O/A 5-10-85

IN THE SUPREME COURT OF FLORIDA

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DEPARTMENT OF BUSINESS REGULATION, DIVISION OF FLORIDA LAND SALES, CONDOMINIUMS AND MOBILE HOMES, Petitioner, v. HERMAN E. SIEGEL, Respondent.	CASE NO. 65,814 DISTRICT COURT OF APPEAL, THIRD DISTRICT, NO. 83-2113
TOWERS OF QUAYSIDE HOMEOWNERS' ASSOCIATION, INC., Petitioner, v. HERMAN E. SIEGEL, Respondent.	CASE NO. 65,834 DISTRICT COURT OF APPEAL THIRD DISTRICT, NO. 83-2113

PETITIONER'S INITIAL BRIEF

DEPARTMENT OF BUSINESS REGULATION
Thomas A. Bell, Staff Attorney
Karl M. Scheuerman, Staff Attorney
725 South Bronough Street
Tallahassee, Florida 32301
(904) 487-1137

TABLE OF CONTENTS

TABLE OF CITATIONS

STATEMENT OF THE CASE

Herman Siegel, the owner of a condominium unit in the Towers of Quayside No. 2 Condominium, in Dade County, Florida, petitioned the Division of Florida Land Sales and Condominiums, in April, 1983, for the issuance of a declaratory statement. The petition requested the Division to find the Towers of Quayside Homeowners' Association (hereinafter "Homeowners' Association") governed by Chapter 718, Florida Statutes, the Condominium Act. If the Homeowners' Association is so governed, then the provisions of the Condominium Act governing condominium associations would apply to it, including section 718.301. This would enable the unit owners to elect no less than one-third of the Homeowners' Association Board. Obtaining this election right was the purpose upon which Mr. Siegel's petition was premised.

The Homeowners' Association intervened in the declaratory statement proceedings and opposed the request of Siegel. The Homeowners' Association argued that it was nothing more than a homeowners' association and not a statutory condominium association.

The Division issued a declaratory statement on August 28, 1983. (R. -14). Contrary to Mr. Siegel's request, the Division declared that the Homeowners' Association was not a condominium association within the meaning of the Condominium Act. The declaratory statement was appealed to the Third District Court of Appeal by Mr. Siegel, where both the Division and the Homeowners' Association appeared as co-appellees. The Third District held

that the Homeowners' Association is a condominium association and consequently reversed the Division's declaratory statement. Siegel v. Division of Florida Land Sales and Condominiums, et al., 453 So.2d 414 (Fla. 3DCA 1984). It further granted Mr. Siegel's motion for attorney's fees against the intervenor Homeowners' Association. Motions for Rehearing were denied on July 30, 1984.

On August 27, 1984, the Division filed its notice to invoke this court's discretionary jurisdiction. The Homeowners' Association filed a similar notice on August 28, 1984. See Supreme Court Case No. 65,834. Jurisdictional briefs were filed and the Division's Motion to Consolidate the two appeals was granted on September 25, 1984. Motion to File Briefs as Amicus Curiae were filed by Builders Association of South Florida, Gardens of Kendall Property Owners Association, Inc. and Florida Home Builders Association. Those motions were granted on February 12, 1985.

STATEMENT OF THE FACTS

Towers of Quayside is a community which, when all proposed units are constructed, will consist of 984 units. At the time of issuance of the declaratory statement, there were completed four condominiums within the community including Towers of Quayside No. 2 Condominium in which Mr. Siegel resided. Each of the four condominiums are separate from the others and each is governed by a separate condominium association pursuant to each separate declaration of condominium. (Id. at 416 f.n. 4). The community contains within it two undeveloped sites which are proposed to serve as condominium sites, but which have not yet been developed

as such. As to these undeveloped sites, Article I, Section 14 of the Declaration of Convenants provides a definition of "dwelling unit" which would permit the developer to develop these sites in a manner other than as condominiums.

