IN THE SUPREME COURT OF FLORIDA

WOODSIDE VILLAGE CONDOMINIUM ASSOCIATION, INC.,

Appellant,

vs.

ADOLPH S. JAHREN, and GARY M. McCLERNAN,

Appellees.
_____/

Supreme Court Case No.: SC00-1030

Second DCA No.: 2D99-504

APPELLEE'S ANSWER BRIEF

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INTRODUCTION

The Appellees understandably and predictably place considerable reliance upon the correctness and propriety of the favorable rulings in the trial and appellate court. Even though they are either distinguishable or in conflict with rulings in other appellate courts, this decision is reasoned and has the effect of protecting the valuable rights of condominium owners who have their rights substantially adversely affected after purchasing in reliance upon rules that were published and in effect at the time.

In essence, the courts below vindicated the Appellees' contention that the removal of the right of these condominium unit owners to lease their condominium units without any provision for compensating them for the value of the right being divested amounted to an action tantamount to a condemnation without just compensation. It was oppressive, confiscatory, arbitrary and unreasonable.

Furthermore, both courts noted that the condominium association permitted two separate classes of ownership to exist: a single owner of multiple units, Abilities of Florida, Inc., was permitted to lease its units on an annual basis, and no other owner was permitted to do so. Notwithstanding the appellant association's contention that it was required to permit this exception pursuant to the settling of a federal lawsuit brought by Abilities, the banning of all other unit owners, particularly and notably including those such as the Appellees who purchased their units for investment purposes at a time when there was no such leasing restriction,

still created a prohibited separate class of owner which was similarly situated but treated differently.

The Appellant condominium association has adequately explained the history of the case to its present posture in the supreme court. The Appellees will utilize the same references and citation method.

STATEMENT OF THE CASE AND OF THE FACTS

Appellees essentially adopt this portion of the Appellant's brief with the following comments:

The Association had, prior to the leasing restriction amendment, permitted leases and renewals thereof by unit owners as a matter of course unless the lessees were found to have violated rules of the Association. Such was not the case with regard to the instant owner/lessor Appellees (Hearing Transcript (TR.), 6), and the sole basis for demanding that they cease leasing their units was the newly enacted leasing restriction. Similarly, the sole basis for allowing Abilities to continue leasing was a special exception applicable only to that particular owner.

Appellees do not question that the Association was indeed attempting to eradicate non-owner occupied condominiums by restricting leasing in such a way as to prohibit annual leases, although Appellees observe that the permitting of leases up to nine months does nothing positive to advance the stated objective of curtailing transient renters, and in fact would seem to be inconsistent and contrary to that goal. Appellees felt that it was improperly confiscatory and arbitrary to take away a right that existed when they purchased their condominiums for investment purposes—a right which was necessary in order for them to implement their investment strategy, in effect forcing them to involuntarily sell their units because they did not regard the restricted leasing provision to be conducive to their desire to own and lease their condominiums on a long-term basis. Short-term rentals, permitted by the new rule changes, would necessitate an entirely different style of

renting. Their investment strategy was negated by the new leasing restrictions, and there was no provision for grandfathering, phasing out over time this type of leasing, or otherwise compensating the Appellees and others similarly situated for the value of their loss.

Indeed, as the Appellant concedes, the effect of the amended leasing restrictions was to encourage permanent owner occupancy by making investment ownership for leasing exceedingly impractical. It is unclear how the 9-month leasing restriction would facilitate that goal–as distinct from an outright ban–inasmuch as it would seem that anyone desiring a short-term rental of nine months or less would necessarily contribute to short-term tenancies and transitory rentals, thereby defeating the Appellant's rationale.

In a footnote (n.1, at 12), Appellant contends that although Appellees claimed that there were approximately one hundred similarly situated absentee condominium owners who were leasing their units, "it is significant that no other absentee investor-owners have come forward in this cause to complain of similar constitutional wrongs or discriminatory treatment." Appellees can only speculate, but it is undoubtedly apparent and well known within the condominium association that this instant litigation has been pending for some time, and these two Appellees have carried the financial burden of the crusade for the benefit of any and all similarly situated. In fact, as noted by the Appellant, during the pendency of this action in the courts, a number of absentee owners have been wisely divesting

themselves of these condominium units. It can only be assumed, and common sense would seem to dictate, that some or all of these sellers believe discretion is the better part of valor. There is no guarantee that the Appellants will ultimately prevail in this legal battle, regardless of their success thus far. A wise "investor" knows when to get out of the market, and this market is indeed shaky. The lack of a groundswell of support or additional parties is no indication of a lack of interest in the subject matter.

