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

IN RE: PETITION FOR ARBITRATION

Alameda Isles Homeowners Association, Inc.,

Petitioner,

v. **Case No. 2004-05-8895**

John Michael Ager,

Respondent.

_____/

FINAL ORDER

Pursuant to notice, the undersigned arbitrator of the Division of Florida Land Sales, Condominiums, and Mobile Homes convened a formal hearing in this case on July 1, 2005. During the hearing, the parties presented the testimony of witnesses, tendered documents into evidence and cross-examined the other party's witnesses. This order is entered after consideration of the complete record in this matter.

APPEARANCES

For Petitioner: David C. Meyer, Esq.
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For Respondent: Michael Moran, Esq.
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PRELIMINARY STATEMENT

On December 2, 2004, Alameda Isles Homeowners Association, Inc, (the association) filed a petition for arbitration naming John Michael Ager as the respondent. The petition alleged that the respondent had violated article 15.D. of the Amended and Restated Alameda Isles Master Form Propriety Lease (the lease) and Rule B. III. of the association's rules and regulations by improperly altering his lot and the dwelling located thereon without prior approval of the association. Specifically, the association alleges that the respondent has poured two concrete slabs, enlarged the shed appurtenant to his unit, and enclosed his carport without prior approval of the association. The respondent does not deny making the alterations, but contends that he had approval and has raised the affirmative defenses of estoppel and selective enforcement.

A hearing was held on July 1, 2005, at the cooperative clubhouse during which the arbitrator appeared in person. Both parties have filed their recommended orders which have been reviewed by the arbitrator prior to entering this final order.

FINDINGS OF FACT

1. The respondent is the record owner of unit 52 located at the Alameda Isles Homeowners Cooperative (the cooperative).

2. Alameda Isles Homeowners Association, Inc. is a Florida non-for-profit corporation and the entity responsible for the operation of the cooperative.

3. Article 15.D. of the lease provides:

> Shareholder shall not, without first obtaining the written consent of the Corporation, alter in any way the lot which is leased hereunder, or

> add to the dwelling located upon the lot or any of its fixtures and appurtenances. Shareholder shall not change the color of the dwelling located upon the lot, nor substantially alter its outward appearance without first having obtained the approval thereof from the Board of Directors.

4. Rule III. B. of the association's rules and regulations provides, in pertinent part:

> …There shall be no change in the outside appearance of the home and the corresponding lot, including trees, lawn and plantings without the written approval of the Board of Directors. See Addendum (A) "Application for Home/Lot Alterations." This also includes, but is not limited to, additions and changes to the home structure and includes any color or change of color to the home, trim, utility building, carport, planter, steps, porch, driveway and walks.
>
> Adjacent homes shall not be painted the same color, other than white. A chart of approved colors may be viewed at the Management Office.
>
> Alterations to homes, lots, porches, utility buildings and carports require the written approval of the Board of Directors prior to commencement of work. See Addendum (A) "Application for Home/Lot Alterations."
>
> Removal or replacement of homes requires the written approval of the Board of Directors prior to commencement of work. See Addendum (B) "Application for Home Removal/Replacement."
>
> Replacement homes and alterations to existing homes, porches, utility buildings and carports may not extend beyond the existing footprint: that is, the space occupied by the existing home, porch, utility building and carport. Other enclosures located in the carport are not considered side porches in the context of these Rules and Regulations.

5. The Alameda Isles community consists of manufactured homes. Typical design consists of a rectangular house, with an attached carport running along one side capped by a utility shed.

6. The respondent has installed landscaping curbing on his lot.

7. The respondent has enclosed the carport on his dwelling. The enclosure consists of a vinyl kick-wall and glass windows. He has also installed a ceiling fan inside the carport.

8. The respondent has enlarged the shed, extending it approximately 5 feet past the end of the dwelling.

9. The respondent has poured two concrete slabs, one at the front of the unit measuring 3' x 5', and the other at the back of the lot measuring 5' x 12'.

10. The association's board of directors has delegated authority to the home/lot alteration committee (the committee) to review and approve home/lot alteration requests.

11. When the association receives an application for home/lot alteration it is given to the home/lot alteration committee. Prior to ruling upon the application, a member of the committee meets with the home owner and conducts an onsite review of the proposed alterations and reports back to the other committee members.

12. At the time of the respondent submitted his home/lot alteration applications, the association would inform unit owners of the disposition of their request by telephoning them. The association has recently changed this policy, by mailing the unit owners a written copy of the committee's decision.

13. Requests to replace homes must be approved by the association's board of directors and require the submission of an application for home removal/replacement.

14. Addendum "B" of the association's rules and regulations, Application for Home Removal/Replacement, New Home Requirements, paragraphs B and C, require that the replacement home not exceed the prior width and length of the existing home or that of the previous home and side porch combined.

