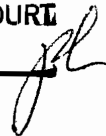
O/a 5-10-85

IN THE SUPREME COURT OF FLORIDA

DEPARTMENT OF BUSINESS REGULATION, DIVISION OF FLORIDA LAND SALES AND CONDOMINIUMS, Petitioners, vs. HERMAN E. SIEGEL, Respondent.	)	CASE NO. 65,814
THE TOWERS OF QUAYSIDE HOMEOWNERS' ASSOCIATION, INC. Petitioner, vs. HERMAN E. SIEGEL, Respondent.	)	CASE NO. 65,834

FILED
SID J. WHITE
MAR 5 1985
CLERK, SUPREME COURT
By Chief Deputy Clerk



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

PETITIONER'S, THE TOWERS OF QUAYSIDE HOMEOWNERS' ASSOCIATION, INC., BRIEF ON THE MERITS

DAVID W. TRENCH, ESQ.
MARTIN A. SCHWARTZ, ESQ.
RUBIN BAUM LEVIN CONSTANT FRIEDMAN & BILZIN
Attorneys for Petitioner, The Towers of Quayside Homeowners' Association, Inc.
1201 Brickell Avenue, Suite 314
Miami, Florida 33131
(305)374-7580

TABLE OF CONTENTS

Page

TABLE OF CITATIONS ii

PREAMBLE iv

STATEMENT OF THE CASE AND FACTS v

SUMMARY OF ARGUMENT ix

ARGUMENT 1

I. HOMEOWNERS' ASSOCIATION IS NOT AN ASSOCIATION GOVERNED BY THE CONDOMINIUM ACT UNDER THE GUIDELINES ARTICULATED IN LEISUREVILLE AND APPROVED BY THIS COURT IN RAINES 1

II. THE COMMON PROPERTIES WERE NOT SUBMITTED TO CONDOMINIUM OWNERSHIP................................ 7

III. THE MEMBERSHIP OF AN ASSOCIATION DOES NOT DETERMINE WHETHER IT IS A "[CONDOMINIUM] ASSOCIATION" WITHIN THE MEANING OF THE CONDOMINIUM ACT 11

IV. THE THIRD DISTRICT'S DECISION IS INCONSISTENT WITH THE CONDOMINIUM ACT 17

V. THE THIRD DISTRICT APPLIED AN IMPROPER STANDARD OF REVIEW IN REVERSING THE DETERMINATION OF THE DIVISION 19

VI. THERE IS NO AUTHORITY FOR AN AWARD OF ATTORNEYS' FEES AGAINST HOMEOWNERS' ASSOCIATION 21

CONCLUSION 23

CERTIFICATE OF SERVICE 25

TABLE OF CITATIONS

Cases	Page
Bethesda Radiology Associates v. Yaffee, 437 So. 2d 189 (Fla. 4th DCA 1983)	22
E. Mortimer Hirshorn v. Division of Florida Land Sales, Declaratory Statement	12
Ft. Pierce Utilities Authority v. Florida Public Service Commission, 388 So. 2d 1031 (Fla. 1980)	19
Great American Indemnity Corp. v. Williams, 85 So.2d 619 (Fla. 1956)	22
Hughes v. Professional Insurance Corporation, 140 So.2d 340 (Fla. 1st DCA 1962)	10
McGhee Interests v. Alexander Nat. Bank, 102 Fla. 140, 135 So. 545 (Fla. 1931)	10
Number One Condominium Association-Palm Greens At Villa Del Ray v. Division of Florida Land Sales and Condominiums, Declaratory Statement	12, 13
Palm Beach Leisureville Community Ass'n. v. Raines, 398 So.2d 471 (Fla. 4th DCA 1981)	1, 2, 3, 5, 12, 13, 23
Palm Greens Limited v. Division of Florida Land Sales and Condominiums, 402 So.2d 618 (Fla. 1st DCA 1981)	12
Pan American World Airways v. Florida Public Service Commission, 427 So.2d 716 (Fla. 1983)	19
Raines v. Palm Beach Leisureville Community Ass'n., 413 So.2d 30 (Fla. 1982)	1, 2, 3, 12, 13, 14
Siegel v. Division of Florida Land Sales and Condominiums, 453 So.2d 414 (Fla. 3rd DCA 1984)	vii, 1, 3, 5, 7, 8, 11 15, 20

TABLE OF CITATIONS (cont'd)

Cases	Page
State ex rel Biscayne Kennel Club v. Board of Business Regulation, 276 So.2d 823 (1973)	19
State Road Department v. Crill, 128 So. 412 (Fla. 1930)	22
Sunbeam Enterprises, Inc. v. Upthegrove, 316 So.2d 34 (Fla. 1975)	21, 22

