TENANCY UNCOMMON: CONDOMINIUM ASSOCIATION ISSUES FOR THE LANDLORD & TENANT LAWYER PART I

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A. Introduction to Condominium Associations -- The Condominium Association and the Condominium Documents

Question: So what exactly *is* a Condominium and its Condominium Association?

A condominium is a statutory form of real property ownership governed by Chapter 718, Florida Statutes (the "Condominium Act"). §§718.102-104, Fla. Stat.; *See Woodside Village Condominium Assn., Inc., v. Jahren and Mclernan,*, 806 So.2d 452, 457 (Fla. 2002). Pursuant to §718.104(2), Fla. Stat.:

> "(2) A condominium is created by recording a declaration in the public records of the county where the land is located, executed and acknowledged with the requirements for a deed…Upon the recording of the declaration, or an amendment adding a phase to the condominium under s. 718.403(6), all units described in the declaration or phase amendment as being located in or on the land then being submitted to condominium ownership shall come into existence, regardless of the state of completion of planned improvements in which the units may be located or any other requirement or description that a declaration may provide."

Each owner of a Unit at the condominium property submitted to ownership as part of the condominium also owns an appurtenant share of the common elements. §§718.103, and 718.106, Fla. Stat. The condominium property is operated and maintained by a statutory corporate entity, the condominium association, which is typically a not-for-profit corporation.

The condominium association, in turn, is governed and represented by a statutorily defined "Board of Administration" or the "Board" (i.e. – the "Board of Directors"). The Board is typically composed of volunteers who do not get paid for their service.

The condominium association, as well as its owners and directors, are required to comply with the Condominium Act as well as the Declaration of Condominium and its exhibits *See*, 718.303(1), Fla. Stat. The Declaration is a covenant running with the land with characteristics of a contract as well. *See Woodside Village Condominium Assn., Inc., v. Jahren and Mclernan*, 806 So.2d at 456. The Declaration is the condominium's "constitution," creates the condominium and strictly governs the relationships among the condominium unit owners and the condominium association. *Curci Village Condominium Ass'n, Inc. v. Maria,* 14 So. 3d 1175 (Fla. Dist. Ct. App. 4th Dist. 2009); *Schmidt v. Sherrill,* 442 So.2d 963, 965 (Fla. 4th DCA 1984). Often, it contains broad statements of general policy with due notice that the Board of Directors is empowered to implement policies and address day-to-day problems in the condominium's operation through the rulemaking process. *Beachwood Villas Condo. v. Poor***,** 448 So. 2d 1143, 1145 (Fla. Dist. Ct. App. 1984). In many Declarations, a provision exists which empowers the Board of Directors to "interpret" the Declaration, often stating that such interpretation will be binding if it is considered reasonable in the written opinion of legal counsel.

Question: What are the Condominium Documents?

The Declaration and its exhibits, the "condominium documents", or the "condo docs", contain various restrictions on ownership and occupancy, restrictive covenants that bind the actions of owners, occupants, tenants, directors, and the association itself. These condo docs consist of, in descending order of primacy:

- The Declaration (see §718.104);
- The Articles of Incorporation through which the association, a corporate entity, is created;

- The Bylaws (§718.112) – essentially the documents governing the operation of the condominium association as a corporate entity, and the contents of which are governed by §718.112, Fla. Stat., among other provisions; and,
- The Rules and Regulations – typically an exhibit to the Bylaws, but usually subject to modification, replacement, supplementation, or elimination by the Board of Directors of the association.
- Board Interpretations and Adopted Policies – which essentially are a form of rulemaking authority, are ways in which the Board clarifies ambiguities in the Condo Docs where appropriate, establishes operational policies and procedures, and documents its exercise of "reasonable business judgment".

In many instances, a condominium association is also subject to covenants and restrictions of a governing master association, typically an association which governs areas that serve the condominium. In these cases the Master Declaration may control over the provisions of the condominium declaration where they are inconsistent and could contain additional restrictions on renting, use, and occupancy. An owner acquiring a condominium unit must be put on notice of the existence of master association or recreational association through which the owner may be bound by additional restrictions in the "Frequently Asked Question and Answer Sheet" required to be provided to a purchaser by the Condominium Act. *See* 718.504, Fla. Stat.

Question: What Legal Authorities are Applicable to Condominiums?

Condominium Associations, owners and tenants are all governed by the Condominium Act when it comes to a unit within a condominium and the common elements appurtenant to same. *See* §718.303(1), Fla. Stat.. As a corporate entity, associations are also governed by and can exercise powers granted by Chapter 607 (the "Florida Corporation Act") or Chapter 617 (the "Not-for-Profit Corporation Act") to the extent that they are not inconsistent with the Condominium Act. *See* §718.111(2), Fla. Stat. Additionally, there are many instances in which an Association can exercise powers incident to a typical landlord / tenant relationship that are expressly governed by Chapter 83, Part II, Florida Statutes (the "Residential Landlord & Tenant Act"), pursuant to the Condominium Act or the Declaration. In exercising its powers, there are

plenty of other examples of statutory authority Associations and owners frequently encounter and must comply with depending on the nature of the activity undertaken (i.e. – towing (§715.07, Fla. Stat.), construction defect claim pre-suit obligations (Chapter 558, Fla. Stat.), to name only a few commonly encountered examples).

Additionally, condominium associations are regulated by the Division of Condominiums, Timeshares, and Mobile Homes (the "Division"), a regulatory body that issues administrative quasi-judicial "Declaratory Statements" announcing the agency's interpretation of the law or a Declaration in a particular set of circumstances, exercises administrative rule making authority to adopt rules interpreting and expanding upon provisions of the Condominium Act within the scope of authorization for such rulemaking authority, has a disciplinary and investigative arm that can issue penalties against violating parties, election monitoring through an ombudsman's office, and conducts judicial arbitration proceedings as a mandatory form of non-binding dispute resolution for certain limited classes of cases. *See* §718.501, Fla. Stat.; *See* §718.1255(3) and (4). Commercial condominiums and Homeowners' Associations are not subject to such arbitration and regulation to the same extent as residential condominiums.

