IN THE SUPREME COURT OF FLORIDA

CASE NO. 61,268

TOWER HOUSE CONDOMINIUM, INC., etc.,

Petitioner,

vs.

MERTON MILLMAN and LILLIAN ARONOFF,

Respondents.

AN APPEAL FROM THE THIRD DISTRICT COURT OF APPEAL, CASE NO. 80-1468

PETITIONER'S BRIEF ON THE MERITS

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INTRODUCTION

References to the record on appeal will be prefixed by the symbol "R".

References to the transcript of the trial of this cause will be prefixed by the symbol "T".

No references to pleadings, orders or the decision of the District Court under review are supplied, as the Clerk of the District Court has not yet supplied a supplemental index to the record.

STATEMENT OF THE CASE

This review is of a decision of the Third District Court of Appeal affirming a judgment in favor of two condominium unit owners in an action brought by a condominium association. The Association sought to foreclose its lien on the Defendants' units for non-payment of a special assessment.

Petitioner, Plaintiff and Appellant below, TOWERHOUSE CONDOMINIUM, INC., will be referred to herein as Association.

Respondents, MERTON MILLMAN and LILLIAN ARONOFF, Defendants and Appellees below, will be referred to herein as Respondents and/or Unit Owners.

The Association brought two actions in the Circuit Court to foreclose liens pursuant to Sec. 718.116, Florida Statutes, against the Unit Owners, who had refused to pay their share of the special assessment levied by the Association for the acquisition of certain adjacent property needed to provide necessary parking for the TowerHouse Condominium. (R.1-7, 100-101).

The Unit Owners answered and counterclaimed, seeking to have the claims of lien declared invalid. (R.25-29, 118-121). Since both actions involved identical claims and issues, the cases were consolidated for all purposes, including discovery and trial. (R.130).

After a non-jury trial, final judgment was entered finding that the Association has the power to purchase real estate which is not part of the original condominium property, but that this power could not be exercised without the consent of all unit owners, and that therefore the assessments were illegal and the

claims of lien invalid. The final judgment dismissed the complaints with prejudice, cancelled the claims of lien, and reserved jurisdiction to award attorney's fees to the successful Unit Owners. (R.131).

Appeal was taken from the final judgment, which was affirmed by the District Court of Appeal. While denying rehearing, the District Court certified its decision as one passing upon a question of great public interest.

This review ensued.

In the final analysis, this case, and the certified question, comes down to two issues:

1. Whether the Association had the power and authority to purchase the property in the manner it did.

2. Whether the Association had the power to assess its Unit Owners for their share of the purchase price.

This was all that was truly at issue below. Everything else, such as the validity of the claims of lien filed by the Association, rises and falls on these two issues.

Specifically not challenged or questioned by the Defendants were:

1. The fairness of the purchase price, or the Respondent Unit Owners' ability to pay the assessment.

2. The sufficiency of, the contents of, and the timing of the notice of the special meeting of the Association at which its members ratified the purchase and assessment.

3. The validity of the special meeting, and the vote in favor of the purchase and assessment by 81% of the unit owners.

4. The manner in which the assessment was levied (as opposed to the Association's power to levy the assessment).

5. The form and procedure utilized in the filing of the claim of lien and the sending of notice to the Respondent Unit Owners of the recording of the lien (as opposed to whether the Association had the power to file the claim of lien).

STATEMENT OF THE FACTS

With one exception, the facts are uncontroverted.

Because this Court's decision will be governed in great part by the provisions of the condominium documents of TowerHouse Condominium, the relevant provisions of the documents will be set forth herein. All emphasis is added by the undersigned counsel.

1. The Declaration of Condominium (Plaintiff's Exhibit 1):

TowerHouse, a Condominium, was created by a Declaration of Condominium recorded on September 11, 1974. Article I(A) of the Declaration provides:

> Except where permissive variances therefrom appear in this Declaration, the Articles of Incorporation of the Association, or the By-Laws of the Association, which are attached hereto and made a part hereof as Exhibit "B", or any lawful amendments to said instruments, the provisions of the Condominium Act, including the definitions therein presently contained, are adopted herein by express reference as if set forth herein in full, and the Condominium Act, and this Declaration, and the Articles of Incorporation and By-Laws of the Association, as lawfully amended from time to time, and documents referred to therein, shall govern this Condominium and the rights, duties and responsibilities of the Owners of Condominium Parcels.

Article I(B) is the definitions section. It provides:

> As used in this Declaration of Condominium and the exhibits attached hereto, the following definitions shall apply (and where

not specifically defined, then the definitions presently set forth in the Condominium Act shall apply):

. . .

(iv) Common Elements means the portions of the Condominium Property not included in the Apartment Residences.

. . .

(v) Common expenses means expenses for which the Apartment Residence Owners are liable to the Association.

(vii) Condominium Parcel means an Apartment Residence together with the undivided share in the Common Elements which is appurtenant to the Apartment Residence.

(viii) Condominium Property means the real property herewith submitted to Condominium ownership, being that property described in Exhibit "A", including all improvements located thereon and all easements and rights appurtenant thereto intended for use in connection with the Condominium.

. . .

(x) Unit means a part of the Condominium Property which is to be subject to private ownership. Reference to and use of the words "Apartment Residence" shall be and shall mean, and shall be used interchangeably with the word "Unit".