FLORIDA STATUTES

§718.101(12)	5
§718.103(2)	7, 11
§718.103(9)	18
§718.103(11)	7
§718.103(15)	7, 11
§718.104(2)	7
§718.104(4)(c)	8
§718.111(1)	17
§718.111(2)	17
§718.111(5)	17
§718.111(6)	17
§718.111(8)	17
§718.111(10)	17
§718.113	17
§718.301(1)	23
§718.302(5)	22, 23
§718.303(1)	7, 21
§718.305(5)	7, 21
§718.501	19

OTHER AUTHORITIES

Chapter 84-368, §26, Laws of Fla.	16

PREAMBLE

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

Petitioner, The Towers of Quayside Homeowners' Association, Inc., will be referred to as HOMEOWNERS' ASSOCIATION. Petitioner, Division of Florida Land Sales and Condominiums, will be referred to as the DIVISION. Respondent, Herman E. Siegel, will be referred to as SIEGEL.

In addition, the following terms will be used throughout this Brief: "Condominium Act" will be referred to as Chapter 718, Florida Statutes. "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. "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. "Quayside" will refer to the community known as The Towers of Quayside.

This Brief is supplemented by an Appendix. References to the Appendix appear as "App."

STATEMENT OF THE CASE AND FACTS

Quayside is a community located in Dade County, Florida. It is composed of three high-rise residential towers, 40 townhouse units, two undeveloped building sites and various community-wide recreational facilities, including, tennis courts, a health spa and a marina. (App. A). Each tower is a separate condominium governed by a separate condominium association. (App. A). Each has common elements, including, a parking garage, swimming pool, recreational amenities and common building components maintained by the condominium association governing that tower. (App. A). The townhouses were operated as rentals from 1978 to 1983. (App. A). In early 1983 they were converted into a separate condominium with its own governing association. (App. A). As a result, there are four distinct condominiums in Quayside at this point in time. (App. A).

The community-wide facilities at Quayside, the Common Properties, such as the health spa, tennis courts, marina, restaurant and access roads, are controlled by HOMEOWNERS' ASSOCIATION pursuant to The Covenants (App. B) made by the developer of Quayside ("Developer"). The Covenants empower HOMEOWNERS' ASSOCIATION to assess each homeowner in Quayside for the costs of maintenance of the Common Properties. (App. B.)

HOMEOWNERS' ASSOCIATION has no general authority over the separate property of the individual condominiums except in two limited situations. It has the power to (1) provide security services throughout the community (App. B, p. 10, Article V(g)) and (2) enter a condominium and correct any disrepair creating dangerous, unsafe or unattractive conditions after an individual condominium association has failed to make such corrections. (App. B, pp. 17-18, Article IX, Section 1). In these situations, it is either impractical to provide for separate individual operation or some control is necessary to insure the integrity of the community.

SIEGEL is a unit owner in Tower 2, one of the condominium high-rise towers, and is a member of HOMEOWNERS' ASSOCIATION. Shortly after the townhouse units were converted to condominium ownership, SIEGEL demanded that HOMEOWNERS' ASSOCIATION comply with what he alleged were applicable provisions of the Condominium Act, specifically, §718.301(1). (See App. C). That section states that when at least 15% of the units in a condominium are held by unit owners other than the developer, those owners are entitled to elect not less than one-third of the board of directors of the condominium association. HOMEOWNERS' ASSOCIATION, whose board of directors then consisted of only Developer appointed individuals, refused SIEGEL's request in the belief that it was not a condominium association and, therefore, not governed by the provisions of

the Condominium Act. (See App. D). In April, 1983, SIEGEL initiated a proceeding with the DIVISION, requesting it to issue a declaratory statement that HOMEOWNERS' ASSOCIATION was a condominium association governed by the Condominium Act. (App. C).

The DIVISION gave HOMEOWNERS' ASSOCIATION notice of SIEGEL's petition (App. E) and HOMEOWNERS' ASSOCIATION's attorneys submitted a letter objecting to the ruling sought. (App. A). The DIVISION, treating HOMEOWNERS' ASSOCIATION's response as a motion to intervene, issued a declaratory statement concluding that HOMEOWNERS' ASSOCIATION is not the entity responsible for the operation of a condominium and, therefore, is not a condominium association within the meaning of the Condominium Act. (App. F). SIEGEL appealed the DIVISION's decision to the District Court of Appeal of Florida, Third District, joining HOMEOWNERS' ASSOCIATION as an appellee.

