign the new dock application within 48 hours, their dock assignment would be cancelled. The Petitioners did not sign the new dock application and removed their boat from the marina. According to the minutes of the October 1, 1991, Board meeting:

[O]nly one person in the complex . . . has failed to return his dock space assignment request, signed and dated. President Willey read a letter written to Mr. & Mrs. Sulfridge from the Manager, again requesting that they return their signed application for dock space. They were given 48 hours to return a signed application or lose the dock assignment. He also read a letter delivered to all Board members plus other interested

parties, from the Sulfridges. The office has no signed application on file, and the "Zoe" has left the premises at the present time.

9. There is no allegation that Petitioners have violated any provisions of the Original or Amended Marina Policy. The Board withdrew Petitioners' dock assignment because they refused to sign the dock application.

10. Petitioners and Intervenor agree, and the undersigned finds, that the dock space assigned to Petitioners at Dock Channel "C" at the marina is a common element pursuant to Sections 4.6 - 4.10 of the Association's bylaws.

CONCLUSIONS OF LAW

1. The Division has jurisdiction over this matter pursuant to sections 120.565 and 718.501, Florida Statutes.

2. Emerald Pointe Condominium, a "condominium" within the meaning of section 718.103(10), Florida Statutes, is comprised of units and, appurtenant to each unit, an undivided share in the common elements.

3. Emerald Pointe Condominium Association is an "association" within the meaning of section 718.103(2), Florida Statutes, thus it is the entity responsible for operating the condominium pursuant to section 718.111, Florida Statutes. Furthermore, the Association is a substantially affected party which is authorized to intervene in this matter pursuant to section 120.565, Florida Statutes.

4. The Petitioners are "unit owners" within the meaning of section 718.103(25), Florida Statutes, thus they are the "record

owner of legal title to a condominium parcel" which is defined as "a unit, together with the undivided share in the common elements which is appurtenant to the unit." Section 718.103(11), Florida Statutes.

5. Pursuant to section 718.103(7), Florida Statutes, "common elements" are "the portions of the condominium property which are not included in the units." "Limited common elements" are common elements that are "reserved for the use of a certain condominium unit or units to the exclusion of other units, as specified in the declaration of condominium." Section 718.103(17), Florida Statutes. The Declaration for Emerald Point Condominiums provides that the marina and dock space involved in this dispute are portions of the condominium property that are not included in the units but that are not reserved to the use of certain condominium units to the exclusion of other units. Therefore, the marina and dock space are common elements, not limited common elements.

6. A unit owner has the exclusive right to use the common elements in accordance with the purpose intended as provided by the declaration (section 718.106(3), Florida Statutes), and all common elements shall be available to condominium unit owners, subject only to the adoption of reasonable rules and regulations for their use. Section 718.123(1), Florida Statutes.

7. The Condominium Act governs all aspects of the creation, administration of a condominium, which is strictly a creature of statute. Suntide Condominium Association, Inc. v. Division of Florida Land Sales, Condominiums and Mobile Homes, 463 So.2d 314,

317 (Fla. 1st DCA 1984). Therefore, the association is not permitted to exercise authority inconsistent with Chapter 718. Section 718.104(4)(1), Florida Statutes (declaration of condominium may contain no provision inconsistent with the Condominium Act); Section 718.112(3)(c), Florida Statutes (bylaws may contain no provision inconsistent with the chapter); Section 718.111(4), Florida Statutes (powers and duties of a condominium association include those set forth in the Condominium Act, as well as those set forth in the declaration and bylaws, to the extent the latter are not inconsistent with Chapter 718).¹ See also, Asbury Arms Development Corporation v. Division of Florida Land Sales, Condominiums, and Mobile Homes, 456 So.2d 1291 (Fla. 2nd DCA 1984 (contract that attempted to waive condominium purchaser's statutory voidability rights is ineffective as a matter of law); Elbadramany v. Oceans Sever Condominium Association, Inc., 461 So.2d 1001 (Fla. 5th DCA 1984) (association could not use condominium documents to change statutory definition of common expenses); Hyde Park Condominium Association v. Estero Island Real Estate, Inc., 486 So.2d 1 (Fla. 2nd DCA 1986) (association could not create property rights unauthorized by statute or declaration). A provision in the

¹ The fact that the association, through its Board of Directors, has the statutory authority to establish rules and regulations does not save the association's action in enacting the forfeiture provision of Amended Marina Policy. The association does not have the authority to act outside the scope of its powers as defined in Chapter 718. Towerhouse Condominium, Inc. v. Millman, 475 So.2d 674, 676 (Fla. 1985); Wenger v. Breakwater Homeowners Association, Inc., 423 So.2d 619, 621 (Fla. 4th DCA 1983).

declaration or bylaws which is inconsistent with Chapter 718 is void. Palm Bay Towers Corporation v. Brooks, 466 So.2d 1071 (Fla. 3d DCA 1984).

8. The Original Marina Policy authorized the Board to levy a fine as a means of enforcing the rules relating to use of the marina. (See, Finding of Fact no. 3, Association Rules, paragraph IX, and Amended and restated Bylaws, sections 4.13 - 4.15.) These rules and policies were lawful implementations of section 718.303(3), Florida Statutes, which permits an association to impose fines for rule violations:

If the declaration or bylaws so provide, the association may levy reasonable fines against a unit for the failure of the owner . . . to comply with any provision of the declaration, the association bylaws, or reasonable rules of the association.