Article IV of the Declaration, "Identification of Building and Apartment Residences", provides, in part:

(D) The area shown on survey and described as "Parking Area" is part of the Common Elements. It shall be used for and made available to the Apartment Residence Owners as parking facilities. Each Apartment Residence Owner shall be entitled to the use of the parking facilities for two automobiles; however, the Owners of the Penthouse Tower Apartment Residences shall

> be entitled to the use of the parking facilities for three automobiles. . . .
>
> (E) The improvements hereinabove referred to will be or have been constructed by the Sponsor on the property covered by this Declaration of Condominium.

Article IX of the Declaration sets forth that the Association is responsible for the operation of the Condominium. It provides that:

> Said Association shall have all of the powers and duties set forth in the Condominium Act, as well as all the powers and duties as are granted to or imposed upon it by this Declaration, the By-Laws of said Association, and its Articles of Incorporation. Every Owner of a Condominium Parcel, whether he has acquired the ownership by purchase, or by gift, conveyance, or transfer by operation of law, or otherwise, shall be bound by the By-Laws of the said Association, as they may exist from time to time, the Articles of Incorporation of the Association, as they may exist from time to time, and the instruments and documents referred to in the Sixteenth Article of said Articles of Incorporation, and by the provisions of this Declaration as they may exist from time to time. . . .

Article X(A) of the Declaration provides:

> The maintenance of the Common Elements shall be the responsibility of the Association; and there shall be no material alteration or substantial additions to the Common Elements except in the manner provided for in this Declaration or in the By-Laws of the Association.

Article XI of the Declaration is entitled "Assessments". It provides, in relevant part:

> (A) The Association, through its Board of Directors, shall have the power to fix and determine from time to time the sum or sums of money necessary and adequate to provide for the common expenses of the Condominium Property;. . .
>
> (B) Each Apartment Residence Owner shall be obligated to pay for his share of the charges and payments required to be made herein, and said charges and assessments shall be deemed and considered to be common expenses of the Condominium Property. . .
>
> (F) The Board of Directors of the Association may not authorize or make any additions or capital improvements to the Condominium Property except in the manner provided for in Article VII, Section 3 D of the By-Laws (Exhibit "B") of the Association.

Article XIV(E) of the Declaration provides, in part:

> The TowerHouse as designed by the Sponsor is a hi-rise luxury condominium building with appropriate amenities designed to accommodate a luxury life style. It is the intent of the Sponsor and the Association to maintain the Condominium in the same manner and life style as originally designed and set up by the Sponsor.

2. The Articles of Incorporation (Plaintiff's Exhibit 2):

The Articles of Incorporation of TowerHouse Condominium, Inc. provide that the Association is incorporated as a corporation not for profit under the provisions of Chapter 617, Florida Statutes (Article Second). Article Sixteenth provides:

> The Corporation shall all the powers set forth and described in Chapter 617.021, Florida Statutes, as amended from time to time, together with those powers conferred by the aforesaid Declaration of Condomin-

ium, this Charter, and any and all lawful By-Laws of the Corporation.

3. The By-Laws of the Association (Plaintiff's Exhibit 2):

Article II of the By-Laws, "Directors", provides in part:

> Section 5. POWERS: The property and business of the Association shall be managed by the Board of Directors, who may exercise all corporate powers not specifically prohibited by statute, the Articles of Incorporation, or the Declaration of Condominium (the Declaration) to which these By-Laws are attached. . . .

Article VII of the By-Laws, "Finances", provides, in part:

> Section 3. DETERMINATION OF ASSESSMENTS: A. The Board of Directors of the Association shall fix and determine from time to time the sum or sums necessary and adequate for the common expenses of the Condominium Property;...common expenses shall include expenses for the operation, maintenance, repair or replacement of the Common Elements and the Limited Common Elements ... costs of carrying out the powers and duties of the Association,...and any other expenses designated as common expenses, from time to time, by the Board of Directors of the Association; and common expenses shall also include the amounts to be paid by each apartment Residence Owner for its share of the charges and payments required to be made under the instruments and documents provided for in the Sixteenth Article of the Articles of Incorporation of the Association;. . .
>
> . . .
>
> D. The Board of Directors may not authorize or make any additions or capital improvements to the Condominium Property at a cost in excess of twenty thousand dollars ($20,000.00) without first securing a three-fourths (3/4) vote of all Members constituting a quorum at the meeting called

> for the purpose of considering said additions or improvements, excepting that in cases of emergency, and in order to protect the Condominium Property, the Board of Directors may, in their sound judgment, make repairs to the Condominium Property in excess of said twenty thousand dollars ($20,000.00).

Even though the Declaration of Condominium in Article IV(D) provided for 172 parking spaces, the property as developed did not have 172 parking spaces. In 1978, the Board of Directors of the Association negotiated the purchase of a parcel of property adjacent to the Condominium for additional parking. The Association noticed and held a special meeting of the unit owners, at which 68 of the 84 units owners were present. At that meeting, the members voted 68 to 0 to acquire the adjacent lot and to assess each unit owner the sum of $6,000.00. This vote equates to an affirmative vote of 81% of the unit owners.

The Association thereupon acquired the lot and improved it with paving and foliage. All but two of the unit owners paid the $6,000.00 assessment: the only delinquents were the Respondents. As of this date, the assessment remains unpaid.

The only controverted factual issue involved at trial was the sufficiency of parking. (T.25). The Association established that there were only 128 parking spaces on the Condominium property. (T.29). The additional land contains 44 parking spaces. (R.17).

One of the Respondent Unit Owners, Mr. Millman, was the President of the general contractor which built the TowerHouse Condominium. (T.43-44). Mr. Millman admitted that 172 spaces were necessary. (T.46). Mr. Millman also admitted that the

building plans for the Condominium (Plaintiff's Exhibit 15) reflect that only 131 designated parking spaces were provided for on the plans. (T.60).

