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

IN RE: PETITION FOR ARBITRATION

Sandra E. Schultz,

Petitioner,

v. Case No. 2003-08-3347

La Costa Beach Club Resort
Condominium Association, Inc.,

Respondent.
_____/

AMENDED SUMMARY FINAL ORDER

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

A summary final order was entered in this cause on November 7, 2003. The arbitrator hereby vacates the summary final order on his own motion and substitutes this final order in its place.

Petitioner Schultz filed her petition for arbitration on September 25, 2003. Ms. Schultz alleges that she was removed from the board by board action taken at a board meeting conducted on March 20, 2003, for being delinquent in the payment of her assessments. The removal of Ms. Schultz was confirmed at a later board meeting conducted on April 10, 2003. Ms. Schultz claims that due to illness, an assessment due on March 1, 2003, was not paid until April 10, 2003. Ms. Schultz requests the entry of a final order reinstating her to the board.

The association filed its answer on October 23, 2003. The association does not dispute the relevant facts but argues that its bylaws control. Article IV Section 5 of the bylaws provides as follows:

> No member shall continue to serve on the board should he be more than thirty days delinquent in the payment of an assessment and said delinquency shall automatically constitute a resignation, effective when such resignation is accepted by the board of directors.

The association agrees that the assessment at issue was over 30 days late and claims that the petitioner has been chronically late in paying a number of assessments in the past. The association disputes that section 718.112(2)(j), Florida Statutes, in providing that the unit owners have the right to recall a board member, indicates that only the owners may recall or remove a member of the board, and does not agree that the statute, in providing associations with a lien remedy where assessments are unpaid, provides an *exclusive* remedy.

It is axiomatic that a condominium is fundamentally and exclusively a creature of statute. Under this principle, each aspect of condominium life is determined and controlled by the statute, and it follows of necessity that being a creature of statute, an association may only exercise those remedies prescribed by the statute. According to section 718.102, Florida Statutes:

718.102 Purposes.—

> The purpose of this chapter is:
> (1) To give statutory recognition to the condominium form of ownership of real property.
> (2) To establish procedures for the creation, sale, and operation of condominiums.

> Every condominium created and existing in this state shall be subject to the provisions of this chapter.

The courts have steadfastly acknowledged and enforced the statutory nature of condominiums in a progression of decisions that has spanned a period of nearly 20 years. In Suntide Condominium Association, Inc. v. Division of Florida Land Sales and Condominiums, 463 So. 2d 314, 317 (Fla. 1st DCA 1984), review denied 469 So. 2d 750 (Fla. 1985), the court held that a condominium association is "strictly a creature of statute" and is required to assess for common expenses in the manner provided by statute. In Towerhouse Condominium, Inc. v. Millman, 475 So. 2d 674 (Fla. 1985), the Court held that since the statute did not confer the authority on a condominium association to purchase land to be used as additional parking, this authority did not exist:

> ...Hence, petitioner may exercise only those powers enumerated in the Condominium Act, which expressly provides that the association may grant itself in the Declaration of Condominium and bylaws only those powers not inconsistent with the Act. ...At the time of the contested purchase, the statute did authorize the association to purchase units in the condominium. Section 718.111(8), Fla.Stat. (1977). It is a general principle of statutory construction, well-established in Florida's jurisprudence, that the mention of one thing implies the exclusion of another. [citation omitted]. This rule of expressio unius est exclusio alterius leads to the conclusion that no other power to purchase real property was intended to be within the association's authority. Had the power to purchase real property been inherent in the association, there would have been no necessity for a legislative grant of such power. [footnote omitted; emphasis added.]

Towerhouse, 475 So. 2d at 676. See also, Woodside Village Condominium

Association, Inc. v. Jahren, 806 So. 2d 452 (Fla. 2002). Because of the statutory nature of condominiums, it follows that purchasers, developers, and associations may only exercise those powers conferred by statute, and may only exercise that authority in the manner prescribed by statute. In Palm Bay Towers Corp. v. Brooks, 466 So. 2d 1071 (Fla. 3rd DCA 1985), opinion on reh. en banc, (Nesbitt, Hubbart dissenting), the majority of the court held that the developer could not, by artfully drafting the declaration of condominium, excuse itself from the payment of statutorily-set assessments on developer-owned condominium units. See also, for a similar result, Hyde Park Condominium Association v. Estero Island Real Estate, Inc., 486 So. 2d 1 (Fla. 2d DCA 1986); Winkleman v. Toll, 661 So. 2d 102, 107 (Fla. 4th DCA 1995); Estancia Condominium Association v. Sunfield Homes, Inc., 619 So. 2d 1008 (Fla. 2d DCA 1993).

Here, Chapter 718, Florida Statutes, empowers the owners to remove board members via the device of a recall as set forth in section 718.112(2)(j), F.S. Based on the authorities set forth above, the fact that the statute permits the owners to recall their board members implies in the first instance that the legislature did not contemplate additional methods by which a board member may be removed. An additional consideration in this regard is that the removal of a board member by other than recall has the effect of disenfranchising the unit owners who have the statutory right to elect their board members. If the board was free to remove board members, this would permit the board to undo the results of duly held elections and would put the board in the position of determining the composition of the board. "If a board

may willy-nilly remove board members following a duly conducted election, the board has the ability to change the outcome of any given election in a fundamental way." Anderson v. Poinciana Island Yacht and Racquet Club Condominium Association, Inc. Arb. Case No. 02-5718, Order on Pending Motions (December 20, 2002). Compare, Baltuch v. Rolling Green Condominium F, Inc., Arb. Case No. 93-0090, Final Order (August 30, 1993) where the arbitrator invalidated a bylaw amendment making the president, after expiration of his term as a board member, an ex officio board member with full voting rights on the ground that it infringed on the right of the membership to elect their board members.

