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RIS Investment Group, Inc. v. Department of Business and Professional Regulation, Division of Florida Land Sales, Condominiums, and Mobile Homes: Condominium Associations Sheated: The Fourth District Denies Assessments Imposed upon Developer-Owned Unconstructed Condominium Units

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RIS Investment Group, Inc. v. Department of Business and Professional Regulation, Division of Florida Land Sales, Condominiums, and Mobile Homes: Condominium Associations Cheated: The Fourth District Denies Assessments Imposed upon Developer-Owned Unconstructed Condominium Units

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I. INTRODUCTION

Prior to the January 29, 1997, decision handed down by the Fourth District Court of Appeal in *RIS Investment Group, Inc. v. Department of Business and Professional Regulation, Division of Florida Land Sales, Condominiums, and Mobile Homes*,[1] there were a handful of cases that addressed the creation of condominium units. The most important of these cases were decided in the second and fourth districts and were at odds with one another, despite that various sections of the *Florida Statutes* adequately address and control precisely when a condominium unit is considered created. While the second district was consistent in two of its most important cases on this topic, the fourth district has made decisions at odds with cases within its own district, as well as decisions at odds with those of the second district. When faced with an opportunity to address the split in the districts last January, rather than rectify the problem it helped to create, the fourth district opted to further confuse an already unnecessarily disconcerting area of law.

In Section II, this comment will survey, in addition to the *RIS* decision, four of the most important decisions in this area, two of which came from the second district, and two of which came from the fourth. Section III will address the statutes that were controlling in each case, and Section IV will address the question of whether the fourth district sought to create a third type of condominium property not contemplated by the legislature.

II. THE CASES PRECEDING *RIS*

Although the fourth district previously decided at least two cases concerning the point in time a condominium unit is created for purposes of imposing assessment fees, in *RIS*, the court addressed only one of those cases, apparently choosing to ignore the other. While the *RIS* decision is based solely upon the fourth district's decision in *Welleby Condominium Ass'n One, Inc. v. William Lyon Co.*,[2] omitted from consideration—or at least discussion—are the fourth district's decision in *Winkelman v. Toll*[3] and the second district's decisions in *Hyde Park Condominium Ass'n v. Estero*

1. 695 So. 2d 357 (Fla. 4th Dist. Ct. App. 1997).
2. 522 So. 2d 35 (Fla. 4th Dist. Ct. App. 1987).
3. 661 So. 2d 102 (Fla. 4th Dist. Ct. App. 1995).

Island Real Estate, Inc.[4] and *Estancia Condominium Ass'n v. Sunfield Homes, Inc.*[5] Not surprisingly, *Welleby* is the single decision among the aforementioned cases that is in concert with the fourth district's *RIS* decision. A brief synopsis of each pre-*RIS* decision, as well as the *RIS* decision, follows.

A. *Hyde Park Condominium Ass'n v. Estero Island Real Estate, Inc.*

In *Hyde Park Condominium Ass'n v. Estero Island Estate, Inc.*,[6] Hyde Park appealed a summary judgment entered in favor of Estero Island Real Estate. Pursuant to the summary judgment, the lower court declined to hold Estero Island liable for assessments Hyde Park claimed were past due on certain unimproved land owned by Estero Island. Estero Island acquired title in November of 1981 to the subject unimproved real property located in Hyde Park I Condominium, which was operated by the appellant. Estero Island acquired title from Philip Werner, Jr., who was also an appellee in this case. Werner acquired title in February of 1976.[7]

In 1983, Hyde Park sought to recover from Estero Island past due assessment fees from 1970 to 1983. Estero Island filed a notice of contest in response to Hyde Park's Claim of Lien, and, in September of 1983, Hyde Park issued a partial release of claim for assessments owed for the period of 1970 to February of 1976, when Werner acquired title. At that time, Hyde Park filed a claim against the appellees for the assessments due from February 1976 to 1983 and sought to foreclose upon the seven units owned by Estero Island that remained unimproved.[8]

The basis for Estero Island's refusal to pay was that, because the property remained unimproved, the property constituted "lots" rather than "units;" thus, according to Estero Island, because it owned "lots," it could not be held liable for assessment fees to which only "units" were subject. Upon the appellees' joint motion for summary judgment, the court agreed that "the issue of law was whether the declaration of condominium provided for assessments to come due against unimproved lots for proposed apartments, or, whether the declaration only contemplated that assessments were to be paid by 'completed apartments.'"[9] Summary judgment was entered in favor of the appellees.[10]

4. 486 So. 2d 1 (Fla. 2d Dist. Ct. App. 1986).
5. 619 So. 2d 1008 (Fla. 2d Dist. Ct. App. 1993).
6. *Hyde Park*, 486 So. 2d at 1.
7. *Id.* at 2.
8. *Id.*
9. *Id.*
10. *Id.*

Upon appeal to the second district, however, the lower court's decision, which was premised upon section 711.03(7) of the *Florida Statutes*, was reversed.[11] The lower court had determined that the unimproved property owned by Estero Island did not fall within the statutory definition of condominium property, which is defined as "units of improvements."[12] The second district disagreed and found that, under the 1969 Condominium Act which controlled in this case,

> condominium property includes land, all improvements, all improvements on the land, and all easements and rights with the condominium.... A "unit" is that part of the condominium property "which is *to be subject to private ownership*."... Therefore, under the 1969 Act, the only type of private ownership available within a condominium is a "unit." *For this court to hold otherwise would, in effect, create property ownership rights which were not contemplated by either the legislature or the Hyde Park Condominium declaration.*[13]

Therefore, the second district determined that the unimproved lots owned by Estero Island were indeed "units" within the meaning of the applicable statute,[14] and Hyde Park was indeed entitled to those past due assessment fees it claimed.[15]

