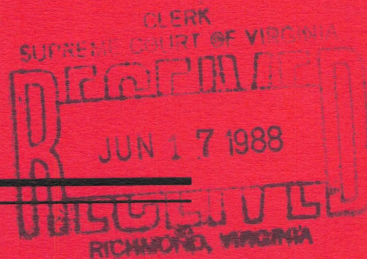


238 VA 85



IN THE
Supreme Court of Virginia
AT RICHMOND

RECORD NO. 870711

THE ROTONDA CONDOMINIUM UNIT
OWNERS ASSOCIATION,

Appellant,

v.

THE ROTONDA ASSOCIATES, et. al.,

Appellees.

JOINT APPENDIX

Stephen H. Moriarty
HYATT & RHOADS, P. C.
1275 K Street, N. W.
Suite 1100
Washington, D. C. 20005
(202) 682-1800

Counsel for Appellant

David G. Fiske
John E. Coffey
Susan M. Cardenas
HAZEL, THOMAS, FISKE, BECKHORN
& HANES
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Alexandria, Virginia 22314
(703) 836-8400

Counsel for Appellees

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VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

FILED

JUL 23 3:32
WARREN E. DARRY
CLERK OF THE CIRCUIT COURT
OF FAIRFAX COUNTY, VA.

THE ROTONDA CONDOMINIUM UNIT
OWNERS ASSOCIATION, a Virginia
condominium association, on
on behalf of itself and all
unit owners at The Rotonda
Condominium,

Plaintiff,

vs.

THE ROTONDA ASSOCIATES,
a Virginia general partnership,

Serve: Rotonda Development
Corporation
William G. Thomas
Registered Agent
510 King Street
P.O. Box 820
Alexandria, VA 22313,

and

ROTONDA DEVELOPMENT CORPORATION,
a Delaware corporation, individ-
ually, and as a general partner
in The Rotonda Associates,

Serve: William G. Thomas
510 King Street
P.O. Box 820
Alexandria, VA 22313,

and

ROTONDA REALTY, INCORPORATED,
a Delaware Corporation, individ-
ually, and as a general partner
in The Rotonda Associates,

AT LAW NO. 70368

3. The Plaintiff Association is by law responsible for the maintenance, repair, renovation, restoration, replacement, management, and operation of the common elements of the Condominium project of The Rotonda Condominium, and brings this action in order to enforce rights relating to those common element properties.

4. Pursuant to the Declaration, the common elements constitute all of the Condominium other than the units, including but not limited to the roofs, exterior brickwork and masonry, balconies, subterranean walls, garage floors, and asphalt paving.

5. Defendant Rotonda Associates ("Declarant") is a Virginia general partnership authorized to do business in Virginia. The Defendant is the Developer and Declarant of the Condominium, pursuant to a Declaration dated January 25, 1978, and recorded in Deed Book 4797 at Page 1 in the Land Records of Fairfax County, Virginia.

6. Defendant Rotonda Development Corporation ("RDC") is a corporation incorporated under the laws of Virginia and Delaware, and authorized to do business in Virginia. RDC is a general partner within the Defendant Declarant general partnership, and to the best of Plaintiff's knowledge, information, and belief, RDC has transacted business in the Commonwealth of Virginia, and has subjected itself to personal jurisdiction pursuant to Section 8.01-301 of the Code of Virginia, as amended.

7. Defendant Rotonda Realty, Incorporated ("RRI") is a corporation incorporated under the laws of Delaware, and authorized to do business in Virginia. RRI is a general partner within the Defendant Declarant general partnership to the best of Plaintiff's knowledge, information and belief. RRI has transacted business in the Commonwealth of Virginia, and has subjected itself to personal jurisdiction pursuant to Section 8.01-301 of the Code of Virginia, as amended.

General Allegations

8. The Rotonda Condominium was designed, constructed, marketed and sold to members of the Plaintiff Association by Defendants during the period from July, 1976 to December, 1980. The Rotonda consists of six buildings and other improvements which were designed, developed, manufactured, installed, constructed, and sold by Defendants, agents of Defendants, or by others under Defendants' direct control, direction and supervision. The six buildings containing the condominium units, and other improvements constituting the condominium's common elements, were constructed and completed at various different times with the 4-1/2 year period set out above.

