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

IN RE: PETITION FOR ARBITRATION

WIMBLEDON TOWNHOUSE CONDOMINIUM,

Petitioner,

v. **Case No. 2011-02-6756**

GRACE FULTON and DERRICK MAKINS,

Respondents.

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ORDER AFTER CASE MANAGEMENT CONFERENCE

On May 20, 2011, Petitioner's counsel filed a Mandatory Non-Binding Petition Form on behalf of Wimbledon Townhouse Condominium III-1 Association, Inc. (Association) naming Grace Fulton and Derrick Makins as Respondents. The Association alleges that Respondents have constructed a porch addition on the rear of their unit without seeking the prior or subsequent approval of the board in violation of Section XII(A)(3) of the Declaration of Condominium.[1] As relief, the Association seeks an order requiring Respondents to remove the unapproved addition or, alternatively, to apply to the Board for approval of the addition.

On June 16, 2011, Respondents filed an Answer alleging the Association violated their equal protection rights and asserting that, as the enclosure complied with the requirements of the Florida Building Code, they were not required to obtain written

[1] Section XII(A)(3) of the Declaration of Condominium, states as follows:

> The responsibility of a unit owner is as follows:…not to paint or make any alteration, decoration, repair, replacement or change of or on the common elements or to any outside or any exterior portion of each unit, including doors, windows, or shutters without the written permission of the Board of Directors.

approval for the enclosure from the Association. Additionally, they raised the affirmative defense of selective enforcement.

On August 23, 2011, a telephonic case management conference was conducted. Present by telephone were Meredith Spira, Esq. for the Association and Respondent Derrick Makins.

Fourteenth Amendment to the United States Constitution[2]

Respondent's allege that the Association's demand for them to remove their porch enclosure or, alternatively, seek written approval by the board for the enclosure is a violation of their rights as found in the 14th Amendment to the U.S. Constitution. Other than the bare statement that their defense is the 14th Amendment, Respondents have not alleged any facts relating to any identifiable constitutional-protected right that has been abridged.

1) Background

Condominiums are creatures of statute. In Florida, Chapter 718 provides the structure and framework for all Florida condominiums. Section 718.104(7), Florida Statutes provides that a declaration of condominium may include covenants and restrictions concerning the use and occupancy of the units, and that the provisions of a declaration are "enforceable servitudes"[3] that run with the land and are effective until

[2] The Fourteenth Amendment to the U.S. Constitution states, in pertinent part, as follows:

> 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

[3] "Equitable servitudes" are basically, a type of property restriction based in contract. Restrictive covenants "are private promises or agreements creating negative easements or equitable servitudes which are enforceable as rights arising out of contract." *Dade County v. Matheson,* 605 So.2d 469 (Fla. 3d DCA 1992) (Ferguson, J., dissenting to denial of rehearing en banc), *citing Board of Public Instruction v. Town of Bay Harbor Islands,* 81 So.2d 637 (Fla.1955).

the condominium terminates. *Costal Garden Condo., Inc. v. Winfrey*, Arb. Case No. 2005-007953, Final Order (September 13, 2005)(Declaration prohibited a unit owner from making any alteration or doing any work within his unit, unless approval had been obtained from the Board of Directors): *Palm Beach Apartments, Inc. v. Flaherty*, Arb. Case No. 96-0088, Summary Final Order (December 12, 1966)(Prior unit owner had modified an exterior wall of the condominium and added a window air conditioner. Declaration prohibited a unit owner from changing the appearance of the exterior of the apartment building).

Typically, the restrictions on ownership and use of condominium units and appurtenances to the units are found within the declaration, articles of incorporation, bylaws, and the rules and regulations promulgated by the board of directors. Generally, a restriction contained in the declaration of condominium is considered a "covenant running with the land".[4] *Pepe v. Whispering Sands Condo. Ass'n, Inc.*, 351 So. 2d 755, 757 (Fla. 2d DCA 1977). Such restrictions come with a very strong presumption of validity[5] and will be invalidated only if it is wholly arbitrary, in violation of public policy or an individual's constitutional rights.[6]

No law protects citizens against enforcement of the condominium's governing documents. Rather, Florida law, pursuant to the provisions of Chapter 718, explicitly

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[4] Black's Law Dictionary defines the term "covenant running with the land" as follows: "A covenant that, because it relates to the land, binds successor grantees indefinitely. The land cannot be conveyed without the covenant." *Black's Law Dictionary*, 383 (8th ed. 2004).