To summarize, and as a point of practice, when a condominium issue is analyzed, the typical sources of authority that can be consulted to research the issue include the following:

- Statutory provisions of Chapter 718
- Case law governing condominium associations and interpreting provisions of Chapter 718.
- Administrative code regulations promulgated by the Division interpreting Chapter 718. *See* https://www.flrules.org/.
- Arbitration Decisions to the extent that the issue may involve a "Dispute" subject to mandatory non-binding arbitration. Even if not, administrative decisions can be persuasive precedent to a Court. *See Bishop Assoc. Ltd. Partnership v. Belkin,* 521 So.2d 158, 163 (Fla. 3d DCA 1988).
- Consult Division of Condominium "Declaratory Statements" – *See* http://www.myfloridalicense.com/dbpr/lsc/archives.html – containing an index of Declaratory Statements since 1990.

- Review leading industry legal blogs and community association oriented periodicals and journals.
- Call the Division's "Bureau of Compliance", if the issue may involve a complaint submitted to the Division for investigation.

Finally, the Association's decision making, if reasonable (typically evidenced by documentation of the Association's rationale for its decision making and pragmatic factual considerations, will not be second guessed by the Courts, pursuant to the well known "business judgment rule". *See Farrington v. Casa Solana Condominium Ass'n, Inc.* 517 So.2d 70, 72 (Fla. 3d DCA 1987).

B. The Particularities of Condominium Tenancies

I. The Lease (and Uniform Leases)

a. Sample Condominium Declaration Provision:

"…Every lease shall be in writing and shall specifically provide (or, if it does not, shall be automatically deemed to provide) that a material condition of the lease shall be the additional execution of any uniform lease addendum which may be adopted by the Board of Directors and which uniform lease addendum shall control in the event of any conflict between the terms and conditions of the lease and the uniform lease addendum, the tenant's full compliance with the covenants, terms, conditions and restrictions of this Declaration (and all Exhibits hereto), and with any and all rules and regulations adopted by the Association from time to time (before or after the execution of the lease), and that the Association may evict any tenant in violation of this Declaration, the By-Laws, or any Rules and Regulations adopted by the Board of Directors, as if the Association, were landlord, in accordance with Chapter 83 of the Florida Statutes governing residential tenancies. The Association is deemed to be granted a limited attorney in fact power by the Owner of the Unit in which a

defaulting tenant resides, solely for the purpose of carrying out any powers of eviction or rent collection set forth in this Section 17.__..."

b. Some Declarations require a "Uniform Lease", in which case the Association's must be consulted to determine if in fact such a Uniform Lease has been formally adopted by the Association, in which case it must be used unless it violates the Declaration or Florida Law. Other Declarations require a Uniform Lease Addendum be added.

c. Landlords and tenants should assume that an automatic material condition of the lease is the tenant's ongoing compliance with the Declaration, condominium documents, rules and restrictions of the condominium, as this provision is in most Declarations, and even if it isn't, the owner's and tenant's rights are limited and governed by the Association's condominium documents pursuant to §718.303(1), Fla. Stat.

II. Tenant Privacy Issues and Use Rights

a. "When a unit is leased, a tenant shall have all use rights in the association property and those common elements otherwise readily available for use generally by unit owners and the unit owner shall not have such rights except as a guest, unless such rights are waived in writing by the tenant. Nothing in this subsection shall interfere with the access rights of the unit owner as a landlord pursuant to chapter 83. The association shall have the right to adopt rules to prohibit dual usage by a unit owner and a tenant of association property and common elements otherwise readily available for use generally by unit owners." *See* §718.106(4), Fla. Stat.

b. While the Association must generally provide access to its "official records" upon a request by an owner, if a tenant must submit an application to be a tenant there, the Tenant has a right to privacy with respect to their application package, including any background check performed in connection with such approval. *See* 718.111(12)(5)(c), Fla. Stat. Similarly, the Association may not disclose "other personal identifying information ***of any person***, excluding the person's

name, unit designation, mailing address, property address, and any address, e-mail address, or facsimile number provided to the association to fulfill the association's notice requirements." [***Emphasis added***].

III. Duty to Maintain

a. In condominiums, the duty to maintain typically held by the landlord is significantly impacted and in many ways shared with the condominium association. The association's maintenance of the common elements will be a very significant factor on the tenancy. Care must be taken to review the Declaration provisions governing landlord versus association maintenance responsibility. It must be noted that these duties may be different in the event of a casualty loss.

b. Florida courts have long held that a landowner's duty to warn is separate and distinct from the duty to maintain the premises in a reasonably safe condition. "Case law consistently recognizes that the fact that a danger is open and obvious may operate to discharge a landowner's duty to warn, but it does not discharge the duty to maintain the property in a reasonably safe condition." *Lomack v. Mowrey*, 14 So.3d 1090, 1092 (Fla. 1st DCA 2009) *Burton v. MDC PGA Plaza Corp.*, 78 So. 3d 732, 734 (Fla. Dist. Ct. App. 2012)

c. The tenant will be subject to the Association's determination of what is reasonably necessary maintenance. Simply because necessary work for maintenance may also constitute alterations or improvements does not nullify a condominium board's authority and duty to maintain the condominium common elements. *Ralph v. Envoy Point Condo. Ass'n, Inc.*, 455 So. 2d 454, 455 (Fla. Dist. Ct. App. 1984).

d. The Association has an "irrevocable" right to access a unit pursuant to §718.111(5)(a), Fla. Stat., which states:

"(a) The association has the irrevocable right of access to each unit during reasonable hours, when necessary for the maintenance, repair, or replacement of any common elements or of any portion of a unit to be

maintained by the association pursuant to the declaration or as necessary to prevent damage to the common elements or to a unit."

Tenants and landlords often underestimate the significant power of this provision, which has been interpreted very broadly by numerous arbitration decisions over the years. *See e.g. Atlantic View Beach Club Condominium No. One Association, Inc., v. Christos Caravias, et. al.,* Arb. Case No. 2003-08-2989 (Amended Summary Final Order / March 2004)(explaining that right to access includes the right to require a copy of the key to a unit, exists notwithstanding any dispute over the propriety of the work for which the access is required, and permits access irrespective of prior thefts and property damage, etc.).