9. During the design, development, manufacture, and installation, construction of the improvements and the condominium buildings, including the structural, mechanical,

electrical and plumbing systems thereof, certain errors, deficiencies, and problems occurred or were created including but not limited to the following:

- (a) Roofing, including without limitation to membrane, ballast, insulation, and cant strips.
- (b) Brick and masonry wall systems, including without limitation to tuckpointing, relief angles, cantilevered brick and obtuse interior corners.
- (c) Balconies, including without limitation to improper rail posts, rusting and defectively designed, placed and installed reinforcing bars and concrete.
- (d) Expansion joints, particularly those in subterranean walls, garage ceilings, and garage floor slabs.
- (e) Entryways and supporting fill.
- (f) Garage entry drives.
- (g) Subgrade concrete garage walls and ceilings.
- (h) Subterranean waterproofing.
- (j) Garage floor slabs.
- (k) Coping and parapet walls.
- (l) Roof and fascia on Building 6.
- (m) Paving and asphalt work.

- (n) Electrical, mechanical, plumbing and sprinkler systems, including without limitation, hot water return water piping joints.

Count I

Breach of Warranty

10. Paragraphs 1 through 9, inclusive, are realleged herein as if fully set forth.

11. The common elements of the condominium are statutorily warranted against defects by the Defendants under the Virginia Condominium Act (the "Act"), Section 55-79.79.

12. The deficiencies, errors and problems set out in Paragraph 9, above, constitute structural defects within the meaning of Section 55-79.79 of the Act.

13. In January, 1980, Defendants and Plaintiff contractually agreed to modify the warranty given by Section 55-79.79 of the Act ("Agreement") by extending the warranty to cover all structural defects which existed during the first two years after the later of either the completion date of the affected common element, or the date of recordation of the deed to the first unit conveyed in any portion of the condominium in which the common element is located. The parties agreed that the warranty under Section 55-79.79 applied whether or not the defect was discovered during that two year period. A copy of that agreement is attached as Exhibit "A".

14. Each of the structural defects set forth in paragraph 9 above, existed within that two year period established and defined by the January, 1980 Agreement between the Defendants and Plaintiff Association.

15. The Defendants had notice of or were aware of all or many of these structural defects listed in Paragraph 9.

16. Defendants were also notified of or aware of information that, had due diligence been exercised by Defendants, would have readily lead them to discover each and every one of the structural defects alleged in Paragraph 9, above.

17. Defendants failed to make timely, proper, and adequate investigation and cure of these defects. In some instances, the Defendants attempted to but failed to cure the defects. In regard to certain other defects, Defendants made either no attempt to cure whatsoever, or wrongfully refused to cure the defect.

18. The existence of these structural defects and the Defendants' failure to cure these defects constitutes wrongful breach by Defendants' of their warranty under Section 55-79.79 of the Act, as modified by the January, 1980 Agreement.

19. By reason of Defendants' wrongful breach of warranty, Plaintiff Association and its member unit owners have been damaged, which damages include, without limitation, the cost to cure the structural defects and all consequential damages and expenses associated therewith.

WHEREFORE, Plaintiff demands judgment against Defendants, jointly and severally, in the amount of One Million Six Hundred Fifty Thousand Dollars (\$1,650,000.00), plus costs and attorney's fees, and such further relief as the Court deems proper and just.

Count II

Negligent Construction

20. Plaintiff realleges Paragraphs 1 through 9 and Paragraph 12 of this Motion for Judgment as if fully set forth herein.

21. Defendants were under a legal duty to Plaintiff to properly and competently design, develop, manufacture, construct and install the buildings and all improvements to the condominium property, and all structural, mechanical electrical, and plumbing systems of those improvements, in a manner commensurate with the industry standards.

22. Defendants negligently failed to perform and comply with their duties to Plaintiff, such that Defendants negligently and improperly designed, developed, manufactured, constructed and installed certain of the common elements of the condominium.