The Third District, in an opinion by Judge Ferguson dated June 19, 1984, Siegel v. Division of Florida Land Sales and Condominiums, 453 So.2d 414 (Fla. 3rd DCA 1984) (App. G), reversed the DIVISION's Declaratory Statement holding that HOMEOWNERS' ASSOCIATION was a condominium association governed by the Condominium Act. In addition, the Third District assessed $1,500 against HOMEOWNERS' ASSOCIATION for SIEGEL's attorneys' fees. (App. H). A motion for rehearing by the

DIVISION and HOMEOWNERS' ASSOCIATION was denied on July 30, 1984. (App. I). On August 28, 1984, HOMEOWNERS' ASSOCIATION filed a Notice to Invoke Discretionary Jurisdiction of this Court. (App. J). A similar notice was previously filed by the DIVISION. On February 12, 1985, the Court accepted jurisdiction of both HOMEOWNERS' ASSOCIATION's and the DIVISION's petitions. (App. K).

SUMMARY OF ARGUMENT

HOMEOWNERS' ASSOCIATION is not an "association" governed by the Condominium Act. It does not operate the condominium property nor does it receive its power from or through the Condominium Act.

The guidelines for determining whether an association can be characterized as a condominium association were established by the Fourth District in Palm Beach Leisureville Community Assoc. v. Raines, 398 So.2d 471 (Fla. 4th DCA 1981) and this Court's affirmance in Raines v. Palm Beach Leisureville Community Assoc., 413 So.2d 30 (Fla. 1982). In accordance with these decisions a court may look to the functions performed by an association, the source of the association's powers and the intent of the developer in creating the regime governing the community.

In the instant case, as in Leisureville and Raines, HOMEOWNERS' ASSOCIATION does not, except in insignificant situations, perform any functions with respect to the individual condominiums. HOMEOWNERS' ASSOCIATION receives its powers and authority through its articles of incorporation and The Covenants; it does not receive any power or authority from the Condominium Act or from any declaration of condominium. Furthermore, there is no intent in The Covenants to subject the Common Properties to the condominum form of ownership.

HOMEOWNERS' ASSOCIATION operates the Common Properties. Those Common Properties are not condominium property because they were not submitted to condominium ownership. No declaration of condominium was recorded for such Properties. Neither did the declaration of condominium for Tower 2 submit the Common Properties to condominium ownership as stated by the Third District. The Covenants, which gives the HOMEOWNERS' ASSOCIATION its powers, have an existence separate and apart from this declaration and there was no intent to incorporate the entirety of the Covenants into this document. Nor could HOMEOWNERS' ASSOCIATION be bound by this declaration of condominium since it was not a party to it. Furthermore, if the Common Properties were made part of Tower 2 then they would be administered by the Tower 2 condominium association (which they are not) and not by HOMEOWNERS' ASSOCIATION (which they are).

The "constitutency" or "membership" test enunciated by SIEGEL and considered by the Third District has no basis in either the Condominium Act or the cases decided under the Act. The Condominium Act defines a condominium association in terms of the entity responsible for administration of condominium property. The cases, in addition, focus on the source of the associations' powers.

The Third District's decision is inconsistent with the Condominium Act. It seems to establish a condominium regime

where two associations administer "condominium" property utilized by condominium unit owners whereas the Act only allows the operation of a condominium by a single association.

The Third District, on an issue of interpretation of the Condominium Act, incorrecty substituted its judgment for that of the DIVISION, the agency charged by the legislature with enforcement of the Condominium Act. Third District made no finding that the DIVISION's decision was clearly erroneous.

Third District improperly awarded counsel fees to SIEGEL. The award was made under either §718.303(1) which applies only to actions for damages or injunctive relief or §718.305(5) which contemplates a judicial proceeding to enforce compliance with the Condominium Act. Since this case involved only a advisory opinion from an administrative agency neither provision is applicable. This is especially true since statutes awarding counsel fees are strictly construed to limit their application.

ARGUMENT

I

HOMEOWNERS' ASSOCIATION IS NOT AN ASSOCIATION GOVERNED BY THE CONDOMINIUM ACT UNDER THE GUIDELINES ARTICULATED IN LEISUREVILLE AND APPROVED BY THIS COURT IN RAINES

The primary issue involved in this case is a determination of the circumstances under which a community or homeowners association may be regulated under the Condominium Act. There are few cases in this area, but the issue has been considered by the District Court of Appeal of Florida, Fourth District, and this Court in Palm Beach Leisureville Association v. Raines, 398 So.2d 471 (Fla. 4th DCA 1981) (App. L), affirmed sub nom Raines v. Palm Beach Leisureville Community Association, 413 So.2d 30 (Fla. 1982) (App. M). The Fourth District opinion in Leisureville and this Court's opinion in Raines did establish certain guidelines. In reachng its decision in Siegel v. Division of Florida Land Sales and Condominiums, supra, the Third District failed to follow those guidelines.

