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

IN RE: PETITION FOR ARBITRATION

Geraldine Jaramillo,

Petitioner,

v. **Case No. 2005-03-7541**

Cypress Club Condominium, Inc.,

Respondent.
_____/

SUMMARY FINAL ORDER

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

Petitioner filed a petition for arbitration in this matter on July 12, 2005. According to the petition, the association passed an amendment to the declaration on March 16, 2004, prohibiting the rental of a unit unless an owner has owned that unit for at least 2 years prior to the intended rental period. Petitioner, who purchased the unit in December, 2003, had a tenant approved by the association prior to the effective date of the amendment. In January, 2005, petitioner received an offer to purchase her unit, and petitioner submitted an application to the association for approval of the transfer. The association declined to approve the transfer, arguing that approving the purchaser would result in a per se violation of the declaration as amended. The association did not produce an alternate purchaser. In this action, petitioner seeks a declaration concerning the association's responsibility to approve a new purchaser subject to the

existing lease, and seeks injunctive relief requiring the association to supply a new purchaser or approve her original purchaser.

On August 30, 2005, the arbitrator issued a notice of intent to issue summary final order. The parties each filed written legal arguments, with the last being filed on September 28, 2005. All arguments have been considered by the arbitrator in the issuance of this final order.

The March, 2004 amendment to the declaration, as it bears on leasing, provides as follows:

> D. Leasing—Entire apartments may be rented provided that occupancy is only by the Lessee and his family and is not for less than three months and not longer than one year. No rooms may be rented and no transient tenants accommodated. There shall be no sub-leasing of any unit at any time.
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> Further, no Unit Owner may lease the Owner's Unit during the first two (2) year period of ownership measured from the date the Owner received title to the Unit. After the first two (2) year period of ownership, a Unit Owner may lease the Owner's Unit subject to the tenant approval and screening process and the other requirements and limitations of the Declaration of Condominium, Articles of Incorporation, Bylaws and Rules and Regulations.
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> If, at the time this amendment is adopted, a Unit Owner has owned a Unit for less than two (2) years, and the Unit is leased to an existing Association approved tenant, the existing approved tenant may remain until the existing tenant leaves, but the Owner shall thereafter comply with the prohibition on leasing during the first two (2) years of ownership.

If the association fails to approve an intended purchaser, the declaration provides as follows:

> (a) Notice to Association. An apartment owner intending to make a bona fide sale or a bona fide lease of his apartment or any interest therein shall give notice to the Association of such intention, together with the name and address of the proposed purchaser or lessor, together with such other information that the Association may require; said notice shall be accompanied by a Fifty Dollar ($50.00) investigation fee in the case of a lease, and a One Hundred Dollar ($100.00) investigation fee in the case of a sale.
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> (b) Decision of Association. Within sixty (60) days after receipt of such notice, the Association must approve the transaction or furnish a purchaser or lessee approved by the Association who will accept terms as favorable to the seller as the terms stated in the notice. Such purchaser or lessee furnished by the Association may not have less than sixty (60) days subsequent to the date of approval within which to close the transaction. The approval of the Association shall be in recordable form are [sic] delivered to the purchaser or lessee.

According to the answer of the association, if the association approved the sale of a unit under lease, this would violate the declaration in that the sale would result in tenant being in place during the prohibited rental period, within the first two years of ownership of a unit. The association argues that approval of the sale would violate the intent of the rule which is to encourage the purchase of units by persons who will live in their units, and to discourage the purchase of units for investment purposes, and that the interpretation urged by the petitioner herein "would effectively subvert and eviscerate the amendment inasmuch as an owner would, under the petitioner's interpretation, be able to escape the effect of the amendment by selling the unit with an existing tenant in place." In the arbitrator's Notice of Intent to Issue Summary Final Order, the arbitrator stated:

> The case turns on the proper interpretation of the declaration as amended. The amendment prohibits leasing during the

> first two years of [ownership] and may or may not address the proposed sale of a unit under a lease; the arbitrator will not re-write the documents to fill in blank fields not addressed in the text of the amendments themselves and will not extend the documents beyond what is addressed. It does not appear to compromise the intent of the rule, assuming the amendment is properly construed as addressing anything but the lease of a unit, to require a new purchaser to sustain a 2-year hiatus after purchasing.