23. Defendants' negligence and breach of duty has resulted in structural defects in the condominium property including those set forth in Paragraph 9 above.

24. By reason of, and direct and proximate consequence of, Defendants' negligence, Plaintiff and its member unit owners have been damaged, which damages include, but are not limited to, the costs to cure those defects and all related consequential damages and expenses.

WHEREFORE, Plaintiff demands judgment against Defendants, jointly and severally, in the amount of One Million Six Hundred Fifty Thousand Dollars (\$1,650,000.00), plus costs and attorney's fees, and such further relief as the Court deems just and proper.

Count III

Negligent Repairs

25. Paragraphs 1 through 17, inclusive, of this Motion for Judgment are realleged as if fully set forth herein.

26. Defendants had a legal duty to Plaintiff to perform all attempted cures and repairs of structural defects and other problems on the condominium property in a competent and proper manner commensurate with industry standards.

27. Defendants negligently and improperly failed to perform and discharge that duty. Defendants attempted to repair or cure all or some defects including, but not limited to, those items listed in subparagraphs (a), (b), (c), (d), (f), (h), (i), (k), (l) and (n) of Paragraph 9, above. The repairs and attempted cures made by Defendants of the structural defects and other problems were themselves


defective. Defendants utilized or made incorrect and incomplete investigations, incorrect diagnosis, and made improper repairs by the use and application of erroneous techniques, materials, and methods. In certain instances, Defendants' defective repairs and attempts to cure certain defects actually aggravated existing structural defects and resulted in additional damages to the condominium property.


28. By reason of, and direct and proximate result of, Defendants' negligence, Plaintiff and its owner members have been damaged, which damages include, but are not limited to, the costs to correctly repair and cure both Defendants' negligent repairs and attempts to cure structural defects and problems, as well as all related consequential damages and expenses.

WHEREFORE, Plaintiff demands judgment against Defendants, jointly and severally, in the amount of One Million Dollars Three Hundred Thousand Dollars (\$1,300,000.00), plus costs and attorney's fees, and such other relief as the Court deems just and proper.

THE ROTONDA UNIT OWNERS ASSOCIATION

By Counsel:



Stephen H. Moriarty


Kenneth E. Chadwick

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(202) 682-1800

Of Counsel:

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Jeffrey A. Hurley
2200 Peachtree Center Harris Tower
233 Peachtree Street, N.E.
Atlanta, Georgia 30303
(404) 659-6600

AGREEMENT

This is an agreement between THE ROTONDA ASSOCIATES, ("THE DECLARANT") and THE ROTONDA CONDOMINIUM UNIT OWNERS ASSOCIATION ("THE ASSOCIATION"). This Agreement is dated January 21, 1980.

ARTICLE I

Recitals

- 1.1 The purpose of this Agreement is to define the rights and responsibilities of the parties to this Agreement respecting warranties concerning the structural integrity of certain common elements at The Rotonda Condominium.
- 1.2 The Rotonda is a phased condominium development which will, when completed, consist of 6 buildings. The construction of Building No. 6 (the sales pavilion) was begun in July, 1976, and completed in October, 1976. The construction of Building No. 1 was begun in November, 1976, and completed in January, 1978. The construction of Building No. 2 was begun in July, 1977, and completed in August, 1978. The construction of Building No. 3 was begun in June, 1978, and completed in August 1979. The construction of Buildings Nos. 4 and 5 was begun in October, 1978, and June, 1979, respectively, and neither is complete at the time of execution of this Agreement. The dates of the conveyance of the first unit in each building is as follows:

Building No. 1 -- January 26, 1978

Building No. 2 -- August 17, 1978

Building No. 3 -- August 21, 1979

1.3 Pursuant to the Condominium Instruments, the Declarant has the power to appoint the members of the Board of Directors of the Association for a period of five years; from January 26, 1978, (the date the first unit was sold) or until units to which 75% of the percentage interests in the common elements appertain are sold and settled, whichever occurs earlier. As of the date of this Agreement, Declarant has appointed six of the nine directors; three members who were nominated by the unit owners were appointed by the Declarant as of October 31, 1979. All nine directors concur in the execution of this Agreement.