The final judgment contained no finding of fact as to the sufficiency of the parking, and ignored Mr. Millman's admission that sufficient parking spaces had not been provided in the number required by the Declaration of Condominium.

ARGUMENT

POINT I

(As certified by the District Court of Appeal)

WHETHER A CONDOMINIUM ASSOCIATION MAY, UPON APPROVAL BY AT LEAST TWO-THIRDS BUT LESS THAN ALL CONDOMINIUM UNIT OWNERS, PURCHASE A SUBSTANTIAL TRACT OF ADJACENT LAND FOR USE BY ALL UNIT OWNERS AS PARKING SPACE IN ADDITION TO THE PARKING SPACE DESIGNATED AS A COMMON ELEMENT BY THE DECLARATION OF CONDOMINIUM, THEN LEVY A PRO-RATA SHARE OF THE PURCHASE PRICE AGAINST THOSE UNIT OWNERS WHO WITHHELD APPROVAL, WITHOUT FIRST SUBMITTING THE PROPERTY TO CONDOMINIUM OWNERSHIP BY AMENDMENT TO THE DECLARATION OF CONDOMINIUM.

INTRODUCTION

The answer to the certified question is yes, and will be discussed herein. Review of the District Court's Opinion will be separately discussed, in Point II of this Brief.

The certified question must be answered in the affirmative because the instant Declaration of Condominium empowered the Association to purchase the property in the manner it did, and to assess the Respondent Unit Owners for their share of the purchase price.

No amendment to the Declaration of Condominium was necessary, as the power to purchase land for additional parking is provided for in the Declaration.

The certified question breaks down into two parts: the power to purchase, and the power to assess. The power to assess will depend on the power to purchase, and will be discussed in

Point III of this Brief. Under the "power to purchase" question are two issues:

1. Whether an association may purchase property upon less than unanimous approval of its unit owner members; and

2. Whether such property must be made part of the common elements, by amendment of the declaration of condominium.

A distinction must here be made between amendment of the declaration of condominium to provide for the power to purchase, and amendment to enlarge the common elements. As will be shown, the former depends on the provisions of the subject condominium documents. The latter is within the discretion of the condominium association, as it is not required by the Condominium Act.

Before explaining the basis for Petitioner's argument, it is imperative to examine both the Condominium Act and the Declaration of Condominium and By-Laws carefully, as the answer depends on construction of the Act and the condominium documents.

The entire Condominium Act must be read in pari materia, as there are several co-existing statutes relating to the rights of the parties. Daytona Development Corp. v. Bergquist, 308 So.2d 548 (Fla. 2d DCA 1975); Vinik v. Taylor, 270 So.2d 413 (Fla. 4th DCA 1972). The various provisions of the Act must be harmonized and reconciled so that the whole scheme may be made effectual. Chiapetta v. Jordan, 153 Fla. 788, 16 So.2d 641 (Fla. 1944). Where possible, this Court should adopt a construction of the statutory provisions which harmonize and reconcile them with the other provisions of the Act. Woodgate Development Corp. v.

Hamilton Investment Trust, 351 So.2d 14 (Fla. 1977). The various provisions must be read as consistent with one another, if there is any reasonable basis for doing so. State v. Putnam County Development Authority, 249 So.2d 6 (Fla. 1971).

Finally, no portion of the Condominium Act should be construed so as to bring about an absurd result. McKibben v. Mallory, 293 So.2d 48 (Fla. 1974).

Since the Declaration of TowerHouse Condominium was recorded on September 11, 1974, Chapter 711, Florida Statutes (1973) controls certain aspects of this case relating to the creation of the condominium. Since the assessment at issue was levied in May of 1978, Chapter 718, Florida Statutes (1977) will govern the Association's exercise of its powers and duties at that time. Century Village, Inc. v. Wellington, etc. Condominium Association, 361 So.2d 128 (Fla. 1978); Kaufman v. Shere, 347 So.2d 627 (Fla. 3d DCA 1977), cert. denied, 355 So.2d 517 (Fla. 1978).

1. THE ELEMENTS OF A CONDOMINIUM.

Section 711.03, Fla. Stat. (1973) was the "Definitions" section. "Condominium" is defined as:

> That form of ownership of condominium property under which units of improvement are subject to ownership by one or more owners, and there is appurtenant to each unit as part thereof an undivided share in the common elements. Sec. 711.03(7).
>
> "Common Elements":
>
> Means the portions of the condominium property not included in the units. Sec. 711.03(4); accord Sec. 718.103(6).

"Condominium Property":

> Means and includes the land in a condominium, whether or not contiguous and all improvements thereon and all easements and rights appurtenant thereto intended for use in connection with the condominium. Sec. 711.03(9).

"Appurtenances" is not defined in the definitions section of the Act, Sec. 711.03. Instead, the enumeration of what are the "appurtenances" to a unit is contained in Sec. 711.04(2) and Sec. 718.106(2):

> (2) There shall pass with a unit as appurtenances thereto:
>
> (a) an undivided share in the common elements.
>
> (b) the exclusive right to use such portion of the common elements as may be provided by the Declaration.
>
> (c) an exclusive easement for the use of the air space occupied by the unit as it exists at any particular time and as the unit may lawfully be altered or reconstructed from time to time, which easement shall be terminated automatically and any air space which is vacated from time to time.
>
> (d) an undivided share in the common surplus.
>
> (e) such other appurtenances as may be provided in the Declaration.