9. The Amended Marina Policy replaced the imposition of a fine with a self-help remedy that permits the Board to compel a forfeiture of the right to use the marina, a common element. (See, Finding of Fact no. 4.) The right to use the common elements is a property right granted by the Condominium Act. Forfeiture of the right to use a common element is not authorized by the Condominium Act. The association may exercise only those powers enumerated in the Condominium Act. Power House Condominium, Inc. v. Millman, 475 So.2d 674, 676 (Fla. 1985). Therefore, the Board acted outside the

scope of its authority in enacting the Amended Marina Policy.²

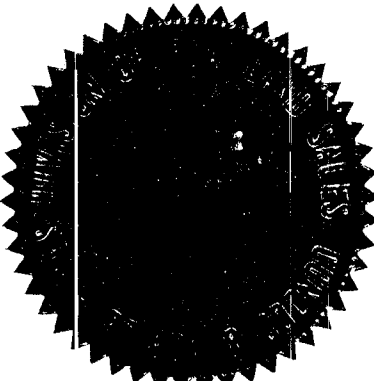
10. Moreover, the Condominium Act enumerates specific remedies that are available to condominium associations for the enforcement of rules. Section 718.303(3), Florida Statutes (1991), provides for the levy of fines up to One Thousand Dollars (\$1,000) as a means by which an association can secure compliance with the declaration, bylaws and rules. Section 718.303(1), Florida Statutes, permits the association to file a lawsuit against a unit owner who fails to comply with this statute and the condominium documents. The existence of these remedies, through which an association can enforce its rules, implies that the legislature did not intend to grant any other remedies to condominium associations. TowerHouse Condominium v. Millman, *supra*, 475 So.2d at 676. By permitting the association to take away the right to use the marina, a common element, the Board impermissibly has sought to supplement those remedies provided in the Condominium Act. Century Village, Inc. v. Wellington, 361 So.2d 128 (Fla. 1978). See also,

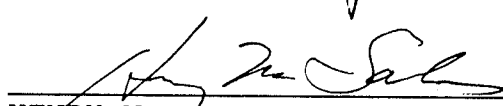
² While not decided here, a potentially more serious problem presented by the association's action in promulgating the forfeiture provisions of the Amended Marina Policy is the fact that Petitioners' right to use their property is a right protected by the Florida and United States Constitutions. Kass v. Lewin, 104 So.2d 572 (Fla. 1958); Corn v. State, 332 So.2d 4 (Fla. 1976). Petitioners' property interest in their unit, which includes the common elements, may not be impaired without due process of law. Due process requires reasonable notice and the opportunity to be heard. Quay Development, Inc. v. Elegante Building Corp., 392 So.2d 901 (Fla. 1981); Philips v. Guin and Hunt, Inc., 344 So.2d 568 (Fla. 1977). While the Amended Marina Policy provides for "advance notification by the Board" before forfeiture, it lacks an opportunity for a hearing before a judicial body. Rather, it permits the Board to unilaterally prohibit a unit owner from using the marina and dock space.

Declaratory Statement. In Re: Orlando International Resort Club Condominium Association, Inc., Case No 85A-272, November 11, 1986, aff'd, 509 So.2d 934 (Fla. 1st DCA, 1987) (condominium association lacks power to prohibit use of common elements based on non-payment of assessments); Declaratory Statement, Dover House Condominium Association, Inc. v. Division of Florida Land Sales, Condominiums, and Mobile Homes, Case No 85A-267, May 29, 1986, aff'd, 506 So.2d 1045 (Fla. 4th DCA 1987) (same).

For the reasons stated above, the Division hereby declares that the Amended Marina Policy enacted by the Board of Directors of the Emerald Pointe Condominium Association to be invalid in that it violates the right of Petitioners to use the common elements, specifically the marina and dock space, as guaranteed by sections 718.106(3) and 718.123, Florida Statutes.

DONE AND ORDERED, this 22nd day of July, 1992.




HENRY M. SOLARES, DIRECTOR
Division of Florida Land Sales,
Condominiums and Mobile Homes
Department of Business Regulation
State of Florida

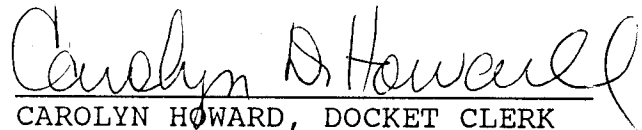
RIGHT TO APPEAL

THIS ORDER CONSTITUTES FINAL AGENCY ACTION AND MAY BE APPEALED BY PETITIONER OR INTERVENOR PURSUANT TO THE FLORIDA RULES OF APPELLATE PROCEDURE AND SECTION 120.68 FLORIDA STATUTES, 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 FEES
AND WITH CAROLYN HOWARD, DOCKET CLERK FOR THE DIVISION OF FLORIDA
LAND SALES, CONDOMINIUMS AND MOBILE HOMES WITHIN THIRTY (30) DAYS
OF THE RENDITION OF THIS ORDER.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. Certified Mail to DAVID and BETTY SULFRIDGE, 25188 Maricn Avenue, A-108, Punta Gorda, Florida 33950 and MELVILLE G. BRINSON, III, Attorney for Intervenor, Emerald Pointe Condominium Association, Inc., Allen, Knudsen, DeBoest, Edwards & Roberts, P.A., 1450 Hendry Street, Post Office Box 1480, Fort Myers, Florida 33902, this 22nd day of July, 1992.


CAROLYN HOWARD, DOCKET CLERK

Copies furnished to:

Faye Mayberry, Chief
Bureau of Condominiums

Jeanne M. L. Player
Assistant General Counsel