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

IN RE: PETITION FOR ARBITRATION

Wanda Dipaola Stephen
Rinko General Partnership,

Petitioner,

v. Case No. 2003-09-6775

Beach Terrace Association, Inc.,

Respondent.
_____/

SUMMARY FINAL ORDER

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

The petition for arbitration was filed in this matter on December 31, 2003. Petitioner maintains that the board had undertaken a substantial lobby renovation project which constituted a material alteration to the common elements without first obtaining a vote of the owners. Petitioner argued in its petition that a vote of 100% of the owners was required, and stated that not even a 75% vote had been obtained. The petitioner also challenged certain amendments to the declaration that re-allocated maintenance responsibility for air conditioners and heaters from the association to the owners individually by removing these components from the definition of common elements and adjusting the insurance provisions of the declaration accordingly. Petitioner requests entry of an order stating that these

components must, consistent with section 718.110(4), Florida Statutes, remain the maintenance responsibility of the association.

The association filed its answer on February 27, 2004. The association stated that an owner vote had been taken on a special assessment needed for the lobby project in May 2003. Subsequently, in response to the petitioner's claim that the lobby changes constituted a material alteration, in September 2003 a ballot was sent to the membership to allow a vote on certain aspects of the lobby project. According to the association, over 80% of the membership voted in favor of this proposal that did not include all parts of the lobby project. The association argued in its answer that material changes required only a 75% vote of the owners, seeking to distance itself from article 6.6 of its declaration providing:

> 6.6 Alteration and Improvements of Common Elements.
>
> ..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 elements 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.

The association theorizes that since this provision results in a re-allocation of common expenses plainly at odds with the formula provided by statute, the statutory default provision contained in section 718.113(2), Florida Statutes, finds

application and the association may accomplish material alterations with only a 75% membership vote.

Concerning those amendments to the declaration challenged by petitioner herein, the association in its answer indicates that an initial owner vote was taken on the amendments, and that once petitioner pointed out that the vote was deficient, an additional vote was undertaken. The association does not dispute that an insufficient number of votes were obtained for these amendments. The association conducted yet another vote on these amendments in December 2003 which did not secure the required approval, and a special owner meeting was conducted on March 31, 2004 in order to place the amendments once more before the membership.

In the order of the arbitrator entered on March 26, 2004, the arbitrator ruled that those components of the lobby renovation plan that reflected life/safety code changes did not require approval of the owners. The order also ruled that the provision in the declaration purporting to excuse nonconsenting owners from the payment of certain common expenses incurred for material changes to the common elements was void. The implication from the order, confirmed specifically here and adopted and incorporated herein, is that due to the invalidity of this provision, the approval of not less than 75% of the owners is required for material alterations as provided by section 718.113(2), Florida Statutes. The order of March 26 required the petitioner to identify what aspects of the lobby renovation not involving life-

safety concerns had not been approved by 75% of the membership. The arbitrator also required the association to file the results of the vote to be held on March 31.

The petitioner on April 9, 2004, filed a list of project components that did not implicate the life/safety considerations and argued that a 100% vote of the members was required for certain of the changes such as the conversion of one lobby exit door into two separate doors. The petitioner noted the concession of the association that the subject amendments did not pass with the required vote, and argued that a corrective certificate of amendment offered by the association did not adequately rescind the amendments.

Petitioner in its response filed April 9, 2004, stated that after the filing of the petition in this matter, the association has attempted to secure the vote necessary to amend articles 6.3 and 6.6 to codify the association's position that maintenance, repair, and replacement of certain items identified as common elements contained in the declaration were now the maintenance responsibility of the owners individually. The association filed a status report on April 12, 2004, reporting the results of the various votes taken at the special owner meeting held on March 31, 2004. It appears that virtually all of the association's initiatives were passed by more than 75% of the membership except the amendment proposing additional restrictions on leasing.

A status conference was held on May 25, 2004 and in the order commemorating the status conference issued on May 26, 2004, the arbitrator ruled that the corrective amendments submitted by the association were sufficient in

formally withdrawing the prior invalid amendments. The association, as agreed to by the parties, was ordered to conduct an additional owner vote for the unapproved portions of the lobby renovation. The order stated that the arbitrator would issue a summary order on the validity of the amendments changing the maintenance responsibility for water heaters, air conditioners, and heating systems serving a single unit. On July 22, 2004, the association filed a status report indicating that more than 75% of the owners had approved all aspects of the lobby project. On July 23, 2004, the arbitrator entered a formal order finding the corrective amendments adopted by the board were effective; this order is adopted herein and is attached and incorporated into this final order. A final status conference was held on October 1, 2004 which allowed the parties to confirm what issues remained for resolution and further permitted the parties to state the location of all pertinent arguments contained in the file.

