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

Federal National Mortgage Association,

Petitioner,

v. Case No. 01-2949

Oakbrook Condominium Association, Inc.,

Respondent.
_____/

FINAL ORDER ON REHEARING

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

The arbitrator issued a summary final order in this cause on August 23, 2001. On August 27, 2001, petitioner filed its request for clarification, noting its confusion at the initial final order. Accordingly, this final order is substituted therefore.

Petitioner Federal National Mortgage Association filed its petition in this matter on May 10, 2001. According to the petition, the respondent association passed an amendment in 1997 that adversely impacted the ability of the petitioner to convey units in the condominium. The amendment to the declaration provides:

> In any event, no unit owner, regardless of how he or she may have acquired title to a unit, shall be permitted to rent, lease, sell or otherwise convey title to said unit, or any interest therein, save and except by will or interstate succession upon his or her death, to any third person, persons, firms or entities whatsoever during the first 12 months of their ownership of said unit.

Prior to the amendment, article XXIV of the declaration provided the association with a right of first refusal with regard to the lease or sale of a unit, and further provided:

> C. Should the interest of a unit owner or developer become subject to a mortgage as security in good faith or for value, the holder of such mortgage upon becoming the owner of such interest, through foreclosure, judicial sale, or voluntary conveyance in lieu of foreclosure, judicial sale, or voluntary conveyance in lieu thereof shall have the unqualified right to sell, lease or otherwise dispose of said interest and the transfer of the fee ownership of said unit may be accomplished without the prior approval of the Association, notwithstanding provisions herein to the contrary, but the Seller shall otherwise sell and the Purchaser or lessee shall take subject to the condominium documents.

The parties were referred to arbitration by order of the court in a pending court case. The association filed its answer in this case on June 6, 2001. The association agrees that the amendment by its terms prohibits owners from selling their units within the first year following acquisition of title to the unit. The association denies that the amendment changed the unqualified right to sell that all owners enjoyed prior to the amendment. The association also claims that the petitioner was not the holder of a mortgage prior to the 1997 amendment and therefore did not have an unqualified right to sell prior to the amendment. The association asserts that the amendment was duly noticed and was passed by an affirmative vote of 75% of the total membership.

The main issue presented in this case is whether the unfettered right to transfer the unit is a right that may not be changed without the joinder or consent of the mortgagees of record. Outside the context of mortgagees and in the absence of a particular provision in the declaration offering protection to certain owners or classes of owners, the courts and the arbitration decisions applying the various opinions have generally held that the right to lease a unit is not a right that may not be diminished without an affirmative vote of the owners affected thereby. For example, in Seagate Condominium Association, Inc. v. Duffy, 330 So. 2d 484 (Fla. 4th DCA 1976), the

court upheld the reasonableness of an amendment to the declaration prohibiting the leasing of units except in certain hardship cases. The court cited the uniqueness of condominium living "and the resultant necessity for a greater degree of control over and limitation upon the rights of the individual owner that might be tolerated given more traditional forms of property ownership." Id. at 486. In Kroop v. Caravelle Condominium, Inc., 323 So. 2d 307 (Fla. 3rd DCA 1975), the court upheld the validity of an amendment to the declaration limiting leasing to once during the period of ownership, recognizing that a purchaser of a condominium unit takes title subject to the possibility that the declaration may thereafter be amended to state additional restrictions, including restrictions on leasing. In the celebrated case of Beachwood Villas Condominium v. Poor, 448 So. 2d 1143 (Fla. 4th DCA 1984), the court formulated a test for determining the validity of board rules imposing rental restrictions. The court stated that "provided that a board-enacted 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." Id. at 1145. Where a declaration contains no express limitations on leasing, but instead contemplates that the leasing of units may occur, it has been generally held under an application of the Beachwood Villas test that board rules placing substantive limitations on the ability of the owners to lease their units violated rights reasonably inferable from the declaration. See, e.g., Mohnani v. La Cancha Condominium Association, Inc., 590 So. 2d 36 (Fla. 4th DCA 1992); Berlinger v. Carlyle House Condominium Association, Inc., Arb. Case No. 94-0128, Final Order (February 20, 1995); Neville v. Sand Dollar III, Inc., Arb. Case No. 94-0452, Final Order (April 12,

