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

IN RE: PETITION FOR ARBITRATION

Kingswood, Phase I, Inc.,

Petitioner

v. **Case No. 2005-02-4875**

Mary Lou Wire,

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 January 20, 2006. During the hearing, the parties presented the testimony of witnesses, tendered documents into evidence and cross-examined witnesses. This order is entered after consideration of the complete record in this matter.

APPEARANCES

For Petitioner: Robert J. Rydzewski, Jr., Esq.
401 East Osceola Street
Stuart, Florida 34994

For Respondent: Robert A. Goldman, Esq.
Fox, Wackeen, Dungey, Beard,
Sobel & McCluskey, L.L.P.
1100 S. Federal Highway
Post Office Drawer 6
Stuart, Florida 34995-0006

PRELIMINARY STATEMENT

On April 29, 2005, the Kingswood Phase I, Inc. (the association) filed a petition for arbitration naming Mary Lou Wire as the respondent, alleging that the respondent had made alterations to the condominium common elements by installing a clothes washer and dryer in her unit. On May 18, 2005, the respondent filed an answer to the petition in which she did not deny that she had installed the washer and dryer, rather, she asserted various affirmative defenses including selective enforcement, waiver, estoppel, accord and satisfaction, license, and unclean hands.

On August 4, 2005, a case management conference was held in this matter during which the association was directed to amend its petition in order to clarify its allegations, and the respondent was required to file an amended answer to clarify her defense of selective enforcement. A subsequent case management conference was held on November 18, 2005, during which the undersigned indicated that the association's claim that the respondent's washer and dryer altered the function of the common element plumbing and electrical system has been recognized as a cause of action in prior arbitration cases. Therefore, the respondent was permitted to amend her affirmative defense of selective enforcement to include any other modifications or devices installed in other units of which the association was aware that would alter the function of the common element plumbing and electrical service in a similar fashion to the respondent's washer and dryer.

The respondent timely amended her affirmative defense and on December 12, 2005, the association moved to strike the respondent's defense of selective enforcement. A hearing was held on January 10, 2006, to consider the association's

motion during which the undersigned found that the respondent's examples involving units from another condominium association were irrelevant and only examples of substantially similar violations involving units located in the same condominium as the respondent would be considered during the final hearing.

The final hearing was held on January 20, 2006. The parties were permitted to file recommended orders which have been considered by the undersigned.

FINDINGS OF FACT

1. The petitioner is the legal entity responsible for the operation of the Kingswood, Phase I, Condominium (the condominium).

2. The respondent is the record title owner of Apartment 5 located on the second floor of the condominium, having purchased the unit in April of 2003.

3. The respondent purchased her unit from Fred Wallace, who had purchased the unit in order to renovate it and resell it.

4. Mr. Wallace indicated that he did not rewire any part of the unit and did not add any new electrical fixtures other than a light.

5. As to plumbing, the only thing Mr. Wallace did was have a plumber install new shut-off valves for the sinks and toilets.

6. Mr. Wallace replaced the existing range, refrigerator, microwave oven, and dishwasher.

7. The condominium building contains a community laundry room.

8. In May of 2003, the respondent installed a washer and dryer in her unit. There were no existing washer and dryer hookups; therefore, any necessary supporting electrical and plumbing connections had to be installed.

9. The respondent's son originally installed the electrical wiring for the machine, but it was subsequently redone by a professional electrician.

10. The respondent is not aware of how the machine was installed.

11. The dryer does not vent to the outside of the unit, rather it vents into a plastic tub containing water.

12. The respondent did not ask the association for permission to install the washer and dryer.

13. The board never gave the respondent permission to install the washer and dryer.

14. By letter dated March 16, 2004, from the association's legal counsel, the association demanded that the respondent remove the washer and dryer, alleging that the installation had resulted in modification to the condominium's common element electrical and plumbing systems. The letter further indicated that the condominium units are not designed to accommodate washers and dryers in each unit.

15. In August 2004, Joseph Kevin Henderson, a professional civil and environmental engineer licensed in the State of Florida, inspected the respondent's unit.

16. Mr. Henderson found that the respondent has installed a stacked washer and dryer in the master bedroom.

17. The installation of the dryer involved running a wire from the machine, up an interior wall, across the attic above the unit and then back down a wall attaching it to the unit's electrical service box.