[5] The Court in *Hidden Harbour Est. v. Basso*, 393 So. 2d 637, 639 (Fla. 4th DCA 1981), reasoned:

> There are essentially two categories of cases in which a condominium association attempts to enforce rules of restrictive uses. The first category is that dealing with the validity of restrictions found in the declaration of condominium itself. The second category of cases involves the validity of rules promulgated by the association's board of directors or the refusal of the board of directors to allow a particular use when the board is invested with the power to grant or deny a particular use.

[6] *Id. At 640; Pines of Boca Barwood Condo. Ass'n, Inc. v. Cavouti*, 605 So. 2d 984 (Fla. 4th DCA 1992).

authorizes condominiums to adopt and enforce the requirements of the condominium's governing documents.

2) Jurisdiction

Respondents' claim that the Association is in some manner in violation of their unidentified rights under the 14th Amendment to the United States Constitution is beyond the jurisdiction of the arbitrator and, thus, cannot be addressed in this forum.

Building Code Defense

Respondents allege that because the porch addition was constructed to comply with the Florida Building Code, that approval by the board pursuant to Section XII(A)(3) of the Declaration of Condominium is not required.

As previously stated, the Association requires unit owners to obtain prior written approval by the board before painting or making any alteration, decoration, repair, replacement or change of or on the common elements or to any outside or any exterior portion of each unit, including doors, windows, or shutters to the unit. While approved alterations must comply with all relevant municipal, county, state or special district permits, codes, and requirements, compliance with such governmental restrictions does not preempt the provisions found in Section XIII(A)(3) of the Declaration of Condominium. Accordingly, Respondents' defense that they did not have to obtain written approval from the board because the addition was built in compliance with the Florida Building Code is without merit and is stricken.

Selective Enforcement

In their Answer, Respondents raised the affirmative defense of selective enforcement and have filed photocopies of other units located in the Association whose

owners have made modifications to the exterior of their unit. Rule 61B-45.019(3), Florida Administrative Code, requires, in pertinent part, as follows:

> The defense of selective enforcement shall contain all examples of selective enforcement upon which the respondent depends, shall indicate the unit(s) to which each example pertains, shall identify the unit owner(s), how long the violation existed, and shall indicate whether the board knew of the existence of the violation(s).

Respondents have failed to comply with the requirements of the rule by failing to indentify the ownership of the units and indicate whether or not the modifications were made without the written approval of the board.[7]

Based on the foregoing, **IT IS ORDERED:**

1. Respondents' defense that the Association has violated their rights under the Fourteenth Amendment to the United States Constitution is **STRICKEN.**

2. Respondents defense that approval of the modification is not required due to their compliance with the Florida Building Code is **STRICKEN.**

3. No later than 5:00 p.m. on September 7, 2011, Respondents shall file a Supplement to their Answer which complies with the requirements of Rule 61B-45.019(3), Florida Administrative Code, and shall identify by unit owner(s) and unit number(s), the units with modifications that were constructed without the written approval of the board. **FAILURE OF RESPONDENTS TO COMPLY WITH THIS ORDER SHALL RESULT IN THE STRIKING OF RESPONDENTS' AFFIRMATIVE DEFENSE OF SELECTIVE ENFORCEMENT.**

[7] It is important to note that, in this case, the *relevant allegation of selective enforcement* is **NOT** that other unit owners have enclosed their porches, but that the owners of the units with enclosed porches did not and do not have the board's approval for the enclosure, as required by Section XII(A)(3) of the Declaration of Condominium.

DONE AND ORDERED this 25th day of August, 2011, at Tallahassee, Leon County, Florida.

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