No "appurtenances" are provided for in the subject Declaration other than those set forth in Sec. 711.04(2) and Sec. 718.106(2).

A condominium is created out of land owned or leased by a declarant/developer by the filing of a Declaration of Condominium. The Declaration "sub-divides" the land and improvements to

be constructed on it into condominium units and common elements. Sec. 711.08, Fla. Stat. (1973). Once the condominium is "creaated" by the recording of the Declaration, Sec. 711.08(1), the land which the declarant/developer originally owned becomes the "condominium property". Sec. 711.08(1)(a); Sec. 711.03(9). This condominium property is divided into:

a. Units; defined as "part of the condominium property which is to be subject to private ownership." Sec. 711.03 (13); and

b. Common elements, defined as "the portions of the condominium property not included in the units." Sec. 711.03 (5).

A condominium parcel is that which is owned by a "unit owner". Sec. 711.03(14). "Condominium parcel" is defined as "a unit together with the undivided share in the common elements which is appurtenant to the unit." Sec. 711.03(8). As one of the draftsman of the Condominium Act has explained, a condominium "parcel" is not the same thing as a "unit". McCaughan, "The Florida Condominium Act Applied", 17 U.Fla.L.Rev. 1, 5-6, 8-9 (1964).

Sec. 711.04(1) states that a "condominium parcel" is a separate parcel of real property subject to ownership by a unit owner. As discussed above, Sec. 711.04(2) sets forth what the appurtenances to the unit are.

From the foregoing, it is clear that the appurtenances to a condominium unit may only be those as set forth in the Declara-

tion. Anything else, whatever it may be, is not an "appurtenance" to a condominium unit.

The definitions of "condominium parcel" and "condominium property" contained in the subject Declaration in Article I are in accord with the provisions of the Condominium Act. Also, Article V (B) of the Declaration is in accord with the provisions of Sec. 711.04(2), Fla. Stat. (1973).

2. THE RELATIONSHIP OF THE PARKING LOT TO THE CONDOMINIUM.

As for the adjacent lot which the Association has purchased, whatever it is, it is certainly not part of the "common elements". It is also certainly not part of the "condominium property". This is because it is not set forth or described in the Declaration, and was not submitted to the condominium form of ownership by the declarant/developer.

It is also not an "appurtenance" to any of the condominium units because it neither falls into any of the categories set forth in Sec. 711.04(2), supra, nor is this land provided for in the Declaration. Id.

For want of some label to give to this land, the Association proposes calling it "association property".

3. THE POWERS OF THE ASSOCIATION, AND LIMITATIONS ON THOSE POWERS.

As in most disputes between a condominium association and a unit owner, this case revolves around the respective powers and rights of the Association and its unit owners. Therefore, a careful review of the Condominium Act's provisions relevant to an association's power to purchase property is required.

The Association's power to purchase real property, pursuant to Article IX of the Declaration, Article Sixteenth of the Articles of Incorporation, Article II Section 5 of its By-Laws, and Sec. 617.021(9), Florida Statutes, has been described in the Statement of the Facts. The incorporation by reference of the Articles and By-Laws into the Declaration has also been described.

The Condominium Act at the time of the recording of the subject Declaration, in Sec. 711.12, "The association", did not require that a condominium association be a corporation. Since Chapter 711 allowed for unincorporated associations, Sec. 711.12(2) provided that, if not incorporated, the association "shall have the power to execute contracts, deeds, mortgages, leases, and other instruments by its officers." Under the current Act, no provision for the power to execute contracts, etc. is made. Instead, Sec. 718.111(1) requires that the association be a corporation. Under Chapter 617, of course, a corporation not for profit has all of these powers, including the power to purchase properly. Sec. 617.021(9), Fla. Stat.

Sec. 711.12(4) provided:

> Unless limited by the declaration the powers and duties of the association shall include those set forth in this law. The powers and duties of the association shall include also those set forth in the declaration and by-laws.

Currently, Sec. 718.111(4) also grants an association those powers and duties set forth in Sec. 718.111, and "those set

forth in the declaration and bylaws, if not inconsistent with this chapter."

The foregoing review of the relevant provisions of the Condominium Act shows clearly that a condominium association has those powers granted it by its Articles of Incorporation and By-Laws, so long as they are not inconsistent with Chapter 711 or Chapter 718.

Nothing in the Condominium Act requires consent of all unit owners to such an acquisition of real property.

To the contrary, Sec. 718.111(12), Florida Statutes (Supp. 1978) (in effect at the time of the purchase) specifically granted an association the power to purchase land upon the approval of the number of members required to amend the Declaration of Condominium. In the instant case, that percentage is 75%. (Declaration, Article VII). Such approval was obtained, by an affirmative vote of 81% of the unit owners. (This provision of Sec. 718.111(12), Fla. Stat. (Supp. 1978) should not be construed to mean that the Declaration of Condominium must be amended in order for the Association to purchase property. Such an amendment would be necessary only if the power to purchase was not already granted).

Should this Court find that Sec. 718.111(12) is not applicable to the instant acquisition, then it must find there are no limitations on the purchase in the Condominium Act. This Court cannot invoke a limitation which has not been placed in the Act by the Legislature. Chaffee v. Miami Transfer Co., Inc., 288 So.2d 209 (Fla. 1974).

Therefore, in answer to the first part of the certified question, an association may purchase real property without approval of 100% of the unit owners.

