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IN THE SUPREME COURT OF FLORIDA

WOODSIDE VILLAGE CONDOMINIUM ASSOCIATION, INC.,

Petitioner,

v.

ADOLPH S. JAHREN, a married man,

Respondent.

_____/

Supreme Court Case No.: SC00-1030

Second DCA No.: 2D99-504

WOODSIDE VILLAGE CONDOMINIUM ASSOCIATION, INC.,

Petitioner,

vs.

GARY M. MCCLERNAN, a single person,

Respondent.

_____/

On Discretionary Review from the Florida Second District Court of Appeal

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PETITIONER'S BRIEF ON JURISDICTION, WITH APPENDIX

(as Revised)

JAMES R. DE FURIO, Esq. and
SAMUEL R. MANDELBAUM, 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

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STATEMENT OF THE CASE AND FACTS

Petitioner is a Florida Condominium Association. Respondents are unit owners in the Petitioner's condominium.

Petitioner, by a vote of its unit owners, passed an leasing amendment to its Declaration of Condominium governing the leasing of units. A lease term could be of no longer duration than 9 months in any 12-month period. The amendment was passed for the purpose of promoting owner occupancy of units. Respondents purchased their units prior to the date of the leasing amendment for the purpose of leasing the units out.

After the date of the amendment, Respondents entered into leases with tenants, wherein the leases had terms longer than 9 months. Thus, the leases appeared to be in direct violation of the leasing amendment.

The Petitioner brought an action against Respondents for injunctive relief. A final summary judgment was entered in favor of the Respondents. Petitioner pursued an appeal to the Florida Second District Court of Appeal, arguing *inter alia* that Flagler Federal v. Crestview, 595 So.2d 198 (Fla. 3rd DCA 1992) *[infra at Exhibit 2]* and Seagate Condominium v. Duffy, 330 So.2d 484 (Fla. 4th DCA 1976) *[infra at Exhibit 3]* both uphold comparable leasing restrictions, contained in a leasing amendment to a declaration of condominium, as *valid* and *enforceable*.

On April 5, 2000, the Second District affirmed the judgment of the trial court, and held: (1) that amendments to Declarations of Condominium that are

adopted subsequent to a unit owner's purchase, and that significantly alter substantial rights that existed in unit owners at the time of their purchase, will be strictly scrutinized as to whether the amendments have unreasonably altered existing rights; (2) The 9-month leasing limitation was arbitrary, discriminatory and oppressive; (3) The amendment deprived the Respondents of a valuable property right existing at the time they purchased their units. Woodside Village v. Jahren, ___ So.2d ___ (Fla.2d DCA, 2000), 2000 WL 345777 *[infra at Exhibit 1].*

The Second District in Woodside expressly "reject[ed] the reasoning" of Seagate, relied upon by Petitioner as controlling precedent for reversal below. It found Petitioner's reliance on Seagate "to be misplaced as we find Seagate to be clearly distinguishable. If not distinguishable, *we are in conflict.*" *[Exhibit 1, page 3].* Similarly, the Second District "rejected" the reasoning and holding in Flagler, concluding that "*the reasoning of the Flagler court is faulty.*" Woodside at Page 5.

The Petitioner has filed a timely notice of its intent to seek the discretionary jurisdiction of this Court under Fla. R. App. P 9.030(a)(2)(A)(iv).

SUMMARY OF ARGUMENT

The Second District in Woodside held that condominium declaration amendments regulating leasing, adopted subsequent to a unit owner's purchase, are *invalid* because they "significantly alter substantial rights" that existed in the unit owner at the time of his purchase. Woodside expressly and directly conflicts with the Third and Fourth Districts in Flagler Federal and Seagate, which decisions both

hold that condominium amendments regulating leasing are *valid*. It also conflicts with this Court's rule in White Egret Condominium v. Franklin, 379 So.2d 346 (Fla.1979), *infra at Exhibit 4*, where this Court held that provisions of a declaration of condominium are "presumptively valid," which can only be invalidated upon a showing that they do not serve a legitimate purpose or are not reasonably applied.

ARGUMENT

The discretionary jurisdiction of the Supreme Court may be sought when a decision of a district court of appeal is "expressly and directly" in conflict with the decision of another district court or the Supreme Court. Fla.R.App.P. 9.030(a)(2)(A)(iv); Burns v. State, 676 So.2d 1366 (Fla. 1996). Conflict exists: (a) where an announced rule of law conflicts with other expressions of the law; or (b) where the rule of law is applied to produce a different result in a case involving "substantially the same controlling facts as a prior case." Jacksonville v. Florida First National Bank, 339 So.2d 632, 633 (Fla. 1976). In the matter *sub judice*, Woodside contains both forms of decisional conflict.

A. THE SECOND DISTRICT DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH CASES OF THE THIRD AND FOURTH DISTRICTS.

The Woodside Court found that the leasing amendment was arbitrary, discriminatory, and oppressive. Woodside at 4. In two factually similar cases, the Third and Fourth Districts in Seagate and Flagler Federal have found otherwise:

(1) Conflict with Flagler Federal v. Crestview Towers--

In Flagler Federal a mortgagee took title to a condominium unit through a judicial foreclosure sale. The first mortgagee had obtained its mortgage *prior to* a amendment to the Declaration that barred unit leasing. Prior to the amendment there had been no significant limitation on leasing. Although the first mortgagee had obtained its title at the judicial sale after the date of the leasing amendment, the court held that its Certificate of Title related back to a date *prior to* the date of the leasing amendment. Thus, Woodside and Flagler Federal similarly involve interests in the unit possessed by the unit owner arising *prior to* the amendment.

The Third District, relying in part on White Egret v. Franklin, 379 So.2d 346 (Fla. 1979), held that the leasing amendment was presumptively valid, and not arbitrary, discriminatory or oppressive. Flagler Federal, 595 So.2d at 200.

The Second District expressly "rejected" the reasoning and holding set forth in Flagler Federal, declaring it to be "faulty." *Woodside at 4*. As a matter of law the Second District found the leasing amendment to be arbitrary, discriminatory and oppressive, but did not find it to be presumptively valid.

Moreover, the Flagler Federal court was persuaded by the argument that the Declaration there had contained provisions that allowed the unit owners by their vote to amend it. Flagler Federal, 595 So.2d at 200. In contrast, Woodside plainly rejected this view:

> "The Flagler court reasoned that inasmuch as the original declaration contained a provision for amending the declaration, FFSL was therefore aware of the recorded declaration and its amendment provisions when FFSL accepted its mortgage and was therefore bound by subsequent amendments to the declaration. *We conclude that the reasoning of the Flagler court is faulty*." -- Woodside at Page 4, infra.

Thus, while these courts have decided cases on substantially similar controlling facts and leasing amendments, they've arrived at conflicting and different results.

(2) Conflict with Seagate Condominium v. Duffy--

In Seagate, *supra*, the Fourth District considered a leasing amendment that barred leasing entirely for "business, speculator, investment or other similar purposes," except the Board of Directors of the Seagate condominium was given the authority to grant hardship exceptions. In no event, however, could an exception be granted for a leasing period of less than 4 months or more than 12 months. This amendment was found to be reasonable and valid.

Notwithstanding, the Second District in Woodside found Seagate to be "clearly distinguishable," and "[i]f not distinguishable, we are **in conflict**." Ultimately the Second District "reject[ed]" the reasoning of Seagate, emphasizing that the Seagate leasing amendment was distinguishable because it had an "escape" provision that would "obviate undue hardship and practical difficulties." However, a conscientious evaluation of the Seagate escape clause reveals that it is just as burdensome as the Woodside leasing amendment.

By the terms of the amended Woodside declaration, units can be leased for up to 9 months every year. No board action is necessary. In comparison, the Seagate leasing amendment is a *blanket prohibition* against investor leasing, coupled with a narrow exception that can only be granted through the unbridled discretion of the Board of Directors. The Second District provides no explanation of how a 9-month leasing limit during any 12-month period guaranteed by the declaration of Woodside Condominium "significantly alters substantial rights" of the unit owner, while a 12-month leasing limit, to be granted *only* by the whims of the Seagate condominium board of directors, does *not*. The attempted distinction between the Seagate and Woodside amendment cannot be substantiated.

The Second District proceeds to find that the Seagate leasing amendment, which prohibited *all leasing*, was justified as a device to promote owner occupancy. In fact, at the trial court level, Woodside filed an affidavit in support of its motion for summary judgment that went unrebutted, stating that the purpose of the amendment was to promote owner occupancy. Thus, the purposes of both the Seagate leasing amendment and the Woodside leasing amendment were *identical*, and it is not possible to distinguish these cases on this ground.

The Second District makes a final attempt to distinguish Seagate by stating that Seagate was a "restraints on alienation" case, while Woodside is "solely a case which interprets rights acquired by reason of purchase of condominium units." Woodside at 5. This, however, is a distinction without a difference.

Seagate and Woodside both passed amendments to their respective condominium declarations that regulated leasing. Both courts were called upon to test the validity of an amendment as it related to a person who acquired an interest in their unit *before* the passage of the amendment. Seagate at 485; Woodside at 2. The Fourth District framed its reasoning within the context of "restraints on alienation", while the Second District chose to avoid the use of this term of art, employing instead original, synonymous language: "significant alteration of substantial rights". Regardless of the words used, the practical results of these cases create *direct conflict*. While the Fourth District found that the right to lease a condominium unit was *not* significant enough to prohibit a condominium association from restricting it, the Second District found that the right to lease a unit was *too* significant to allow the condominium association to restrict the right.

Finally, shedding any pretext that the Seagate case could seriously be distinguished from the case *sub judice*, the Second District in Woodside expressly "rejects" the reasoning of Seagate:

> One of the 'escape' provisions in the Seagate amendment that the Court held might alleviate hardship was the provision that the leasing prohibitions could 'be terminated at any time by a vote of a condominium owners pursuant to the amendment provisions of their Declaration of Condominium.' We *reject the reasoning* that the object to rescind a prior amendment by the ability to further amend a declaration of condominium can breathe life into an amendment that is otherwise arbitrary or discriminatory. Woodside at 4.

All attempts by the Second District to distinguish Seagate are flawed. Each involves a leasing amendment designed to promote owner occupancy, and involving a unit owner who obtained interest in the unit prior to the amendment. Both situations call for the application of law recognizing the significance of the use of real property for investment and leasing purposes. It is plain that Woodside conflicts with Seagate regarding the validity of condominium leasing amendments.

B. THE RULE OF LAW ANNOUNCED BY THE SECOND DISTRICT EXPRESSLY CONFLICTS WITH EXPRESSIONS OF LAW ENUNCIATED BY THE FLORIDA SUPREME COURT IN *WHITE EGRET*.

