

IN THE THIRD DISTRICT COURT OF APPEAL
STATE OF FLORIDA

20 AVENTUR, LLC, et al.,
Plaintiffs/Appellants,

Case No. 2024-0389
LT Case No. 2020-16846

v.

1100 WEST CONDOMINIUM ASSOCIATION, INC., et al.,
Defendants/Appellees.

_____ /

ON APPEAL FROM THE CIRCUIT COURT OF THE 11TH
JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

APPELLANTS' INITIAL BRIEF

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I. INTRODUCTION

For the purposes of this appeal, Appellants Anthony Aligo, Didier Hirsch, and Mondrian West Avenue 1202, LLC, individually and on behalf of all others similarly situated, will be referred to as the “Plaintiffs” or “Appellants.” Appellee, 1100 West Condominium Association, Inc., will be referred to as the “Association” and Appellee 1100 West Investments LLC, the intervenor on Count I below, will be referred to as the “Hotel.” The term “Declaration” shall mean the Declaration of 1100 West, a Condominium (R. 4216-4309). The designation “D” will refer to the Declaration and will be followed by the section referenced. The term “Order” will refer to the Omnibus Order on Plaintiffs’ Motion for Partial Summary Judgment, Defendant 1100 West Investments, LLC’s Motion for Partial Summary Judgment, and Defendant 1100 West Condominium Association, Inc.’s Counter-Motion for Summary Final Judgment. (R. 5548-5555.)

II. STATEMENT OF THE CASE AND FACTS

A. Statement of the Case

The Plaintiffs/Appellants filed their Fourth Amended Class

Action Complaint in this case on January 18, 2022, seeking declaratory relief against 1100 West Condominium Association, Inc. (the “Association”). (R. 4192-4355.) 1100 West Investments, LLC (the “Hotel”) requested to intervene as to Count I, which was granted by the court. (R. 4534.) Plaintiffs asserted several additional counts against the Hotel, which are still pending in the trial court and are not the subject of this appeal. The pertinent count against the Defendants is as follows:

Count I: Declaratory Judgment

Plaintiffs sought a determination that the Declaration of 1100 West Condominium impermissibly divests the Association and unit owners of ownership of the minimum required common elements pursuant to *Icon Brickell Condo. No. Three Ass'n v. New Media Consulting, LLC*, 310 So. 3d 477 (Fla. 3d DCA 2020). (R. 4192-4204). Specifically, Plaintiffs requested that the trial court deem certain provisions of the Declaration as violative of the Condominium Act. The Hotel moved to intervene in this count and was granted permission to do so on July 18, 2022. (R. 4534).

Plaintiffs filed their Motion for Partial Summary Judgment and Statement of Undisputed Material Facts on April 13, 2023. (R.

4855-4926). The Hotel filed its cross-motion for summary judgment on May 22, 2023 (R. 4937-5056) and the Association filed its cross-motion on June 12, 2023. (R. 5089-5107).

On September 5, 2023, the trial court entered an order denying the Plaintiffs' Motion for Partial Summary Judgment and granting 1100 West Condominium Association, Inc.'s Counter-Motion for Summary Final Judgment and 1100 West Investments, LLC's Motion for Partial Summary Judgment as to Count I, the declaratory action. (R. 5548-5555). Plaintiffs moved for rehearing, which was denied by the trial court. (R. 5490-5501). This appeal followed.

B. Statement of the Facts

1100 West, a Condominium, is a condominium subject to the Florida Condominium Act. *See* Declaration Section 1.2¹ (stating that the condominium is formed subject to "the condominium form of ownership and use in the manner provided for in the Florida

¹ Section 1.2 makes reference to "Shared Facilities" which are properties shared between several buildings under a Master Declaration and are not the subject of the present suit. The relevant "Shared Components" of the Mondrian building are portions of the Hotel Unit within the 1100 West Condominium property.

Condominium Act”) (R. 4216). The Plaintiffs are current or former owners of residential units who acquired title to their units in 2015-2016. (R. 4902-4907).

The condo is operated by 1100 West Investments, LLC as the Mondrian South Beach Hotel in a single building with the hotel rooms/residential units on floors 2-17 and the lobby, pool, restaurant, etc. on the ground floor.² See D. 3.1.



² Although the trial court found IconBrickell Tower No. Three factually distinguishable from the building in this case, both are identical in that they are single buildings with a “mixed-use condominium consisting of hundreds of residential units, several commercial units, and the [] Hotel.” *IconBrickell Condo. No. Three Ass’n, Inc. v. New Media Consulting, LLC*, 310 So. 3d 477, 478 (Fla. 3d DCA 2020).

Pursuant to the Declaration, the “Hotel Unit” is defined as *all* of the condominium property “less and excepting only” the residential and commercial units and air rights of the property. D. 3.2(b). The owner of the “Hotel Unit” is 1100 West Investments, LLC, which also controls the Association.

The structural components of the building like the outer walls and roof, the interior including hallways and elevators, and everything inside the walls—conduits, ducts, plumbing, wiring, and other facilities for the furnishing of utility services to the units—comprise the “Shared Components” within the “Hotel Unit.” D. 2.41. Therefore, aside from air rights above 300 feet, there are no portions of the property that are *not* within a “unit.”

The Hotel Unit, as opposed to the Association, has the sole responsibility for operations and maintenance of the building. D. 7.3 (R. 4913-4921). While the Hotel Unit Owner is exempt from the requirements and duties of an association under the Condominium Act, it retains all the powers of an association. It has the power to charge unit owners assessments like a condominium association, and the right to foreclose on anyone who falls behind in paying its assessments. D. 12.1, 12.3.

The annual operating budget for the “Hotel Shared Costs” assessed to owners is approximately \$8,830,716. (R. 4923-4924). This budget is not submitted to the unit owners as part of an annual meeting, there is no vote to adopt the budget, and there is no Association oversight over the line items in this budget. It is created and assessed solely at the Hotel’s discretion. (R. 4913-4921). In 2020, in addition to the millions of dollars charged to unit owners in regular assessments, the Hotel also required owners to pay an additional \$7.6 million in special assessments, with no oversight from the Association. (R. 4926).