SUMMARY OF ARGUMENT

The trial court and the district court of appeal recognized that a condominium association does not have an unbridled right, even by majority vote, to effectively destroy a valuable property right that existed and vested at the time of purchase without making some provision for compensating the owner for the value of the right removed or providing some other kind of remedy. The appellate court rationalized that a condominium owner buys a unit (or multiple units, if permitted) with notice of the permissible uses and restrictions then in place. That sounds a lot like the detrimental reliance law more akin to contract law, but it works. Otherwise, as the appellate court pointed out, the rights, remedies, and rules remain in a constant state of unpredictable flux. There must be some measure of control over the extent to which the association can affect–even destroy--the valuable property rights of the minority.

Yes, Appellees concede that changes in the articles of condominium can and do occur over time and that a condominium is purchased with that presumption in mind. But when a substantial change occurs such as is in issue in this case, an owner is not simply inconvenienced or subjected to some relatively minor rule change intended to benefit the whole of the community—in a change such as this, the owner's very reason for purchasing and owning has been rendered impermissible and the absentee owner is stuck immediately with one or more condominium units that he either must occupy, lease subject to the obviously

unattractive leasing restrictions, or sell (perhaps at a loss). This, the appellate court correctly ruled, requires too much. An effectively total divesting of such a valuable property right without some provision for compensating the owner for the value of the right which the association has usurped is simply wrong. And although before the Second District Court of Appeal ruled in Appellees favor, there was very little law establishing such a result, there also seem to have been few if any cases with facts identical to these. In all of the other "taking" cases at least some remedy was provided to the dispossessed owner. But the Second DCA established a new rule in order to prevent the tyranny of the majority to prevail over the existing rights of the hapless minority, and to hold condominium associations accountable for the destruction of substantial and valuable property rights. Thus, the ruling of the district court of appeal should be affirmed.

Notwithstanding the argument which Appellees raise regarding the confiscatory and arbitrary action of the condominium association, there remains the issue of separate classes of ownership. No matter how it is presented, the association cannot avoid the fact that by its own action it has created a separate class of ownership with regard to Abilities of Florida, and that this owner has a right to lease long-term without regard to the nine-month restriction while no other owner can do so. Regardless of its reason for creating a separate class, it does in fact exist and it cannot continue.

ARGUMENT

I. LIMITATIONS ON CONDOMINIUM UNIT LEASING CONTAINED IN THE DECLARATIONS OF CONDOMINIUM, WHILE PRESUMPTIVELY VALID, ARE NOT PER SE VALID IN EVERY CASE, AND NEITHER THE TRIAL COURT NOR THE DISTRICT COURT OF APPEAL ERRED IN FINDING THE ASSOCIATION'S SUBSTANTIAL ALTERATION OF PREVIOUSLY EXISTING RIGHTS ALLOWING LEASING INVALID

Appellant correctly notes the many cases that distinguish condominium ownership and condominium communities from other types of ownership and other types of residential communities, citing those cases which repeatedly acknowledge that principle. The Appellees do not take issue with those principles. In fact they champion them. They agree with Appellant that "[c]ondominium unit owners comprise a little democratic sub society of necessity more restrictive as it pertains to use of condominium property than may be existent outside the condominium organization." White Egret Condominium, Inc. v. Franklin, 379 So. 2d 346, 350 (Fla. 1979). But there are rules and principles that guide all democratic societies and one of them is that a valuable property right cannot be taken away without just compensation.

The power of condemnation exists just as surely within a condominium organization as it does in the government to take property for a public purpose. But because a condominium association is a social subset and effectively a mini-governmental substitute for those subject to its rules, it has the power to drastically

and adversely affect the rights of existing owners by whatever majority vote is provided for in its documents. It is noteworthy that the "supermajority" that Appellant refers to was changed from 75% to 66 2/3% before seeking to change the article on leasing restrictions. It could have as easily been changed to 50% or some other arbitrary number, if that was what the majority approved. But by the simple expediency of gathering sufficient votes, every absentee property owner who bought one or more units for investment purposes to rent was divested of that otherwise lawful right and once permissible use.

