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

IN RE: PETITION FOR ARBITRATION

Raymond Long, David Betts and
Joanne McGregor,

Petitioners,

v. Case No. 2004-02-8316

Ocean Harbour of Islamorada
Condominium Association, Inc.,

Respondent.

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PARTIAL SUMMARY FINAL ORDER

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

In their petition for arbitration, the petitioners allege that the association impermissibly converted an area of the clubhouse to an exercise facility and conducted an improper unit owner vote authorizing the creation of the exercise facility. In its answer, the association argues that the exercise facility is not a material alteration because the board has simply reinstated the area to its prior use. However, the association did conduct a unit owner vote and argues that the vote was proper and no illegal activity occurred during the voting process. Further, the association contends that because the condominium declaration "annexes" the by-laws, voting requirements contained in the by-laws regarding alterations and additions to the condominium property control, rather than section 718.113(2)(a),

Florida Statutes, that requires a 75% vote for material alterations where the declaration is silent on this issue. The association contends that per the by-laws, it obtained approval from 51% of the voting interests for the exercise facility, thus, the vote is valid.

Pursuant to section 718.113(2)(a), Florida Statutes:

> Except as otherwise provided in this section, there shall be no material alteration or substantial additions to the common elements or to real property which is association property, except in the 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 percent of the total voting interests of the association must approve the alterations or additions. [emphasis added].

The association argues that the statute cited above does not come into play in this case because the association's by-laws are not silent regarding additions or alterations.[1] Pursuant to section 5.13 of the association's by-laws:

> Any additions, repairs or alterations in or to the common elements consisting of less than any amounts contained in an association contingency fund and/or capital reserve account may be made by the governing board without approval of the unit owners or unit mortgagees,...Whenever in the judgment of the governing board the common elements require additions, repairs, or alterations costing in excess of any contingency fund and/or capital reserve account, the making of such additions, repairs and alterations shall require approval by a majority of the unit owners. [emphasis added].

[1] The association also argues that a vote is not even required as the cost of the exercise facility does not exceed the funds contained in the association's contingency account.

As the by-laws only demand approval by a simple majority of the voting interests where the additions or alterations exceed contingency fund amounts, the association argues that the governing documents are not silent, and the 75% approval requirement in section 718.113, Florida Statutes, does not control. However, the statutory language requires 75% approval where the addition or alteration is material and, specifically, where an association's declaration is silent regarding material alterations. While the association admits that the body of the declaration is silent and does not contain a provision regarding alterations, it argues that "the By-Laws constitute an exhibit to the Declaration, thus being a part of them for the purpose of the provisions of the Act relating to alterations." To support the proposition that the by-laws govern this dispute, the association cites article 20 of the by-laws, which provides the following:

> The unit owners' membership and voting rights in the association shall be as provided in the bylaws annexed as Exhibit "C". All agreements and determinations lawfully made by the association in accordance with the voting percentages, established in the bylaws shall be binding on all unit owners, their heirs, successors, and assigns.

The association essentially argues that the by-laws should take the place of the declaration based on the language cited above which provides for the annexation of the by-laws and establishes that voting procedures in the by-laws are binding. However, this argument is not persuasive as the statute clearly states that unless the declaration specifies voting requirements on material alterations or additions, 75% approval from the association membership is required. Even when reading the by-laws in conjunction with the declaration, the statute does not state or even

imply that other governing documents, such as articles of incorporation, by-laws or rules and regulations may be considered when interpreting voting procedures for applicable alterations. The unambiguous language of the statute only authorizes provisions contained in an association's declaration to be followed in certain voting instances.[2] If the legislature had intended for voting procedures included in an association's by-laws to be controlling where the declaration is silent, such an intent would have been reflected in the statute. In fact, section 718.113(2)(c), Florida Statutes, provides for voting policies contained in the *declaration, articles of incorporation or by-laws* to be evaluated when involving material alterations to real property in a condominium operated by a multicondominium association. As the articles of incorporation and by-laws are not included in section 718.113(2)(a), Florida Statutes, regarding material alterations to the common elements in a condominium operated by a single association, it can logically be construed as an intentional and purposeful omission that must be enforced. The rationale behind the omission is most predictably based upon the stability associated with provisions contained in an association's declaration. Because amending by-laws typically requires less stringent approval requirements than what is necessary to amend a declaration, the statute, in only providing an exception for voting percentages for material alterations when the declaration is silent, affords consistent and dependable criteria for perspective and current condominium owners.

[2] The statute in section 718.104(4)(l), Florida Statutes, requires the by-laws to be attached to the declaration but the statute does not support the position that the mere act of attaching, annexing, or otherwise appending the by-laws to the declaration renders the distinctions between these two documents superfluous.

Furthermore, it is well established that under principles of statutory construction, given particular application to the condominium area, where the statute permits or requires something to be accomplished in a stated manner, the Legislature did not intend any other method to be authorized. Review, Towerhouse Condominium, Inc. v. Millman, 475 So. 2d 674 (Fla. 1985)(court ruled that where the Condominium Act at the time of creation of the condominium permitted a condominium association to purchase units within the condominium, no purchase of other forms of real property could be accomplished by the association); see also, Suntide Condominium Association, Inc. v. Florida Land Sales and Condominiums, 465 So. 2d 314 (Fla. 1st DCA 1984)(condominiums are strictly a creature of statute). The language contained in section 718.113(2)(a), Florida Statutes, is clear and unambiguous in requiring 75% approval of unit owners where an association's declaration is silent on voting procedures for approving material alterations or additions. Any conflicting voting provisions contained in the association's articles of incorporation or by-laws are not enforceable. Thus, in the case at hand, the alleged 51% vote obtained by the association does not, on its face, result in the exercise facility being permitted, if such is found to be a material alteration or substantial addition. As this is a factual dispute, a hearing will be conducted on this issue.

DONE AND ORDERED this 1st day of February 2005, at Tallahassee, Leon County, Florida.

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Melissa Mnookin, Arbitrator
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