Although the unit owners are responsible for paying millions in annual assessments in addition to the Hotel’s unilateral imposition of special assessments, they have no vote or voice in how any of that money is spent, and no idea if it is actually spent. *Id.* The unit owners are also required to pay the Hotel’s share of the condominium assessments. D. 12.1.

The Condominium Association’s budget is largely made up of assessments due to the Master Association, with some administrative expenses and management fees. Its yearly budget is around

\$496,606.00. It spends \$0 on maintenance, does not have reserves, and does not control or maintain any common elements.

> The association is not involved with the latest special assessment, that is why I cannot provide any information about it and that is also why there isn't any minute of the meeting. The reserve and reserve studies that you are requesting are documents that are requested from a condominium association but not from a LLC. The association doesn't have any reserve and hasn't done any reserve studies because it doesn't own anything. Everything is owned by the Hotel Unit which is operating by an LLC and not a condominium association.

>

> Regards,

>

> Alienor Sandoval

> Cell 786 352 6912

> Residential Manager 1100 West Condominium

(R. 4910-4911, 4913-4921).

The Declaration

The Declaration states that it requires a “form of ownership and use in the manner provided for in the Florida Condominium Act,” yet contrarily provides that “[t]he Condominium has been established in such a manner to minimize the Common Elements. Most components which are typical ‘common elements’ of a condominium, have instead been designated herein as part of the Shared Components of the Hotel Unit. No portion of the Shared Components shall be deemed Common Elements hereunder.” D. 2.14. The sweeping provisions of the Declaration illustrate that, with limited and inconsequential exceptions, there are no common elements

controlled by the Association or undividedly owned by the unit owners.

The Declaration sets forth the boundaries of the “Hotel Unit” as follows:

The Hotel Unit shall consist of **all** of the Condominium Property, including, without limitation, any and all improvement now or hereafter constructed thereon, less and except only the following: (i) the Residential Units and the Commercial Units; and (ii) the portion of the Condominium Property above elevation three hundred (300’) N.G.V.D.

D. 3.2(b) (emphasis added).

The Hotel Unit, accordingly, is under the exclusive ownership of the Hotel, and the Hotel Unit is **all** of the condominium property, excepting the residential and commercial units, and limited air rights.

The Declaration defines “Common Elements” in keeping with the statutory definition, but also adds:

No portion of the Shared Components shall be deemed Common Elements hereunder.

D. 2.14. (emphasis added).

Within its definition of “Shared Components,” the Declaration states, in relevant part:

Notwithstanding anything herein, or in any of the exhibits hereto, contained to the contrary, ***the Shared Components shall be deemed part of the Hotel Unit.***

D. 2.34 (emphasis added).

The Shared Components are defined as including all structural components, walls, hallways, stairways, roof, plumbing, life safety systems, wires, conduits, pipes, HVAC systems, elevators, and trash facilities:

... and the Hotel Unit have been, or shall be, operated as an integrated project. Given the integration of the improvements, and notwithstanding anything to the contrary depicted on the survey/plot plan attached hereto as Exhibit "2" (as same may be amended), the following components of the improvements (the "Shared Components") shall be deemed part of the Shared Components of the Hotel Unit, whether or not graphically depicted as such on said survey/plot plan: any and all structural components of the Improvements, including, without limitation, all exterior block walls, exposed structural or decorative members, all finishes (glass, paint, stucco etc) and balconies, lanais, terraces, and/or facades attached or affixed thereto; hallways and stairways serving more than one Unit; the roof; all roof trusses, roof support elements and roofing insulation; the parking facilities; to the extent permitted by the Act, all microwave receiving and transmission equipment, including the equipment related to technologies, not yet existing but which may, in the future exist, plumbing, telephone switchboard, Life Safety Systems, and other systems or services, including, without limitation, all wires, conduits, pipes, ducts, transformers, cables and other apparatus used in the delivery of the utility, mechanical, telephonic, telecommunications, electrical, safety systems and equipment, Life Safety Systems, plumbing and/or other services; all heating, ventilating and air conditioning systems, including, without limitation, compressors, air handlers, ducts, chillers, water boiler systems, water towers and other apparatus used in the delivery of HVAC services (except only for the portions of any of same serving only one Unit other than the Hotel Unit); all elevator shafts, elevator cabs, elevator cables and/or systems and/or equipment used in the operation of the elevators transversing the Condominium Property; all storage areas and storage rooms, trash rooms, trash chutes (if any) and any and all trash collection and/or disposal systems. In addition, the Shared Components

D. 2.41.

III. STANDARD OF REVIEW

A trial court's ruling on a motion for summary judgment is de novo. *Quintero v. Diaz*, 300 So. 3d 288, 290 (Fla. 3d DCA 2020) (citing *Volusia Cty. v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000)). And while a declaratory judgment is accorded a presumption of correctness, “[n]onetheless, because here, the trial court's interpretation and application of both the Florida Condominium Act and Declaration present pure questions of law, our standard of review is de novo.” *IconBrickell Condo. No. Three Ass'n, Inc. v. New Media Consulting, LLC*, 310 So. 3d 477, 479 (Fla. 3d DCA 2020).

IV. SUMMARY OF THE ARGUMENT

The Order should be reversed because the contested sections of the Declaration are violative of Florida Law on their face the Declaration's own terms are contradictory. The inclusion of a throwaway nod to the statutory language does not cure every other violation of the Condominium Act. At the very least, a declaratory judgment was required to address the inherent ambiguities.

