D/a 5-10-85

IN THE SUPREME COURT OF FLORIDA

DIVISION OF FLORIDA LAND SALES AND CONDOMINIUMS, DEPARTMENT OF BUSINESS REGULATION; and THE TOWERS OF QUAYSIDE HOMEOWNERS' ASSOCIATIONS, INC. 65,834

Appellants,

vs. CASE NO. 65,814

HERMAN E. SIEGEL, on behalf of himself and other unit owners of THE TOWERS OF QUAYSIDE NO. 2 CONDOMINIUM,

Appellee.

AMICUS CURIAE BRIEF OF FLORIDA HOME BUILDERS ASSOCIATION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

SUMMARY

Amicus FLORIDA HOME BUILDERS ASSOCIATION takes the position that the District Court of Appeal failed to recognize one of the critical reasons for the existence of the Quayside Homeowner's Association; to facilitate the overall development of a planned community by the developer.

This brief calls attention to certain positions in the HOA documents which bears out that its purpose was to aid the construction and final completion of the project, and compares the HOA's limited powers to the more pervasive provisions in the Condominium Act.

Finally, this brief attempts to point out that if two condominium associations are permitted to exist simultaneously for the governance of one condominium, such broad authority would ultimately be chaotic to the condominium scheme.

STATEMENT OF THE CASE AND FACTS

Amicus, FLORIDA HOME BUILDERS ASSOCIATION hereby adopts the statement of the case and facts of Appellant, DIVISION OF FLORIDA LAND SALES, CONDOMINIUMS AND MOBILE HOMES.

As used herein the FLORIDA HOME BUILDERS ASSOCIATION will be referred to as "FHBA".

POINT I

THE DISTRICT COURT OF APPEAL WAS INCORRECT IN HOLDING THAT THE HOMEOWNERS'S ASSOCIATION IS A CONDOMINIUM ASSOCIATION WITHIN THE MEANING OF SECTION 718.103(2), FLORIDA STATUTES, SUBJECT TO ULTIMATE CONTROL BY UNIT OWNERS IN ACCORDANCE WITH SECTION 718.301, FLORIDA STATUTES

In reaching its final conclusion, the District Court asked and then affirmatively answered three questions:

"(1) Does the Homeowners' Association operate condominium property generally;

(2) Are the common properties in fact condominium property; and

(3) Does the Homeowners' Association exist solely for the purpose of serving condominium owners." Siegel v. Division of Florida Land Sales and Condominiums, et al., 453 So.2d 414, at 416 (Fla. 3rd DCA 1984).

Appellants, DIVISION OF FLORIDA LAND SALES, CONDOMINIUMS AND MOBILE HOMES and THE TOWERS OF QUAYSIDE HOMEOWNERS' ASSOCIATION, INC., have, FHBA believes, adequately and correctly addressed the first two issues. It is the third issue regarding the purpose for creation of home owner associations, which FHBA believes will have great effect on the housing industry in Florida.

The reason for creation and use of Home Owner Associations (HOA's), by community developers in Florida is something which the District Court failed to consider. HOA's are widely used by community developers, particularly with phased projects or those with build-outs over extended periods of time. The use of such an association is absolutely necessary to facilitate the orderly

completetion of a planned community, as opposed to one or more individual condominiums ,and that goal is born out by the HOA documents. Article IVX, Section 4, entitled Interpretation specifically states that:

> "The provisions of this declaration shall be liberally construed to effectuate its purpose of creating a uniformed plan for the development of a residential community and for the maintenance of community recreational facilities in common properties." (Emphasis supplied)

Here, as is commonly done in the industry, the developer was attempting to insure overall consistency in a planned community, something which six condominium associations functioning independently could not do, and to insure his ability to plan, construct and sell all of his product. A review of the Declaration of Covenants and Restrictions of the HOA as opposed to the requirements of Chapter 718 and the Condominium Declaration will show that many of the authorities and duties of the HOA documents are geared to the overall appearance and development of the community, while the Condominium Documents are concerned with the maintenance of the individual Condominiums and those amenities peculiar to them.

As the District Court pointed out in its opinion, each condominium building has "'common elements' which are operated and maintained by the condominium association. These elements include parking lots, terraces, recreational amenities located on the plaza deck, a swimming pool, balconies and air-conditioning units.", Siegel at 415 These common elements are the

responsibility of the individual condominium associations, and are for the most part, relative to the use and enjoyment of individual owners. However, as the Court also points out . . . "the homeowners' association operates other common properties which include a health spa, marina, restaurant, and tennis courts. . . ." Siegel at 415. As can be seen from the type of "common properties" which the homeowner association operates, they are unique to the integrity and character of an overall community. It should also be noted that things such as health spas, marinas, restaurants and tennis courts are, to a developer, critical sales items in convincing would be purchasers to buy in a particular planned community. It is absolutely necessary that a developer have the ability to control and maintain such facilities in a paramount manner, rather than leaving such maintenance and overall direction to the whims and financial capabilities of six autonomous condominium associations who may fund the maintenance of any amenity at whatever level they choose.