The Second District held in Woodside . . . .

> "[A]mendments to Declarations of Condominium that are adopted subsequent to a unit owner's purchase and that significantly alter substantial rights that existed in unit owners at the time of their purchase do require a *strict scrutiny* as to whether they have *unreasonably altered existing rights*." Woodside at 2.

Thus, Woodside similarly conflicts with this Court's rule in White Egret, 379 So.2d at 350, where it held that:

> "a condominium restriction or limitation does not inherently violate a fundamental right and may be enforced if it serves a legitimate purpose and is reasonably applied." *[Exhibit 4, infra at Page 6].*

This rule of law has been interpreted to require amendments to Declarations of Condominium *to be clothed with a strong presumption of validity*, which will not be invalidated absent a showing that they're wholly arbitrary in their

application, violative of public policy, or abrogate a fundamental constitutional right. Flagler Federal; Hidden Harbour v. Basso, 393 So.2d 637 (4th DCA 1981).

To the contrary, the opinion of the Second District below failed to *presume* that the leasing amendment was valid, and failed to identify any particular fundamental right or a public policy that was being violated by its enforcement. Instead, the Second District promulgated a completely new test, i.e. invalidity for significant alteration of substantial rights, which is broader and different in scope than in White Egret, Flagler Federal, and Hidden Harbour. While the Second District cites only White Egret in support of this rule, but no language can be found in that decision to suggest that such a broad standard should be applied when testing the validity of condominium amendments.

As a practical matter, Woodside now dispels the notion that amendments to condominium declarations are "presumed valid." Nor is it clear that the infringement of a fundamental right or an overriding public policy must be identified to challenge the validity of an amendment. Thus, Woodside now calls into question the validity of *all* condominium amendments. Does the amendment affect a substantial right that a unit owner had at the time of his purchase? If so, does the amendment significantly alter it? The impediments to enforcement of condominium declarations will expectedly spiral as unit owner litigants argue that the restriction to which their conformity is demanded "significantly alters" a "substantial right" that existed at the time they purchased their unit.

CONCLUSION

A direct and express conflict exist between the Second District's Woodside opinion, the Third District's Flagler Federal and the Fourth District's Seagate, as well as this Court's decision in White Egret. This Court should accept jurisdiction pursuant to Fla. R. App. P. 9.030 (a)(2)(A)(iv) to resolve these conflicts.

Respectfully Submitted,

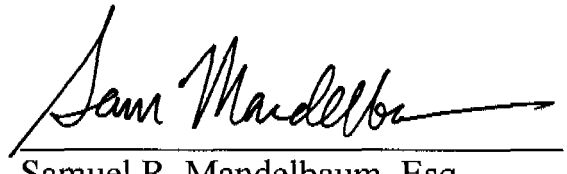
Samuel R. Mandelbaum, Esq.(FBN 270806)
Becker & Poliakoff, P.A.
401 East Jackson Street, 24th Floor
Tampa, Florida 33602
(813) 222-7500

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 5 day of June, 2000.

CERTIFICATION OF TYPE

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



Samuel R. Mandelbaum, Esq.

IN THE SUPREME COURT OF FLORIDA

WOODSIDE VILLAGE CONDOMINIUM ASSOCIATION, INC.,

Petitioner,

v.

ADOLPH S. JAHREN, a married man,

Respondent.

_____/

Supreme Court Case No.: SC00-1030

Second DCA No.: 2D99-504

APPENDIX

TO

PETITIONER'S BRIEF ON JURISDICTION

(as Revised)

Exhibit 1	*Woodside Village v. Jahren*, _____ So.2d _____ (Fla.2d DCA, 2000), 2000 WL 345777
Exhibit 2	*Flagler Federal v. Crestview Towers*, 595 So.2d 198 (Fla. 3rd DCA, 1992)
Exhibit 3	*Seagate Condominium v. Duffey*, 330 So.2d 484 (Fla. 4th DCA, 1976)
Exhibit 4	*White Egret v. Franklin*, 379 So.2d 346 (Fla. 1979)
Exhibit 5	Complaint in *Woodside Village v. Jahren,* Pinellas Circuit Court
Exhibit 6	Adopted Amendments to the Declaration of Condominium of Woodside Village
Exhibit 7	Final Summary Judgment in *Woodside Village v. Jahren,* Pinellas Circuit Court

WOODSIDE VILLAGE CONDOMINIUM ASSOCIATION, INC., Appellant,
v.
Adolph S. **JAHREN** and Gary M. McClernan, Appellees.

No. 2D99-504.

District Court of Appeal of Florida, Second District.

April 5, 2000.

Condominium unit owners brought action against association to challenge amendment to the declarations that prohibited unit owners from leasing units for more than nine months in any 12-month period. The Circuit Court, Pinellas County, Brandt C. Downey, III, J., entered summary judgment in favor of owners. Association appealed. The District Court of Appeal, Campbell, Acting C.J., held that the restriction was invalid as to the owners.

Affirmed.

[1] CONDOMINIUM ⚿13

89Ak13
Restrictions on leasing rights of condominium owners contained in a declaration of condominium do not inherently violate any fundamental right of the unit owners and may be enforced if not arbitrarily or discriminately applied.

[2] CONDOMINIUM ⚿13
89Ak13
Use restrictions contained within declarations of condominiums are clothed with a very strong presumption of validity, which arises from the fact that each individual unit owner purchases his or her unit with the knowledge and acceptance of the restrictions imposed.

[3] CONDOMINIUM ⚿3
89Ak3
Persons affected by a declaration of condominium are entitled to rely upon the rights afforded or those prohibited by the declaration.

[4] CONDOMINIUM ⚿3
89Ak3
Amendments to declarations of condominium that are adopted subsequent to a unit owner's purchase and that significantly alter substantial rights that existed in unit owners at the time of their purchase require a strict scrutiny as to whether they have unreasonably altered existing rights.

[5] CONDOMINIUM ⚿3
89Ak3
An amendment to declarations of condominium is invalid as to a unit owner if it is adopted subsequent to the owner's purchase, significantly alters substantial rights that existed in the owner at the time of the purchase, and is discriminatory, arbitrary, or oppressive in its application to that particular owner.

[6] CONDOMINIUM ⚿13
89Ak13
An amendment to a declaration of condominium that prohibited unit owners from leasing units for more than nine months in any 12-month period was arbitrary, discriminatory and oppressive and, therefore, invalid as to unit owners who bought their units before the amendment and leased them year round, even though some of the leases had expired; the amendment deprived the owners of valuable property right, the unlimited right to lease.

[7] CONDOMINIUM ⚿3
89Ak3
The option to rescind a prior amendment by the ability to further amend a declaration of condominium cannot breathe life into an amendment that is otherwise arbitrary or discriminatory.

*832 James R. DeFurio of Becker & Poliakoff, P.A., Tampa, for Appellant.

Robert G. Walker, Jr., Clearwater, for Appellees.

CAMPBELL, Acting Chief Judge.

Appellant, Woodside Village Condominium Association, Inc. (Woodside), challenges a final summary judgment entered in favor of appellees, Adolph S. Jahren and Gary M. McClernan, each of whom owned individual residential condominium units in Woodside Village Condominiums. We affirm.

The final summary judgment invalidated as to

appellees an amendment to the declaration of condominium that limited the leasing of units to a term of no more than nine months in any twelve-month period. Prior to the adoption of this lease restricting amendment, there were no substantial restrictions on leasing by unit owners so long as the parties did not violate association rules applicable to all unit owners. The original Declaration leasing provision stated:

> 10.3 Leasing. The apartment may be leased or rented without prior approval, for any period of one (1) year or less, and may be leased by successive leases for periods in excess of one (1) year without the approval of the Board of Directors of the Association. In the event apartment owner leases to a lessee for a period of one (1) year or less and the apartment owner and lessee desire to extend that lease for a term of one (1) year or less, said extension shall not require the approval of the Association. However, if the Association finds during the term of any such lease that the lessee has violated the rules and regulations of the Association or the terms and provisions of the Declaration of Condominium of Woodside Village or other documents governing Woodside Village, a Condominium, or that the lessee has otherwise been the cause of a nuisance or annoyance to the residents of Woodside Village, then the Association may so notify lessor of its disapproval of such lessee in writing and lessor shall be precluded from extending any lease to said lessee without the written approval of the Association.

Both appellees had purchased their units prior to the adoption of the lease restricting amendment. Both appellees had purchased their units not to reside in them, but as investment properties for the purpose of leasing. Both appellees had leased their units continuously since their purchase and desired to continue to do so.

[1][2][3] Restrictions on leasing rights of condominium owners contained in a declaration of condominium do not inherently violate any fundamental right of the unit owners and may be enforced if not arbitrarily or discriminately applied. Such restrictions contained in a declaration of condominium in existence at the time unit ***833** owners purchase their units are uniformly upheld. Use restrictions contained within declarations of condominiums are clothed with a very strong presumption of validity, which arises from the fact that each individual unit owner purchases his or her unit with the knowledge and acceptance of the restrictions imposed. Those affected by a declaration of condominium are entitled to rely upon the rights afforded or those prohibited by the declaration. Otherwise, the rights and obligations created by a declaration could be in a constant state of flux. See Constellation Condominium Association, Inc. v. Harrington, 467 So.2d 378 (Fla. 2d DCA 1985); Hidden Harbour Estates, Inc. v. Basso, 393 So.2d 637 (Fla. 4th DCA 1981).

[4][5] General classifications of restrictions contained within declarations of condominium which apply to all owners equally and are not arbitrarily and discriminately applied need not pass a strict scrutiny test. We conclude, however, that amendments to declarations of condominium that are adopted subsequent to a unit owner's purchase and that significantly alter substantial rights that existed in unit owners at the time of their purchase do require a strict scrutiny as to whether they have unreasonably altered existing rights. When such an amendment is determined to be discriminatory, arbitrary or oppressive in its application to any particular unit owner, it will be held invalid as to that owner. See White Egret Condominium, Inc. v. Franklin, 379 So.2d 346 (Fla.1979).

[6] Such is the case before us. When appellees purchased their units for investment leasing purposes, there existed no significant restriction against leasing. When the lease restricting amendment at issue was adopted some leases were permitted, but others that had been specifically authorized were prohibited. Unit owners were prohibited from leasing units for more than nine months in any twelve-month period. Therefore, all unit owners could lease their unit for nine months of every year, yet no owner could lease a unit for twelve months of any year. To apply this restriction to appellees would be arbitrary, discriminatory and oppressive.