It is also clear that no amendment to the Declaration of Condominium would be required for the association to purchase real property, so long as that power is already contained in its Declaration or By-Laws. An amendment would only be necessary if the power did not already exist. Waterford Point Condominium Apartments, Inc. v. Fass, 402 So.2d 1327 (Fla. 4th DCA 1981). It must be kept in mind that the instant acquisition of the parking lot did not involve the existing common elements of the condominium nor any ownership interest or use rights in the existing common elements. It accordingly did not involve an "appurtenance" to the Defendants' units. Secs. 711.04(2), 718.106(2), Fla. Stat. Therefore, no amendment of the Declaration of Condominium was required for the Association to purchase the property, as the Association's Articles of Incorporation or By-Laws already granted it that power.

The only arguable limitation on the Association's power to purchase the parking lot is one contained in Article VII, Section 3.D of its By-Laws: any additions or capital improvements to the condominium property at a cost in excess of $20,000.00 must be approved by a vote of three-fourths of the unit owners present and constituting a quorum at a special meeting called for that purpose. This condition was met, by the affirmative vote of 81% of the unit owners.

In this regard, the instant case is distinguishable from Pepe v. Whispering Sands Condominium Association, Inc., 351 So.2d 755 (Fla. 2d DCA 1977), relied on by the Unit Owners below. In Pepe, an association which operated multiple condominiums attempted, by mere resolution, to merge the budgets of the separate condominiums, contrary to the express provision of the declaration of condominium providing for separate budgets. The court held that the association could not change its budgetary practices without amendment to the declaration, as what it was attempting to do was contrary to the declaration. See Sec. 718.110(4).

In the instant case, however, the Declaration and By-Laws contemplated the action taken, and it was taken in conformance with the Declaration and By-Laws.

The limitation found by the District Court, Section 718.110(4), is not a limitation on the Association's power to purchase. Section 718.110(4) provides:

> Unless otherwise provided in the declaration as originally recorded, no amendment may...materially alter or modify the appurtenances to the unit...unless the record owner of the unit and all record owners of liens on it join in the execution of the amendment and unless all the record owners of all other units approve the amendment. (Emphasis supplied).

This sub-section is not a limitation on the power to purchase because:

1. It deals, on its face, only with amendments to the declaration. No amendment has been made to the TowerHouse

Declaration, and none was necessary for the Association to purchase the parking lot, as discussed, supra.

2. It deals only with amendments which materially alter or modify the existing appurtenances to the unit. The "appurtenances" to the unit, as discussed above, are only those items set forth in Sec. 711.04(2), Fla. Stat. (1973) and Sec. 718.106(2), Fla. Stat. (1977). They do not include property not described in the Declaration of Condominium, such as the subject parking area.

3. This sub-section contains a proviso: "unless otherwise provided in the declaration". Therefore, even if this Court finds the parking lot acquisition to "materially alter or modify the appurtenances to the unit", the Declaration of Condominium of TowerHouse provides for additions or capital improvements to the condomnium property at a cost in excess of $20,000.00 upon approval of 75% of the unit owners.

4. Further support for the Association's position that the purchase of additional property by a condominium association to serve its unit owners is not within the scope of Sec. 718.110 (4), is found in the existence of Sec. 718.114. This is the statute authorizing a condominium association to acquire lands for recreational purposes. This statute, which enables an association to enter into a recreation lease in the first place, was treated by the Fourth District in Waterford Point Condominium Apartments, Inc., supra, as governing the buyout of a recreation lease, as well, insofar as the power to purchase would have to be set forth in the Declaration as well. This is because, al-

though not reflected in the decision, Waterford Point's buyout occurred prior to the enactment of Sec. 718.111 (12), Fla. Stat., specifically granting a condominium association the power to buy out a lease, and because the Waterford Point Declaration of Condominium did not contain "as amended from time to time" language.

While the Fourth District declined to express its opinion about the instant case (which was still on rehearing at that time), it declined to follow the Third District's opinion in this case, and held that the Declaration of Condominium for Waterford Point Condominium did not need to be amended, as the power to purchase the lease was already set forth therein. Similarly, in the instant case, the Association's power to purchase the subject parking lot, upon approval by 75% of its unit owners was set forth in its By-Laws, as incorporated by reference into its Declaration of Condominium.

The Association's position is that the parking area it purchased is neither part of the common elements nor part of the condominium property. Accordingly, not even the limitations contained in Article XI(F) of its Declaration or Article VII(3)(D) of its By-Laws (requiring threefourths approval for additions or capital improvements to the condominium property at a cost in excess of $20,000.00) should apply as a limitation on its power to purchase the property. The Association recognizes, however, that this is the only limitation contained in the condominium documents which can even arguably be applicable to the exercise of the Association's general power to purchase property. Therefore, if this Court does desire to place some limi-

tation on the authority of the Board of Directors to undertake such a transaction on behalf of the Association, it may properly hold that this provision would be applicable in the instant case.

Finally, while the Association submits the District Court erred in determining that the acquisition of the parking lot constituted a material alteration or modification of the condominium property and the unit owners' interest in the appurtenances to their units, Section 718.110(4), Florida Statutes, and Article VII of the Declaration (dealing with amendments) are still not applicable, as no amendment to the Declaration of Condominium is involved. Instead, it would be Section 718.113 (2), Florida Statutes, which would govern.

Section 718.113(2), formerly Sec. 711.13(2), prohibits material alterations or substantial additions to the common elements except as provided in the Declaration. The By-Laws, of course, are an exhibit to the Declaration and incorporated by reference, as required by the Condominium Act. Secs. 711.08 (1)(j), 711.11(1), Fla. Stat.; see Waterford Point Condominium Apartments, Inc., supra; Cole v. Angora Enterprises, Inc., ___ So.2d ____ (Fla. 4th DCA Case Nos. 79-2269 and 80-939, opinion filed July 15, 1981, rehearing denied, October 8, 1981) (1981 FLW DCO 1662).

