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

IN RE: PETITION FOR ARBITRATION

Kenneth Richardson, et al.,

Petitioners,

v. **Case No. 02-4354**

Jupiter Bay Condominium Association, Inc.,

Respondent.
_____/

SUMMARY FINAL ORDER

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

The petitioners filed their petition in this matter on January 24, 2002. Relying on the opinion of the 2nd District Court of Appeal in Woodside Village Condominium Association, Inc. v. Jahren, 754 So. 2d 831 (Fla. 2nd DCA 2000), petitioners argued that certain amendments to the bylaws restricting the ability of the owners/petitioners to lease their units deprived petitioners of a valuable property right guaranteed by the declaration.

By the time the association filed its answer on February 18, 2002, the opinion of the Second District had been reversed by the Florida Supreme Court in Woodside Village Condominium Association, Inc. v. Jahren, 806 So. 2d 452 (Fla. 2002). In its answer, the association argues that the statute of limitations has run on petitioners,

and that the association has the authority to amend its documents pursuant to the documents themselves as well as under the amendment authority referenced in the Woodside opinion. The arbitrator permitted the parties to file written arguments on the legal issues presented, and the last argument was filed on April 8, 2002. The case was transferred to the undersigned on June 11, 2002.

Under the undisputed facts appearing of record, petitioners are unit owners in a condominium operated by the respondent association. All petitioners purchased and now hold their apartments as investment rental properties. The properties are rented through an on-site rental agency. Petitioners maintain that they purchased units that were marketed as investment rental properties, and that the declarations at the time specifically permitted leasing and contained no restrictions on the length of rental periods. Petitioners would not have purchased their units but for the lack of rental restrictions.

The petition alleges that the association has unlawfully amended its bylaws by limiting the minimum lease period to one month. Petitioners assert that the bylaws, as amended, contradict the right in the declaration to unrestricted leasing. Section 10.1 of the original declaration provided (and continues to provide) that:

> Leasing or renting of a condominium unit by a Unit Owner is permitted; however, the Developer is neither offering a rental service nor promoting the use of any rental service, and further, makes no representations as to the availability of tenants for such condominium unit.

The association in its answer indicates that article 5 of the bylaws were first amended in 1991 to provide:

> The Board of Directors shall have the power to promulgate rules and regulations governing the leasing of units including, but not limited to, the proscribing of a minimum lease term, within the Condominium.

In 1995, article 5 of the bylaws was again amended to provide that:

> …A unit may be leased provided that the occupancy is only by the lessees and their guests…. The terms of each lease shall be for a period of not less than one month. If the terms of each lease begins other than on the first day of the month, the minimum rental period shall be for four consecutive weeks. Exceptions to the minimum rental period will be allowed during the holidays of Thanksgiving, Christmas and Easter. During the aforementioned holidays, the term of each lease shall be for a period of not less than 10 consecutive days provided that the rental period must include the holiday of Thanksgiving Day, Christmas Day or Easter Sunday….

In 1999, article 5 of the bylaws was amended to provide:

> …A unit may be leased provided that the occupancy is only by the lessees and their guests…. The terms of each lease shall be for a period of not less than one calendar month or 30 days whichever is less. ~~If the terms of each lease begins other than on the first day of the month, the minimum rental period shall be for four consecutive weeks.~~ Exceptions to the minimum rental period will be allowed during the holidays of Thanksgiving, Christmas and Easter. During the aforementioned holidays, the term of each lease shall be for a period of not less than 10 consecutive days provided that the rental period must include the holiday of Thanksgiving Day, Christmas Day or Easter Sunday….[underlining shows additions; strike-through shows deletions].

The bylaws were again amended in 2001 to provide as follows:

> A unit may be leased provided that the occupancy is only by the lessees and their guests…. The terms of each lease shall be for a period of not less than one calendar month or 30 days whichever is less. ~~Exceptions to the minimum rental period will be allowed during the~~

~~holidays of Thanksgiving, Christmas and Easter. During the aforementioned holidays, the term of each lease shall be for a period of not less than 10 consecutive days provided that the rental period must include the holiday of Thanksgiving Day, Christmas Day or Easter Sunday....~~

There is evidence to suggest that in 1991, the association attempted to amend the declaration itself to provide for restrictions on leasing; however, the amendment failed. General amendments to the declaration require a 75% vote of the owners while bylaw amendments only require 51% approval. See, article 12 of the declaration and section 12.2 of the bylaws.