Architectural control is one of the most important areas where a developer must retain tight control. In the case sub judice, four condominiums within the community were completed. Each condominium is separate from the others and is governed by a separate association and declaration. Were it not for the HOA architectural requirements, each condominium, upon turnover, could conceiveably vote to change the landscaping, exterior appearance of the condominium building, or make any other decision which may have a detrimental effect on the developer's

ability to develop or sell the remaining sites in the community.

If the District Court's decision is allowed to stand, HOA's communities containing Condominiums and having long term build-outs, may be forced to turn over control of the association to unit owners pursuant to the requirements of Section 718.301, Florida Statutes. The aspect of having unit owners take over and control the operation of the overall community prior to the developer having an opportunity to complete the project could spell chaos for the development of those communities in Florida.

In furtherance of FHBA's contention that the developer in this case sought to use an HOA to facilitate the overall development of the community, the Courts attention is called to certain of the terms of the Declaration of Covenants and Restrictions of the homeowners' association for guidance. In the District Court's Order, Article IX, Section 1, of the Declaration of Covenants is cited as a characteristic of Condominium Associations. That section states in pertinent part that:

> ". . . it shall be the duty of each condominium in the Towers of Quayside at its sole cost and expense subject to the provisions of this declaration regarding Architectural Committee approval, to maintain, repair, replace and restore areas subject to its exclusive control, in a neat sanitary and attractive condition. In the event that any condominium shall permit any improvement which is the responsibility of such condominium to maintain, to fall into disrepair or not to be maintained so as to create a dangerous, unsafe, unsightly or unattractive condition, or otherwise violate this

> declaration, the architectural committee or the association shall have the right, but not the duty, upon fifteen days (15) prior written notice to the condominium association, to correct such condition and to enter upon such condominium property to make such repairs or to perform such maintenance, and the cost thereof shall be charged to the condominium." (Emphasis supplied)

The District Court of Appeal likened such authority under the HOA documents to that authority normally granted condominium associations under Section 718.111(5), Florida Statutes. However, close inspection of the statute and the provisions in the HOA Declaration of Covenants shows a great deal of difference. As emphasized above, this provision specifically recognizes that it is the obligation of each condominium to maintain certain areas subject to its exclusive control, in a neat, sanitary and attractive condition. The words "neat, sanitary and attractive" relates to appearance, which a developer would normally be concerned with in an ongoing sales operation.

It should further be noted, that prior to the architectural committee or the HOA taking action to cure any "dangerous, unsafe, unsightly or unattractive condition", it must give the condominium "fifteen days (15) prior notice . . . to correct such condition . . . ." prior to entering upon the condominium property to make such repairs or perform such maintenance itself. Giving fifteen days (15) prior written notice is far different from the authority of a true condminium association under Section 718.111(5), Florida Statutes, which states that:

> "The association has the irrevocable right to access to each unit during reasonable hours, when necessary for the maintenance, repair, or replacement of any common elements or for making emergency repairs necessary to prevent damage to the common elements or to another unit or units."

The authority and responsibility of these two separate associations is very different; one is truly for the maintenance and protection of the condominium common elements, on short notice. The other represents the authority to maintain an attractive and safe product, after substantial notice and opportunity to correct the situation has been given to the condominium association. In short, the HOA is not given complete or even primary responsibility for the maintenance of condominium common elements; rather, its given highly circumscribed authority to deal with those things which would detrimentally affect an ongoing construction and sales program.

As further evidence of the developer's interest in the overall development and sale of the community, attention is called to the following provisions in the HOA Covenants and Restrictions:

> "Article II, Section 1 Every owner shall have a right and easement of ingress and egress and of enjoyment in, to and over the common properties . . . subject to the following conditions:
>
> (g) The right of the declarant (and its sales agent, customers and representatives) to the non-exclusive use of the common properties and the facilities thereof, without charge, for

> sales, display, access, ingress, egress and exhibit purposes. The declarant specifically reserves the right to place and maintain, without charge, sales offices in the areas designated as common properties."

Given the needs of an ongoing project, the Developer sought to provide an integrated infrastructure plan, something which no single condominium association could do. The following paragraphs are indicative:

> "Article V The Association, acting through the Board of Directors shall also have the power and duty to:
>
> (b) Maintain all private streets within the common properties, including cleaning and periodic resurfacing.
>
> (c) Obtain, for the benefit of the common properties, all commonly needed water, sanitary seawerage and electric services, and may provide for all refuse collection and cable or master television service (if any), as necessary.
>
> (d) Grant easement, right-of-way, or strips of land, where necessary for utilities and sewer facilities over the common properties to serve the common properties and other portions of the TOWERS OF QUAYSIDE.
>
> (g) Install and maintain security devises, detectors and communication facilities, and employ or contract for employment of security services, guards and watchmen for the Common Properties and the Condominium Properties in the TOWERS OF QUAYSIDE."