Therefore, this "substantial addition" was accomplished "in the manner provided for in the declaration", i.e., Article VII(3)(D) of the By-Laws. This finding is supported by Russell McCaughan, in his discussion of the equivalent provision in

Chapter 711, Sec. 711.13(2). Mr. McCaughan wrote that this restriction will prevent substantial additions to the common elements by purchase or lease unless authorized by the Declaration. Thus, if the declaration provides for it, it may be done in the manner provided for therein. If the declaration does not provide for it, then it must be amended to provide for such a purchase. McCaughan, "The Florida Condominium Act Applied", 17 U.Fla.Rev. 1, 47-48 (1964).

Respondents may well argue that, notwithstanding any of the foregoing, neither the Declaration nor the By-Laws specifically say that the Association has the power to purchase land for additional parking. Such an argument defies reason. See Waterford Point Condominium Apartments, Inc., supra.

The instant Declaration and its exhibits are, for these purposes, a contract. They define a unit owner's rights, obligations, and liabilities. See White Egret Condominium, Inc. v. Franklin, 379 So.2d 346 (Fla. 1979); Pepe v. Whispering Sands Condominium Association, Inc., 351 So.2d 755 (Fla. 2d DCA 1977). Every provision in a contract should be given meaning and effect, and apparent inconsistencies should be harmonized if possible. A reasonable interpretation is preferred to an unreasonable one. Excelsior Insurance Co. v. Pomona Park Bar & Package Store, 369 So.2d 938 (Fla. 1979).

Article VII(3)(D) of the By-Laws contains a requirement of unit owner approval for additions to the condominium property by the Board of Directors in excess of $20,000.00. The only sensible construction of this provision is that if the addition or

capital improvement will cost less than $20,000.00, no unit owner approval is required at all.

4. MUST "ASSOCIATION PROPERTY" BE MADE PART OF THE COMMON ELEMENTS.

The final part of the certified question asks whether an association may purchase real property and hold title in its own name without making it part of the common elements. The answer is "yes".

Nothing in the Condominium Act requires an association to divest itself of title to association property by adding the property to the common elements. Section 718.110(6) discusses how this is accomplished, by amending the declaration of condominium, but this provision is permissive, and not mandatory. Sec. 718.110(6) provides:

> The common elements designated by the declaration may be enlarged by an amendment to the declaration. The amendment must describe the interest in the property and must submit the property to the terms of the declaration. The amendment must be approved and executed as provided in this section. The amendment divests the association of title to the land invests title in the unit owners as part of the common elements, without naming them and without further conveyance, in the same proportion as the undivided shares in the common elements that are appurtenant to the unit owned by them. (Emphasis supplied).

Section 718.110(6) is noteworthy in that it recognizes that an association may hold title to real property which is neither common elements nor part of the "condominium property". As originally enacted in 1974, Ch. 74-104 § 3, Laws of Florida,

this provision was part of Sec. 711.06, "Common Elements". Even in this original form, as Sec. 711.06(3), it envisioned an association holding title to the property.

Further, Florida case law contains numerous examples of association property which is not made part of the common elements of the condominium which the property serves.

In Waterford Point Condominium Apartments, Inc. v. Fass, supra, there is no indication that the recreation area purchased by the association was made part of the common elements of the condominium.

In Gundlach v. Marine Towers Condominium, Inc., 338 So.2d 1099 (Fla. 4th DCA 1976), land used in connection with the condominium, which included a parking lot, was not part of the common elements of the condominium. Instead it was held (albeit under a lease) in the name of the condominium association.

In Goodner v. Daytona Beach Ocean Towers, Inc., 389 So.2d 230 (Fla. 5th DCA 1980), the court recognized that an association could hold an interest in property which is not part of the common elements of the condominium.

In Sauder v. Harbour Club Condominium No. Three, Inc., 346 So.2d 556 (Fla. 2d DCA 1977), the recreation area serving one condominium was part of the common elements of another, separate, condominium. While the court found the unit owners in the first condominium had a use right in the recreation area, neither they nor their association owned the property.

In Trafalgar Towers Association #2, Inc. v. Zimet, 314 So.2d 595 (Fla. 4th DCA 1975), the association purchased a unit

to be used as its resident manager's apartment. The association did not add this property to the common elements of the condominium; instead, it held title to the unit in its own name.

Legally, there cannot be a distinction between this land and the purchase of any property, real or personal, by a condominium association. Neither the Condominium Act nor the condominium documents, nor Section 617.021(9), Florida Statutes make any distinction between a corporation's power to purchase real or personal property. Accordingly, the subject parking lot cannot be viewed any differently from a purchase of a typewriter for use in the Association's office. Both are purchases of property within the power of the Association. Both are purchased in furtherance of the Association's powers and duties. Neither are affixed to the common elements so as to become part of the condominium property. It might be noted that, under the current Act, "condominium property" may encompass not only land and leaseholds, but also personal property which is "subjected to condominium ownership". Sec. 718.103(11). It is clear that while personal property may become part of the condominium property, there must be an affirmative act so submitting it to condominium ownership. Sec. 718.110(6). That action, however, is not mandatory. Otherwise, the property remains "association property".

Therefore, nothing in the Condominium Act requires an association to divest itself of title to property it holds in its own name, and make that property part of the common elements.