The trial court incorrectly found that the Declaration was in

compliance with the Florida law simply because the definition of “common elements” in Section 2.14 tracked the statutory language of the Condominium Act. The trial court’s Order ignored the glaring red flags raised by the remaining provisions of the Declaration and summarily ruled that one section, which is contradicted both by the provisions that the Plaintiffs’ sought to declare void and by the lack of common elements in reality, validated the Declaration as a whole.

As presented herein, the Declaration creates a conundrum that this Court must resolve. Even though the Declaration contains language that states the “property and installations required for the furnishing of utilities and other services to more than one unit” are common elements, and claims to grant to the Association all powers and duties set forth in the Act (D. 9.1), it violates the Act by then improperly recharacterizing statutory common elements as “Shared Components” owned by the Hotel Unit Owner. In fact, it leaves no property that could be classified as the “common elements” as everything outside of the commercial and residential units is the “Hotel Unit.” To find that the Declaration and its treatment of the common elements as a whole comport with the Act would require the court to ignore all the other language that directly **contradicts** the

portion cited. Accordingly, the trial court erred in focusing on one inconsistent and contradicted provision of the Declaration to find that the contested portions do not violate the Condominium Act.

There were also several factual issues raised by Plaintiffs in their Statement of Undisputed Material Facts that were not addressed in the Order. (R. 4894-4926). The specific facts raised by Plaintiffs but unaddressed by the court include that the Association is not responsible for any maintenance or operations of any portion of the building, has no reserves, and that that the Association has no common elements to manage or maintain.

The court did not address the fact that, regardless of the language in the Declaration, in actuality there are no common elements in the condominium. As these facts are integral to Plaintiffs' argument that the required minimum common elements do not exist, the Order entering summary judgment must be reversed.

The trial court also improperly relied on Section 718.110, Florida Statutes, to find that the Plaintiffs had failed to join indispensable parties. First, Section 718.110 only applies to amendments to a condominium declaration, not a judicial determination of the legality of its provisions. Second, Section

718.111 grants the Association, a named party, the power to assert, maintain, and settle claims on behalf of all unit owners that concern matters of common interest, including but not limited to the common elements. Further, Section 6.2 of the Declaration, which was not considered in the Order, expressly provides that the addition of property to the common elements is not a material amendment requiring the consent or joinder of all unit owners and the mortgagees. As the Association was named a party, and the Hotel intervened, there was no failure to join indispensable parties.³

Finally, the court erred by holding that the action for declaratory judgment was subject to a 5-year statute of limitations. Florida courts have consistently refused to enforce agreements that cannot be performed without violating a constitutional or statutory provision regardless of the passage of time. In such matters it follows that there is no statute of limitations with respect to the challenge of illegal provisions in a contract that were void *ab initio*.

³ Even if the trial court was correct in finding that all unit owners and mortgagees are indispensable, summary judgment would have been improper, and the correct course would have been to allow leave for Plaintiffs to include these parties.

V. ARGUMENT

A. **The Declaration Violates the Florida Condominium Act**

Florida Courts have long enforced the authority of the Condominium Act against derogation by private contract, following the “general rule concerning the invalidity of a private agreement which contravenes a governing statute.” *Palm Bay Towers Corp. v. Brooks*, 466 So. 2d 1071, 1074 (Fla. 3d DCA 1984). Indeed, this Court emphasized that “[t]his principle must be given special force in the condominium field in which the legislature has found it necessary statutorily to overcome just the sort of purportedly-arms-length, but actually self-dealing-type of ‘agreement’ represented [by a developer-created pre-turnover] declaration.” *Id.*

Despite the crafty structure of the subject Declaration, “in Florida, all provisions of a condominium declaration must conform to the Act, and to the extent that they conflict therewith, the statute must prevail.” *IconBrickell Condo. No. Three Ass'n, Inc. v. New Media Consulting, LLC*, 310 So. 3d 477, 480 (Fla. 3d DCA 2020) (citing *Winkelman v. Toll*, 661 So. 2d 102, 105 (Fla. 4th DCA 1995)) (internal quotations omitted). Here, as in *IconBrickell*, the drafter of the Declaration of 1100 West Condominium attempted to contravene

both the plain language of the Condominium Act as well as the edict of the Act by recharacterizing the statutorily required common elements as “Shared Components” and subjecting the same to private ownership, operation, and control as part of the “Hotel Unit”.⁴ It is, of course, the unit owners who must own the common elements in undivided interests and the democratically elected associations that must control and assess for those common elements. Section 718.111(1)(a), Florida Statutes.

Count I of the Fourth Amended Complaint specifically challenged Sections 2.41, 7.3, 12.1, and 12.3 of the Declaration. The trial court, notwithstanding, found that because “Section 2.14 of the Declaration complies with the requirements of Fla. Stat. 718.08,” it preempted a finding that the challenged provisions violated the Condominium Act.

It is axiomatic that condominium property *must* be operated by the condominium’s democratically controlled Association. See §718.111(1)(a), Fla. Stat. Likewise, maintenance of all common

⁴ Notably, both this Declaration and the *IconBrickell* Declaration, which was found to be violative of the Florida Condominium Act, were drafted by the same attorney.

elements must be the responsibility of the Association. See §718.113(1), Fla. Stat. Notably, §718.103(21), Fla. Stat. (2005), unambiguously provides that the term “‘Operation’ or ‘operation of the condominium’ includes the administration and management of the Condominium Property.” Further, the statute provides that “‘Condominium Property’ means the lands, leaseholds, and personal property that are subjected to condominium ownership, whether or not contiguous, and all improvements thereon and all easements and rights appurtenant thereto intended for use in connection with the condominium.” §718.103(13), Fla. Stat. Accordingly, any provision contained within the Declaration which seeks to relinquish the “operation of the condominium” property to a party other than the association is a violation of the plain language and the edict of the Condominium Act.

As established below, the offending provisions of the Declaration are violative of the Condominium Act and therefore, each is void and unenforceable.