1.4 For the past several months, there has been considerable discussion concerning the necessity of and timing of a comprehensive, general engineering study of the structural integrity of the completed buildings. This concern was occasioned by no specific structural defect but rather by:

(a) recent disclosure of disputes and potentially costly litigation concerning alleged structural defects respecting common elements of other residential condominium complexes in Northern Virginia;

(b) apprehension as to the time period within which the statutory warranty ("the structural warranty") contained in §55-79.79 of the

Virginia Condominium Act, may be enforced, since the structural warranty expires as to Building No. 1 and Building No. 2 on January 26, 1980, and August, 1980, respectively; and (c) a desire on the part of The Rotonda Resident Advisory Council to have, prior to January 26, 1980, a thorough inspection of all pertinent structural systems of the common elements (including mechanical and electrical rooms and areas, elevator shafts, ventilation areas, roofs, heating and air conditioning, etc.) to be conducted by an architectural and engineering firm not connected with the Declarant or any contractor of the Declarant. It has been proposed that the funding for this could be accomplished by several methods, including special assessment of each unit owner.

1.5 In light of the action of the Board of Directors of the Association to engage the independent engineering firm of Tadjer-Cohen-Associates for the purpose of serving as a consultant to the Association to determine the structural integrity of the common elements, it is the Declarant's opinion that such a further structural inspection is premature and unnecessary at this time.

1.6 The Declarant believes that the common elements have been properly constructed and comply with the requirements of the structural warranty. The Declarant does, however, desire to relieve the apprehension of the Association as to the time limit for enforcement of the structural warranty after its expiration.

ARTICLE II

Extension of Statute of Limitations

2.1 In order to alleviate the concerns of unit owners described above, in consideration of the mutual assurances and forbearance and for other valuable consideration, the receipt and sufficiency of which is hereby acknowledged by Declarant, Declarant for itself, its heirs, successors and assigns hereby agrees not to invoke, or raise the defense of Statute of Limitations to any suit to enforce the structural warranty on the common elements at The Rotonda brought by The Association within five (5) years from the date the cause of action accrues.

2.2 Declarant agrees that the Association may enforce the structural warranty in respect of any structural defect in the common elements which has occurred within two years of the date of recordation of the deed to the first unit to be conveyed in that portion of the condominium in which the common element is located, or completion of the common element, whichever is later, even if such structural defects are not discovered within that two year period.

2.3 The rights and obligations created in this section are not in lieu of other warranties, either express, implied or statutory existing in respect of the common elements, nor is it affected by any provision of the Limited Warranty given to purchasers.

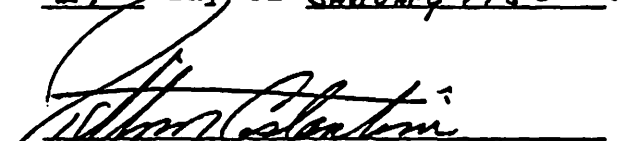
ARTICLE III

Enforceability

3.1 This Agreement shall be binding upon all parties and may be enforced by appropriate legal pleading in any case instituted by the Association or the Declarant.

Executed on the date set forth above.

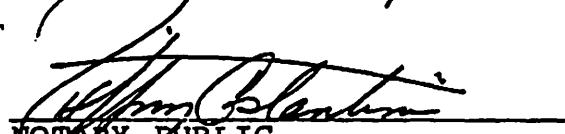
Executed before me this
24 day of JANUARY 1980.


NOTARY PUBLIC
my commission expires 6/7/81

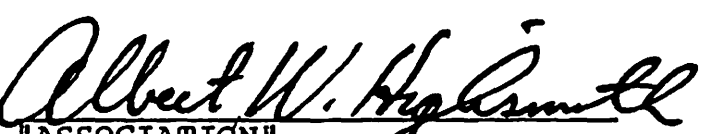
THE ROTONDA ASSOCIATES

By: 
"DECLARANT"

Executed before me this
24 day of JANUARY 1980.


