

August 10, 2018

**LEGAL ADVISORY OPINION AS TO ISSUANCE OF BUILDING PERMITS TO
CONDOMINIUM UNIT OWNERS AND OVERSIGHT BY THE BROWARD COUNTY BOARD
OF RULES AND APPEALS**

You have asked your attorney to determine the propriety of intervention or oversight by the Broward County Board of Rules and Appeals with respect to the issuance of building permits (in this case for hurricane shutters) to individual unit owners where a concern exists by at least one (1) condominium association that the issuance of a permit may allow installation of hurricane shutters which are not in compliance with aesthetic requirements established by a condominium association.

It is assumed that there are no allegations that any condominium association's declaration, by-laws, or rules and regulations are violative of the Florida Building Code, Broward County Edition, and for the sake of argument, all shutters are deemed to be code compliant.

I. Rules governing condominiums under Florida Statutes

Your attorney has represented a number of condominium associations in south Florida and has familiarity with Florida Statutes Sec 718. et.al. including F.S. Sec 718.113 which states *inter alia*.

718.113 Maintenance; limitation upon improvement; display of flag; hurricane shutters and protection; display of religious decorations.—

(2)(a) 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 before the material alterations or substantial additions are commenced. This paragraph is intended to clarify existing law and applies to associations existing on July 1, 2018.

(b) There shall not be any material alteration of, or substantial addition to, the common elements of any condominium operated by a multicondominium association **unless approved in the manner provided in the declaration of the affected condominium or condominiums as originally recorded or as amended under the procedures provided therein.** If a declaration as originally recorded or as amended under the procedures provided therein does not specify a procedure for approving such an alteration or addition, the approval of 75 percent of the total voting interests of each affected condominium is required before the material alterations or substantial additions are commenced. This subsection does not prohibit a provision in any declaration, articles of incorporation, or bylaws as originally recorded or as amended under the procedures provided therein requiring the approval of unit owners in any condominium operated by the same association or requiring board approval before a material alteration or substantial addition to the common elements is permitted. This paragraph is intended to clarify existing law and applies to associations existing on July 1, 2018.

(c) There shall not be any material alteration or substantial addition made to association real property operated by a multicondominium association, **except as provided in the declaration, articles of incorporation, or bylaws as originally recorded or as amended under the procedures provided therein.** If the declaration, articles of incorporation, or bylaws as originally recorded or as amended under the procedures provided therein do not specify the procedure for approving an alteration or addition to association real property, the approval of 75 percent of the total voting interests of the association is required before the material alterations or substantial additions are commenced. This paragraph is intended to clarify existing law and applies to associations existing on July 1, 2018.

...

(5) Each board of administration of a residential condominium shall adopt hurricane shutter specifications for each building within each condominium operated by the association which shall include color, style, and other factors deemed relevant by the board. All specifications adopted by the board must comply with the applicable building code.

(a) The board may, subject to s. 718.3026 and the approval of a majority of voting interests of the residential condominium, install hurricane shutters, impact glass, code-compliant windows or doors, or other types of code-compliant hurricane protection that comply with or exceed the applicable building code.

...

(d) Notwithstanding any other provision in the residential condominium documents, if approval is required by the documents, a board may not refuse to approve the installation or replacement of hurricane shutters, impact glass, code-compliant windows or doors, or other types of code-compliant hurricane protection by a unit owner conforming to the specifications adopted by the board.

Florida Statutes Sec 718.113

II. Analysis

A. Review of Statutes, Special Act and the Broward County Charter

The Florida Statutes clearly determine that the individual unit owners shall comply with the requirements set forth in the declaration or amendments thereto for each particular association or in the case of a multi-condominium association, the declaration, articles of incorporation, or bylaws as originally recorded or as amended under the procedures provided therein. See F.S. Sec 718.113 (2)(a)(b)(c).

It is not within the purview of the Broward County Board of Rules and Appeals to order confirmation of a unit owner's compliance with Association declarations, rules and regulations, bylaws, or any amendments thereto. Section 9.02 of the Broward County Charter sets forth the function of the Broward County Board of Rules and Appeals. More specifically:

A. Purpose.

(1) It shall be the function of the Broward County Board of Rules and Appeals, to exercise the powers, duties, responsibilities, and obligations as set forth and established in Chapter 71-575, Laws of Florida, Special Acts of 1971, as amended by Chapters 72-482 and 72-485, Laws of Florida,

Special Acts of 1972; Chapter 73-427, Laws of Florida, Specials Acts of 1973; 74-435, 74-437, and 74-448, Laws of Florida, Special Acts of 1974; and Chapter 98-287, as amended by Chapter 2000-141, Laws of Florida, or any successor building code to the Florida Building Code applicable to the county, as amended.