B. *Welleby Condominium Ass'n One, Inc. v. William Lyon Co.*

The next of the cases, *Welleby Condominium Ass'n One, Inc. v. William Lyon Co.*, was decided in 1987 by the Fourth District Court of Appeal.[16] *Welleby*, the case upon which *RIS* was decided, involved a dispute between the plaintiff condominium association, Welleby Condominium Association, and the defendant land owner, the William Lyon Company.[17] The dispute concerned assessment fees the Welleby Condominium Association levied upon the unimproved lots owned by the William Lyon Company, all of

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11. *Hyde Park*, 486 So. 2d at 2.
12. FLA. STAT. § 711.03(7) (1969).
13. *Hyde Park*, 486 So. 2d at 2. (citations omitted) (second emphasis added) (citing FLA. STAT. § 711.03(9), (13) (1969)).
14. *Id.*
15. *Id.*
16. *Welleby*, 522 So. 2d at 35.
17. *Id.*

which were described in the declaration of condominium that was filed in October of 1974.[18]

In March of 1986, Welleby filed Claims of Lien upon the subject land for unpaid maintenance assessments, which it subsequently sought to foreclose. Welleby alleged that the unimproved land owned by the defendant was subject to such assessments pursuant to both section 718.116 of the *Florida Statutes* and the declaration of condominium. The defendant, however, claimed that the unimproved land owned by it did not constitute "'condominium parcels' or 'units'" as defined by either the declaration of condominium or the *Florida Statutes* and, therefore, could not be subject to the claimed assessments.[19]

The fourth district determined that the issue before it was "whether the land[] owned by the [d]efendant [was] subject to assessments levied by the [p]laintiff under the [d]eclaration of [c]ondominium and the Laws of Florida."[20] In determining that the defendant land owner was not liable for the claimed assessments, the court considered section 711.15(1) which read: "A unit owner . . . shall be liable for all assessments coming due while he is the owner of a unit."[21] The court next considered section 711.03(15),[22] which stated that a "'[u]nit' means a part of the condominium property which is to be subject to private ownership. A unit may be in improvements, land, or land and improvements together, as specified in the declaration."[23]

The court next turned to the declaration for its definition of a "unit;" however, the declaration, despite that section 711.15(1) holds "unit owner[s]. . . liable for all assessments coming due . . .[,]"[24] failed to define or mention "unit" or "unit owner." The court did recognize, however, that the declaration, while "not us[ing] the word 'unit' as the object of assessments[,] . . . utilized the term 'condominium parcel' as the object of assessments by the Condominium Association."[25] This was determined by the fourth district to be an intentional decision made by the scrivener of the declaration as evidenced by the consistent and repeated use of the term, as well as by the statement in the declaration that "'[t]he owner of each

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18. *Id.* at 35–36.

19. *Id.* at 36.

20. *Id.*

21. *Welleby*, 522 So. 2d at 36 (citing FLA. STAT. § 711.15(1) (Supp. 1974)).

22. This section, in effect at the time the declaration of condominium was recorded, is presently codified at section 718.103(24) and has retained the exact language. FLA. STAT. § 718.103(24) (1995).

23. Welleby, 522 So. 2d at 38 (citing FLA. STAT. § 711.03(15) (Supp. 1974)).

24. Id. at 36 (citing FLA. STAT. § 711.15(1) (Supp. 1974)).

25. *Welleby*, 522 So. 2d at 37.

condominium parcel shall be liable to the condominium association for the share of common expenses set forth.'"[26]

The declaration proceeded to define the term "condominium parcel" as "'[a]n apartment together with the undivided share in the common elements and all its easements, rights and interest which are pertinent to the apartment.'"[27] The declaration further defined "apartment" as an "'[i]ndividual dwelling'" and, as the fourth district stated, "not raw, unimproved lands."[28] Accordingly, the court stated that the scrivener, pursuant to section 711.03(15),[29]

> chose to describe a "unit" in terms of a "condominium parcel", which is an individual private dwelling. As permitted by [s]tatute, this [d]eclaration specifically describes the object of assessments as land and improvements, namely, an individual private dwelling, and the use of the term "condominium parcel" is so specifically used throughout this [d]eclaration of [c]ondominium, as to preclude any other interpretation as to what the object of assessments was to be against. Assessments, according to this [d]eclaration, could not be assessed and levied against anything other than an individual private dwelling, and the [d]eclaration would not permit any interpretation allowing an assessment against raw, unimproved lands upon which there is no private dwelling.[30]

The fourth district did, however, recognize the very different decision in *Hyde Park*, the most recent case at the time of the *Welleby* decision. The *Welleby* court distinguished its decision from *Hyde Park* by relying upon the statutory language contained in the sections that were in effect at the time of each decision. In *Hyde Park*, the 1969 Condominium Act controlled, under which section 711.03(13) defined "units" as including "any part of the condominium property which was subject to private ownership."[31] This, according to the fourth district, was a very broad definition that would include unimproved property such as that at issue in *Welleby* and that, therefore, the second district was correct in assessing the owner of unimproved lands in *Hyde Park*.[32]

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26. *Id.*
27. *Id.*
28. *Id.*
29. FLA. STAT. § 711.03(15) (Supp. 1974) (stating that a unit is as defined by the declaration of condominium).
30. *Welleby*, 522 So. 2d at 37.
31. *Id.* at 37–38.
32. *Id.* at 38.