In Leisureville and Raines this Court and the Fourth District examined a community association regulating certain community-wide facilities in a community composed of 1,803 single family improved lots and 21 separate condominiums containing 502 condominium apartments. The trial court, on an issue involving entitlement to attorneys' fees, held that the community association was a condominium association. In

reversing the trial court's determination, the Fourth District found the community association was not an "association" within the meaning of the Condominium Act stating, in part, that the community association:

> . . . is organized for the purpose of performing certain functions for the benefit of a planned community. It is not responsible for the operation of any of the 21 condominiums. With respect to the condominium buildings, its responsibility is limited to the exterior maintenance, and unlike a condominium association, it does not have the irrevocable right of access to each unit for repair or protection of the common elements, §718.111(5); it does not have the power to lease the common elements, or to maintain or make repairs to the common elements beyond the exterior surfaces of the buildings, §718.111(8); it is not required to maintain any insurance to protect the common elements of any of the condominiums, §718.111(9); and it does not have the power to purchase the recreation lease to which all residents of the project are bound. §718.111(12). All of these powers and duties are exercised by the condominium associations, not the appellant. Id. at 474.

Similarly, in the instant case, HOMEOWNERS' ASSOCIATION is not the association responsible for the operation of any of the condominiums. That function is performed by the individual condominium associations. As in Leisureville and Raines, HOMEOWNERS' ASSOCIATION has no right of access to each unit for repair or protection of the common elements (except limited access to the building itself in certain extreme situations); no power to lease the condominium's common elements; no power to repair the common elements (beyond the correction of

dangerous or unsightly condition after the condominium association has failed to act); it is not required to maintain insurance to protect the common elements of any of the condominiums; no power to purchase units or to hold, convey, lease or mortgage units and no power to insure the condominium's common elements. All of these powers and duties are exercised by the separate associations which were created to be condominium associations.

In Leisureville and Raines, both courts held it significant that the community association derived its powers from its articles of incorporation and a declaration of restrictions, a source independent of the Condominium Act and any condominium declaration. The instant case is similar. HOMEOWNERS' ASSOCIATION derives its powers from its articles of incorporation and from the The Covenants which are independent of the Condominium Act and any condominium declaration.

The Third District attempted to distinguish Raines with respect to the source of powers issue on the theory that, in Siegel, The Covenants were "incorporated" into the declaration of condominium for Tower 2. Siegel v. Division of Florida Land Sales and Condominiums, supra at 418 (App. G). To reach this conclusion, the Third District relied on Section 21 of the declaration of condominium for Tower 2 (App. N) which provides:

> Each Unit Owner shall become a member of The Towers of Quayside Homeowners' Association, Inc., a non-profit Florida corporation (the "Homeowners' Association"), which may own, operate and maintain certain properties (the "Common Properties") in the community known as The Towers of Quayside in accordance with that certain The Covenants, Restrictions and Easements . . . . Pursuant thereto, the Unit Owners shall have the non-exclusive use of the Common Properties and shall contribute to the costs and expense of operating and maintaining same in accordance with the provisions thereof. All rights, privileges, benefits, liabilities and obligations set forth in said The Covenants, Restrictions and Easements are incorporated herein by reference and each Unit Owner shall be bound thereby in all respects. The Homeowners' Association shall perform or cause to be performed all duties and obligations imposed upon it in the The Covenants, Restrictions and Easements. (App. N, p. 31).

The court stated that the sentence incorporating the "rights, privileges, benefits, liabilities and obligations" set forth in The Covenants incorporates The Covenants into the declaration of condominium for Tower 2, and seemed to conclude that, as a result, The Covenants do not exist independent of this declaration of condominium. This is not true. Despite any "incorporation" into the declaration of condominium, The Covenants have a separate and independent existence. If the declaration of condominium was terminated, The Covenants would still exist. Clearly, The Covenants were intended to be operative outside the scope of the declaration of condominium for Tower 2 since it governed the entire Quayside community.

Furthermore, HOMEOWNERS' ASSOCIATION could not have received its powers from the declaration of condominium since it was not a party to this instrument.

In addition, the language of section 21 does not support the Third District's interpretation. Section 21 speaks of incorporating "rights, privileges, benefits, liabilities and obligations," but not of incorporating the entirety of The Covenants. The function of section 21 is to make clear that the use rights in the Common Properties created by The Covenants would attach as an appurtenance to ownership of each of the condominium units and that the unit owners are bound by the provisions of the The Covenants. It does not purport to confer, nor does it in fact confer, any power on HOMEOWNERS' ASSOCIATION.

In Leisureville, the Court also focused on the intent of the developer -- did it intend to submit the property covered by the declaration of restrictions to the condominium form of ownership? This focus is appropriate since the existence of a condominium association assumes the fact that the property to be administered will be condominium property. See §718.101(12). This in turn requires the property to have been submitted to the condominium form of ownership. In Leisureville, the Fourth District found there was no intent to subject the property administered by the community association to condominium ownership.

