OA 5-10-85

IN THE SUPREME COURT OF FLORIDA

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

Petitioner,

v. CASE NO. 65,814

HERMAN E. SIEGEL,

Respondent.

TOWERS OF QUAYSIDE HOMEOWNERS'
ASSOCIATION, INC.,

Petitioner,

v. CASE NO. 65,834

HERMAN E. SIEGEL,

Respondent.

PETITIONER'S REPLY BRIEF

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

TABLE OF CONTENTS

TABLE OF CITATIONS

INTRODUCTION

Petitioner in Case No. 65,814, DEPARTMENT OF BUSINESS REGULATION, DIVISION OF FLORIDA LAND SALES AND CONDOMINIUMS, will be referred to herein as "Petitioner".

Petitioner in Case No. 54,834, THE TOWERS OF QUAYSIDE HOMEOWNERS' ASSOCIATION, INC., will be referred to herein as "Homeowners' Association".

References in this Brief to "Petitioners" will refer to arguments and positions advanced by both DIVISION and HOMEOWNERS' ASSOCIATION.

References to the Appendix filed by Petitioner HOMEOWNERS' ASSOCIATION will be preceded by the symbol "App.", the "exhibit reference" used in the Appendix, and where appropriate, by the page number at the bottom of a particular page in that exhibit. For example, references to page 1 of the Declaration of Convenants, Restrictions and Easements will be in the form "App.B.1".

All references to sections of the Condominium Act are to Chapter 718, Florida Statutes (Supp. 1984).

References to Petitioner's Initial Brief will appear herein as "(Pet. Int. B.)."

References to Respondent's Answer Brief will appear herein as "(Resp. An. B.)."

STATEMENT OF CASE AND FACTS

In reviewing Respondent's Statement of the Case, this petitioner became aware of an incorrect statement which unfortunately also appears in the Statement of the Facts of Petitioner's Initial Brief. That Initial Brief phrased it as follows: "The Homeowners' Association membership, for the time being, consists exclusively of condominium unit owners." (Pet. Int. B. 3). Respondent's Answer Brief contains the following similar statement: "The Declaration of Convenants expressly contemplates the encumbered property being divided into condominiums and Common Properties, with various amenities constructed and enjoyed exclusively by the owners of units in the several condominiums." (Resp. An. B. 3-4). In fact, the Declaration of Convenants, Restrictions and Easements provides as follows:

> Declarant will or has caused such Corporation to be formed for the purpose of exercising the functions aforesaid. The members of the Corporation shall be the respective Owners of Dwelling Units in the Towers of Quayside and the Declarant.

(Emphasis Added). (App. B. 1).

Further, Article III, Section 1, Membership provides: "Every owner of a Dwelling Unit and the Declarant shall be a Member of the Association. . .." (Emphasis added). (App. B. 8).

Article I, Section 12 contains the following definition:

> Section 12. "Declarant" shall mean and refer to Quayside Associates, Ltd., a Florida Limited Partnership, its successors and assigns, if such successors and assigns should acquire any portion of the Towers of Quayside for the purpose of development and resale.

(App. B. 4).

To the extent that the statements in Petitioner's Initial Brief implied that membership in the Homeowners' Association excluded the developer, it is incorrect. Likewise, similar statements in Respondent's Answer Brief must be read to include the developer whether or not he owns any units, which ownership status is not reflected in the record.

ARGUMENT

Respondent's introduction states what Respondent perceives to be the crucial question of this appeal. That is, whether the developer of a condominium community can evade the Condominium Act merely by the way he legally structures the community. Such a statement contains the possible inference that the developer of Quayside in some manner attempted to mislead or deceive purchasers into believing that their membership in the Homeowners' Association came complete with the statutory protections of a condominium association. If such an inference is intended, it is clearly without support in the record. There has not been the slightest suggestion that any of the documents associated with the purchase or the project were anything but entirely accurate in their description of the operation of the condominium, and separately, of the operation of the Homeowners' Association.

But such phrasing of the issue does, in any event, serve to highlight the magnitude of the issue involved in this appeal. That is, where the documents establish a homeowners' association regime which is clearly and specifically <u>not intended to constitute a condominium association</u>, should a court by finding a few, insignificant acts of that association relative to "condominium property," change the form of that association to one which <u>none</u> of the parties contemplated or bargained for? It is respectfully suggested that the lower court erred in answering that question in the affirmative.

Curiously, respondent in its introduction examines the motives of each of the parties to this appeal. While knowledge

of each party's motives may explain why it advocated its respective position, it sheds little or no light on resolving the ultimate issue. Thus, whether or not an amicus association is still developer controlled has little importance as to whether its analysis is correct.