However, in *Welleby*, section 711.03(15), as opposed to section 711.03(13), was in effect, and the newer section defined "unit" differently. The critical amendment, according to the fourth district, was the addition of the phrase that "permitted a 'unit' to be described in any number of different ways."[33] The court subsequently concluded that the declaration defined a "'unit' as a private dwelling, thus exempting from an assessment, raw, unimproved property"[34] and found that the Welleby Condominium Association did not "have legal authority to levy assessment against the [d]efendant's land."[35]

C. *Estancia Condominium Ass'n, v. Sunfield Homes, Inc.*

In 1993, *Estancia Condominium Ass'n v. Sunfield Homes, Inc.* was decided.[36] The second district rendered a decision consistent with its decision in *Hyde Park* seven years earlier. In *Estancia*, the second district reversed and remanded the case in which the appellee, Sunfield Homes, despite failing to prove that "it was not the legal owner of twenty units [of condominium property] under the applicable *Florida Statutes* and the definition of 'unit' within the declaration[,]"[37] was declared exempt from paying the assessment fees levied against it.[38]

The declaration of condominium for Estancia Condominium was recorded in 1981 and proposed a twelve-phase condominium. In 1983, an amendment to the declaration was recorded that submitted to the condominium the land for Buildings 200 and 600. Subsequently, in 1990, Sunfield Homes purchased the land that had been dedicated to Building 600, but upon which Building 600 had never been constructed. Accordingly, the unimproved land remained subject to the declaration of condominium.[39]

Upon acquiring title to the land, Estancia Condominium Association began assessing Sunfield Homes for units 610–629. Sunfield Homes subsequently refused to pay these assessments, and Estancia filed an action to foreclose its lien upon such units for unpaid assessments. The trial court entered judgment in favor of Sunfield Homes based primarily upon the fourth district's holding in *Welleby*, which declared unimproved land inconsistent with the definition of "unit" and, thus, immune to assessments.[40]

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33. *Id.*
34. *Id.*
35. *Welleby*, 522 So. 2d at 38.
36. *Estancia*, 619 So. 2d at 1008.
37. *Id.* at 1009 (emphasis added).
38. *Id.*
39. *Id.*
40. *Id.*

The second district recognized that *Welleby* was controlled by an earlier version of the statutory definition of "unit" and that the case before them concerned the 1981 version, codified at section 718.103(16) of the *Florida Statutes*. This section defined "unit" as "a part of the condominium property which is subject to exclusive ownership. A unit may be in improvements, land, or land and improvements together, as specified in the declaration."[41] Further, the declaration in *Estancia* defined a "unit" as "'the part of the condominium property which is to be subject to exclusive ownership'—a definition which is indistinguishable from the definition in *Hyde Park*."[42] Thus, the second district declined "to decide in this case whether [it] agree[d] with the Fourth District's decision in *Welleby*" and held, in accordance with its decision in *Hyde Park*, that Sunfield Homes was liable for the assessments levied upon its unimproved land by Estancia.[43]

D. *Winkelman v. Toll*

The most recent of the cases preceding *RIS* was decided in 1995 by the fourth district. *Winkelman*[44] is a case that was surprisingly consistent with previous second district decisions and inconsistent with the fourth district's own decision in *Welleby*. Perhaps even more surprisingly, the *Winkelman* court's only mention of *Welleby* is found in its sole footnote in which the court summarily dismisses the *Welleby* decision with respect to its present contrasting decision.[45]

In *Winkelman*, the trial court held that the unimproved land owned by the appellees was not subject to assessment fees because the contemplated units were never constructed.[46] However, the fourth district reversed "[b]ecause . . . the property was subjected to condominium ownership upon the recording of the amendment to the declaration adding it to the condominium."[47] Therefore, although the units described in the declaration and added to the condominium through an amendment were never

41. *Estancia*, 619 So. 2d at 1010 (citing FLA. STAT. § 718.103(16) (1981)). It is interesting to note that the words that were critical to the *Welleby* decision denying the assessments are identical to the words in the newer version: "... as specified in the declaration."

42. 619 So. 2d at 1010.

43. *Id.*

44. 661 So. 2d at 102.

45. *Id.* at 107 fn.1.

46. *Id.* at 103.

47. *Id.*

constructed, they were subject to assessments, and the owner of the unimproved land was liable.[48]

The declaration of condominium for Mission Lakes Condominium was recorded in 1980. The declaration contemplated nine phases, which were to be submitted by amendment pursuant to section 718.403.[49] This section permits the developer of a condominium to describe in the declaration the proposed number of phases, but permits the contemplated units to escape assessments until the developer adds the phases by amending the declaration; hence, this section of the statute is titled "Phase condominiums."[50] Accordingly, the developer recorded the declaration, and thereby submitted phase II to condominium ownership. Just over one week later, the developer recorded an amendment adding phases I and III through VIII to the condominium.[51] In compliance with the applicable statute, the developer attached land surveyor certificates upon substantial completion of phases I and II;[52] however, the remaining phases were never constructed.[53]

In 1985, the Winkelmans purchased all the units in phase I of the condominium and purchased all the units in phase II the following year. In 1987, ICON Development Corporation, an appellee in this case, acquired all the units in phases III through VIII. According to the fourth district, "[t]he deed to these phases described the property by their description as contained in the amendment to the declaration of condominium, and the deed was specifically subject to the declaration[] of condominium and amendments thereto."[54]

In 1989, the Winkelmans filed suit to recover from ICON the assessment fees for the percentage of the common expenses of the condominium owned by ICON but for which the Winkelmans had been paying. Several years after instituting this action, ICON filed a counterclaim to quiet title claiming that it had acquired title in fee simple and not subject to the condominium form of ownership. In finding for ICON, the trial court determined that, according to the declaration of condominium, only upon substantial completion of the units could a phase in which the units were to

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48. *Id.*

49. FLA. STAT. § 718.403 (1979).

50. *Id.*

51. *Winkelman*, 661 So. 2d at 104.

52. Section 718.104(4)(e) of the *Florida Statutes* requires that, upon substantial completion of each phase submitted to condominium ownership, a certificate of a registered land surveyor be recorded as an amendment to the declaration of condominium. The phase may, however, be added to the declaration prior to substantial completion. FLA. STAT. § 718.104(4)(e) (1979).

53. *Winkelman*, 661 So. 2d at 104.