The amendment deprived appellees of a valuable property right that existed at the time theypurchased their units. See Mortgage Investors of Washington v. Moore, 493 So.2d 6 (Fla. 2d DCA 1986). Appellant argues that appellees' protected property rights were in the leases that existed at the time the amendment was adopted and therefore, when those

leases expired, appellees no longer had any existing property rights related to leases. We disagree. The substantial property right that appellees acquired when they purchased their units was the unlimited "right to lease." When their unlimited right to lease was prohibited, their substantial property right was destroyed. See Pearlman v. Lake Dora Villas Management, Inc., 479 So.2d 780 (Fla. 5th DCA 1985).

We find appellant's reliance on Seagate Condominium Ass'n, Inc. v. Duffy, 330 So.2d 484 (Fla. 4th DCA 1976) to be misplaced as we find Seagate to be clearly distinguishable. If not distinguishable, we are in conflict. While Seagate appears factually similar to our case, it is not. Seagate is primarily a "restraints on alienation" case. The case before us on the other hand is solely a case which interprets rights acquired by reason of purchases of condominium units under terms of a declaration of condominium that is later substantially amended to destroy those rights without affording any avenue of relief. In Seagate, an amendment to the declaration of condominium was adopted which provided as follows:

> As previously stated, it is the intent that the owner of each unit of Seagate Towers Condominium shall occupy and use such unit as a private dwelling for himself and his immediate family, and for no other purpose including business purposes. Therefore, the leasing of units to others as a regular practice for business, ***834** speculative, investment or other similar purposes is not permitted.
>
> To meet special situations and to avoid undue hardship or practical difficulties the Board of Directors may grant permission to an owner to lease his unit to a specified lessee for a period of not less than four consecutive months nor more than twelve consecutive months.

330 So.2d 484-85. The trial court in Seagate determined that the amendment was both an unreasonable restriction and an unlawful restraint on alienation and awarded damages for lost rents to the unit owners who had sought to invalidate the amendment. The Fourth District reversed, holding as follows:

> It is our opinion that appellant's leasing restriction constitutes neither an unlimited nor unreasonable restraint on alienation. The restriction is not unlimited in several respects: it prohibits only a specific form of alienation, i.e., leasing; under general but not unlimited circumstances, i.e., the condominium association will consider its suspension in hardship for a not unlimited period of time, i.e., because it can be terminated at any time by a vote of the condominium unit owners pursuant to the amendment provisions of their Declaration of Condominium. The restriction, moreover, is reasonable. Given the unique problems of condominium living in general and the special problems endemic to a tourist oriented community in South Florida in particular, appellant's avowed objective--to inhibit transiency and to impart a certain degree of continuity of residence and a residential character to their community--is, we believe, a reasonable one, achieved in a not unreasonable manner by means of the restrictive provision in question. The attainment of this community goal outweighs the social value of retaining for the individual unit owner the absolutely unqualified right to dispose of his property in any way and for such duration or purpose as he alone so desires.

330 So.2d at 486.

Without deciding whether we would approve the amendment in Seagate if it were before us in this appeal, Seagate presents several distinguishing factors. In Seagate, the amendment prohibited all leasing. It did not allow some leases but prohibit others. Inasmuch as it was a prohibition against all leasing, it could be found to promote its stated desired purpose of encouraging owner occupancy. That argument cannot reasonably be made regarding the amendment before us. In addition, as the Fourth District found and apparently relied upon, the Seagate amendment contained "escape" provisions that might alleviate undue hardship and practical difficulties. No such escape clauses are contained in the amendment before us. Finally, we are not confident of the acceptance of Seagate even within the Fourth District. In Hidden Harbour, where the Fourth District held in favor of a unit owner against a condominium association, the court stated its intent to "summarize the law in regard to the enforcement of use restrictions against condominium unit owners," Seagate, however, was neither discussed nor cited. Hidden Harbour, 393 So.2d at 638.

[7] One of the "escape" provisions in the Seagate amendment that the court held might alleviate hardship was the provision that the leasing

prohibitions could "be terminated at any time by a vote of the condominium owners pursuant to the amendment provisions of their declaration of condominium." We reject the reasoning that the option to rescind a prior amendment by the ability to further amend a declaration of condominium can breathe life into an amendment that is otherwise arbitrary or discriminatory.

Similarly, as it applies to the facts before us, we reject the reasoning and holding in Flagler Fed. Sav. & Loan Ass'n of Miami v. Crestview Towers Condominium Ass'n, Inc., 595 So.2d 198 (Fla. 3d DCA *835 1992). In a case with facts at least partially similar to the facts in this appeal before us, the Flagler court upheld, against unit owners, leasing restrictions contained in an amendment to a declaration of condominium. Flagler Federal (FFSL) became the mortgagee on Crestview Towers Condominium (Crestview) units 503 and 216. At the time FFSL acquired its mortgages, the declaration of condominium provided that unit owners could not lease their units without express approval of the association, but excluded from that leasing restriction institutional mortgagees acquiring title. In 1984, after FFSL acquired its mortgages, the declaration of condominium was amended to prohibit leasing entirely and eliminated the previous exclusion for mortgagees acquiring title. In 1987, FFSL acquired title to unit 503 by purchasing the unit at foreclosure sale. When FFSL attempted to lease the unit, the Association objected and FFSL filed suit seeking declaratory and injunctive relief. The trial court granted the Association summary judgment.

The Third District affirmed, holding that even though FFSL's title to unit 503 acquired at foreclosure sale dated back to the date of its mortgage, which predated the objectionable amendment, FFSL was nonetheless bound by the subsequent declarations amendment that completely prohibited leasing. The Flagler court reasoned that inasmuch as the original declaration contained a provision for amending the declaration, FFSL was therefore aware of the recorded declaration and its amendment provisions when FFSL accepted its mortgage and was therefore bound by subsequent amendments to the declaration. We conclude that the reasoning of the Flagler court is faulty. It makes no provision for, nor does it provide an "escape" for, unit owners whose substantial property rights are altered by amendments to declarations adopted after they acquire their property. As the Hidden Harbour court reasoned, such an interpretation leaves a unit owner unable to rely upon restrictions contained in a declaration subject to amendment, leaving the unit owners' property rights in a condition of "continuous flux."

We would address one final matter considered by the trial judge below and objected to by appellant. The trial judge partially based his summary judgment for appellees on a finding that: "Further, the amendment which allowed Abilities of Florida to purchase up to six units caused the creation of a separate class of units from those units that are bound by the amendment which is at issue."

At the time of the hearing on the motions for summary judgment, appellees requested that the trial judge consider what became known as the "Abilities Amendment to the Declaration." Appellant argues that the "Abilities Amendment" was not properly and timely before the trial judge. We would first call attention to the fact that the "Abilities Amendment" is not critical to our affirmance. We do, however, conclude that the matter was properly before the trial judge.

It is conceded by appellant that the "Abilities Amendment" was a valid and existing amendment to the Articles of Condominium. Because the entire Articles of Condominium document was properly before the trial judge for consideration, the "Abilities Amendment" was also before the court. The "Abilities Amendment" resulted from a federal court action that Abilities of Florida, Inc. (Abilities) had filed against appellant, alleging that the lease restricting amendment at issue before us violated the civil rights of the handicapped. Abilities is a corporation that obtains financing through HUD to purchase condominium units that Abilities then leases to handicapped persons. HUD refused to finance Abilities' purchase of six units at Woodside Village Condominiums because of the leasing restriction amendment at issue here. The federal court entered a temporary injunction against appellant barring the enforcement of the lease restricting amendment against Abilities.

*836 Abilities had also sought damages against

appellant. The parties settled the federal lawsuit. One of the conditions of the court-approved settlement was that appellant would pass the "Abilities Amendment" so that Abilities could purchase six units at the condominium that would be excluded from the lease restricting amendment. Appellant presented to its membership the "Abilities Amendment," and it was passed by the membership. Appellant first argues that the "Abilities Amendment" should not be considered because it was not properly before the court. Appellant alternatively argues that the "Abilities Amendment" should not be considered in an equal protection argument regarding an arbitrary creation and treatment of two classes of unit owners because the "class" created by the "Abilities Amendment" resulted from the settlement of a contested claim involving alleged civil rights violations. We reject both appellant's arguments in regard to the "Abilities Amendment" and agree with appellees and the trial court that it created two classes of condominium unit ownership.

Affirmed.

PARKER and CASANUEVA, JJ., Concur.

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nal adoption was not obtained through fraud.

Ruden, Barnett, McClosky, Smith, Schuster & Russell and Lisa C. Reynolds and James George, Miami, for appellant.

Blackwell & Walker and Angela C. Flowers, Charles O. Morgan, Jr., Miami, for appellee.

Before HUBBART, FERGUSON and GODERICH, JJ.

PER CURIAM.

[1–3] After a careful examination of the record, briefs, and applicable law in this case, we conclude that the final order under review should be affirmed. At the outset, we have considerable doubt as to the correctness of the January 9, 1987, circuit court order which set aside the adoption of Kelly Page Lessem as, in our view, it is dubious whether a fraud upon the court was ever shown. Yiannis Baron Antoniadis, the biological father of Kelly, was not an essential party to the original adoption proceeding and was not required to be notified of such proceedings, as his consent to the adoption was not required—given the fact that (a) Kelly was born out of wedlock, (b) Antoniadis' paternity was never established by court proceedings, and (c) Antoniadis never filed an official acknowledgement of his paternity nor supported or adopted Kelly. *DeClaire v. Yohanan*, 453 So.2d 375, 377 (Fla.1984); *In re A.J.B.*, 548 So.2d 906 (Fla. 1st DCA 1989); *Wylie v. Botos*, 416 So.2d 1253, 1255–56 (Fla. 4th DCA 1982); *In re Adoption of Mullenix*, 359 So.2d 65 (Fla. 1st DCA 1978); §§ 63.062(1), 63.122(4)(c), Fla.Stat. (1979). Nonetheless, we are convinced that the circuit court in Hillsborough County had the jurisdiction and authority to reach a different result by entering the subject order and that, accordingly, the trial court below, sitting in probate, was eminently correct in rejecting the aff
by the Estate of
that the January
ously entered an
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orders of another circuit court on the theory that such orders were erroneously entered. *See Eastern Shores Sales Co. v. City of N. Miami Beach*, 363 So.2d 321, 323 (Fla.1978).

[4, 5] Moreover, we are totally unpersuaded that the January 9, 1987, order did not invalidate the adoption decree ab initio as it is plain that the subject order had just that effect. *Bemis v. Loftin*, 127 Fla. 515, 173 So. 683, 688–89 (1937); *Shields v. Flinn*, 528 So.2d 967, 968 (Fla. 3d DCA 1988). Finally, we reach our result herein, as did the Second District Court of Appeal [which affirmed a trial court order denying the Estate of Yiannis Baron Antoniadis' motion to vacate the January 9, 1987, order for lack of standing], "without prejudice to the appellant's ability to initiate an *independent action*" to set aside the subject order on the ground that the original adoption was not obtained through a fraud upon the court. *In re Adoption of Lessem*, 536 So.2d 343, 344 (Fla. 2d DCA 1988) (emphasis added). Unless and until the January 9, 1987, order is set aside in such an independent action, the trial court was plainly required to recognize, as it did, the validity of said order.