18. Mr. Henderson had concerns regarding the installation of the electrical wiring. However, since he is not an electrician, he recommended that a professional electrician review the wiring.

19. As to the plumbing for the washer, the drain pipe from the washing machine was installed underneath the master bedroom bathtub connecting into the drain pipe for the bathtub. There is no separate vent stack for the washer drain. However, the applicable building code does not permit the bathtub drain vent to also serve as the washer drain vent.

20. In Mr. Henderson's opinion the problem with such an installation is that if a unit connects a washing machine to the bathtub drain without separate venting, it would alter the performance of the common element plumbing, adversely affecting other drains attached to common element by not draining as well. The only way respondent's machine could be properly vented would require breaching the common element roof to install a vent pipe.

21. Mr. Henderson also opined that venting the dryer into a box in the master bedroom does not meet code requirements. The building code requires that it be vented to the outside, and this can only be done by breaching a common element wall.

22. Based upon his interpretation of the condominium documents, the vertical elements of the building's plumbing are common elements while the horizontal elements servicing the unit are part of the unit.

23. Because the association representative present during the inspection was silent regarding the code violations, the respondent indicated that she thought if she made efforts to become code compliant, the association would permit the machine to remain.

24. Subsequent to Mr. Henderson's inspection of the unit, by letter dated September 22, 2004, and addressed to the respondent's counsel, the association addressed its concerns with the inspection and provided the respondent with a copy of Mr. Henderson's inspection report. The association alleged that the installation did not comply with the applicable building codes in various ways and could not be brought into compliance without encroaching on the common elements. For example, the letter noted that a separate vent stack is required for the washer drain which would require creating a hole in the common elements. Again, the association demanded the respondent remove the machine.

25. By letter dated December 30, 2004, addressed to the association's counsel, the respondent indicated that she was working to remedy the electrical and plumbing issues raised by Mr. Henderson.

26. By letter dated January 28, 2005, the respondent provided the association a copy of the invoice for electrical remediation work. The invoice indicated that the electrical feed line for the dryer had been replaced with a metal clad cable feed and the outlet and cord were changed to "4 wire."

27. By letter dated March 7, 2005, the association made a final demand to the respondent requesting that she remove the washer and dryer and restore all modifications to their prior condition or else the association would pursue and arbitration action.

28. The respondent testified that she believes that her neighbor is storing items in the attic space because she has heard him moving around in the attic as if he were removing items from the attic.

29. Article 9.2.b., of the condominium's amended and restated declaration of condominium (the declaration) provides:

> Alteration and Improvement. There will be no alterations or additions to the common elements without prior approval in writing by the record owners of not less than 75% of the common elements.

30. Article 4.5 of the declaration defines common elements as follows:

> The portion of the condominium property not included in the apartments; and shall include the land of the condominium, Association property containing recreational facilities and sewage disposal system, and tangible personal property required for the maintenance and operation of the condominium.

31. Article 5.6.a. of the declaration defines the upper and lower boundaries of a unit as follows:

> Upper and lower boundaries. The upper and lower boundaries of the apartment will be the following boundaries, extended to the intersection with the perimetrical boundaries:
>
> (1) Upper Boundary (first floor apartments) – The horizontal plane of the lower surfaces of the ceiling slab;
>
> (2) Upper Boundary (second floor apartments) – The horizontal plane of the upper surfaces of the sheetrock;
>
> (3) Lower Boundary (all apartments) – The horizontal plane of the lower surfaces of the floor slab.

32. Article 5.7 of declaration defines common elements as follows:

> Common Elements. The common elements of the condominium consist of the land and other parts of the condominium property not within the apartments, including but not limited the premises owned by the Association contain recreational facilities and sewage disposal system, and all tangible personal property used in the maintenance and operation of the condominium.

33. Article 9.1a.(2) & (3) of the declaration provides that the association will maintain, repair, and replace:

> (2) All conduits, ducts, plumbing, wiring and other facilities for the furnishing of utility services, except electrical switches, electrical outlets, lights bulbs, appliances, bathroom fixtures, kitchen fixtures and similar equipment, contained within or attached to the portions of the apartments to be maintained

by the Association. Such will be done at the expense of the Association, unless made necessary by the negligence of any apartment owner, members of his family or his or their guests, employees, agents or lessees. In the event of such negligence, it will be done by the association at the expense of the said apartment owner.'