In its supplemental legal argument, the association states that, consistent with Woodside Village Condominium Association, Inc. v. Jahren, 806 So. 2d 452 (Fla. 2002), restrictions on leasing are consistent with an owner's right to alienate his property. The petitioner does not dispute the association's ability under Woodside to adopt amendments to the declaration that place increasing restrictions on the ability of an owner to lease his unit. The arbitrator notes that the precise holding of Woodside has been tempered to a large degree by the 2004 amendment creating section 718.110(13), Florida Statutes, providing that any amendment to the declaration restricting an owner's right to rent applies only to those owners who consent to such application and to those who purchase after the restriction becomes effective. In the final analysis, Woodside has only peripheral application to this case. Woodside speaks to the right of an association to substantively restrict the right of the owners to rent their units; this case, on the other hand, concerns the proper interpretation to be given a rental restriction.

Next, the association argues, as suggested earlier, that the association should not be required to approve a sale if the sale would result in a violation of the declaration, citing Coquina Club, Inc. v. Mantz, 342 So. 2d 112 (Fla. 2d DCA 1977). Initially, citing this case begs the question of whether the documents address the sale of a unit at all,

so initially, it is not clear that this case applies at all.[1] Secondly, assuming the documents, albeit indirectly, address the sale of a unit, this argument presupposes that the sale here violated the declaration, which will be explored shortly. Thirdly, Coquina Club holds that an association is not liable in damages for failing to approve the sale of a unit to a person who was clearly not qualified to purchase the unit. Here, there is no argument that the prospective purchaser fails to achieve any eligibility factors set forth in the declaration; instead, the association argues in effect that the seller is not eligible to sell given the presence of the tenant. The association argues that the provision is similar to hundreds or thousands of such amendments in condominiums across Florida, and that "[i]f the arbitrator rules that an owner can escape compliance with such a limitation by purchasing a unit with an existing tenant in place, the arbitrator will turn all such leasing restrictions on their head and will create a great deal of upheaval and uncertainty in this area." If, as urged by the association, the declaration is properly construed to apply to sales, and to prohibit the subject sale, then Coquina Club would be found applicable.

Petitioner responds to the association's arguments by asserting that the amendment, said to be ambiguous, should be construed against the association that is seeking to enforce it, and that "a plain reading of the text of the amendment reveals no specific prohibition on selling a unit with an existing, association-approved tenant." The petitioner argues that the controlling factor is the expressed intent of the parties, and

[1] The association has also filed an affidavit of counsel, who drafted the subject amendment, that it was the drafter's intent that the association is not required to approve a sale with an existing tenancy in place because the sale would result in a violation of the declaration. Petitioner responds that the affidavit should not be considered for evidentiary purposes as it merely contains the arguments of counsel, and because the affidavit simply seeks to contribute additional terms to the amendment not contained therein. Also, petitioner maintains that the amendment, due to its ambiguity, should be construed against the drafter.

that unexpressed intent will be unavailing, citing Noble v. Kisker, 183 So. 836, 837 (Fla. 1938). Moreover, as pointed out by the petitioner, in its grandfathering provision, the amendment does provide that if, at the time of adoption of the amendment, a unit is leased to an existing tenant, the existing tenant may stay for the duration of the lease term, "but the Owner shall thereafter comply with the prohibition on leasing during the first two (2) years of ownership."[2]

The arbitrator does not find that the subject amendment is ambiguous, and accordingly there is no proper occasion presented to consider extrinsic evidence such as the affidavit of counsel. The amendment is entitled "Leasing," and replaces the previously existing leasing provision that permitted leasing for terms of not less than one month or more than a year. There is a separate provision in the declaration that addresses "Conveyances," located in article XII section (G) of the declaration which was not amended along with the subject amendment. This provision continues to provide, in summary, that no unit owner may sell or lease a unit without approval of the association, and that if the association disapproves a proposed sale or lease, the association is required to produce a substitute buyer or tenant, as the case may be. That section XII(G) addressing the sale of units was not amended to address (or prohibit) the sale of a unit under an existing lease is some evidence that the amendment to section XII(D) does not impose substantive restrictions on the ability of an owner to sell his unit. That section XII(D), as amended, on its face does not address the selling scenario at issue here suggests that the provision does not reach the situation where a

