

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

**IN RE: PETITION FOR ARBITRATION**

**Montecito Palm Beach  
Condominium Association, Inc.,**

**Petitioner,**

**v.**

**Case No. 2006-05-4182**

**Darren D'Amico, John Russo, Gregg  
Greaves, John Michael Cunningham,  
Edward Frangione, Patricia V. Cohen,  
And James Barbuto,**

**Respondents.**

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**FINAL ORDER**

**Statement of Issue**

The issues in this case are whether the installation of travertine marble floors in Respondents' units violated Petitioner's Declaration of Condominium, and whether Respondents should be ordered to remove the floors.

**Procedural History**

The Association filed a Petition for Arbitration on September 27, 2006, alleging Respondents had installed travertine marble flooring throughout their units without obtaining approval from the board of directors, and that it was anticipated noise from the floors would create a nuisance to units beneath. Respondent filed an Answer on November 13, 2006, admitting the marble floors, claiming permission from the Association, and that the floors were built with soundproofing material.

Based on case management conferences, the failure of the parties to agree on

testing, and the lack of occupancy of potentially affected units, the issues of fact for the final hearing were limited to:

- a.) whether the Respondents submitted written applications for approval for the floors;
- b.) whether Respondents received approval from the board of directors of the Association or an authorized representative;
- c.) whether the marble floors were installed according to the approval;
- d.) whether enforcement of Section 17.9 of the Declaration would be inequitable based on waiver, estoppel or selective enforcement.

The issues were further limited to what was necessary to consider the request for relief in the Petition for an Order to require removal of the hard floor.

The Amended Order Scheduling Hearing dated March 22, 2007, further provided, “No evidence of the actual level of noise from the travertine floors will be accepted at this hearing. Because it was not ripe at the time the Petition was filed, this case will not decide an issue with respect to nuisance.”

The case proceeded to a final hearing on April 2, 2007, with the arbitrator in attendance at the office of Petitioner’s attorney. After a day of testimony, the hearing was adjourned until August 10, 2007, with the arbitrator attending the reconvened hearing by telephone.

The parties were given 30 days to submit written arguments or proposed orders, and both did so. This Order is entered after consideration of the testimony, documentary evidence and post hearing written submissions of the parties.

### Findings of Fact

1. Petitioner is the condominium association responsible for management of Montecito Palm Beach Condominium (" the Condominium").
2. Respondents are the record owners of seven units in the Montecito Palm Beach Condominium, Units 509, 309, 401, 913, 704, 901, 1202.
3. The Condominium was created by the conversion of an existing apartment building with the filing of a Declaration of Condominium on February 4, 2005.
4. Respondents Russo, Greaves, Cunningham, Frangione, Cohen and Barbuto purchased vacant units from the developer between September 30, 2005 and November 2, 2005.
5. Respondent D'Amico acted as an agent or construction manager for the other Respondents, at all times relevant to this case, and on December 8, 2005, acquired a partial interest in record title to unit #509 of the Condominium.
6. Respondent D'Amico received keys to some of Respondents' units in September 2005.
7. In September 2005, the bottom floor of the Condominium housed separate offices for the developer and for the building manager. The developer's office handled presentation of the building, negotiation and sales. The management office performed specific building maintenance.
8. For the first eight months or so, the board of directors of the Condominium consisted of employees of the developer. A non-resident unit owner was elected to the board in October 2005. Turnover of the board from developer control to unit owner control occurred on December 15, 2005.

9. Before turnover to the unit owners in December 2005, there were no meetings of the Association's board of directors.

10. In August 2005, the management office of the Condominium was operated by Atlantic and Pacific Management, with the responsible condominium association manager, Janice Moncour. Anthony DiMartino, working under the supervision of Janice Moncour, served as the on-site representative of Atlantic and Pacific.

11. In practice, if unit owners sought approval to make changes to their units in August, September or October of 2005, the building manager did not get involved. Such requests were passed on to the developer.

12. In late September or early October, Respondents began installation of the marble floors.

13. Before Respondents began construction, Respondents did not make a request in writing to the board of directors for permission to install hard flooring in their units. Respondents did request permission from the developer's representatives to allow construction activity including the floor installation.

14. Over a period of more than two months, materials for the marble floor installation, including perlite cement mix were stored in four to six parking spots of the covered parking area of the Condominium. Respondents were also allowed to store construction materials in the utility closets on the stories on which they were working. This activity was known and observed by representatives of the developer, the management office and unit owners.

15. Apparently, during this same period, renovations in a number of units, in addition to those of Respondents, exposed unit owners to construction workers,

materials and noise on a regular, if not daily, basis.