Interestingly, the condominium association clearly has exercised the right to impose rules and regulations on all tenants, be they owners or renters. Clearly, the association can control the quality of life within the property by the imposition and enforcement of reasonable regulations. But instead of seeking to structure and foster this sub society through rules that directly affect the quality of life, it provides for a restriction that fosters owner-occupancy, but which still permits short-term rentals (arguably contradicting the very purpose which it seeks to impose). And it imposes this restriction on all present owners without any regard for the loss that such an act may cause. That appears to be a first in this state, at least in the reported cases.

It is the position of the Appellees that the Appellant condominium association unreasonably applied its rule change to Appellees and others similarly situated because it failed to provide either a grandfathering provision to protect

existing rights, or a time period for those affected to come into compliance by either converting to a partial-year leasing scheme, occupying their properties themselves, letting them sit vacant, or selling them. Appellees agree that the leasing restriction is clearly applicable to those who purchase their condominiums with knowledge of such a restriction, but it is considerably less reasonable–and perhaps unreasonable per se–to divest an owner of such a previously permissible right without just compensation or other alternative to recoup a loss.

Appellant notes (brief, at 22) that the condominium association had an existing policy in place to review and deny extensions of leases to lessees who had been found to be "a nuisance or annoyance" to others in the community. Thus, the association had a means of controlling conduct and refusing continued residency to those renters who breached its rules. Still, Appellant went further than the association in Seagate Condominium v. Duffy, 330 So. 2d 484 (4th DCA 1976), by first reducing the percentage of the majority necessary to make a change in the articles from 75% to 66 2/3%, and then amending the articles to eliminate long-term leases, making no hardship exceptions other than for Abilities, and that exception was not based on any hardship other than a pending lawsuit that the Appellant chose to resolve by settlement.

The facts of Seagate are also somewhat distinguishable, it would seem. There, the court was careful to note that some 96% of the residents favored the change, the nature of the surrounding community was considered, and there was a

provision for granting exceptions in the case of hardship. Arguably, had the Seagate court had facts more akin to those in issue in the present case, a different result may well have occurred. But the Second DCA did note that even the Fourth DCA has not consistently followed its own law in later cases.

Again, the language quoted from Seagate by Appellant (at 24) is instructive. Appellant boldly emphasizes the association's avowed objective to inhibit transiency and to foster a greater degree continuity of residential quality in stressing the reasonableness of such leasing restrictions. But when the Appellant's overall scheme is viewed along with the provisions it has enacted, it is difficult to envision how providing for partial-year transient rentals, and excluding all long-term rentals (no matter how stable and continuous), achieves its declared purpose. Rather, its scheme is unreasonable because it is inherently conflicting. There may have been stable, continuous, acceptable tenants renting for years at the association, only to be dispossessed and ordered to leave at the end of their existing lease, while an owner could permissibly rent to short-term lessees for nine out of 12 months. That seems to be a rather strange way of advancing the declared interest in owner-occupied residency and a decrease in transient occupancy. And the association's assumption that owners would be more prone to care for their units and common areas is just that—with the existing condominium rules holding all residents accountable for their actions and the care of their property, be they owner or renter—is pure speculation. In any event, the association has always had

the means to achieve that end without imposing such a drastic restriction on the property rights of present owners. The destruction of an existing property right to advance a purpose which may be achieved in a significantly less damaging way seems unreasonable, and requires that the party destroying the valuable property right in pursuit of the stated interest compensate the injured party in some proportion to the harm done. Appellees contend, and the district court of appeal and trial court agreed, that the association may have had a legitimate interest, but that it was unreasonably applied. The court specifically found that the condominium association's destruction of a substantive property right without some kind of adequate remedy was "arbitrary, discriminatory and oppressive." 754 So.2d 831, at 833. With this Appellees agree.

The Second District Court of Appeal contrasted its position with that of the 4th District Court of Appeal case of Seagate Condominium v. Duffy, 330 So. 2d 484 (4th DCA 1976), which was factually similar. But the court in Seagate drew attention to unique factors in the community affected, as well as noted that there was a hardship provision to prevent leases of at least four but no more than twelve months. There is no such exception or procedure to avoid the harsh consequences of the amended leasing restriction at issue herein.