IV. Quiet Enjoyment

a. "Florida law… recognizes that 'in the absence of express covenants inconsistent therewith' the ordinary lease includes an implied covenant of quiet enjoyment. *See Hankins v. Smith,* 103 Fla. 892, 138 So. 494, 496 (1931)." *Stinson, Lyons, Gerlin & Bustamante, P.A. v. Brickell Bldg. 1 Holding Co.,* 923 F.2d 810, 813-14 (11th Cir. 1991)(The court held that the lease provisions allowing for renovations and entry to make repairs to the building that are deemed necessary for safety, comfort, and preservation of the building do NOT violate quiet enjoyment.)

b. When there is a constructive eviction such constitutes a breach of the covenant of quiet enjoyment. *Richards v. Dodge,* 150 So.2d 477 (Fla. 2d DCA 1963). A constructive eviction occurs when a tenant is essentially deprived of the beneficial enjoyment of the leased premises where they are rendered unsuitable for occupancy for the purposes for which they are leased. *Hankins v. Smith,* 103 Fla. 892, 138 So. 494 (1931). *Barton v. Mitchell Co.,* 507 So. 2d 148, 149 (Fla. Dist. Ct. App. 1987).

    a. In *Barton*, the Tenant notified Landlord of noise issues with other tenants. Landlord acknowledged the issue and agreed to remedy the situation. Tenant gave Landlord reasonable time and noise issue was not resolved. Tenant was constructively evicted, breaching the covenant of quiet

enjoyment. Court held that tenant was not responsible for rent after the constructive eviction.

V. Question: What Remedies Exist for Landlords, Tenants and Associations in the Condominium Association Context?

a. §718.303(1), Fla. Stat.:

Each unit owner, each tenant and other invitee, and each association is governed by, and must comply with the provisions of, this chapter, the declaration, the documents creating the association, and the association bylaws which shall be deemed expressly incorporated into any lease of a unit. Actions for damages or for injunctive relief, or both, for failure to comply with these provisions **may be brought by the association or by a unit owner against:**

a. (a)**The association.**
b. (b)**A unit owner.**
c. (c)Directors designated by the developer, for actions taken by them before control of the association is assumed by unit owners other than the developer.
d. (d)Any director who willfully and knowingly fails to comply with these provisions.
e. (e)**Any tenant leasing a unit, and any other invitee occupying a unit.**
    1. **NOTE: Tenants DO NOT have standing under §718.303(1), Fla. Stat.**

b. Condo ADR → Mandatory Non Binding Arbitration
    a. Florida Admin Code 61B-45 – The Mandatory Non-Binding Arbitration Rules of Procedure
    b. Prior to the institution of court litigation, a party to a "Dispute" shall petition the division for nonbinding arbitration. §718.1255(4)(a), Fla. Stat.
    c. "The term "dispute" means any disagreement between two or more parties that involves: (a) The authority of the board of directors, under this

chapter or association document to: 1. Require any owner to take any action, or not to take any action, involving that owner's unit or the appurtenances thereto." §718.1255(1)(a)(1), Fla. Stat.

1. Prior to the institution of court litigation, a party to a dispute shall petition the division for nonbinding arbitration. §718.1255(4)(a), Fla. Stat**.**
2. A dispute shall not include: "…the eviction or other removal of a tenant from a unit; alleged breaches of fiduciary duty by one or more directors; or claims for damages to a unit based upon the alleged failure of the association to maintain the common elements or condominium property." *See* §718.1255(4)(a), Fla. Stat.

c. Other Potential Remedies:

I. Negligence. *See e.g., Newell v. Best Sec. Systems, Inc.,* 549 So.2d 1130, (Fla. 4th DCA 1990)(Reversing judgment in favor of condominium association in negligent security case to permit evidence of prior similar criminal acts that would have put the Association on such notice as a create a foreseeable risk of harm requiring stepped up security measures).

II. Tortious Interference with a Contractual Relationship - McKinney-Green, Inc. v. Davis, 606 So. 2d 393, 397 (Fla. Dist. Ct. App. 1992). The elements of a cause of action for tortious interference with a contractual relationship are:

a. *The existence of a contract, AND*
b. *The defendant's knowledge of the contract, AND*
c. *The defendant's intentional procurement of the contract's breach, AND*
d. *Absence of any justification or privilege, AND*
e. *Damages resulting from the breach*

III. Tortious Interference with Advantageous Business Relationship - Salit v. Ruden, McClosky, Smith, Schuster & Russell, P.A., 742 So. 2d 381, 385 (Fla. Dist. Ct. App. 1999) The elements of a cause of action of a tortious interference with an advantageous business relationship are as follows:

a. *the existence of a business relationship, under which the plaintiff has legal rights (but which is not necessarily evidenced by an enforceable contract) AND*
b. *the defendant's knowledge of the relationship AND*
c. *an intentional and unjustified interference with the relationship by the defendant; AND*
d. *damage to the plaintiff as a result of the interference*

C. Restrictions on Leasing in a Condominium Declaration

I. **HYPO ONE: Landlord wants to rent their condominium unit. The Landlord and Tenant enter into a lease and a copy is sent to the Association, which has adopted a Leasing Approval Rule, in which the Association has forty five (45) days to consider an application for a lease and can approve or disapprove for any reason whatsoever. The Association also requires a $300.00 background check fee and a security deposit of $4,000.00 for the protection of the common elements. The Declaration is silent regarding leasing approval but only permits the leasing of a unit once per calendar year. The Association rejects the tenant and states the reason as "too many kids". The following sections will address the issues raised above.**

II. Declaration Restrictions. The Condominium Act states that the Declaration can include "covenants and restrictions concerning the use, occupancy, and transfer of the units permitted by law with reference to real property. However, the rule against perpetuities shall not defeat a right given any person or entity by the declaration for the purpose of allowing unit owners to retain reasonable control over the use, occupancy, and transfer of units." *See* §718.104(5), Fla. Stat. Accordingly, the Declaration will nearly always contain some type of restrictions upon leasing.

III. When Leases Can be Restricted and the Presumption of Valid Declaration Restrictions

1. Declaration leasing restrictions are presumed to be valid and enforceable. *See Woodside Village Condominium Assn., Inc., v. Jahren and McClernan*, 806 So.2d 452, 457 (Fla. 2002).