Similarly, the statute prescribes certain remedies for the nonpayment of assessments. In permitting an association to impose and foreclose a lien for unpaid common expenses, the legislature did not imply that additional remedies may be exercised where an owner fails to pay an assessment.[1] Review, in this regard, San Remo Condominium Association, Inc. v. Unit Owners Voting for Recall, Arb. Case No. 98-5285, Partial Summary Final Order (December 28, 1998) where the board subject to recall challenged the eligibility of the replacement board members to serve because of an alleged delinquency in the payment of their assessments. The arbitrator noted:

[1] In its declaratory statement issued in the case of Dover House Condominium Association, Inc. v. Division of Florida Land Sales and Condominiums, Case No. 85A-267, aff'd per curiam, 506 So. 2d 1045 (Fla. 4th DCA 1987), the Division ruled that since the legislature provided condominium associations with the remedy of a lien for unpaid assessments, the association could not supplement its remedies by amending the bylaws to provide that a unit owner who was delinquent in the payment of assessments could be physically locked out of the common elements.

> Moreover, condominiums are creatures of statute and are thus only permitted to exercise those powers provided by the statute. [citations omitted]. Nowhere does the statute permit an association to deny an owner the right to vote or hold office due to an alleged arrearage in the payment of assessments. The statute permits the association to file a lien and to refuse to approve a prospective tenant where an arrearage exists...In addition, the right to vote is specifically made an appurtenance to the unit as described by section 718.106, Florida Statutes, and the right to hold office, while not specifically made an appurtenance to membership, is not in the statute conditioned upon the faithful payment of assessments.

The statute presently contains no facial qualifications on the right of an owner to run for the board other than the restriction contained in section 718.112(2)(d)1., Florida Statutes that addresses convicted felons. Accordingly, any owner may run for the board and may nominate himself to that position. Section 718.112(2)(d)3., Florida Statutes permits any owner or other eligible person to provide timely notice of his candidacy. It follows that if an owner is eligible pursuant to the statute to run for the board, then any unit owner is eligible to continue to sit on the board, once duly elected, regardless of the status of an alleged delinquency in the payment of assessments. Permitting removal of a board member for nonpayment of assessments would open the way to removal for an entire host of other reasons including a violation of the condominium documents or perhaps even a rule adopted by the board, and would create wholesale uncertainty and instability in the composition of the board. Moreover, in these type of removals, an additional issue presented is how the board is to determine whether the rule or provision of the documents has been violated, whether the board is

required to hold a hearing and permit the ousted board member to present rebuttal evidence, and the like.[2]

For the reasons stated, the bylaw is declared to be invalid, and Ms. Schultz is hereby immediately reinstated to the board; the board is ordered to reinstate Ms. Schultz and to include her as a functioning board member until the term to which she was appointed has expired. The board is further required to notice and conduct at least one meeting prior to the next election, at which meeting Ms. Schultz shall be permitted to function as any other board member. The remainder of the relief requested by Ms. Schultz is denied.

DONE AND ORDERED this 21st day of November, 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

[2] There exist many questions in this area. Under the preceding analysis, a rule, for example, deeming a board member to have resigned for missing 3 consecutive meetings would also be considered invalid because this method of removal is not allowed by the statute. A board member may *voluntarily resign* as contemplated by statute, or a board member may be involuntarily removed via the statutory recall procedure. Compare, Visoly v. Buckley Towers Condominium Association, Inc., Arb. Case No. 94-0224, Summary Final Order (November 2, 1994) where the arbitrator ruled that nothing in the election law amendments contained in Ch. 91-103, Laws of Florida, supported the conclusion that through passage of that law, the legislature intended to outlaw term limits for board members. By way of contrast, a rule or provision of the documents requiring that an owner actually reside in the condominium in order to run for a board office violates the statutory right of every owner to nominate himself to run for the board as expressed in § 718.112(2)(d)3., Florida Statutes. For the same reason, there is support for the proposition that a bylaw prohibiting more than one owner of a unit owned by more than one person to sit on the board is invalid. Finally, the fact that chapter 718, Florida Statutes, prescribes comprehensive recall procedures warrants an inference that the Legislature intended these procedures to apply to the exclusion of any parallel provision contained in chapters 607 or 617, Florida Statutes.

Certificate of Service

I hereby certify that a true and correct copy of the foregoing amended final order has been sent by U.S. Mail to the following persons on this 21st day of November, 2003:

Sandra E. Schultz
19420 N.W. 43 Avenue
Miami, Florida 33055

Stuart J. Zoberg, Esquire
Becker & Poliakoff, P.A.
3111 Stirling Road
Ft. Lauderdale, Florida 33312-6525

_____
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.