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

IN RE: PETITION FOR ARBITRATION

Bay Pointe Waterfront Condominium Association, Inc.,

Petitioner,

v. Arb. Case No. 02-5765

Tammy Peavy,

Respondent.
_____/

SUMMARY FINAL ORDER

Comes now, the undersigned arbitrator, and enters this summary final order as follows:

The petitioner association filed its petition in this matter on October 31, 2002. The petition alleges that the respondent has refused to remove a dog residing in her unit in violation of the rules and regulations of the association. The respondent filed her answer on December 2, 2002. The respondent claims that the pet rule passed by the board in 1993, which prohibits pets after 1993, conflicts with rights recognized by the declaration or bylaws, and as such the rules constitute an illegal amendment to the documents.

The arbitrator issued a notice of intent to issue a summary final order, recognizing that the dispute presented was primarily an issue of law, the resolution of which turned on the interpretation of the documents. The order permitted the parties

to file written legal arguments. The time for such submissions was subsequently extended, and the last written argument was filed with the arbitrator on January 21, 2003.

The rules and regulations as amended in 1993 by the board provide as follows:

> Owners who bought in Bay Pointe prior to January 20, 1979, purchased under rules in effect at the time which permitted dogs and cats under certain restrictions. Owners and lessees coming in after that date were not allowed pets however, all previously owned pets were grandfathered in until the end of the pet's natural life.
>
> As of September 15, 1993, dogs are grandfathered in with no replacements allowed and no additional dogs permitted.

The declaration of condominium does not either expressly prohibit pets or permit pets. Article 3 of the declaration incorporates into the declaration, the bylaws, articles of incorporation, and the rules and regulations. Article 3 also provides that the rules and regulations may be amended by the association. Article 12 of the declaration prohibits owners from maintaining a nuisance on the property and permits the board to create and amend rules concerning the use of the condominium property. Section 2.A of the articles of incorporation gives the board the authority to make reasonable rules governing the use of the units and other parts of the condominium. Section XII(3) of the articles provides that no amendment to the articles may be made in any manner which reduces, amends, affects or modifies the provisions and obligations set forth in the declaration. The original rules and regulations permitted pets:

> 13. An apartment owner may have a reasonable

> household pet so long as the pet does not cause a nuisance and does not unreasonably interfere with the peaceful possession of the other condominium parcel owners.

Article IX of the bylaws grants the board the authority to adopt or amend rules and regulations governing the details of the operation, use, maintenance, management and control of the common elements. The bylaws also permit the board to adopt rules governing the use and maintenance of the condominium parcels. Article X of the bylaws, in discussing internal dispute resolution measures to be undertaken where the association seeks to abate a nuisance created or maintained by an owner, uses the following as an example of a nuisance: "(For example: the owner's dog barks constantly when the owner is away)." The board is not authorized to amend the bylaws without a vote of the owners. Pursuant to article XII of the bylaws, the bylaws may only be "altered" or amended or repealed with proper notice and upon the vote of ¾ of the total membership unless a different vote is provided for in the articles or declaration. Neither the bylaws nor the declaration were amended to reflect the 1993 change in the pet rules.

It is elementary that a board cannot adopt a rule modifying the provisions of the declaration or bylaws, without at the same time adopting an amendment to the those documents. See, Gordon v. Palm Aire Country Club Condominium Association No. 9, Inc., 497 So. 2d 1284 (Fla. 4th DCA 1986). "[P]rovided that a board-made rule does not contravene either an express provision of the declaration or a right reasonably inferable therefrom, it will be found valid, within the scope of the board's authority." Beachwood Villas Condominium v. Poor, 448 So. 2d 1143, 1145 (Fla. 4th DCA 1984).

