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

IN RE: PETITION FOR ARBITRATION

Robin Humphrey and
Marsha Humphrey,

Petitioners,

v.

Carriage Park Condominium
Association, Inc.,

Respondent.
_____/

Case No. 2008-04-0230

FINAL ORDER

Statement of the Issues

This case presents three separate issues. First, whether Respondent, Carriage Park Condominium Association, Inc. improperly removed concrete "pavers" and indoor – outdoor carpeting which Petitioners, Robin Humphrey and Marsha Humphrey, had placed on common elements. Second, whether Respondent made material alterations and additions to common elements without approval of the membership. Third, whether Respondent willfully failed to allow inspection of official records.

Procedural History

On July 2, 2008, Robin Humphrey and Marsha Humphrey filed a Petition for Arbitration against Carriage Park Condominium Association, Inc. seeking an order to allow Petitioners to maintain pavers and indoor-outdoor carpet on common elements; to require removal of a coquina boulder in front of unit 601; to require removal of coquina boulders located along the entry road into the condominium; to require removal of hose racks from

condominium buildings; to require the production of official records and payment of statutory damages for failure to allow inspection; and awarding attorneys fees and costs incurred in arbitration. An Order Requiring Answer was entered on July 22, 2008. An Answer and Affirmative Defenses to the Petition was filed on September 22, 2008. On October 14, 2008, an Order Holding Case in Abeyance was entered to allow for records production and settlement discussions. On December 22, 2008, a Pre-Hearing Order was entered scheduling a final hearing as to all issues except delivery of the requested records, and requiring the filing of witness and exhibit lists and copies of all exhibits intended to be introduced at the final hearing. After a joint motion for continuance, the final hearing was rescheduled for February 26, 2009, with the required filings due on February 16, 2009.

Respondent filed its witness and exhibit list, with copies of the exhibits on February 16, 2009. Petitioners did not make a similar filing or provide copies to Respondent. On February 19, 2009, Respondent filed a Motion to Dismiss for the failure of Petitioners to comply with the pre-hearing orders. This motion was renewed on February 23, 2009. On February 24, 2009, Petitioners filed a compact disc represented to contain copies of photographs of the condominium.

A Final Hearing was held on February 26, 2009. At the outset of the hearing, the arbitrator considered the Motion to Dismiss pursuant to Rule 61B-45.036(1), Florida Administrative Code, for Petitioners' failure to comply with the order for pre-hearing filings. As a sanction for the violation, the arbitrator ruled that the compact disc filed February 24, 2009, would not be admitted into evidence or considered by the arbitrator, but that Petitioners could introduce any documents previously filed, including Respondent's

exhibits. Additionally, based upon the photographs submitted by Respondent, the arbitrator summarily ruled that Respondent had not made material alterations and additions to common elements without approval of the membership. The parties were given until March 20, 2009 to file written submissions pursuant to Rule 61B-45.039(6), Florida Administrative Code. Each party did file a proposed final order.

Statement of the Facts

Concrete Patio on Common Element

1. Petitioners are the owners of Unit 105 of Carriage Park Condominium in Melbourne, Florida.

2. Respondent is the Association responsible for the operation and maintenance of Carriage Park Condominium.

3. Petitioners moved into their unit when the building was new. Shortly after moving in they constructed a patio outside of the unit, abutting the lanai of the unit. The patio consisted of four rows of ten concrete squares ("pavers") approximately ten inches on each side. This was done after seeing similar patios for other units and informal discussion with the site manager employed by the developer.

4. Before the patio was installed the ground immediately outside the lanai's sliding door consisted of drainage stones extending about twenty inches out from the wall. The drainage stones ran along the wall for the length of the building. A narrow edge of the same stones was placed along the sides of Petitioners' patio.

5. On June 30, 2003, the property manager sent a letter to Petitioners advising that the cement slab was on common property and would have to be removed or approved by an architectural committee. An application for approval was rejected because

alteration of the common elements would require a vote of 100% of the membership. A follow-up letter on July 23, 2003, again advised they would be required to remove the patio addition.