NOTARY PUBLIC
my commission expires 6/7/81

THE ROTONDA CONDOMINIUM
UNIT OWNERS ASSOCIATION

By: 
"ASSOCIATION"

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

THE ROTONDA CONDOMINIUM UNIT
OWNERS ASSOCIATION,

Plaintiff,

v.

THE ROTONDA ASSOCIATES, et al.,

Defendants.

AT LAW NO. 70368

MEMORANDUM OF POINTS AND AUTHORITIES IN
SUPPORT OF PLAINTIFF'S OPPOSITION TO
DEFENDANTS' PLEA IN BAR AND AMENDED PLEA IN BAR

Preliminary Statement

On July 23, 1985, Plaintiff, The Rotonda Condominium Unit Owners Association (hereinafter "Plaintiff" or "Plaintiff Association"), filed its Motion for Judgment against co-Defendants, The Rotonda Associates, the Rotonda Development Corporation and Rotonda Realty, Incorporated (hereinafter referred to collectively as "Defendants"). In its Motion for Judgment, Plaintiff requested damages caused by numerous construction defects, alleging that Defendants had breached their statutory warranty against structural defects, had negligently constructed The Rotonda Condominium (hereinafter referred to as "the Condominium"), and had negligently affected repairs to the Condominium.

2. Equitable Estoppel

Should the Court entertain Defendants' position that the common elements were completed upon construction of the buildings rather than upon satisfaction of the punchlist items, Plaintiff Association's cause of action is still timely in that Defendants, through their actions and representations, are equitably estopped from raising a statute of limitations defense.

Virginia courts have recognized the theory of equitable estoppel to prohibit a defendant from using the defense of statute of limitations to avoid liability where, by his actions or silence, he has induced plaintiff, to plaintiff's detriment, to believe and to rely upon certain facts or to refrain from litigation in the hopes of attaining satisfaction on a claim. American Mutual Liability Insurance Co. v. Hamilton, 135 S.E. 21 (1926) (because insurer had repeatedly promised injured insured that his medical expenses would be paid for under the insurance policy, insurer could not escape reimbursement liability by raising the statute of limitations). See also, Lataif v. Commercial Industrial Construction, Inc., 286 S.E.2d 159 (1982) ("A person induced to refrain from taking an action he otherwise would have taken has changed his position in reliance upon the inducement. When one has lulled another into inaction to his detriment, the latter may invoke estoppel against the former." Id. at 161,

citing to City of Bedford, infra); City of Bedford v. James Leffel and Co., 558 F.2d 216 (4th Cir. 1977) (defendant, who installed turbine engines in 1969 that failed to properly perform, and who participated in unsuccessful remedial repairs of the engines through 1975 could not raise the statute of limitations to bar plaintiff's action. Despite lack of deceit, plaintiff, to its detriment, relied on defendant's acts and promises to repair and avoided litigation believing it would receive satisfaction of its warranty claims); Suttine v. Savas, 455 F.Supp. 153 (S.D.W.Va. 1978) (where a fiduciary relationship existed between parties so that plaintiff had placed confidence in the business dealings of the defendant and had relied upon defendant to deal honestly with it, defendant could not use this fiduciary relationship or the statute of limitations to obstruct plaintiff's action).

Plaintiff Association, like those plaintiffs in the cases cited above, relied to its detriment upon Defendants' reassurances that they intended to make Rotonda a "model residence," and that

With reference to your question about whether The Rotonda Associates is responsible to correct at its expense a structural defect occurring during the two-year warranty period but within the five-year period -- the answer is yes. As we have continually said, we believe this to be the law today; however, even if it is not, we will not stand on technicalities.

See Cecchi letters, Exhibit "B," Number 1.

The Developer has repeatedly placated concerns expressed by the unit owners that now comprise Plaintiff Association by stating that

We believe that The Rotonda has provided you with an outstanding product and with great value for your money. It is practically impossible, in a project of this magnitude and complexity, however, to avoid a certain degree of human error, in spite of the high degree of care and control exercised throughout the development process.

What we can assure you unequivocally is that we do stand behind our product, and that means that we will correct any mistake for which we are responsible, irrespectively of the time when such mistake is discovered or reported.

