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

IN RE: PETITION FOR ARBITRATION

Westgate Blue Tree Orlando, LTD., a Texas Limited partnership f/k/a Blue Tree Orlando I, LTD., a Texas limited partnership, through its general partner Westgate Blue Tree, LBV, LLC, a Florida limited liability company,

Petitioner,

v. **Case No. 2004-03-9446**

Blue Tree Resort at Lake Buena Vista Condominium Association, Inc., a Florida Corporation,

Respondent.
_____/

SUMMARY FINAL ORDER

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

Petitioner Westgate Blue Tree Orlando, LTD., (Blue Tree) filed its petition for arbitration in this matter on July 29, 2004. Blue Tree is the developer of the timeshare condominium resort called Blue Tree Resort at Lake Buena Vista, a Condominium, located in Orange County, Florida. The respondent Blue Tree Resort at Lake Buena Vista Condominium Association, Inc., is presently under control by owners other than a developer.[1]

[1] The arbitrator takes official notice of the final order including the facts contained therein entered in Westgate Blue Tree Orlando, LTD. v. Blue Tree Resort at Lake Buena Vista Condominium Association, Inc., Arb. Case 2004-01-3195, Summary Final Order (October 28, 2004).

According to the petition, in May 2003, the association, without the benefit of a unit owner vote, undertook plans to construct an administrative/check-in building on the common elements. Petitioner argues that this will result in a material change to the common elements in violation of section 718.113(2), Florida Statutes[2]. Petitioner asserts that the declaration does not contain a provision for materials alterations, and consequently, the statutory default percentage of 75% controls.

The association filed its answer on September 13, 2004 and argues that certain amendments to Chapter 721, Florida Statutes, must be examined in conjunction with the language contained in the declaration, to arrive at the conclusion that a time share association is not required to obtain a 75% vote for material changes to the common elements. By order entered on Tuesday, November 23, 2004, the parties were given a final opportunity to submit written arguments, and this summary final order followed. The parties opted to present oral argument on the issues presented in a hearing conducted on December 2, 2004.

The parties agree that the addition of the check-in administrative building will result in a material alteration to the common elements.[3] Therefore, the arbitrator accepts as a given that a material alteration will result. Neither do the parties disagree with the fact that the declaration does not contain a provision whereby material changes

[2] Neither party argues that such a change will materially change the appurtenances to the units in the manner contemplated by section 718.110(4), Florida Statutes.

[3] The association *does* remark in its memorandum of law that it is impossible for the association to operate the resort unless the association has some place to check in guests and perform related services such as the planned administration building. This remark falls short of the presentation of an argument that the administration center is necessary for the operation of the common elements. Compare, Tiffany Plaza Condominium Association, Inc. v Spencer, 416 So. 2d 823 (Fla. 2nd DCA 1982) and various cases that have followed Tiffany Plaza.

to the common elements may be effectuated. In this regard, section 718.113(2), Florida Statutes, provides as follows:

> (2)(a) Except as otherwise provided in this section, there shall be no material alteration or substantial additions to the common elements…except in a manner provided in the declaration as originally recorded or as amended under the procedures provided therein. If the declaration as originally recorded or as amended under the procedures provided therein does not specify the procedure for approval of material alterations or substantial additions, 75% of the total voting interests of the association must approve the alterations or additions. [emphasis added.]

The association argues that although section 718.113(2), Florida Statutes, works as a default mechanism[4], where, as here, the declaration fails to specify a percentage vote needed to materially alter the common elements, the timeshare act in effect excuses timeshare associations from the material alteration provisions contained in the condominium statute. The timeshare statute *does* outright exempt timeshare condominiums from certain portions of Chapter 718, Florida Statutes. For example, section 721.03(3), Florida Statutes, provides that a timeshare plan otherwise subject to Chapter 718, Florida Statutes, is expressly exempt from Sections 718.202, 718.503 and 718.504, Florida Statutes. However, section 721.03(2), Florida Statutes, announces the general rule that:

> (2) When a timeshare plan is subject to both the provisions of this chapter and the provisions of chapter 718 or chapter 719, the plan shall meet the requirements of both chapters unless exempted as provided in this section.

[4] The default mechanism was added to the statute by section 4 of Ch. 92-49, Laws of Florida. Section 41 of the chapter law provides that the act shall take effect April 1, 1992, or upon becoming a law, whichever occurs later, and shall operate retroactively to April 1, 1992.

There is no outright exemption contained in section 721.03, Florida Statutes, for a timeshare plan or association from the provisions of either section 718.113(2) or section 718.110(4), Florida Statutes. Section 721.13(8), Florida Statutes, allows a condominium time share association to make certain material alterations or substantial improvements without the approval of the membership. According to this section:

> (8) Notwithstanding anything to the contrary in s. 718.110, s. 718.113, s. 718.114, or s. 719.1055, the board of administration of any owners' association that operates a timeshare condominium pursuant to s. 718.111, or a timeshare cooperative pursuant to s. 719.104, shall have the power to make material alterations or substantial additions to the accommodations or facilities of such timeshare condominium or timeshare cooperative without the approval of the owners' association. However, if the timeshare condominium or timeshare cooperative contains any residential units that are not subject to the timeshare plan, such action by the board of administration must be approved by a majority of the owners of such residential units. Unless otherwise provided in the timeshare instrument as originally recorded, no such amendment may change the configuration or size of any accommodation in any material fashion, or change the proportion or percentage by which a member of the owners' association shares the common expenses, unless the record owners of the affected units or timeshare interests and all record owners of liens on the affected units or timeshare interests join in the execution of the amendment. [emphasis added].