6. Petitioners' request for an extension of time was granted by the property manager because turnover from the developer to a new board of directors was scheduled for September 23, 2003.

7. Petitioner, Robin Humphrey, took a seat on the first board of directors. While he served on the board, it attempted to get unit owner approval for porch slabs on the common elements adjacent to the units. In March 2004, the board was unable to get a quorum for membership approval of the slabs.

8. Robin Humphrey served on the board until early 2006.

9. In 2006, a contractor painting the exterior of the building damaged Petitioners' patio. In approximately December 2006, Petitioners replaced the damaged patio with new concrete squares covering a larger area, without the drainage stone border.

10. Before Petitioners rebuilt the patio, they had a discussion with the president of the board about the type of stone that would be used and concluded that he did not disagree with their proposed replacement. The president was under the impression they had gotten written approval for installation of the initial patio and asked to see the documents.

11. On April 11, 2007, Respondent sent a Violation Notice requiring the concrete patio to be removed by April 26, 2007. The Violation Notice also required removal of carpet/flooring material that had been placed on the limited common element sidewalk leading to the front of Petitioners' unit.

12. In April 2007, the association also advised nine other unit owners that their concrete patios on the common element would have to be removed. Seven of the patios were removed by the unit owners without additional enforcement efforts.

13. On or about May 11, 2007, Respondent's representatives removed the patio and carpeting from outside Petitioners' unit. The concrete pavers were returned to Petitioners.

Material Alteration of Common Elements by Association

14. The association placed decorative coquina boulders on the landscape of the common elements, installed storage racks for water hoses. Also the association installed speed bumps, traffic signs along interior roadways of the condominium, and smaller white rocks marking the edges of the road.

Request to Inspect Official Records

15. On May 21, 2007, Petitioners' attorney mailed a request to inspect official records. The request quoted subsections 718.111(12)(a)1-10, 13 and 14, Florida Statutes, and items a.- d. of subsection 11. It additionally requested the following:

a. All committee records and minutes.
b. All records which establish any vote by the membership for alteration of the common elements.
c. All correspondence, including e-mails to or from all board members for the past seven years.
d. All correspondence, e-mails to or from the Department of Business and Professional Regulation.

16. On May 25, 2007, Respondent's attorney answered official records request letter, which had been received May 23, 2007. The answer offered to allow inspection, by appointment at an off site self-storage unit, on any Wednesday between 5:00 p.m. and 7:00 p.m., or Saturday from 9:00 a.m. to 1:00 p.m., because the association had no

manager or management office. The letter offered to make the records available at a first session on May 30, 2007.

17. Further correspondence between the attorneys for the parties scheduled inspection for June 23, 2007. Petitioners' attorney attended the inspection on that date at the home of the board secretary and at the storage facility. In his follow-up letter, dated July 12, 2007, the attorney requested copies of sixteen categories of records, requested copies of accounting records from the CPA, and listed five classes of records that were not available for inspection on June 23.

18. By letter of July 20, 2007, the association attorney advised that the initially requested copies totaled some 1,600 pages and that they would be delivered upon payment of $400.75.

19. The records not available for inspection on June 23, 2007, according to Petitioners were listed as:

> 1. Minutes of all meetings of the association, of the board of directors, and of unit owners for the years 2005, 2004, 2003, 2002 and 2001 (June 24, 2001 to December 31, 2001).
> 2. All committee records and minutes.
> 3. All records which establish any vote by the membership for alteration of the common elements.
> 4. All correspondence, **including e-mails** to or from all board members for the past seven years. (*emphasis in original*)
> 5. Correspondence to or from the Department of Business and Professional Regulation concerning the alteration of the common elements.

20. Minutes for the meetings of 2005 were continuously available at the association's web site. No evidence was presented that minutes exist or were created for meetings in 2001, 2002, or 2003. The evidence establishes that no minutes for meetings before turn-over in September 2003, were ever delivered to the board of directors.

