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

IN RE: PETITION FOR ARBITRATION

SEYCHELLES CONDOMINIUM
MANAGEMENT ASSOCIATION INC.,

Petitioner,

v. Case No. 01-3639

JERRY EHLEN,

Respondent.

_____/

FINAL ORDER

On August 8th, 2001, the Seychelles Condominium Management Association, Inc., filed a petition for non-binding arbitration with the department, naming Jerry Ehlen as the respondent. The Petition alleges that the Respondent had violated section 10.5 of the declaration of condominium, which as originally filed in the public records, prohibited the renting of units for periods of less than two weeks. Additionally, the Petitioner alleged that the Respondent was in violation of the above section which, as later amended, prohibits unit rentals for any period of less than 30 days.

The Respondent disputed the allegation that he had rented his unit for less than two weeks. He did stipulate that he had rented his unit for less than 30 days, but maintained that this did not constitute a violation in that

the amendment to section 10.5, which prohibits rentals of less than 30 days, was not enacted in accordance with the requirements of the declaration of condominium and was, therefore, without force.

The final evidentiary hearing for this case was held on April 19th, 2002, at the boardroom on the 16th floor of the Seychelles Condominium located at 3855 South Atlantic Avenue, Daytona Beach Shores, Florida. The association was represented by Joyce Fuller of Taylor & Carls, P.A. and Mr. Ehlen appeared pro se. Testimony was taken from renter Peggy Jackson, who appeared by phone, and Mr. Tom Farm, president of the association.

During the hearing, the existence of a letter to the association from its attorney on the required procedure for the amendment of Section 10.5, was discussed. The president of the board agreed to provide a copy of that letter to the Respondent and the Arbitrator. Subsequently, the association has chosen to withhold the letter and invoke attorney-client privilege and the Respondent has moved for sanctions and the Petitioner has moved for a protective order. This issue will be addressed below.

Issue I: Renting for less than two weeks

Ms. Peggy Jackson, under subpoena, testified that she had been periodically renting a unit, located in the Seychelles Condominium, from the Respondent over a period of 10 to 15 years. Ms. Jackson stated that the rentals had been for a period of varying lengths of time but that on several occasions she rented for a period of only one week.

Mr. Farm testified that the normal and customary procedure of the association was to issue parking permits to renters. A number of permits were issued to individuals renting the Respondent's unit which showed that the individuals were staying for only one week.

The Respondent countered that his practice was to rent two-week blocks, and that the renters were free to use as much or as little of those blocks as they chose. This would be analogous to an individual renting a car for two weeks, but only driving it for a week. However, in such a situation the person renting the car knows that he or she has exclusive control of the car for that two-week period.

However, the testimony of Ms. Jackson, buttressed by the parking permit records, demonstrates that, for at least some of the renters, what was being offered by the Respondent was a one week-rental. By renting his unit for periods of one week, the Respondent has violated section 10.5 as it originally existed.

Issue II: Rentals for less than 30 days.

As the Respondent has stipulated that he has rented his unit in Seychelles Condominium for less than 30 days, the fact of such rentals is accepted. The remaining question is: Are such rentals a violation of the declaration of condominium, as amended, of the Seychelles Condominium?

As initially filed in 1986, the declaration of condominium contained these two related sections:

> 10.5 Leasing of Units. THE SALE, LEASE OR TRANSFER OF UNITS IS RESTRICTED OR CONTROLLED. No unit may be rented or leased for an occupancy period of less than two weeks.
>
> 13.3 Limitations. ...nor shall any amendment to paragraph 10.5, entitled Leasing of Units, or any part hereof, be effective unless Unit Owners of all Condominium Parcels join in the execution of any such amendment.

Unable to achieve the required votes to attack section 10.5 directly, the unit owners attempted a flanking maneuver. In a two step process, the unit owners voted first to amend section 13.3, to remove the requirement of unanimity for amending 10.5, and then they voted to amend 10.5 to alter the minimum rental term. The intent of the association is demonstrated by the notice to unit owners contained in the case file. The notice from John Voorn (association secretary), dated November 3, 2000, opens :

> TO ALL UNIT OWNERS: There will be a Special Owners' meeting in the Clubroom on Saturday, November 25, 2000 at 9:00 AM to vote on changing the affirmative voting requirements in paragraph 13.3 from 100% to 60% in order to subsequently change paragraph 10.5 Leasing of Units.