The arbitrator notes that the language contained above does not amount to an outright exemption for condominium timeshare associations from the provisions of sections 718.113(2) or 718.110(4), Florida Statutes.[5] Instead, the exemption is made

[5] This statement is particularly true with reference to the rights protected by section 718.110(4), Florida Statutes, in view of the caveat contained in section 721.13(8), Florida Statutes, that an amendment creating a material alteration approved only by the board of a timeshare condominium may not change those rights protected by section 718.110(4), Florida Statutes, except with unanimous owner and lienholder consent.

applicable only where the board of a timeshare association seeks to make material alterations to the "accommodations" or to the "facilities." These terms are defined by section 721.05, Florida Statutes, as follows:

> (1) "Accommodation" means any apartment, condominium or cooperative unit, cabin, lodge, hotel or motel room, campground, cruise ship cabin, houseboat or other vessel, recreational or other motor vehicle, or any private or commercial structure which is real or personal property and designed for overnight occupancy by one or more individuals…
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> (17) "Facility" means any amenity, including any structure, furnishing, fixture, equipment, service, improvement, or real or personal property, improved or unimproved, other than an accommodation of the timeshare plan, which is made available to the purchasers of a timeshare plan. [emphasis added].

It cannot be said that a check-in facility is an accommodation within the meaning of the statute. It is simply not designed for overnight occupancy, or for any occupancy, but is tantamount to an office space. It exists to facilitate overnight occupancy in other structures. "Accommodations" refer to structures "of the type suited to residency." All Seasons Resorts, Inc. v. Dept. Bus. Reg., 455 So. 2d 544 (Fla. 1st DCA 1984). However, it is likely that a check-in building or office would constitute an "amenity…which is made available to the purchasers of a timeshare plan."[6] The purchasers use the check-in office in a commercial capacity much like they would use a hotel desk upon registering at a hotel, no less so than a weight room or restaurant or swimming pool. Therefore, the arbitrator concludes that the check-in office is a facility within the meaning of section 721.03, Florida Statutes. It follows, given this conclusion,

[6] The petitioner has not argued that the check-in office does not constitute a facility within the meaning of the statute.

that section 721.13(8), Florida Statutes, *if it found to otherwise apply*, would operate to excuse a time share association from compliance with sections 718.113 and, to the extent limited by the caveat contained in section 721.12(8), Florida Statutes, with 718.110(4), Florida Statutes.

A major dispute between the parties is whether section 721.13(8), Florida Statutes, may even be properly applied to this association. Petitioner takes the position that this section, effective in June 2000, cannot be applied to this association without impairing vested rights where the declaration was recorded in 1992. Petitioner theorizes that since the declaration is silent on the manner of making material alterations to the common elements, the owners who have purchased in the resort have acquired a right to expect that alterations to the common elements could only be accomplished by 75% of the total voting interests as prescribed by the default mechanism provided in section 718.113(2), Florida Statutes.

The arbitrator does not agree that the manner of accomplishing material changes to the common elements[7] as set forth in sections 718.113(2), and 721.13(8), Florida Statutes, amounts to a vested property right under the statute or controlling case law.[8] Considering first the condominium statute, prior to this section of the statute being amended in 1992 to provide the residual 75% figure where the declaration failed to specify a method of approving material alterations, it was commonplace for the Division

[7] This is to be contrasted with the manner of making material changes to the appurtenances to the units, to be discussed later in this order.

[8] Since the corresponding provision in the condominium statute has been in effect much longer than section 721.13(8), Florida Statutes, much of the discussion that follows highlights section 718.113(2), Florida Statutes, and the case authority applying this section. However, since these two provisions each address material changes to the common elements, the conclusions reached here with reference to section 718.113(2), Florida Statutes, find equal application to section 721.13(8), Florida Statutes.

to take the position that where the declaration was silent, the declaration could be amended using the general amendatory provisions to provide a method of accomplishing material alterations to the common elements; thereafter, the new amendatory framework must be utilized to approve a specific material change. Review, the declaratory statements issued by the Division in South Garden Condominium Association, Case No. 82A-253 (January 10, 1983), and In re Petition for Declaratory Statement of Three Palms Pointe Condominium; Fred Fogg, Case No. 89L-147, Final Order Dismissing Petition for Declaratory Statement (October 20, 1989), and the other declaratory statements cited therein. If the Division had considered, prior to the amendment to section 718.113(2), Florida Statutes, allowing material changes upon the vote of 75% of the voting interests where the declaration was silent on the manner of accomplishing material changes, that a silent declaration conferred on associations the ignoble fate of never being able to accomplish material alterations by any means whatsoever including amendment to the declaration to provide such a procedure, the Division would not have taken the position that it was permissible, or required, for an association to amend its declaration to provide such a procedure.