- i. The Trial Court erred finding in that the Declaration does not violate the Condominium Act

“[I]n Florida, all provisions of a condominium declaration must

conform to the Act, and to the extent that they conflict therewith, the statute must prevail.” *IconBrickell Condo. No. Three Ass’n, Inc. v. New Media Consulting, LLC*, 310 So. 3d 477, 480 (Fla. 3d DCA 2020) (citing *Winkelman v. Toll*, 661 So. 2d 102, 105 (Fla. 4th DCA 1995)) (internal quotations omitted). While the Declaration does contain language defining common elements, that language is rendered moot by the subsequent and contradictory language that the Appellants sought to declare void as a matter of law. To be certain, no actual property is identified or characterized as common elements within the Declaration. With the exception of Section 2.14, the trial court erroneously made no findings as to whether the remaining subject provisions were violative of the Condominium Act. (R. 5548-5555).

Specifically, the language that the Appellants sought to have declared void was nearly identical to that determined to be void in *Icon Brickell*.

Section 2.14 of the Declaration states:

2.14 "Common Elements" mean and include:

- (a) The portions of the Condominium Property which are not included within the Units;
- (b) An easement of support in every portion of a Unit which contributes to the support of the Building;
- (c) The property and installations required for the furnishing of utilities and other services to more than one Unit or to the Common Elements.
- (d) Easements through Units for conduits, ducts, plumbing, wiring, and other facilities for the furnishing of utility services to Units and the Common Elements; and
- (e) Any other parts of the Condominium Property designated as Common Elements in this Declaration and/or required pursuant to the Act to be part of the Common Elements.

The Condominium has been established in such a manner to minimize the Common Elements. Most components which are typical "common elements" of a condominium have instead been designated herein as part of the Shared Components of the Hotel Unit. No portion of the Shared Components shall be deemed Common Elements hereunder.

Subsection (e) of this Section facially appears to bring the Declaration into compliance but is belied by the actuality of the "Hotel Unit," which owns the Shared Components, including all statutory common elements, in their entirety. One need not look much further to determine the dubious intent of this Declaration than the clarification that "[m]ost components which are typical 'common elements' of a condominium have instead been designated herein as part of the Shared Components of the Hotel Unit." A closer inspection at the contested provisions of the Declaration further reveal the intent of the drafter, as there is no portion of the condominium property that could be considered a common element.

The Section defining Common Elements provides that "[n]o

portion of the Shared Components shall be deemed Common Elements.” Notably, Section 2.41 of the Declaration defines the Shared Components and provides an extended list of property that is expressly included within that definition, namely (but not limited to):

- All exterior block walls
- Balconies;
- Hallways and stairways;
- The roof;
- Roof support elements and trusses;
- Parking;
- Life safety systems;
- All wires, conduits, pipes, ducts, transformers, cables, and other apparatus used in the delivery of the utility, mechanical, telephonic, telecommunications, electrical, safety systems, and equipment, life safety systems, plumbing, and/or other services;
- All HVAC systems;
- All elevators and elevator shafts and equipment;

(R. 4220).

Further, the Hotel Unit, a broader area of property that includes the Shared Components, has boundaries set forth as follows:

The Hotel Unit shall consist of all the Condominium Property, including, without limitation, any and all improvements now or hereinafter constructed thereon, less and except only the following: (i) The Residential Units and the Commercial Units, and (ii) the portion of the Condominium Property above the elevation three hundred (300') N.G.V.D.

D. 3.2. Except for limited air rights, the Hotel Unit comprises all

the property not within the units and provides for no common elements. Excluding all areas that are traditionally and statutorily required to constitute common elements has far more substance than the vague and boilerplate language of Section 2.14, which is in turn contradicted by the larger and more pertinent sections of the Declaration.

In both their Motion for Summary Judgment and Motion for Rehearing, Plaintiffs raised the factual application and consequences of the challenged provisions of the Declaration in this case, including:

a. That “there are no portions of the property that are not within a ‘unit;”

b. That the Association “spends \$0 on maintenance;”

c. That the “Association ‘doesn’t have any reserve and hasn’t done any reserve studies because it doesn’t own anything. Everything is owned by the Hotel Unit;”

d. That the “Hotel Unit, as opposed to the Association, has the sole responsibility for operations and maintenance of the building;” and

e. That “the Association has no common elements to manage and no oversight powers.” (R. 5209-5212).

In its Order Denying Plaintiffs' Motion for Rehearing, the trial court addressed several arguments that were not actually raised in the Motion for Rehearing but declined to address the as-applied reality of Sections 2.41, 3.2(b), 7.3, 12.1, and 12.3 of the Declaration. (R. 5490-5501).

Simply stating that common elements exist does not will them into being. In fact, the Declaration makes it clear that all of property outside the residential and commercial units is exclusively owned and controlled by the Hotel. The Florida Condominium Act does not permit required common elements to be alienated from ownership by the unit owners and privatized and maintained by a third party simply by designating such elements by an alternative name such as "Shared Components."

- ii. Section 2.41 reclassifies the common elements as "Shared Components" and violates the Florida Condominium Act

The trial court ignored the challenged sections of the Declaration, which contradict Section 2.14 and are violative of Florida's Condominium Act. The Declaration seeks to impermissibly mischaracterize all the common elements of the condominium property and expropriate them to exclusive ownership of and control

by the Hotel. Notwithstanding the clear language of § 718.108, Fla. Stat., defining the common elements to include, *inter alia*, “the condominium property which is not included within the units” and “the property and installations required for the furnishing of utilities and other services to more than one unit or to the common elements,” Section 2.41, in violation of the Act, classifies the following common elements as being part of the “Shared Components” or so-called “Hotel Unit” owned and controlled by 1100 West Investments:

- i. “any and all structural components of the Improvements, including, without limitation, all exterior block walls... all finishes (glass, paint, stucco etc.) ...”;
- ii. “hallways and stairways serving more than one Unit”;
- iii. “the roof; all roof trusses, roof support elements and roofing insulation”;
- iv. “the parking facilities”;
- v. “all wires, conduits, pipes, ducts, transformers, cables and other apparatus used in the delivery of the utility, mechanical, telephonic, telecommunications, electrical, safety systems and equipment, Life Safety Systems, plumbing and/or other systems”;
- vi. “all utility, mechanical, electrical, telephonic, telecommunications, plumbing, telephone switchboard, Life Safety Systems and other systems or services...”;
- vii. “all heating, ventilating and air conditioning systems, including, without limitation, compressors, air handlers, ducts, chillers, water boiler systems, water towers and other apparatus used in the delivery of HVAC services”;
- viii. “all elevator shafts, elevator cabs, elevator cables and/or equipment used in the operation of the elevators traversing the Condominium Property”; and

- ix. “all trash rooms and any and all trash collection and/or disposal systems.”