At each step, the percentage voting for the amendment was only 60 percent. At hearing, the president of the association noted parenthetically that the vote tallies in each step, as broken down by class of owners, were identical. The Petitioner has sought to legitimize this tactic by invoking Woodside Village Condominium Ass'n, Inc. v. Jahren, 806 So.2d 452 (Fla.

2002) and Tradewinds East Condominium Association, Inc. v. Thibeau, Arb. Case No. 97-0009, Final Order June 1997, and claiming that language that might be seen as reinforcing the inter-relation of sections 10.5 and 13.3, should be dismissed as a typographical error.

In Petitioner's memorandum of law, Woodside Village, supra, is cited to support the propositions a condominium association has broad authority to amend its declaration, that the amended declaration is as binding as the original declaration, and that the association's right to limit or otherwise regulate renting of it units is not trumped by any claim to a vested property right to lease.

The Petitioner goes on, in its memorandum of law, to say that:

> In its analysis, the court noted the absence in the Condominium Act of any provision which would prohibit the adoption of an amendment imposing lease restrictions, and the absence therein which requires consent of all unit owners to adopt such an amendment.

In the passage referred to by the Petitioner, the Court in Woodside Village was looking to § 718.110(1)(a), Fla. Stat. (2000),[1] which details the procedures to be followed when "the declaration fails to provide a method of amendment." In the instant case, the declaration contains an explicit

[1] "The Legislature has demonstrated its awareness of the need for limitations on the authority of unit owners to amend a declaration by its enactment of section 718.110(1)(a), (4), and (8). However, as noted, in this instance no provision in the Condominium Act prohibits the adoption of an amendment imposing a lease restriction, nor does any provision require the consent of all unit owners to adopt such an amendment. To the contrary, the Condominium Act provides broad authority for amending a declaration of condominium. See § 718.110(1)(a), Fla. Stat. (2000)." Woodside Village Condominium Ass'n, Inc. v. Jahren, 806 So.2d 452 at 464 (Fla. 2002).

procedure for amendment that requires the consent of all unit owners to adopt such an amendment. The central issue is not whether the unit owners may restrict leasing by amending the declaration, but whether the required procedure to amend the declaration was followed.[2]

In Petitioner's memorandum, Tradewinds East Condominium Association, Inc., v. Thibeau, Arb. Case No. 97-0009 Final Order June 13th, 1997 is cited for the proposition that it is "permissible for the association to circumvent a 75 percent membership voting requirement.... by utilizing the general amendatory provisions of its declaration." In fact, the ruling in Tradewinds turned on the identification of the interest implicated by the proposed change. Specifically, the Respondent in Tradewinds, "installed a nonglare glass enclosure within her patio" to control standing water. The Arbitrator ruled that "since the other owners could have no legitimate expectation of use rights in the limited common element patio, it cannot be said that the appurtenances to their units are being undermined by enclosure of the private deck." Therefore, a change effecting the "parcel", which required 100 percent approval according to the Tradewinds declaration of condominium, was not implicated and the mater was within the scope of the

[2] The Court in Woodside stated, "It is also uncontradicted that the Association acted within the framework of the Declaration in adopting the amendment at issue. As noted above, the Declaration for Woodside Village specifically provides for amendment and sets forth the procedure for doing so. Further, pursuant to the Declaration, the amendment imposing the nine-month lease restriction was approved by at least two-thirds of the condominium unit owners. Hence, we conclude that the lease restriction amendment was properly enacted under the amendment provisions of the Declaration..." id at 461.

regular amendatory process. In essence, the changes made in the Tradewinds case were directed at an internal management procedure used in the association, not a right explicit in the declaration.

The court in Woodside, reaffirmed the concept that any purchaser of a condominium must, by the nature of condominium living, accept the real possibility of the amendment of the declaration of condominium. However, such a purchaser must be able to make a reasonable calculation as to the likelihood of any such amendments. Such a calculation must rest, to a large measure, on the protections provided in the declaration of condominium.

In the instant case, the declaration contains two inextricably intertwined sections. Section 10.5 imposes limits on the leasing of units and section 13.3 imposes limits on the ability of the association to amend the section 10.5.

