IN THE SUPREME COURT OF FLORIDA

WOODSIDE VILLAGE CONDOMINIUM ASSOCIATION, INC.,

Appellant,

v.

ADOLPH S. JAHREN, a married man,

Appellee.

_____/

Supreme Court Case No.: SC00-1030

Second DCA No.: 2D99-504

WOODSIDE VILLAGE CONDOMINIUM ASSOCIATION, INC.,

Appellant,

vs.

GARY M. MCCLERNAN, a single person,

Appellee.

_____/

On Discretionary Review from the Florida Second District Court of Appeal

---

APPELLANT'S REPLY BRIEF

(as Revised)

SAMUEL R. MANDELBAUM, Esq. &
JAMES R. DE FURIO, Esq.,
Becker & Poliakoff, P.A.
SunTrust Financial Center
401 E. Jackson Street, Suite 2400
Tampa, FL 33602
Phone: (813) 222-7500
Florida Bar No. 270806
Attorneys for Petitioner Woodside Village

TABLE OF CONTENTS

TABLE OF CITATIONS

STATEMENT OF CASE AND FACTS

The Appellant would rely on its statement of case and facts appearing in its main brief. However, Appellant takes exception to Appellees' rendition of the case and facts, which is devoid of record citations, replete with legal argument, has abundant references to matters outside the record, and relies heavily upon speculation and surmise. As held in Island Harbor v. Department of Natural Resources, 471 So.2d 1380, 1381 (Fla. 1st DCA, 1985), an appellate brief is subject to being stricken where it contains "many unsupported factual assertions and extensive improper legal arguments contained in the statement of facts."

Notwithstanding, in their introductory statement Appellees applaud the Second District's decision below as effectively protecting the valuable rights of condominium owners whose rights are substantially affected after purchasing and in reliance upon rules previously in effect (Appellees' Brief, p. 1). According to Appellees, the courts below had found that the leasing amendment was a divestment "tantamount to a *condemnation* without just compensation" (*Id*). These positions are essentially legal argument without record support.

Appellees incorrectly note that prior to the 1997 leasing amendment the Association "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" (Appellees' Brief, p. 3). Quite the contrary, Section 11.1(b) of the Association's 1979 declaration provides that no owner can lease for *over a year* without board

approval (R63). Thus, when acquiring their units Appellees were on notice that leases over a year's duration could be readily disallowed by the Association's Board.

On Page 3 of their brief Appellees "observe that the permitting of leases up to nine months *does nothing positive* to advance the stated objective of curtailing transient renters, and . . . [is] inconsistent and contrary to their goal." According to Appellees, it's "unclear" how the nine-month leasing restriction would facilitate the goal of encouraging permanent owner occupancy, "as distinct from an outright ban." (Appellees' Brief, p. 4). Rather, Appellees maintain, "*it would* <u>*seem*</u> 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." (Appellees' Brief, p. 4). These assertions completely lack record support, as there is abundant evidence and comparative market data outlining the <u>positive</u> effects of the 1997 amendment upon Woodside's unit values and quality of life.

For example, sworn statements of Appellant's president, Paul Ceffaliao, establish that the "value of his unit was *enhanced*" by the nine-month leasing limitation because "a greater owner occupancy rate means that more people will care for their unit and the common element" (R234). Ceffaliao noted that with *most* of Woodside's seasonal rentals, *the unit owner personally resides* in his or her unit during the *portion* of the year that there is not a seasonal tenant there (R234). The effect of the amendment is to "discourage short term tenancies and high turn-overs," Ceffaliao noted, as the nine-month leasing limitation encourages permanent owner

occupancy (R235). Ceffaliao stated that this has happened in reality, as a majority of the units sold since March 1998 have resulted in a *transformation* from non-owner occupancy to owner occupancy (R235-236).

Additionally, property appraiser Frank Catlett had conducted comparative market research on 43 sales of Woodside condominium units over the preceding 18 months, fortifying the amendment's positive effect (R164-165). Not only did Catlett find there was not any market evidence demonstrating that the 9-month limitation has had an adverse impact on value, but he stressed that there were positive effects on unit values from owners that were actually occupying their units (R166). Catlett concluded that there is no quantitative information indicating that the leasing amendment has had *any* adverse impact on unit sale prices (R166). Thus, there is abundant evidence in the record dispelling Appellees' bare-boned contention of "diminished" values and prices.