Consistency with the Declaration

Next, petitioners argue that the bylaw amendments are inconsistent with rights granted under the declaration, and are hence invalid. 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 Owners 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).

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*.

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.

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.

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.

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.

[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 declaration.

The Effect of Woodside

As a final issue, it must be determined whether the Supreme Court opinion in Woodside Village Condominium Association, Inc. v. Jahren, 806 So. 2d 452 (Fla. 2002) resurrects the fallen bylaw amendments. In a nutshell, the opinion holds that new restrictions on leasing may be imposed on pre-existing residents in the community by amending the controlling documents to impose such restrictions, even where the residents purchased in reliance on the lack of such restrictions. There is no intent in the opinion to restrict the holding to amendments to the declaration, and there is no rational reason shown as to why Woodside would be restricted to amendments to the declaration. Just as purchasers are placed on notice that the declaration may be amended, bylaws which along with the articles of incorporation and declaration control the operation of the association, may be amended under appropriate circumstances. See, Woodside at 452, wherein the Court states:

> Hence, because condominiums are a creature of statute courts must look to the statutory scheme as well as the condominium declaration *and other documents* to determine the legal rights of owners and the association. [e.a.]

Woodside is, accordingly, not restricted to amendments to the declaration, but the rationale of Woodside would logically apply to the bylaws and articles of incorporation. The decision would find its most direct application to the facts in this case if the association had successfully amended its declaration, in which case, absent some special provision in the documents or special protection afforded

under ss. 718.110(4) or 718.110(8), F.S., the conclusion would be inevitable that an amendment restricting the right to rent would be valid, all other things remaining equal.

The facts of this case, however, are different from the facts in Woodside. The Court did not have before it an amendment to the bylaws that restricted a right conferred by the declaration and that was found inconsistent with the declaration. 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. Surely if the bylaws were amended in a manner that failed to comply with the mandatory procedural requirements for such an amendment, no one would argue the amendment was nonetheless valid due to Woodside. 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 or the failure to comply with a mandated procedure relating to amendments. Neither does Woodside afford an association the opportunity to evade the amendatory provisions of the declaration by turning to the bylaws, with its more liberal amendatory provisions, in order to accomplish by indirect means what it could not accomplish directly.

Statute of Limitations

The association argues that petitioners are barred from maintaining this action based on the statute of limitations. The first relevant amendment to the bylaws was passed in 1991 purporting to give the board the authority to pass rules restricting the

right to rent. The 1995 amendment to the bylaws first restricted the lease periods to not less than one month. The 1999 amendment merely clarified the running of the 30-day minimum rental period. The 2001 amendment did away with the holiday exemptions from the minimum rental period. The amendment that impacted the most on petitioners was the 1995 amendment restricting rentals to not less than 30 days. The subsequent amendments were built on the foundation of the earlier amendments. If a four or five year statute of limitations applies[2], petitioners will only be able to challenge the amendments passed in 1999 and 2001; in this event, the main challenge sought to be instituted by petitioners would be time-barred. In this case, the amendments passed in 1991 and 1995 easily exceed the four or five year statute of limitations and are beyond the reach of the petitioners.

Assuming that this is a case in which the statute applies at all, the arbitrator does not agree with the petitioners' argument that the statute does not begin to run until a unit owner suffers actual damages from the rejection of a lease. The record supports the conclusion that the petitioners were owners when the subject amendments were passed, and that they were, therefore, on notice of the amendments. They either were aware of the content of the amendments or should have been aware of the amendments. If, as stated in the petition, the petitioning owners purchased for investment and rental purposes, then they were presumably impacted or injured at the time of the amendments and cannot argue that they were not so impacted until now. The cause of action accrued in this case upon passage of

[2] Section 95.11(3), F.S. applies a 4 year statute of limitations to an action founded on a statutory liability (here, the procedure relating to amending the bylaws is located in the statute); section 95.11(2), F.S., applies a 5 year statute for actions founded on a contract (here, the declaration.)

the respective amendments, and therefore, the arbitrator would be inclined to rule that petitioners are barred from challenging the validity of the 1991 and 1995 amendments. The statute of limitations would not prevent petitioners from challenging the amendments occurring in 1999 and 2001.

