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IN THE SUPREME COURT OF FLORIDA

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

Petitioner,

vs.

ANTONIO TOUSARD,

Respondent.

CASE NO. 65,814

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THE TOWERS OF QUAYSIDE HOMEOWNERS' ASSOCIATION, INC.

Petitioner,

vs.

ANTONIO TOUSARD,

Respondent.

CASE NO. 65,834

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ON APPEAL FROM THE DISTRICT COURT OF APPEAL OF FLORIDA,
THIRD DISTRICT
CASE NO. 83-2113

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# PETITIONER, THE TOWERS OF QUAYSIDE HOMEOWNERS' ASSOCIATION, INC.'S, REPLY BRIEF

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## PREAMBLE

Petitioners were Appellees in the District Court of Appeal of Florida, Third District, and Respondent was Appellant.

The following terms will be used throughout this Brief:

"Common Properties" will refer to those recreational facilities, access roads, restaurant and marina located in the community known as The Towers of Quayside and available to all owners in such community.

"Condominium Act" or the "Act" will refer to Chapter 718, Florida Statutes.

"DIVISION" will refer to Petitioner, Division of Florida Land Sales, Condominiums and Mobile Homes formerly known as Division of Florida Land Sales and Condominiums.

"HOMEOWNERS' ASSOCIATION" will refer to Petitioner, The Towers of Quayside Homeowners' Association, Inc.

"Quayside" will refer to the community known as The Towers of Quayside.

"RESPONDENT" will refer to Respondent, Antonio Tousard.

"The Covenants" will refer to the recorded Declaration of Covenants, Restrictions and Easements affecting the Quayside community.

"Tower 2" will refer to The Towers of Quayside No. 2 Condominium.

References to the Appendix submitted by HOMEOWNERS' ASSOCIATION with its initial brief on the merits will appear as "App."; references to Respondent's answer brief will appear as "Ans.B."

## SUMMARY OF ARGUMENT

This Court should not discharge its jurisdiction since RESPONDENT raises no new arguments in his brief on the merits and the Court has already considered this issue on the basis of the jurisdictional briefs submitted.

The analysis applied by this Court in Raines v. Palm Beach Leisureville Community Ass'n, 413 So.2d 30 (Fla. 1982) and the Fourth District in Palm Beach Leisureville Community Ass'n v. Raines, 398 So.2d 471 (Fla. 4th DCA 1981) requires a conclusion that HOMEOWNERS' ASSOCIATION is not an association subject to regulation under the Condominium Act. RESPONDENT's attempt to avoid this analysis by dismissing most of the substantive legal discussion applied by these courts as "findings" of the courts is clearly improper.

The Covenants do not limit use of the Common Properties to condominiums as RESPONDENT states but specifically provides that they are available for all single family residences in Quayside.

RESPONDENT's argument that the condominium owners' use rights in the Common Properties render such properties "condominium property" within the meaning of Chapter 718 is incorrect. Condominium property envisions a submission of at least the primary portion of the property administered by the association to condominium ownership. The Common Properties

have never been submitted to condominium ownership. In addition, the existence of condominium property is secondary to the primary focus of the Act. An association subject to regulation under Chapter 718 must be the entity responsible for the operation of a condominium. HOMEOWNERS' ASSOCIATION is not responsible for the operation of a condominium and is therefore not governed by the Act.

The "constituency" test is a test invented by RESPONDENT without support in either the Condominium Act or any case decided under the Act. RESPONDENT turns the conclusion reached by the court in Leisureville on its head to find support for his contention. That court reasoned that an association cannot be regulated under the Condominium Act if the association has non-condominium owners. RESPONDENT use of this as authority for the proposition that an association must be regulated under Chapter 718 if the association only has condominium unit owners is not borne out on the basis of logic or the Leisureville case itself.

RESPONDENT's "solution" to the confusion caused by having two associations regulate a single condominium is not consistent with the Condominium Act as drafted. RESPONDENT's "solution" would require a judicial rewriting of the Act to accomplish the limitation of each association's authority to the property it administers.