The instant case is similar. No intent to subject the Common Property to condominium ownership appears in the The Covenants. While the residents of the individual condominiums have use rights in the Common Properties, The Covenants do not submit them to condominium ownership.*

In Siegel, the Third District attempted to distinguish Raines from the instant case on the theory that:

> The supreme court's affirmance [of Leisureville] pivoted on the fact that the community association served both the single family homes and the condominium buildings, and the single family homes were not subject to condominium ownership. Id. at 418.

This is an overly restrictive reading of Raines. Even if this were the case, however, Raines would not be distinguishable from the instant case since at the time of its creation, Quayside, like the community in Raines, consisted of condominium and non-condominium forms of ownership. The subsequent conversion of the townhouses to condominiums in no way affected the operative documents (The Covenants and the declaration of condominium for Tower 2) which had both been executed and recorded several years earlier. The change in the membership of HOMEOWNERS' ASSOCIATION could in no way change the character of the documents.

---

* The issue of whether the declaration of condominium for Tower 2 submitted the Common Properties to condominium ownership will be discussed in part III.

II

THE COMMON PROPERTIES WERE NOT SUBMITTED TO CONDOMINIUM OWNERSHIP.

An association regulated under the Condominium Act is one which administers and manages "condominium property." See §§718.103(2) and 718.103(15). "Condominium property" is that property that has been "subjected to condominium ownership" by recording a declaration of condominium in the public records. §§718.103(11) and 718.104(2). In Siegel, the property administered by HOMEOWNERS' ASSOCIATION is the Common Properties. No declaration of condominium has ever been recorded with respect to the Common Properties. However, the Third District held that the declaration of condominium for Tower 2 submitted the Common Properties to condominium ownership. Siegel v. Division of Florida Land Sales and Condominiums, supra at pp. 419-20. (App. G). This holding directly conflicts with the DIVISION's determination that the Common Properties were not condominium property. (App. F., p. 6). The fallacy in the Third District's argument is evident when one examines the Court's reasoning.

The Third District began by stating that Article II, Section I of The Covenants contemplates that the Common Properties would be used in connection with condominium units by providing that:

> Every Owner shall have a right and easement of ingress and egress and of enjoyment in, to and over the Common Properties which shall be appurtenant to and shall pass with title to every Dwelling Unit . . . . (App. B, p. 5).

Once determining that the condominium owners had use rights in the Common Properties, the Third District made a disjointed leap in logic. In examining the submission statement for Tower 2 submitting to condominium ownership "all other property intended for use in connection with the condominium" 353 So.2d at 419 (App. G), it concluded that:

> The submission statement submits to condominium form of ownership the land, improvements and 'all other property . . . intended for use in connection therewith,' without qualification, which quite reasonably includes the common properties. Id. at 419-20 (App. G).

The Court thus leapfrogged from use rights to underlying property ownership without any recognition that two distinctly different interests are involved.

Moreover, the Condominium Act requires that the submission of any land to condominium ownership contain a legal description of such land. §718.104(4)(c). The language in the submission statement of "all other property intended for use in connection therewith is vague and falls far short of a legal description of land sufficient to place it under condominium ownership.

The Third District's interpretation of the declaration of condominium for Tower 2 is also inconsistent with the entire concept of the Quayside community. If the Common Properties were submitted to condominium ownership as part of Tower 2, what happened when the declaration of condominium for Tower 1 was recorded? If that declaration (identical in pertinent part to the Tower 2 declaration, see App. O) submitted the Common Properties to condominium ownership as part of Tower 1, how could they subsequently be submitted to Tower 2 ownership? Futhermore, if the Common Properties are part of Tower 2, then they should be administered by the Tower 2 condominium association and not by HOMEOWNERS' ASSOCIATION. The Covenants, however, provide that HOMEOWNERS' ASSOCIATION "shall have the power and duty to: (a) Maintain, repair and otherwise manage the Common Properties . . . ." (App. B, p. 8).

The Covenants also specifically provide:

> Section 7. Title to the Common Properties. When title to nine hundred eighty four (984) Dwelling Units in The Towers of Quayside have been conveyed to purchasers thereof, or sooner, at Declarant's [Developer's] option, the Declarant [Developer] shall convey to the Homeowners' Association the fee simple title to the Common Properties . . . . (App. B, p. 7)

How could the Developer convey the Common Properties to HOMEOWNERS' ASSOCIATION if the Developer already has made them the property of Tower 2?