21. The only evidence for minutes of the meetings in 2004 is that they were last known to be in the custody of Petitioner, Robin Humphrey, or a management company that had been terminated. In either case, there was no evidence the association retained or could recreate copies of such records.

22. There is no evidence of records for votes by the membership for alteration of common elements. The only testimony was that attempts to hold such votes failed for lack of a quorum.

23. The testimony with respect to e-mails was that they exist only on the individual home computers of board members. The association does not have any policy with regard to transferring records or hard copies of such e-mails to the association, nor was there evidence of an association e-mail address or a computer owned by the association and dedicated to the operation of the condominium.

Conclusions of Law

The Division has jurisdiction over this matter pursuant to section 718.1255, Florida Statutes, over disputes involving alteration of a common element and failure to allow inspection of books and records.

Concrete Patio on Common Element

"Common elements" means the portions of the condominium property not included in the units. Section 718.103(8), Florida Statutes.

Except as otherwise provided in the declaration as originally recorded, section 718.110(4), Florida Statutes, prohibits, among other things, amendments to the declaration that materially alter or modify the appurtenances to the unit, unless all unit owners and lien holders join in or approve the amendment. Although 718.110(4), F.S., on

its face, speaks only to amendments to the declaration that change the appurtenances, this section has come to be understood as prohibiting unapproved changes to the appurtenances, regardless of whether a particular change is accompanied by an amendment to the declaration. *Cascades of Falling Waters v. Rafuse*, Arbitration Case No. 00-1625, Summary Final Order (May 4, 2001).

Rafuse held that the unit owner must remove a ten foot by fourteen foot patio consisting of concrete paver blocks. It followed established precedent that no unit owner may convert an area of the common elements into a limited common element, or "colonize" an area for his exclusive use. *Bogikes v. Windmill Village by the Sea Condominium Ass'n*, Arb. Case No. 97-0159, Final Order (June 30, 1998).

A condominium board lacks authority to give away portions of the common elements by approving structures which effectively appropriate common areas for the exclusive use and enjoyment of a single owner. *Kamfjord v. Harbour Green Condominium Ass'n*, Arb. Case No.93-0173, Final Order (October 28, 1993) (expansion of limited common element patio into common area); *Rensen v. Heritage Landings Condominium Ass'n*, Arb. Case No. 92-0307, Final Order (May 27, 1993) (unit owner constructing wooden deck on the common elements). Therefore, Petitioners could not reasonably rely on opinions or verbal representations of a single member of the board of directors to approve a patio.

Petitioners have raised the equitable defense of laches based upon the lapse of time the association has allowed patios to remain on condominium common elements. Laches is an equitable defense which weighs the totality of the circumstances to determine whether it would be fair to grant affirmative relief to a party. Petitioners knew

that modification of the patio in 2006 required a vote of the membership, because Petitioner, Robin Humphrey, had tried to obtain such a vote for the first patio in 2004. In light of Petitioners' knowledge and pattern of behavior, it cannot be concluded that it is now unfair to enforce the law and the governing documents. In any event, because Petitioners seek affirmative relief, they cannot raise a defense of laches

Material Alteration of Common Elements by Association

Photographs of the alleged alterations require the conclusion that they did not interfere with the function of the common elements but complemented the landscape maintenance and road functions. Thus, they were not material alterations which required membership approval. *See, Girsch v. Whisper Walk Section E Ass'n., Inc.*, Arb. Case No. 97-0305, Order Dismissing Arbitration Petition (November 26, 1997). In *Girsch*, the arbitrator held that landscape management decisions are properly left to business judgment of board of directors. The same logic applies to maintenance of traffic and safety on interior roadways of the condominium.

Request to Inspect Official Records

Section 718.111(12)(b), Florida Statutes, provides:

> The official records of the association shall be maintained within the state. The records of the association shall be made available to a unit owner within 5 working days after receipt of a written request by the board or its designee. This paragraph may be complied with by having a copy of the official records of the association available for inspection or copying on the condominium property or association property.