In addition to the four developed and two undeveloped sites, the community also consists of certain properties denominated "common properties", which are governed by another document apart from the declarations of condominium. (Id. at 415). This document is a Declaration of Convenants and Restrictions. It confers upon the Homeowners' Association the power to operate the "common properties". The Homeowners' Association's membership, for the time being, consists exclusively of condominium unit owners. However, its membership will eventually include all "unit owners" whether condominium or other. The Homeowners' Association operates the common properties, consisting of a health spa, marina, restaurant, and tennis courts, among others. The "common properties" are separate and distinct from the common elements of each of the condominiums.

Each of the four condominiums is composed of exclusively owned units to which there is appurtenant an undivided share in the common elements. The common elements include such property as parking lots, terraces, recreational amenities located in the plaza deck, a swimming pool, balconies and air conditioning equipment. The common elements of each of the four condominiums are operated by the respective condominium association independent of the Homeowners' Association.

Mr. Siegel argued before the court that the Homeowners' Association was, in reality, a condominium association because

it was comprised solely of condominium unit owners. This test was referred to in the proceeding as the "constituency" test. The Division and the Homeowners' Association, drawing authority from the Condominium Act's definition of "condominium association", in section 718.103(2), Florida Statutes, argued that the Homeowners' Association was not a condominium association because it was not "the corporate entity responsible for the operation of a condominium". Section 718.103(2), Florida Statutes. This function, the Division argued, as to each of the four condominiums rested with the respective condominium associations. This test was referred to in the proceeding as the "function" test.

The court held that under either test, the constituency test or the function test, the Homeowners' Association is a "condominium association", and therefore governed by section 718.301, Florida Statutes, and the rights therein bestowed upon unit owners. In the course of the opinion the court found that the Homeowners' Association does, to a meaningful extent, operate condominium property. Siegel, supra, at 420.

SUMMARY OF ARGUMENT

The court below was incorrect in its finding that the common properties are in fact condominium property. It is only the use rights in the common property that condominium purchasers in Quayside receive. Further, the term "condominium property" has several meanings within the context of Chapter 718. Several sections use it interchangeably with the term "common elements". Other sections negate the inference that it includes mere use rights of property unassociated with actual ownership of the underlying land. At best it is only the limited use rights in the common properties that might qualify even under most expansive construction of the statutory definition of "condominium property."

The court below erred in its conclusion that the Homeowners' Association operated condominium property. It ignored the analysis used by the Fourth District Court of Appeal in Palm Beach Leisureville Community Association, Inc. v. Raines, 398 So.2d 471 (Fla. 4DCA 1981), approved 413 So.2d 30 (Fla. 1982). It further ignored this court's finding in its affirmance in Raines, supra, that functions similar to that performed by the Homeowners' Association here do not make such an association the corporate entity responsible for the operation of a condominium. It instead chose to elevate the few functions performed by the Homeowners' Association on condominium property to the status of "administration and management". By their very nature, administration and management connote control and direction. Those functions, by the terms of section 718.302(3), are reserved to the designated condominium association. There can be only one such association and it is that one designated in the original documents.

The lower court erred in its interpretation and application of the constituency test by applying the test to the then existing stage of development of the community. Such an approach is both illogical and confusing. It will result in day-to-day fluctuations of the status of a particular association, from condominium association to a mere homeowners' association. It will leave all parties in doubt as to their legal rights and responsibilities. A more consistent approach is one which examines the documents at their inception to determine if the association may ever include non-condominium owners. If this test is correctly applied, the Homeowners' Association would not meet it due to the fact that the documents permit non-condominium owners membership in the Homeowners' Association. The only true condominium association is that association designated in the declaration.

I.

WAS THE DISTRICT COURT OF APPEAL CORRECT IN ITS CONCLUSION THAT THE HOMEOWNERS' ASSOCIATION IS A CONDOMINIUM "ASSOCIATION" WITHIN THE MEANING OF SECTION 718.103(2).