The Covenants contemplate that HOMEOWNERS' ASSOCIATION would administer and will eventually hold title to the Common Properties for all owners at Quayside and that these facilities would not be a part of any particular condominium. Yet, rather than interpret all of the documents involved in the creation of Quayside in harmony, the Third District has taken language out of context and interpreted one portion of the document without consideration of its effect on other related documents. When an ageement is evidenced by several separate writings, they all must be construed together. McGhee Interests v. Alexander Nat. Bank, 102 Fla. 140, 135 So. 545 (Fla. 1931); Hughes v. Professional Insurance Corporation, 140 So.2d 340 (Fla. 1st DCA 1962). In this case, when the declaration of condominium is construed in its entirety, and together with The Covenants, it is clear that the Common Properties were never submitted to Tower 2 condominium ownership.

III

THE MEMBERSHIP OF AN ASSOCIATION DOES NOT DETERMINE WHETHER IT IS A "[CONDOMINIUM] ASSOCIATION" WITHIN THE MEANING OF THE CONDOMINIUM ACT.

In Siegel, the Third District appears to have ruled that if, at any point in time, all of the members of an association are condominium unit owners, that association is subject to the Condominium Act. This test has been called the "constituency test" by SIEGEL and the Third District. It is more appropriately called the "membership test." While this construct may have some superficial appeal, it cannot withstand logical scrutiny or examination within the framework of the Condominium Act.

Section 718.103(2) defines an association as "the corporate entity responsible for the operation of a condominium." Section 718.103(15) supplements this definition by indicating that the "'operation of the condominium' includes the administration and management of the condominium property." The definition of a condominium association under the statute thus relates to the function of the association, not its membership list. Nowhere is membership even mentioned as affecting the characterization of the association or the application of the Condominium Act.

Perhaps recognizing the absence of support in the Condominium Act, SIEGEL attempts to rely on judicial precedent

for the "membership test." An examination of his authorities, however, reveals no support for his contention. SIEGEL argues that the decision in Leisureville, established a membership test. It does not. In Leisureville, the Fourth District applied the guidelines discussed in Part I above. This Court in Raines, affirming and expressly approving the Leisureville decision, also directed its inquiry to the source of powers and the function of the association:

> The respondent association derives its powers from its articles of incorporation and from the declarations of restrictions governing both the condominium apartments and the single-family lots. Although the association has broad powers, it is not 'the corporate entity responsible for the operation of a condominium.' Id. at 32 (App. M).

Similarly, the declaratory statements of the DIVISION relied on by SIEGEL, E. Mortimer Hirshorn v. Division of Florida Land Sales and Condominiums, Declaratory Statement (App. P.) and Number One Condominium Association - Palm Greens At Villa Del Ray v. Division of Florida Land Sales and Condominiums, Declaratory Statement (App. Q), aff'd mem., Palm Greens Limited v. Division of Florida Land Sales and Condominiums, 402 So.2d 618 (Fla. 1st DCA 1981), gives no support to his contention. While the DIVISION, in those very limited instances, found a master association to be a condominium association, these were circumstances where there

was something akin to a corporate parent-subsidiary relationship between the master association and the sub-associations. In such instances the master association was, in essence, using the sub-associations as a conduit to govern the common properties and condominium properties. In such circumstances, denominating the master association as the condominium association had no substantative impact on the operation of the individual condominiums.

In the Quayside community, however, HOMEOWNERS' ASSOCIATION acts through its individual members and not through the condominium associations which independently administer the individual condominium properties. The application of the Condominium Act to HOMEOWNERS' ASSOCIATION would therefore create confusion in the administration of the individual condominiums where none exists today.

Furthermore, the focus of the Palm Greens declaratory statement was stated at the outset:

> The Declaration of Condominium provides for the existence of both sub-associations and a "Master Association" and our task is to examine the powers and duties given to the "Master Association" in light of the applicable provisions of Chapter 718, Florida Statutes, the Condominium Act. (emphasis added) (App. Q, p.2).

It is therefore clear that the Division was applying the same principles enunciated in Leisureville and Raines.

The "constituency" or "membership" test invented by SIEGEL and considered by the Third District has no basis in either the

Condominium Act or the cases decided under that law. Not only does the test lack statutory or judicial support, but the application of such a test could produce illogical and even absurd results. If, for example, a charitable or civic association is comprised solely of condominium unit owners, is it governed by the Condominium Act?

The projects in Raines and at Quayside were developed in stages. That is to say, initially there may have been only high rise condominium towers, while a second phase may consist of rental units and a later phase may be single family homes. When dealing with such phased developments, it makes no sense to focus on the membership of an association at a particular instant in time to determine if it is subject to the Condominium Act. If in Raines the initially constructed housing were only the condominium units, would the community association have been subject to the Condominium Act until the single family homes were constructed? We think not.