See Cecchi letters, Exhibit "B," Number 2 at 2.

In another letter, Defendants emphasized, on the eve of the warranty expiration period for Phase One of the condominium,

that ID's commitment to The Rotonda and its residents is one of substance and not one that will be affected by technicalities. We intend to deliver to you what we contracted to deliver, possibly more, but definitely no less. And if in the process we or our contractors did something wrong, we will make the appropriate repair, irrespectively of the expiration date of a formal warranty.

See Cecchi letters, Exhibit "B," Number 3 at 6.

In addition to the many promises made by Mr. Cecchi and other Defendants, both written and verbal, Plaintiff Association relied upon the import of Defendants' extensive repair program, that Defendants could and would construct functional common elements. See discussion of repair program, Section III(A)(2)(b), supra.

Throughout the period of Defendants' control of Plaintiff Association, Defendants repeatedly dismissed as premature concerns expressed by members of Plaintiff Association that engineering surveys should be conducted to evaluate the cause and extent of any defective common elements. In 1980 and 1981, after the surveys were conducted and the deficiencies discovered, Defendants repeatedly reassured members of Plaintiff Association their intention to repair all structurally defective common elements. For example, in a series of 1982 correspondence from Richard Grizzard of Defendant Rotonda Associates to Stanley Siegel of Plaintiff Association, the last of which is attached hereto as Exhibit "I" Defendants promised to "proceed with the work outlined as expeditiously as possible and . . . [to] report to you upon its completion." Id. at 1. Defendants' attachments to these letters detail the warranty work in progress by the developer as including such items as masonry work, subterranean walls, balconies and humidifier and condensate drain lines. Through correspondence and repair programs such as these, Plaintiff came to rely upon Defendants' promises to repair such documented structural defects.

Additionally, members of Plaintiff Association made clear to Defendants and their counsel their goal of resolving all disputes with Defendants without resorting to litigation and were reassured, verbally and through the Cecchi

letters, of Defendants' similar goal. In an emotional 1979 letter, attached hereto as Exhibit "J," to Thomas & Sewell, then counsel for Defendants, the unit owners who now comprise Plaintiff Association set forth the history of representations made to them by Defendants, promising to repair any discovered defects. The unit owners also stated their desire to cooperate with Defendants' non-litigative approach to warranty solutions, stating

We are determined to resolve conflicts which we may have with the Declarant without having to resort to litigation. Thus, we are determined to make every effort to see that issues respecting the statutory period for commencing lawsuits by the Rotonda Association against the Declarant never have any practical significance for us.

See Exhibit "J" at 4.

Shortly after receiving this letter, Defendants negotiated with Plaintiff the Warranty Agreement of January 21, 1980, incorporating into its text the Defendants' promise to repair as follows:

1.6 The Declarant believes that the common elements have been properly constructed and comply with the requirements of the structural warranty. The Declarant does, however, desire to relieve the apprehension of the Association as to the time limit for enforcement of the structural warranty after its expiration.

See Exhibit "C" at 4.

From 1979 through 1984, Defendants continued to induce reliance by Plaintiff Association upon Defendants' acts of and promises to repair, thereby causing Plaintiff

Association to refrain from enforcing its rights through litigation under its statutory warranty and common law remedies.

Defendants are therefore now foreclosed from asserting a defense of statute of limitations against Plaintiff Association.

IV. Conclusion.

For the above reasons, Defendants' Plea in Bar and Amended Plea in Bar should be denied. Their cursory treatment of one of several applicable statutes of limitations and its negligible review of the facts of this case render it legally deficient, if not misleading, and without merit.

As Plaintiff has set forth above, its Motion For Judgment was timely filed under all three applicable statutes of limitations, Virginia Code Sections 55-79.79(c), 8.01-250 and 8.01-243. In insisting that the statutory period for filing has elapsed for all causes of action, Defendants incorrectly assess the time of accrual of Plaintiff's causes of action in all counts.