15. Addendum “B” of the association’s rules and regulations, Application for Home Removal/Replacement, New Home Requirements, paragraph K provides:

> The Association Board of Directors may, in its sole discretion, grant a member a written exception to any of the above New Home Requirements, provided the exception be for similarly situated homes and that the home be the same length as the neighboring homes. The member must provide the Board all requested documentation and other information requested by the Board of Directors.

16. The association permits replacement homes to vary from the original home’s dimensions and placement on the lot to the extent necessary to accommodate any changes in proportions due to current industry standards.

17. The respondent submitted a home/lot alteration application dated December 17, 2003, describing the project as, “install curbing per diagram – use of lava rock & 10 small patio lights in front of house.” The copy on file with association lacks a diagram. The respondent testified that the diagram indicated the location of the curbing and a 3’ x 5’ cement pad at the front of the unit and a 5’ x 12’ cement pad at the rear of the unit. The application was approved by the committee, provided that the curbing remain two feet from the edge of the road. After receiving approval, the respondent made the improvements.

18. The respondent submitted a home/lot alteration application dated January 19, 2004, describing work as, “Install white siding on all four sides of home (vinyl).” The application was approved by the committee on January 19, 2004.

19. The respondent submitted a home/lot alteration application dated April 26, 2004, describing proposed work as, “extend driveway and fix contractors[sic] mistake and paint driveway.” The application indicated that the driveway base color would be black

with a white overlay diamond pattern. The committee denied the application because of proposed width and color.

20. The respondent submitted a home/lot alteration application dated April 26, 2004, describing the project as, “roof over with extensions.” The application was approved with the condition that the extensions not exceed 12 to 18 inches.

21. The respondent submitted a home/lot alteration application dated May 13, 2004, describing work as, “screen in carport.” The application was approved. Committee member Bill Buck performed an in-person review during which the respondent informed him of the extent of the project. During the onsite review, Mr. Buck indicated that it was acceptable so long as two cars could be parked in it.[1]

22. On August 17, 2004, the respondent commenced work on the carport enclosure.

23. After construction was commenced, two board members and the property manager asked to see the building permit and informed the respondent that the project was not approved. The property management company asked him to submit another application.

24. The respondent submitted a home/lot alteration application dated August 25, 2004, describing the pouring of two concrete slabs, carport enclosure and shed extension with detailed specifications. This application was submitted after construction had been completed. The application was denied.

25. If the association had indicated any problems with any of the improvements he made to his lot or house, the respondent would not have proceeded forward due to the potential cost.

[1] This is consistent with the association’s rule prohibiting overnight street parking.

26. There are various dwellings in the development that have had improvements made to them:

a. Unit #54 - A patio has been constructed at the end of the driveway. The association approved the improvement.

b. Unit #8 - On May 18, 2004, the owners submitted an application for home removal/replacement seeking to replace their existing home with one that was approximately 6 feet longer and about 2' 6" wider. The application was approved by the board. The driveway was widened from 12' to 14'.

c. Unit #255 – Replacement home and cement pad under home are larger than original. The new mobile home is larger than original by 2' in length and 3' 6" inches in width. Replacement home was approved by the board.

d. Unit #301 – Replacement home that is approximately 1' wider than the original home was approved by the association.

e. Unit #145 – Concrete steps have been poured outside original footprint.

f. Unit #86 – A 5' x 10' concrete slab has been poured outside original footprint.

g. Unit #85 – A large concrete pad has been poured outside original footprint.

h. Unit #27 – A large block patio has been added outside original footprint. The addition was approved by the association with condition that no structure be placed on it or a golf cart be parked on it.

i. Unit # 49 – A concrete pad and a roof have been placed outside the original footprint.

j. Unit #9 – A patio consisting of concrete pavers has been placed outside original footprint.

k. Unit # 254 –Landscape curbing has been installed within 2' of the street. Association approved its installation. At the time of approval, there was no prohibition against installing curbing close the street.

l. Unit #205 – Two rooms were added to the house by owner while owner was on the board.

m. Unit # 335 – A room has been added to the house. The addition does not "square off" the house.

n. Unit #206 –The trim color of the house is not a permitted color.

o. Unit #75 – The landscape curbing is within 2 feet of the street. Built by owner. Approved by the association.

p. Unit #245 – Landscape curbing and planters were installed within 2' of the street. The improvements were constructed by the unit owner and approved by the association.

q. Unit #49 – The owners installed snake-like landscape curbing. The projected was approved by the association.

r. Unit #55 – The owners installed snake-like landscape curbing.

s. On October 11, 2004, the association received a home/lot application from John Trush to make improvements to his home, unit 214. The application proposed

an addition to his unit's porch adding about 15' to its length under a new roof. The application was approved by the association on October 16, 2004.