This Court must consider the ramifications of any decision in the case before it in the same manner as it does in other controversies. Were future consequences ignored, the time, energy, money and judicial effort applied in this controversy may be vitiated by a minor future development in the Quayside community.

RESPONDENT has created an exception to the applicable standard of review of administrative determinations which is not relevent to the issue before this Court and has no basis in judicial precedent.

RESPONDENT's motion to strike is improper since this Court can take judicial notice of the declaration of condominium of The Towers of Quayside No. 1 Condominium.

## ARGUMENT

### POINT I

### THIS COURT SHOULD NOT DISCHARGE ITS JURISDICTION

RESPONDENT's opposition to this Court's jurisdiction was fully argued in the jurisdictional briefs; his attempt at a "second bite at the apple" in his brief on the merits is inappropriate and adds nothing new. A review of all of the arguments set forth in RESPONDENT's brief makes it abundantly clear that this Court's decision in Raines v. Palm Beach Leisureville Community Ass'n, 413 So.2d 30 (Fla. 1982), and the decision of the Fourth District Court of Appeal in Palm Beach Leisureville Community Ass'n v. Raines, 398 So.2d 471 (Fla. 4th DCA 1981), conflict with the holding below, Siegel v. Division of Florida Land Sales and Condominiums, 453 So.2d 414 (Fla. 3d DCA 1984).

## POINT II

## THE OPERATION OF HOMEOWNERS' ASSOCIATION DOES NOT SUBJECT IT TO REGULATION UNDER THE CONDOMINIUM ACT

### A. Application of Leisureville and Raines Analysis (Corresponds to Part B of Respondent's Brief)

In order to avoid the consequences of the Fourth District's analysis in Leisureville and this Court's analysis in Raines, RESPONDENT attempts to characterize a major portion of the substantive legal discussion in these opinions as "findings" rather than the "holding" of the courts; and attempts to convince this Court that the source of powers and function tests applied in these cases were not actually applied. RESPONDENT ignores the thrust of the courts' analysis because it is inconsistent with his view of the Condominium Act. Even a cursory reading of these opinions, however, belies RESPONDENT's contentions.

### B. Function Test (Corresponds to Point C of Respondent's Brief)

In setting forth his arguments, RESPONDENT takes certain liberties with the documents before this Court. RESPONDENT states: "Not only are the Common Properties intended for use in connection with Respondent's condominium, they are intended only for use in connection with condominiums in the Towers of Quayside (App. B. 1-2)." (Ans.B., p. 20)

(emphasis in original). This is a complete misstatement. The reader will search in vain on the referenced pages of The Covenants for any limitation on use of the Common Properties to condominiums. As a matter of fact, at the time of the creation of the Quayside regime, the townhouses were not condominiums but rental housing. (See App.A., p.1). In accordance with The Covenants, these units, not then condominiums, were entitled to use of the Common Properties operated by HOMEOWNERS' ASSOCIATION under The Covenants.

RESPONDENT also states that "Membership in the HOMEOWNERS' ASSOCIATION is limited to condominium unit owners." (Ans.B., p. 20). RESPONDENT does not cite any reference in The Covenants to support this conclusion. None can be cited because the Covenants do not contain any such limitation. The Covenants do provide:

> Section 1. Membership. Every owner of a Dwelling Unit and the Declarant shall be a Member of the Association, and no owner shall have more than one membership in the Association. (App. B, p. 8)

A Dwelling Unit is defined in The Covenants as:

> "Dwelling Unit" shall mean and refer to a constructed dwelling which is designed and intended for use and occupancy as a residence by a single family. Said term includes, without limitation, a Unit in a Condominium, together with the interest in land, improvements and other property appurtenant thereto. (App. B, p. 4)

The Covenants expressly show that the use of the Common Properties is not limited to condominiums.