16. Installation of the marble floors in Respondents' units was substantially finished in early December 2005.

17. Section 17.9 of the Declaration of Condominium provides

Weight and Sound Restriction. Hard and/or heavy surface floor coverings, such as tile, marble, wood, and the like will be permitted only in foyers and bathrooms or as otherwise installed by the Developer or prior to the recordation of this declaration. Installation of hard surfaced floor coverings (other than by the Developer) in any other areas are to receive a sub-floor sound proofing (for example corking) sound absorbent, less dense floor coverings, such as carpeting. Use of a hard and/or heavy surface floor covering in any other location must be first submitted to and approved by the Board of Directors and also meet applicable structural requirements and any sound insulation standards adopted by the Board. Also the installation of any improvement or heavy object must be submitted to and approved by the Board, and compatible with the overall structural design of the building. The Board of Directors may require a structural engineer to review certain of the proposed improvements, with such right to be at the Owner's sole expense. The Board will have the right to specify the exact material to be used on balconies. Any use guidelines set forth by the Association shall be consistent with good design practices for the waterproofing and overall structural design of the Building. Owners will be held strictly liable for violations of these restrictions and for all damages resulting therefrom and the Association has the right to require immediate removal of violations. **Applicable warranties of the Developer, if any, shall be voided by violation of these restrictions and requirements. Sound transmission in a high-rise building is very difficult to control and noise from adjoining or nearby Units or mechanical equipment can often be heard in another Unit. The Developer does not make any representation or warranty as to the level of sound transmission between and among Units and other portions of the Condominium Property, and each Unit Owner hereby waives and expressly releases any such warranty and claim for loss or damages resulting from sound transmission.**

(bold in original)

18. Section 9.1 of the Declaration of Condominium provides:

Consent of the Board of Directors. No Unit Owner shall make any

addition, alteration or improvement in, or to, the Common Elements, his Unit or any Limited Common Elements without the prior written consent of the Board of Directors. The Board shall have the obligation to answer any written request by a Unit Owner for approval of such an addition, alteration or improvement in such Unit Owners Unit or Limited Common Elements within 30 days after such request and all additional information requested is received, and the failure to do so within the stipulated time shall constitute the Board's consent. The proposed additions, alterations and improvements by the Unit Owners shall be made in compliance with all laws, rules, ordinances and regulations of all governmental authorities having jurisdiction and with any conditions imposed by the Association with respect to design, structural integrity, aesthetic appeal, construction details, lien protection or otherwise.

19. Because there was no functioning board before December 2005, Respondents did not make requests for permission to install hard floors that were "first submitted to and approved by the Board". Also, there were no "sound insulation standards adopted by the Board".

20. The marble tiles were installed over a mortar incorporating perlite which has some sound insulating properties. This mortar was intended as a sub-floor soundproofing.

21. At all times relevant to this case, Respondents' units and the units below them have been vacant. Any issue of actual noise originating from Respondent's units is not part of this arbitration.

22. On January 10, 2006, Petitioner sent the first letter to Respondents demanding removal of the installed travertine marble floor from areas other than the bathroom or foyer. Letters to each of the Respondents followed.

### Conclusions of Law

1. The arbitrator has jurisdiction over the parties and the subject matter.

2. Petitioner relies on application of Sections 9.1 and 17.9 of the Declaration of Condominium to the activities of the Association and Respondents before turnover of control to unit owners. In this case, before turnover, the only authority of the Association or of a “board of directors” was exercised by the developer through the developer’s employees.

3. When a developer gives permission for changes to a unit before turnover to a unit-owner board of directors, the association is estopped to enforce a provision of the declaration that might not have allowed the changes. *Plaza Del Prado Condominium Ass’n v. Richman*, 345 So. 2d 851 (Fla. 3rd DCA 1977).

4. Petitioner’s proof that Respondents’ did not make a written request has little value. If Respondents had made a written request to the developer’s “board”, the evidence shows it would have been handled by a non-board representative. Assuming Respondents had figured out who the developer’s directors were, and how to get a written request to them, with no board meetings, such a request would have been automatically approved by operation of section 9.1, after thirty days. Section 17.9 does not specifically state a written request is required. The law will not require performance of an act when the undisputed evidence establishes such performance would have been futile. Cf., *Waksman Enterprises, Inc. v. Oregon Properties, Inc.*, 862 So. 2d 35 (Fla. 2nd DCA 2003)(non-performance of application for permit did not prevent claim for refund of deposit where inability to apply for permit caused by factors outside of control of party seeking refund.)

5. In this case the developer’s representatives actively assisted Respondents’ renovations. Section 17.9 provides that the developer could have

performed installation of hard flooring without violating the Declaration.

6. Although Petitioner now challenges the sound proofing claimed by Respondents, the developer was well aware of the technique at the time it was installed. Section 17.9 further supports an interpretation that, if the perlite sound proofing is equivalent to cork sub-floor, the travertine floors would have been acceptable upon application to the board. Under these facts, Respondents were entitled to rely upon acceptance by the developer of the placement of the marble floor and use of the perlite sound proofing.

Based on the foregoing it is Ordered:

1. Petitioner may not require Respondents to remove the travertine marble floor installed in Units 509, 309, 401, 913, 704, 901, 1202, before turnover of control from the developer.

DONE AND ORDERED this 17th day of September, 2007, at Tallahassee, Leon County, Florida.

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Bruce A. Campbell, Arbitrator  
Department of Business and  
Professional Regulation  
Arbitration Section  
1940 North Monroe Street  
Tallahassee, Florida 32399-1029

**Trial *de novo* and Attorney's Fees**

**This decision shall be binding on the parties unless a complaint for trial *de novo* is filed in accordance with section 718.1255, Florida Statutes. As provided by section 718.1255, Florida Statutes., the prevailing party in this proceeding is entitled to have the other party pay reasonable costs and attorney's fees. Any such request must be filed in accordance with Rule 61B-45.048, F.A.C.**

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