STATE OF FLORIDA
DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION
DIVISION OF FLORIDA LAND SALES, CONDOMINIUMS, AND MOBILE HOMES
IN RE: PETITION FOR ARBITRATION

Barbara R. Tilney,

Petitioner,

v. Case No. 02-5651

Association of the Fountains, Inc.,

Respondent.
_____/

SUMMARY FINAL ORDER

Comes now, the undersigned arbitrator, and issues this summary final order as follows:

Petitioner Tilney filed her petition in this matter on October 3, 2002. The petition alleges that the board has materially altered the common elements without a vote of the owners as required by the documents and the statute. Specifically, it is alleged that the board changed a portion of the common elements by adding trees, landscaping rocks, an irrigation system, and parking spaces to a previously-undeveloped parcel of property. There is a series of photographs included with the petition. Petitioner asks that the board members involved be forced to reimburse the association for the monies spent on the project and that if a membership vote is required by the arbitrator, that the board members involved individually be held responsible for returning the land to its prior state.

The association filed its answer on October 29, 2002. The association admits that the board approved the project which it describes as a beautification project.

According to the answer, the parcel of land was acquired by the association as association property in 1993. It consists of 22 unconstructed (but declared) units conveyed to the association by a now-defunct subsequent developer of the condominium. The association states that the "oval" shaped parcel is vacant land which, prior to the beatification project, consisted of sand, weeds or grass, and a few trees. Residents often parked their vehicles in or about the oval, resulting in damage to the grass as well as a former irrigation system supplying water to this area. In order to prevent further damage and to regulate parking in the oval, the association placed a number of large rocks at strategic points around the oval to prevent parking in certain areas. The association added six trees, some landscape shrubberies, installed the rocks, and spread cypress mulch in the area that could still used for parking. The association indicates that it spent $7,050 in total for the project, disputing petitioner's higher estimate. The association maintains that the project implicates the maintenance function of the board and is accordingly insulated from the material alteration requirements of the statute. According to the association, no material alteration has resulted, and the improvements to the oval would protect the oval from further parking damage.

The photographs submitted by the petitioner show that the "oval" may measure half an acre or more. A portion of the oval has been sliced away from the rest of the oval to form parking for perhaps 6-8 vehicles. The area cut away from the rest of the oval is ringed by landscaping bushes on the interior sides of the parking area to keep vehicles within its perimeter, and the actual parking area has been mulched to form a suitable parking surface. Railroad ties have been added to

facilitate parking. Boulders, apparently 24 of them, have been added at intervals of 10-15 feet around the outside edges of the oval (except for the parking area) to prevent parking within the oval itself. A few trees have been added among the rocks for a similar purpose. It appears that the project has involved in total the addition of 10 Queen Palm Trees, 2 decorative palms, the landscaping rocks, repairing the old irrigation system, and installing a new irrigation system for the new plantings. Other than the parking area and the landscaped areas, the oval is predominantly occupied by grass.

The petitioner alleges that the landscaping project constitutes a material alteration to the common elements or association property. As stated by the court in Sterling Village Condominium, Inc. v. Breitenbach, 251 So. 2d 685, 687 (Fla. 4th DCA 1971):

> ...We hold that as applied to buildings, the term "material alteration or addition" means to palpably or perceptively vary or change the form, shape, elements or specifications of a building from its original design or plan, or existing condition, in such a manner as to appreciably affect or influence its function, use, or appearance.

The courts have carved out an exception to following the requirements of the statute and documents where the material change contemplated implicates the duty of the association to maintain and repair the condominium property or the improvements thereon. See, Tiffany Plaza Condominium Association, Inc. v. Spencer, 416 So. 2d 823 (Fla. 2nd DCA 1982); Ralph v. Envoy Point Condominium Association, Inc., 455 So. 2d 454 (Fla. 2nd DCA 1982). Here, the association argues that it has undertaken the project pursuant to its duty to maintain the condominium property, and that as such, the project is exempt under the maintenance doctrine of Tiffany Plaza, supra.