Similarly, if the Division had considered that the method of accomplishing material alterations to the common elements was tantamount to a protected property right, the Division would not have applied the 1992 amendment to the statute providing the residual 75% provision to silent declarations, to pre-existing associations, which it has consistently done both in its declaratory statements and in its arbitration decisions, as to do so would have trampled on these supposed vested rights. See, Kamfjord v. Harbour Green Condominium Association, Inc., Arb. Case No. 93-0173, Summary Final

Order (October 28, 1993)(where the declaration--obviously recorded before 1992--is silent concerning material alterations, by operation of section 718.113(2), Florida Statutes, at least 75% of the voting interests must approve the material change); James v. Perdido Towers Owners Association, Inc., Arb. Case No. 96-0424, Summary Final order (March 4, 1997) (where the declaration is silent, the vote of 75% of the voting interests must be obtained for material alterations); accord Ladolcetta v. Carlton Condominium Association, Inc., Arb. Case No. 94-0499, Summary Final Order (April 19, 1995).

Also uniquely instructive in this regard is In re Petition for Declaratory Statement Key West by the Sea Association, Inc., Case No. DS96660 (February 20, 1997). Under certain amendments creating section 718.113(5), Florida Statutes,[9] associations became authorized to adopt hurricane shutter specifications, and a majority of the voting interests became authorized to require the installation of shutters within a community. Further under the statutory amendments, the Legislature provided that the addition of approved hurricane shutters did not constitute a material alteration to the common elements. The issue addressed by the Division in the Key West declaratory statement was whether the new statute that exempted the installation of approved shutters from the material alteration provision of the statute, controlled over the provisions of the pre-exiting declaration requiring a 75% vote for all material alterations to the common elements.[10] In that case, the declaration of condominium, like the

[9] This subsection was added by Ch. 91-103, Laws of Florida.

[10] It is not subject to dispute that the addition of hurricane shutters on a condominium building, in the absence of special treatment in the statute, would constitute a material alteration to the

declaration involved in the instant case, did not automatically incorporate future changes to the Condominium Act,[11] and the Division directly examined the issue of whether the amendment creating section 718.113(5), Florida Statutes, could be applied retroactively. The Division noted:

> ..Generally, the law governing a particular condominium is the law in existence on the date of the recording of the declaration of condominium. [citations omitted]. Even in the absence of automatic amendment clauses, certain other types of amendments to the Condominium Act are exceptions to the general rule stated above and will be applied retroactively to all condominiums. A substantive law will not be applied retroactively but a law that relates only to procedure and remedy generally applies to all pending cases. [citation omitted]. Statutes which are remedial or procedural, which do not create new or take away vested rights, but only operate in furtherance of the remedy or confirmation of rights already existing, do not come within the legal concept of a retrospective law, or the general rule against retrospective operation of statutes. [citations omitted].
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> Petitioner's question should thus be examined in terms of whether section 718.113(5), Florida Statutes (1994) is remedial or procedural such that it may apply to this condominium. First it would appear that the statute is procedural in nature. The statute did not affect the right of an association or unit owner to alter or improve the common elements because it already existed….The Key West Condominium's declaration and the earlier provisions of 718.113, Florida Statutes, required a 75% vote of the unit owners for alterations and improvements. The new statutory provision, 718.113(5), Florida Statutes, (1994), reduced the votes needed from 75% to 51%, a procedural matter.
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> The statute also appears to be remedial in nature. In the determination whether this statute is remedial, it is important to examine the legislative history of the section. Prior to 1991, section 718.113(2), Florida Statutes, addressed alterations or improvements to the common elements,…

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common elements. See, Slater v. Palm Beach Towers Condominium Association, Inc., Arb. Case No. 94-0418, Summary Final Order (April 3, 1995).

[11] See, Kaufman v. Shere, 347 So. 2d 627 (Fla. 3rd DCA 1977).

> Thus, if considered a material alteration, unit owner installation of hurricane shutters could be allowed only as authorized by the declaration, which in the case of the Key West Condominium, would require approval of 75% of its voting interests….[T]he enactment of section 718.113(5), Florida Statutes, excluded the installation of hurricane shutters from the definition of "material alteration", authorized condominium boards to adopt hurricane shutter specifications, and prohibited boards from refusing to approve the installation of shutters that were in compliance with the board's specifications even where the condominium documents contained blanket provisions prohibiting their use… Since the statute applies to those condominiums whose declarations specifically prohibit the installation of the shutters, it would be unreasonable to conclude that this provision was not applicable to condominium declarations that did not directly address the installation of shutters such as in the instant case.
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> Thus, the new section 718.113(5), Florida Statutes (1994), is remedial in nature since the statute's provision that the installation of hurricane shutters,…is excluded from the definition of a material alteration to the common elements, does not affect vested rights, and does not create or impose a new obligation or duty. Rather, it provides yet another way in which the association can protect the common elements through the use of hurricane shutters. [emphasis added].