As to paragraph (g) above, the District Court seems to indicate that the authority to provide security devices and services for condominium properties is indicative of a condominium association. FHBA would suggest that this community

is an ongoing construction project and as such, it would be absolutely necessary for the developer, whether individually or through the vehicle of an HOA to provide security to the construction site of a community of luxury condominiums. The fact that the HOA is given the ability to protect existing condominiums is an indication that the developer may also want to protect his unsold, vacant inventory of condominiums.

POINT II

THE DISTRICT COURT WAS INCORRECT IN HOLDING THAT TWO CONDOMINIUM ASSOCIATIONS COULD SIMULTANEOUSLY GOVERN A SINGLE CONDOMINIUM.

Although it is not specifically stated in Chapter 718, it has been uniformly assumed throughout this industry that only one condominium association can exist to govern a condominium pursuant to Chapter 718, Florida Statutes. In the case at bar, many of the functions of the HOA are independent of the Condominium Association, such as the maintenance and operation of the marina or restaurant. Those functions are derived exclusively from the HOA declaration, independent and beyond anything contained in the Condominium Declaration; they are the property of the HOA, as opposed to common elements of the condominium. Although the two are very different, a reading of the District Court's Opinion leaves one with the conviction that the District Court confused and treated interchangably the <u>common properties</u> of the HOA with the <u>common elements</u> of the condominium association. Although similar in wording the two are very different in legal effect.

If the HOA is determined to be a condominium association pursuant to Chapter 718, Florida Statutes, and common elements and common properties are the same, the requirements on the HOA would be onerous and the conflict between the two associations would be chaotic. Some of those potential problems are as follows:

- - - Both the individual and the HOA would be required to maintain the common elements of each as 718.113, Florida Statutes requires;

- - - The HOA may be required to create a budget for its own property as well as the individual condominium units pursuant to 718.112(2)(k), Florida Statutes;

- - - The developer of the HOA may be held responsible for warranties pursuant to Section 718.203, Florida Statutes;

- - - A developer would have to file HOA documents with the Division of Florida Land Sales, Condominiums and Mobile Homes pursuant to the filing requirements of Section 718.502 and 503, Florida Statutes.

- - - The two separate associations could potentially hire and fire employees simultaneously, and enter into separate contracts for the same services.

Clearly, the imposition of the foregoing duties upon the Homeowners Association was neither contemplated by the developer nor bargained for by either party as part of the sale and purchase of units in the QUAYSIDE community. The action of the Court below, in essence, provides an arrangement far different from that contracted for and relied upon by the parties.

There is an existing statutory framework for the interfacing of condominiums in certain extended development schemes, and that is the Phase Condominium provisions of Section 718.403, Florida Statutes. It recognizes and provides for the interplay of such construction and is but one option a developer has in fashioning what he believes will be a functionally viable community; the HOA is another, and the District Court should not attempt to create one giant phase condominium where there exists no more than several separate ones under an umbrella association with limited purposes and tasks.

Both Appellants and Appellees will debate the issue of whether of not the powers of the HOA sub judice enables it to escape the provisions of Chapter 718 as set forth in Raines v. Palm Beach Leisure Community Association, 413 So.2d 32 (Fla. 1982). However, for the case at bar, perhaps the most important point of the Raines holding is in the last paragraph of the Opinion:

> . . . the legislature might decide to include this type of association within the scope of Chapter 718 in the future, but we conclude that the Respondent Association presently does not come within the ambit of the condominium statute." (Emphasis supplied) P.32

The imposition of such regulation on a potentially broad field of existing and planned community associations would vastly increase the jurisdiction of the Division of Florida Land Sales, Condominiums and Mobile Homes, and should be left to the Florida Legislature for the design of a statutory framework, if needed,

as opposed to what will undoubtedly be a case by case factual test by the Courts.

CONCLUSION

The District Court failed to perceive the true reasons for the creation of the QUAYSIDE HOA, as well as the difference between its limited duties, and that of the Condominium Associations. Without a strong showing that the Condominium Association is merely a conduit for the HOA, the Court should not have held both to be subject to Chapter 718, Florida's Condominium Act.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished by U.S. Mail to the following this 4th day of February, 1985: MARK B. SCHORR, ESQ., attorney for Herman E. Siegel, 6520 North Andrews Avenue, P.O. Box 9057, Ft. Lauderdale, Florida 33310-9057; TOM BELL, ESQ., Department of Business Regulation, 725 South Bronough Street, Tallahassee, Florida 32301; RICHARD L. ALLEN, ESQ., Rubin Baum Levin Constant Friedman & Bilzin, 1201 Brickell Avenue, Miami, Florida 33131; and STEVEN M. SIEGFRIED, ESQ., Dady, Siegfried & Kipnis, P.A., 9300 South Dadeland Boulevard, Suite 702-Dadeland Towers, Miami, Florida 33156-2789.

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