Further, Appellees attempt to explain why *no other unit owners* at Woodside have come forward to complain of similar "constitutional wrongs" or "discriminatory treatment" (Appellees' Brief, P. 4). Appellees imagine, without a scintilla of evidentiary or record support, that the reason no other unit owners have ever complained is since Appellees "have carried the financial burden of the *crusade* for the benefit of any and all similarly situated." Just who these other "similarly situated" unit owners are, or may be, is a complete mystery, and this spurious point should be stricken as outside the record.

Appellees next belabor the point with unsupported argument that they "assume" that "a number of absentee owners have been *wisely* divesting themselves of these condominium units" (Appellees' Brief, p. 5). Exploiting this notion further, Appellees argue that "it can only be *assumed*, and *common sense would seem to dictate*, that some or all of these sellers *believe* discretion is a better part of valor" (Appellees' Brief, p. 5). Pyramiding upon these assumptions, Appellees comment that "a wise investor knows when to get out of the market" (Appellees' Brief, p. 5). With no record support for any of these contentions, they should be wholly disregarded. *See e.g.* Raybon v. Burnett, 135 So.2d 228, 230 (Fla. 2d DCA, 1961) (appellate court "will not consider statements made in briefs which are not substantiated by the record").

In sum, Appellees' statement of case and facts is replete with speculation, surmise, postulation and imaginative argument, with little or no support from the record. The absence of record citations in Appellees' factual statement underscores the deficiency. See Hartford Accident v. Travelers, 531 So.2d 1049 (Fla. 1st DCA, 1988) (appellate briefs stricken where parties failed to comply with rule that references be made to appropriate pages of record or transcript). For these reasons, this Court should disregard Appellees' statement of case and facts in the entirety. *See:* Island Harbor, 471 So.2d at 1381 (appellate brief stricken due to "many unsupported factual assertions and extensive improper legal arguments" in statement of facts).

ARGUMENTS IN REPLY

In their summary of arguments Appellees contend that community associations do not have unbridled rights, "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 . . ." (Appellees' Brief, p. 6). The inherent flaw of Appellees' contention is that the Association did nothing to "destroy" any unit owner's property rights. To the contrary, abundant evidence in the record shows that the Association's 1997 leasing amendment was approved by *at least* two-thirds of Woodside's owners, responding to the problems of increasing percentages of rental units, absentee owners, and diminution of values and quality of life at Woodside.

Appellees correctly "concede" that "*changes* in the articles of condominium can and do occur over time and that a condominium is purchased with that presumption [of article changes] in mind" (Appellees' brief, p. 6). Since all owners such as Appellees had purchased their units with full knowledge that the declaration was changeable by a super-majority of owners *at any time*, they cannot now complain of being bound by subsequent leasing limitations. This principle was recently embraced by the Supreme Court of Washington, relying upon Florida condominium law on this point, in Shorewood West Condominium Association v. Sadri, 992 P.2d 1008, 1010-12 (Wash., 2000).

In Shorewood, 992 P.2d at 1010, a condominium association passed a *bylaws* amendment through a 70% majority vote of unit owners which prohibited owners

from renting or leasing their units. The amendment was passed due to widespread concern "about the *devaluation* of the condominium units due to the percentage of units being rented." 992 P.2d at 1010. The Washington Supreme Court expressed approval for the application of new leasing restrictions upon *current* owners:

> "The court found that the amendment restricting leasing does not infringe upon any legal right of the plaintiff's because she had notice before the units were bought that the declaration was changeable. Id. Other cases have held that **a duly-adopted amendment either restricting occupancy or leasing is binding upon condominium owners who bought their units before the amendments were effective**. See . . . *Seagate Condominium v. Duffy*, 330 So.2d 484 (Fla. App., 1976); *Kroop v. Caravelle Condominium*, 323 So.2d 307 (Fla. App., 1975).
>
> The property rights of that owners of individual condominium units have in their units are creations of the condominium statute and are subject to the statute, the declaration and bylaws. **An association may apply a restriction on leasing, if adopted in accordance with the statute, to current owners**."
> --992 P.2d at 1011-12 (Emphasis added).