54. *Id.* at 105.

be contained be submitted to condominium ownership.[55] Furthermore, the court relied upon sections 718.403(1) and (4) of the *Florida Statutes* for the proposition that, because the subject property never became subject to the condominium, the phases that were built acquired the entire interest in the common elements for which they were assessed.[56] Thus, the court reasoned that the units, by virtue of the declaration of condominium, could become subject to the condominium only upon substantial completion and that, because construction of the units never commenced, the units were never substantially completed, the property in question was never subject to condominium ownership, and ICON was not subject to the assessments that the Winkelmans were attempting to recover.[57]

However, upon appeal by the Winkelmans, the fourth district reversed the lower court. Although section 718.103(16) permits the scrivener to define a "unit" as "improvements, land, or land and improvements together, . . . "[58] it is crystal clear that "[i]t is the recording of the declaration in the public records that subjects the property to condominium ownership."[59] Further, because "[a] condominium is *strictly a creature of statute*[,]"[60] it is with the statute that the declaration must comply, and, should the declaration fail to do so, it is the statute that shall prevail.[61] Accordingly, contrary to the findings of the lower court, the fourth district found that, because section 718.104(2) of the *Florida Statutes* "mandates that the condominium is created upon the recording of the declaration, the

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55. *Id.*

56. *Id.* at 105. Section 718.403(1) states that

[a] developer may develop a condominium in phases, if the original declaration of condominium submitting the initial phase to condominium ownership provides for and describes in detail all anticipated phases; the impact, if any, which the completion of subsequent phases would have upon the initial phase; and the time period within which each phase must be completed.

Section 718.403(4) states that,

[i]f one or more phases are not built, the units which are built are entitled to 100 percent ownership of all common elements within the phases actually developed and added as a part of the condominium.

FLA. STAT. § 718.403(1), (4) (1979).

57. *Winkelman*, 661 So. 2d at 105.

58. FLA. STAT. § 718.103(16) (Supp. 1980).

59. *Winkelman*, 661 So. 2d at 105 (citing FLA. STAT. § 718.104(2) (1979)).

60. *Winkelman*, 661 So. 2d at 105 (emphasis added) (citing Suntide Condominium Ass'n v. Division of Florida Land Sales and Condominiums, Dep't of Bus. Regulation, 463 So. 2d 314 (Fla. 1st Dist. Ct. App. 1984)).

61. *Id.*

certificate of substantial completion cannot be a condition precedent to the creation of the condominium if it can be submitted at a later date."[62]

Additionally, section 718.110(3) similarly mandates that an amendment to a declaration becomes effective upon recordation of the amendment adding the subject property to the condominium, thereby subjecting it to the declaration, as well.[63] Therefore, as with section 718.104(2), failure to improve the property already added to the condominium by amendment prior to recordation of the amendment "does not prevent the inclusion of the land in the condominium, because the amendment is *effective* when recorded."[64] To find otherwise would be to contradict the clear language of the statute.[65]

The fourth district found that the unconstructed phases owned by ICON became subject to the declaration upon the recordation of the amendments adding the phases and remanded the case for further proceedings consistent with that finding.[66] The court cited to *Estancia* for support for its finding and briefly addressed, in a single footnote, its own decision in *Welleby*, which the appellee ICON argued was inconsistent with both *Estancia* and *Hyde Park*. While the court's decision in *Welleby* is contrary to its decision in *Winkelman*, the court dismissed the contradiction by viewing *Welleby* as having not addressed the issue of "whether the property dedicated to the unconstructed units was part of the condominium. In fact, from a reading of the opinion the court assumed that the property was part of the condominium but not subject to assessments."[67] Thus, the fourth district, in a brief breath, both contradicted and dismissed its perhaps iniquitous decision in *Welleby* rather than seeking to rectify this past discrepancy.

E. *RIS Investment Group, Inc. v. Department of Business and Professional Regulation, Division of Florida Land Sales, Condominiums, and Mobile Homes*

In *RIS*,[68] the fourth district relied upon its decision in *Welleby* for support and, at the same time, completely ignored its more recent decision in *Winkelman*. Once again, the controversy involved whether the owner of unimproved condominium property could be assessed for common expenses on that property. RIS was the developer of the condominium at issue and retained ownership of certain units. Although the subject units were

62. *Id.* at 106.
63. *Winkelman*, 661 So. 2d at 106 (citing FLA. STAT. § 718.110(3) (1981)).
64. *Id.*
65. *Id.*
66. *Id.* at 107.
67. *Winkelman*, 661 So. 2d at 107 fn.1.
68. 695 So. 2d at 357.

eventually constructed, RIS failed to pay assessments on the units from the time of recordation of the declaration of condominium until the time a certificate of occupancy was issued on the units. RIS argued that it was not until the certificate of occupancy was issued that the units were subject to assessment fees, the time from which RIS did pay assessments.[69]

While the Department of Business and Professional Regulation, Division of Florida Land Sales, Condominiums, and Mobile Homes (the "Department") determined that RIS was liable for the assessments from the date of recordation of the declaration of condominium, the fourth district disagreed and reversed the Department's ruling.[70] In so finding, the court compared *RIS* to its decision in *Welleby* in which it exempted from assessments developer-owned unimproved land because the declaration made reference only to "condominium parcel," as opposed to "unit," which was defined as an apartment or individual dwelling unit, a definition into which the court believed unimproved land did not fall. The court analogized these cases on the premise that the RIS declaration also expounded a definition of "unit" that was inconsistent with unimproved land upon which, therefore, assessments could not be levied.[71] However, while it is questionable that the declaration in *RIS* even defined the term "unit," what the RIS declaration did provide was a description of what will constitute a unit upon completion:

> Each unit consists of the dwelling applicable to the [u]nit, less that portion of the basic Building structure for the dwelling lying within each dwellings['] maximum dimension as shown on the survey graphic description and plot plan attached hereto .... The boundary lines of each [u]nit are the unfinished surface of the ceilings and floors, perimeter walls and any interior walls that are shown within the maximum limits of each unit on the plot plan.[72]

Together with this description, the court considered two additional clauses found within the declaration:

> 2.2 The Condominium ... is divided into 160 [u]nits which .. [.] are shown in the survey of the land on which a graphic description of the improvements in which the [u]nits are located and a plot plan thereof which, together with this [d]eclaration are in sufficient detail to identify the common elements and each [u]nit

69. *RIS*, 695 So. 2d at 358.
70. *Id.*
71. *Id.* at 358–59.
72. *Id.* at 359 (emphasis omitted) (quoting section 3.2 of the RIS declaration).