D. 2.41 (R. 4220).

The Declaration clearly states that the above-listed Shared Components will be deemed part of the “Hotel Unit,” and therefore exclusively owned and controlled by 1100 West Investments. It then contradicts itself again and attempts to salvage the legality of the document by stating “the property and installations required for the furnishing of utilities and other services to more than one Unit of to the Common Elements shall be deemed Common Elements and shall not be part of the Shared Components.” *Id.*

Where two clauses of an agreement contradict one another and cannot stand together, the first clause shall control, and the second term shall be disregarded. *See Boden v. Atlantic Federal Sav. & Loan Ass’n*, 396 So. 2d 827 (Fla. 4th DCA 1981) (citing *Florida Power Corp. v. City of Tallahassee*, 154 Fla. 638 (Fla. 1944)). In this case, the definition of common elements in Section 2.14 should control over the contrary definition of Shared Components in Section 2.41.

Notwithstanding the foregoing, the trial court failed to address Section 2.41 entirely, and only held that “the Declaration’s definition

of Common Elements tracks verbatim and is consistent with the definition of “common elements” in section 718.108.” (R. 5549). While this may be true, it does not squarely address the Plaintiffs’ claims and does not reach the issues for which they sought relief. It is incontestable that each and every one of the Shared Components are “property and installations required for the furnishing of utilities and other services to more than one unit” which are required to be common elements subject to association operation and control and owned in undivided interests by the unit owners within the condominium. See §§ 718.103, § 718.108(d) and § 718.111, Fla. Stat. Accordingly, the inclusion of such elements of the condominium property in the so-called “Shared Components” or “Hotel Unit” contravenes both the plain language and edict of the Act.

Using Section 2.41 of the Declaration to divest condominium owners of their right to own and control the statutory common elements attempts to do indirectly that which a developer may not lawfully do directly. See *Cent. Carillon Beach Condominium Ass’n, Inc. v. Carillon Hotel, LLC*, 2023 WL 1429624, at *1 (Fla. Cir. Ct.) (citing *Clermont-Minneola Country Club v. Loblaw*, 143 So. 129, 134 (Fla. 1932) (“[i]t is a fundamental principle of law that a person will not be

permitted to do indirectly what he is not permitted to do directly”); *IconBrickell Condo. No. Three Ass'n, Inc. v. New Media Consulting, LLC*, 310 So. 3d 477, 481 (Fla. 3d DCA 2020) (invalidating provisions of declaration that illegally divested unit owners of their statutory rights to an undivided interest in “common elements” by reclassification). As aptly stated by Judge Hanzman in the *Carillon Hotel* case, if the law were to recognize such expropriation of the common elements, the unit owners would be rendered “nothing more than long-term hotel guests.” *Carillon Hotel, LLC*, 2023 WL 1429624, at 11.

As this Court recognized in *IconBrickell*, the improper designation of these common elements as shared components “burdens residential unit owners with those expenses incurred by [the Hotel],” while at the same time allowing the Hotel to be “unencumbered by certain statutory provisions regulating condominium association assessments.” *IconBrickell Condominium No. Three Association, Inc.*, 310 So. 3d at 479. *IconBrickell* held that the designation of “wires, conduits, pipes, ducts, transformers, cables,’ residential lobby and elevators, and communal trash disposal systems” as shared components “indubitably contravenes

the edict of the Act.” 310 So. 3d at 481. The Declaration’s “compliance with the remainder of the Act remains wholly contingent upon a proper classification of the minimally required common elements.” *Id.* Accordingly, the trial court here erred in failing to find that Section 2.41 was not violative of the Act as a matter of law.

- iii. Section 7.3 of the Declaration prohibits the Association’s control of common elements in violation of the Florida Condominium Act

As with the foregoing Section 2.41, Section 7.3 of the Declaration is invalid as a result of the inclusion of common elements in the so-called “Shared Components” of the “Hotel Unit” and the authority granted to the Hotel Unit Owner over such areas. Specifically, Section 7.3 grants the Hotel Unit Owner, 1100 West Investments, the right to repair, replace, improve, maintain, manage, operate and insure the Hotel Unit. (R. 4227). Conversely, Section 9.1 of the Declaration states that the Association shall be the entity responsible for the common elements (of which there are none), but not the Shared Components. (R. 4229). By the language of Section 9.1, the Hotel Unit Owner has the exclusive right to repair, replace, improve, maintain, manage, operate and insure all property outside of the units, including the areas that should appropriately be deemed

common elements.

Under Florida law, the obligation for maintenance, repair and replacement of the aforementioned common elements is clearly vested in the Association pursuant to § 718.113(1), Fla. Stat. It is clear that the Florida Condominium Act contemplates that the Association, not the Hotel Unit Owner, shall be responsible for the maintenance, operation and control of the aforementioned property including the roof, structural components of the building, mechanical, electrical, and plumbing elements serving an improvement or building, etc. See § 718.111(3)(b)(1), Fla. Stat. (allowing the association to institute, maintain, settle or appeal matters of common interest including, but not limited to, the common elements, the roof and structural components of a building or other improvements, mechanical, electrical, and plumbing elements...); see also § 718.111(2)(f)(2)(a), Fla. Stat. (requiring the Association to maintain a reserve account for “roof replacement, building painting, and pavement resurfacing”); § 718.203, Fla. Stat. (granting the purchaser of each unit an implied warranty “as to the roof and structural components of a building or other improvements and as to mechanical, electrical, and plumbing elements serving

improvements or a building...”).

