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

IN RE: PETITION FOR ARBITRATION

Pompano Beach Club North
Association, Inc.,

Petitioner,

v. Case No. 02-5892

William T. Freyvogel,

Respondent.
_____/

ORDER ON PENDING MOTIONS AND ORDER REQUIRING SUPPLEMENTAL INFORMATION

Comes now, the undersigned arbitrator, and enters this order as follows:

On December 5, 2002, Pompano Beach Club North Association, Inc. (petitioner) filed a petition for mandatory non-binding arbitration, naming William T. Freyvogel as respondent. The petition alleges that the respondent maintains a dog in his unit in violation of pet restrictions contained in article 10.09 of the declaration of condominium (adopted as an amendment in April 1998). The petitioner seeks removal of the dog pursuant to those pet restrictions. On January 3, 2003, respondent filed an answer, counterclaim and motion to conduct discovery. The arbitration section also received a motion to strike respondent's answer and counterclaim and a motion in opposition to discovery by the petitioner.

The arbitrator acknowledges numerous procedural deficiencies in respondent's answer and counterclaim, according to filing requirements set forth in Rule 61B-45.019 (1), (3) and (4), F.A.C. However, the arbitrator finds that by reading

respondent's answer and counterclaim in conjunction with each other, sufficient grounds exist to form the basis for an answer, even if submitted in a manner contrary to procedural rules. Accordingly, the arbitrator shall consider grounds set forth in respondent's counterclaim as part of his answer; petitioner's motion to strike respondent's answer and counterclaim is therefore denied.

Respondent cites three (3) defenses in his answer: waiver, estoppel and laches. Waiver is the "intentional or voluntary relinquishment of a known right, or conduct which implies the relinquishment of a known right." Mizell v. Deal, 654 So. 2d 659, 663 (Fla. 5th DCA 1995). The elements of waiver are: (1) the existence at the time of the waiver of a right, privilege, advantage, or benefit which may be waived; (2) the actual or constructive knowledge of the right; and (3) the intention to relinquish the right. Id. Petitioner contends that in April 1998, article 10.09, Pets, was adopted as an amendment to the declaration of condominium. It states, in relevant part:

> 10.09. Pets. The maintenance, keeping, breeding, boarding and or raising of animals, livestock, or poultry of any kind, is prohibited. This shall include all pets, expect [sic] those pets residing in the Condominium prior to the date of recordation of this amendment. Such pets as are residing in the apartment as of the date of the recording of this amendment may not be replaced upon their demise or removal from the Condominium for a period in excess of six (6) months.

In the instant case, the respondent has not shown that the association relinquished its right to enforce the above mentioned pet restrictions, as required to establish the third element of waiver. The fact that the association did not assert this violation against the respondent at the time of the passage of the amendment does not satisfy this element. The mere passage of time does not establish waiver. American Somax

Ventures v. Touma, 547 So. 2d 1266 (Fla. 4th DCA 1989). Moreover, considering the respondent's seasonal residence, where he and his family and guests only occupy the unit from thirty (30) to sixty (60) days per year, the association's delay in filing this petition is not unreasonable and does not constitute relinquishment of its right to enforce pet restrictions contained in article 10.09. Given that, respondent has failed to establish the required elements of waiver; it is denied as a defense.

Respondent's second defense is laches. Laches is an unreasonable delay in asserting a known right, which delay causes undue prejudice to the party claiming laches. Appalachian, Inc. v. Olson, 468 So. 2d 266 (Fla. 2nd DCA 1985). While the amendment prohibiting pets was allegedly passed in April 1998, the association did not initiate this proceeding until December 2002. In Cypress Bend Condominium Association, Inc. v. Dexner, Arb. Case No. 95-0145, Final Order (May 19, 1997), the defense of laches was not successful where the association waited four years to file an action because the unit owner only occupied the unit two to three weeks per year, so the noise at issue was not constant. Likewise, and for reasons explained above concerning the respondent's seasonal nature, the association's delay in filing this petition is not unreasonable and does not constitute laches. Additionally, respondent has failed to show an undue prejudice caused by this delay. Accordingly, the defense of laches is stricken.

Respondent's final defense is estoppel. The elements of estoppel are: (1) a representation as to a material fact that is contrary to a later-asserted position; (2) reasonable reliance on that representation; and (3) a change in position to his detriment by the party claiming the estoppel caused by the representation and reliance. Enegren v. Marathon Country Club Condominium Association, Inc., 525 So.