[2] It is unclear what grandfathering effect this provision would have where an owner resided in his unit for two years upon his purchase, and then leased the unit to an approved tenant where the lease began before the amendment, but the lease term extended past the effective date of the amendment.

seller seeks to convey a unit under a current lease. The arbitrator finds that the amendment, obviously well-considered and thought out, does not address the situation where an owner seeks to sell a unit under an existing lease. If considered or anticipated, it would have been an easy matter to address with similarly explicit language in the amendment. Certainly neither the amendment nor section XII(G) prohibit the sale of a unit under lease, or even address this aspect of a sale. While the amendment states (under the easy scenario) that if, at the time of the amendment, a unit is leased, the tenant may continue occupancy of the unit, and that thereafter the owner (who purchased and presumably leased immediately) would observe the two year moratorium on leasing, the parallel provision that would logically appear and would specifically state that if the unit is sold under a lease, the two year moratorium would apply to the new purchaser upon expiration of the lease (which must be under the prior section (D), not less than a year from its commencement) is absent. Also absent is an explanation for how the objective of the rule would be violated where the two-year provision was deemed to apply anew to the subsequent purchaser upon expiration of his predecessor's lease; in that case, the objective of the rule--to encourage the sale of units to residents--would appear to be preserved. Whether the unit was sold under lease with the two year ban on leasing to commence with the expiration of the lease, or whether the unit was sold with no existing lease and the new owner then observed the two year ban, in either case a two year ban would be implemented not later than one year after the purchase (as section (D) continues to contain its maximum rental term of one year). It is not shown that allowing the sale and delaying the two year prohibition by

one year or less would exact injury on the objective of the rule by encouraging speculation in the condominium market.

In short, the arbitrator finds that the amendment does not address, much less prohibit, the sale of a unit under lease. The fact that, in afterthought, it would have been preferable to include a sale provision in the amendment, does not grant the arbitrator a license to go back and amend the provision to gratuitously include this provision. At this point, the amendment may be amended to provide addition restrictions on the *lease* of a unit consistent with Woodside, but only in a manner consistent with the new section 718.110(13), Florida Statutes. Restrictions on the outright *sale* of a unit are not addressed by the new statutory section, and in the absence of a statutory provision, Woodside, which is properly understood as applying beyond mere rental restrictions, governs in its holding that purchasers are charged with notice that the documents may be amended whether in the area of rental or sale restrictions.

WHEREFORE, the relief sought by the petitioner is granted. Petitioner was entitled to sell her unit to an otherwise-qualified purchaser, with a current lease in effect; however, upon expiration of the existing lease, the new purchaser may not rent for two (2) years.[3] The association shall approve the original prospective purchaser, if the purchaser is still available and able and willing to purchase, failing which it must comply with its obligation under section XII(G) to furnish an alternate purchaser under the same terms and conditions.

[3] Compare, BPCA Condominium Association v. Capano, Arb. Case No. 93-0251, Final Order on Default (April 14, 1994), holding that where an owner intentionally violated the declaration prohibiting leasing during the first year of ownership, the arbitrator could impose the ban for one year commencing upon issuance of the final order, notwithstanding that the owner's first year of ownership had long since lapsed.

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

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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 a true and correct copy of the foregoing final order has been sent by U.S. Mail to the following persons on this 1st day of November, 2005:

Aaron R. Cohen, Esquire
150 East Palmetto Park Rd., Ste. 350
Boca Raton, Florida 33432

Robert B. Burr, Esquire
Levine and Burr, P.A.
2500 North Military Trail, Ste 490
Boca Raton, Florida 33431

_____
Karl M. Scheuerman, Arbitrator

Right to Appeal

As provided by s. 718.1255, F.S., this final order may be appealed by filing a petition 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 order. This 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 an arbitration proceeding is entitled to have the other side pay its reasonable costs and attorney's fees. As provided by rule 61B-45.048, F.A.C., a motion seeking an award of attorney's fees and costs, which motion must conform to the requirements of the administrative rule, must be filed with the Division within 45 days of the date of the entry and mailing of this final order.