Where, as here, the so-called Shared Components of the Hotel Unit are comprised, in whole or in part, of common elements, such provision violates the Act by assigning to 1100 West Investments (the Hotel Unit Owner), as opposed to the Association, the right to repair, replace, improve, maintain, manage, operate and insure the common elements in contravention of § 718.113(1), Fla. Stat. (“Maintenance of the common elements is the responsibility of the association.”); § 718.111(4), Fla. Stat. (“The association has the power to make and collect assessments and to lease, maintain, repair, and replace the common elements or association property...”); and § 718.103(2), Fla. Stat. (“Association” means, in addition to any entity responsible for the operation of common elements owned in undivided shares by unit owners, any entity which operates or maintains other real property in which unit owners have use rights...”). Accordingly, Section 7.3 is clearly violative of the Act and the trial court erroneously failed to make this finding.

- iv. Sections 12.1 and 12.3 of the Declaration are inconsistent with the Condominium Act

Similarly, Sections 12.1 and 12.3 are inconsistent with the Act

as they impermissibly usurp the power and authority of the Association in favor of the Hotel Unit Owner to repair, replace and maintain the common elements of the condominium, and to assess unit owners for the common expenses associated therewith. (R. 4234). As set forth above, the obligation of maintenance, repair, and replacement of the aforementioned common elements is clearly vested in the Association (and not the Hotel Unit Owner) pursuant to § 718.113(1), § 718.111(3)(b)(1), Fla. Stat., § 718.111(2)(f)(2)(a), Fla. Stat., and §718.203, Fla. Stat.

Further, Section 12.1 requires the other unit owners to pay for “any assessments payable by the Hotel Unit Owner to the Association and/or Master Association” in violation of the Act. § 718.115(2), Fla. Stat. (In a “mixed-use condominium ... each unit's share of the common expenses of the condominium and common surplus of the condominium shall be the same as the unit's appurtenant ownership interest in the common elements.”); § 718.116(9)(a), Fla. Stat. (“A unit owner may not be excused from payment of the unit owner's share of common expenses unless all other unit owners are likewise proportionately excluded from payment.”); (R. 4234).

Sections 12.1 and 12.3 clearly deviate and violate the clear and

unambiguous terms of the Condominium Act and, therefore, are void and unenforceable.

The trial court reversibly erred in failing to consider these Sections when ruling on Plaintiff's Motion for Partial Summary Judgment and solely relying on Section 2.14, which mischaracterizes the actual circumstances of the condominium. The court should have declared these specific sections of the Declaration violative of the Act and, therefore, unenforceable.

B. The Plaintiffs' Claims Are Not Time Barred as the Statute of Limitations Does Not Apply to Void Provisions of a Contract

Plaintiffs here sought to invalidate certain provisions of the Declaration that violate the Condominium Act. Indeed, any instrument, or portion thereof, which violates a Florida statute is unlawful, void, and unenforceable. *See Hernandez v. Crespo*, 211 So. 3d 19, 25 (Fla. 2016) ("Contractual provisions which contravene a statute or legislative intent are injurious to the public good, violate public policy, and are therefore unenforceable"); *Cont'l Mortg. Invs. v. Sailboat Key, Inc.*, 395 So. 2d 507, 509-10 (Fla. 1981) (reciting the "truism that an agreement against public policy is unenforceable"); *Saralegui v. Sacher, Zelman, Van Sant Paul, Beily, Hartman &*

Waldman, P.A., 19 So. 3d 1048, 1050 (Fla. 3d DCA 2009) (affirming determination that contract was unenforceable because it violated Florida law); *Park v. Wausau Underwriters Ins. Co.*, 547 So. 2d 213, 215 (Fla. 4th DCA 1989) (“The general rule is that a contract which is violative of a statute or public policy will not be enforced by the courts.”) (cleaned up).

Of course, unlawful contractual provisions may be severed and eliminated, and the balance of the contract enforced, if the illegal portion does not go to the essence of the contract. *See Addit, LLC v. Hengesbach*, 341 So. 3d 362, 371 (Fla. 2d DCA 2022); *Gold, Vann & White, P.A. v. Friedenstab*, 831 So. 2d 692, 696 (Fla. 4th DCA 2002).

As this Court recently explained:

‘[A]n agreement that is violative of a provision of a constitution or a valid statute, or an agreement which cannot be performed without violating such a constitutional or statutory provision, is illegal and void.’ We have consistently applied this rule to invalidate contracts that violate the law.

Gables Ins. Recovery, Inc. v. Citizens Prop. Ins. Corp., 261 So. 3d 613, 624 (Fla. 3d DCA 2018) (internal citation omitted).

The Appellants’ arguments at the trial court proposed that the violative sections of the Declaration be stricken and severed from

the Declaration, consistent with *IconBrickell*, allowing for a democratically elected and statutorily controlled association to manage, operate, and assess for the common elements. The foregoing relief would have cured the violative sections of the Declaration.

Florida law establishes that a party may not generally seek to enforce an illegal contract. See *P.C.B. Partnership v. City of Largo*, 549 So. 2d 738, 742 (Fla. 2d DCA 1989) (citing *Local No. 234 of United Ass'n of Journeymen and Apprentices of Plumbing v. Henley & Beckwith, Inc.*, 66 So. 2d 818, 821 (Fla. 1953); *Harris v. Gonzalez*, 789 So. 2d 405, 409 (Fla. 4th DCA 2001) (“A contract which violates a provision of the constitution or a statute... will not be enforced in our courts.”)).