2. Furthermore, Declarations can be freely amended and owners purchase with notice that their rights are subject to change through lawfully adopted amendments. As long as an amendment is consistent with the Condominium Act and lawfully enacted, Courts will generally permit declaration restrictions. *See id*. at 457.

3. Declaration provisions will only be invalidated if they are (1) wholly arbitrary in their application, (2) in violation of public policy, or (3) if they abrogate a fundamental constitutional right. *See id.*; *see also Grove Isle Ass'n, Inc. v. Grove Isle Associates, LLP*, 137 So.3d 1081, 1090 (Fla. 3d DCA 2014).

   a. Violations of Public Policy include "unreasonable restraints on alienation." *See Seagate Condominium Ass'n, Inc. v. Duffy,* 330 So.2d 484, 486-487 (Fla. 4th DCA 1976).

   b. Leasing restrictions will be upheld as a reasonable restraint on alienation unless they are <u>wholly arbitrary in application</u>, because leasing restrictions are not absolute restrictions on the transfer of property rights. *Id.* <u>Furthermore, undue hardship exceptions</u> to restrictions on leasing do not necessarily mean that the restraint on alienation is unreasonable. *See Woodside Village Condominium Assn., Inc.*,806 So.2d at 457; *See e.g., Seagate Condominium Ass'n, Inc. v. Duffy*, 330 So.2d 484 (Fla. 4th DCA 1976)(upholding validity of declaration provision that completely restricted leasing, with limited exceptions);

IV. <u>Examination of Individual Cases</u>

1. *Seagate Condominium Ass'n, Inc. v. Duffy*, 330 So.2d 484 (Fla. 4th DCA 1976)

i. In *Seagate*, the Fourth District Court of Appeal upheld a blanket restriction in the declaration that completely prohibited the right to lease units, with limited exceptions in the cases of hardship.

ii. The Court explained that the leasing restriction in question was only a limited restriction on the right to transfer the property, it was reasonable based upon practical considerations and demands involved in condominium living, and it was not unlimited in duration because it was subject to the right of unit owners to amend the restriction by lawful vote. *Seagate*, 330 So.2d at 486-487.

2. *Kroop v. Caravelle Condominium, Inc.,* 323 So.2d 307, 309 (Fla. 3d DCA 1975)(upheld a rental restriction solely permitting owners to rent once during their period of ownership).

3. *Woodside Village Condominium Assn., Inc., v. Jahren*, 806 So.2d 452, 457 (Fla. 2002)

i. Florida Supreme Court cited *Seagate* favorably.

ii. Upheld an amendment to a declaration that created additional restrictions and limitations on those rights to rent that had been previously contained within the declaration. *See Woodside*, 806 So.2d at 457-458.

iii. Those amendments were held to be enforceable against all owners, including those whose ownership pre-dated the amendment and who relied upon the previous leasing restrictions (or lack thereof) in making their purchase. *Woodside*, 806 So.2d at 457-458.

iv. All unit purchasers were considered "on notice" of the amendment provisions contained within the declaration, and that their leasing rights could be taken away by the amendment process. *Id.* at 461.

v. 2004 Addition of Section 718.110(13)

1. Passed in response to the *Woodside* holding.
2. The 2004 Version "Grandfathered" pre-existing owners who did not consent in writing to amendments

"restricting unit owners' rights relating to the rental of units[.]"

vi. Current Wording of Section 718.110(13)

1. An amendment prohibiting unit owners from renting their units or altering the duration of the rental term or specifying or limiting the number of times unit owners are entitled to rent their units during a specified period **applies only to unit owners who consent to the amendment and unit owners who acquire title to their units after the effective date of that amendment.** [**Emphasis added**]. *See* § 718.110(13), Fla. Stat. (2014)

vii. Applying the Current Version of Section 718.110(13)

1. Current version is more limited than the 2004 Version.
2. Current version only requires grandfathering for amendments "prohibiting unit owners from renting their units or altering the duration of the rental term or specifying or limiting the number of times …" owners can rent their units.
3. Query – which version applies to the condo in which the unit is located? *See Maronda Homes, Inc. of Fl., v. Lakeview Reserve Homeowners Ass'n., Inc.*, 127 So.3d 1258, 1272, 1274 (Fla. 2013); *See Cohn v. The Grand Condominium Association, Inc*. 62 So.3d 1120 (Fla. 2011).
    a. Is the statutory change remedial or substantive?
    b. Retroactive?
    c. An unconstitutional impairment of vested rights?

4. *Palermo and Palermo v. Tower Residences Condominium Assn., Inc*., Arb. Case No. 2005-01-7027, Summary Final Order (June 2005)

   i. The Association's Board had express Declaration authority to modify leasing restrictions by rule, including to make them ***more*** restrictive.

   ii. However, §718.110(13) had been adopted to prevent amendments to leasing restrictions from impacting pre-existing owners who do not consent. The issue was whether a rule fell within the purview of this statute, which governed Declaration amendments. After all, the Declaration was not being amended and it had always alerted owners to the possibility that rules could further restrict leasing rights.

   iii. The Arbitrator held that the intent of the statute applied to rule amendments as well as leasing restrictions in a declaration. Rationale was that the Declaration was supreme over rules and therefore if the Declaration could not be amended to add new restrictions without consent, the rules couldn't either.

   iv. Additionally, the Arbitrator reasoned that since the Declaration facially contained a specific leasing restriction, the rule adopted pursuant to the Declaration required a corresponding Declaration amendment to avoid misleading language in the public records.

5. *Las Brisas Homeowners Association of New Smyrna Beach, Inc., f/k/a The Club Oceania Homeowners' Association, Inc. v. Fidler, Auld, and Auld*, Arb. Case No. 12-03-6350, Summary Final Order (October, 2012).

   i. City had ordinance prohibiting short term rentals so the Board adopted a policy to do the same. Declaration did not expressly restrict short term rentals, but gave the Board the right to approve or disapprove of leases within thirty (30) days and required that every lease be "lawful".

   ii. The arbitrator distinguished *Palermo* and held that prohibiting short term rentals based upon the Declaration was permitted.