In an attempt to satisfy the function test, RESPONDENT has apparently abandoned the unsupportable premise that the Common Properties were submitted to condominium ownership. Instead, RESPONDENT now argues that the use rights in the Common Properties enjoyed by the Quayside owners satisfy the definition of condominium property contained in §718.103(11):

> (11) "Condominium property" means the lands, leaseholds, and personal property that are subjected to condominium ownership, whether or not continguous, and all improvements thereon and all easements and rights appurtenant thereto intended for use in connection with the condominium. (emphasis added)

RESPONDENT has seized on a minor catchall phrase of the definition and ignores the primary focus - property "subjected to condominium ownership." If RESPONDENT's argument were the law, condominium association* status would have been conferred on the community association in Raines since the owners involved in that case had use rights in the property administered by the community association.

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*RESPONDENT attempts to attach some significance to the fact that HOMEOWNERS' ASSOCIATION has referred to an association governed by Chapter 718 of the Florida Statutes as a "condominium association" when only the word "association" is used in the statute. The phrase "condominium association" is commonly employed to denote that type of association subject to regulation under the Condominium Act. The use of the phrase "association" as appearing in Chapter 718 or "condominium association" as utilized in HOMEOWNERS' ASSOCIATION's brief is without any substantive consequences.

The definition of condominium property is only a marker in the general regulatory scheme whose primary focus in determining whether an association is included under Chapter 718 is whether it is the "entity responsible for the operation of a condominium." §718.103(2). RESPONDENT's attempt to create condominium property where none exists does not address this criteria. HOMEOWNERS' ASSOCIATION does not operate a condominium; the individual condominium associations at Quayside perform this function.

C. The "Constituency" Test (Corresponds to Point D of Respondent's Brief)

RESPONDENT would have this Court believe that the acid test for determining whether an association is subject to regulation under the Condominium Act is the composition of its membership. While this test does have the advantage of easy application, it ignores the framework of the Act. RESPONDENT, however, appears unconcerned with the niceties of statutory construction.

Apparently believing that the Condominium Act as drafted is not protective of condominium unit owners in situations which a homeowners association is involved, RESPONDENT attempts to rewrite the law. Although we do not believe that the Act is deficient in this regard, even if it were, RESPONDENT's avenue of relief would be through the

legislative process and not by judicial revision. As this Court noted in Century Village, Inc. v. Wellington, 361 So.2d 128 (Fla. 1978):

> In Florida, condominiums are creatures of statute and as such are subject to the control and regulation of the Legislature. . . . It was within the discretionary power of the Legislature to extend this protection . . . . They did not and we cannot. 361 So.2d at 133-34.

The Condominium Act defines those associations subject to regulation under Chapter 718: "'Association' means the corporate entity responsible for the operation of a condominium." §718.103(2). Nowhere does it indicate that membership has anything to do with the characterization of an association or the applicability of the Act.

Is HOMEOWNERS' ASSOCIATION responsible for the operation of a condominium? No. While HOMEOWNERS' ASSOCIATION is authorized to exercise certain limited authority over the individual condominiums, it is not the entity responsible for the operation of any condominium. This task is performed by each of the separate condominium associations at Quayside.

The cases cited by RESPONDENT in support of his novel theory lend no support to his proposition. The language excerpted from the opinion of the Fourth District Court of Appeal in Palm Beach Leisureville Community Association v. Raines, supra, does not support a membership test. The court

merely concluded that one could not have a condominium association governing owners who did not own condominium units since the members of a condominium association must be condominium unit owners. See §718.111(1). RESPONDENT extrapolates from that conclusion to the obverse that if an association has only condominium unit owner members, it must be a condominium association. Neither the rules of logic nor the law supports such a conclusion.

RESPONDENT cites dicta from Raines -- "It might well be that other associations similar to this one would be associations as defined by the statute [Condominium Act]" - as authority for a membership test. RESPONDENT, however, ignores the main holding of this Court in that case:

> Although the association has broad powers, it is not "the corporate entity responsible for the operation of a condominium." §718.103(2). The individual condominium associations fit within this definition, but the respondent association does not. 413 So.2d 32.

In other words, this Court held in Raines that the acid test for determining whether an association was a condominium association for purposes of regulation under the Act was whether the association operated a condominium.