The amendment examined above, which created section 718.113(5), Florida Statutes, and carved out hurricane shutters from the material alteration provision, is similar in operation both to the amendment to section 718.113(2), Florida Statutes, providing a residual 75% vote for silent declarations, as well as to the amendment to section 721.13(8), Florida Statutes, providing that the board may accomplish certain material changes to the common elements without securing a vote of the membership. Consistent with the Key West declaratory statement, the arbitrator concludes that the amendment to section 718.113(2), Florida Statutes, providing for a 75% backup percentage for material changes, is procedural or remedial in nature and applies to the

instant declaration of condominium. This being the case, it follows that prior to the amendments creating section 721.13(8), Florida Statutes, exempting timeshare condominium associations from the operation of section 718.113(2), Florida Statutes, material changes to the common elements in this timeshare condominium could be undertaken with the approval of 75% of the total voting interests in accordance with the 1992 amendments to section 718.113(2), Florida Statues. The amendment to section 721.13(8), Florida Statutes, is also seen as procedural or remedial in nature as it addresses the procedure in accomplishing material alterations, and it supplements an association's remedies in adding needed material alterations to the common elements such as the instant change which inures to the benefit of the unit owners. Given the arbitrator's conclusion that these amendments are procedural or remedial in nature, it would follow that they may properly be applied to existing condominiums, such that under section 721.13(8), Florida Statutes, the board here is free, absent countervailing considerations, to make material alterations to the common elements without approval of the owners.[12]

Petitioner next argues that under Wellington Property Management v. Parc Corniche, 755 So. 2d 824 (Fla. 5th DCA 2000), the manner in which material alterations may be made to the common elements is in the nature of a vested right. The association, on the other hand, characterizes the statutory amendment section

[12] While it may initially appear democratic and perhaps desireable to require an authorizing vote of the owners for each material alteration, it is exceedingly difficult to obtain an owner vote for any purpose in a timeshare condominium due to the short term nature of the residents' stay and the fractional voting interest typical of a timeshare condominium. Accordingly, the reality faced by many timeshare associations in the absence of the remedial provisions of section 721.13(8), Florida

721.13(8), Florida Statutes, as procedural, and not substantive, in nature, and ventures its opinion that Parc Cornish was implicitly but necessarily overruled by Woodside Village Condominium Association, Inc. v. Jahren, 806 So. 2d 452 (Fla. 2002). Park Corniche involved a challenge to an amendment to the declaration giving the association the power to alter or improve the common elements upon a 51% vote of the board. The declaration as originally recorded did not contain a provision addressing material changes to the common elements. The court held:

> The effect of the amendment, if applied retroactively, is to deprive a purchaser of a condominium unit of his or her vested interest in or to the common elements. In such a situation, even if one paid a premium to purchase a condominium at a tennis complex subject to a Declaration containing only a general power to amend, he or she may not object if a majority of the owners, after they grow older, use the general power to amend to convert the tennis courts into shuffleboard courts.

The court also ruled that the amendment to section 718.113(2), Florida Statutes, permitting material alterations to the common elements absent the approval of 75% of the total voting interests, was substantive and could not be applied within constitutional limits retroactively to change the vested rights of purchasers. In addition to discussing section 718.113(2), Florida Statutes, the court opinion also weaves strands of section 718.110(4), Florida Statutes, into its analysis of section 718.113(2), Florida Statutes, and the court concludes, without explicitly identifying the particular appurtenance that was violated, that the amendment to the declaration permitting material alterations to the common elements violated section 718.110(4), Florida Statutes, and the appurtenances to the units. These sections of the statute address different situations

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Statutes, is that no material alterations may ever be added, no matter now reasonable or beneficial

to the owners or essential to the operation of the resort.

and generally operate independently[13], although these sections of the statute have on occasion been unwittingly intermingled by the courts. See, the helpful discussion appearing in Berger v. Island's End Condominium Association, Inc., Arb. Case No. 96-0341, Summary Final Order (December 18, 1997), wherein the issue presented was whether an amendment to the declaration changing the common element dock, capable of accommodating boats, into a mere fishing pier constituted a material change to the common elements, a material modification to the appurtenances to the units, or both. The arbitrator stated:

> The morass that the parties have created, engendered, and prolonged for a term of years is only surpassed by the unsettled state of the case law appurtenant to this area of the law. Much of this dispute centers around a determination of whether the change in the dock constitutes a material alteration, a change to the appurtenances to the units, or instead is mere maintenance. There exists case law supporting all theories advanced by the parties. The most enlightened case law which is consistent with the intent of the statute supports the association's position that the mere change in use from a dock to a fishing pier does not disturb the appurtenances to the units as identified in the declaration, but merely constitutes either maintenance or a material alteration to the common elements, particularly since there were no limited common element boat slips or docks assigned to individual owners. The petitioners cite the condominium cases which have in error applied the material alteration provisions of section 718.113(2), Florida Statutes, to the provisions of section 718.110(4), Florida Statutes. The association likewise has amassed the condominium law authorities in favor of its position that material alterations do not typically implicate the provisions of section 718.110(4),

[13] Some changes to the condominium property may change both the common elements and the appurtenances to the units, as found in Bogikes v. Windmill Village by the Sea, Arb. Case No. 97-0159, Final Order (June 12, 1998) (board rule that permitted owners to colonize a portion of the common elements for use as boat docks violated both section 718.113(2), Florida Statutes, and section 718.110(4), Florida Statutes); Villas at Eagles Point Condominium Association, Inc. v. Kahn, Arb. Case No. 94-0391, Final Order (July 10, 1995), aff'd., Kahn v. Villas at Eagles Point Condominium Association, Inc., 693 So. 2d 1029 (Fla. 2d DCA 1997) (the addition of a patio deck on the common elements simultaneously offended both sections of the statute).

Florida Statutes, governing, among other things, changes to the appurtenances to the units.