Respondent's brief then begins an examination of the holding of the Fourth District Court of Appeal in Palm Beach Leisureville Community Association, Inc. v. Raines, 398 So.2d 471 (4DCA 1981), and this court's holding in Raines v. Palm Beach Leisureville Community Association, Inc., 413 So.2d 30 (Fla. 1982). Respondent suggests that neither decision announces the "function" test. (Resp. An. B. 17). Respondent further asserts that ". . . the powers to be exercised by an association have never been held to be the test for determining Chapter 718 'association' status." While respondent admits that the Third District in the instant case found and applied such a test based upon Palm Beach Leisureville, supra, and Raines, supra, respondent finds such a test confusing and unnecessary.

Semantics aside, there can be little doubt that both this court and the Fourth District Court of Appeal relied strongly on the powers and functions performed by the association in Palm Beach Leisureville, supra. Indeed, respondent's whole argument in this case finds its genesis in the definitions of "condominium property" and "operation of the condominium". In order to determine if a given association operates a condominium as defined in Florida Statute 718.103(17), one must first ascertain whether it is involved in the "operation and management" of that property.

Function, however denominated, is crucial to the ultimate determination.

Respondent attempts to distinguish the Palm Beach Leisureville, supra, and Raines, supra, decisions based upon the lack of showing in those decisions that the declarations of restrictions were attached to or referenced in the declarations of condominium. Such an analysis seems to miss the point of the "source of power" doctrine. While this court's opinion in Raines, supra, did not discuss the issue at length, it appears to focus on the purpose for which each type of association was formed. In discerning that purpose, it looks to the formative documents. Clearly, ". . . a condominium asociation derives its powers, duties and responsibilities from Chapter 718 . . . The declarations of restrictions for the single family lots, on the other hand, do not create a condominium form of ownership." Raines, supra at 32. The suggestion by respondent that incorporation of the Covenant of Restrictions in the declaration of condominium changes the purpose of its formation, is incorrect. The purpose for which the Homeowners' Association was formed is not for "the operation of a condominium". Florida Statutes 718.103(2). Its source of power in documents outside the parameters of Chapter 718 is not changed by incorporation within the declaration.

In discussing whether or not the use rights in the property constitute "condominium property", respondent ignores the conflicts within the statute itself as to the meaning of that term. Respondent specifically fails to reconcile those sections of the

Act, including Florida Statute 718.504(11) which strongly suggests that use rights in other property are not condominium property. (Pet. Int. B. 11). It makes no attempt to discuss the inter-relationship between the definitions of "unit" and "common elements" contained in Florida Statutes 718.103(6) and (23). Those definitions read together imply that all condominium property is either comprised of units or common elements, not use rights in other property.

At the very least, these sections lead to the conclusion that perhaps these incidental use rights are of a lower dignity than other forms of "condominium property". Yet, it is on the basis of the incorporation of these incidental rights into the declaration of condominium that respondent bootstraps the entire Common Properties into condominium property. Respondent specifically states this in its brief (Resp. An. B. 4): "Is all property owned by the Homeowners' Association automatically converted into condominium property? Within the definition of 'condominium property' contained in section 718.103(11), Florida Statutes, the answer is yes." (Emphasis added). Such a magical and far-reaching metamorphosis should be reserved for those situations where the statutory intent and language is clear. That is not the case here.

In support of its argument, respondent continually recites two "facts" that merit clarification and refinement. The first is respondent's allegation that the Common Properties ". . .are intended only for use in connection with condominiums in the Towers of Quayside (App. B. 1-2). " (Resp. An.B. 20). No such statement

appears in the section of the Declaration of Covenants referenced by respondent. A careful reading of that section reveals that the Common Properties are intended for use by the Owners of Dwelling Units and the developer Declarant. As previously set forth in Petitioner's Initial Brief (Pet. Int. B. 18-21), the proposed dwelling units may be non-condominium in nature. Further, the developer has also reserved to itself membership in the association. Thus, respondent's further statement that "[m]embership in the Homeowners' Association is limited to condominium unit owners. . .." (Resp. An. B. 20), is also incorrect.

In addition, respondent continually refers to its belief that "the Common Properties of the Towers of Quayside are intended to be conveyed to the Homeowners' Association, pursuant to the terms of the Declaration of Covenants (App. B. 1, 3, 7-8, 29)." (Resp. An. B. 22). A close reading of those sections reveals that the developer reserves unto itself the option to convey all or part of those properties ". . .as the Declarant deems necessary. . .." (App. B. 7, 20). Thus, no guarantee whatsoever exists that all Common Properties will be conveyed to the Homeowners' Association, as respondent suggests.