In Quayside, the project initially consisted of rental housing and condominium units. No one suggested at that time that HOMEOWNERS' ASSOCIATION was a condominium association. However, after conversion of the rental housing to condominiums, SIEGEL claimed HOMEOWNERS' ASSOCIATION had become a condominium association. What will happen if the Developer constructs non-condominium housing on the two unbuilt sites (as it has retained the right to do)? Will HOMEOWNERS' ASSOCIATION

then be automatically transformed back into a non-condominium association?* That is an unworkable arrangement.

The reason many developers choose a phased form of development is to allow themselves the ability to change the character of the development to respond to changing market demands. If development is begun utilizing the condominium form of ownership, the developer should not be restricted as further development of the community progresses. Yet, use of the "membership" test may result in the loss of necessary control over the project well before it is complete. Perhaps it is with this consideration in mind that the Condominium Act looks to the function of the association and not to its membership.

The Third District appears to believe that it is somehow inequitable to allow an association which furnishes facilities solely to condominium unit owners to function outside the provisions of the Condominium Act. Yet that inequity, if it can be characterized as such, was created by the Condominium Act itself. If, therefore, corrective measures are necessary (and we believe they are not), they must come from the legislature and not by way of legislation from the judiciary. In fact, the 1984 Legislature specifically authorized the impaneling of a study commission to determine whether regulation

---

* The Third District specifically declined to answer this question. Siegel, 453 So.2d at 416 n.4 (App. G).

of homeowners associations is appropriate and, if so, to propose the form of regulation. Chapter 84-368, §26, Laws of Fla. (App. R). Clearly, it is outside the province of the Court to impose such regulations without legislative authority.

IV

THE THIRD DISTRICT'S DECISION IS INCONSISTENT WITH THE CONDOMINIUM ACT

Although the Condominium Act permits a single association to administer more than one condominium, (§718.111(1)), it does not permit more than one association to operate a single condominium. Section 718.111(1) provides in part:

> The operation of the condominium shall be by the association, which must be a corporation for profit or a corporation not for profit. (emphasis added)

Section 718.111(2) empowers "the [condominium] association [to] institute, maintain, settle, or appeal actions or hearings in its name on behalf of all unit owners;" §718.111(5) grants "the [condominium] association . . . [an] irrevocable right to access to each unit . . . 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;" §718.111(6) gives "The [condominium] association . . . the power to make and collect assessments and to lease, maintain, repair, and replace the common elements;" §718.111(8) grants "the [condominium] association . . . the power . . . to purchase units in the condominium . . .;" §718.118(10) enables "the [condominium] association" to modify or move any easement for ingress and egress;" and §718.113 provides that "maintenance of the common elements is the

responsibility of the [condominium] association" (emphasis added in all cases). These are the obligations and responsibilities of the individual condominium associations, not of HOMEOWNERS' ASSOCIATION.

The Third District's opinion raises confusion as to which association should administer which property. If the Common Properties are condominium property, they must be part of a condominium, but what condominium? Not Tower 2 because it is administered by its own association and a condominum may have only one association. If the Common Properties are the condominium property of a HOMEOWNERS' ASSOCIATION's condominium, what are the units of that condominium? A condominium must have common elements and units. §718.103(9), All the units at Quayside, however, are part of the already existing condominiums. Consequently, there is no possible configuration that is consistent with both the Third District's opinion and the Condominium Act.

The Developer's intent in creating the Quayside regime was to confine HOMEOWNERS' ASSOCIATION's activities to the Common Properties and the condominium association of Tower 2 to the Tower 2 property. But the Third District has ruled that the Developer's intent is irrelevant and has applied its own standards. These standards do not fit within the framework of the Condominium Act.

V

THE THIRD DISTRICT APPLIED AN IMPROPER STANDARD OF REVIEW IN REVERSING THE DETERMINATION OF THE DIVISION

Section 718.501 of the Condominium Act empowers the DIVISION: "to enforce and ensure compliance with the provisions of this chapter [Condomimium Act]. . . . " It is a well accepted principal of administrative review that an agency's determinations regarding the statute it is charged with enforcing are entitled to great weight and are not to be overturned unless clearly erroneous. State ex rel. Biscayne Kennel Club v. Board of Business Regulation, 276 So.2d 823 (Fla. 1973); Ft. Pierce Utilities Authority v. Florida Public Service Commission, 388 So.2d 1031 (Fla. 1980).

This Court recently, in Pan American World Airways v. Florida Public Service Commission, 427 So.2d 716 (Fla. 1983), stated:

> We have long recognized that the administrative construction of a statute by an agency or body responsible for the statute's administration is entitled to great weight and should not be overturned unless clearly erroneous. Id. at 719.