(3) All conduits, duct, plumbing, wiring and other facilities for the furnishing of utility services and all fixtures and equipment contained within the portions of the apartments to be maintained by the apartment owners, if necessary to properly furnish utility services to parts of the condominium other than the apartment within which they are contained. Such will be done at the expense of the owner of the apartment where the work is done.

CONCLUSIONS OF LAW

Kingswood Phase I Condominium is a condominium within the meaning of section 718.103, Florida Statutes. The undersigned has jurisdiction over the parties and subject matter of this dispute, pursuant to section 718.1255, Florida Statutes. The respondent, by her ownership of a unit at the condominium, is required to comply with all governing condominium documents.

Article 9.2.b., of the declaration prohibits unit owners from making alterations or additions to the common elements except with prior approval in writing by the record owners of not less than 75% of the common elements. The installation of the respondent's washer/dryer required the running of a heavy duty electrical line through the attic space above her unit. Based upon the above definitions for common elements and the description of the upper and lower boundaries of the unit, the attic space is clearly a common element. Thus, the respondent has altered the common element attic space by installing the electrical line.

It might be argued that installation of a wire in a common element attic does not constitute a material alteration. A material alteration or addition to a building palpably or perceptively varies or changes the form, shape and elements or specifications of a building

from its original design plan, or existing condition, in such a manner as to appreciably affect or influence its function, use or appearance. Sterling Village Condo. Inc. v. Breintenbach, 251 So.2d 685 (Fla. 4th DCA 1971). This argument may or may not have merit if the declaration prohibited material alterations in similar fashion to section 718.113(2)(a), Florida Statutes. However, article 9.2.b., of the declaration does not require that the alteration be material in nature and, therefore, has a more expansive application.

The installation of the wiring in the attic clearly constitutes an alteration and addition to the attic and is therefore prohibited by article 9.2.b. of the declaration unless approved by at least 75% of the unit owners. *See High Point of Delray West Condo. Ass'n v. Sharwell*, Arb. Case No. 2003-06-2857, Summary Final Order (August 5, 2003)(addition of a telephone line to the outside of a unit was found to violate provisions prohibiting the alteration of the condominium buildings or common elements), *New Hampton at Century Village Condo. III Ass'n, Inc. v. Brocato*, Arb. Case No. 98-3187, Final Order on Default (May 27, 1998)(where declaration prohibited any alteration to the unit without association approval and any modification or installation of electrical wiring or any material puncture or break in the boundaries of the unit, installation of a central air conditioning system without board approval which involved cutting through a fire safety wall clearly violated the provision). As the respondent has not obtained such approval, she has violated article 9.2.b. of the declaration.

The association argues that the respondent has altered the common electrical and plumbing system by attaching a washer and dryer to the condominium unit's electrical and plumbing system which in turn connects to the building's common element systems. Such

was the case in Environ Condominium II Assoc., Inc. v. Friedland, Arb. Case No. 96-0228, Final Order (February 24, 1997), where the arbitrator found that the installation of a washer and dryer materially altered the common element plumbing system based upon testimony of a plumbing expert who reviewed the plans for the building and concluded that the building's common plumbing could not handle the installation of washing machines in each unit.

The association presented expert testimony in support of its contention. However, as the expert acknowledged himself, he was not qualified to testify as to the impact on the building's electrical system by the washer and dryer as he was not an electrical expert. Accordingly, the association has failed to present sufficient evidence to establish that the washer and dryer has altered the common element electrical system.

The installation of the plumbing connections for the washing machine involved hooking into existing plumbing within in the unit serving the bathtub in the master bedroom. Based upon the definitions for common elements contained in articles 4.5 and 5.7, the description of the unit's boundaries described by article 5.6a. and the maintenance requirements of article 9.1a(2) & (3), it is clear that the pipes that the respondent actually modified are not part of the common elements. However, the pipes do connect to the common element plumbing system.

The association's expert did not review any of the plans for the building's plumbing system nor was he familiar with the capacity of the washing machine and its water discharge rate. Therefore, he could not provide competent testimony as to whether the use of a properly installed washing machine would alter the common element plumbing system by overburdening it. However, the expert did indicate that the

drain for the washing machine had not been installed properly in that there was no independent vent pipe servicing it, which violated the applicable building code and would alter the common plumbing system, adversely affecting other drains connected to the common plumbing systems. The expert further indicated that a drain vent could not be properly installed without modifying the common elements by installing it through the roof. Thus, the installation alters the common element and, as it was not properly approved, constitutes a violation of article 9.2.b. of the declaration.