Appellees nonetheless assert that where there is a "substantial change" to articles of condominium, "as is an issue in this case," it is different than the situation of "some relatively minor rule change intended to benefit the whole of the community" (Appellee's Brief, p. 6). However, in the case *sub judice* a super-majority of *at least two-thirds* of all unit owners had found this leasing limitation necessary. According to Appellee, the 1997 leasing amendment resulted in "effectively *total divesting* of such valuable right" without compensation, which is "simply wrong." Although Appellees properly recognize there is "very little law" supporting the Second District's ruling below, they characterize the ruling as establishing "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." (Appellee's Brief, p. 7). Notwithstanding, the record fails to establish Appellees as a "hapless minority" victimized by "tyranny of the majority."

As noted by this Court in White Egret v. Franklin, 379 So.2d 346, 350 (Fla., 1980), the underlying concept of the condominium is "to promote the health, happiness and peace of mind in the *majority* of the unit owners since they are living in such close proximity and using facilities in common." It is for the foregoing reason, this Court emphasized, that "each unit owner *must give up a certain degree of freedom of choice* which he might otherwise enjoy in separate, privately owned property." White Egret, 379 So.2d at 350.

POINT I

THE SECOND DISTRICT AND THE TRIAL COURT ERRED IN FINDING THAT THE APPELLANT'S 1997 LEASING AMENDMENT WAS "INVALID" AS AN IMPERMISSIBLE AND UNREASONABLE "ALTERATION OF PREVIOUSLY EXISTING RIGHTS," SINCE THE AMENDMENT WAS PROPERLY ADOPTED BY A SUPER-MAJORITY OF ALL UNIT OWNERS, THE APPELLEES WERE AWARE OF THE POSSIBILITY OF SUBSEQUENT AMENDMENTS WHEN THEY PURCHASED THEIR UNITS, AND THE AMENDMENTS WERE PROPER AND REASONABLE LIMITATIONS TO MAINTAIN CONTINUITY AND CHARACTER OF THE RESIDENCE.

Without specific legal authority or support, Appellees maintain that those principles previously set forth by this Court in White Egret are constrained in

"democratic societies" by the principle that "a valuable property right cannot be taken away without just compensation" (Appellees' Brief, p. 8). Appellees compare a condominium association's efforts to place reasonable restrictions on use and occupancy of a condominium unit to the "**power of condemnation**" (Appellees' Brief, p. 8). The 1997 leasing amendment, Appellees argue, is "a drastic restriction on the property rights of present owners," tantamount to a "destruction of an existing property right to advance a purpose which may be achieved in a significantly less damaging way" (Appellees Brief, p. 12). According to Appellees, the condominium association is a "*mini-governmental* substitute" which is bound by the same principles of condemnation and damages as a government entity.

However, as this Court pointed out in White Egret, based upon the amendment powers of condominium associations per F.S. §718.112(3), "the legislature of the state has expressly *approved* the allowance of reasonable restrictions on use and occupancy." In this Court's view, "a condominium restriction or limitation does not inherently violate fundamental right and may be enforced *if it serves a legitimate purpose and is reasonably applied*." 379 So.2d at 350. The Association and its super-majority of owners acted reasonably here and responsibly within their authority in implementing the 1997 leasing amendment.

For the first time in this case's history Appellees suddenly raise a question concerning the Association's amendment of March 15, 1994 (Appellees' brief, p. 9-10), which reduced the requisite approval threshold by eight percent for adoption of

proposed amendments from 75% to 66-2/3% (R118-119). The amendment had been approved at a meeting of members on February 1, 1994, following unanimous adoption of the amendment resolution by a unanimous board and a supermajority of owners (R118-119). As Appellees have never before raised any question or challenge to the slightly reduced super-majority percentage requirement resulting from the 1994 amendment, not in the trial court nor Second DCA, this should not be first considered in a Supreme Court appeal. See: Raybon, 135 So.2d at 230 (Fla. 2d DCA, 1961) (where "the record is silent on [certain] matters," the court "will not consider statements made in briefs which are not substantiated by the record"). And as noted in Wyrembek v. Frey, 231 So.2d 222, 223 (Fla. 4th DCA, 1970):

> "It is not only too late but clearly improper to insert in a brief an expansion of an original claim when there is nothing in the record to establish that such an amendment or claim was ever brought to the attention of the trial court."