Affirmed.

FLAGLER FEDERAL SAVINGS AND LOAN ASSOCIATION OF MIAMI, Appellant,

v.

CRESTVIEW TOWERS CONDOMINIUM ASSOCIATION, INC., Appellee.

No. 91–2078.

District Court of Appeal of Florida, Third District.

Feb. 25, 1992.

Rehearing Denied April 7, 1992.

Mortgagee which had obtained two condominium units brought declaratory

judgment action seeking to determine its right to lease the units. The Circuit Court for Dade County, Joseph P. Farina, J., entered final summary judgment in favor of condominium association finding that the mortgagee was bound by amendment to declaration of condominium, and mortgagee appealed. The District Court of Appeal, Baskin, J., held that mortgagee was bound by amendment to declaration of condominium which prohibited leasing of condominium units.

Affirmed.

1. Deeds ⇐108

Title to condominium unit acquired by quitclaim deed in lieu of mortgage did not relate back to date of mortgage, but, rather, operative date was date of quitclaim deed.

2. Condominium ⇐5

Mortgagee which acquired title to condominium by quitclaim deed at time when amended declaration of condominium was in effect was bound by the terms in the amended declaration, even though amended declaration was not in effect at time mortgagee acquired mortgage.

3. Condominium ⇐5

Title to condominium unit acquired at foreclosure sale related back to date of mortgage.

4. Condominium ⇐5

Mortgagee who obtained title to condominium unit at foreclosure sale was bound by amendment to declaration of condominium, even though title to the unit related back to date of mortgage at which time the amendment was not in effect; mortgagee was aware of recorded declaration of condominium when it issued mortgage, same declaration contained provisions for amending declaration, and mortgagee had option of refusing to issue mortgages on units bound by the declaration.

Keith, Mack, Lewis, Cohen & Lumpkin and Hugh Lumpkin and Cindy J. Mishcon, Miami, for appellant.

Becker & Poliakoff and David H. Rogel, Miami, for appellee.

Before BASKIN, JORGENSON and LEVY, JJ.

BASKIN, Judge.

Flagler Federal Savings and Loan Association of Miami [FFSL] appeals a final summary judgment entered in favor of defendant, Crestview Towers Condominium Association, Inc. [Association], in a declaratory judgment action brought by FFSL to determine its right to lease two condominium units. We affirm.

In June 1970, the developers of Crestview Towers Condominium (Crestview) executed a Declaration of Condominium and recorded it in the public records of Dade County. The Declaration stated that unit owners could not lease their units without the express approval of the Association. The Declaration excluded from the leasing restrictions institutional mortgagees acquiring title. While the exclusion was in effect, FFSL became the mortgagee on Crestview Units 503 and 216.

In June 1984, the Declaration was amended to prohibit leasing entirely. In 1987, FFSL acquired title to Unit 503 by purchasing the unit at a foreclosure sale. It acquired title to Unit 216 when the mortgagors gave FFSL a quitclaim deed in lieu of foreclosure. When FFSL attempted to lease the units, the Association objected, asserting that the amended Declaration proscribed leasing. FFSL filed an action against the Association requesting a declaration of its right to lease and seeking injunctive relief. The trial court granted the Association's motion for summary judgment and entered a final summary judgment. FFSL instituted this appeal.

FFSL argues that neither unit is bound by the amendment to the Declaration. It maintains that unit owners are bound by the rules in effect at the time they acquire title and that its titles to both units relate back to the dates of the mortgages, which predate the amendment. Thus, it asserts, the amendment prohibiting leasing does not apply to its units. FFSL does not

argue that the amendment was not properly adopted by the Association. *Kroop v. Caravelle Condominium, Inc.*, 323 So.2d 307 (Fla. 3d DCA 1975).

[1, 2] First, we find no authority to support FFSL's assertion that title to Unit 216, acquired by a quitclaim deed in lieu of foreclosure, relates back to the date of the mortgage.[1] Thus, the operative date for the purpose of determining the applicability of the Declaration amendment to Unit 216 is the date of the quitclaim deed. When FFSL acquired title by quitclaim deed to this unit in 1987, the amended Declaration was in effect. FFSL was aware of the recorded Declaration and its amendment provisions when it mortgaged the unit and when it acquired the unit.[2] Accordingly, it may not complain that the Declaration amendment is binding. *Providence Square Ass'n v. Biancardi*, 507 So.2d 1366, 1372 (Fla.1987) (condominium purchaser charged with knowledge of recorded documents); *see Kroop*, 323 So.2d at 307 (condominium owner acquired title with knowledge of Declaration and possibility of subsequent amendments).

[3, 4] Furthermore, while FFSL's title to Unit 503, acquired at foreclosure sale, does relate back to the date of the mortgage, *Summerlin v. Orange Shores, Inc.*, 97 Fla. 996, 122 So. 508 (1929); *Mortgage Investors of Washington v. Moore*, 493 So.2d 6 (Fla. 2d DCA 1986), FFSL is nonetheless bound by the Declaration amendment. Restrictions found in a Declaration of Condominium "are clothed with a very strong presumption of validity which arises from the fact that each individual unit owner purchases his unit knowing of and accepting the restrictions to be imposed." *Hidden Harbour Estates v. Basso*, 393 So.2d 637, 639 (Fla. 4th DCA 1981). FFSL was aware of the recorded Declaration of Condominium binding Unit 503 when it issued the mortgage;[3] the same Declaration contained provisions for amending the Declaration. *Providence Square; White Egret Condominium, Inc. v. Franklin*, 379 So.2d 346 (Fla.1979). FFSL had the option of refusing to issue mortgages on units bound by the Declaration. FFSL, like other unit owners who acquired title prior to the amendment, is bound by the Declaration as amended. *Everglades Plaza Condominium Ass'n v. Buckner*, 462 So.2d 835 (Fla. 4th DCA 1984); *Seagate Condominium Ass'n v. Duffy*, 330 So.2d 484 (Fla. 4th DCA 1976); *Kroop; McElveen-Hunter v. Fountain Manor Ass'n*, 386 S.E.2d 435 (N.C.Ct.App.1989), *affirmed*, 328 N.C. 84, 399 S.E.2d 112 (1991); *Hill v. Fontaine Condominium Ass'n*, 255 Ga. 24, 334 S.E.2d 690 (1985); *see Hidden Harbour Estates; Constellation Condominium Ass'n v. Harrington*, 467 So.2d 378 (Fla. 2d DCA 1985); *Ritchey v. Villa Nueva Condominium Ass'n*, 81 Cal.App.3d 688, 146 Cal.Rptr. 695 (1978). *Compare Winston Towers 200 Ass'n v. Saverio*, 360 So.2d 470 (Fla. 3d DCA 1978) (condominium

1. "As a general rule, if a borrower returns his interest in mortgaged property to the lender, such a transfer operates as a merger of the two estates of interests, the lender is vested with *complete title and any rights that he formerly held under the mortgage are terminated.*" *Prigal v. Kearn*, 557 So.2d 647, 648 (Fla. 4th DCA 1990) (emphasis added); *Alderman v. Whidden*, 142 Fla. 647, 195 So. 605, 606 (1940); *Janus Properties v. First Florida Bank, N.A.*, 546 So.2d 785, 786 (Fla. 2d DCA 1989) ("by accepting the warranty deed ... First Florida merged its equitable interest as mortgagee into its *new legal interest as owner of the property.*") (emphasis added); *Floorcraft Distributors, Inc. v. Horne-Wilson, Inc.*, 251 So.2d 138, 140 (Fla. 1st DCA 1971).

2. The legal description to Unit 216, as recited in FFSL's complaint, is:

Unit No. 216, CRESTVIEW TOWERS CONDOMINIUM, a Condominium, *according to the Declaration of Condominium thereof*, as recorded in Official Records Book 6888, at Page 155, of the Public Records of Dade County, Florida; *as amended*, together with all improvements, appliances and fixtures located thereon as described in said mortgage.

(Emphasis added).

3. The legal description to Unit 503, as recited in FFSL's complaint, is:

Unit No. 503, CRESTVIEW TOWERS CONDOMINIUM, a Condominium, *according to the Declaration of Condominium thereof*, as recorded in Official Records Book 6888, at Page 155, of the Public Records of Dade County, Florida; *as amended*, together with all improvements, appliances and fixtures located thereon as described in said mortgage.

(Emphasis added).

association *by-law* invalid when it attempts to impose retroactive regulation). For these reasons, we conclude that the trial court properly entered summary judgment in the Association's favor.

Appellant's remaining points lack merit.

Affirmed.

F.M. and L.M., individually and as parents and natural guardians of A.M., a minor, Petitioners,

v.

OLD CUTLER PRESBYTERIAN CHURCH, INC., and Robert and Vivian Fijnje, as parents and natural guardian of Bobby Fijnje, Respondents.

No. 92-132.

District Court of Appeal of Florida, Third District.

Feb. 25, 1992.

Rehearing Denied April 14, 1992.

Church was sued on behalf of minor alleging that minor was sexually, physically, and emotionally abused while on church premises. The Circuit Court, Dade County, James C. Henderson, J., granted church's motion requesting that all therapy sessions between child and her psychologist be videotaped for purpose of discovery. Parent sought certiorari review. The District Court of Appeal, Jorgenson, J., held that church was not entitled to videotape regular, ongoing therapy sessions between child and her treating psychotherapist for purposes of litigation.

Petition granted; order quashed; matter remanded.

1. Damages ⇐206(7)
Witnesses ⇐219(5)

By bringing suit alleging that minor child was sexually, physically, emotionally abused while on church premises, child placed her mental state at issue and waived her rights to confidentiality concerning her mental condition as it related to litigation; however, church was not entitled to videotape all regular, ongoing therapy sessions between child and her treating psychologist.

2. Damages ⇐206(7)

If either independent examination or examination by party's expert is undertaken, trial court may, under proper circumstances, allow third party to witness that examination or order that examination be recorded. West's F.S.A. RCP Rule 1.360(a)(3).

Stinson, Lyons & Bustamante, P.A., and Ian J. Kukoff and P. Campbell Ford, Miami, for petitioners.

George, Hartz & Lundeen, P.A., and Charles Michael Hartz, Coral Gables and Hicks, Anderson & Blum, P.A., Miami, and Alyssa Reiter, Fort Lauderdale, for respondent Old Cutler Presbyterian Church, Inc.