In its analysis of the correctness of the Division's declaratory statement, the court below posed three questions for purposes of its examination. These were:

1. Does the Homeowners' Association operate condominium property;

2. Are the common properties in fact condominium property; and

3. Does the Homeowners' Association exist solely for the purpose of serving condominium unit owners.

Siegel v. Division of Florida Land Sales and Condominiums et al., 453 So.2d 414, (Fla. 3DCA 1984).

From that point forward, the court examines the various positions of the parties including discussions of the "constituency" test and "function" test. It concludes:

> Applying, appropriately, both the constituency test advanced by appellant, and the function test embraced by appellees, we conclude that the Homeowners' Association is a condominium "association" within the meaning of section 718.103(2) subject to ultimate control by unit owners in accordance with section 718.301.

Siegel, supra, at 420.

By its use of the term "appropriately" it must be assumed that the court felt that both tests should be applied in making a determination as to whether a given association is a "condominium association" as defined in section 718.103(2). The analysis to be followed in this brief will examine each of the two tests, address their appropriateness and address the correctness of the conclusions reached after application of the test. Of the three

questions posed, questions one and two have bearing on the function test and will be examined within that section of this brief. Question number 3 will be examined within the text of the argument on the constituency test.

The first two questions posed by the court below examine whether the Homeowners' Association operates condominium property and what properties actually make up common property. For purposes of organizational clarity, this analysis will review those first two questions in reverse order. First, the analysis will focus on whether the common properties are condominium property. Secondly, the focus will shift to address the question of whether the Homeowners' Association operates any condominium property.

A. WAS THE DISTRICT COURT OF APPEAL CORRECT IN ITS INTERPRETATION AND APPLICATION OF THE "FUNCTION" TEST?

1. IS THE COMMON PROPERTY "CONDOMINIUM PROPERTY"?

In its opinion, the court below formulates the function test as: ". . .whether the entity operates a condominium or has sufficient powers that constitute condominium operation." Siegel, supra, at 417. The decision acknowledges that this test was employed by this court to defeat condominium status in Palm Beach Leisureville Community Association, Inc. v. Raines, 398 So.2d 471 (Fla. 4DCA 1981), approved 413 So.2d 30 (Fla. 1982). However, the court below then distinguished Raines. The court did so based upon its belief that this court's affirmance pivoted on the fact that the association in Raines served both condominium units and non-condominium single family homes. However, notwithstanding its conclusion that Raines is distinguishable, the lower court nonetheless applied a function test. The court's opinion that the

function test was met in the instant case is based squarely upon its finding that the Homeowners' Association operates condominium property. Siegel, supra, at 420. It is respectfully submitted that the court below both misinterpreted this court's decision in Raines and, further, misapplied the function test in the instant case.

Chapter 718 contains the following definitions in section 718.103 upon which the lower court's opinion was based:

> (17) "Operation" or "operation of the condominium" includes the administration and management of the condominium property.
>
> (11) "Condominium property" means the lands, leaseholds and personal property that are subjected to condominium ownership, whether or not contiguous, and all improvements thereon and all easements and rights appurtenant thereto intended for use in connection with the condominium.

In applying the function test, the court below focused upon the language of the Declaration of Condominium and Declaration of Covenants. It found in the Declaration of Condominium a statement submitting to condominium ownership ". . .all other property, real, personal or mixed intended for use in connection therewith." It found in the covenants that "Every owner shall have a right and easement of ingress and egress and of common enjoyment in, to, and over the common properties which shall be appurtenant to and shall pass with title to every dwelling unit." Siegel, supra, at 419. The court then concluded that these sections submitted the common properties to the condominium form of ownership. Siegel, supra, at 420. It is submitted that such a conclusion is neither logical nor intended by the statutory scheme.

Rather than examining the statutory language as a whole,

the decision below isolates specific words and definitions, and then reaches its conclusion from that limited viewpoint. In finding that the common property constitutes condominium property, the effect of the decision is to choose form over substance. First, the court below has obviously concluded that all of the common property is condominium property. It reaches this conclusion despite the clear language of all documents that it is only "use rights" in that property which a condominium purchaser obtains. Using this theory, if the declaration had provided for an easement across the property of a neighboring shopping center, the shopping center would also be condominium property and the mall authorities would be a statutory condominium association under this test.