In any event, since Appellee McClernan purchased his two units at Woodside in 1996, *two years after* the 1994 amendment was enacted, he has no standing to *twice* raise any questions on that amendment (R152, 118-119). Raybon. In any event, since neither Appellee ever before raised the question before this time, the record is silent as to the *exact* percentage of unit owners who had approved the 1997 leasing amendment in question. While it's clear that over 66-2/3% of all unit owners had approved the nine-month leasing restriction in 1997, it is unknown from the record whether the approval was 70%, 99%, or some percentage in between.

In their brief at page 11 Appellees reject the notion that the Association's objective of inhibiting transience could ever be served. Appellees characterize the Association's 1997 leasing amendment and expressed goals as an "overall scheme" that "is unreasonable because it is inherently conflicting." According to Appellees, "it is difficult to envision how" leasing restrictions could achieve its declared purposes;" "That *seems to be a rather strange way* of advancing the declared interest in owner-occupied residency and a decrease in transient occupancy" (Appellees' Brief, p. 11). Appellees label the idea that owners would be more prone to care for their units and common areas than would transient tenants as "pure speculation." To the contrary, as cited above, the record contains *abundant* evidence demonstrating the *positive* effects of the 1997 leasing amendment.

Attempting to distinguish the Fourth District's Seagate Condominium v. Duffy, 330 So.2d 484 (Fla. 4th DCA, 1976), Appellees point out that Seagate's leasing restriction had a "hardship provision" in the form of an "escape valve." However, the restriction in Seagate had completely barred all leasing of units. (330 So.2d at 486). A *complete* prohibition to leasing as in Seagate, even with an "escape valve," is far more onerous than Woodside's open leasing policy with a nine-month limitation.

Appellees next urge application of the "strict scrutiny test," claiming a "valuable property right is *virtually destroyed"* by "*tyranny* of the majority" (Appellees' Brief, p. 15). This contention completely misconceives the "strict

scrutiny" standard, which the Second DCA erroneously relied upon below. Woodside v. Jahren, 724 So.2d 831,833 (Fla. 2nd DCA, 2000)

As defined by this Court in Lane v. Chiles, 698 So.2d 260, 263 (Fla., 1997), "strict scrutiny" is a standard to be applied in "exceptional cases" where actions by the state "abridge some fundamental right or adversely affect a suspect class." The strict scrutiny test "applies only when the statute operates to the disadvantage of some *suspect class* such as race, nationality, or alienage, or impinges upon a fundamental right . . . protected by our constitution." In re Greenberg, 390 So.2d 40,42 (Fla. 1980).

"In most cases," this Court noted in Lane, "the rational basis standard is used to test the constitutional validity of a state statute." 698 So.2d at 263. For that reason this Court in Lane rejected application of a strict scrutiny standard and instead applied a *rational basis test*, noting in that particular case that fishing is *not* a "fundamental right" and commercial fisherman are *not* a "suspect class." It is the rational basis test, *not* one of strict scrutiny, that is applicable to condominium restrictions and limitations. See White Egret, 379 So.2d at 350 (condominium leasing restriction does not inherently violate fundamental right and may be enforced if it serves a legitimate purpose and is reasonably applied). In any event, it is difficult to imagine how non-disabled investment-owners such as Appellees could qualify as a "suspect class," or that unbridled leasing as Appellees desire could be considered a "fundamental right."

In any event, since the amendment in question neither involved "state action" nor an enactment of a municipal zoning ordinance, it is doubtful that the concepts of "strict scrutiny" or "equal protection" can be implicated to a leasing restriction. As noted by this Court in White Egret, 379 So.2d at 349-350, a condominium "restriction is not a zoning ordinance adopted through *police power*, but rather is a *mutual agreement* entered into by all condominium owners of the complex." Thus, constitutional standards applied to governmental action are not really applicable here.

Nonetheless, the record fails to specifically demonstrate just how Woodside owners' rights in their units are "virtually destroyed." Appraiser Catlett's comparative market analysis refutes the notion that the leasing restrictions have had *any* adverse impact on unit sales prices or values (R165-166). The fact that not a single other owner of the 288 units has complained diminishes Appellees' contention.