Section 718.111(12)(c), Florida Statutes, provides, in pertinent part:

> The official records of the association are open to inspection by any association member or the authorized representative of such member at all reasonable times. The right to inspect the records includes the right to make or obtain copies, at the reasonable

> expense, if any, of the association member. The association may make reasonable rules regarding the frequency, time, location, notice, and manner of record inspections and copying. The failure of an association to provide records within 10 working days after receipt of a written request shall create a rebuttable presumption that the association willfully failed to comply with this paragraph. A unit owner who is denied access to official records is entitled to the actual damages or minimum damages for the association's willful failure to comply with this paragraph. The minimum damages shall be $50 per calendar day up to 10 days, the calculation to begin on the 11th working day after receipt of the written request.

Because the statute provides for a monetary penalty, it must be strictly construed. The penalty provision applies only to failure to make available official records described in section 718.111(12), Florida Statutes. It does not apply to records that have not been created, or documents the Association might obtain but would not normally receive, such as copies of negotiated checks.

Respondent made available a date and place for inspection within ten days after receipt of the request to inspect official records. Petitioners selected a later date so that they could be accompanied by their attorney. The evidence fails to establish that Respondent willfully failed to provide access for inspection of records within the statutorily required time. *See, Gosselin v. Sand Castle Condominium Ass'n., Inc.*, Arb. Case No. 02-5465, Final Order (December 18, 2002) (association did contact counsel for the petitioner and attempt to schedule a time for him to review the records in a timely manner).

The evidence did not establish the existence of official records in the following categories:

> 1. Minutes of all meetings of the association, of the board of directors, and of unit owners for the years 2005, 2004, 2003, 2002 and 2001 (June 24, 2001 to December 31, 2001).
> 2. All committee records and minutes.
> 3. All records which establish any vote by the membership for alteration of the common elements.

5. Correspondence to or from the Department of Business and Professional Regulation concerning the alteration of the common elements.

Although failure to have and maintain these records may be a violation of section 718.111(12), Florida Statutes, that violation is not an issue in this arbitration case. In the ordinary case failure to maintain a record does not give rise to a claim for money damages for failure to produce the non-existent record. *Brown v. Wellington L. Condominium Ass'n., Inc.*, Arb. Case No. 94-0363, Final Order (February 20, 1995). In this case, the evidence of changes of management and of boards of directors explains the lack of such records in such a way that failure to produce them cannot be found to be a willful refusal to comply with the statute.

E-Mails

The e-mails requested in this case are those existing, if at all, on the personal computers of individual directors. These are not official records of the condominium association. The property of an individual director does not become the property of the association because of his office on the board.

Just as a statement by an individual director cannot bind the board, an e-mail from or to a director, is not a record of the association. Even if directors communicate among themselves by e-mail strings or chains, about the operation of the association, the status of the electronic communication on their personal computer would not change.

Similarly, an e-mail to an individual director or to all directors as a group, addressed only to their personal computers, is not written communication to the association. This must be so because there is no obligation for a director to turn on personal computer with any regularity, or to open and read e-mails before deleting them.

Because there is no evidence the e-mails requested by Petitioners ever became official records, there can be no penalty for failure to allow inspection of them.[1]

Based on the foregoing, it is ORDERED that Petitioners requests for relief are denied.

DONE AND ORDERED this 30th day of March, 2009, at Tallahassee, Leon County, Florida.

Bruce A. Campbell Arbitrator
Dept. of Bus. & Prof. Reg.
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 within 30 days, 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 within 45 days, in accordance with Rule 61B-45.048, F.A.C.

Certificate of Service

I hereby certify that a true and correct copy of the foregoing final order on default has been sent by U.S. Mail to the following persons on this 30th day of March, 2009:

John A. Leklem, Esq.
1800 North Orange Avenue
Suite C
Orlando, FL 32804

James E. Olsen, Esq
Wean & Malchow
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Bruce A. Campbell

[1] The conclusion may be different if the association owns a computer on which management conducts business including e-mails (analogous to government public records); or if e-mails are printed up and passed around for discussion at a board meeting.