At best, only the use rights of the purchasers in and to the common property were declared to be a part of the condominium. However, even then the statute appears unclear as to whether these are "condominium property", as used in the definition of "operation of a condominium". The uncertainty arises due to the lack of precision used in the various sections of the statute. For example, it is one thing to say that the common property is "condominium property", and yet quite another to say it constitutes common elements. Yet, that is the very conclusion reached if one examines the definitions of "unit" and "common elements". Chapter 718 provides the following:

> 718.103(23) "Unit" means a part of the condominium property which is subject to exclusive ownership. . . .
>
> 718.103(6) "Common elements" means the portions of the condominium property which are not included in the units.

Using the above definitions, the common property, if it is

indeed part of the condominium property, then becomes part of the common elements and is owned by each unit owner. See, section 718.106 providing that there shall pass with each unit, as an appurtenance thereto, "[a]n undivided share in the common elements." But which owner owns what percentage? There is a different number of owners in each condominium. Are their shares determined by their percentage interest in their own condominium, or by their overall percentage share in the community as a whole? The problems are evident.

Simply put, the common properties are not "condominiumized". Raines, 398 So.2d 471, 473. Merely because certain use rights are provided unit owners via their declaration, the entire scheme of ownership rights in the property should not be altered. While a literal reading of the definition of "condominium property" may lend itself to that conclusion, numerous other sections of the statute seem to equate that term with a more restrictive meaning; one which speaks only to the land and buildings on which the condominium is located, viz., the common elements. See 718.112(2)(c), 718.112(2)(d)2, 718.112(2)(e), 718.1124, 718.118, 718.121 and particularly 718.202(5) and 718.504(11). The last listed section specifically negates any inference that condominium property includes property not owned but only used by the unit owners. The section requires that a developer state in the public offering statement:

> (11) The arrangements for management of the association and maintenance and operation of the condominium property and of other property that will serve the unit owners of the condominium. . .. [Emphasis added].

This distinction between the terms "condominium property" and the

phrase "other property that will serve the unit owners" leads credence to but one conclusion. That is, it is inappropriate to focus solely on the literal terms of the definition of "condominium property", as did the court below. Nothing of the common property, other than perhaps the use rights of the purchasers, can be said to be condominium property in its truest sense. The lower court was incorrect in its strict definitional approach to this second of its three questions posed. The common properties themselves are not condominium property.

2. DOES THE HOMEOWNERS' ASSOCIATION OPERATE CONDOMINIUM PROPERTY?

As the previous argument demonstrates, the only conceiveable type of "condominium property" contained within the common property is the purchasers' use rights therein. Assuming arguendo that the purchasers' use rights are in fact condominium property, the lower court's first question may be appropriately paraphrased as follows:

> Are the duties of the Homeowners' Association as to the units, common elements, and purchaser use rights of such a nature as to rise to the level of managing and administering condominium property?

In answering this question, the court below took an approach which drastically conflicts with the approach affirmed by this court in Raines, 413 So.2d 30. In assessing the functions performed by the Homeowners' Association in this case, the lower court chose to find "administration and management" where little, if any, existed. The lower court focused on whether the Homeowners' Association managed any condominium property in any way whatsoever.

This court seemed to take the opposite approach in its affirmance in Raines. Id. This court there approved the opinion

of the Fourth District Court of Appeal and rejected the argument that the Homeowners' Association there was "the corporate entity responsible for the operation of a condominium", Raines, 413 So.2d at 32, despite the fact that the Homeowners' Association there did indeed have some degree of control over condominium property. In Raines, the Homeowners' Association had primary responsibility for maintaining all of the exterior areas of the condominium units, the power to approve and disapprove all transfers of title to condominium units and appurtenant common elements, and the power to fix and collect maintenance assessments for such services as lawn maintenance and building and road repair. In fact the Fourth District specifically held that:

> Through the Association's articles of incorporation and a series of declarations of restrictions applicable to both the single family lot owners and the condominium unit owners the [Homeowners'] Association has extremely broad powers and duties.