CONCLUSIONS OF LAW

Alameda Isles Homeowners Cooperative is a cooperative within the meaning of section 719.103, Florida Statutes. The undersigned has jurisdiction over the parties of subject matter of this dispute, pursuant to section 718.1255, Florida Statutes. The respondent, by his ownership at the cooperative, is required to comply with all governing condominium documents.

Article 15.D. of the lease prohibits a member of the cooperative from making any changes to his unit without the association's approval. Rule III.B. of the association's rules and regulations likewise prohibits improvements without the prior consent of the association and provides the process by which one must request approval. The rule also prohibits expansion of the home beyond its original footprint.

The respondent does not deny making the above described improvements. Rather, he contends that the association is estopped from enforcing the rules against him because the improvements were approved or the association has permitted similar improvements/violations. The respondent bears the burden of proving his affirmative defenses. Sea Breeze South Apartments Condo., Inc. v. Beck, Arb. Case No. 00-1734, Final Order (May 17, 2002); White Egret Condominium, Inc. v. Franklin, 379 So.2d 346 (Fla. 1979); Killearn Acres Homeowners Association, Inc. v. Keever, 595 So.2d 1019, 1021 (Fla. 1st DCA 1992).

The respondent contends that due to its actions, the association should be estopped from taking any action against him based upon the alterations he has made to

his house. In order to establish estoppel, the respondent must demonstrate the following: (1) a representation as to a material fact that is contrary to a later-asserted position; (2) reasonable reliance on that representation; and (3) a change in position to the respondent's detriment by the representation and reliance. Energren v. Marathon Country Club Condo. Assoc., Inc., 525 So.2d 488 (Fla. 3d DCA 1988). The respondent submitted a home/lot alteration application on December 17, 2003, with an attached diagram that indicated the placement of two cement slabs in question. This application was approved by the association. It was reasonable for the respondent to rely upon approval of the application and attached diagram and the respondent would not have undertaken the cost of the improvement if he thought he did not have approval. Therefore, the association is estopped from requiring the respondent to remove the cement slabs.

The respondent also argues that the association is estopped from taking action against him based upon the enclosure of his carport and extension of his shed.[2] The approved application describes the project as "screen in the carport." The actual project went far beyond simply screening in the carport, it involved installation of a 3' high vinyl sided kickwall, windows, a beam and ceiling fan. However, Bill Buck, a member of the committee, made an onsite review, during which the respondent informed him in detail of the extent of the intended improvements.

The association correctly notes that a unit owner's reliance upon a single board member's verbal representation is not reasonable where the board member lacks the authority to legally bind the association. Katchen et al. v. Braemer Isles Condo. Assoc.,

[2] The respondent did not raise the defense of estoppel as to carport/shed project until the final hearing. The association has not demonstrated that it was prejudiced by the respondent's delay in presenting the defense.

Inc., Arb. Case No. 98-5485, Final Order (August 5, 1999). However, the instant matter is distinguishable. In Kactchen, the unit owners relied upon an agreement with the president of the board of directors who did not have the authority to bind the entire board. However, in the instant case the association's board of directors has delegated authority to the home/lot alteration committee to approve alterations. The committee in turn asks a member to conduct an onsite review of any propose improvement. It is reasonable to expect that any committee member conducting an onsite review would convey information provided during his review to the full committee and that the committee's decision is based upon the application and onsite review. Therefore, it was reasonable for the respondent, after discussing the enclosure project with Mr. Buck during an onsite review, to expect that any information provided to Mr. Buck would be conveyed to the committee and the committee's approval would be based upon such information. Furthermore, if the respondent had thought the project was not approved, he would not have proceeded forward with it due to its expense. Based on the foregoing, the undersigned finds that the respondent has presented competent and substantial evidence to conclude that the association should be estopped from taking action against the respondent based upon his carport enclosure.

It may be argued that as to the shed extension portion of the project, the respondent may not have reasonably relied upon any apparent approval by the committee as such an addition is specifically contrary to rule III.B. However, as discussed below, this argument is not determinative in this matter.

The respondents contend that the association is selectively enforcing the above restrictions. To prove the defense of selective enforcement, a party has to show that

there are instances of similar violations of which the governing body has notice but in which they have refused to act. See White Egret Condominium, Inc. v. Franklin, 379 So.2d 346 (Fla. 1979); see also Killearn Acres Homeowners Association, Inc. v. Keever, 595 So.2d 1019, 1021 (Fla. 1st DCA 1992); and, Camelot II Condominium Assn., Inc. v. Dirse, Arb. Case No. 00-0951, Final Order (May 10, 2001). In order to establish selective enforcement, the respondent need only demonstrate a single instance of a similar violation. Cove Village, Inc. v. Vendola, Arb. Case No. 2003-05-5193, Summary Final Order (October 9, 2003).