Florida law has long recognized the legitimate purpose of leasing restrictions to enhance condominium life and values. Broadly approving lease restrictions the court in Seagate considered the unique challenges of condominium living, declaring that a condominium association's avowed goal – "to inhibit transiency to impart a certain degree of continuity of residence in a residential charter to their community" – is "a reasonable objective." 330 So.2d at 486.

Here, the Association's 1997 leasing limitation is a reasonable, enforceable measure that benefits and effectuates the legitimate purposes of a super-majority of the Association's unit owners. Restrictions upon leasing by a condominium

association are readily enforceable. See Pine Island Ridge Condominium v. Waters, 374 So.2d 1033 (Fla. 4th DCA, 1974). Condominium associations must be able to amend their declarations to respond to problems and changes in their community. This Court should *reverse* the Second District and declare that the amendment is "clothed with a very strong presumption of validity." Flagler, 595 So.2d at 200.

POINT II

THE SECOND DISTRICT AND TRIAL COURT ERRED IN FINDING THAT THE 1997 LEASING AMENDMENTS CONSTITUTED AN ARBITRARY, IMPERMISSIBLE CREATION AND TREATMENT OF "TWO SEPARATE CLASSES" OF CONDOMINIUM UNIT OWNERSHIP, IN VIOLATION OF APPELLEES' RIGHTS TO EQUAL PROTECTION.

In their Brief at page 16 Appellees insist that creation of 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." However, the record fails to support a conclusion that Woodside's 1997 amendments constituted "an arbitrary creation and treatment of two classes of unit owners." 754 So.2d at 835-836.

Appellees argue that the Association's reason for creating the Abilities' exception—to afford fair housing rights and accommodation to Abilities' disabled tenants—has no relevance to whether their rights were violated (Appellees' brief, p. 16). However, their reasoning leads to absurd results whenever required accommodations are made. Upon Appellees' logic, for example, a pet-restricted

condominium complex would always be creating "two separate classes of unit owners" by allowing blind residents to maintain seeing-eye dogs, when non-disabled residents are barred from animal ownership.

Moreover, as noted above, since the leasing amendment did not involve state or municipal action, but rather is derived from mutual agreement, it is doubtful that "equal protection" principles are implicated here. White Egret, 379 So.2d at 349-350.

Appellees insist that Appellant "created a second class of owners," for which "there is simply no lawful justification for Abilities to be able to continue its leasing practice [to handicapped tenants] and no other owner who is similarly situated be able to do the same"(Appellees' brief, p. 17). However, in Lakeside v. Forehand, 513 So.2d 1104, 1006 (Fla. 5th DCA, 1987), the Fifth DCA *rejected* a similar challenge by a unit owner to a leasing restriction on the basis that "other classes of owners" were exempt from the same leasing restriction. Appellees here have no legitimate basis to portray themselves as "victims" of discriminatory treatment, or that contending they are entitled to the same leasing accommodations as Abilities' handicapped tenants.

This Court should reverse and remand the lower court's rulings. *See e.g.* Rodriguez v. Tower Apartments, 416 F.Supp. 304, 307 (D.P.R., 1976) (where some tenants receiving federal subsidies and reduced rents at HUD housing, other full-paying tenants that aren't receiving such federal subsidies *are not denied equal protection*; "it is clearly a rational exercise of the [HUD] secretary's discretion to treat the **two classes** of tenants **differently**").

CONCLUSION

Based upon the foregoing arguments and authorities, Appellant respectfully requests this Honorable Court to *reverse* the courts below and uphold the subject amendment to Appellant's Declaration of Condominium as a valid leasing restriction. This Court should remand this cause with instructions for entry of judgment in favor of Appellant, therein granting mandatory and permanent injunctions against Appellees (1) enjoining tenancies that exceed nine months, (2) removing unauthorized tenants, and (3) compelling Appellees to comply with the terms and conditions of the amendment to Appellant's declaration.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this brief has been sent by regular U.S. Mail to Robert G. Walker, Esq., 1421 Court Street, Suite F, Clearwater, Florida 33756-6147, on this 16th day of February, 2001.

CERTIFICATION OF TYPE

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

Respectfully Submitted,

Samuel R. Mandelbaum, Esq. (FBN 270806)
Becker & Poliakoff, P.A.
401 East Jackson Street, 24th Floor

Tampa, Florida 33602
Tel. (813) 222-7500; Fax (813) 222-7519