> and the relative location and the approximate dimensions thereof.... Each unit shall be a part of the Condominium Parcel which contains the [u]nit.
>
> 3.4 ... The Condominium Parcel, consisting of the [u]nit together with the undivided share of the common elements which are appurtenant to the [u]nit, and the limited common elements which are appurtenant to the [u]nit, constitutes a separate parcel of real property, the ownership of which is in fee simple.[73]

It is upon these portions of the declaration that the court found a "clear" intent by the scrivener "not to include [raw, unimproved] land ... within the definition of a unit."[74] Accordingly, the fourth district reversed the Department and held that, because raw land did not constitute a "unit" subject to assessments, RIS owed no assessments.[75]

III. APPLICABLE STATUTES

In *Winkelman*, the fourth district recognized that a condominium is strictly a creature of statute and that any declaration in derivation of the statute cannot control.[76] However, only sixteen months later, the court, as it did in *Welleby*, once again applied a misinterpretation of the clear and unambiguous language of the statute it had not too long before confirmed was controlling. While in *RIS* the fourth district relied upon its decision in *Welleby*, the court not only clearly ignored its contrary decision in *Winkelman* only a short time earlier, but ignored the contrary decisions from the second district in both *Hyde Park* and *Estancia*. Presented with an opportunity to address the discrepancy within its own district, as well as between the second and fourth districts, the court failed to do so and succeeded only in adding more confusion to what should be a crystalline area of law.

In *Hyde Park* and *Estancia*, the second district relied upon the applicable statute in each case. In *Hyde Park*, the statute in effect at the time the declaration was recorded was section 711.03(9),[77] which stated, in pertinent part, that "condominium property includes land, all improvements, all improvements on the land, and all easements and rights with the condominium."[78] Further, "[a] 'unit' is that part of the condominium

73. *Id.*
74. *RIS*, 695 So. 2d at 359.
75. *Id.*
76. 661 So. 2d at 105.
77. FLA. STAT. § 711.03(9) (1969).
78. 486 So. 2d at 2 (citing FLA. STAT. § 711.03(9) (1969)).

property 'which is *to be subject to private ownership.*'"[79] Therefore, based upon this simple statutory language, the court determined that a "unit" is the only type of condominium property subject to private ownership and that "to hold otherwise would, in effect, create property ownership rights which were not contemplated by either the legislature or the Hyde Park Condominium declaration[;]"[80] accordingly, the court held that, because they were subject to private ownership, unimproved lots were indeed "units" and subject to assessments pursuant to section 711.03 of the *Florida Statutes*.[81]

Likewise, in *Estancia*, the court again relied upon the clear statutory language in deciding that the unimproved condominium property at issue was subject to assessments. The statute here in effect was section 718.103(16)[82] of the 1981 *Florida Statutes*, which contained some of the same language to define a "unit" as the 1969 statute that controlled in *Hyde Park*: "[It is] a part of the condominium property which is subject to exclusive ownership. A unit may be in improvements, land, or land and improvements together, as specified in the declaration."[83] Due to the addition of the phrase "as specified in the declaration[,]" the court considered the definition of the term "unit" that was contained in the declaration. Because the Estancia declaration defined "'unit' as 'the part of the condominium property which is to be subject to exclusive ownership[,]'"[84] and because it is clear that the statute subjects unit owners to assessment fees, the court again found that unimproved condominium property that was subject to private ownership was also subject to assessments.[85]

The *Estancia* court, while refraining from commenting on whether it agreed with the fourth district's decision in *Welleby*, expressed concern that *Welleby* served to create a type of condominium property that was not created or contemplated by the legislature.[86] The court in *Welleby* determined that, because the Welleby declaration used the term "condominium parcel," defined within the declaration as an individual

79. *Id.* (quoting FLA. STAT. § 711.03(13) (1969)).

80. *Id.*

81. *Id.*

82. FLA. STAT. § 718.103(16) (1981).

83. *Id.*

84. *Estancia*, 619 So. 2d at 1010.

85. *Id.* at 1010.

86. *Id.* The *Estancia* court stated: "It is arguable that the [f]ourth [d]istrict's decision [in *Welleby*] allowed the declaration of condominium to create a third type of condominium property that was neither a unit nor a portion of the common elements." *Id.*

private dwelling, rather than "unit" as used in the statute, unimproved property was not subject to assessment fees.[87]

However, the reasoning espoused by the fourth district in *Winkelman* is much more on target. In *Winkelman*, it appears that the developer wanted to phase the condominium development, but for some reason submitted the phases to condominium ownership prior to the construction of the buildings and units in those phases. Although the declaration stated that substantial completion was a condition precedent to condominium ownership, as the court correctly stated, "[i]t is the recording of the declaration in the public records that subjects the property to condominium ownership."[88] Thus, despite the contention of the declaration, because "the provisions of the declaration must conform to the statutory requirements[] and[,] to the extent that they conflict therewith, the statute must prevail[,]"[89] upon recordation of the amendment adding the phases to the condominium, the unimproved property became subject to condominium ownership and, therefore, subject to assessments.[90]

In *RIS* the effective statute was chapter 718 of the 1987 *Florida Statutes*, which is virtually the same as the 1995 *Florida Statutes*.[91] While these statutes are quite similar, where the legislature has seen fit to clarify or amend various sections of the statute, courts should give effect to that legislative intent as evidenced by the amendments.[92] Under this chapter, section 718.103(23), which is identical to section 718.103(24) of the current statute, provides that a "'[u]nit' means a part of the condominium property which is subject to exclusive ownership. A unit may be in improvements, land, or land and improvements together, as specified in the declaration."[93] This is identical to the statutory provisions effective in *Welleby*,[94] *Estancia*,[95] and *Winkelman*.[96] While this provision is quoted and relied upon throughout these decisions, what the courts in *Welleby* and *RIS* appear to have

87. 522 So. 2d at 37.

