STATE OF FLORIDA
DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION
DIVISION OF FLORIDA LAND SALES, CONDOMINIUMS, AND MOBILE HOMES
IN RE: PETITION FOR ARBITRATION

Robert Engelhardt,

Petitioner,

v. Case No. 2003-06-3375

Carlton Terrace Condominium Association, Inc.,

Respondent.
_____/

SUMMARY FINAL ORDER

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

Although the original petition was filed in this matter on May 21, 2003, it was not until September 23, 2003, that the petitioner filed his second amended petition in which he challenges certain amendments to the declaration recorded in the public records in 1987, 1988, 1993, 1996 and 2001. These amendments restrict or impact to various degrees the ability of an owner to rent or otherwise transfer his unit. The association correctly points out that many of these amendments are unavailable to the petitioner to challenge due to the applicable statute of limitations. In fact, the only amendment the petitioner may challenge is the 2001 amendment to the declaration. Challenges to all other amendments are barred by the statute of limitations. See Sheoah Highlands, Inc. v. Daugherty, 837 So. 2d 579 (Fla. 5th DCA 2003). Accordingly, the arbitrator may only consider the amendment recorded in 2001.

As originally recorded in 1978, article 18 of the declaration of condominium

provided:

> 18. Selling, Leasing and mortgaging of Units. Unit Owners may sell or lease their Units without restriction, except as elsewhere provided to the contrary.

Beginning in 1987, the declaration was amended in a series of amendments that placed increased restrictions on the ability of the owners to rent or transfer their units. In 1987, an amendment to section 18.1 of the declaration provided the association with a right of first refusal where an owner desired to sell, rent, or lease his or her unit. An amendment in 1988 placed a minimum rental term of 1 year on leases. An amendment recorded in December 1993 (which petitioner characterizes as materially altering the appurtenances to the unit), appears to have removed the association's right of first refusal. However, an amendment recorded in 1996 reinstated the right of first refusal. An amendment recorded in 2001 provided the board with the authority to approve or disapprove the sale or lease of a unit. Grounds for disapproval include conviction of certain enumerated felonies or a history of financial irresponsibility.

The declaration contains certain provisions regarding amendments to the declaration. Article 6 provides in part:

> 6. Amendment of the Declaration. Except as elsewhere provided, this Declaration may be amended as follows:
>
> 6.1 By the Association... A resolution for the adoption of a proposed amendment may be proposed either by a majority of the Board of Directors of the Association or by not less than one-third of the members of the Association. Except as elsewhere provided, approvals must be by affirmative vote of:
>
> (a) Unit owners owning not less than 50% of the Units and by not less than 66 2/3% of the Board of Directors of the Association; or
>
> (b) Unit owners owning not less than 80% of the Units; or
>
> (c) 100% of the Board of Directors; or

> (d) Not less than 50% of the entire membership of the Board of Directors in the case of amendments to the section entitled "Insurance" that are reasonably required by insurers or Institutional First Mortgagees.
>
> 6.4 Proviso. Unless otherwise provided specifically to the contrary in this Declaration, no amendment shall change the configuration or size of any Unit in any material fashion, materially alter or modify the appurtenances to any Unit, or change the percentage by which the Owner of a Unit shares the common expenses and owns the common elements and common surplus, unless the record Owner(s) thereof and all record owners of mortgages or other liens thereon shall join in the execution of the amendment. No amendment may be adopted which would eliminate, modify, prejudice, abridge or otherwise adversely affect any rights, benefits, privileges or priorities granted or reserved to the Developer or mortgagees of Units....