Raines, 398 So.2d at 473.

Despite these "broad powers and duties", the court specifically found that the Homeowners' Association was "not responsible for the operation of any of the 21 condominiums." Id. at 474. [Emphasis added]. The court clarified this conclusion with an itemization of the numerous and substantial functions, powers and responsibilities which the statute requires the designated condominium associations to perform.

In contrast to the Homeowners' Association's powers, the Towers of Quayside No. 2 Condominium Association, Inc., has the statutory power and duty to operate and manage the condominium property of the Towers of Quayside No. 2 condominium. These

powers are listed in section 11 of the Declaration. (App. 12-13). A summary of them is listed in paragraph 5 of the Declaratory Statement. (R. 2-3). They include the following:

1. Power to lease, maintain repair and replace common elements. Section 718.111(4).
2. Duty to maintain separate accounting records according to good accounting practices. Section 718.111(12).
3. Duty to make accounting records open for inspection by Unit Owners. Section 118.111(12).
4. Power to enter into contracts for management and maintenance of Condominium Property. Section 718.111(13).
5. Power to acquire and enter into agreements regarding leaseholds for the benefit of Unit Owners. Section 718.111(18).
6. Fiduciary Duty to unit owners. Section 718.111(1).
7. Duty to furnish unit owners annual financial report. Section 718.111(13).
8. Duty to maintain all official records of the Association. Section 718.111(12).
9. Duty to maintain adequate insurance to protect association, association property and condominiums. Section 718.111(11).
10. Power to grant, modify or move easements on common elements. Section 718.111(10).
11. Power to purchase, hold, lease, mortgage and convey units. Section 718.111(9).
12. Power to purchase land and recreation leases. Section 718.111(8).
13. Power to acquire property for the use and benefit of the members. Section 718.111(7).
14. Power to lease, maintain and repair common elements. Section 718.111(4).
15. Power to institute, maintain, settle or appeal actions on behalf of the unit owners. Section 718.111(3).

Certainly, in reaching its decision, this court relied to some extent on the fact that the Homeowners' Association in Raines also included non-condomnium owners and that that association derived its powers from other than condominium documents and

Chapter 718. And while this appellant also believes the Homeowners' Association here fails the constituency test as well, this court's broad reading of section 718.103(2), which is both logical and completely reflective of the statutory scheme, compels the conclusion that the function test has not been satisfied. Two, three or four isolated acts or duties should not be sufficient to transform a piece of real property from one form of ownership to the condominium form of ownership. Administration and management are more than isolated acts. Rather, they are a continuing process. Indeed, Black's Law Dictionary 865 (5th ed. 1979) defines "manage" as "[t]o control and direct, to administer, to take charge of." It can hardly be said that by virtue of the few acts performed by the Homeowners' Association on the condominium property, the association directed, controlled or took charge of that property.

This argument finds further support in Chapter 718 itself. While perhaps never actually stating that there will be only one association managing a condominium, that conclusion readily emerges from a review of the language actually employed. The Act states:

> Section 718.111(1). The operation of the condominium shall be by the association. . ..
>
> Section 718.103(2) Association means the corporate entity responsible for the operation of a condominium.

Indeed, the Condominium Act even contains a section that would negate the possibility of two associations performing the duties with which the association designated in the documents is charged:

> (2) Any grant or reservation made by a declaration, lease or other documents, . . . that provides for operation, maintenance, or management of . . . property serving the unit owners of a condominium shall not be in conflict with the powers and duties of the association or the rights of the unit owners as provided in this chapter. This subsection is intended only as a clarification of existing law.

Section 718.302(2), Florida Statutes.