Michael Seth Cohen, Miami, for respondents Robert and Vivian Fijnje.

Miller, Selig & Kelley and Peter A. Miller, Miami, for respondent Bobby Fijnje.

Before JORGENSON, COPE and GODERICH, JJ.

JORGENSON, Judge.

F.M. and L.M., the parents and natural guardians of A.M., a minor, seek certiorari review of an order of the trial court requiring that all therapy sessions between the child and her psychologist be videotaped. For the reasons that follow, we grant the petition and quash the order under review.

Through her parents, A.M. sued Old Cutler Presbyterian Church, Inc., and the parents of Bobby Fijnje, alleging that Fijnje sexually, physically, and emotionally abused her while she was on the Church premises. A.M. has regular therapy ses-

Accordingly, the summary judgment appealed from is reversed and the cause is remanded for further proceedings consistent herewith.

CROSS, OWEN and DOWNEY, JJ., concur.

SEAGATE CONDOMINIUM ASSOCIATION, INC., a Nonprofit Florida Corporation, Appellant,

v.

William B. DUFFY and Richard G. Duffy, as Executors of the Estate of Alice M. Duffy, Deceased, Appellees.

No. 75–77.

District Court of Appeal of Florida, Fourth District.

April 15, 1976.

Condominium owner brought action against condominium association, challenging lease restriction. The Circuit Court, Palm Beach County, Hugh MacMillan, J., held restriction invalid as unlawful restraint on alienation, and association appealed. The District Court of Appeal, Owen, J., held that lease restriction was limited, contained provision for hardship leases, was reasonable, and did not constitute restraint on alienation.

Reversed and remanded.

1. Perpetuities ⇐6(1)

Rule against restraints on alienation precludes only unlimited or absolute restraints.

2. Estates ⇐11

Unique problems of condominium living necessitate greater degree of control over and limitation upon rights of individual owners than might be tolerated under more traditional forms of property ownership. West's F.S.A. § 711.08(2).

3. Estates ⇐11

Where 96% of unit owners of condominium approved leasing restriction, restriction prohibited only leasing of units for business, speculative, or investment purposes, restriction provided for special situations by allowing board of directors to approve certain specified leases in cases of hardship, and restriction was reasonable in light of special problems endemic to tourist-oriented community, restriction did not constitute unlimited or unreasonable restraint on alienation. West's F.S.A. § 711.08(2).

Frederick L. R. Hill, Boynton Beach, and Guy C. Hill, West Palm Beach, for appellant.

Manley P. Caldwell, Jr., of Caldwell, Pacetti, Barrow & Salisbury, Palm Beach, for appellees.

OWEN, Judge.

Appellant-condominium association appeals from a final judgment declaring certain restrictions upon the leasing of condominium units, contained in its Declaration of Condominium, invalid as an unlawful restraint on alienation and awarding appellee-unit owners damages for rents lost as a result of the enforcement of these restrictions.

The restrictive provision in question was added to the appellant's Declaration of Condominium, pursuant to the amendment procedures prescribed therein, upon an affirmative vote of over ninety-six percent of the unit owners. It provided as follows:

"As previously stated, it is the intent that the owner of each unit of Seagate Towers Condominium shall occupy and

use such unit as a private dwelling for himself and his immediate family, and for no other purpose including business purposes. Therefore, the leasing of units to others as a regular practice for business, speculative, investment or other similar purposes is not permitted.

To meet special situations and to avoid undue hardship or practical difficulties the Board of Directors may grant permission to an owner to lease his unit to a specified lessee for a period of not less than four consecutive months nor more than twelve consecutive months."

Appellee-unit owners inherited their unit from their mother, the original purchaser. They received notice of the condominium association meeting at which the amendment was to be considered, but did not attend this meeting and did not return a proxy ballot mailed to them. In fact, they did not voice any objection to the amendment until well after its passage, when it first became apparent that the restriction would interfere with their plans to lease their unit. At that point, they initiated the instant suit. The trial court determined that the amendment was both an unreasonable restriction and an unlawful restraint on alienation and awarded damages to appellees for lost rents.

[1] The ancient rule against restraints on alienation is founded entirely upon considerations of public policy, specifically, the idea that the free alienability of property fosters economic and commercial development. 2 Archbold's Blackstone, Ch. XIX (1825); Simes & Smith, The Law of Future Interests, § 1135 (2nd ed., 1956); Manning, "The Development of Restraints on Alienation Since Gray," 48 Harv.L.Rev. 373, 403 (1935); IV Restatement, Property, 2129–33, 2379–80 (1944); 61 Am.Jur.2d, Perpetuities and Restraints on Alienation, § 93 (1972). Competing policy considerations, however, have, almost from the inception of the rule, caused exceptions to be carved out of it. Our courts have traditionally undertaken to determine the validity of restraints by measuring them in terms of their duration, type of alienation precluded, or the size of the class precluded from taking.[1] 4A Thompson, Real Property, § 2016 (1961); 61 Am.Jur.2d, Perpetuities and Restraints on Alienation, §§ 102–104(1972). The rule has long been recognized as precluding only *unlimited* or *absolute* restraints on alienation. *Robinson*

1. This approach has been criticized by more modern authorities which have taken the position that the validity of restraints should be weighed more simply in terms of the competing social policies involved. See, e. g., *Gale v. York Center Community Cooperative, Inc.*, 21 Ill.2d 86, 171 N.E.2d 30, at 33 (1960):

"From the authorities here mentioned and many others examined, it would appear that the crucial inquiry should be directed at the utility of the restraint as compared with the injurious consequences that will flow from its enforcement. If accepted social and economic considerations dictate that a partial restraint is reasonably necessary for their fulfillment, such a restraint should be sustained. No retraint should be sustained simply because it is limited in time, or the class of persons excluded is not total, or all modes of alienation are not prohibited. These qualifications lessen the degree to which restraints violate general public policy against restraining alienation of property and should be considered to that extent; but they are not, in themselves, sufficient to overcome it. In short, the law of property, like other areas of the law, is not a mathematical science but takes shape at the direction of social and economic forces in an ever changing society, and decisions should be made to turn on these considerations."

See also, 2 Rohan & Reskin, Condominium Law and Practice, § 10.03[2] (1975); Simes & Smith, The Law of Future Interests, § 1168 (2nd ed. 1956):

"In last analysis a given rule as to restraints on alienation is a resultant of balancing the beneficial character of the purposes of the restraint as against the extent to which alienability would be hindered, if the provision in question were held valid. . . . One may well anticipate that, in the face of new purposes which are definitely in accord with good public policy, the courts may make new exceptions to the old doctrines with respect to direct restraints."

v. Randolph, 21 Fla. 629, 58 Am.Rep. 692 (1885); *Davis v. Geyer*, 151 Fla. 362, 9 So.2d 727 (1942).

The test which our courts have adopted and applied with respect to restraints on alienation and use[2] is reasonableness. E. g., *Points v. Barnes*, 301 So.2d 102 (4th DCA Fla.1974); *Robinson v. Speer*, 185 So.2d 730 (1st DCA Fla.1966); *Blair v. Kingsley*, 128 So.2d 889 (2nd DCA Fla. 1961). The question for us here, therefore, is whether appellant's leasing restriction is reasonable given the context in which it was promulgated, i. e., the condominium living arrangement.

[2] Our courts have on several occasions pointed out the uniqueness of the problems of condominium living and the resultant necessity for a greater degree of control over and limitation upon the rights of the individual owner than might be tolerated given more traditional forms of property ownership. *Hidden Harbour Estates, Inc. v. Norman*, 309 So.2d 180 (4th DCA Fla.1975); *Holiday Out in America at St. Lucie, Inc. v. Bowes*, 285 So.2d 63 (4th DCA Fla.1973); *Sterling Village Condominium, Inc. v. Breitenbach*, 251 So. 2d 685 (4th DCA Fla.1971); *Chianese v. Culley*, 397 F.Supp. 1344 (S.D.Fla.1975). As this court said, in *Hidden Harbour Estates, Inc. v. Norman*, at 181–2:

> ". . . inherent in the condominium concept is the principle that to promote the health, happiness, and peace of mind of the majority of the unit owners since they are living in such close proximity and using facilities in common, each unit owner must give up a certain degree of freedom of choice which he might otherwise enjoy in separate, privately owned property. Condominium 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."

Our Legislature also has expressly recognized the necessity for restrictions upon the use, occupancy and transfer of condominium units. Fla.Stat. § 711.08(2) (1973).

[3] It is our opinion that appellant's leasing restriction constitutes neither an unlimited nor unreasonable restraint on alienation. The restriction is not unlimited in several respects: it prohibits only a specific form of alienation, i. e., leasing; under general but not unlimited circumstances, i. e., the condominium association will consider its suspension in hardship[3] for a not unlimited period of time, i. e., because it can be terminated at any time by a vote of the condominium unit owners pursuant to the amendment provisions of their Declaration of Condominium. The restriction, moreover, is reasonable. Given the unique problems of condominium living in general and the special problems endemic to a tourist oriented community in South Florida in particular, appellant's avowed objective—to inhibit transciency and to impart a certain degree of continuity of residence and a residential character to their community—is, we believe, a reasonable

2. There is a distinction between restraints on alienation and restraints on use. 25 Fla. Jur., Perpetuities and Restraints on Alienation, § 17 (1959). Appellant urges that we apply the reasoning of *Holiday Out in America at St. Lucie, Inc. v. Bowes*, 285 So.2d 63 (4th DCA Fla.1973), wherein we held that a restraint on the *method* of leasing was not in violation of the rule against restraints on alienation. The appellees in that case were not prohibited from conveying a fee or a leasehold interest, but simply restricted in the manner in which they could do so.

3. Appellees in fact had the benefit of this exception for one year, prior to bringing the instant suit, because the condominium association board concluded that since appellees' decedent's estate was still being administered, they did have a "special situation" or "practical difficulties" within the meaning of the provision. Appellees stipulated in the proceedings before the trial court, however, that they no longer fell within any of the enumerated special circumstances at the time that they filed this suit.

one, achieved in a not unreasonable manner by means of the restrictive provision in question. The attainment of this community goal outweighs the social value of retaining for the individual unit owner the absolutely unqualified right to dispose of his property in any way and for such duration or purpose as he alone so desires.

The judgment is therefore reversed and the cause remanded for further proceedings consistent herewith.

REVERSED and REMANDED.

WALDEN, C. J., and DOWNEY, J., concur.

Roger Dean HILL, Appellant,

v.

STATE of Florida, Appellee.

No. 75-170.

District Court of Appeal of Florida, Fourth District.

April 15, 1976.

