

STATE OF FLORIDA
DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION
DIVISION OF FLORIDA LAND SALES, CONDOMINIUMS, AND MOBILE HOMES

IN RE: PETITION FOR ARBITRATION

THE OAKS OF SUNTREE CONDOMINIUM
ASSOCIATION, INC.,

Petitioner/Cross Respondent,

v.

Case Nos. 02-5870
02-5756

JODIE HAVEN,

Respondent/ Cross Petitioner.

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SUMMARY FINAL ORDER

On October 28, 2002, the petitioner, The Oaks of Suntree Condominium Association, Inc., filed a petition for arbitration naming Jodie Haven as respondent. The petition alleges that the respondent placed a satellite dish antenna on the condominium common elements without the authorization of the board of directors, in violation of the declaration of condominium and 718.113(2), Florida Statutes. As relief, the petition requests entry of an order requiring the respondent to remove the satellite dish antenna from the common elements of the condominium. On November 25, 2002, the respondent filed a cross-petition for arbitration alleging claims that were substantially the same as those in the petition for arbitration.

On January 9, 2003, these cases were consolidated and a partial summary final order was entered. In the partial summary final order the arbitrator determined that the installation of the satellite dish on the association's common elements was

not pre-empted by 47 C.F.R. § 1.4000, Federal Telecommunications Act. Accordingly the respondent's defense of selective enforcement remains to be addressed.

In her answer, the respondent admits having installed a satellite dish on the common elements without the consent of the board. However, she contends that the board is selectively enforcing the sections of the association's governing documents regarding satellite dish installations.

The respondent has installed the satellite dish on an area of the common elements that can best be described as a grass covered or lawn area near her unit. The dish is not installed on her unit or any portion thereof. Article 10, Section 10.7 of the declaration states that no aerial or antenna shall be erected or maintained on or about the exterior of any unit, other than as permitted in accordance with applicable federal law. Article 14, Section 14.1 of the declaration states in pertinent part:

No unit owner... without first having obtained the written consent of the Board of Directors of the Association...make any alteration, replacement, decoration, enclosure, or addition to the common elements...

It is noted that the present installation of the satellite dish does not involve an installation on the respondent's unit, therefore, Article 10, Section 10.7 does not necessarily apply to the installation in this matter. The association has indicated that it would permit the respondent to install the satellite dish within the confines of the boundaries of her unit. The respondent, however, appears to be unable to receive a signal in this configuration and has instead chosen to install the dish upon

the common elements of the association. This installation involves alteration of common elements provisions contained in Article 14, Section 14.1, of the declaration. Section 718.113(2), Florida Statutes, prohibits material alterations or additions to the common elements except in the manner provided in the declaration.

The declaration, as quoted above, states that a unit owner shall obtain the prior approval of the board prior to making any material alterations or additions to the common elements. The court in Sterling Village Condominium, Inc. v. Breitenbach, 251 So. 2d 685, 687 (Fla. 4th DCA 1971), held that as applied to buildings, the phrase 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."

Whether the placement of a satellite dish on the common elements constituted a material alteration was addressed in Misty Lake South Condominium Association, Inc. v. Caron, Arb. Case No. 94-0113, Summary Final Order (April 28, 1995). In that case, the arbitrator held that where the declaration of condominium prohibited alterations to the common elements without board approval, a unit owner's installation of a satellite dish on the common elements without board approval constituted a violation of the documents. See also, Bay Hill Village Club Condominium Association, Inc. v. Farah, Arb. Case No. 93-0255, Final Order (June 19, 1995)(The installation of a satellite dish constituted an alteration or

improvement requiring compliance with the procedures for such set forth in the condominium documents.)

The respondent asserts the affirmative defense of selective enforcement. In support thereof, the respondent cites the following examples of where other unit owners, without board permission or objection, altered the common elements:

- 1) The president of the association has installed a birdbath on the front lawn.
- 2) Other residents have plants, planters, decorations, bird feeders, benches, flags and other items on the common elements.
- 3) One resident has installed a concrete slab for a bar-b-que grill and has planted bushes around it.

Selective enforcement involves the failure of an association to enforce the condominium documents in other instances bearing sufficient similarity to the instant case to warrant the conclusion that it is discriminatory, unfair, or unequal to permit the association to enforce the restriction in the present case. Oceanside Plaza Condominium Association, Inc. v. Salussolia, Arb. Case No. 96-0384, Order Striking Certain Defenses (September 4, 1996). The burden of proving an affirmative defense is on the party asserting it. Mercede v. Mercede Park Italian Restaurant, Inc., 392 So. 2d 997 (Fla. 4th DCA 1981). The respondent has failed to assert the existence of any other satellite dish or similar device on the common elements, without board approval against which the association has failed to take enforcement action; thus, the defense of selective enforcement is without merit.

The respondent admits installing and maintaining a satellite dish on the common elements of the association without board approval. By installing and

maintaining the satellite dish on the common elements, the respondent has violated Article 14, Section 14.1 of the declaration of condominium. The respondent has offered no viable defense that would bar the association's enforcement effort.

Therefore, it is ORDERED:

1. The relief requested by the association is GRANTED.
2. Within thirty days of the date of entry of this order, the respondent shall remove the satellite dish from the common elements of the condominium. All wiring and other items used in connection with the operation or placement of the dish shall also be removed. The respondent shall restore the area to its prior condition; failing which, the association may remove the dish, restore the area and bill the cost of removal and restoration to the respondent.

DONE AND ORDERED this 1st day of April 2003, at Tallahassee, Leon County, Florida.

Richard M. Coln, Arbitrator
Arbitration Section
Department of Business and
Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-1029

RIGHT TO TRIAL DE NOVO

PURSUANT TO SECTION 718.1255, FLORIDA STATUTES, THIS DECISION SHALL BE BINDING ON THE PARTIES UNLESS A COMPLAINT FOR TRIAL DE NOVO IS FILED BY AN ADVERSELY AFFECTED PARTY IN A COURT OF COMPETENT JURISDICTION IN THE CIRCUIT IN WHICH THE CONDOMINIUM IS LOCATED WITHIN 30 DAYS OF THE DATE OF MAILING OF THIS ORDER. THIS FINAL 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 this proceeding is entitled to have the other party pay its reasonable costs and attorney's fees. Rule 61B-45.048, F.A.C., requires that a party seeking an award of costs and attorney's fees must file a motion seeking the award not later than 45 days after rendition of this final order. The motion must be actually received by the Division within this 45-day period and must conform to the requirements of rule 61B-45.048, F.A.C. The filing of an appeal of this order does not toll the time for the filing of a motion seeking prevailing party costs and attorney's fees.

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing was mailed by U.S. mail, postage prepaid, this 1st day of April 2003, to:

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Richard M. Coln, Arbitrator