The above section explicitly enunciates the statutory scheme. Primary and sole responsibility for the performance of the statutory duties of a condominium association rest with the association designated as such in the documents. Were it otherwise, responsibility would continuously ebb and flow between different administering bodies, depending upon which was doing the more "administering" at a given time. For example, using the theory espoused by the court below, if the designated condominium association were to take over those duties previously performed by the Homeowners' Association, the Homeowners' Association then would cease to operate as a statutory condominium association. Such fluctuation provides far too unreliable a base upon which to operate a community and would tend to promote never ending litigation.

While perhaps not intending to do so, the opinion of the lower court has the effect of changing the statutory framework at a time when the Legislature has chosen not to do so. This court in Raines specifically held open to the Legislature the opportunity to include such types of associations within the statute.

> . . .we can find, however, no legislative intent to cover the instant management association. 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.

Raines, 413 So.2d at 32. That the Legislature is aware of the situation can be seen by Chapter 84-368, section 26, Laws of Florida. That chapter establishes a residential planned development study commission which is charged with, inter alia, the following duties:

> (2) The commission shall investigate the formation, administration operation, powers, rights, sales, obligations and regulation of offerings which involve the sale of any interest in real property comprised of units to which no interest in common property is appurtenant to the ownership interest in the units, residential planned developments and master associations.
>
> (3) The commission shall prepare a report of its investigation including recommendations, if any, for proposed legislation. The commission shall submit its report and any recommendations to the President of the Senate and Speaker of the House of Representatives by February 15, 1983.

Since the time of this court's opinion in Raines, the Legislature has met twice in general session and several times in special session.

The Legislature has chosen not to broaden the scope of Chapter 718. That scope and the statutory framework should only be changed by the Legislature. The current framework provides for the designated condominium association to have primary and sole responsibility for the process of administering and managing the condominium property. Other homeowners' associations do not come within the scope of that chapter by virtue of isolated and

limited powers or duties contained within a Convenant of Restrictions. To the extent that those powers or duties infringe on those of the designated association, rather than allowing such infringement to bootstrap the infringing association into the scope of the chapter, the infringement is prohibited. Review, sections 718.302(3) and 718.104(4)1.

B. WAS THE COURT CORRECT IN ITS APPLICATION OF THE CONSTITUENCY TEST, THAT IS, DOES THE HOMEOWNERS' ASSOCIATION EXIST SOLELY FOR THE PURPOSE OF SERVING CONDOMINIUM UNIT OWNERS?

In its opinion, the court below listed as the third question for examination the following:

> (3) Does the Homeowners' Association exist solely for the purpose of serving condominium unit owners?

Siegel, supra, at 416.

In essence this question presents the standard to be met in order for a Homeowners' Association to meet the "constituency" test. The test may be rephrased as follows: "If the constituency which will be served by the Homeowners' Association comprised solely of condominiun unit owners?" This appellant has continuously urged that such a test should not be independently utilized to determine if an association is a statutory condominium association. Rather, this appellant has urged that the failure to meet the test prevented statutory status but meeting the test did not alone assure that the association is a statutory association.

In this regard it appears the court below was correct in its implied holding that meeting the constituency test alone would not suffice. Unfortunately, however, it appears the lower

court misapprehended the method of application of the test. It in fact found that the test had been met. It found, incorrectly, that the Homeowners' Association existed solely for the purpose of serving condominium unit owners.

It should be recalled that the documents of the Quayside development specifically permitted the developer to construct units other than condominium units on the two undeveloped parcels. Siegel, supra, at 416 f.n. 4. Yet, in reaching its conclusion the lower court rejected the argument that since there is a potential for use of the common properties by other than condominium unit owners, the constituency test could not be met. Id. It did not, however, reject the argument because the potential did not exist. Rather the court rejected this argument with the following rationale:

> ". . .since we are dealing only with the present form of residential development which is limited to condominium units."

Id. [Emphasis added].