Related to this analysis is the business judgement doctrine. The petitioner has chosen to challenge the board's exercise of discretion in an area in which the board's judgement has traditionally received a large measure of deference due to the operation of the business judgment rule. Under the business judgement doctrine, a judge or an arbitrator is required to afford the board's judgement wide latitude where the subject area in which the board is operating is found to be particularly infused with day to day business judgment that can only be exercised by the elected board. Review, Girsch v. Whisper Walk Section E Association, Inc., Arb. Case No. 97-0305, Order Dismissing Petition (November 26, 1997), in which an owner challenged the board's decision to replace a hibiscus hedge with a ficus hedge on the basis that a material alteration resulted. The arbitrator noted as follows:

> The hibiscus hedge which has been replaced is not immediately adjacent to the unit, but extends in a line parallel to the unit approximately 50 yards from the rear sliding glass doors of the petitioners. It forms an eyebrow serving to provide some privacy from the road which runs along the hedge.
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> Board decisions regarding what shrubbery to plant or how to replace existing shrubs particularly implicate the business judgment decision of the board, and rarely grow to the dimensions necessary to implicate the provisions of the documents or statute regarding material alterations to the common elements. On occasion, as where a board arbitrarily determines to radically remove or change the use of the landscaping adorning the common elements, it is possible that a material alteration may result and that a vote of the owners may be required….[citations omitted].
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> Based on the foregoing, it appears that petitioners have failed to state a valid claim for relief. Instead, they seek to challenge the business judgment of the board in an area particularly suited for deference based on business judgment--the choice of shrubberies and their location. To permit the arbitrator to substitute his judgment for the board in this range of business decisions would be to add great instability to the presumption of normalcy attending ordinary day-to-day decisions, and the arbitrator has no proper role in adjudging whether hibiscus is preferable to ficus, and similar decisions.

> In addition, on the material alteration issue, what is material in the garden may depend upon season, preferences, the degree of fertilizer applied, and a host of other factors suggesting that gardening decisions would rarely result in a material alteration due to the ordinary wide range of variance typically achieved in this setting. Moreover, changes apparent in a garden setting are not interchangeable with the types of decisions typically regarded as requiring compliance with section 718.113(2), Florida Statutes, such as the change in the use of an area of the common elements as occurs when a nonconforming hurricane shutter is installed, when a paved golf cart path is added, and when wooden decks are installed on the common elements. Changes to foliage may appear dramatic to the observer, but rarely would the function and use of that portion of the common elements be appreciably altered to an extent deemed material. These considerations, combined with the realization that there is less of a legitimate expectation of the status quo in the area of landscaping, which may be transient in a given case, suggests that this area is one particularly ill-suited for material alteration analysis.

Another case that illustrates this principle is Katchen v. Braemer Isle Condominium Association, Inc., Arb. Case No. 98-5485, Final Order (August 5, 1999), in which an owner challenged the board's decision to make certain landscaping changes affecting the owner's patio and view. The arbitrator analyzed the case as follows:

> Other arbitration cases confirm that a high degree of deference is appropriate in this area. In Lipton v. Martinique Village IIB Condominium Association, Inc., Arb. Case No. 94-0213, Final Order Dismissing Petition (June 4, 1994), the arbitrator ruled that the failure of the board to prune a tree in the manner preferred by the unit owner/petitioner could not be viewed as an alteration or addition to the common elements. In Village Green at Baymeadows Two Condominium Association, Inc. v. Danninger, Arb. Case No. 94-0091, Final Order (November 4, 1994), the arbitrator, in rejecting a challenge from an owner that the board was not correctly maintaining the trees, grass, and shrubs, noted that the board's decisions regarding maintenance of the common elements are presumed correct, and absent a showing of mismanagement, fraud, or breach of trust, neither a court nor an arbitrator should substitute their judgment for that of the board. But see, Trio Englewood, Inc. v. Fantasy Island Condominium Association, Inc., Arb. Case No. 98-4670, Notice of Communication, Order on Motion for Summary Disposition, etc. (April 16, 1999),