1995).[1]

The factual circumstances presented in the foregoing authorities demonstrate that the cases cited above can find no direct application in this case. Many of the cases discussed above involve challenges to board rules, where the appropriate focal point became whether the rules were inconsistent with rights inferable from the declaration. Where the declaration itself is amended, this inquiry in inapposite. Other cases discussed above involved amendments to the declaration that lawfully impaired the previous right to lease, where the declaration itself contained no assurance that additional rental restrictions would not be imposed. While it is feasible and consistent with the case law to conclude that an ordinary purchaser takes title subject to his constructive knowledge that the document may be amended, this principle finds no application *where the declaration itself contains assurances that no amendments shall be passed depriving a particular owner or class of owners of their right to lease or sell their units*. This is exactly what article XXVI does insofar as it prohibits amendments to the declaration which alter, amend, or modify in any manner whatsoever the rights, powers, and privileges granted and reserved in favor of mortgagees. The obvious intent is of this specific amendatory provision is to preserve the rights granted to mortgagees and the developer as contained in the original documents, and to prohibit amendments changing their substantive rights without the consent of all the mortgagees.[2] Also, where a specific provision in the declaration (here, article XXVI)

[1] The only known authority perhaps to the contrary is Jahren v. Woodside Village Condominium Association, Inc., 754 So. 2d 831 (Fla. 2nd DCA 2000) suggesting that a purchaser who buys a unit in reliance on then-existing rental provisions could not be dispossessed of its vested right to lease its units. However, review of Woodside is pending in the Florida Supreme Court, Case No. SCOO-1030. Oral arguments in the case were heard on April 2, 2001.

[2] Compare, Gate Condominium Association, Inc. v. Finkel, Arb. Case No. 95-0344, Partial Summary Final Order (December 9, 1996), holding that the declaration could properly be amended to prohibit

finds application due to the facts presented, as here, the general amendatory provisions of the declaration requiring a vote of only 75% of the membership do not apply in such a manner as to eclipse the intended operation of the specific provision. Therefore, based on this analysis, it is concluded that the 1997 amendment, which removed the prior exemption enjoyed by mortgagees from the association approval process, violated article XXVI. By the amendment, the rights and privileges afforded to mortgagees were abridged without their joinder or consent.

A secondary issue is whether petitioner is in a position to challenge the validity of the amendment. According to the petitioner's reply filed on June 21, 2001, the mortgagees of record did not receive notice of the amendment. Petitioner also claims that since no mortgagees consented to the amendment, any effort to enforce the amendment against the petitioner would constitute an impairment of the contractual relationship between and among the condominium, its members and their mortgagees. Petitioner in the reply described itself as the "beneficial owner and assignee of the mortgage which was held in the name of First Nationwide Mortgage Corporation," who did not receive notice of the proposed amendment. An affidavit of the predecessor in interest to First Nationwide is attached, in which the vice-president of the corporation indicates that the corporation had no notice of the amendment. The issue presented is whether the declaration by its terms was intended to protect a "beneficial owner and assignee" such as the petitioner herein. The petitioner relies on article XXVI, providing as follows:

> Furthermore, no amendment to this Declaration shall be adopted which would operate to affect the validity or

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all future rentals of units, and further holding that the amendment did not impair the security of mortgages on the units. There, the declaration contained no provision mirroring article XXVI in this case, but only prohibited amendments impairing the security of mortgages.

> priority of any mortgage held by a mortgagee or which would alter, amend or modify, in any manner whatsoever the rights, powers and privileges granted and reserved herein in favor of any mortgages [sic] or in favor of the Developer without the consent of all such mortgagees or the Developer, as the case may be.