The respondent has alleged that various other units have alterations that do not comply with the association's controlling documents. The association has attempted to avoid the defense of selective enforcement by claiming that the nonconformities were approved or constructed by the developer and arguing that the prior acts of developer cannot be used against an association in an attempt to establish such conduct by the association. Constellation Condo. Assoc., Inc. v. Harrington, 467 So.2d 378, 383 (Fla. 2d DCA 1985); Estates of Fort Lauderdale Property Owner's Association, Inc. v. Kalet, 492 So.2d 1340 (Fla. 4th DCA 1986). The Supreme Court in Moore Meats, Inc. v. Strawn, 313 So.2d. 660, 661 (Fla. 1975) quoting Henry Trawick, explained the meaning of "avoidance" when applied to an affirmative defense.

> Avoid means 'to make legally void; to prevent the … effectiveness of.' In pleading, avoidance means 'an allegation of new matter in opposition to a former pleading that admits the facts alleged in the former pleading and shows cause why they should not have their ordinary legal effect.

The party pleading avoidance bears the burden of affirmatively establishing facts in alleged in the avoidance. Roux v. Indian Lumber Co. et al., 161 So. 270, 272 (Fla. 1935). The association failed to provide sufficient evidence that the violations cited by

the respondents were approved or constructed by the developer. The arbitration case of Leisure Living Estates Condo. Association, Inc. v. Grieve, Arb. Case Nos. 98-3285, 97-0277, Final Order (May 14, 1998), relied upon by the respondent, is consistent with the holding that the party who raises selective or arbitrary enforcement has the burden of establishing that fact. Moreover, as the Grieve final order consolidated two previously separate proceedings, one which Mr. Grieve filed as a petitioner alleging selective enforcement, the arbitrator correctly observed that he carried the burden of proving his petition.

The post-turnover association has approved an application by the owner of unit 214 to extend the porch on his unit by fifteen feet. Likewise, unit numbers 205 and 335 have added rooms while the association was under owner control. Rule III.B. prohibits any improvements that will result in the increase of the original footprint. The "footprint" is described as the space occupied by the existing home, porch, utility building and carport. Thus, the additions to units 214, 205 and 335 clearly increase the units' footprints. The respondent's extension of his utility shed likewise clearly increases the footprint. Therefore, by permitting units 214, 205 and 335 to increase their footprints and by not allowing the respondent to do so, the association is selectively enforcing rule III.B.

The undersigned is not persuaded by the association's argument that the addition to unit 214 does not support a finding of selective enforcement because it is sufficiently dissimilar in that it "squares off"[3] the unit where the respondent's shed extension juts out past the end of the unit. Both additions similarly violate the prohibition against increasing the original footprint. Additionally unit number 335 has an addition which juts out and does

[3] "Squareing off" apparently occurs when an addition is added to the home which results in the outer dimensions of the structure forming a square or rectangle.

not "square off" the house. Based on the foregoing, the association has selectively enforced the prohibition contained in rule III.B. regarding increasing the original footprint and may not enforce such provision against the respondent's extended shed.

Unit numbers 9, 27, 49, 54, 85, 86, and 142, each have some type of patio consisting of either cement slabs or cement pavers. To permit these units to have patios and deny the respondent's cement slabs would be arbitrary.

The respondent has presented competent and substantial evidence that the association is seeking to selectively enforce the association's controlling documents against him by taking action against him regarding the above referenced improvements. He has cited substantially similar improvements made to other units which either the association has approved or not taken action against.[4] The improvements are of an open and notorious nature of which the association should have been aware.

Finally, the undersigned notes that the respondent did submit an application dated August 24, 2004, detailing the carport enclosure and shed expansion project. The association denied application. Other than indicating that it would have been denied because the shed addition did not "square off" the house, the association failed to provide reasonable justification for denying the application. As indicated above, the "square off" distinction has been rejected.

Based upon the foregoing it is

ORDERED:

The relief requested by the association is hereby denied.

[4] The respondent also cited various replacement homes that varied from the original homes' dimensions. As industry standards for manufactured homes have changed, it is reasonable for the association to permit new homes to vary to the extent dictated by the new standards. Additionally, the undersigned finds that any modification to a unit referenced in the Findings of Fact which is not specifically addressed in the Conclusions of Law, is not substantially similar to the violations alleged in the petition and does not support a defense of selective enforcement.

DONE AND ORDERED this 22nd day of August 2005, at Tallahassee, Leon County, Florida.

_____
James W. Earl, Arbitrator
Department of Business and
Professional Regulation
Arbitration Section
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 by trial de novo of this final order tolls the time for the filing of a motion seeking prevailing party costs and attorney's fees until 45 days following the conclusion of the de novo appeal proceeding and any subsequent appeal.

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 22nd day of August 2005:

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