88. 661 So. 2d at 105.

89. *Id.*

90. *Id.*

91. FLA. STAT. § 718.101–.622 (1995); *id.* §718. 101–.622 (1987).

92. Memorandum of Law in Support of Proposed Recommended Order at 8, Department of Bus. and Prof'l Regulation, Div. of Florida Land Sales, Condominiums, and Mobile Homes v. Sports Shinko (Florida) Co. Ltd., Case No. 96-001391 (State of Florida Division of Administrative Hearings August 5, 1997) (No. 96-001391) (citing Rowles v. Div. of Florida Land Sales, Condominiums, and Mobile Homes, 585 So. 2d 319 (Fla. 5th Dist. Ct. App. 1991)).

93. *Id.* § 718.103(24) (1995); *id.* § 718.103(23) (1987).

94. *Welleby*, 522 So. 2d at 35 (applying § 711.03(15) (Supp. 1974)).

95. *Estancia*, 619 So. 2d at 1008 (applying § 718.103(16) (1981)).

96. *Winkelman*, 661 So. 2d at 102 (applying § 718.103(16) (Supp. 1980)).

overlooked are some other important provisions within the same statutory section. For instance, the legislature provides that the assessments at issue in the foregoing cases are to be "assessed against the unit owner."[97] Additionally, a "'[c]ondominium' means that form of ownership of real property . . ., which is comprised of units that may be owned by one or more persons, and in which there is, appurtenant to each unit, an undivided share in common elements[,]"[98] and it is a "'declaration of condominium' . . . by which a condominium is created."[99] Thus, it is apparent upon the faces of these sections that, upon the recording of the declaration, a condominium is created, which includes the units that are to be assessed. However conspicuous this conclusion may be, to avoid any confusion, the legislature clearly codified it at section 718.104(2):

> A condominium is created by recording a declaration . . . . Upon the recording of the declaration, or an amendment adding a phase to the condominium under § 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.[100]

While the portion of this statute that reads "regardless of the state of completion of planned improvements in which the units may be located" was added in 1990[101] and was a subsequent amendment to the statute that was in

97. FLA. STAT. § 718.103(1) (1995); *id.* § 718.103(1) (1987) (effective at the time the RIS declaration was recorded); *id.* § 718.103(1) (1981) (effective at the time the Estancia declaration was recorded); *id.* § 718.103(1) (Supp. 1980) (effective at the time the Winkelman declaration was recorded); *id.* § 711.03(1) (Supp. 1974) (effective at the time the Welleby declaration was recorded); FLA. STAT. § 711.03(1) (1969) (effective at the time the Hyde Park declaration was recorded).

98. *Id.* § 718.103(10) (1995); *id.* § 718.103(9) (1987) (effective at the time the RIS declaration was recorded); *id.* § 718.103(9) (1981) (effective at the time the Estancia declaration was recorded); *id.* § 718.103(9) (Supp. 1980) (effective at the time the Winkelman declaration was recorded); FLA. STAT. § 711.03(8) (Supp. 1974) (effective at the time the Welleby declaration was recorded).

99. *Id.* § 718.103(14) (1995); *id.* § 718.103(13) (1987) (effective at the time the RIS declaration was recorded); *id.* § 718.103(12) (1981) (effective at the time the Estancia declaration was recorded); *id.* § 718.103(12) (Supp. 1980) (effective at the time the Winkelman declaration was recorded); FLA. STAT. § 711.03(11) (Supp. 1974) (effective at the time the Welleby declaration was recorded); *id.* § 711.03(10) (1969) (effective at the time the Hyde Park declaration was recorded).

100. FLA. STAT. § 718.104(2) (1995) (emphasis added).

101. *Id.* § 718.104(2) (Supp. 1990).

effect at the time of recordation of the RIS declaration, as previously mentioned, courts, in determining the correct meaning of prior statute, not only have the right but have the duty to consider such subsequent legislative amendments for purposes of clarification of legislative intent.[102] Thus, in this case the fourth district had not only the right but the duty to consider this clarification when making its decision. This it failed to do. As the Department argues in its current case against Sports Shinko (Florida) Co., a case in which the same statute was in effect at the time of recordation of declaration as was in effect in *RIS*,

> in determining legislative intent, the subsequent clarifying amendments . . . should be considered in determining the proper meaning to be given to [this] section[] as [it] existed in 1987 and still exist[s] today.
>
> The obvious purpose of these amendments should be given their stated effect especially because the amended provisions reflect not only the Division's unwavering interpretation of the statute but also the intent of the [l]egislature that has been in effect all along.[103]

Accordingly, despite that the court in *RIS* misconstrued the combined effect of the various definitions contained within the condominium statutes, the legislature proceeded to spell it out. However, it appears that the fourth district chose to ignore this particular statutory section and create its own laws for which there is absolutely no support other than its earlier misguided decision in *Welleby*.

The *RIS* court further erred in its reasoning by basing its decision solely upon the few provisions in the RIS declaration that discussed the boundaries of a unit and the description of the condominium. The court cited to section 3.2 of the declaration, which discussed the boundaries of a unit, as its primary support for its decision that, "in reading the declaration[,] . . . the term 'unit' was not meant to encompass raw land."[104] The court then, as additional support, cited to two sections that describe the condominium and a condominium parcel.[105] While the fourth district found in these portions of the declaration a "clear" intent "not to include [raw, unimproved] land by

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102. Memorandum of Law in Support of Proposed Recommended Order at 8, Department of Bus. and Prof'l Regulation, Div. of Fla. Land Sales, Condominiums, and Mobile Homes v. Sports Shinko (Florida) Co., Case No. 96-001391 (State of Florida Division of Administrative Hearings August 5, 1997) (No. 96-001391) (citing Rowles v. Dep't of Bus. Regulation, 585 So. 2d 319 (Fla. 5th Dist. Ct. App. 1991)).