It thereby follows that there is no statute of limitations with respect to the challenge of illegal contract provisions which were void *ab initio*. See *Moore v. Smith-Snagg*, 793 So. 2d 1000, 1001 (Fla. 5th DCA 2001) (“there is no statute of limitations in respect to the challenge of a forged deed, which is *void ab initio*”); *Gotshall v. Taylor*, 196 So. 2d 479, 481 (Fla. 4th DCA 1967) (statutes of limitations are inapplicable to void deeds); *New Testament Baptist*

Church Inc. of Miami v. State, Dept. of Transp., 993 So. 2d 112, 116 n.1 (Fla. 4th DCA 2008); *Volusia County v. Del-Air Corp.*, 25 So. 2d 804 (Fla. 1946); *Reed v. Fain*, 145 So. 2d 858 (Fla. 1962); *Brown v. Floyd*, 202 So. 2d 215 (Fla. 1st DCA 1967); *Boys Work Inc. v. Gale*, 321 So. 2d 435, 437 (Fla. 1st DCA 1975); *McKeown v. Collins*, 21 So. 103, 105 (Fla. 1896); *Wernle v. Bellemead Dev. Corp.*, 308 So. 2d 97, 102 (Fla. 1975).

Here, just as in *IconBrickell*, the Declaration's improper designation of common elements as "Shared Components" subject to the complete ownership and control of the Hotel Unit Owner is illegal under Florida law and, accordingly, those portions should be found to be void *ab initio*. Therefore, Section 95.11(2)(b), Fla. Stat., cannot be used to validate provisions that have been void since their inception via the mere passage of time.

C. All Parties Were Properly Joined

i. All interests are adequately represented

Here, Plaintiffs' claims for declaratory relief can proceed to final resolution without the intervention of all unit owners and/or mortgagees as their interests are adequately represented through the Defendant Association. "Florida law defines 'indispensable parties' to

a lawsuit as “[p]ersons who have not only an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience.” *Mazza v. Santoni*, 855 So. 2d 710, 712 (Fla. 4th DCA 2003) (citing and quoting *Glancy v. First W. Bank*, 802 So. 2d 498 (Fla. 4th DCA 2001) (quoting *Phillips v. Choate*, 456 So. 2d 556, 557 (Fla. 4th DCA 1984))).

As a first matter, the association is the entity, as established by the Florida Legislature, “where membership in the entity is composed exclusively of unit owners or their elected or appointed representatives and is a required condition of unit ownership,” § 718.103(2), Fla. Stat., and which operates the condominium. § 718.111(1)(a), Fla. Stat. Florida law also expressly provides that it is the association which “may contract, sue, or be sued with respect to the exercise or nonexercise of its powers,” § 718.111(3), Fla. Stat, and that the association is the entity which has the power to “[i]nstitute, maintain, settle, or appeal actions or hearings in its name on behalf of all unit owners concerning matters of common interest to most or all unit owners, including, but not limited to,

the common elements; the roof and structural components of a building or other improvements; mechanical, electrical, and plumbing elements serving an improvement or a building; and representations of the developer pertaining to any existing or proposed commonly used facilities.” § 718.111(3), Fla. Stat. (emphasis added). Pursuant to the plain and unambiguous language of Chapter 718, Fla. Stat., all unit owners’ and mortgagees’ interests are adequately represented in this lawsuit through the Defendant Association.

By requiring the joinder of all unit owners and lien holders to lawsuits involving condominium common elements, the language of Chapter 718, Fla. Stat., would be rendered meaningless and the outcome would be an absurd result totally incongruous with the will of the legislature. Unless the court can say that no reasonable legislature would have intended for the statute to carry its plain meaning, it should “presume that [our] legislature says in a statute what it means and means in a statute what it says there.” *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004).

This is further supported by the fact that the claims brought in this lawsuit are similar if not identical to those asserted in

IconBrickell Condo. No. Three Ass'n, Inc. v. New Media Consulting, LLC, 310 So. 3d 477 (Fla. 3d DCA 2020), wherein this Court found that *IconBrickell's* Declaration of Condominium, which is substantially similar to the Declaration at issue herein, impermissibly divested unit owners of their undivided share in the condominium's common elements. *Id.* Notably, in *IconBrickell*, the Association was the only defendant to the declaratory relief claims which resulted in the entry of a summary judgment order being entered for the plaintiff at the trial court level and affirmed on appeal. *Id.* at 478. As the declaratory relief claims asserted herein are almost identical to those set forth at the trial court level in *IconBrickell*, the joinder of all unit owners and mortgagees is clearly not required or warranted.

Further, as Judge Hanzman explained in *Central Carillon Beach Condominium Association, Inc., et al. v. Carillon Hotel, LLC, et al.*, “[d]efendants walked into this hornets’ nest with eyes wide open, and purchased the Hotel Lot (and its attendant contract rights) ‘subject to Florida law.’ If it turned out that Florida law did not permit them to lawfully own some of the rights they claimed to have purchased, then so be it. ‘The law is the law’ and ‘it must be

served’ no matter the ‘consequences.’” 2023 WL 1429624, at *14 (Fla. Cir. Ct.) (citing *Spencer v. EMC Mortg. Corp.*, 97 So.3d 257 (Fla. 3d DCA 2012)). Moreover, the rights of the mortgagees would be minimally impacted as once the common elements are properly reclassified, any mortgagee would maintain the same undivided interest in the common elements.

ii. The limitations of Section 718.110(4) do not apply

While 718.110(4), Florida Statutes provides that no amendment may change the configuration or size of any unit “unless all the record owners of all other units in the same condominium approve the amendment,” Plaintiffs do not seek to amend the Declaration as referenced in Section 718.110. Instead, Plaintiffs here seek a judicial declaration that Sections 2.41, 3.2(b), 7.3, 12.1, and 12.3 of the Declaration are void as a matter of law and therefore unenforceable.