...

(3) The Board of Rules and Appeals shall conduct a program to monitor and oversee the inspections practices and procedures employed by the various governmental authorities charged with the responsibility of enforcing the Building Code.

(4) The Board of Rules and Appeals shall organize, promote and conduct training and educational programs designed to increase and improve the knowledge and performance of those persons certified by the Board of Rules and Appeals pursuant to the Building Code and may require the completion of certain minimum courses, seminars or other study programs as a condition precedent to the issuance of certificates by the Board of Rules and Appeals pursuant to the Building Code.

Charter of Broward County, Board of County Commissioners. Sec 9.02

Nowhere does the Charter set forth in any instance where the Board of Rules and Appeals is charged with a police function for private contractual obligations between a condominium unit owner and a condominium association.

Furthermore, the Florida courts and the Florida Department of Business and Professional Regulation have determined that the building authority does not answer to condominium boards and is not a party to violations of condominium declarations, by-laws, or rules and regulations involving work which is otherwise governed by the Florida Building Code. See Jorge L. Planas, v. The Carriage House Condominium Association, Case No. 16-05-5116, December 13, 2016, (Fla DBPR). ("The local building official is responsible for determining the violation and any steps necessary to obtain compliance [with the building code]. Son v. The Gardens of Key Biscayne-Alhabmbra Condo. Ass'n, Inc., Arb. Case No. 94-0351, Summary Final Order (June 13, 1995)(arbitrator declined jurisdiction of a petition for mandatory non-binding arbitration seeking enforcement of the South Florida Building Code with respect to their desire to install a stairway from their unit to the roof of the condominium).")

b. Municipal Codes and Ordinances

In the present case, it is the position of a condominium association that it should be the duty of the Board of Rules and Appeals to ensure oversight that individual condominium unit owners have obtained the approval of their respective Boards before submitting a (hurricane shutter) permit application. The Florida Department of Business and Professional Regulation has determined that the local building authority is not responsible for such a function so that oversight of same necessarily could not be imputed to BORA which has the specifically elaborated responsibilities as set forth in Florida Special Act of Legislature 71-575 and none of which would authorize the requested oversight provision.

It is readily acknowledged that numerous municipalities have codes and ordinances which regulate non-technical, administrative functions such as conformance with "paint palette" selection for commercial and residential structures, and confirmation of authorization by respective homeowner's condominium owners' associations, for changes to the appearance of property.

Municipal codes which reasonably regulate alterations to property, including property appearance are permissible under Florida law. See Fla. Constitution Art 8 sec. 8. As noted in M&H Profit vs. City of Panama Beach, 28 So. 2d 371 (Fla. 1st DCA 2009):

The Municipal Home Rule Powers Act, section 166.021(4), Florida Statutes (1979), provides in part that [i]t is the further intent of the Legislature to extend to municipalities the exercise of powers for municipal governmental, corporate, or proprietary purposes not expressly prohibited by the constitution, general, or special law, or county charter and to remove any limitations, judicially imposed or otherwise, on the exercise of home rule powers other than those so expressly prohibited.

See M&H Profit at 373

In so saying, while municipal powers may give municipalities a rather broad amount of power in certain areas, issues such as the Florida Building Code and its regulation are controlled by statute.

CONCLUSION

The Broward County Board of Rules and Appeals cannot regulate, supervise, nor enforce rules set forth in condominium association documents. Condominium documents are not products of legislation and are therefor outside the scope of any BORA authority.

Municipalities may require proof of condominium or homeowners' association approval before issuance of a building permit through the Municipal Powers Act. Enforcement of such requirements falls squarely and solely upon the respective municipality.

Charles M. Kramer, Esq.
Board Certified by the Florida Bar
5561 University Drive, Suite 102
Coral Springs FL 33067
Phone 954.323.1023 | Direct 954.947.2773
ckramer@bmdlawyers.net |