Defendant was convicted in the Circuit Court, Orange County, B. C. Muszynski, J., of rape, and he appealed. The District Court of Appeal, Downey, J., held that trial court erred in permitting jury to hear witness invoke his Fifth Amendment privilege, and that defendant's Sixth Amendment right to confrontation of witnesses was violated when prosecutor introduced incriminating tape-recorded statement of witness who refused to testify.

Reversed and remanded.

1. Criminal Law ⇐662(1)

It is violation of confrontation clause of Sixth Amendment for trial court to permit jury to hear witness' extrajudicial statement inculpating defendant in criminal trial if witness refuses to testify on Fifth Amendment grounds, and if refusal has not been procured by defendant. U.S.C.A. Const. Amends. 5, 6, 14.

2. Criminal Law ⇐662(4)

Where acquitted codefendant was called as witness in defendant's trial, and such witness' refusal to testify was not procured by defendant, defendant's Sixth Amendment right to confrontation of witnesses was violated by allowing prosecution to play tape-recorded statement in which witness implicated himself and defendant in crime charged. U.S.C.A.Const. Amends. 5, 6.

3. Witnesses ⇐307

Where prosecution and trial court were aware that witness would invoke Fifth Amendment privilege not to testify, it was improper for court to permit jury to hear such witness invoke his Fifth Amendment privilege. U.S.C.A.Const. Amend. 5.

Richard L. Jorandby, Public Defender, and Elliot R. Brooks, Asst. Public Defender, West Palm Beach, for appellant.

Robert L. Shevin, Atty. Gen., Tallahassee, and C. Marie Bernard, Asst. Atty. Gen., West Palm Beach, for appellee.

DOWNEY, Judge.

Appellant was convicted of rape and sentenced to 51 years and 135 days in the State Penitentiary.

Three individuals, including appellant and Carl Allen McDonald, allegedly raped the prosecutrix. The state tried McDonald first, and he was acquitted. Before appellant's trial, the state subpoenaed and interrogated McDonald about the incident in question pursuant to § 914.04 F.S.1973, thereby granting him use immunity. See

WHITE EGRET CONDOMINIUM, INC., Appellant, Petitioner,
v.
Marvin FRANKLIN et al., Appellees, Respondents.

No. 54519.

Supreme Court of Florida.

Dec. 13, 1979.

Rehearing Denied Feb. 19, 1980.

Sale of condominium apartment was made to one purchaser whose application had been approved by condominium association, and he conveyed half his interest in apartment to his brother. Association sought to have transfer set aside on theories that such brother had minor children in violation of restriction not allowing any children under 12 years of age to reside on premises and that permitting two brothers and their families to occupy premises would violate restriction against use of apartment for purpose other than "single family residence." The Circuit Court, Broward County, Gene Fischer, J., entered final judgment setting aside transfer and brothers appealed. The District Court of Appeal, Kovachevich, Elizabeth A., Associate Judge, 358 So.2d 1084, reversed. On direct appeal and on petition for writ of certiorari, the Supreme Court, Overton, J., held that: (1) age restrictions are reasonable means to identify and categorize varying desires of the population in regard to housing, but cannot be used to unreasonably or arbitrarily restrict certain classes of individuals from obtaining desirable housing; (2) restriction against residency by children under age of 12 was reasonably related to lawful objective, and, thus, did not per se violate right to equal protection; (3) enforcement of such restriction against brother was an unconstitutional arbitrary and unequal enforcement of the restriction; (4) condominium agreement's provisions prohibiting use of apartment for any purpose other than as a single-family residence but permitting ownership by more than one individual, were inconsistent and inherently ambiguous, and, thus, the doubt had to be resolved against party claiming right to enforce the covenant; and (5) even if two brothers and their families constituted two separate families, their use of apartment was a "single family use."

Ordered accordingly.

[1] CONDOMINIUM ⚿13

89Ak13
Condominium restriction or limitation does not inherently violate fundamental right and may be enforced if it serves a legitimate purpose and is reasonably applied. U.S.C.A.Const. Amend. 14; West's F.S.A. § 718.112(3).

[2] COVENANTS ⚿1
108k1
In regard to housing, age restrictions are a reasonable means to identify and categorize varying desires of the population but cannot be used to unreasonably or arbitrarily restrain certain classes of individuals from obtaining desirable housing. U.S.C.A.Const. Amend. 14; West's F.S.A. § 718.112(3); National Housing Act, § 1 et seq., 12 U.S.C.A. § 1701 et seq.; Housing Act of 1959, § 202(d)(4), 12 U.S.C.A. § 1701q(d)(4); Housing Act of 1949, § 515(a)(3), 42 U.S.C.A. § 1485(a)(3); Older Americans Act of 1965, § 101 et seq., 42 U.S.C.A. § 3001 et seq.

[3] CONSTITUTIONAL LAW ⚿253.2(3)
92k253.2(3)
Restriction on individual rights on basis of age need not pass "strict scrutiny" test; age is not a suspect classification. U.S.C.A.Const. Amend. 14.

[4] CONSTITUTIONAL LAW ⚿213.1(1)
92k213.1(1)
Test for determining whether an age restriction denies due process or equal protection is whether the restriction under particular circumstances of the case is reasonable and whether it is discriminatory, arbitrary or oppressive in its application. U.S.C.A.Const. Amend. 14; West's F.S.A. § 718.112(3); National Housing Act, § 1 et seq., 12 U.S.C.A. § 1701 et seq.; Housing Act of 1959, § 202(d)(4), 12 U.S.C.A. § 1701q(d)(4); Housing Act of 1949, § 515(a)(3), 42 U.S.C.A. § 1485(a)(3); Older Americans Act of 1965, § 101 et seq., 42 U.S.C.A. § 3001 et seq.

AL LAW ⚿253.2(3)

EXHIBIT
4

92k253.2(3)
Test for determining whether an age restriction denies due process or equal protection is whether the restriction under particular circumstances of the case is reasonable and whether it is discriminatory, arbitrary or oppressive in its application. U.S.C.A.Const. Amend. 14; West's F.S.A. § 718.112(3); National Housing Act, § 1 et seq., 12 U.S.C.A. § 1701 et seq.; Housing Act of 1959, § 202(d)(4), 12 U.S.C.A. § 1701q(d)(4); Housing Act of 1949, § 515(a)(3), 42 U.S.C.A. § 1485(a)(3); Older Americans Act of 1965, § 101 et seq., 42 U.S.C.A. § 3001 et seq.

[5] CONSTITUTIONAL LAW ⚖82(10)
92k82(10)
It is not mandated that all related relatives be allowed to live in whatever single-family facilities they desire. U.S.C.A.Const. Amend. 14; West's F.S.A. § 718.112(3); National Housing Act, § 1 et seq., 12 U.S.C.A. § 1701 et seq.; Housing Act of 1959, § 202(d)(4), 12 U.S.C.A. § 1701q(d)(4); Housing Act of 1949, § 515(a)(3), 42 U.S.C.A. § 1485(a)(3); Older Americans Act of 1965, § 101 et seq., 42 U.S.C.A. § 3001 et seq.

[6] CONSTITUTIONAL LAW ⚖225.5
92k225.5
Condominium agreement's restriction against residency of children under age of 12 was reasonably related to lawful objective, and, thus, did not per se violate right to equal protection. U.S.C.A.Const. Amend. 14; West's F.S.A. § 718.112(3); National Housing Act, § 1 et seq., 12 U.S.C.A. § 1701 et seq.; Housing Act of 1959, § 202(d)(4), 12 U.S.C.A. § 1701q(d)(4); Housing Act of 1949, § 515(a)(3), 42 U.S.C.A. § 1485(a)(3); Older Americans Act of 1965, § 101 et seq., 42 U.S.C.A. § 3001 et seq.

[7] CONDOMINIUM ⚖13
89Ak13
Enforcement of condominium agreement's restriction, which prohibited residency by children under age of 12, against person, to whom one-half interest in condominium was conveyed and who had children under 12 years of age, was an unconstitutional arbitrary and unequal enforcement of the restriction where six other children under the age of 12, including some substantially under such age, were living in two households within the condominium complex. U.S.C.A.Const. Amend. 14.

[8] CONDOMINIUM ⚖13
89Ak13
Condominium agreement provisions, which prohibited use of condominium apartment for any purpose other than as a single-family residence and did not define the term "single family residence" and which permitted ownership of an apartment by more than one individual, were inconsistent and ambiguous, and, thus, the doubt had to be resolved against party claiming right to enforce the covenant against use other than as a single-family residence.

[9] CONDOMINIUM ⚖13
89Ak13
Even if two brothers and their families constituted two separate families, their use of condominium apartment was a "single family use" within meaning of condominium agreement prohibiting use of apartment for any purpose other than as a single-family residence where only one brother and his family actually occupied apartment at any given time.
See publication Words and Phrases for other judicial constructions and definitions.
***347** Welcom H. Watson, Jr., and Michael K. Davis of Watson, Hubert & Davis, Fort Lauderdale, for appellant, petitioner.

James G. Kincaid, Fort Lauderdale, for appellees, respondents.

Gerald W. Pierce of Henderson, Franklin, Starnes & Holt, Fort Myers, for Leisure Technology of Florida, Inc., amicus curiae.

Ralph H. Haben, Jr., Palmetto, for Florida Apartment Ass'n, amicus curiae.

Mark B. Schorr of Becker, Poliakoff & Streitfeld, Fort Lauderdale, for amicus curiae.

OVERTON, Justice.

This case is before this Court on direct appeal and on petition for writ of certiorari from the decision of the Fourth District Court of Appeal reported at 358 So.2d 1084 (Fla. 4th DCA 1978). The district court construed provisions of the United States

Constitution in determining the constitutionality of an express covenant in a condominium agreement which prohibited children under the age of twelve from residing in the condominium premises. In addition, the decision of the district court fails to harmonize with portions of Coquina Club, Inc. v. Mantz, 342 So.2d 112 (Fla. 2d DCA 1977), and Hidden Harbor Estates, Inc. v. ***348** Norman, 309 So.2d 180 (Fla. 4th DCA 1975). We have jurisdiction.[FN1]

FN1. Art. V, s 3(b)(1), (3), Fla.Const.

The principal issue is whether a condominium agreement containing a restriction against residency by children under the age of twelve violates a condominium purchaser's constitutional rights to marriage, procreation, and association, and his right to equal protection of the laws. We find such a restriction is not constitutionally prohibited unless unreasonably or arbitrarily applied. We disagree with the district court's holding that the restriction was unreasonable "per se" and unconstitutional. We do agree, however, that the condominium restriction in the instant case was arbitrarily and selectively applied, and therefore we approve the result.

The recency of the condominium concept, its dependency upon certain use and occupancy restrictions and rules, and the substantial development of retirement communities in this state necessitate a full discussion of this issue.