103. *Id.* (emphasis added).

104. *RIS*, 695 So. 2d at 359; *see also supra* text accompanying note 72.

105. *Id.*; *see also supra* text accompanying note 73.

itself within the definition of a unit[,]"[106] its finding is fallacious. As stated by the Department in its pending case, pursuant to sections 718.403(2) and (6) governing phase condominiums, the assertion of the fourth district and of RIS

> that the existence of plot plans, unit floor plans[,] and unit boundaries in the [d]eclaration and its phase amendments is evidence of intent that the units would come into existence at the time of completion must . . . fail as not supported by the statutory scheme of the Condominium Act and provisions concerning phase condominiums. The declaration or the amendment to the declaration that provides for the phase condominium [] *must* describe the land which may become part of the condominium and the land on which each phase is to be built; the minimum and maximum numbers and general size of units to be included in each phase; each unit's percentage of ownership in the common elements as each phase is added; the recreational areas and facilities which will be owned as common elements by all unit owners, and the membership vote and ownership in the association attributable to each unit in each phase.[107]

Thus, it is clear that the section of the RIS declaration that the fourth district itself recognized as "discuss[ing] the boundaries of a unit"[108] cannot be construed as evidencing an intention that a unit must be substantially completed before assessment fees may be levied. Contrariwise, this type of boundary description, as well as the additional descriptions cited by the fourth district in support of its finding, is currently mandated by the *Florida Statutes*, as it was in 1987 when the RIS declaration was recorded.[109] Accordingly, the decision of the Fourth District Court of Appeal, on yet another statutory ground, is erroneous and unsupported.

Additionally, the proffered reasoning in *Welleby*, upon which RIS was decided, is painfully fallacious. The court refers to section 711.03(15), the same language that was applicable in both *Estancia* and *Winkelman*, which permits the scrivener, in the declaration, to define a "unit" as improvements and/or land.[110] However, because the scrivener used the term "condominium

106. *RIS*, 695 So. 2d at 359.

107. Memorandum of Law in Support of Proposed Recommended Order at 16–17, *Sports Shinko* (No. 96-001391) (emphasis added).

108. *RIS*, 695 So. 2d at 359.

109. Sections 718.403(2) and (6) contain identical language in both 1987 and the current edition. FLA. STAT. § 718.403(2), (6) (1987); *id.* § 718.403(2), (6) (1995).

110. FLA. STAT. § 711.03(15) (Supp. 1974).

parcel" throughout the Welleby declaration and never used the term "unit," the court relied solely upon the definition of "condominium parcel" under the declaration which read: "An apartment together with the undivided share in the common elements and all its easements, rights and interest which are pertinent to the apartment."[111] In turn, an "apartment" was defined as an "[i]ndividual private dwelling."[112] Thus, because the scrivener "chose to describe a 'unit' in terms of a 'condominium parcel', which is an individual private dwelling[,]"[113] it was only an individual private dwelling that could be subject to assessments and not unimproved land.

However, while section 711.103(15),as have its preceding statutes since *Winkelman*, grants to the scrivener the authority to define a "unit" in a couple of different ways, what the statute does not do is grant to the scrivener the power or authority to determine what property is to be subject to assessments.[114] Section 718.103(1) very clearly states, as it always has, that it is *units*, not condominium parcels or any other property, that shall be subject to assessments[115]. Additionally, the statute defines, as it always has, "condominium parcel" as specifically including a "unit;"[116] thus, within the term "condominium parcel" is a unit, and a "condominium parcel" by its very definition is subject to assessments. Therefore, regardless of how a "unit" or "condominium parcel" is defined, upon recordation of the declaration, a condominium, and therefore a unit, comes into existence and is subject to assessments. Again, because a court has the right and duty to consider subsequent statutory amendments, while many of the statutory provisions remained the same, if any provisions were subsequently amended, the fourth district was obligated to consider these amended statutory provisions and failed to do so.

IV. IF IT'S NOT A UNIT, WHAT IS IT?

The condominium statutes have always contemplated only two types of property that are subject to condominium ownership: units and common

111. *Welleby*, 522 So. 2d at 37.

112. *Id.*

113. *Id.*

114. FLA. STAT. § 711.103(15) (1995).

115. *Id.* § 718.103(1) (1995); *id.* § 718.103(1) (1987); *id.* § 718.103(1) (1981); *id.* § 718.103(1) (Supp. 1980); FLA. STAT. § 711.03(1) (Supp. 1974); *id.* § 711.03(1) (1969).

116. This section states: "'Condominium parcel' means a unit, together with the undivided share in the common elements which is appurtenant to the unit." *Id.* § 718.103(11) (1995); *id.* § 718.103(10) (1987); *id.* § 718.103(10) (1981); FLA. STAT. § 718.103(10) (Supp. 1980); *id.* § 711.03(9) (Supp. 1974); *id.* § 711.03(8) (1969).

elements.[117] Furthermore, while one may own an "undivided share in common elements[,]"[118] which are "the portions of the condominium property which are not included in the units[,]"[119] it is only the units that are "subject to exclusive ownership."[120] Thus, it logically follows that any portion of condominium property that is exclusively owned must be a unit, the only other type of condominium property being common elements which are not subject to exclusive ownership.

However, the fourth district, in both *Welleby* and *RIS*, determined that the condominium property that was subject to exclusive ownership in each case was not units subject to assessments;[121] further, the court failed to

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117. This section states: "'Condominium' means that form of ownership of real property which is created pursuant to the provisions of this chapter, which is comprised of units that may be owned by one or more persons, and in which there is, appurtenant to each unit, an undivided share in common elements." *Id.* § 718.103(10) (1995); *id.* § 718.103(9) (1987); FLA. STAT. § 718.103(9) (1981); *id.* § 718.103(9) (Supp. 1980); *id.* § 711.03(8) (Supp. 1974); *id.* § 711.03(7) (1969).