Similarly, the other cases cited by RESPONDENT "in support" of the membership test furnish no support. RESPONDENT accuses HOMEOWNERS' ASSOCIATION of ignoring two declaratory

statements by the DIVISION, S. Mortimer Hirshorn v. Division of Florida Land Sales and Condominiums (App. P) and Number One Condominium Association - Palm Greens at Villa Del Ray v. Division of Land Sales (App. Q), aff'd sub nom, Palm Greens Limited v. Division of Florida Land Sales and Condominiums, 402 So.2d 618 (Fla. 1st DCA 1981).

In Hirshorn, DIVISION found a master association to be a condominium association in the situation where 88 condominium associations in the Kings Point community reorganized themselves into eight area associations and a single master community association. Each area association was responsible for administering several condominiums. The community association's purpose was "to organize and coordinate a united, viable federation of condominium associations within the Kings Point complex . . . ." (App. P., p. 2). The area associations were empowered to join in the formation of a community asociation and "to delegate to said [community] association authority to contract for and to establish guidelines for the orderly and uniform consolidated administration, maintenance, appearance, upkeep and management of all Kings Point condominiums . . . ." (App. P., p. 2). In its organizational documents the community association was specifically authorized to have the powers conferred by the Act. In essence, the area associations administered the individual condominiums subject to direction from the community association. The community

association controlled the operation of the condominiums through its control of the area associations.

Similarly, in Palm Greens, DIVISION dealt with a situation in which there was a master association and sub-associations. The condominium documents provided that the master association was "the entity responsible for the coordination and operation of all sub-associations . . . ." (App. Q., p. 2) (emphasis in opinion). The individual condominium associations were the members of the master association. The master association controlled the condominiums through its control of the sub-associations. In addition, there was joint ownership of recreational facilities by the sub-associations and the master association so that the master association directly controlled property included with the individual condominiums. Here again the master association satisfied the requirements of §718.103(2) of the Act. It was the "corporate entity responsible for the operation of a condominium."

In both cases, unlike the case below, the individual condominium associations were mere agents or instrumentalities of the master association. In neither case did DIVISION consider membership determinative. If it had, the discussion of powers and duties of the associations expounded in the opinions would be irrelevant.

D. Regulation of a Condominium by More Than One Condominium Association Under Chapter 718 (Corresponds to Point E of Respondent's Brief)

RESPONDENT's conclusion that it is perfectly appropriate for a condominium to be regulated by more than one association is not supported by his citations to Hirschorn and Palm Greens. As explained above, the master or community associations described in those cases involved a situation analogous to a multi-tiered corporation in which the parent corporation regulates and controls the activities of its subsidiaries and their subsidiaries. In such situations, it is of little consequence whether we view the operation of a condominium through the chain or hierarchy of several corporate levels or truncate the process and deal with the relationship between the master or community association and the unit owners.

In Quayside, there are no layered levels of authority - the individual condominium associations are not members of HOMEOWNERS' ASSOCIATION. No "corporate" relationship exists between HOMEOWNERS' ASSOCIATION and the individual condominium associations. Each operates independently of the other in its own sphere.

More importantly, however, RESPONDENT's answer that "No 'confusion' need exist if each association merely deals with its condominium property" (Ans.B., p. 31) (emphasis in original), is adequate only if we rewrite the Condominium Act. On the basis of the existing Condominium Act, how could we

confine HOMEOWNERS' ASSOCIATION's activities to the Common Properties when the Act states that "the operation of the condominium shall be by the association" (§718.111(1)) and "[t]he association has the irrevocable right to access to each unit during reasonable hours" (§718.111(5)? RESPONDENT's response that we use "a little common sense" (Ans.B. p. 31) on this matter in essence means that we use his version of the Condominium Act and not the one drafted by the Florida Legislature.

E. Future Consequences Should be Considered in Rendering a Decision on this Case. (Corresponds to Point G of Respondent's Brief).

This litigation has already consumed several years. If RESPONDENT's contentions were to be sustained by this Court, the consequences would have a material impact on the operation of HOMEOWNERS' ASSOCIATION, as RESPONDENT is well aware. Substantial sums would have to be expended by HOMEOWNERS' ASSOCIATION to alter the mode of the operation from that presently utilized. This expenditure of time, energy, money and judicial effort would be futile if, as a result of some future non-condominium development at Quayside, the consequences of the Court's decision could be reversed.