6. *Seychelles Condominium Management Association, Inc. v. Ehlen*, Arb. Case No. 01-3639, Final Order (May, 2002).

   i. Where the declaration prohibited amendments to the leasing rights contained in the declaration except with 100% approval of the owners, the association could not use the general amendatory provisions of the declaration to delete the requirement of 100% approval for rental amendments.

7. *Haakenson v. The Nautilus Mgmt. Co.,* Arb. Case No. 2006 – 00 – 5354, Summary Final Order (April, 2006).

   i. Supported the notion that Declaration can vest rental restrictions with "material amendment" status, requiring higher approval rights.
   ii. Despite an express limitation on the right to adopt leasing restrictions and the absence of leasing restrictions in the Declaration, the Association tried to argue that it could prohibit short term rentals because it was likely to raise the cost of insurance and constituted a nuisance.
   iii. The Arbitrator rejected this position, using standard canons of interpretation including *expressio unius est exclusio alterius ("the expression of one is to the exclusion of the other")* to hold that the absence of leasing restrictions was a prohibition against them, and the specific absence of leasing restrictions controlled over the generally applicable provisions of the Declaration relating to insurance and nuisance.

V. Limitations on the Ability to Adopt Rules Inconsistent with the Condominium Declaration

1. According to the "Beachwood Test" found in *Beachwood Villas Condominium v. Poor*, 448 So.2d 1143 (Fla. 4th DCA 1984) and *Hidden Harbor Estates, Inc., v. Basso*, 393 So.2d 637 (Fla. 4th DCA 1981)(discussing the element of reasonableness), the elements required to adopt a rule are as follows:

i. Authority to Adopt Rule in the Declaration – Does the authority to adopt rules in the Declaration or the Condominium Act cover the subject matter of the rule?

Ex. The Declaration permits rules governing the "Use" and "Operation" of the Condominium Property -- does a rule governing email communications deal with the "Use" or "Operation" of the Condominium Property?

Ex. §718.111(12)(c), Fla. Stat., permits the Association to adopt reasonable rules governing official records requests.

ii. Consistency with Restrictions in the Declaration, Bylaws and Articles of Incorporation. *See e.g., Koplowitz v. Imperial Towers Condominium, Inc*., 478 So.2d 504 (Fla. 4th DCA 1985)(Rule could not contravene Articles of Incorporation); *Mohnani v. La Cancha Condominium Assn., Inc*. 590 So.2d 36 (Fla. 4th DCA 1991)(Right to lease was inferable from Declaration provisions allowing leasing subject to a right of first refusal, thus rule preventing leasing for the first two years of ownership was inconsistent and invalid); *See also Bay Pointe Waterfront Condominium Assn., Inc., v. Peavy*, Arb. Case No. 02-5765, Summary Final Order (Scheuerman / 2003)(where the Declaration and Bylaws were silent on pets but permitted rules to govern the Association and the original rules addressed pets, Arbitrator held that pets could be restricted by Rule even though Declaration was silent); *compare, Neville v. Sand Dollar III, Inc*., Arb. Case No. 94-0452, Summary Final Order (April, 1995)(Declaration permitted renting generally, so arbitrator held that a rule requiring a minimum rental period of seven (7) days contravened that absolute right to rent and was invalid.)

iii. Condominium Act (or HOA Act) Compliance?

iv. Reasonableness. *See Juno by the Sea North Condominium Assn. (the Towers), Inc. v. Manfredonia,* 397 So.2d 297 (Fla. 4th DCA 1980). In which

An Association rule governing parking was governed by a test of reasonableness once it was established that the Association was within its power to adopt such rule. There was covered parking and uncovered parking and the Association adopted a rule that only permitted those without covered parking to use the uncovered nearby parking, which were not limited common elements.

VI. Cases Considering Whether an Association's Approval Process was Reasonable and/or Arbitrary

1. Intended Use of the Unit: *Lyons v. King*, 397 So.2d 964 (Fla. 4th DCA 1981) (finding that a owner's intended use of the Unit is a reasonable factor to consider in determining whether an Association should allow that owner to lease the unit and finding that a restriction was not arbitrary when the Association demonstrated a history of rarely approving leases and used hardship as the primary approval criteria).

Facts

i. Prospective purchasers of a condominium unit sued defendant prospective sellers and the Condominium Association, in light of Condominium Association's refusal to approve the plaintiffs as purchasers. *Id*. at 965.
ii. Plaintiffs argued unsuccessfully in the trial court that the restrictions in the condominium documents were void as an unreasonable restraint on alienation of property. *Id.*
iii. On appeal, Plaintiffs admitted the restrictions were reasonable, and argued that the Association was guilty of an unreasonable and arbitrary application of the restrictions. *Id.*

Holding

iv. Whether condominium regulations were arbitrarily and unreasonably applied was a factual determination. *Id*. at 967.

v. **Association's reasons for rejecting the application were neither arbitrary nor unreasonable because**:

1. There was **evidence that the purchasers had no intention of living in the uni**t. He planned to rent it only. *Id*.
2. Evidence that purchaser intended to hold the apartment as a hedge against inflation. *Id*.
3. Some evidence that **the unit was being purchased only as an investment**. *Id*.
4. **Only four applications for leases were approved at the Association in over a ten year period. Of those leases, approval was either based on hardship or renewals of already existing leases**. There were no units held by a landlord merely for rental purposes. *Id*. at 968.

vi. Though in the context of sale approval restrictions, this case exemplifies a pragmatic, fact based, and deferential approach to what constitutes "good cause" that places an emphasis on consistent and coherent application of a rejection rationale.

2. Eligiblity. In *Coquina Club v. Mantz*, 342 So.2d 112 (Fla. 2d DCA1977), the Association could disapprove of an applicant without exercising its right of first refusal because applicant was not eligible for membership under the Declaration; *Compare*, *Camino Gardens Ass'n, Inc. v. McKim*, 612 So.2d 636 (Fla. 4th DCA 1993)(restriction on sales to non-members was an unreasonable restraint on alienation). In the leasing context, *Coquina Club* could be applicable to support any rejection based upon a tenant's disqualification under the requirements for occupancy stated in the Declaration – i.e. – the tenant has a pet when there is a no pet restriction (but see, support animal exceptions).
3. Unit Owner's Payment History: *Pine Island Ridge Condominium "F" Ass'n, Inc. v. Waters*, 374 So.2d 1033 (Fla. 4th DCA 1979) (finding that an owner's default of monthly assessments is a reasonable factor to consider in determining whether the owner can lease out his unit); *See* §718.116(4), Fla. Stat. ("If the association is authorized by the declaration or bylaws to approve or disapprove a proposed lease

of a unit, the grounds for disapproval may include, but are not limited to, a unit owner being delinquent in the payment of an assessment at the time approval is sought.")