One preliminary issue that is not capable of reasonable divergence of opinion involves the petitioners' assertion that amendment #1, which speaks to material alterations to the common elements, by its very terms changed section 19.k of the declaration, which addresses changes to the appurtenances of the units. An examination of the declaration reveals that prior to the passage of amendment #1, the declaration did not contain a provision corresponding to section 718.113(2), Florida Statutes. Amendment #1 added to the declaration a provision to deal with effectuating material alterations or substantial additions to the common elements. It is clearly and concisely drawn, and precisely encapsulates those classes of changes governed by section 718.113(2), Florida Statutes, and does not intrude within the zone of changes regulated by section 718.110(4), Florida Statutes. Without deciding whether the dock changes implicate one section or another, the two provisions of the statute are separate on their face and are intended to address different situations; hence, the addition of amendment #1 does not violate section 19 of the declaration or section 718.110(4), Florida Statutes.

Nor does the fact that the amendment indicates that necessary maintenance of the common elements is within the responsibility of the board, and requiring no vote of the owners, infringe on any of petitioners' rights. This portion of the amendment merely codifies established case law recognizing that the maintenance function is separate and apart from changing the common elements in a material fashion. Therefore, as a preliminary matter, it is inaccurate for petitioners to argue that amendment #1 reduced the 100% approval required for material alterations to the common elements. Prior to the amendment, the documents did not address the issue of material alterations to the common elements, but only addressed changes to the appurtenances to the units. Where the declaration does not address the issue of material alterations, section 718.113(2), Florida Statutes, provides that the changes must be approved by at least 75% of the total voting interests. Moreover, it cannot be said, as claimed by the petitioners, that amendment #1 changed the share in the common elements or the other appurtenances to the units. After the amendment was passed, the unit owners continued to share

in the common expenses in the same proportion or percentage, and no appurtenance identified in the statute or documents was disturbed by the amendment, which does not even address changes to the appurtenances to the units but concerns itself with material alterations to the common elements. Amendment #1 does not modify the provisions of section 19.k of the declaration; it addresses an entirely different class of changes.

The major issue presented is whether amendment #2, which changes the dock from a facility capable of supporting boating, to a fishing pier, implicates the maintenance function of the association, whether the changes constitute material alterations, or whether the changes modify the appurtenances to the units in violation of section 718.110(4), Florida Statutes, and section 19.k of the declaration. Petitioners argue that amendment #2 permits the board to materially alter a common element, reduces the approval needed to further modify the common element pier, and ultimately delegates to the board the authority to determine the fate of the dock. These observations at a very basic level fail to state a valid objection to the passage of amendment #2. Section 718.113(2), Florida Statutes, permits the documents to set forth the voting requirement, if any, pertaining to changes to the common elements, and provides a formula to be followed in the event that the documents do not address this issue. The documents are permitted to delegate material alteration approval authority to the board without a vote of the owners. Vinik v. Taylor, 270 So. 2d 413 (Fla. 4th DCA 1972). Given that the documents may delegate this entire function to the board, it follows that the documents may carve out a specific change or class of changes to the common elements and delegate their fate to the discretion of the board. This is all that amendment #2 accomplishes. Assuming for the moment that the subject of amendment #2 does not implicate section 718.110(4), Florida Statutes, even if this portion of the amendment is interpreted as actually delegating to the board itself the initial decision of whether to preserve the pier or change it into a fishing facility, the amendment would not violate section 718.113(2), Florida Statutes, which permits the owners to delegate this function entirely to the board.

Returning to the overall issue of whether plans for the dock, as reflected in amendment #2, are changes regulated by section 718.110(4) or 718.113(2), Florida Statutes, it is

concluded that the view most supported by the statute is that the contemplated changes brought about by the amendment #2 plan do not disturb the appurtenances to the units. The declaration in this case does not identify as an appurtenance any dock space assigned to a particular unit; petitioners admit that dock spaces were never created as a limited common element nor was the exclusive right to use any space ever conveyed to an owner. Given that the declaration does not provide that use of the dock spaces is an appurtenance to a unit, it is difficult to perceive precisely what appurtenance is disturbed by the amendment.

Beyond this consideration, the type of modification undertaken in this case does not rise to the level of changing the appurtenances to the unit. In Garing v. Sugar Creek Country Club Travel Trailer Park Association, Inc., Arb. Case No. 93-0153, Final Order (March 23, 1994), the arbitrator held that where the association tore down a maintenance building and rebuilt a somewhat larger version of it in a different location less prone to flooding, the change did not result in an alteration to the appurtenances to the units. The arbitrator also ruled that the decision was a maintenance decision which the board was authorized to make consistent with the board's duty to maintain and preserve the common elements. In Lodolcetta v. Carton Condominium Association, Inc., Arb. Case No. 94-0499, Final Order (April 24, 1995), the arbitrator examined the issue of whether the association's conversion of a game room into a manager's office violated the statute. The arbitrator concluded that the conversion constituted a material alteration to the common elements but did not alter the appurtenances to the units as the owners were not deprived of the use of the area. Similarly, in Raska v. The Fountains Association, Inc., Arb. Case No. 93-0364, Final Order (December 23, 1994), the association had altered a practice putting green by removing the artificial turf and placing tables and chairs on the area previously occupied by the putting green. The arbitrator held a material alteration to the common elements resulted, but that no change to the appurtenances to the units had resulted. The area remained a recreational area, and the beneficial use of the area had not changed. In Aldrich v. Tahitian Gardens Condominium Association, Inc., Arb. Case Nos. 96-0055, 96-0070, Final Order (August 5, 1996), the arbitrator held that no vote of the owners was required where the board, empowered under the documents to accomplish material alterations without an accompanying vote of the