The respondent contends 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 respondents need only to 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 bears the burden of proving her 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 argues that Mr. Wallace, the former owner of the respondent's unit made various modifications to the unit of which the association was aware of or

should have been aware. Such alleged modifications included installing a larger bathtub and sink, light fixtures, electrical outlets and electrical appliances such a microwave, range and refrigerator. The respondent claims that many of these modifications were done improperly. For example, the toilets were not installed properly causing them to stop up and the bathtub was not installed properly causing it to leak.

All of the changes made by the prior owner cited by the respondent clearly involved her unit, not the common elements. Moreover, the respondent has failed to provide competent evidence as to how these changes altered or added to the common elements in the same fashion as the washer and dryer installation. Thus, this defense fails.

The respondent has also alleged that her neighbor, Mr. Duxberry, is storing items in the attic above his unit. She indicated that she has heard the neighbor in the attic moving items about. However, the respondent has failed to demonstrate that the association was aware that the neighbor was so using the attic above his unit prior to this proceeding.

The respondent also argues that the association is discriminating against her by subjecting her to heightened scrutiny regarding the activities in her unit. This is in essence the selective enforcement defense which the respondent has not demonstrated.

The respondent also argues the association has waived its right to request the removal of the washer and dryer, or at least based upon its actions, should be estopped from demanding their removal. The respondent contends that during the months following the inspection of her unit by the association's expert, she undertook extensive

remedial work based upon the report's findings and kept the association informed of the work as it progressed. The respondent claims that the inspection was agreed to so that the association could inspect the unit and clear up what was done and what was not done. However, in its correspondence to the respondent subsequent to the inspection, the association consistently demanded the removal of the washer and dryer and asserted that the condominium building was not built to accommodate washers and dryers, and that the respondent's installation of the washer and dryer altered the common elements, was not up to code, and could only be brought up to code by modifying the common elements. There was no testimony presented that the association informed the respondent that if she corrected the violations cited in the inspection report she could keep the washer and dryer. The respondent testified that she relied upon the silence of the association as to the remedial efforts. However, such reliance is not reasonable in light of the association's stated position in its correspondence. Thus, the respondent has not presented competent and substantial evidence that the association waived its right to request the removal of the washer and dryer or acted in such a manner that it would have been reasonable for the respondent to have relied on such actions as indicating that the washer and dryer could remain if she took remedial action.

The respondent also contends that the common laundry room facilities are inadequate to serve the entire building, costly, antiquated, and prone to frequent failure. Therefore, the respondent argues that the association should be estopped from prohibiting her from installing a washer and dryer in her unit. The respondent has failed to indicate any requirements in condominium documents or the applicable law that

requires a condominium association to provide laundry facilities for its members. It appears that the community laundry room is part of the common elements of the condominium. If the respondent feels that it is not being properly maintained, the appropriate remedy is to pursue legal action against the association for failing to properly maintain or repair its common elements, not to engage in a self-help remedy such as installing her own washer and dryer.

The respondent also asserts that it is difficult for herself and other senior citizen residents to transport their laundry from the second floor down to the first floor laundry room. However, the respondent has not asserted or provided proof that she suffers from a disability that would entitle her under applicable state and federal law to a washer and dryer in her unit as a reasonable accommodation.

The respondent has failed to produce competent and substantial evidence in support of remaining defenses of accord and satisfaction, license, and unclean hands. Accordingly, these defenses fail.

The respondent has installed a washer and dryer, which required the running of an electrical wire through common element attic. Furthermore, the washing machine's drain is not properly installed, lacking an independent drain vent, which will affect the common element plumbing. The respondent has not proven any defenses that would prevent the association from demanding removal of the machine. Therefore, the respondent is found to have violated article 9.2.b of the condominium's declaration.

Based upon the foregoing, it is ORDERED:

Within thirty (30) days of the date this order, the respondent shall permanently remove the washer and dryer from her unit and restore the common elements to their original condition.

DONE AND ORDERED this 19th day of April, 2006, 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 19th day of April 2006:

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_____
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