In reviewing the DIVISION's determination herein, the Third District noted:

> Concededly we are exploring an area where the law is in early stages of development and without clearly defined landmarks. 453 So.2d at 416 (App. G)

Yet, despite what it considered the murky state of the law, the Third District seems to have afforded little deference to the determination of the agency charged with the enforcement of the Condominium Act. Nowhere in its opinion did it find that the DIVISION's determination was clearly erroneous. It has simply substituted its judgment for the judgment of the DIVISION.

VI

THERE IS NO AUTHORITY FOR AN AWARD OF ATTORNEYS' FEES AGAINST ASSOCIATION

SIEGEL requested the Third District to award him attorneys' fees against HOMEOWNERS' ASSOCIATION pursuant to §§718.303(1) and 718.305(5). (App. S). The Third District, without specifying which of these statutes it was relying on, granted SIEGEL's request and awarded him $1,500 in attorneys fees against HOMEOWNERS' ASSOCIATION (App. H).

Section 718.303(1) provides:

> Each unit owner and each association shall be governed by, and shall comply with the provisions of, this chapter, the declaration, the documents creating the association, and the association bylaws. Actions for damages or for injunctive relief, or both, for failure to comply with these provisions may be brought by the association or by a unit owner . . . The prevailing party is entitled to recover reasonable attorneys' fees. . . . (emphasis added).

Thus, Section 718.303(1) only permits the award of attorneys' fees in actions brought "for damages or for injunctive relief, or both." The instant case involved neither an action for damages nor injunctive relief but rather a request to an administrative agency to make a ruling and an appeal from that ruling. Since attorneys' fee statutes are in derogation of the common law, they must be strictly construed. *Sunbeam*

Enterprises, Inc. v. Upthegrove, 316 So.2d 34 (Fla. 1975); Great American Indemnity Corp. v. Williams, 85 So.2d 619 (Fla. 1956). Any attempt by The Third District to broaden the scope of this section was improper.

SIEGEL also sought attorneys' fees under Section 718.302(5). That section provides:

> In any such action brought to compel compliance with the provisions of Section 718.301 [relating to election of unit owner directors and transfer of control of the condominium association], the prevailing party shall be entitled to recover reasonable attorneys fees.

The word "action" connotes a legal proceeding initiated in a court of competent jurisdiction. In State Road Department v. Crill, 128 So. 412 (Fla. 1930), this Court stated:

> In any legal sense "case", "cause", "action" and "suit" are convertible terms, each meaning a proceeding in a court.

See also Bethesda Radiology Associates v. Yaffee, 437 So.2d 189 (Fla. 4th DCA 1983) (an administrative proceeding is not an action). In this case the DIVISION noted in its declaratory statement:

> The DIVISION . . . received a Petition for Declaratory Statement from HERMAN E. SIEGEL on behalf of himself and other unit owners. . . . The Petition seeks the Division's opinion as to the applicability of Chapter 718, Florida Statutes. . . . (App. F, p.1)

This case involves in essence a request for an agency to issue an advisory opinion. HOMEOWNERS' ASSOCIATION was not named by SIEGEL as a party to the preceding. It was only upon DIVISION's notice to HOMEOWNERS' ASSOCIATION that it may submit a response that HOMEOWNERS' ASSOCIATION became involved. No direct relief was sought by SIEGEL against HOMEOWNERS' ASSOCIATION. If SIEGEL has been successful in his quest for a favorable declaratory statement from the DIVISION, he would have not have "compelled compliance" with §718.301 but merely obtained a statement of what the DIVISION believed to be the applicable law. If HOMEOWNERS' ASSOCIATION had ignored the DIVISION's determination that it was a condominium association, a subsequent action could have been brought against HOMEOWNERS' ASSOCIATION "to compel compliance" and in that suit the provisions of §718.302(5) would be applicable. Hence, this proceeding failed to satisfy the requirements of Section 718.302(5) on two counts: it was not an "action" and did not seek "to compel compliance" with §718.301. To the extent that there is any ambiguity on the application of §718.302(5), this section must be strictly construed against any award of attorneys fees. See Leisureville at 474.

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.

DAVID W. TRENCH, ESQ.
MARTIN A. SCHWARTZ, ESQ.
RUBIN BAUM LEVIN CONSTANT
FRIEDMAN & BILZIN
Attorneys for Petitioner, The
Towers of Quayside Homeowners'
Association, Inc.
1201 Brickell Avenue, Suite 314
Miami, Florida 33131
(305)374-7580

By: ______________________

0240f

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed this 4th day of March, 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 STEVEN M. SIEGFRIED, ESQ., Dady, Siegfried & Kipnis, P.A., 9SOO South Dadeland Boulevard, Suite 702 - Dadeland Towers, Miami, Florida 33156-2789.

RUBIN BAUM LEVIN CONSTANT
FRIEDMAN & BILZIN

BY: ____________________
DAVID W. TRENCH