It is respectfully suggested that insofar as the test proposed by the court below is limited only to the then current stage of development of a community, it provides insufficient guidance for the ultimate decision as to the status of a given association. Instead it is further suggested that, if a constituency test is to be applied, it is the terms of the creative documents themselves that should control in determining if all members of the Homeowners' Association in question are to be condominium owners. If those documents in any manner allow for membership in the association by other than condominium owners, then the constituency test will not have been met.

The instant case is similar in many respects to the facts in Raines, save for the extent of development. In the instant case, the potential clearly exists for a situation, such as existed in Raines, where the Homeowners' Association will govern not only condominium owners but other owners who will be free from condominium-type restrictions. Appellees have conceded in their Reply to Motions for Rehearing and Clarification (pg. 4) that in such an event the Homeowners' Association would no longer be a statutory condominium association. The conclusion reached is that under the test as applied by the court below, the status of the given Homeowners' Association could change with each stage of development. Such an approach leaves both purchasers and developers without adequate guidance as to their legal rights.

An example helps to illustrate the problems which arise. Under the lower court's analysis, a unit owner, such as the one in Raines, brings an action against the Homeowners' Association as the statutory condominium association at a time when all unit owners were condominium owners. By the time the matter proceeds to trial with the unit owner prevailing, the developer has conveyed several non-condominium units and thus the Homeowners' Association no longer meets the constituency test as applied by the court below. Against whom should the judgment be issued? If against the Homeowners' Association, then is the plaintiff entitled to attorney's fees pursuant to section 718.303, which provides for attorney's fees to the prevailing party in an action brought by a unit owner against "the Association"? The confusion is evident and would extend far beyond this example. In essence, neither unit owners nor the respective associations would ever

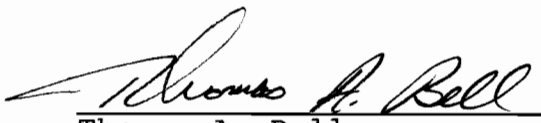
be clear as to who was in control.

In order to avoid this confusion and potential problems, it seems far simpler to apply the constituency test without the "stage of development" limitation inherent in the method used by the court below. A review of the documents creating the Homeowners' Association should provide an immediate answer as to whether the constituency of the association will ever be permitted to be made up of non-condominium unit owners. If those documents permit non-condominium unit owners, then the constituency test has not been met. That is, the Homeowners' Association does not <u>exist solely</u> for the purpose of serving condominium unit owners. Its existence is based upon documents which state it will serve both condominium and non-condominium unit owners should the latter become owners on the property.

CONCLUSION

The lower court's opinion arises from an over-technical reading of the definitions contained in Chapter 718 and ignores the overall scheme of the statute. At best, only the use rights in and to the common properties can be considered condominium property. The common properties as a whole are not. The few isolated functions performed by the Homeowners' Association as to the units and common elements are not such as to rise to the level of "administration and management of the condominium property." Further, the documents themselves clearly establish that the Homeowners' Association exists to serve both condominium and non-condominium owners. The statutory scheme is that of one association primarily and solely liable for performance of statutory condominium association functions. That scheme should only be changed by the Legislature. The lower court erred and should be reversed.

Respectfully submitted,



Thomas A. Bell
Staff Attorney
Department of Business Regulation
725 South Bronough Street
Tallahassee, Florida 32301
(904) 487-1137

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Mark B. Schoor, Esquire, 6520 North Andrews Avenue, P.O. Box 9057, Ft. Lauderdale, Florida 33310; Richard L. Allen, Esquire, Rubin, Baum, et al., 1201 Brickell Avenue, Suite 314, Miami, Florida 33131; Richard E. Gentry, General Counsel, Florida Home Builders Association, P.O. Box 1259, Tallahassee, Florida 32302; and Steven M. Siegfried, Esquire, Dady, Siegfried & Kipnis, P.A., 9300 S. Dadeland Boulevard, Suite 702-Dadeland Towers, Miami, Florida 33156-2789, this 4th day of March, 1985.

Thomas A. Bell

Thomas A. Bell, Esquire