Facts

i. Association sought to foreclose a claim of lien on defendant's unit for failure to pay monthly assessments. *Id*. at 1034

ii. The Association did not allow the unit owner to lease their unit while fees were in default. *Id*.

Holding

vii. The Association's refusal to lease the unit was reasonable. *Id*. at 1035

viii. The Court explained that **it was reasonable to withhold approval from an owner who is in default of monthly assessments because that unit owner was "thereby placing an added burden upon other owners."** *Id*.

4. Age Restrictions: *White Egret Condominium, Inc. v. Franklin*, 379 So.2d 346 (Fla. 1979) (holding that an age restriction was a reasonable restriction on residency as long as it was not arbitrarily applied, and that an age restriction was arbitrarily applied when at least six other children were already living in the condominium complex).

Facts:

a. Condominium agreement contained a restriction against residency by children under age 12.

b. Issue was whether that restriction unconstitutionally violated a purchaser's rights to marriage, procreation and association, and his right to equal protection of the laws.

Holding – Age Restrictions are valid, but must not be arbitrary in application or selectively enforced.

c. The restriction was constitutional unless it was unreasonably or arbitrarily applied.

d. Although, the Condominium Association's age restriction against children under 12 years of age was reasonable, it was selectively and arbitrarily applied, so that it could not be enforced in this instance.

i. When the apartment was purchased, there were at least six other children under the age of 12 living in the condominium complex

5. Rights of First Refusal

a. Rights of first refusal are a preemptive right to purchase (or lease) a property either directly or (where permitted) through a chosen designee, at terms that are the same as a bona fide offer received. Ex. Condominium Association x has a right of first refusal to lease a unit through a designee of the Association's choosing.

b. Rights of first refusal in a condominium declaration have been held not to violate the rule against perpetuities and were not considered an unreasonable restraint on alienation because they do not absolutely restrict the transfer of property. *See Old Port Cove Holdings, Inc. v. Old Port Cove Condo. Ass'n One, Inc.*, 986 So. 2d 1279 (Fla. 2008).

c. The association has a right of first refusal on the proposed sales contract or lease, or has the right to deny approval of the prospective transfer, in which case the association is obligated to produce another person to buy or rent the unit on identical terms within a specified period of time. If there is no approval or disapproval within the specified period, the transaction is usually

considered approved. **UNIT OWNER RIGHTS AND RESPONSIBILITIES, CONDO FL-CLE 12-1**

d. Unit owner entered into contract to sell condominium to prospective buyer. Association asserted rights under declaration to disapprove of buyer and provided an alternative purchaser for the unit. After suit was filed, owners issued warranty deed to prospective buy, but Association refused to acknowledge the transfer. The issue in the case was whether the "right of refusal" article in the declaration was an illegal restraint on alienation of property. The Court held that the article in the decoration was a "valid and enforceable right of first refusal to condo association. *Chianese v. Culley*, 397 F. Supp. 1344, 1346 (S.D. Fla. 1975)

e. The Restatement of Property, Vol. 4 § 413(1) takes the position that a provision that the owner shall not sell his property without giving a designated person the opportunity to meet any offer received does not constitute an invalid restraint on alienation, provided that such provision does not violate the rule against perpetuities. *Chianese v. Culley*, 397 F. Supp. at 1346.

e. **Unsuccessful Purchaser Standing – Could Apply to Unsuccessful Renters.** An unsuccessful purchaser of a condominium unit lacks standing to sue the condominium association on the grounds that the association wrongly interfered with a contract for the sale of a condominium unit to the purchaser by failing to follow the procedural requirements of the declaration of condominium and the bylaws of the association. *See Backus v. Smith*, 364 So. 2d 786 (Fla. Dist. Ct. App. 1st Dist. 1978); 10 Fla. Jur 2d Condominiums, Etc. § 56.

6. Other Criteria Examples and Frequent Declaration Restrictions

1. Section 8 Housing
2. Credit-worthiness
3. Failing a Background check

4. A provision not requiring the Association to give an explanation for the rejection.
5. Rental Caps – i.e. Only 20% of the units may be rented at a given time.

VII. The Fair Housing Act

1. The Federal Fair Housing Act, 42 U.S.C.A. § 3604, makes it unlawful:

   a. To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.

   b. To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.

   c. To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination.

2. In order to make out a prima facie case of a violation of sub-section 3604(a) for discriminatory housing refusal, a plaintiff must show that he is a member of a statutorily protected class who applied for and was qualified to rent or purchase housing and was rejected although housing remained available. *Soules v. United States Dep't of Housing & Urban Dev.,* 967 F.2d 817 (2d Cir.1992) *Martin v. Palm Beach Atl. Ass'n, Inc.,* 696 So. 2d 919, 921 (Fla. Dist. Ct. App. 1997).

3. A violation of sub-section 3604(b) may be proven by showing either discriminatory treatment or discriminatory effects of a given policy on a statutorily protected group. *Simms v. First Gibraltar Bank,* 83 F.3d 1546 (5th

Cir.1996) *Martin v. Palm Beach Atl. Ass'n, Inc.*, 696 So. 2d 919, 922 (Fla. Dist. Ct. App. 1997).

a. Bank (landlord) rented unit to Appellant and his children. Rules against children under the age of 12 in a condominium were discriminatory on their face under "'familial section' of the FHA". Appellant brought prima facie case with evidence of damages, including emotional distress. Case was remanded for new trial on the issue of actual intent to discriminate.

