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

IN RE: PETITION FOR ARBITRATION

Kenneth Richardson, et al.,

Petitioners,

v. Case No. 02-4354

Jupiter Bay Condominium Association, Inc.,

Respondent.
_____/

FINAL ORDER ON MOTION FOR REHEARING

Comes now, the undersigned arbitrator, and enters this order on motion for rehearing as follows:

The arbitrator entered a final order in this case on July 3, 2002. The final order found as follows:

> WHEREFORE, the arbitrator determines that the challenge to the 1991, 1995, 1999 and 2001 amendments is not time-barred; these amendments are found to be inconsistent with rights granted under the declaration and are invalid ab initio. Finally, Woodside offers the association no remedy in this case. The association is hereby prohibited from enforcing the 1991, 1995, 1999 and 2001 amendments against anyone in the condominium.

The association filed its motion for rehearing on or about July 12, 2002. The motion raised many points of law, the majority of which were already ruled on in the course of the previously entered final order. It is not the function of rehearing to

present an opportunity to re-argue the merits of the earlier order. See, rule 61B-45.044, F.A.C. On the other hand, a portion of the motion raises issues not previously argued by the parties or specifically decided by the arbitrator. Accordingly, this order will discuss these additional issues.

The association first re-argues the statute of limitations issue and states that the subject amendments are voidable and not void. The arbitrator has reviewed the case law authority and has found sufficient support for the original holding that the bylaw amendments may properly be considered void. The association failed to follow the appropriate procedures for passing substantive restrictions on the right to lease found in the declaration, and ultimately amended the wrong set of documents. The declaration should have been amended instead of the bylaws. It does not go far enough to say, as the association does, that the statute allows the bylaws to contain restrictions on unit use; the statute, as observed in the final order, only allows such bylaw provisions that are consistent with the declaration. The arbitrator therefore re-affirms that the statute of limitations should be rejected.

Next, the association argues that the arbitrator overlooked the articles of incorporation which provide the board with the authority to approve or disapprove the leasing of units. The significance of the foregoing is that that the bylaw amendments disapproved by the arbitrator in the final order included a provision requiring approval of the board to lease individual units. The approval issue is part of a larger issue: In invalidating the bylaw amendments, the arbitrator intentionally or otherwise invalidated provisions in the bylaw amendments that do not constitute substantive limitations on the right to vote deemed by the arbitrator to be

inconsistent with the declaration. The bylaw amendments included occupancy limits for the units, a provision for transfer fees, and other limitations on the right to rent including the minimum rental periods that were the focus of the prior final order. The association in effect requests reinstatement of those provisions not deemed inconsistent with the declaration.

The association is correct in its observation that the issue of primary concern in the proceeding was the validity of the minimum rental periods provided by the amended bylaws. That was the focus of the prior final order which quoted those portions of the amendments deemed invalid. The rationale for finding the amendments invalid was inconsistency with specific rights granted in the declaration. If a particular amendment is consistent with rights conferred by the declaration, that portion of the amendment, logically, should not be considered invalid. The occupancy limits contained in the amendments are not deemed inconsistent with the declaration, but are expressly contemplated by section 10.1 of the declaration. The amendment provision limiting occupancy to those renting the unit and their guests mirrors section 10.1 of the declaration and is valid. The bylaw amendment requiring that tenants and guests comply with the rules and regulations of the association is wholly consistent with the declaration. Therefore, it is held that these portions of the bylaw amendments are valid.

The more difficult provision to deal with involves the asserted right of the association to approve or disapprove a prospective lessee. The articles of incorporation, as stated, reference the right of the board to approve or disapprove the leasing of units, but the entire provision reads:

> (f) To approve or disapprove the leasing, transfer, ownership and possession of Units as may be provided by the Declaration. (e.s.)

Unfortunately for the association, the right of the board to approve leases as it appears in the articles of incorporation is made specially contingent on the declaration providing for such a right. The declaration as originally recorded or as subsequently amended does not create a right of approval in the association and does not even mention such a right in passing. Indeed, the usual provisions customarily located in the declaration which spell out the procedures to be followed where an owner desires to sell or lease his unit are wholly absent. There is no right of first refusal given to the association in the declaration; there is no time limit for exercising such a right; there is no provision requiring association approval prior to the transfer of a unit or requiring the association to substitute itself or another as the prospective lessee or purchaser in the event of disapproval. In short, there is no provision putting the association in the business of approving proposed tenants; hence, the supposed right of the association in the articles of incorporation to approve rentals or to charge a transfer fee rings hollow without specific accompaniment in the declaration.

The association has a legitimate interest in being made aware of rentals. If the association is unaware of the number or nature of intended occupants, it cannot enforce the declaration restricting occupancy to owners, guests, and lessees, and cannot enforce the part of the declaration requiring that the number of occupants be related to the size of a unit. Based on these considerations, the association is deemed be authorized to require that leases be in writing and filed

with the association prior to occupancy by the tenant, not less than 3 business days in advance of the intended occupancy. The association cannot charge a transfer fee, and further, cannot charge a "processing fee" of $75 as currently provided in its rules. If the association intends to exercise a right of approval or right of first refusal on proposed sales or leases in the future, it must first amend its declaration to provide for such.

WHEREFORE, the arbitrator issues this final order on rehearing as more particularly set forth herein. No further motions for rehearing will be entertained.

DONE AND ORDERED this 26th day of August, 2002, 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 26th day of August, 2002:

John L. Avery, Esquire
1001 N. U.S. Highway One, Ste. 207
Jupiter, Florida 33477

Keith F. Backer, Esquire
136 East Boca Raton Rd.
Boca Raton, Florida 33432

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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.