Upon review of the case file in this matter, it appears that the only issue remaining for disposition is the validity of a certain amendment to the declaration that has the effect of altering the maintenance responsibility for certain components including air conditioners and hot water heaters serving the individual units. The association, after the filing of the petition for arbitration, proposed an amendment to article 6.3. The effect of the amendment is to shift the responsibility for maintenance and repair of mechanical, ventilating, heating and air conditioning equipment to the individual owner. The amendment to the declaration approved by at least 75% of the owners provides as follows:

> 6.3 By the Unit Owner. The responsibility of the Unit Owner shall be as follows:
>
> (a) To maintain, repair and replace, at his expense, all portions of his unit, including the unit front door, except that the Association shall be responsible to paint the front entry door, ~~except the portion to be maintained, repaired and replaced by the Association~~. Unit owners shall also maintain, repair, replace the following limited common elements: heating and air conditioning units contained solely within the boundaries of an apartment, sliding glass doors and adjacent windows and screens, screening and screen supports that are appurtenant to the unit. [Emphasis in original amendment].

The amendment has the effect of changing the maintenance responsibility for a portion of the common elements from the owners *collectively*, to the owners *individually*. The petitioner argues that the amendment is inconsistent with section 718.113(1), Florida Statutes, providing that maintenance and repair of the common elements must be assessed as a common expense against all owners in accordance with ownership interest in the common elements. Petitioner also argues that the proposed amendment has the effect of changing an appurtenance to the unit by changing common elements into limited common elements in violation of section 718.110(4), Florida Statutes. Finally, petitioner points out that an item can only become an appurtenance to a unit if provided in the declaration as an appurtenance. Once an item is an appurtenance, it may only be removed as an appurtenance in a manner consistent with section 718.110(4), Florida Statutes. The association recognizes that consistent with section 718.113(1), Florida Statutes, the declaration may provide that limited common elements may be maintained by those entitled to utilize them. It is not disputed that the items

enumerated in article 6.3 are common elements, and it is further undisputed that the amended article 6.3 classifies or at least refers to these items as limited common elements.

There exist certain authorities that discuss these issues. In Hillsboro Light Towers, Inc. v. Sherrill, 474 So. 2d 1219 (Fla. 4th DCA 1985), the court held that an amendment to the declaration that changed the maintenance responsibility for certain interior boundary walls between the units from the responsibility of the association to the owners individually did not change the share of common expenses and did not require a 100% vote of the owners.[1]

By way of contrast, in Theiss v. Island House Association, Inc., 311 So. 2d 142 (Fla. 2d DCA 1975), the court examined the validity of an amendment that among other things, made one class of owners solely responsible for the costs of maintenance and repair of the common element dryers serving those owners. The court stated:

> The effect of the amendment was to place the entire expense of operating these machines upon the apartment owners rather than apportioning the expenses among all of the unit owners. Appellants' share of the common expenses with respect to these machines has been changed without their consent. [Id. at 146].

Thus the court appeared to hold that an amendment that carved away some common expenses and reassigned them to a class consisting of less than all

[1] Consistent with later discussions in this order, the court in Hillsboro Light presented only the common expense issue and did not address any resulting change to the status of various components of the condominium property.

owners changed the percentage share of common expenses assigned to the owners as to those expenses re-classified by the amendment. The court's analysis set forth above is suggestive that the amendment at issue in Theiss, all other things remaining equal, would require 100% approval of the total voting interests in the manner provided by section 718.110(4), Florida Statutes.[2]

The Division has issued two declaratory statements that bear mention. In the declaratory statement In re: Robert Jackson; Englewood Golf Condominium Villas, Docket No. DS 90056 (January 31, 1991), the Division examined the validity of an amendment to the declaration that changed the manner of sharing the expenses of roof replacement and plumbing lines serving the individual units. Under the original declaration, the association was responsible for these expenses. The amendment made the individual owners responsible for the roofs over their units and for the pipes serving their units. The Division ruled that deleting these items from the common expenses did not change the percentage share of common expenses assigned to each unit as prohibited by section 718.110(4), Florida Statutes. With regards to the roof, the Division observed that the roofs were included in the definition of unit, and hence concluded that no violation of the statute resulted where maintenance responsibility for the roof was shifted to the individual owners. The Division also ruled that if the plumbing lines serving the individual units were common elements, it would be inappropriate to transfer

[2] All other things did not remain equal, as the statute was subsequently amended to provide for limited common elements and to provide the option that those entitled to exclusive use of a limited common element could be charged for its maintenance.

maintenance of them to the owners individually unless the declaration was amended to make the lines limited common elements.