owners, determined to add a circulating fountain to the condominium lake; the arbitrator also held that no appurtenances were disturbed by the addition. Finally, see, L'Ambiance at Longboat Key Club Condominium Association, Inc. v. Isaac, Arb. Case No. 96- 0334, Final Order (August 5, 1997), in which the arbitrator invalidated a rule of the association which permitted any owner to use the penthouse owners' terrace as a staging area for lowering a swing stage and equipment necessary for the installation and maintenance of hurricane shutters on the exterior of the lower units. The arbitrator determined that the rule modified the penthouse owners' right to use their limited common element balconies appurtenant to their units and resulted in a violation of section 718.110(4), Florida Statutes.

The arbitrator adopts the position of the association on this argument and concludes that amendment #2 does not affect the appurtenances to the units. Use of the dock spaces is not made an appurtenance by the declaration, and the petitioners' position that the dock structure itself is an appurtenance is without support in the declaration and leads to a result which fatally blends 718.113(2) into 718.110(4), ignoring the intended distinction between the two statutory sections. If, as urged by the petitioners, physically changing the common elements, or one component of the common elements, requires a 100% vote, then an association would never be able to make any material alteration to the common elements without 100% vote, and section 718.113(2), Florida Statutes, with its typically lower vote requirement, would exist without a purpose, since the higher vote required by section 718.110(4), would always apply. An association would effectively be precluded from performing any of the changes described by section 718.113(2) without the vote required by section 718.110(4), Florida Statutes. An association would be powerless to change the paint scheme of the buildings without 100% approval; would be powerless to permit the installation of hurricane shutters by owners without 100% approval ; would be unable to install a fence on the property without 100% approval; would be unable to plant a stand of trees on the property without unanimous approval of the owners; and could not construct a sidewalk on the common elements without receiving 100% approval. All of these examples are changes governed by section 718.113(2), Florida Statutes, and all involve changing the common elements rather than the appurtenances to the

> units. Under petitioners' position, 100% approval of the owners would be required for all these alterations.
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> The cases relied upon by petitioners exhibit both a heritage of nonallegiance to the statute as well as unfortunate timing. The opinion of the Third District in Tower House Condominium, Inc. v. Millman, 410 So. 2d 926 (Fla. 3rd DCA 1981) perhaps represents the initial misapplication of section 718.110(4). The court held that the association required 100% consent of the owners before purchasing additional land to be used as additional parking for the residents. What is even more egregious is the continued reliance on the opinion of the Third District both before and after the opinion of the Florida Supreme Court in the same case, rendered four years later, reported at 475 So. 2d 674 (Fla. 1985), in which the Court affirmed the opinion of the Third District on other grounds unrelated to the issues analyzed in the district court opinion. In the interim between Towerhouse I and II, the courts produced Beau Monde, Inc. v. Bramson, 446 So. 2d 164 (Fla. 2nd DCA 1984), which relied on the analysis of the Third District in a similar holding. After Beau Monde came the remarkable case of Downey v. Jungle Den Villas Recreation Association, Inc., 525 So. 2d 438 (Fla. 5th DCA 1988), in which the court held that the acquisition of land and the construction of a swimming pool violated section 718.110(4), Florida Statutes. The list of cases grew in the 1990's such that at present, there is a divergence in the court opinions despite several rounds of clarifying amendments to the statute. This divergence notwithstanding, the arbitrator rules that section 718.110(4), Florida Statutes, finds no application to this case, that section 19.k of the declaration has not been violated by either amendment, and that amendments #1 and 2 were properly passed by the membership.

Brushing aside the academic question of whether the opinion in Parc Cornish was consistent with the statute and case law in effect at the time the case was decided, it would be no small task to conclude that the Parc Cornish opinion continues to breathe, given both the corrective legislation passed to counter the opinion and the later opinion of the Florida Supreme Court in Woodside Village Condominium Association v.

Jahren, 806 So. 2d 452 (Fla. 2002). Woodside teaches that there are few vested rights in the condominium regime. In Woodside, the Florida Supreme Court upheld the validity of an amendment to the declaration restricting the leasing of units in the condominium. The Second District Court of Appeal had found that the right to rent was a fundamental property right that could not be taken away. 754 So. 2d 831 (Fla. 2d DCA 2000). The Florida Supreme Court on review found that the right to rent was not a vested right protected by the statute, the Constitution, or the documents. Instead, purchasers are put on notice, given the general amendatory provisions of the declaration, that rights not deemed fundamental or otherwise protected by the statute or documents could be changed by amendment to the declaration:

> Respondents in this case purchased their units subject to the Declaration which expressly provides that it can be amended and sets forth the procedure for doing so…Thus, we find that the respondents were on notice that the unique form of ownership they acquired when they purchased their units in the Woodside Village Condominium was subject to change through the amendment process, and that they would be bound by properly adopted amendments. We also conclude that the respondents have failed to demonstrate that the restriction, in and of itself, violates public policy or respondents' constitutional rights.