According to the facts submitted, at the time of the 1997 amendment, the petitioner was not a mortgagee of record for the unit involved in this case. The mortgage on the unit at that time was held in the name of First Nationwide Mortgage Corporation. California Federal Bank, F.S.B. was the predecessor in interest to First Nationwide Mortgage Corporation. The mortgage on the unit was executed on June 29, 1993 and was assigned to First Nationwide Mortgage Association by assignment dated May 22, 2000. Petitioner was not therefore the holder of the mortgage prior to the 1997 amendment or prior to becoming the owner of the unit through foreclosure sale.

It cannot be said that the petitioner was granted any rights under the declaration prior to the assignment of the mortgage that occurred in 2000. The declaration prior to the 1997 amendment granted to mortgagees an unrestricted right to lease or sell the unit subject to the mortgage. Petitioner was not the holder of a mortgage on the unit at that time. The language of article XXIV exempts "the holder of such mortgage" from the requirement of association approval, and grants the mortgage holders who acquire title to the unit the "unqualified right to sell, lease or otherwise dispose of said interest." It would have been a simple matter for the drafter of the declaration to have granted assignees of mortgage holders the same rights, privileges and immunities as mortgagees, either by outright mention or by defining one to include the other, neither of which occurred here. Compare, Ross v. El Dorado Towers Condominium Association, Inc., Arb. Case No. 93-0005, Final Order (July 2,

1993), in which the arbitrator concluded that where the declaration granted institutional first mortgagees acquiring title to a unit the unqualified right to sell or lease their unit, the protection did not extend beyond institutional first mortgagees to include the non-institutional assignee of the mortgage who accepted such assignment after the commencement of foreclosure proceedings instituted by the institutional first mortgagee, with the arbitrator commenting that "[t]here is in the documents no intent shown to extend the protection afforded to first mortgagees, to third party assignees." It is concluded here that the protection in the pre-1997 declaration granting to the holder of a mortgage who acquires title to a unit the unfettered right to sell or lease the unit does not extend in this instance to the assignee of the mortgage who received an assignment of the mortgage in 2000.[3] The above notwithstanding, however, the association does not appear to argue that the mortgagees of record in fact had advance notice of the 1997 amendment. Article XXVI prohibits amendments to the declaration which alter or amend the rights and privileges granted to mortgagees unless all mortgagees of record consent to the amendment. Since the association did not obtain the consent of the mortgagees of record, and since the amendment plainly alters the ability of the mortgagee to transfer units foreclosed upon, the amendment is invalid on its face for noncompliance with article XXVI, regardless of whether the petitioner actually held a mortgage at the time of the amendment.

Based on the foregoing, it is concluded first, that the 1997 amendment violates

[3] Compare, Glen Cove Apartments Condominium Master Association, Inc. v. Weit, Arb. Case No. 93-0075, Final Order (May 30, 1995), in which the arbitrator concluded that the subsequent developer did not enjoy the exemption of the creating developer from rental and residential use restrictions in the absence of an assignment of rights from the original creating developer where the documents showed no overall intent to benefit remote developers.

rights granted specifically under article XXVI. The amendment is therefore invalid and may not be enforced. Secondly, the amendment is invalid because the association did not secure the consent of the mortgagees of record as required by article XXVI. Although the petitioner was not a mortgagee of record at the time of the amendment and was not intended to benefit from the pre-amendment provisions of article XXVI or XXVI, the failure to obtain joinder of the mortgagees of record renders the amendment invalid.

DONE AND ORDERED this 5th day of September, 2001, 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 has been sent by U.S. Mail and by fax to the following persons on this 5th day of September, 2001:

Donna Evertz, Esquire
801 S. University Drive
Suite 500
Plantation, Florida 33324

David J. Schottenfeld, Esquire
7520 NW 5th Street
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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 petition for trial de novo with a court of competent jurisdiction in the circuit in which the condominium is located, within 30 days of the rendition and mailing of this final order.