An additional declaratory statement offers insight into these issues. In the declaratory statement In re: Leona B. Toppal, Docket No. DS 95-445, Order Denying Petition for Declaratory Statement (August 2, 1996), the Division was asked whether an amendment to the declaration making the owners individually responsible for painting of the garage doors was valid. The Division could not ultimately construe the documents in that case, but concluded that if the garage doors were part of the unit, the association could collect the painting costs from the owners individually, but if the doors were deemed part of the common elements, then the amendment transferring this cost to the owners individually violated section 718.113(1), Florida Statutes, providing that the cost of maintaining the common elements is a common expense to be shared by all owners in accordance with ownership interest.

In the arbitration case of 1800 Atlantic Condominium Association, Inc. v. Golan, Arb. Case No. 94-0134, Final Order (September 17, 1994), the arbitrator considered whether converting from one master water meter, where the expense of water to the community was treated as a common expense, to individual owner water meters with the owners individually paying their water bill, constituted a material alteration. The arbitrator ruled that the provision in the declaration requiring the approval of 67% of the owners for improvements costing $25,000 or more in one calendar year applied, and the board could not implement the sub-

metering project with a simple board vote. Perhaps what is missing from Atlantic is of the greatest value; the arbitrator did not rule that changing this common expense into an individual expense was a change coming within section 718.110(4), Florida Statutes.[3] The arbitrator treated the installation of the meters similarly to a change to the common elements in the manner governed by section 718.113(2), Florida Statutes.

There is a passing reference to this issue in the arbitration case of Cote D'Azur Condominium Association, Inc. v. Hammond, Arb. Case No. 00-1648, Summary Final Order (February 21, 2001). In that case, the association sued an owner who had extended his patio onto the common elements. The association argued successfully that this change required 100% approval of the owners in accordance with section 718.110(4), Florida Statutes, because the owner had appropriated a portion of the common elements for his exclusive use. With reference to an ancillary issue concerning whether an amendment to the documents providing that owners were responsible for maintaining the exterior surfaces of their patio changed the maintenance responsibilities of the association and the owners, the arbitrator cautioned:

> Indeed, if the amendment in fact changed the maintenance responsibilities in a material manner, a substantial question would be raised as to whether the unanimous consent of the owners was required to pass the amendment. See, s. 718.110(4), F.S.

[3] There is no direct evidence in the final order that the owners challenging the board action in that case argued that section 718.110(4), Florida Statutes, applied to the facts of the case. The opinion in the main dealt with the effect of the physical changes to the property and did not discuss the changes to the distribution of common expenses.

With these authorities in mind, it is possible to examine the issue at hand. The declaration of condominium is required to contain the percentage share of liability for common expenses in the condominium which must be the same as undivided shares of ownership in the common elements.[4] Common expenses include the expenses of the operation, maintenance, repair, and replacement of the common elements and association property, and must be shared in accordance with ownership interest in the common elements.[5] In a residential condominium, the percentage share of ownership in the common elements assigned to each unit shall be based either on the total square footage in uniform relationship to the total square footage of each other residential unit or on an equal fractional basis.[6] The statute permits the declaration to provide that certain limited common elements shall be maintained by those entitled to use them.[7]

Neither the statute nor the declaration here suggests a procedure to be employed by an association where common elements are to be converted into limited common elements, where simultaneously the expenses associated therewith are to be reclassified from a general common expense to limited common expense. The subject amendment accomplishes both of these results. By the amendment, new limited common elements are hewn from general common elements, and at the same time, the responsibility for sharing the expenses of maintaining the new

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[4] Section 718.104(2)(g), Florida Statutes.
[5] Section 718.115(1),(2), Florida Statutes.
[6] Section 718.104(2)(f), Florida Statutes.
[7] Section 718.113(1), Florida Statutes.

limited common elements is shifted from all unit owners to the individual owners. Each of these consequences must be independently examined.

One result of an amendment converting common elements into limited common elements for the exclusive use of less than all owners is that less general common elements are available for use by all owners. It may not matter where the common element being severed is the air conditioner housed in a single unit used by a single owner and not available for general use, but in another case, the facts may be different. For example, if the association by a 75% vote of the owners and approval of the board amended the declaration to carve out a portion of the common elements adjoining a waterway in order to permit a private dock to be constructed for exclusive use by a single owner, the association would be diminishing the common elements available for use by all owners in favor of the owner benefited thereby.[8] The unit owners have the right to use the common elements for the purposes intended[9], and the right to use the common elements has been equated with an appurtenance to the units.[10]

The second issue presented is whether the owners' percentage share of liability for common expenses has changed without their consent. It is plain that the owners who, under the amendment, were assigned maintenance responsibility

[8] These are essentially the facts in the arbitration case of Bogikes v. Windmill Village by the Sea Condo. No. 1 Association, Inc., Arb. Case No. 98-0159, Final Order (June 12, 1998), where the arbitrator held that the association violated section 718.110(4), Florida Statutes by permitting individual owners to colonize portions of the land adjacent to the canal for use as private boat docks.