> where an owner sought to challenge the decision by the board to remove two trees. The trees were Norfolk Island Pine trees, and based on photographs, the arbitrator was unwilling to rule without the benefit of a fact-finding hearing that removal of the trees could not as a matter of law constitute a material alteration:
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> > ...two very tall, conical trees, [that] are, in setting and type, distinct from the other landscaping, and thus may be sufficiently significant features of the landscape that their removal would constitute a material alteration of the common elements....In the present case, where there is evidence suggesting that the removal of the trees would constitute a material alteration, the arbitrator cannot hold as a matter of law that the original petition fails to state a cause of action...
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> Based on the foregoing cases, and based on the facts presented in the course of the final hearing, it has not been shown that the contemplated landscaping changes constitute an alteration or betterment within the meaning of the documents. This being the case, it follows that article XVI(D) does not apply, and that article XVI(B), in requiring the association to maintain and repair the common elements, does find application. The area in question will not change in function or essential nature; it will still be a landscaped garden area with flowers, bushes, and trees, similar in function to the parcel when petitioners first purchased their unit. The total landscaped area is not being appreciably expanded or diminished; it continues to act as a garden, and it will still serve as a buffer region that isolates petitioners' balcony from the open areas of the condominium.

The arbitrator finds in this case that the holdings of Braemer Isle and Whisper Walk are controlling here. The arbitrator finds that the use and function of the oval were not appreciably changed under the landscaping plan implemented by the board. The area in question is still a wide-open expanse of grass available for use by the residents. Residents continue to use the area as parking. Trees continue to occupy the parcel. The essential character of the property has not changed in a material sense. Some change in appearance is inevitable where landscaping details are altered, as noted in the above-cited arbitration decisions, but this does not compel the conclusion that all changes are material. As noted earlier, owners have less of a

legitimate expectation that landscaping details, unlike perhaps other aspects of the property, will remain static.

Even if a material change existed, which the arbitrator does not agree with, the degree of maintenance chosen by the board is entitled to a presumption of correctness through operation of the business judgement rule. That the board has determined to maintain the area to a higher standard than previously prevailed within the parcel does not remove the decision from within the ambit of business judgement. Instead, the choice by the board to maintain the property in a more developed state is in the nature of a maintenance decision that comes within the Tiffany exception to the material alteration requirements of the statute and documents.

WHEREFORE, the relief requested by the petition is denied.

DONE AND ORDERED this 7th day of February, 2003, at Tallahassee, Leon County, Florida.

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Karl M. Scheuerman, Arbitrator
Department of Business and
Professional Regulation
Arbitration Section
Northwood Centre
1940 North Monroe Street
Tallahassee, Florida 32399-1029

Certificate of Service

I hereby certify that a true and correct copy of the foregoing final order has been sent by U.S. Mail to the following persons on this 7th day of February, 2003, to the following persons:

Barbara R. Tilney
5725 North A1A
Indian River Shores, Florida 32963

Deborah L. Ross, Esquire
Cornett, Google, Ross
& Earle, P.A.
P.O. Box 66
Stuart, Florida 34995

_____
Karl M. Scheuerman, Arbitrator

Right to Appeal

As provided by s. 718.1255, F.S., this final order may be appealed by filing a petition for trial de novo with a court of competent jurisdiction in the circuit in which the condominium is located, within 30 days of the entry and mailing of this order. This order does not constitute final agency action and is not appealable to the district courts of appeal.

Attorney's Fees

As provided by s. 718.1255, F.S., the prevailing party in an arbitration proceeding is entitled to have the other side pay its reasonable costs and attorney's fees. As provided by rule 61B-45.048, F.A.C., a motion seeking an award of attorney's fees and costs, which motion must conform to the requirements of the administrative rule, must be filed with the Division within 45 days of the date of the entry and mailing of this final order.