However, it has not been shown that the statute of limitations applies in this proceeding. Where an enactment is properly considered void, as opposed to merely voidable, the statute of limitations does not operate as a bar to one challenging it. See generally, Markham v. Nepture Hollywood Beach Club, Inc., 527 So. 2d 814 (Fla. 1988); The Word of Life Ministry, Inc. v. Miller, 778 So. 2d 360 (Fla. 1st DCA 2001); Moore v. Smith-Snagg, 793 So. 2d 1000 (Fla. 5th DCA 2001) on mot. for reh.; Bhoola v. City of St. Augustine Beach, Florida, 588 So. 2d 666 (Fla. 1991); c.f., Lavey v. The City of Two Rivers, 994 F. Supp. 1019 (E.D. Wisc. 1998). Under this line of cases, if an action is properly viewed as ultra vires and void ab initio, the statute of limitations does not apply.

In Smith-Snagg above, the court ruled that the statute of limitations did not bar a claim by a grandmother that a deed purporting to transfer a remainder interest to her granddaughter was a forgery:

> But the telling point on this issue is our own case of *Holland v. Hattaway*, 438 So. 2d 456 (Fla. 5th DCA 1983). In that case, Judge Cowart carefully examined the law and concluded that even the twenty year statute of limitations applicable to recorded deeds will not prevent an action to set aside a forged or wild deed. The reason is quite simple. A forged deed is void; it has no effect. It will not divest title in the owner or create title in the grantee after four years or twenty years or forever...[Id. at 1000].

Another instructive case that assists is determining whether the bylaw amendment in this case is void or merely voidable is City of St. Augustine, supra. In that case, Bhoola had purchased property on St. Augustine Beach that was zoned to permit hotels and motels. However, the city subsequently changed the zoning ordinance deleting hotels and motel, without complying with the statutorily required public hearing and notice requirements. The court held:

> First, the city's purported amendment is not voidable---it is void....The city had no authority to enact the ordinance without complying with the statutorily mandated notice and public hearing requirements. It is as though the ordinance does not exist.

A final case to be examined is Word of Life Ministry, supra. In that case, the bylaws and articles of incorporation of the corporate church required that board members be members of the corporation. The church conducted an election and failed to observe its documents. The court stated:

> Even if those voting on May 24, 1978, had been authorized to elect directors, the elections were void for failure to observe restrictions imposed by the articles of incorporation which required directors to be members of the association(3)... Because at most a single member of the corporation voted for the amendment, however, the amendment was ultra vires and of no legal effect.
>
> 3 The bylaws of the Church contain specific notice and quorum requirements for the meetings of its members.

In the present case, the declaration provided owners with the right to rent their units. Owners under Woodside and under the declaration had no right to expect that additional amendments to the leasing provisions of the declaration would not be forthcoming, but they had reason to expect that restrictions on the

ability to rent set forth in the declaration would be passed as amendments to the declaration, using the amendatory procedures set forth in the declaration, and not as amendments to the bylaws or rules or regulations. Because the right to rent was set forth in the declaration in this case, the amendment procedures followed by the association, in attempting to amend the bylaws after a failed effort to amend the declaration, were ultra vires and void. The association, in attempting to amend rights granted in the declaration by following the amendatory procedures set forth in the bylaws, acted without authority. Therefore, the arbitrator rules that the statute of limitations does not apply in this limited scenario.

WHEREFORE, the arbitrator determines that the challenge to the 1991, 1995, 1999 and 2001 amendments is not time-barred; these amendments are found to be inconsistent with rights granted under the declaration and are invalid ab initio. Finally, Woodside offers the association no remedy in this case. The association is hereby prohibited from enforcing the 1991, 1995, 1999 and 2001 amendments against anyone in the condominium.

DONE AND ORDERED this 3rd day of July, 2002, 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 3rd day of July, 2002:

John L. Avery, Esquire
1001 N. U.S. Highway One, Ste. 207
Jupiter, Florida 33477

Keith F. Backer, Esquire
136 East Boca Raton Rd.
Boca Raton, Florida 33432

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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.