Compare, further, the statement of the Parc Corniche court that

> The exercise of the general power to amend the Declaration of Condominium which occurred in this case is contrary to the requirements of section 718.113(2) and section 718.114(4), Florida Statutes…

By contrast, the Woodside Court held that the general power to amend the declaration provided the requisite authority for the restrictive amendment:

> Significantly, section 718.110 also provides broad authority for amending a declaration of

> condominium…Based upon this broad statutory authority and the provisions for amendment set out in the declaration of condominium, courts have recognized the authority of condominium unit owners to amend the declaration on a wide variety of issues, including restrictions on leasing….It is also uncontradicted that the Association acted within the framework of the Declaration in adopting the amendment at issue. [*Woodside* at 457,461].

The two cases are dissimilar on a very fundamental level. Under Woodside, unless a right is protected by the documents or statute, the right may be amended away in the manner provided for general amendments to the declaration. Woodside further recognized that the only rights protected under the statute that were in the nature of fundamental rights were those rights appearing in section 718.110(4), (8), Florida Statutes; the Court did not recognize a vested right to the procedural manner in which changes could be accomplished under section 718.113(2), Florida Statues:

> Of course, section 718.110(1)(a) itself contains some restrictions on the amendment process. For example, pursuant to subsections (4) and (8), all unit owners must consent to amendments which materially alter or modify the size, configuration or appurtenances to the unit, change the percentage by which the unit owner shares the common expenses or owns the common surplus of the condominium, and owns the common surplus…[*Woodside* at 457].

By contrast, under Parc Cornishe, despite that fact that the right to make changes to the common elements under section 718.113(2), Florida Statutes, is not given special recognition and protection in the statute or documents, this right cannot be altered because there is a vested right in the procedure (or the absence of a procedure) whereby these amendments can be made. Certainly the legislature recognized that fundamental property interests assembled under section 718.110(4), (8), Florida

Statutes, could not be amended except with 100% approval of the owners, except if otherwise provided in the declaration as originally recorded.[14] However, this special protection was not afforded by the legislature to those lesser changes regulated by section 718.113(2), Florida Statutes.

The association makes much of the fact that Woodside did not address changes to the *statute*, but only changes to the *declaration*, such that purchasers are only on notice that their rights under the declaration may be changes without their consent. This appears to be an erroneous conclusion for a number of reasons. First, the Woodside court and countless prior courts have steadfastly acknowledged that condominiums are creatures of statute, and section 718.102, Florida Statutes, expressly provides that every condominium created and existing in the state "shall be subject to the provisions of this chapter." This being the case, to suggest that questions regarding the operation of a condominium are governed exclusively by its documents, and without reference to the statute, is to ignore the fundamental statutory nature of condominiums. Secondly, because various parts of the statute establish a nexus between the statutory procedures and the actual condominium documents, it is disingenuous to say that Woodside only discusses changes to the documents. By way of example, section 718.113(2), Florida Statutes, provides that there shall be no material changes to the

[14] Special protection may also be written in the documents themselves. See, Seychelles Condominium Management Association, Inc. v. Ehlen, Arb. Case No. 01-3639, Final Order (May 15, 2002), aff'd., Seychelles Condominium Management Association, Inc. v. Ehlen, Case No. 200231331 CICI in the circuit court in and for Volusia County, Seventh Judicial Circuit (March 31, 2003), holding that where the declaration specifically provided that rental restrictions contained in the declaration could not be amended absent unanimous consent of the owners, the holding of Woodside did not operate to validate an amendment to the declaration using the general

common elements except in the manner provided in the declaration, and if the declaration is silent, the approval of 75% of the voting interests is required. Where the documents are inextricably tied to the statute, it is an exercise in myopia to sever one from the other. Thirdly, regardless of the holding of Woodside, it is simply inaccurate to say that statutory changes do not apply to existing condominiums, regardless of whether a particular declaration specifically incorporates future amendments to the statute. In Rothfleish v. Cantor, 534 So. 2d 823 (Fla. 4th DCA 1988) on rehearing, the court held that a statutory amendment authorizing associations to grant easements applied to condominiums pre-existing the effective date of the amendment, with the court noting that to rule otherwise

> Would result in a morass of legal entanglement where no holding in any one condominium case could be precedent for any other except those created in the same year. This could not possibly be the intent of the legislature or the Courts of this state. [*Id.* at 823].

Obviously, amendments to the statute apply to existing condominiums except where vested rights are impaired. Woodside suggests the absence of vested rights in this context. Moreover, it would have been consistent with the decision in Parc Cornishe for the court in Rothfleish to hold that since neither the statute nor the documents at the time of the recording of the declaration at issue in Rothfleish authorized the board to grant easements on the condominium property, unit owners had the right to expect that the board was powerless to grant easements on their condominium property, and therefore the statutory amendment could not apply. The arbitrator rejects this reasoning.