But the Second DCA went further than the Seagate court, and the court in Flagler Fed. Sav. & Loan Ass'n of Miami v. Crestview Towers Condominium Ass'n, Inc., 595 So.2d 198 (Fla. 3d DCA 1992), the reasoning of which was also

rejected. The Second District Court of Appeal noted the possibility of the destruction of valuable property rights after they have been acquired, without any compensation or other remedy, under the reasoning of those two cases, and as advanced by Appellant in this case. In fact, were that reasoning to prevail, a condominium unit owner would have no expectation of continuity and in effect could not rely on any restriction or rule contained in the articles of condominium, except those required by law, because the association would be free to create and destroy property interests by whatever majority vote is required.

While not a Florida case, Worthinglen Condo. Unit Owners' Assn. v. Brown, 57 Ohio App.3d 73, 566 N.E.2d 1275 (Ohio 10th DCA 1989) is the clearest case with facts similar to the case now before the court. In that case, as in the instant case, a condominium association amended its condominium declarations to include a provision that prohibited leasing, but the association "grandfathered" any existing lease in effect at the time the restriction was recorded. The Ohio appellate court reviewed existing condominium law in the nation, including Florida law. It agreed with Florida's Seagate case and the majority that such use restrictions must meet a "reasonableness" test. *Id*., at 1277, citing Seagate Condominium Association, Inc. v. Duffy, 330 So.2d 484 (Fla. 4th DCA 1976), and Hidden Harbour Estates v. Basso, 393 So.2d 637, 639 (Fla. 4th DCA 1981).

The Ohio court in Brown posed three questions to determine if a new use restriction is reasonable. In adopting this test, the court hoped to balance the

countervailing interests represented in any condominium dispute. "The first question in applying the test of reasonableness is whether the decision or rule was arbitrary or capricious. This requires, among other things, that there be some rational relationship of the decision or rule to the safety and enjoyment of the condominium." *Id*., at 1277, citing Hidden Harbour Estates, Inc. v. Norman, 309 So.2d 180 (Fla. 4th DCA 1975).

"The second question is whether the decision or rule is discriminatory or evenhanded. This may sound like a 'constitutional' consideration applicable only in case of 'state action,' see Shelley v. Kraemer (1948), 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161, but we believe it protects against the imposition by a majority of a rule or decision reasonable on its face, in a way that is unreasonable and unfair to the minority because its effect is to isolate and discriminate against the minority. It provides a safeguard against a tyranny of the majority." *Id*., at 1278-79.

"The third question is whether the decision or rule was made in good faith for the common welfare of the owners and occupants of the condominium. It is derived from Rywalt v. Writer Corp. (1974), 34 Colo.App. 334, 526 P.2d 316, and Papalexiou v. Tower West Condominium (Ch.Div.1979), 167 N.J.Super. 516, 401 A.2d 280, in which the good faith required of a corporate board of directors is analogized to that required of a condominium board of managers. Both boards owe a duty of good faith in managing property held in common by a group of owners. We believe good faith is an essential ingredient of a reasonable decision

or rule." Id. 33 Ohio App.3d at 57, 514 N.E.2d at 737-738, fn. 8.

It is just this "tyranny of the majority" at the substantive expense of the minority which the Appellees question here. The Second DCA opts for a strict scrutiny test when a valuable property right is virtually destroyed without any remedy whatsoever, and finds that the Appellant condominium association's destruction of the Appellee's property right in leasing does not meet the reasonableness test. The Second District Court of Appeal fashioned a rule of reason to protect the property rights of those who purchased their units in reliance upon a set of expectations and circumstances that were published in the articles of condominium, and upon which they had an equitable continued reliance. As in the other cases cited by Appellees in their appellate brief, grandfathering seems to have been an accepted practice where a new rule imposes a restriction that adversely affects substantive rights. Some of those have to do with children and pets, but all have to do with the justifiable reliance of a purchaser with regard to the substantive rights acquired at the time of purchase.

Appellees are not contending that a condominium association cannot make reasonable changes in its articles for the benefit of its community of interest. They are merely stating that the destruction of a substantive property right without some appropriate remedy is confiscatory, oppressive, unreasonable, arbitrary and discriminatory. No other organization, entity, government, or property owner can retroactively destroy property rights without a remedy, and a condominium

association should not be able to either.