VIII. Broward Municipal Code Sec. 16½-35.6. - Required notices in connection with application to purchase or rent a dwelling. (Ord. No. 2013-29, § 1, 9-10-13)

1. Within fifteen (15) days after receipt of any incomplete or incorrectly completed application (or amended application) to purchase or rent a dwelling, the condominium association, homeowners' association, or cooperative association shall provide the applicant with written notice specifically identifying any and all items in the application that need to be completed or corrected.
2. Within forty-five (45) days after receipt of a correctly completed application, the association shall either reject or approve the application and shall provide the applicant with written notice of same. If the application is rejected, the written notice must state with specificity each reason for the rejection.
3. If the condominium association, homeowners' association, or cooperative association fails to comply with the provisions of Sec. 16½-35.6(a) or (b), the Human Rights Section may send a demand letter requesting that the condominium association, homeowners' association, or cooperative association, within ten (10) days after the date of the demand letter, provide to the applicant and the Human Rights Section a written acknowledgement of application receipt, notice of approval or rejection of the application, and notice specifying each reason for the rejection (if applicable). The failure of the condominium association, homeowners' association, or cooperative association to timely comply with this provision may be considered in determining whether reasonable cause exists to believe the association's decision or action was discriminatory.

IX. Condominium Act Provisions Relating to Security Deposits and Transfer Fees

1. Section 718.112 – Bylaws

A. § 718.112(3)(a) – Optional Provisions; Leasing Restriction

i. **The bylaws may provide for Restrictions on and requirements for the use, maintenance, and appearance of the units and the use of the common elements**.

B. § 718.112(2)(i) – Transfer Fees; Security Deposits

ii. An association may, if it has the authority in the declaration or bylaws, require that a prospective lessee place a security deposit.

1. The Amount cannot exceed the equivalent of 1 month's rent
2. Must be placed into an escrow account maintained by the association.
3. The security deposit shall protect against damages to the common elements or association property. . .

iii. §718.112 (2)(i)

Transfer fees.—No charge shall be made by the association or any body thereof in connection with the sale, mortgage, lease, sublease, or other transfer of a unit unless the association is required to approve such transfer and a fee for such approval is provided for in the declaration, articles, or bylaws. Any such fee may be preset, but in no event may such fee exceed $100 per applicant other than husband/wife or parent/dependent child, which are considered one applicant…" However, if the lease or sublease is a renewal of a lease or sublease with the same lessee or sublessee, no charge shall be made. The foregoing notwithstanding, an association may, if the authority to do so appears in the declaration or bylaws, require that a prospective lessee place a security deposit, in an amount not to exceed the equivalent of 1 month's rent, into an escrow account maintained by the association. The security deposit shall protect against damages to the common elements or association property. Payment of interest, claims against the deposit, refunds, and

> disputes under this paragraph shall be handled in the same fashion as provided in part II of chapter 83."

X. HYPO A – REVISITED

Looking back on HYPO A, the leasing "Rule" is highly problematic because the Declaration does not contain a leasing restriction that provides that the Association has a right to approve or disapprove of the tenant. Furthermore, the stated rejection criteria evidences discriminatory intent pursuant to the Fair Housing Act, because of familial status and the absence of an elderly living exemption in the hypo. The Rule also requires a violation of municipal ordinances in Miami-Dade County and Broward. Finally, the transfer fee and security deposit are both in violation of §718.112(2)(i).

XI. Recent Condominium Act Remedies for Associations

1. **Associations now have a statutory right to collect rent from the tenants of delinquent owners, even if this right isn't in the Declaration.**

See §718.116(11), Fla. Stat.:

> "(11)(a) If the unit is occupied by a tenant and the unit owner is delinquent in paying any monetary obligation due to the association, the association may make a written demand that the tenant pay to the association the subsequent rental payments and continue to make such payments until all monetary obligations of the unit owner related to the unit have been paid in full to the association. The tenant must pay the monetary obligations to the association until the association releases the tenant or the tenant discontinues tenancy in the unit.
>
> 1. The association must provide the tenant a notice, by hand delivery or United States mail, in substantially the following form:
>
> > Pursuant to section 718.116(11), Florida Statutes, the association demands that you pay your rent directly to the condominium association and continue doing so until the association notifies you otherwise.
> >
> > Payment due the condominium association may be in the same form as you paid your landlord and must be sent by

United States mail or hand delivery to (full address) , payable to (name) .

Your obligation to pay your rent to the association begins immediately, unless you have already paid rent to your landlord for the current period before receiving this notice. In that case, you must provide the association written proof of your payment within 14 days after receiving this notice and your obligation to pay rent to the association would then begin with the next rental period.

Pursuant to section 718.116(11), Florida Statutes, your payment of rent to the association gives you complete immunity from any claim for the rent by your landlord for all amounts timely paid to the association.

2. The association must mail written notice to the unit owner of the association's demand that the tenant make payments to the association.
3. The association shall, upon request, provide the tenant with written receipts for payments made.
4. A tenant is immune from any claim by the landlord or unit owner related to the rent timely paid to the association after the association has made written demand.

(b) If the tenant paid rent to the landlord or unit owner for a given rental period before receiving the demand from the association and provides written evidence to the association of having paid the rent within 14 days after receiving the demand, the tenant shall begin making rental payments to the association for the following rental period and shall continue making rental payments to the association to be credited against the monetary obligations of the unit owner until the association releases the tenant or the tenant discontinues tenancy in the unit.

(c) The liability of the tenant may not exceed the amount due from the tenant to the tenant's landlord. The tenant's landlord shall provide the tenant a credit against rents due to the landlord in the amount of moneys paid to the association.

(d) The association may issue notice under s. 83.56 and sue for eviction under ss. 83.59-83.625 as if the association were a landlord under part II of chapter 83 if the tenant fails to pay a required payment to the association after written demand has been made to the tenant. However, the association is not otherwise considered a landlord under chapter 83 and specifically has no obligations under s. 83.51.

(e) The tenant does not, by virtue of payment of monetary obligations to the association, have any of the rights of a unit owner to vote in any election or to examine the books and records of the association.

(f) A court may supersede the effect of this subsection by appointing a receiver."