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amendatory provision of the declaration to remove the requirement of unanimity applicable to the

The Division recently had the opportunity to address many of these issues in a declaratory statement in the case of In Re: Le Chateau Association, Inc., DPR DS 2002-017 (February 24, 2003). In that case, the Division examined the issue of whether the association could amend its declaration under the general amendatory provisions (requiring not less than 51% of the voting interests) to require a 75% vote of the total voting interests for material changes to the common elements[15], where the declaration at the time it was recorded in the public records was silent on the procedure for changes to the common elements. The declaratory statement acknowledged the Parc Corniche case, but noted:

> The Condominium Act has been amended several times since the condominium was created. The law now allows alterations to the common elements with a seventy-five percent vote. Section 718.113(2), Fla. Stat. (2002); ch. 92-49, s. 4, at 443, Laws of Fla. ("If the declaration does not specify the procedure for approval of alterations or additions, 75 percent of the total voting interests of the association must approve the alterations or additions."). In 2002, the legislature amended section 718.113(2), Florida Statutes, again to provide for the amendment of a declaration by the general procedures provided in the declaration, as follows:
>
> > (2)(a)…There shall be no material alteration or substantial additions to the common elements,…except in a manner provided in the declaration as originally recorded or as amended under the procedures provided therein. If the declaration as originally recorded or as amended under the procedures provided therein does not specify the procedure for approval of material alterations or additions, 75 percent of the total voting interests of the association must approve the alterations or additions.

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rental restriction.

[15] The amendment further exempted out material changes required for the maintenance and repair of the common elements and required only a 66 2/3 vote for certain material changes to the first floor lobby of the condominium building.

> The Senate staff analysis of the bill proposing this amendment explains the legislature's intent behind this change as follows:
>
> > …In 1992, this section was amended to provide that 75 percent of the total voting interests could approve such alterations if not contained in the declaration. s. 3, Ch. 92-49, L.O.F…Case law holds, however, that declarations recorded prior to the 1992 statute that are silent regarding material alterations cannot be subsequently amended. See, Wellington Property Management v. Park Corniche…This bill allows amendment of declarations to provide procedures for amendments to common elements. It states that the changes are intended to clarify existing law and apply to existing condominiums.
>
> The legislature has determined that an association's alterations to the common elements are not a material alteration or modification of the appurtenances to a unit and were never intended to be by expressly overruling the Wellington decision….The bill analysis indicates that the legislature is clarifying existing law, which means that it is not a substantive change to any fundamental property interests acquired under declarations recorded prior to 2002. Therefore, amendments passed under the general amendment provisions of a declaration that authorize an association to materially alter or modify the common elements do not fall within the class of amendments that may implicate fundamental property interests, such as a change in the percentage share of ownership of the common elements under section 718.110(4), Florida Statutes.

The arbitrator hereby adopts the thorough and exemplary effort represented by the declaratory statement in Le Chateau as set forth above. The declaratory statement provides undeniable evidence of legislative intent to respond to and overrule Parc Corniche, provides for a proper demarcation between the corresponding sections of the statute, and promotes a consistency in application of the statute that gives meaning and purpose to both sections of the statute. It provides a basis for giving meaning to that

portion of section 718.110(4), Florida Statutes, providing that material alterations to the common elements governed by section 718.113(2), Florida Statutes, "shall not be deemed to constitute a material alteration or modification of the appurtenances to the units."

WHEREFORE, based on the foregoing, the arbitrator rules as follows:

- The addition of the check-in facility constitutes a material alteration to the common elements within the meaning of section 718.113(2), Florida Statutes;

- That section 718.113(2), Florida Statutes, prior to the amendment to section 721.03(8), Florida Statutes, exempting timeshare associations from section 718.113(2), Florida Statutes, applied to this declaration along with the 1992 amendment to the statute providing a 75% voting requirement where the declaration was silent regarding material changes to the common elements;

- That section 718.113(2), Florida Statutes, addressing material alterations to the common elements and providing a default 75% provision, is procedural or remedial in nature and may properly be applied to existing condominiums and does not impair any vested property rights or interests;

- That section 721.03(8), Florida Statutes, in addressing material alterations to the facilities of a timeshare association, is procedural or remedial in nature and may properly be applied to existing timeshare associations and does not impair any vested property rights or interests;

- That section 721.03(8), Florida Statutes, exempts timeshare associations from the requirements of section 718.113(2), Florida Statutes, and allows timeshare associations to make material alterations or substantial additions to the facilities of the timeshare condominium by a vote of the board of directors without the need to obtain the approval of the members of the association;

- That section 721.03(8), Florida Statutes, which on its face purports to exempt timeshare associations from the operation of section 718.110(4), Florida Statutes, may be properly applied to existing condominium timeshare declarations because section 721.03(8), Florida Statutes, specifically recognizes that none of the fundamental rights created or recognized by section 718.110(4), Florida Statutes, may be impaired without the joinder or approval of all owners of record and the holders of all liens on the units. As such, no timeshare association through its board may change the appurtenances to the units as described in section 718.110(4), Florida

Statutes, without the approval of all unit owners, unless otherwise specifically provided in the declaration as originally recorded.

- That the amendment to the declaration challenged in this case does not impair vested property rights or any rights conferred on the parties by Chapters 718 and 721, Florida Statutes.

DONE AND ORDERED this 7th day of January, 2005, at Tallahassee, Leon County, Florida.

_____
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 U.S. Mail has sent a true and correct copy of the foregoing final order to the following persons on this 7th day of January, 2005:

Michael Marder, Esquire
Greenspoon, Marder et al., P.A.
Capital Plaza
201 East Pine St., Ste. 500
Orlando, Florida 32801

Marlene L. Kirtland, Esquire
Becker & Poliakoff, P.A.
2500 Maitland Center Pkwy., Ste. 209
Maitland, Florida 32751

_____
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.