118. *Id.*

119. FLA. STAT. § 718.103(7) (1995); *id.* § 718.103(6) (1987); *id.* § 718.103(6) (1981); *id.* § 718.103(6) (Supp. 1980); *id.* § 711.03(5) (Supp. 1974); FLA. STAT. § 711.03(4) (1969).

120. *Id.* § 718.103(24) (1995).

121. In *Welleby*, the fourth district interestingly stated that, although the William Lyon Company "was the owner of certain real property . . . described as follows: *Units* #101, #102, #103, #104, #105, #203, #204, #401, #402, #421, and #422, of Welleby Townhome Condominium One," 522 So. 2d at 36 (emphasis added), because the land described as the aforementioned units had no construction upon it, and because the "scrivner (sic) of this declaration sought to define a 'unit' as a private dwelling, [thereby] exempting from an assessment, raw, unimproved property[,]" *id.* at 38, the units exclusively owned by the William Lyon Company were not the units that were meant to be subject to assessments and were, therefore, exempt. *Id.*

Similarly, in *RIS*, the fourth district once again demonstrated its lack of understanding of this area of the law in finding that the developer-owned condominium property, which had been submitted to condominium ownership upon the recording of the declaration, was not subject to assessments because the buildings containing the units had not yet been constructed. 695 So. 2d at 359. This finding was based primarily upon the description of the boundaries of a unit found within the RIS declaration, which discussed that

[e]ach unit [would] consist[] of the dwelling applicable to the [u]nit, less that portion of the basic Building structure for the dwelling lying within each dwellings[] maximum dimension as shown on the survey graphic description and plot plan . . . [and that] [t]he boundary lines of each [u]nit [would consist of] the unfinished surface of the ceilings and floors, perimeter walls and any interior walls that are shown within the maximum limits of each unit on the plot plan.

Id. Thus, because this description of the boundaries of a unit contemplated a completed unit, the court determined that the scrivener meant only to subject completed units to assessments, apparently completely ignorant of the section that requires the declaration to include such "a

indicate what, if not units, the William Lyon Company and RIS owned. In both cases, the declaration had been recorded, which, by statute, served to create the condominium.[122] Additionally, applicable to *RIS*, it was upon the recording of the declaration that "all units described in the declaration[s] . . . as being located in or on the land then being submitted to condominium ownership . . . [came] into existence, *regardless of the state of completion of planned improvements in which the units may be located.*"[123] Accordingly, the units described in the RIS declaration, despite having not yet been constructed, were created at the time the declaration was recorded and, since the only condominium property that has ever been subject to exclusive ownership is units, it was only these unconstructed units that the parties in *Welleby* and *RIS* could possibly have owned. Therefore, because the William Lyon Company, in *Welleby*, and RIS, in *RIS*, could only have owned units, and because the condominium statutes effective in both cases dictated that unit owners are "liable for all assessments which come due while [they are] the unit owner[s][,]"[124] the decision the fourth district reached in these two cases could not have been arrived at logically.

What the fourth district has seemingly done is, as the second district has pointed out, "allow[] the declaration of condominium to create a third type of condominium property that [is] neither a unit nor a portion of the common elements[,]"[125] and for which there is no statutory authority. In fact, it was precisely this result that the second district sought to avoid in its decision in *Hyde Park*: "[T]he only type of private ownership available within a condominium is a 'unit.' For this court to hold otherwise would, in effect, create property ownership rights which were not contemplated by either the legislature or the Hyde Park Condominium declaration."[126] It is unfortunate that the fourth district does not share the second district's understanding of the condominium statute.

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graphic description of the improvements in which units are located." FLA. STAT. § 718.104(4)(e) (1995).

122. FLA. STAT. § 718.104(2) (1995); *id.* § 718.104(2) (1987) (stating that "[a] condominium is created by recording a declaration").

123. *Id.* (emphasis added).

124. *Id.* § 718.116(1)(a) (1995); *id.* § 718.116(1)(a) (1987); *id.* § 711.15(1) (Supp. 1974).

125. *Estancia*, 619 So. 2d at 1010 (commenting on the fourth district's decision in *Welleby*).

126. 486 So. 2d at 2 (citing FLA. STAT. § 711.03(4), (9), (13) (1969)).

V. CONCLUSION

The condominium statute permits a developer to create a condominium with land as a unit, or improvements as a unit, or both land and improvements as a unit.[127] However, the statute does not permit a developer to create a condominium and have units which are not subject to assessments;[128] only common elements are not subject to assessments.[129] Through its *RIS* decision, the fourth district has once again demonstrated its total lack of understanding of a very basic premise of condominium law—one that every attorney who practices in this area, whether representing developers or associations, understands—unless, of course, the attorney is arguing before a court on behalf of a unit owner who seeks to avoid his or her assessment obligation. Unless and until the fourth district recognizes the error of its ways or the Supreme Court of Florida agrees to tackle the daunting task of clarifying—apparently for the benefit of the misguided fourth district—the clear language of the condominium statute, those unfortunate enough to have to appear before the Fourth District Court of Appeal will be hard-pressed to obtain a logical and legitimate—or even a consistent—ruling regarding condominium assessments.

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127. FLA. STAT. § 718.103(24) (1995); *id.* § 718.103(23) (1987).

128. Section 718.116(9)(a) of the *Florida Statutes* provides an exception to this rule: "No unit owner may be excused from the payment of his share of the common expense of a condominium unless all unit owners are likewise proportionately excused from payment, except as provided [in this section]." *Id.* § 718.116(9)(a) (1995). The section then provides exceptions for developer-owned units where the developer guarantees the assessments. *Id.*

129. *Id.* §§ 718.103(1), (7); 718.104(2); 718.116(1)(a) (1995); *id.* §§ 718.103(1), (6); 718.104(2); 718.116(1)(a) (1987).