These clarifications become especially important when viewed in light of respondent's reply to the mall hypothetical posed in Petitioner's Initial Brief. As may be recalled, the hypothetical involved the case where a declaration provided for an easement across the property of a neighboring shopping center. It was suggested that under respondent's theory (whereby "use rights" in property transform such property into "condominium property" with

its administering body subject to the Condominium Act), the shopping center would be condominium property and the mall authority would be a statutory condominium association. Respondent answers that, even presuming the easement to be an exclusive one, "the 'mall authority' would have 'members' who were not condominium unit owners and would operate other property which serves these non-condominium unit owners (the shopping center tenants)." (Resp. An. B. 23). Thus, under respondent's own argument, both the makeup (constituency) of those entitled to the particular right and the makeup of the association charged with administering the property in which the right exists, must be exclusively condominium unit owners. How then does respondent explain the fact that among the members of the Homeowners' Association is Quayside Associates, Ltd., the owner of the non-condominium property proposed to be contained within the Common Properties? It appears that in such a circumstance, the arrangement would fail to meet even respondent's own "constituency" test.

Respondent suggests that this petitioner has always followed a constituency test. Respondent neglects to state what was clearly stated in the decision below, namely, that the prior declaratory statements which respondent referenced were issued prior to this court's decision in Raines, supra. Further, those declaratory statements can in no manner be read to negate a reliance on a function type test.

Respondent emphatically states that two condominium associations may coexist within a single condominium. (Resp. An. B. 30). Respondent suggests that no confusion need exist if common sense is used. Common sense is an inadequate substitute for

legislative guidance in this area. Additionally, respondent's approach gives no effect to Section 718.302(3). As may be recalled from Petitioner's Initial Brief, page 16, that subsection states as follows:

> (3) 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.

718.302(3), Florida Statutes.

The Declaration of Condominium of Towers of Quayside No. 2 Condominium (App. N 2) provides as follows:

> 2.3 "Association" means the Towers of Quayside No. 2 Condominium Association, Inc., a not for profit Florida corporation. This entity is responsible for the operation of the condominium.

That association is clearly responsible for operation of the condominium which is defined as "administration and management of the condominium property", 718.103(17), Florida Statutes. According to respondent's analysis, this would include the "use rights" in issue. "Common sense" does not cause the overlap to evaporate. This very statutory provision is intended to prevent confusion of the sort brought about by the lower court in permitting two associations to exist.

Respondent suggests that the court below was correct in ignoring future development of the property. By refusing to address the issue as speculative, respondent is closing its eyes to the problems which will certainly arise. Those problems were

addressed in this Petitioner's Initial Brief, pages 18-20, and ignored in Respondent's Answer Brief. Such an ostrich-like approach is shortsighted and can only be attributed to an inability on respondent's part to adequately address those problems.

Respondent's brief concludes with a recitation of what it believes to be the policy considerations which support the opinion of the district court below. Those policy arguments include a statement by respondent that purchasers should be able to rely upon the caveat that "What you see is what you get". In fact, what respondent seeks is far in excess of what respondent was told by the documents he would receive. By respondent's position, it seeks to achieve certain advantageous benefits provided by Chapter 718 that were clearly not provided him in his operative documents and not bargained for by either party. Beyond that, these windfall benefits do not appear to have been provided by either the spirit or intent of the Condominium Act.

CONCLUSION

Not every aspect of every housing regime falls within the specialized provisions of Chapter 718. Rather, it is only those arrangements which by their terms are "condominiumized" that the Legislature intended to be embraced within the parameters of the Act. Chapter 718 should not be extended by an ultra-technial, definitional stepping stone approach to encompass far more than either the seller or purchaser intended. Such an extension not only imposes additional obligations on the Homeowners' Association, but also on purchasers who may never have purchased had they been aware of the extent of those obligations. If the Legislature had intended for the Condominium Act to cover arrangements of the sort existing in Quayside, they could have easily done so. The rewriting of the statutory framework by the court below is improper. Further, the position of this petitioner in its declaratory statement was not clearly erroneous. Therefore, the decision should be reversed by this court.

Respectfully submitted,

THOMAS A. BELL, ATTORNEY SUPERVISOR
Department of Business Regulation
725 South Bronough Street
Tallahassee, Florida 32301
(904) 487-1137

KARL M. SCHEUERMAN, 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 David W. Trench, Esquire, and Martin A. Schwartz, Esquire, Rubin Baum Levin Constant Friedman & Bilzin, Attorneys for Petitioner The Towers of Quayside Homeowners' Association, Inc., 1201 Brickell Avenue, Suite 314, Miami, Florida 33131; Robert E. Dady, Esquire and Paul A. Arencibia, Esquire, Dady, Siegried & Kipnis, P.A., Attorneys for Amici Curiae, Builders Association of South Florida and The Gardens of Kendall Property Owners Association, Inc., 1570 Madruga Avenue, Suite 300, Coral Gables, Florida 33146; and Richard E. Gentry, General Counsel for Amicus Curiae Florida Home Builders Association, Post Office Box 1259, Tallahassee, Florida 32302, this 23rd day of April, 1985.

Thomas A. Bell

THOMAS A. BELL, ESQUIRE