2. Associations can now take over abandoned units to maintain and relet them pursuant to express statutory authority outside of the ability to appoint a receiver. *See* §718.111(5)(b), Fla. Stat.

i. At the Board's discretion, **the Association may enter an abandoned unit "to inspect the unit and adjoining common elements**; **make repairs**. . . repair the unit if mold or deterioration is present; **turn on the utilities** for the unit; **or otherwise maintain, preserve, or protect the unit** and adjoining common elements." *See* § 718.111(5)(b)(1).

ii. A unit is presumed to be abandoned if:

a. The unit is the subject of a foreclosure action and no tenant appears to have resided in the unit for at least 4 continuous weeks without prior written notice to the association; § 718.111(5)(b)(1)(a); or

b. No tenant appears to have resided in the unit for 2 consecutive months without prior written notice to the association, and the association is unable to contact the owner or determine the whereabouts of the owner after reasonable inquiry. § 718.111(5)(b)(1)(b)

iii. Except in the case of an emergency, an association may not enter an abandoned unit until 2 days after notice of the association's intent to enter the unit has been mailed or hand-delivered to the owner. .

iv. The notice may be given by electronic transmission if the owner previously consented to receive notice in that fashion. § 718.111(5)(b)(2)

v. Any expense incurred by an association pursuant to [these rules] is chargeable to the unit owner and enforceable as an assessment. . .§ 718.111(5)(b)(3)

vi. The association may petition a court . . .to appoint a receiver to lease out an abandoned unit for the benefit of the association to offset against the rental income the association's costs and expenses of maintaining,

> preserving, and protecting the unit and the adjoining common elements, including the costs of the receivership and all unpaid assessments, interest, administrative late fees, costs, and reasonable attorney fees .§ 718.111(5)(b)(4).

Bonus Material - Recent Developments Where L&T and Condominium Law Intersect

A. Changes to § 83.64, Fla. Stat. Prohibiting Retaliatory Conduct

§ 83.64, Fla. Stat., prohibits retaliatory conduct by a landlord and specifies various examples of activities to which the prohibition applies. In 2013, the statute was amended to add payment of rent to a condominium association as a specific example of conduct that a landlord cannot retaliate against. The statute provides as follows:

> (1) It is unlawful for a landlord to discriminatorily increase a tenant's rent or decrease services to a tenant, or to bring or threaten to bring an action for possession or other civil action, primarily because the landlord is retaliating against the tenant. In order for the tenant to raise the defense of retaliatory conduct, the tenant must have acted in good faith. Examples of conduct for which the landlord may not retaliate include, but are not limited to, situations where:
> (a) The tenant has complained to a governmental agency charged with responsibility for enforcement of a building, housing, or health code of a suspected violation applicable to the premises;
> (b) The tenant has organized, encouraged, or participated in a tenant organization;
> (c) The tenant has complained to the landlord pursuant to s. 83.56(1);
> (d) The tenant is a servicemember who has terminated a rental agreement pursuant to s. 83.682;
> **(e) The tenant has paid rent to a condominium, cooperative, or homeowners' association after demand from the association in order to pay the landlord's obligation to the association; or**

(f) The tenant has exercised his or her rights under local, state, or federal fair housing laws. [emphasis added].

Sub-sections (e) and (f) were added in 2013 and deal with situations of particular applicability to the condominium context. As you are likely already aware, §718.116(11), Fla. Stat., was added to the Condominium Act several years ago and permits an association to collect rent directly from the tenant of a delinquent owner, including a right to bring eviction proceedings for non-compliance by the tenant with a written demand for rent sent by the condominium association. Payment of rent pursuant to §718.116(11), Fla. Stat is a complete defense to a landlord's claims for unpaid rent. Now, due to the recent additions to §83.64, Fla. Stat., there is a clear prohibition against retlation for this conduct. Additionally, Landlords cannot retaliate for fair housing act claims, which are commonly brought in the condominium context.

B. Other L&T Act Changes Relating to Condominium Living

1. §83.51(1)(b) -- New obligations relating to screen maintenance. In Condominium Associations, the duty to maintain common elements that serve a Unit and contribute to the habitability of a leased Unit for the most part will fall on the Condominium Association. As with all other aspects of a landlord's duty to maintain the premises, in a condominium, the landlord must act with care in determining where the landlord's responsibility ends and the condominium's begins. The screen will often be an item required to be maintained by the landlord. In addition to requiring the landlord to ensure that screens are installed in a reasonable condition at the commencement of the tenancy, a landlord is now obligated to repair damage to screens at least once annually while the tenancy remains in effect.
2. §83.49(2) – has been modified to provide specific language required in leases regarding security deposits, while also impacting statutory notices required in connection with a security deposit. The changes also include language that prohibits a landlord from seeking a setoff against the return of a deposit, where previously the statute solely provided that a failure to comply merely forfeited a claim to the deposit. These changes are important in the condominium context for several reasons, including:
    a. Landlords must ensure that condominium uniform leases have been updated to comply with these changes.
    b. Condominium Associations are often entitled to collect a common element security deposit form a tenant, and §718.112(2)(i), Fla. Stat., specifically references and requires association compliance with Chapter 84 requirements relating to security deposits.

c. However, there is an issue regarding whether condominium associations must comply with the statutory notice requirements relating to the collection of these deposits, since the Association is (a) not a landlord; and (b) not ***typically*** renting more than five (5) units at a time.

3. §83.56(2)(b) – Adds language governing a landlord's notice of violation to a tenant for noncompliance under the terms of a lease agreement, which provides that any reoccurrence of noncompliance within a 12 month period after such notice permits the landlord to commence an eviction action without delivering a subsequent notice. This is critical in a condominium, where governing rules and restrictions are often automatically incorporated into a lease by operation of the Declaration's leasing restrictions. Furthermore, Associations are often empowered to evict a tenant for violations of condominium rules and restriction pursuant to the Declaration, but often must follow L&T notice requirements to do so.

4. §83.56(2)(b) -- Makes subtle and confusing changes to the statutory provisions governing a provision of a lease which requires a notice from a tenant within a specified period of vacating a premises. The change essentially states that the lease can only require such notice from a tenant if the landlord must give notice of non-renewal during that time (i.e. – making such notice material for the purposes of the landlord / tenant relationship). This provision could have ripple effects for the purpose of condominium compliance with security deposit requirements, since a condominium association's obligations are tied to the termination of the tenancy and they are less likely to be informed regarding same. Accordingly, a condominium is more likely to adopt rules or uniform leases requiring such notices and providing for liquidated damages to the condominium if not complied with.