To understand the intent of the drafter, the canons of statutory construction are illuminating. As the Florida Supreme Court has stated, "related statutory provisions should be read together to determine legislative intent, so that "if from a view of the whole law, or from other laws *in pari materia* the evident intent is different from the literal import of the terms employed to express it in a particular part of the law, that intent should prevail." Golf Channel v. Jenkins 752 So.2d 561,564(Fla. 2000).

Read together, the clear intent of the declaration is that section 10.5 cannot be lawfully altered without the "consent of all unit owners."

A very similar issue was addressed in the case of Island Manor Apartments of Marco Island, Inc. v. Division of Florida Land Sales, Condominiums and Mobile Homes 515 So.2d 1327 (Fla. 2nd DCA,1987) (rev. denied 523 So. 2d 577 (Fla.1988))where there was an attempt to treat a provision of the declaration of condominium as effectively amended by a change in statute. The court rejected that argument and stated:

> [T]he declaration specifically says in article VIII that the particular provisions sought to be amended (those of the type in article VI which would be amended by incorporating section 718.115(2) into the declaration) cannot be amended without a unanimous vote of all unit owners and certain lienholders, which did not occur. Article VIII controls because of the well-settled rule of contractual construction that a provision specifically dealing with a particular subject controls over another provision only generally dealing with that subject. Id. at 1330. (emphasis added)

This reasoning was endorsed by the Third District Court of Appeal in which the court reiterated that it is a "a provision of a contract which specifically deals with a particular subject takes precedence over another provision only generally dealing with that subject." Bobroff v. Imperial House Condominium, Inc., 541 So.2d 776 (Fla. 3rd DCA,1989) (citations omitted).

In the declaration of condominium for the Seychelles Condominium there is a provision, section 13.3 that deals specifically with the particular matter of amending section 10.5. Therefore, section 13.3 takes precedence

over, and is exempt from, the general amendatory language of the declaration.

FINDINGS

The Respondent has violated the unamended declaration of condominium by renting his unit for a period of less than two weeks.

Additionally, the attempt to amend the declaration by less than the required number of unit owners was in violation of the declaration and therefore the amendment is void and unenforceable. Accordingly, any charges which rest on that language are hereby dismissed.

Still pending is the Respondent's request to see the Attorney's letter to the association and subsequent motion for sanctions. As the letter was not necessary for the resolution of the instant case, it is not part of the current action. The Respondent's motion for sanctions constitute a counterclaim which is bared by 61B-45.019 Florida Administrative Code[3]. Respondent may to refile his request as a separate action, however such an action faces the strong presumption in favor of protecting the attorney-client privilege and failure in such an action would entail attorney's fees being awarded the prevailing party.

[3] **61B-45.019 Answer and Defenses.**
(1) …Any claim or request for relief must be filed as a new petition following the procedure provided in Rule 61B-45.017.

RELIEF

Accordingly, it is ORDERED: That the Respondent shall refrain from renting his unit for any period of less then two weeks. This does not require that renters occupy the unit for the entire period. Respondent, or his agent, shall keep records that shall demonstrate compliance with section 10.5 of the declaration of condominium.

Petitioner's motion for protective order and Respondent's motions for sanctions are dismissed.

DONE AND ORDERED this 15th day of May 2002, at Tallahassee, Leon County, Florida.

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Peter Grant Gioia, Arbitrator
Arbitration Section
Department of Business and
Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-1029

RIGHT TO TRIAL DE NOVO

PURSUANT TO SECTION 718.1255, FLORIDA STATUTES, THIS DECISION SHALL BE BINDING ON THE PARTIES UNLESS A COMPLAINT FOR TRIAL *DE NOVO* IS FILED BY AN ADVERSELY AFFECTED PARTY IN A COURT OF COMPETENT JURISDICTION IN THE CIRCUIT IN WHICH THE CONDOMINIUM IS LOCATED WITHIN 30 DAYS OF THE DATE OF MAILING OF THIS ORDER. THIS FINAL ORDER DOES NOT CONSTITUTE FINAL AGENCY ACTION AND IS NOT APPEALABLE TO THE DISTRICT COURTS OF APPEAL.

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.

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing was mailed by U.S. mail, postage prepaid, to, Joyce Fuller, Taylor & Carls P.A., 850 Concourse Parkway South, Suite 105, Maitland, FL 32751 and to Jerry Ehlen, 3832 Sandy Shores Drive, Jacksonville, Fl 32277, this 15th day of May 2002.

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Peter Gioia, Arbitrator