Section 718.110 deals with amendments to a declaration proposed by the board of directors of an association or by the unit owners themselves. That is a much different situation from a court determining whether or not portions of a declaration are violative of the Florida Condominium Act. Yet the trial court found that, as

applied to this action, “the statute requires that all members of the Hotel Condominium (plus their record lien holders) approve a “reform” or modification to the Common Elements.” (R. 5551).

If 718.110(4) were applicable to the case at issue, as the trial court suggests, then even a single unit owner or lien holder could withhold their consent for the court to correct a clearly illegal provision of a declaration and preclude the courts of this state from enforcing its duly enacted laws. The Condominium Act and decisions of this Court, like that in *IconBrickell*, would be unenforceable and futile absent the unanimous approval of every unit owner and lien holder. That surely can’t be right. “[S]tatutes, as a rule, will not be interpreted so as to yield an absurd result.” *Fla. Dep’t of Highway Safety & Motor Vehicles v. Hernandez*, 74 So. 3d 1070, 1079 (Fla. 2011) (citing *State v. Iacovone*, 660 So. 2d 1371, 1373 (Fla.1995) (internal quotations omitted)).

- iii. The reclassification of common elements is not a material alteration or modification

Even if it did apply, Section 718.110(4) only concerns amendments that constitute material alterations or modifications of the appurtenances of the units. Assuming that the striking of

unlawful and nonconforming provisions of the Declaration were deemed amendments, the Declaration itself permits for such property additions and does not require the joinder by mortgagees and lienholders.

While Section 6.2 of the Declaration begins by mirroring Section 718.110(4), Florida Statutes, requiring the joinder of “the record owner of the unit and all record owners of liens on the unit join in the execution of [an] amendment” that changes the configuration or size of the unit in any material fashion, materially alters or modifies the appurtenances to the unit, or changes the proportion by which the unit owners shares the common expenses, Section 6.2 provides for an exemption to these stringent requirements by excluding the addition of property to the common elements as an activity that constitutes a Material Amendment (as defined therein, and including material alterations). Specifically, Section 6.2 reads:

“The acquisition of property by the association, material alterations or substantial additions to such property or the Common Elements by the association...if in accordance with the provisions of this Declaration, shall not be deemed to constitute a material alteration or modification of the appurtenances to the units, and accordingly shall not constitute a Material Amendment.”

(R. 4226).

The drafter's purposeful wording allows for the Association to acquire, adjust, and obtain additional common elements without the necessity of obtaining unit owner approval. As such, individual unit owners and mortgagees are not "necessary parties" to this action.

iv. The unit owners currently bear the expense of all costs associated with the common areas

There was no evidence before the trial court to support the finding that the unit owners would have to "pay a significantly higher share for the maintenance if Plaintiffs prevail on their claims," and that therefore all lienholders and mortgagees were required to be joined as indispensable parties. (R. 5550).

Such a rationale is fatally flawed, and, in fact, the opposite is true. As the record clearly reflects, the Declaration renders unit owners responsible for assessments related to the repair, replacement, improvement, management, maintenance, operation, ad valorem tax, and insurance of the so-called Shared Components as well as the Hotel's share of condo assessments. D. 12.1. These costs are defined as the "Hotel Shared Costs" and the Declaration

obligates the Unit owners to pay 100% of the Hotel Shared Costs.

D. 12.3. As such, whether correctly classified as “common elements” or erroneously designated as “Shared Components,” the unit owners’ burden to pay the expenses associated with such elements remains unchanged.

In addition, the Hotel has unilaterally allocated costs associated with the operation of its hotel business, in addition to the so-called Shared Components, to the unit owners. Therefore, if the requested relief were granted, the expense to the unit owners would likely decrease, contrary to the trial court’s unfounded and unsupported conclusion above. (See R. 4192-4214).

The current structure was created to wrest control of building maintenance from the democratically operated not-for-profit entity required by law to operate and maintain the building with statutory duties regarding obtaining bids, keeping transparent financials, maintaining reserves, and with directors that have a fiduciary duty to the other owners and give that control to a for-profit company with zero statutory obligations to unit owners.

Significantly, there is no record support to reflect that the Hotel has been subsidizing or otherwise lowering the costs that are

attributable to the unit owners. While no evidence exists that the unit owners would have to pay significantly higher costs of maintenance if they prevail here, should the Plaintiffs prevail in the action still pending at the trial court and demonstrate that the allocation of certain Hotel Shared Costs was improper or that they improperly include the cost of hotel operation, the maintenance costs in the future would undeniably decrease. Accordingly, the trial court's unfounded conclusion that the action could result in greater costs to the unit owners is as erroneous as it is unfounded, and does not support any finding that it is necessary to join all unit owners and their lienholders and/or mortgagees to this action.

VI. CONCLUSION

The trial court erred as a matter of law in holding that “the Declaration of 1100 West, A Condominium recorded July 16, 2007... does not violate the Florida Condominium Act Chapter 718.” On its face, all of the property necessary to provide utilities and services to more than one unit is inside the “Hotel Unit,” and there are thus no minimum common elements as required by the Act and affirmed by *IconBrickell*. The inclusion of some of the required statutory language does not change the essential ownership structure of the property.

Both on paper and in practice, the Plaintiffs established the lack of common elements and lack of Association control.

The court also erred in determining that Florida Statute Chapter 95 time-bars some of the Plaintiffs from challenging the illegal provisions of the Declaration and ruling that all other unit owners and lien holders had to be joined as indispensable parties.

For these reasons, the Order granting summary judgment in favor of the Association and Hotel must be reversed.

Dated: July 15, 2024

Respectfully submitted,

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VII. CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of July 2024, I electronically filed the foregoing document with the Clerk of Courts by using the Court's E-Filing system, which will send a notice of electronic filing to all counsel of record, including:

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VIII. CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the foregoing Brief is in conformity with all requirements set forth in Florida Rules of Appellate Procedure.

/s/ Megan Lazo
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