Petitioner claims that the subject amendments impair his vested right to alienate his own property and run afoul of § 718.110(4), Florida Statutes. However, this position finds no support in the case law. In Kroop v. Caravelle Condominium, Inc., 323 So. 2d 307 (Fla. 3rd DCA 1975), the court held that an amendment to the declaration of condominium that restricted the right of the owners to lease their units no more than one time during their period of ownership did not constitute an unlawful restraint on alienation. In Seagate Condominium Association, Inc. v. Duffy, 330 So. 2d 484 (Fla. 4th DCA 1976), the court affirmed the validity of an amendment to the declaration that prohibited further leasing of the units--even as to current owners, where the amendment provided the board discretionary approval authority in hardship cases. The court noted:

> Given the unique problems of condominium living in general and the special problems endemic to a tourist oriented community in South Florida in particular, appellant's avowed objective--to inhibit transciency and

> to impart a certain degree of continuity of residence and a residential character to their community--is, we believe, a reasonable one, achieved in a not unreasonable manner by means of the restrictive provision in question. The attainment of this community goal outweighs the social value of retaining for the individual unit owner the absolutely unqualified right to dispose of his property in any way and for such duration or purpose as he alone so desires. [Id. at 486-87].

Consider also in this regard, Flagler Federal Savings and Loan Association of Miami v. Crestview Towers Condominium Association, Inc., 595 So. 2d 198 (Fla. 3rd DCA 1992), where an amendment to the declaration that prohibited leasing was held to properly apply to a savings and loan association that owned units prior to the amendment. This decision was based in part on the court's rationale that the savings and loan association took title to its units with knowledge that the condominium declaration could be amended.

These principles were recently affirmed by the Florida Supreme Court in Woodside Village Condominium Association, Inc. v. Jahren, 806 So. 2d 452 (Fla. 2003), where the Court was faced with the question of whether an amendment to the declaration of condominium that restricted leasing to 9 out of 12 months and prohibiting owners from leasing their units within the first 12 months of their ownership was valid. The Court, noting that the owners had failed to prove that the restrictions on leasing violated public policy, the statute, or their constitutional rights, concluded that the owners were on constructive notice that the leasing restrictions contained in the declaration were subject to change through the amendment process. The Court found that the amendment had been accomplished in accordance with the

amendatory procedures contained in the statute and the declaration itself[1], and specifically discussed the provisions of § 718.110(4), Florida Statutes, which prohibits amendments that change the appurtenances to the unit and other fundamental changes not consented to by all owners in the condominium. The Court did not find that the right to rent or the right to freely alienate property in any manner desired were fundamental property interests protected by § 718.110(4), Florida Statutes or the Constitution of the State of Florida. Instead, the Court found that:

> Indeed, it is restrictions such as these that distinguish condominium living from rental apartments or single-family residences. Hence, persons acquiring units in condominiums are on constructive notice of the extensive restrictions that go with this unique, and some would say, restrictive, form of residential property ownership and living. [Id. at 462.]

Based on these authorities, the arbitrator concludes that nothing in the 2001 amendment[2] deprives the petitioner of any fundamental property interest protected by statute including the provisions of § 718.110(4), Florida Statutes, or organic law.

WHEREFORE, the petitioner is required to comply with the various amendments to the declaration.

DONE AND ORDERED this 17th day of February, 2004, at Tallahassee, Leon County, Florida.

_____
Karl M. Scheuerman, Arbitrator
Department of Business and
Professional Regulation

[1] The fact that the declaration in this case can be amended in a relatively facile manner by the unanimous vote of the board does not detract from the conclusion that the petitioner is charged with notice that the declaration could be amended in this manner.

[2] While this decision is restricted of necessity to the 2001 amendment due to the operation of the statute of limitations, even assuming that the amendments were void ab initio and therefore not subject to the statute of limitations, petitioner has likewise shown no support in the law in favor of the invalidity of the prior amendments to the declaration.

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 summary final order has been sent by U.S. Mail to the following persons on this 17th day of February, 2004:

S. David Sheffman, Esquire
1111 Lincoln Rd., #400
Miami Beach, Florida 33139

Lisa C. Cicero, Esquire
Douberley & Cicero, P.A.
15100 NW 67th Ave., Ste. 204
Miami Lakes, Florida 33014

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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.