Two brothers, Marvin Franklin and Norman Franklin, sought to acquire a condominium apartment as a joint vacation home for their respective families when they visited Florida. Although they intended to have dual ownership of this condominium, only one brother's family at a time would be using the apartment. Both brothers filed application for ownership, but only Marvin's application had been approved at the time of the closing. The record reflects that at the closing Norman Franklin's application could not be found. The apartment was conveyed to Marvin Franklin who then transferred one-half ownership to Norman. Ten months after the conveyance, White Egret Condominium, Inc., the condominium association, sought to set aside the transfer of the ownership interest from Marvin to Norman on the grounds that: (1) the defendant, Norman Franklin, had minor children in violation of the restriction which did now allow any children under twelve years of age to reside on the premises, and (2) permitting two brothers and their respective families to occupy and own the premises violated the restriction which did not permit the use of the apartment for any purpose other than as a "single family residence."

The condominium agreement did not define the phrase "single family residence." The agreement did provide that membership could be held in more than one owner's name and that an apartment could be transferred to a member of the "immediate family." In addition, the condominium association conceded that where other requirements and restrictions were satisfied, the owner did not need the association's approval to convey a fee simple interest in the apartment to a brother. The record further reveals that six children under the age of twelve were residents of White Egret Condominium.

In entering its final judgment, the trial court directed Norman to reconvey title of his one-half ownership interest to his brother, Marvin, because said conveyance from one brother to another brother was "void and contrary to the declaration of condominium and other documents related thereto which limit ownership in condominium apartments in White Egret Condominium to a single family." This was the sole ground for the trial court's judgment. The final judgment was not based on the fact that Norman had minor children under the age of twelve, contrary to the condominium declaration.

The district court reversed the trial court's judgment, holding: (1) that the restriction against children under the age of twelve was an unconstitutional violation of the rights to marriage, procreation, and association, and of the right to equal protection of the laws; (2) that the restriction was unreasonable because the condominium association selectively and arbitrarily enforced its application; and (3) that the restriction against the use of the apartment for purposes other than as a single family residence was not violated because the two brothers and their families alternated their stays in the apartment.

***349** Constitutionality of Age Restrictions or Limitations

In holding that the restriction violated an owner's constitutional rights, the district court primarily relied upon three United States Supreme Court decisions: (1) Loving v. Virginia, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967) (holding unconstitutional a statute prohibiting a white person from marrying anyone but a white person); (2) Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965) (holding unconstitutional a statute prohibiting use and distribution of contraceptives); and (3) Skinner v. Oklahoma, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942) (holding unconstitutional a statute requiring sterilization of habitual criminals). In our view, the district court's reliance on these cases was misplaced and not a proper interpretation of them.

The limitation on use of property by requiring single dwelling units and single family use has received constitutional support. In Village of Belle Terre v. Boraas, 416 U.S. 1, 94 S.Ct. 1536, 39 L.Ed.2d 797 (1974), the United States Supreme Court considered the constitutionality of a zoning ordinance which restricted land use to one family dwellings. Family was defined to mean any number of persons related by blood, adoption, or marriage, or not more than two unrelated persons living as a single housekeeping unit. The majority opinion held that this restriction violated no fundamental right, such as the right of association or privacy. The court found the restriction reasonable and rationally related to a permissible state objective, and therefore held it did not violate equal protection. Referring to this ordinance having an appropriate purpose, the court stated:

> A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. This goal is a permissible one within Berman v. Parker, (348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27) Supra. The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.

Id. at 9, 94 S.Ct. at 1541.

On the other hand, there have been cases holding that property and family limitations in zoning ordinances violate constitutional rights. In Moore v. City of East Cleveland, 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977), Mrs. Moore lived in her home with her son and two grandsons who were cousins rather than brothers. A housing ordinance selected categories of relatives who may live together and others who may not, making failure to comply a criminal penalty. Mrs. Moore received a notice of violation from the city stating that one grandson was "an illegal occupant" and directing her to comply with the ordinance. When she failed to remove her grandson from her home, the city filed a criminal charge. A motion to dismiss was denied, and Mrs. Moore was convicted and sentenced to five days in jail and a $25 fine. The United States Supreme Court held that the ordinance could not be justified as serving the city's interests of preventing overcrowding and minimizing traffic and parking congestion. The court further held that the substantive due process right to live together as a family was not confined to the nuclear family, since the constitution's protection of the sanctity of the family was deeply rooted in the nation's history and tradition and since such tradition was not limited to respect for the bonds uniting the members of the nuclear family but extended as well to the sharing of their household with uncles, aunts, cousins, and especially grandparents. A concurring opinion by Justice Stevens, whose vote was necessary for a decision, stated: "The city has failed to totally explain the need for a rule which would allow a homeowner to have two grandchildren live with her if they are brothers, but not if they are cousins." In Molino v. Mayor and Council of Glassboro, 116 N.J.Super. 195, 281 A.2d 401 (1971), a zoning ordinance had the effect of keeping children out of the city for the admitted purpose of avoiding taxes and more schools. ***350** The court held the ordinance violative of the equal protection clause. A review of the facts in both Moore and Molino clearly establishes an unreasonable and arbitrary application of the governmental police power.

In the instant case, the restriction is not a zoning ordinance adopted under the police power but rather a mutual agreement entered into by all condominium apartment owners of the complex. With this type of land use restriction, an individual can choose at the time of purchase whether to sign an agreement with these restrictions or limitations. Reasonable restrictions concerning use, occupancy, and transfer of condominium units are necessary for the

operation and protection of the owners in the condominium concept.

[1] In Hidden Harbor Estates, Inc. v. Norman, 309 So.2d 180, 181-82 (Fla. 4th DCA 1975), Judge Downey explained the necessity for restrictions on condominium living:

> It appears to us that inherent in the condominium concept is the principle that to promote the health, happiness, and peace of mind of the majority of the unit owners since they are living in such close proximity and using facilities in common, each unit owner must give up a certain degree of freedom of choice which he might otherwise enjoy in separate, privately owned property. Condominium 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.

In addition, the legislature of this state has expressly approved the allowance of reasonable restrictions on use and occupancy. See s 718.112(3), Fla.Stat. (1977). Therefore, it is our view that 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.

The issue of age restrictions in condominiums and housing developments is a new legal issue although it has recently been addressed by courts in other jurisdictions and referred to in two decisions of our district courts.[FN2] In Hidden Harbor Estates, Inc. v. Norman, the condominium association adopted a rule prohibiting the use of alcoholic beverages in certain areas of the common elements. A unit owner sought to enjoin the enforcement of the rule. The district court held that this was a reasonable rule, citing examples of other restrictions on individual rights which are necessary for the condominium concept: "(N)o sale may be effectuated without approval; no minors may be permanent residents; no pets are allowed." 309 So.2d at 182. The limitation on minors being permanent residents was quoted with apparent approval although it was not an issue in the cause. In Coquina Club v. Mantz, 342 So.2d 112 (Fla. 2d DCA 1977), the condominium board denied an application for the purchase of a unit by a family with two children under twelve years of age. Because of this denial, the unit owner sought to require the condominium to either purchase the unit or provide a purchaser for the apartment at his price. The district court noted that the condominium legislation in this state specifically allowed reasonable restrictions, and that age restrictions had withstood constitutional attack in other jurisdictions, citing Riley v. Stoves, 22 Ariz.App. 223, 526 P.2d 747 (1974). See Annot., 68 A.L.R.3d 1239 (1976).

> FN2. See generally 7 Stetson Intramural L.Rev. 193 (Spring 1978).

In Riley the court upheld a covenant in a deed restricting occupancy in a mobile home subdivision to persons twenty-one years or older. The court stated: "The obvious purpose is to create a quiet, peaceful neighborhood by eliminating noise associated with children at play or otherwise." Id. at 228, 526 P.2d at 752. The court noted there were other areas in the mobile home park for families with children. The court therefore found this restriction reasonably related to a legitimate purpose and declined to hold that its enforcement violated the defendant's right to equal protection.

***351** In Ritchey v. Villa Nueva Condominium Ass'n., 81 Cal.App.3d 688, 146 Cal.Rptr. 695 (Ct.App.1978), the issue before the court was the validity of a condominium bylaw restricting occupancy of condominium units to persons eighteen years of age or older. The court held that age restrictions in condominium documents were not unreasonable "per se," and that it was a reasonable restriction upon an owner's right to sell or lease his condominium unit.

We agree with these courts that age limitations or restrictions are reasonable means to accomplish the lawful purpose of providing appropriate facilities for the differing housing needs and desires of the varying age groups. We reject the view that Moore v. City of East Cleveland absolutely prohibits this type of limitation. We note that Congress has established age limitations in recognizing the need for senior citizen housing by including an age minimum of sixty-two years for occupancy of certain housing developments. See 12 U.S.C. s 1701, Et seq. (1969); 42 U.S.C. s 3001, Et seq. (1973); 12 U.S.C. s 1701q(d)(4) (Supp.1979) (minimum age); and 42 U.S.C. s 1485(a)(3) (1978).

[2][3][4][5] The urbanization of this country

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT OF FLORIDA,
IN AND FOR PINELLAS COUNTY, FLORIDA
CIVIL DIVISION

WOODSIDE VILLAGE
CONDOMINIUM ASSOCIATION, INC.,

Plaintiff,

vs. CASE NO.:

ADOLPH S. JAHREN, a married man,

Defendant.

_____/

COMPLAINT

Plaintiff, WOODSIDE VILLAGE CONDOMINIUM ASSOCIATION, INC., sues the Defendants, and in support thereof would allege as follows:

COUNT I

1. This is an action for injunctive relief wherein the amount in controversy is of a value in excess of $15,000 exclusive of attorney's fees and costs.

2. Plaintiff is a condominium association pursuant to Chapter 718, Florida Statutes.

3. Defendant owns real property in Pinellas County, Florida, described as follows:

> That certain condominium parcel described as Unit 1203D, Building 3, Woodside Village, a Condominium, and an undivided interest or share in the common elements appurtenant thereto, in accordance with and subject to the covenants, conditions, restrictions, easements, terms and other provisions of the Declaration of Condominium of Woodside Village, a Condominium, as recorded in Official Records Book 4816, page 1517, and amendments thereto, and the Plat thereof recorded in Condominium Plat Book 34, page 78-86, Public records of Pinellas County, Florida. A/K/A 4215 East Bay Drive, #1203D, Clearwater, Florida 33764.

EXHIBIT 5

4. The Declaration of Condominium for Plaintiff states in pertinent part as follows:

"10. Use Restrictions....