In implementing the Beachwood test in Mohnani v. La Cancha Condominium Association, Inc., 590 So. 2d 1991), the court stated:

> In resolving the first prong of the Beachwood test, a court must determine (A) whether a board is empowered to pass rules and regulations for the governance of the condominium, and (B) whether the topic is a legitimate subject for board rulemaking.
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> To determine part A, the court must examine the relevant statutes and the condominium's declaration and bylaws. In the instant case, it is undisputed that the Board is empowered to pass rules.
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> To determine whether the topic of a rule is a legitimate subject for board rulemaking, the *Beachwood* court stated that a rule will be found within a board's scope of authority if the board enacted rule does not contravene either an express provision of the declaration or a right reasonably inferable therefrom….[Id. at 37].

Provisions contained in the declaration are clothed with a very strong presumption of validity, while rules are not entitled to any such presumption. Beachwood Villas at 1144; Hidden Harbour Estates Inc. v. Basso, 393 So. 2d 637 (Fla. 4th DCA 1981).[1] The court in Mohnani invalidated a board rule prohibiting an owner from renting during the first two years of ownership. The court found that the rule impermissibly infringed upon the right to rent that was reasonably inferable from the declaration. The declaration in that case simply provided that no owner could lease his unit without written notice to the association. By placing additional limitations on the

[1] The Florida Supreme Court in its recent opinion in Woodside Village Condominium Association, Inc. v. Jahren, 806 So. 2d 452 (Fla. 2002) acknowledged the continued significance of the Hidden Harbor Estates decision that forms the bedrock of the Beachwood Villas case. Hence, the association's report of the demise or irrelevance of the landmark Beachwood Villas case is inapposite.

owners' right to rent, the board rule infringed on the right to rent provided by the declaration. In Neville v. Sand Dollar III, Inc., Arb. Case No. 94-0452, Summary Final Order (April 12, 1995), the arbitrator invalidated a rule providing a minimum rental period of 7 days where the declaration simply allowed owners to rent their units. The rule, by placing additional substantive limitations on the right to rent left unfettered by the declaration, violated the right to rent for a period left to the discretion of the owner, a right reasonably inferable from the declaration. In Payne v. Hillsboro Windsor Apartments, Arb. Case No. 92-0231, Summary Final Order (June 4, 1993), the arbitrator invalidated a board rule placing a rental cap of 10% of the units in the condominium, where the bylaws did not impose a cap but simply contained a 30 day minimum period and other unrelated limitations. The arbitrator found that the board rule was invalid because it was more restrictive than the leasing restrictions found in the bylaws. In Reiss v. Siesta Dunes Condominium Association, Inc., Arb. Case No. 92-0148, Final Order (Jule 2, 1993), at issue was the validity of a board rule establishing a minimum rental period of 14 days. The declaration authorized the board to adopt reasonable rules and regulations. The arbitrator stated:

> In this case, as in *Mohnani*, the rule might not violate any express provision of the Declaration, but it clearly contravenes a right that can be reasonably inferred from the Declaration — the right of the unit owner to determine the length of a rental agreement. In effect, the rule is an attempt to amend the Declaration to restrict the right of a unit owner to determine one of the major terms or conditions of a rental agreement. Unlike the bylaws in the Payne case cited above, where the board was specifically given the right to set the terms of a sublease, the Siesta Dunes Declaration specifically gives the right to determine the terms of a lease or rental to the unit owner.

> The Declaration in the instant case has a lengthy section entitled "Sales, Rental, Lease or Transfer". The section explains, in detail, the procedure that must be followed by a unit owner when the unit owner desires to rent or lease his unit. Insofar as the instant case is concerned, the most important aspect of those regulations is that the owner designates the terms of the rental or lease and the Board, if it does not consent to the transaction, must rent or lease the unit "upon the same terms as those specified in the Unit Owner's notice."

In The Lakes of Inverrary Condominiums, Inc. v. Goldberg, Arb. Case No. 93-0125, Final Order (October 5, 1993), the arbitrator ruled that where the declaration was silent regarding pets but indicated that the use of the units and common elements was subject to reasonable rules and regulations to be adopted by the board, a rule prohibiting pets did not violate either an express or implied right in the declaration to have pets. Compare, Laurel Oaks at Pelican Bay Condominium Association, Inc. v. Athans, Arb. Case No. 93-0172, Final Order (October 21, 1993), in which the arbitrator held that where the declaration was silent regarding pets, but permitted the board to adopt rules governing the use of the common elements, a rule prohibiting pets was invalid because the board was not given the authority to enact rules regarding *unit* use.