Therefore, the certified question must be answered in the affirmative: a condominium association may purchase property

upon approval of less than all of its unit owners, and hold title in its own name, rather than adding that property to the common elements.

POINT II

WHETHER THE COURT BELOW ERRED IN DETERMINING THAT THE PURCHASE OF THE ADDITIONAL PARKING AREA MATERIALLY MODIFIES THE APPURTENANCES TO A UNIT, THEREBY REQUIRING AN AMENDMENT TO THE DECLARATION OF CONDOMINIUM WHICH MUST BE APPROVED BY ALL UNIT OWNERS.

In Point I, Petitioner Association has addressed the certified question. An answer in the affirmative disposes of this appeal, and also dictates quashing the District Court's Opinion in its entirety, as the opinion is based on erroneous construction of the Condominium Act and the subject condominium documents, and is in conflict with several decisions of other district courts.

The District Court held that the acquisition of the parking lot "materially modifies" the Respondents' interest in the common elements, and, therefore, changes their condominium parcels. It held such a change requires 100% approval under Sec. 718.110(4) and Article VII of the Declaration (containing a similar provision as Sec. 718.110[4]).

This holding is erroneous for several reasons:

The District Court, in determining that the acquisition of the parking lot constitutes a "material alteration or modification of the common area, and, of the unit owner's interest in the appurtenances to the condominium unit", misperceived the legal status of the purchased parking area.

The term "common area", of course, has no meaning in Florida condominium law. Assuming that the Distrit Court meant

"common elements" or "condominium property", it has still overlooked the fact that the condominium property, the definition of which is strictly defined by both the Act and the Declaration of Condominium, does not include this parking lot.

In its use of a dictionary definition of "appurtenance", the District Court overlooked the Condominium Act's express provision, in Sec. 711.04(2) and Sec. 718.106(2) of what is an "appurtenance" to a condominium unit. The subject parking lot is not an appurtenance to the Respondents' units.

Its treatment of the parking lot, which is not part of the common elements, as part of the common elements anyway, is also in conflict with a long line of decisions which make clear that property serving, affecting, or benefitting unit owners of a condominium need not be part of the common elements. Ackerman v. Spring Lake of Broward, Inc., 260 So.2d 264 (Fla. 4th DCA 1972) (developer could have retained title to recreation area and leased it to unit owners); Gundlach v. Marine Tower Condominium, Inc., 338 So.2d 1099 (Fla. 4th DCA 1976) (parking area leased, not common elements); Goodner v. Daytona Beach Ocean Towers, Inc., 389 So.2d 230 (Fla. 5th DCA 1980) (switchboard serving apartment units not common elements).

Even if, arguendo, the acquisition of the parking lot is considered to affect the existing common element parking area, that affect cannot be considered an "alteration or modification" of the existing common element parking area. While it is rare that a lower court's factual findings will be disturbed, there is no way that this purchase can be considered an "alteration"

or even a "modification". Instead, the acquisition of the parking area is an "addition". "Additions" to the common elements are governed by Sec. 718.113(2).

An "addition" is not the same thing as an alteration or modification, either in its dictionary meaning, or under the Condominium Act. Even in Sec. 718.110, dealing with amendments to the declaration, there are different subsections dealing with i) amendments which alter or modify, Sec. 718.110(4), and ii) amendments which create additions to the common elements, Sec. 718.110(6). The District Court adopted the Fourth District's definition of "material alteration or addition", Sterling Village Condominium, Inc. v. Breitenbach, 251 So.2d 685 (Fla. 4th DCA 1971), as the basis for its finding that this was a "material alteration or modification". Therein lies the rub: in Sterling Village, the court was construing Section 718.113 (2), Florida Statutes, to determine whether the installation of shutters by a unit owner on the common elements was a material alteration or addition accomplished other than in "a manner provided in the declaration", as required by Sec. 718.113(2). Here, of course, the acquisition of additional parking was accomplished in the manner provided for in the Declaration.

Since the Declaration (through incorporation of the By-Laws) already provided for "additions", no amendment was necessary.

The District Court also expressly disagreed with the Fourth District's suggestion in Juno By The Sea North Condominium Association, Inc. v. Manfredonia, 397 So.2d 297 (Fla. 4th DCA

1981) that the common elements themselves do not pass as appurtenances to the units. But the Fourth District is right, both technically and logically.

The whole thrust of the condominium form of ownership of property is one which limits a unit owner's traditional fee simple property rights, especially when dealing with that which is owned in common with the other unit owners. Although common elements are owned by the unit owners as tenants in common, no action for partition of the common elements may lie. Sec. 718.107(3). As the Act constantly states, it is a share of the common elements which passes with a unit. Sec. 718.106(2). The common elements themselves are subject to being altered or added to, as provided for in the declaration of condominium. Sec. 718.113(2); Juno By The Sea, supra.

The opinion of the District Court, if left to stand, will open the door to a tremendous amount of litigation over the issue of whether an act by a condominium association was "material". This is because the decision may easily be interpreted as holding that a condominium association cannot undertake any major or material transaction in property of any kind if but one unit owner dissents. In other words, any property transaction by the association is subject to one unit owner dissenting, with the resulting litigation focusing on whether or not the transaction was "a material alteration or modification" of the association's property. Carried to its logical conclusion, one dissenter can force the courts to determine if an association's

decision to junk its old office equipment and refurnish the office is "material" or not.