[9] Section 718.123, Florida Statutes.

[10] See, e.g., Bogikes v. Windmill Village by the Sea Condominium No. 1 Association, Inc., Arb. Case No. 97-0159, Final Order (June 12, 1998).

for the new limited common elements have experienced a change in their percentage of responsibility for paying this part of what was previously a common expense. An amendment substituting the owner for the association as the person responsible for a portion of the former common expenses would cause the proportion or percentage of sharing common expenses to remain the same for those items still included in the pool of common expenses. However, as to those expenses shifted, the individual owners would now be responsible for 100% of that expense. As in the parallel analysis discussed earlier, it may appear more equitable for the individual owner to repair his own air conditioning system, but where, for example, a vote is taken to divert the common expense of re-roofing a single building damaged in a hurricane to the occupants of that building only and 75% of the total owners so vote, the equities appear less certain.[11]

In the final analysis, it must be concluded that unit owners have no vested rights in budget items. Just as owners are charged with notice that the documents may be amended in a manner that causes them financial hardship,[12] owners are also on notice that items contained in the budget for one particular year may change, whether in the sole discretion of the board or with an accompanying vote of the membership depending on the nature of the change. Where a given modification or amendment to the declaration changes the percentage of sharing common expenses, section 718.110(4), Florida Statutes, and the accompanying

[11] At some point in this example, the fundamental concept of a standard condominium as involving shared expenses would be injured where major parts of the common elements are assigned to particular groups of owners for maintenance and replacement purposes.
[12] See, Woodside Village Condominium Association, Inc. v. Jahren, 806 So. 2d 452 (Fla. 2003).

portions of the documents must be complied with. Where an expense item is deleted from the pool of common expenses and made a direct owner expense or a limited common element expense, all other things equal, it cannot be said that the proportion of paying common expenses has changed, and section 718.110(4), Florida Statutes, does not come into play. Here, changing the expense of repairs to individual air conditioners from the association responsibility to the individual owners does not change the percentage share of common expenses and no appurtenance has been changed in this respect. The case of Theiss, discussed earlier, occurred at a time when the statute did not allow one owner or class of owners to bear the burden of maintaining a limited common element as a common expense, and the decision was correct under the statute then in effect. Currently, the statute permits this result and it cannot be said that the subject amendment is inconsistent with the statute or the documents.

Likewise, it cannot be said in this instance that the amendment transferring maintenance responsibility for the individual air conditioning equipment serving the individual units from the owners collectively to the individual owners benefiting thereby modified the appurtenances to the units where the amendment formally codifies these improvements as limited common elements. Prior to the amendment, the unit owners had no right to use the air conditioning systems servicing the individual owners because each owner was assigned the exclusive use of his or her air conditioning system. From the perspective of owners other than the owner using the air conditioner, no use rights in the common elements

have changed.[13] From the perspective of the individual owner so affected, he still has the exclusive right to utilize the system serving his unit; these systems are functionally, limited common elements. The amendment has merely formalized the relationship between the owner and the individual air conditioning system. Section 718.106(2), Florida Statutes, provides that the appurtenances to the unit include the exclusive right to use such portion of the common elements as may be provided in the declaration. Accordingly, the right of the owner individually to use his or her air conditioner was in the nature of an appurtenance under the original declaration, and therefore an amendment formally changing the status of the property to limited common element did not introduce an additional appurtenance to his unit.

Based on the foregoing analysis, the arbitrator concludes that the subject amendment did not violate either section 718.113(1) or section 710.110(4), Florida Statutes, and is otherwise valid.

DONE AND ORDERED this 21st day of October, 2004, at Tallahassee, Leon County, Florida.

_____
Karl M. Scheuerman, Arbitrator
Department of Business and

[13] Compare, Kravitz v. Lake Laura Condominium Association, Inc., Arb. Case No. 93-0277, Final Order (June 28, 1994), where the arbitrator ruled that although the action of the unit owner in fencing in her limited common element grassy area did result in a material change to the common elements, it did not change the other owners' appurtenances because the owners had no use right in the limited common element. See also, Cascades of Falling Waters, Inc. v. Rafuse, Arb. Case No. 00-1625, Final Order (May 4, 2000), where the arbitrator found that the addition of concrete paving stones to the common elements adjacent to the back door of a unit materially modified the appurtenances to the units, with the arbitrator noting that "changes to limited common elements in which the other owners have no use rights would not in the ordinary case modify any appurtenances to the units."

Professional Regulation
Arbitration Section
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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 21st day of October, 2004:

Mark A. Hanson, Esquire
Lobeck, Hanson & Wells, P.A.
2033 Main St., Ste. 403
Sarasota, Florida 34237

Lynne E. Dailey, Esquire
George Hartz, Lundeen, el al., P.A.
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Ft. Myers, Florida 33912

_____
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.