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

IN RE: PETITION FOR ARBITRATION

Debra Goodwin, Christopher Elwell, Gregg Visintin, Stephen E. Davis and Phyllis J. Davis,

Petitioners,

v. **Case No. 2004-04-4285**

Island Club Condominium, Inc.,

Respondent.
____/

PARTIAL SUMMARY FINAL ORDER

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

Petitioners filed this action on August 20, 2004. In count I, the subject of this order, petitioners alleged that a certain amendment to the bylaws recorded in the public records on February 12, 2004, that created a ban on the leasing of units, was invalid because it is inconsistent with rights granted under the declaration. Petitioners request an award of damages for lost rent in excess of $15,000.

By order entered on October 12, 2004, the parties were given an opportunity to identify any material issues of fact that were disputed by the parties. No factual disputes were identified. By order entered on November 1, 2004, the parties were given the right to file any written legal argument on the issues of whether the bylaws as amended are inconsistent with the declaration, and whether the declaration itself must be amended to ban leasing. The parties did not file any written argument.

Turning now to the validity of the amendment to the bylaws restricting leasing, the original declaration provides in article 10.5 as follows:

> Leasing. After approval by the Association elsewhere required, entire apartments may be rented provided the occupancy is only by the lessee, its servants and guests. No rooms may be rented and no transient tenants may be accommodated. Leases for less than 30 days shall not be allowed. [emphasis added].

The declaration in article 11.1 sets forth the procedure to be followed where an owner desired to lease his or her unit. Section 11.1(b) of the declaration provides:

> b. Lease. No apartment owner may dispose of an ISLAND CLUB CONDOMINIUM, INC., apartment or any interest in an ISLAND CLUB CONDOMINIUM, INC., apartment by lease without approval of the Association except to an ISLAND CLUB CONDOMINIUM, INC., apartment owner. Only one such lease, during any calendar year shall be allowed. The maximum period of time on any lease shall be one year and the minimum period of time shall be 30 days… [emphasis added].

The declaration as written is virtually not subject to amendment in the ordinary course of association affairs. Article 13 of the declaration sets forth the requirements for amending the declaration. For ordinary amendments, the declaration requires as relevant here the approval of not less than 75% of the total voting interests *and all approved mortgagees*. There is no evidence in the record that the association has ever managed to successfully amend the declaration to regulate leasing or anything else.

On the other hand, an amendment to the bylaws requires only a vote of 60% of the board and 60% of the membership, or 70% of the membership and no approval of the board. According to the petition, the association recorded an amendment to the

bylaws that placed additional restrictions on the ability of an owner to lease. According to an amendment to the bylaws dated February 7, 2004:

> It was hereby resolved by a vote of 69.56% of the entire membership at the annual meeting of the association that the bylaws be changed as follows:
>
> Effective this 7th day of February, 2004, the condominium association will no longer allow leasing of an owner's unit under any conditions or for any period of time. All units must now be owner-occupied with future leasing of the owner's unit or units forbidden.
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> Any units presently being leased by an owner are grandfathered-in through the term of their original lease with their tenant. No new leases will be accepted and a notarized copy of the lease must be delivered to the Board of Directors upon receipt of this bylaw amendment. [emphasis added].

The petitioners state that the association is enforcing the bylaw amendment and is prohibiting any rental of units at the condominium. Petitioners claim damages for a sum in excess of $15,000 for loss of income and other damages.

In Richardson v. Jupiter Bay Condominium Association, Inc., Arb. Case No. 02-4354, Final Order (July 3, 2002), the arbitrator determined that an amendment to the bylaws that restricted leases to a minimum of 30 days was inconsistent with the declaration which permitted leasing. The undersigned arbitrator adopts the analysis set forth in that case:

> The bylaws or rules of the association cannot exist in conflict with the declaration. Beachwood Villas Condominium v. Poor, 448 So. 2d 1143 (Fla. 4th DCA 1984). The declaration in this case in section 10.1 clearly grants the unit owners the right to rent their units: "Leasing or renting of a condominium unit by a Unit Owner is permitted." There is nothing in the declaration purporting to give the board the authority via vote or by amending the bylaws to pass substantive limitations on the right to rent the unit.

In Neville v. Sand Dollar III, Inc., Arb. Case No. 94-0452, Final Order (April 12, 1995), at issue was a rule passed by the board that restricted rental periods to not less than 28 days. The declaration in that case provided that after the association approves a lease, the unit may be rented. The arbitrator noted:

> Reasonable regulations on the use, occupancy, and transfer of units within the condominium are necessary for the operation and protection of the owners in the condominium concept. *White Egret Condominium, Inc. v. Franklin*, 379 So. 2d 346 (Fla. 1979). Where a rental restriction is not located within the declaration of condominium, but is, for example, located within a board rule, there is no entitlement to a presumption of correctness, but rather, a court must determine whether the board acted within the scope of its authority in enacting the rule, and secondly, the court must determine whether the rule reflects reasoned or arbitrary and capricious decision making. *Hidden Harbour Estates, Inc. v. Basso,* 393 So. 2d 637 (Fla. 4th DCA 1981); *Beachwood Villas Condominium v. Poor,* 448 So. 2d 1143 (Fla. 4th DCA 1984).
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> Board rules may not contradict any specific provision in the declaration or infringe upon any right of the unit owners contained therein or which can be reasonably inferred therefrom. *Beachwood Villas, supra*.
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> In the declaratory statement issued by the Division In re: *Meadowbrook Lakes View Condominium Association, Inc.*, Case No. 88A-163 (March 9, 1989), the declaration prohibited unit owners from leasing any unit for less than 120 consecutive days. The board enacted a rule restricting rentals to one time during the period of ownership, for a term not to exceed one year, and not to be less than 120 days. The Division determined that the board rule was more restrictive than the declaration which granted to the unit owners the right to rent their units and placed no restriction on the number of unit rentals during the period of ownership. Accordingly, the Division determined that the rule was invalid.
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> In the arbitration case *of Reiss v. Siesta Dunes Condominium Association, Inc.*, Arbitration Case No. 92-0148 (Grubbs / Arbitration Final Order / July 2, 1993), the board passed a rule establishing a minimum rental period of fourteen (14) days where the declaration did not specify any minimum rental period. The arbitrator invalidated the rule upon a finding that the rule contravened a right that could be reasonably