This is sure to have a chilling effect on every condominium association in the State of Florida. This Court can take judicial notice of the fact that it is extremely difficult, if not impossible, for a condominium association to get 100% of its unit owners to agree on anything. From the undersigned counsel's experience, in representing approximately 350 condominium associations in South Florida, it is virtually impossible to get 100% of the unit owners to affirmatively agree that the sun rose in the east this morning. There will always be one dissenter who will vote no, either for the sake of being different, or, because technically the sun rose in the east-southeast. In addition, many condominium units are owned by persons who do not live in the United States, requiring the association to put off taking action until it hears from the unit owner in Buenos Aires or Bonn.

Approval of 100% of the unit owners for action in a condominium is the exception rather than the rule under the Condominium Act. It is required only for those kinds of amendments to the declaration set forth in Sec. 718.110(4). Otherwise, we are to look to the Declaration of Condominium and Bylaws. As the Court noted in Pepe v. Whispering Sands Condominium Association, Inc., 351 So.2d 755 (Fla. 2nd DCA 1977) these condominium documents spell out the true extent of what has been purchased, and of a unit owner's interest in his unit. As this Court recognized in White Egret Condominium, Inc. v. Franklin, 379 So.2d

346 (Fla. 1979), a restriction in a declaration of condominium is "a mutual agreement entered into by all condominium apartment owners of the complex." A unit owner decides, at the time of purchase, whether he wants to purchase the unit subject to what the documents provide. In the instant case, the Respondent Unit Owners purchased their unit subject to the condominium documents Plaintiff's Exhibits 4 and 7) empowering the Board of Directors to undertake an addition or capital improvement at a cost in excess of $20,000.00 upon getting approval of three-fourths of the unit owners.

As the Court noted in Sterling Village Condominium, Inc. v. Breitenbach, 251 So.2d 685 (Fla. 4th DCA 1971), the Condominium Act and condominium documents ought to be construed strictly to assure purchasers of condominium units "that what the buyer sees the buyer gets." In the instant case, the Respondent Unit Owners bought subject to Article VII (3)(D) of the By-Laws. That provision was treated by the Association as governing the purchase of the parking lot. The Association complied with it. The opinion of the District Court allows the Respondent, and every other dissenter who lives in a Florida condominium, to stymie decisions made by the overwhelming majority of their neighbors to improve their surroundings and the quality of their life through an addition or capital improvement to the condominium property. This is not what was intended by the Condominium Act, or by the documents which created the condominium.

The opinion of the District Court should be quashed.

POINT III

WHETHER A CONDOMINIUM ASSOCIATION MAY ASSESS ITS UNIT OWNERS THEIR PRO RATA SHARE OF THE COST OF ACQUISITION OF PROPERTY BY THE ASSOCIATION.

A condominium association's power to assess its unit owners is derived both from the Condominium Act and its declaration of condominium and by-laws.

A unit owner's liability for assessments is defined in Sec. 718.116(1), Fla. Stat., and its predecessor, Sec. 711.15(1), as follows:

> A unit owner, regardless of how title is acquired,...shall be liable for all assessments coming due while he is the owner of the unit.

What is an assessment? Both Sec. 718.103(1) and its predecessor, Sec. 711.03(1), define an assessment as "a share of the funds required for the payment of common expenses which from time to time is assessed against the unit owner".

Sec. 718.115(1), Fla. Stat., describes what is included within the "common expenses" for which a unit owner is liable for the payment of:

> Common expenses shall include the expenses of the operation, maintenance, repair, or replacement of the common elements, <u>costs of carrying out the powers and duties of the association</u> and any other expense designated as common expense by this chapter, the declaration, the documents creating the condominium, or the bylaws. (Emphasis supplied).

Therefore, it is clear that a "common expense" for which a unit owner will be liable for the payment of is any expense properly incurred by the association in carrying out its powers and duties.

Therefore, since the Association had the power to purchase this property in the manner it did, the Respondent Unit Owners are liable for their pro rata share of this assessment, regardless of whether or not they voted in favor of the purchase. Waterford Point Condominium Apartments, Inc., supra.

CONCLUSION

Based on the foregoing, the Association had the power to purchase the parking lot in the manner it did. The Respondent Unit Owners' approval was not required. Such a requirement is nowhere contained in the Condominium Act, nor in the subject Declaration of Condominium.

Therefore, the Opinion of the District Court should be quashed, and the Final Judgment of the trial court reversed, and remanded with directions to enter judgment for the Association, as prayed for in its Complaints.

Respectfully submitted,

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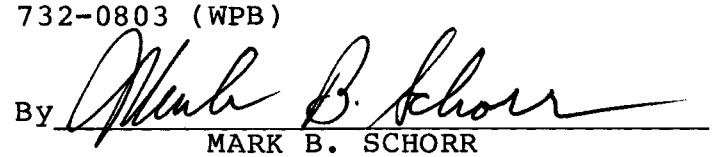
By 
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CERTIFICATE OF MAILING

I HEREBY CERTIFY that a true copy of the foregoing Petitioner's Brief on the Merits was furnished by mail this 3rd day of November, 1981, to: ROBERT GOLDEN, ESQ., Attorney for Respondents, Suite 1205, 14 Northeast First Avenue, Miami, FL 33132.

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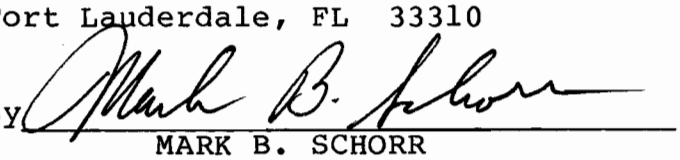
By 
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