Based on the foregoing authorities, the arbitrator finds that a board rule that infringes on a right either expressly stated or readily inferred from the bylaws or declaration is invalid. In the instant case, the declaration is silent regarding pets. No right to have a pet is expressly stated or necessarily inferred from the absence of such language in the declaration. The original bylaws *mention* pets as a passing example of a nuisance resolution procedure; the bylaws do not create the inference that pets are

permissible, or that pets would always be permissible. Since the original rules permitted certain (reasonable) pets, it is natural that the original bylaws would be constructed on the framework of the original rules. The arbitrator concludes that the bylaws are effectively silent regarding any right to own and possess a pet and confer no right, express or implied, on the owners to have pets. The conclusion that the rules and regulations, and not the bylaws or the declaration, were intended or authorized to address and contain substantive restrictions regarding pets is bolstered by the fact that the original rules and regulations addressed pet regulations and permitted the owners to have reasonable pets. Since the original rules and regulations addressed the subject of pets and placed substantive restrictions thereon, it is logical that subsequent restrictions on pets would be located in the rules and regulations. Here, the board was specifically authorized to pass and adopt rules and amendments[2] to the rules governing use of the condominium parcels and the use of the condominium property. This includes, by definition[3], the right to pass rules regarding unit use. It is therefore determined that the pet rule is valid.

WHEREFORE, the remaining defenses of the respondent are overruled, and the relief requested by the association in its petition is granted. Respondent shall remove her dog from the unit within 45 days hereof and shall in the future comply with the rules and regulations concerning pets.

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[2] The arbitrator does not agree with the association that Woodside, supra, is either controlling or directly relevant to this proceeding. If the bylaws or the declaration had either expressly or impliedly permitted pets, Woodside would not authorize an amendment to the rules outlawing pets. Purchasers are deemed to be on notice that the documents may be amended lawfully, but Woodside did nothing to topple the hierarchy of documents in the law and it still remains the law that no rule may contravene any of the superior documents.

[3] Section 718.103(12), (13), F.S.

DONE AND ORDERED this 31st day of January, 2003, at Tallahassee, Leon County, Florida.

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Karl M. Scheuerman, Arbitrator
Department of Business and
Professional Regulation
Arbitration Section
Northwood Centre
1940 North Monroe Street
Tallahassee, Florida 32399-1029

Certificate of Service

I hereby certify that a true and correct copy of the foregoing final order has been sent by U.S. Mail to the following persons on this 31st day of January, 2003:

Steven H. Mezer, Esquire
Bushg, Ross, Gardner
Warren & Rudy, P.A.
P.O. Box 3913
Tampa, Florida 33601

Tammy Peavy
8824 Bay Point, Unit F 206
Tampa, Florida 33618

_____
Karl M. Scheuerman, Arbitrator

Right to Appeal

As provided by s. 718.1255, F.S., this final order may be appealed by filing a complaint for trial de novo with a court of competent jurisdiction in the circuit in which the condominium is located, within 30 days of the entry and mailing of this final order. This order does not constitute final agency action and is not appealable to the district courts of appeal. If this final order is not timely appealed, it will become binding on the parties and may be enforced in the courts.

Attorney's Fees

As provided by s. 718.1255, F.S., the prevailing party in this proceeding is entitled to have the other party pay its reasonable costs and attorney's fees. Rule 61B-45.048, F.A.C. requires that a party seeking an award of costs and attorney's fees must file a motion seeking the award not later than 45 days after rendition of this final order. The motion must be actually received by the Division within this 45 day period and must conform to the requirements of rule 61B-45.048, F.A.C. The filing of an appeal of this order does not toll the time for the filing of a motion seeking prevailing party costs and attorney's fees.