> inferred from the declaration, to wit: the right of the unit owner to determine the length of the rental agreement.
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> In the arbitration case of *Payne v. Hillsboro Windsor Apartments*, Case No. 92- 0231 (Scheuerman / Summary Final Order / June 4, 1993), the arbitrator invalidated a board rule restricting rentals to ten percent (10%) of the total units in the cooperative. The cooperative bylaws prohibited renting during the first year of ownership, permitted only one lease per year, and required a minimum term of thirty (30) days for a lease. The arbitrator determined that the rule was more restrictive than the subleasing restrictions found in the bylaws, and that the board rule, in placing additional substantive restrictions on the right to sublease, in effect amended the provisions of the bylaws without following the bylaw amendatory procedures.

The Sand Dollar final order reproduced in part above, is fairly representative of those leasing restriction cases exploring the degree of consistency required between rights conferred by the declaration, either expressly or by inference, and the restrictions imposed by rule or bylaw amendment. The court cases cited in Sand Dollar are also instructive. See also, Sky Lake Gardens No. 2 v. Gomes, Arb. Case No. 95-0362, Final Order (September 25, 1996) (Where the declaration allowed the units to be used as a residence for the owner and his tenants, the right to lease may be inferred from the declaration, and a rule that barred leasing was invalid). Review also, Koplowitz v. Imperial Towers Condominium, Inc., 478 So. 2d 504 (Fla. 4th DCA 1985), holding that an amendment to the association's rental rule was invalid where the rule was not approved by 75% of the membership as required by the articles of incorporation and the declaration. Further review, Gordon v. Palm Aire Country Club Condominium Association, No. 9., Inc., 497 So. 2d 1284 (Fla. 4th DCA 1986), holding that a board may not adopt a blanket rule against pets where the declaration prohibits pets, unless approved by the board; the board cannot adopt a rule modifying a provision of the declaration absent an amendment to the declaration. Further, in Ero Properties, Inc. v. Cone, 418 So. 2d 434 (Fla. 3rd DCA 1982) the court ruled that where the developer-controlled association amended the bylaws by a majority vote of the board to stave off transition pursuant to s. 718.301, F.S., the declaration, providing a later turnover date, took precedence over the bylaws. In Mohnani v. La Cancha Condominium Association, Inc., 590 So. 2d 36 (Fla. 4th DCA 1991), the court invalidated a board rule prohibiting leasing within 2 years of the purchase of a unit, where the declaration simply said that no owner may lease his apartment without approval of the board. The court stated:

> In our view, a La Cancha apartment owner's right to lease his or her apartment can be inferred from [the declaration] which provides that within thirty days of application for Board approval of a lease, the Board shall either approve the lessee or furnish another lessee…. Applying the test enunciated in *Beachwood* to the facts of the instant case, it is clear that rule 10 contravenes Article XIII and the rights reasonably inferable therefrom.
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> Based on these authorities,[1] it is concluded that the declaration expressly recognizes the right of the owners to lease their units, and that that the bylaw amendments in 1991, 1995, 1999, and 2001 purporting to give the board the right to pass substantive restrictions to leasing, restricting leasing to a term of not less than 30 days, recalculating the 30 day period, and removing the holiday exemption are more restrictive than the rights afforded under the declaration. The bylaw amendments, in placing additional substantive restrictions on the right to rent, are declared invalid.
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> 1. It should also be noted that while s. 718.112(3), F.S., permits the bylaws to contain restrictions on the use of the units, this section also states that the bylaws may not be inconsistent with the declaration.

In the instant case, while the declaration permits the bylaws to set forth use restrictions concerning the use of the common elements, the bylaws cannot set forth use restrictions that are inconsistent with the declaration, where the right to rent is set forth in the declaration along with substantive limitations on the right to rent.[1] It is quite plain that the bylaw amendment is an illegal amendment to the declaration and is of no force and effect. The association shall immediately cease enforcing the bylaw amendment prohibiting leasing as of the date of issuance of this order. The issue of damages for its enforcement of this provision will be taken up presently.

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[1] The association has not argued that Woodside Village Condominium, Inc. v. Jahren, 806 So. 452 (Fla. 2002) resurrects the fallen bylaw amendment. "Purchasers and owners are charged with notice that a declaration is subject to valid amendments, and that the bylaws are subject to change through valid amendments consistent with the declaration…Accordingly, it is held that the holding in Woodside does not operate to validate an amendment to the bylaws that is otherwise invalid due to inconsistency with the declaration. Richardson v. Jupiter Bay Condo. Ass'n., Inc. Arb. Case No. 02-4354, Summary Final Order (July 3, 2002).

WHEREFORE, the parties shall comply with this order.

DONE AND ORDERED this 12th day of January, 2005, at Tallahassee, Leon County, Florida.

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