II. USE RESTRICTIONS ARE TO BE APPLIED SO AS NOT TO CREATE MORE THAN ONE CLASS OF UNIT OWNERS, AND THE TRIAL COURT AND DISTRICT COURT OF APPEAL PROPERLY FOUND THAT THE CONDOMINIUM ASSOCIATION DID IN FACT CREATE TWO SEPARATE CLASSES OF CONDOMINIUM OWNERSHIP WITH SUBSTANTIALLY DISPARATE RIGHTS WITH REGARD TO THE ABILITY TO LEASE CONDOMINIUM UNITS.

Stating that it was not essential to its holding, the Second District Court of Appeal also found that the "Abilities Amendment" did in fact create a prohibited separate class of owners who enjoyed greater rights than those not subject to the exception to the leasing restriction. Noting that the separate class resulted from the settlement of a federal lawsuit which was approved by the condominium association, the court held that regardless of the reason for it, a second class was nonetheless approved.

There are in fact two separate classes because Abilities can and does rent its units on an annual basis in derogation of the 9-month rule, and no other unit owner can do so. Every other factor being equal, they are treated differently and their substantive property right to lease continues unabated. That the association may have lost a federal lawsuit and faced greater liability is irrelevant. By that reasoning, the association could have elected to settle the instant lawsuit and grandfather the Appellees only. But that would have created a much more transparent differentiation.

In fact, grandfathering always creates owners with different rights. But they are based upon the status of those owners and the conditions in existence at the time of purchase. All unit owners who acquired their units for investment leasing purposes when such was permissible are dissimilar from any unit owner who purchased at a time when the leasing restriction was in effect. That is a finite number, and since that type of use is no longer permissible, the class of investment buyers cannot grow larger. As those owners sell there units, the class will diminish. The alternative, as the trial judge noted, is for the association to acquire those units at fair market value (based upon the equity investment that the owner has in the unit) and resell them to those who wish to be resident owners, or investment buyers who cannot rent their units for more than nine months per calendar year.

The fact is that Appellant created a second class of owners within the class of similarly situated, pre-amendment owners. There is no such separate class of post-amendment owners, and all of those are treated equally. There is simply no lawful justification for Abilities to be able to continue its leasing practice and no other owner who is similarly situated be able to do the same. The same concern of the association is impacted in either case: the conversion of the community to owner-occupied units, or (paradoxically) the change from annual rental agreements to transitory rental agreements of no more than nine months at a time. Again, that scheme is so obviously flawed in advancing the interests of the association in

eliminating transient occupancy as to be totally inconsistent with its declared legitimate purpose. No one could disagree that a renter who can lease for no more than nine months must move out at least once a year, leaving the unit vacant for at least three months a year. How that advances the theme of residential ownership is lost on Appellees.

CONCLUSION

The key to both of Appellees' points is that unit owners have a right to rely upon the rules in effect at the time of purchase, and when those rules change to their substantial harm, a valuable, vested right is lost. To hold otherwise would be to hold that no right ever vests because it is subject to divestment at any time without any remedy. Abilities retains the right to enter into annual leases with its renters, and the association seeks to preclude any other owner from doing so. Furthermore, if the care for the premises and elimination of transient occupancy are the stated legitimate goals of the association, those ends can be achieved by the creation or enforcement of other, more specific bylaws and rules that address those concerns. Rather than permitting a nine-month occupancy, the association would be better served to require longer leases which are subject to termination for failure to follow the rules of the association. Or it can ban leasing altogether, but not without providing some remedy to those owners who bought their units as investments. One cannot destroy a valuable property right without compensating the owner for its value or making some other provision to make the owner whole.

A private owner should have no greater right than a governmental entity to condemn a vested property right without just compensation. Unless, that is, the court is willing to make the rather draconian conclusion that these rights never do vest and no purchaser can justifiably rely upon the conditions existing at the time of purchase because they are always subject to change. Change is one thing, but the substantial destruction of a valuable property right is something else again.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was delivered to James R. DeFurio, Esq., Becker & Poliakoff, P.A., SunTrust Financial Center, 401 East Jackson Street, Suite 2400, Tampa, FL 33602, by U.S. Mail this January 8th, 2001.

CERTIFICATE OF TYPE

I HEREBY CERTIFY that size and style of type used herein is 14-point proportionately spaced Times New Roman.

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