> Paragraph 10.3 Leasing. All leases, subleases or assignments of leases and all renewals of such agreements shall be first submitted to the Board of Directors for approval or disapproval. ... No unit may be rented for more than a total of nine (9) months in any twelve (12) month period. ...

5. The Defendant is in violation of the above referenced portion of the Declaration of Condominium in that Defendant submitted a lease application or renewal, a copy of which is attached hereto as Exhibit "A" for a lease term expiring on November 11, 1997. No lease application or renewal has been filed for any term after said lease expired.

6. The Plaintiff has given notice to the Defendant of this violation, but the Defendant refuses to comply with the terms and conditions of the Declaration as herein above described. See Exhibit "B."

7. Without injunctive relief, the Plaintiff will suffer irreparable harm, because without injunctive relief the Defendant's violation of the Declaration will continue prospectively. Additionally, the Plaintiff will be estopped from enforcing this portion of its Declaration against this Defendant or any other unit owner in the condominium.

8. Section 13.3 of the Declaration of Condominium provides as follows:

> Costs and Attorneys' Fees. In any proceeding arising because of an alleged failure of an apartment

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TELEPHONE (813) 443-3781

owner to comply with the terms of the Declaration, By-Laws, Management Agreement and Rules and Regulations adopted pursuant thereto, and said documents as they may be amended from time to time, the prevailing party shall be entitled to recover the costs of the proceeding and such reasonable attorneys' fees as may be awarded by the Court, provided no attorneys' fees may be recovered against the Association in any such action.

9. Additionally, Chapter 718, Florida Statutes, provides for prevailing party's attorney's fees.

10. Plaintiff has agreed to pay counsel a reasonable fee and Plaintiff is entitled to an award of attorney's fees and costs against the Defendant.

WHEREFORE, Plaintiff requests from this Honorable Court a judgment as follows:

A. A mandatory injunction removing the unauthorized tenant from the Defendant's unit;

B. A permanent injunction against this Defendant compelling the Defendant to henceforth comply with the terms and conditions of the above referenced portion of the Declaration of Condominium prospectively;

C. An award of attorney's fees and costs; and

D. Such other and further relief as the Court may deem just and proper.

COUNT II

11. This is an action for injunctive relief wherein the amount in controversy is of a value in excess of $15,000 exclusive of attorney's fees and costs.

12. Plaintiff is a condominium association pursuant to Chapter 718, Florida Statutes.

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TELEPHONE (813) 443-3781

13. Defendant owns real property in Pinellas County, Florida, described as follows:

> That certain condominium parcel described as Unit 1105D, Building 1 Woodside Village, a Condominium, and an undivided interest or share in the common elements appurtenant thereto, in accordance with and subject to the covenants, conditions, restrictions, easements, terms and other provisions of the Declaration of Condominium of Woodside Village, a Condominium, as recorded in Official Records Book 4816, page 1517, and amendments thereto, and the Plat thereof recorded in Condominium Plat Book 34, page 78-86, Public records of Pinellas County, Florida. A/K/A 4215 East Bay Drive, #1105D, Clearwater, Florida 33764.

14. The Declaration of Condominium for Plaintiff states in pertinent part as follows:

"10. Use Restrictions....

> Paragraph 10.3 Leasing. All leases, subleases or assignments of leases and all renewals of such agreements shall be first submitted to the Board of Directors for approval or disapproval. ... No unit may be rented for more than a total of nine (9) months in any twelve (12) month period. ...

15. The Defendant is in violation of the above referenced portion of the Declaration of Condominium in that the unit is occupied by someone other than the owner without Board approval. Alternatively, the unit is vacant but the Defendant has represented that he will not abide by the portion of the Declaration quoted above.

16. The Plaintiff has given notice to the Defendant of this violation, but the Defendant refuses to comply with the terms and conditions of the Declaration as herein above described. See Exhibit "B."

17. Without injunctive relief, the Plaintiff will suffer

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TELEPHONE (813) 443-3781

irreparable harm, because without injunctive relief the Defendant's violation of the Declaration will continue prospectively. Additionally, the Plaintiff will be estopped from enforcing this portion of its Declaration against this Defendant or any other unit owner in the condominium.

18. Section 13.3 of the Declaration of Condominium provides as follows:

> Costs and Attorneys' Fees. In any proceeding arising because of an alleged failure of an apartment owner to comply with the terms of the Declaration, By-Laws, Management Agreement and Rules and Regulations adopted pursuant thereto, and said documents as they may be amended from time to time, the prevailing party shall be entitled to recover the costs of the proceeding and such reasonable attorneys' fees as may be awarded by the Court, provided no attorneys' fees may be recovered against the Association in any such action.

19. Additionally, Chapter 718, Florida Statutes, provides for prevailing party's attorney's fees.

20. Plaintiff has agreed to pay counsel a reasonable fee and Plaintiff is entitled to an award of attorney's fees and costs against the Defendant.

WHEREFORE, Plaintiff requests from this Honorable Court a judgment as follows:

A. A mandatory injunction removing the unauthorized tenant from the Defendant's unit;

B. A permanent injunction against this Defendant compelling the Defendant to henceforth comply with the terms and conditions of the above referenced portion of the Declaration of Condominium prospectively;

C. An award of attorney's fees and costs; and

LAW OFFICES
BECKER & POLIAKOFF, P.A. • 33 NORTH GARDEN AVENUE, STE. 960 • CLEARWATER, FL 34615-4116
TELEPHONE (813) 443-3781

D. Such other and further relief as the Court may deem just and proper.

BECKER & POLIAKOFF, P.A.
Attorneys for
33 North Garden Avenue
Suite 960
Clearwater, FL 33755-4116
(813) 443-3781

By_____
James R. De Furio
Florida Bar #0364061

PINELLAS COUNTY FLA.
OFF.REC.BK 9633 PG 1177

ADOPTED AMENDMENTS TO THE DECLARATION OF CONDOMINIUM OF WOODSIDE VILLAGE, A CONDOMINIUM

Additions indicated by underlining.
Deletions indicated by ~~strike-throughs~~.
Unaffected language indicated by "...".

1. Proposed amendment to Section 10.3 of the Declaration, as follows:

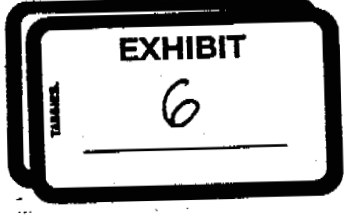
10. Use Restrictions. ...

10.3 Leasing. All leases, subleases or assignments of leases and all renewals of such agreements shall be first submitted to the Board of Directors for approval or disapproval. No record owner or owners of units in this condominium shall rent or lease more than three of their units at any one time. ~~After the date of recording this amendment in the Public Records, n~~No lease of an owner or owners who have three units rented or leased shall be approved by the Association. No unit may be rented for more than a total of nine (9) months in any twelve (12) month period. However, if the Association finds during the term of any such lease that the lessee has violated the rules and regulations of the association or the terms and provisions of the Declaration of Condominium of Woodside Village or other documents governing Woodside Village, a Condominium, or that the lessee has otherwise been the cause of a nuisance or annoyance to the residents of Woodside Village, then the association may so notify lessor of its disapproval of such lessee in writing and lessor shall be precluded from extending any lease to said lessee without the written approval of the Association.

2. Proposed amendment to Section 10.3, Declaration of Condominium, to add the following new paragraph:

10.3 Leasing. ...

No owner shall enter into a lease, rental agreement, or other similar convevance of use of a unit during the first twelve (12) months of ownership of that unit.



3. Proposed amendment to Section 11.2(c), Declaration of Condominium, as follows:

11.2 Approval by Association. The approval of the Association which is required for the transfer of ownership of apartments shall be obtained in the following manner.

...

(c) ~~Approval of Corporate Owner or Purchaser~~ Prohibition Against Corporate Ownership. Inasmuch as the condominium may be used only for residential purposes and a corporation cannot occupy an apartment for such use ~~if the apartment owner or purchaser of an apartment is a corporation, the approval of ownership by the corporation may be conditioned by requiring that all persons occupying the apartment be also approved by the association~~ no unit may be sold to a corporation, partnership, or other business entity, with the sole exception that the association may take title to a unit pursuant to the Governing Documents of the Condominium and the Association.

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT OF FLORIDA,
IN AND FOR PINELLAS COUNTY, FLORIDA
CIVIL DIVISION

CONSOLIDATED CASE NO.: 98-003090-CI-20

WOODSIDE VILLAGE
CONDOMINIUM ASSOCIATION, INC.,

Plaintiff,

vs.

ADOLPH S. JAHREN, a married man,

Defendant.
_____/

WOODSIDE VILLAGE
CONDOMINIUM ASSOCIATION, INC.,

Plaintiff,

vs.

GARY M. McCLERNAN, a Single Person,

Defendant.
_____/

FILED
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FINAL JUDGMENT ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

THIS CAUSE came to be heard upon the Plaintiff's Motion for Summary Judgment and Defendants' Motion for Summary Judgment. Upon consideration of the filings, arguments of counsel, and otherwise being fully advised in the premises, the Court finds as follows:

1. The Plaintiff Condominium Association has authority to pass an amendment restricting the leasing of units. However, the amendment at issue in this case, namely, the amendment which limits the leasing of a unit to nine months during any twelve-month period creates more than one class of ownership because it cannot be applied retroactively against unit owners who purchased their unit prior to the date of the amendment. Constellation Condominium

EXHIBIT 7

Association v. Harrington, 467 So. 2d 378 (Fla. 2d DCA 1985); Pearlman v. Lake Dora Villas Management, Inc., 479 So 2d 781 (Fla. 2d DCA 1985).

2. Further, the amendment which allowed Abilities of Florida to Purchase up to six units caused the creation of a separate class of units from those units that are bound by the amendment which is at issue.

THEREFORE, it is,

ORDERED AND ADJUDGED, as follows:

1. The Plaintiff's Motion for Summary Judgment is denied and the Defendants' Motion for Summary Judgment is granted with the following proviso:

2. The Plaintiff will have 30 days to reconsider whether or not it wishes to enforce this amendment retroactively. If the Plaintiff does not reconsider, the Plaintiff shall purchase the Defendants' units for the price at which the Defendants purchased each unit plus 1% for each year that the Defendants owned each unit. Additionally, said purchase price will include the costs associated with any remodelling the Defendants have done after the purchase of a unit, provided that those costs are proven by affidavit. Plaintiff shall have an opportunity to contest, at a hearing, with notice to the Defendants, the purchase price and cost of improvements claimed by the Defendants.

DONE AND ORDERED this 11th day of January, 1999, Pinellas County, Florida,

Honorable Brandt C. Downey, III

cc: James R. De Furio, Esq.
Robert G. Walker, Esq.

c:\docs\woodside\adolph\fnl-jgmc