2d 488, 489 (Fla. 3rd DCA 1988). Respondent's answer alleges that he relied on representations made in 1992, when he purchased his unit, concerning pet restrictions. Even if the respondent was successful in proving the first and third elements based on those 1992 representations, it would be of no consequence since he could not reasonably rely on the representations considering the power to amend the declaration provided in article 12. Article 12, Amendments, states, in pertinent part:

> 12. Amendments. Except as elsewhere provided otherwise, this Declaration of Condominium may be amended in the following manner:
>
> 12.1. Notice. Notice of the subject matter of a proposed amendment shall be included in the notice of any meeting at which a proposed amendment is considered.
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> 12.2. Resolution of adoption. A resolution adopting a proposed amendment may be proposed by either the board of directors of the Association or by the members of the Association. Directors and members not present in person or by proxy at the meeting considering the amendment may express their approval in writing, providing such approval is delivered to the Secretary at or prior to the meeting. Except as elsewhere provided, such approvals must be either by:
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> a. not less than seventy-five per cent (75%) of the votes of the entire membership of the board of directors and by not less than seventy-five per cent (75%) of the votes of the entire membership of the Association; or
> b. not less than eighty per cent (80%) of the votes of the entire membership of the Association;

Courts have recognized the authority of condominium unit owners to amend the declaration on a wide variety of issues. Woodside Village Condominium Association, Inc. v. Jahren, 806 So. 2d 452 (Fla. 2002). Pursuant to article 12, amendments to the declaration may be approved in the prescribed manner. Respondent was on

notice, by virtue of the recorded declaration, that the unique form of ownership in purchasing a condominium unit was subject to change through the amendment process, and that he would be bound by properly adopted amendments. See Kroop v. Caravelle Condominium, Inc., 323 So. 2d 307, 309 (Fla. 3rd DCA 1975) (upholding a restriction limiting leasing to once during ownership where condominium owner acquired unit with knowledge that the declaration might thereafter be lawfully amended). In light of article 12, it is unreasonable for the respondent to expect as a general proposition that provisions in effect at the time he purchased his unit would remain unchanged throughout the duration of his ownership period. See, further, Seagate Condominium Association, Inc. v. Duffy, 330 So. 2d 484 (Fla. 4th DCA 1976); Flagler Federal Savings & Loan Association v. Crestview Towers Condominium Association, Inc., 595 So. 2d 198 (Fla. 3rd DCA 1992). For these reasons, respondent cannot reasonably rely on the 1992 representations concerning the pet policy, and, therefore, fails to establish estoppel as a defense. As such, the defense of estoppel is hereby denied.

However, pursuant to article 10.09, pets currently residing on the premises are exempt from the prohibition. The amendment further prohibits the replacement of the existing pet after its demise or removal from the property for a period in excess of six (6) months. In the instant case, respondent alleges that when he purchased his unit in March 1992, he owed a five (5) pound Yorkshire terrier and that he presently owns a five (5) pound Yorkshire terrier. The question is whether the dog respondent owned in April 1998 is the same dog he owns today. Respondent shall submit documentation, including but not limited to, vaccination records and verification from the veterinarian who regularly administers medical

care to the dog, attesting to the date respondent acquired his current five (5) pound Yorkshire terrier.

Regarding respondent's motion to conduct discovery, Rule 61B-45.024 (1), F.A.C., provides that "the discovery process shall be used sparingly and only for the discovery of those things which are necessary for the proper disposition of the petition." Adhering to the basic intentions of this rule, demands for discovery are rarely granted. Similarly, respondent's motion to conduct discovery is denied. However, the arbitrator hereby orders each party to exchange all documents that they intend to use in this proceeding with the other party. This document exchange should alleviate the need for costly, time consuming discovery.

It is therefore ORDERED:

1. Respondent shall file the requested documentation concerning his dog with the arbitration section within fourteen (14) days of the date of entry of this order. The fax number for the arbitration section is (850) 487-0870. If such documentation is not received in the time allotted, barring an emergency communicated to the arbitrator, the respondent shall forfeit this defense.

2. Petitioner and respondent shall participate in a mutual document exchange of all documents that each intends to use in this proceeding by March 17, 2003.

DONE AND ORDERED this 19th day of February 2003, at Tallahassee, Leon County, Florida.

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Melissa Mnookin, Arbitrator
Department of Business and

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