Under RESPONDENT's argument, if the developer of Quayside elected to construct one single family home or one rental unit at Quayside, the results of the modifications of HOMEOWNERS' ASSOCIATION practices would be undone since the

membership criteria would then not be satisfied. Such a consequence is ludicrous, a waste of judicial resources and a result that is inconsistent with the framework of the Condominium Act. This Court must focus on the consequences of its decision in this case just as it must focus on the consequences of its decisions in other areas.

## POINT III

## THE CORRECT STANDARD OF REVIEW

HOMEOWNERS' ASSOCIATION admits it is baffled by RESPONDENT'S argument on this point. This case involves important issues relating to the interpretation of the Condominium Act. Although they may relate to the status of HOMEOWNERS' ASSOCIATION, the fundamental issue involved is the scope of the Condominium Act. The Act conferred upon DIVISION the power to enforce its provisions. (§718.501). DIVISION has determined that the Act does not extend to homeowner's associations. Even it HOMEOWNERS' ASSOCIATION's status were somehow determinative of this case, neither of the cases cited by RESPONDENT supports the proposition advanced.

The issue before the court in G. E. J. v. State, 401 So.2d 1325 (Fla. 1981) was whether a particular training center was one from which escape was prohibited by the Florida Statutes. In Rubin v. Shapiro, 198 So.2d 854 (Fla. 3d DCA 1967), the employment status of the respondent was based on a City of Miami Beach ordinance; there was no discussion of substitution of the court's judgment for the judgment of the City and no administrative agency was involved. Neither of these cases indicate any exception to the general rule set forth in HOMEOWNERS' ASSOCIATION's main brief that an administrative determination of a statute which it is charged with enforcing will be given great weight and will not be overturned unless clearly erroneous.

## POINT IV

## RESPONDENT'S MOTION TO STRIKE SHOULD BE DENIED

In an attempt to illustrate to this Court the absence of a basis for the Third District's decision in Siegel, HOMEOWNERS' ASSOCIATION included in its appendix, as Item O, a copy of certain pages of the declaration of condominium of The Towers of Quayside No. 1 Condominium ("Tower 1"). Since the provisions in the declaration of condominium for Tower 1 were not before the Third District Court of Appeal, RESPONDENT attempts to perpetuate the error of the Third District by excluding this exhibit. This he cannot do.

It is well-settled that this Court, or any trial or appellate court, may take judicial notice of all items of public record. This Court stated in Conyers v. State, 98 Fla. 417, 123 So. 817 (Fla. 1929): "Courts may take judicial cognizance of all public documents and public records." See also Schriver v. Tucker, 42 So.2d 707 (Fla. 1949). The declaration of condominium for Tower 1 is a matter of public record and is on file with the Clerk of the Circuit Court of Dade County, Florida as the recording information on Exhibit O reflects. This Court can and should take judicial notice of this document pursuant to well established authority.

## CONCLUSION

Based upon the foregoing argument, policies and authority, it is respectfully submitted that the opinion of the District Court of Appeal of Florida, Third District, should be reversed.

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed this 23rd day of April, 1985 to MARK B. SCHORR, ESQ., Becker, Poliakoff & Streitfeld, Attorneys for Respondent, 6520 North Andrews Avenue, Post Office Box 9057, Fort Lauderdale, Florida 33310-SO57, THOMAS A. BELL, ESQ. and KARL M. SCHEUERMAN, ESQ., Department of Business Regulation, 725 South Bronough Street, Tallahassee, Florida 32301, RICHARD E. GENTRY, General Counsel, Florida Home Builders Association, Post Office Box 1259, Tallahassee, Florida 32302 and to ROBERT E. DADY, ESQ., STEVEN M. SIEGFRIED, ESQ. and RAUL ARENCIBIA, ESQ., Dady, Siegfried & Kipnis, P.A., 1570 Madruga Avenue, Coral Gables, Florida 33146.

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