As shown by Plaintiff above, accrual is triggered, for purposes of Plaintiff's claims for breach of warranty and negligent repairs, by Defendants' refusal or failure to satisfactorily repair the defective common elements. For purposes of Plaintiff's claim for negligent construction, accrual is not triggered until the punchlist warranty items were accepted by representatives of Plaintiff Association.

Exhibit B, Number 1

THE ROTONDA ASSOCIATES

A SUBSIDIARY OF I.D.I.

October 25, 1979

Mr. Albert W. Highsmith
President
The Rotonda Condominium Unit Owners Association
8330 Greensboro Drive
McLean, Virginia 22102

Dear Mr. Highsmith:

I am in receipt of your recent letter concerning my letter to you of September 28, 1979 about the statutory structural warranty and its enforceability at The Rotonda.

I have repeatedly said that it is the intention of The Rotonda Associates to provide the maximum assurance to the homeowners at The Rotonda in regard to the structural warranty.

My letter of September 28, 1979 constitutes a binding agreement upon The Rotonda Associates that the ultimate but assuredly unnecessary legal weapons for enforcement of the warranty will be available to the Association for five years. By giving the Association this ultimate right of legal action, it must be clear that The Rotonda Associates will work with the Association to fulfill its promises of a structurally sound project.

With reference to your question about whether The Rotonda Associates is responsible to correct at its expense a structural defect occurring during the two-year warranty period discovered after the expiration of the two-year warranty but within the five-year period--the answer is yes. As we have continually said, we believe this to be the law today; however, even if it is not, we will not stand on technicalities and that is the reason for our letter agreement of September 28.

If there are any further questions, please do not hesitate to inquire.

Sincerely yours,

For: THE ROTONDA ASSOCIATES

By: Giuseppe Cecchi
President
Rotonda Realty, Inc. (General Partner)

GC/lc

Exhibit B, Number 2

CO: [unclear]
[unclear]
11/13/1979 ✓

THE ROTONDA ASSOCIATES

A SUBSIDIARY OF I.D.I.

T.R.A.

GRI	CEC	LEE	JCB
	LISA	MAT	VEL

October 1, 1979

Ms. Gloria D. Hawkes
Acting Chairperson
The Rotonda Resident Advisory Council

OCT 1 1979

BRO	CAN	TRAG	HAR
LEE	HOU	BAE	AND
THO	WDA	HOL	LEN

Dear Ms. Hawkes:

As promised to the Resident Advisory Council in our meeting of August 15, I have requested our attorneys to determine the applicable statute of limitations for enforcement of the structural warranty provided in the Virginia Condominium Act.

Attached hereto you will find a copy of the legal opinion prepared by Thomas and Sewell.

Our attorneys have informed us that there is a significant likelihood that the statutory warranty may be construed as an implied contract and that the applicable statute of limitations for enforcing the statutory warranty would be three years from the date the cause of action accrues. Our attorneys have further informed us that the applicable statute of limitations for enforcing a written contract is five years from the date of the accrual of the cause of action.

Since the structural warranty is created by statute, we have been advised that the Declarant cannot modify or amend its provisions.

Since our original intention was and still is to provide maximum protection to our purchasers, including the availability of the 5 year statute of limitation on enforcement of the statutory warranty, we have agreed to waive any applicable statute of limitations shorter than 5 years.

Enclosed please find a copy of my letter dated September 28, 1979 to the President of the Rotonda Unit Owners Association, constituting such agreement.

While this agreement does not create a new warranty or modify the statutory warranty, it does, nonetheless, enable the Unit Owners Association to enforce the statutory warranty for a period of five years from the accrual of the cause of action, as compared to three years if the warranty is classified as an implied contract.

Ms. Gloria D. Hawkes
October 1, 1979
Page 2

The legal opinion of Thomas and Sewell, together with our agreement, will release - I am sure - the concern expressed by some members of the Resident Advisory Council about the Unit Owners Association losing their rights to enforce the statutory warranty on common elements after January 1980.

Aside from any legal consideration, however, I would like to reconfirm to you my assurance that IDI's commitment to you is one of substance and will not be affected by technicalities.

We believe that The Rotonda has provided you with an outstanding product and with great value for your money. It is practically impossible, in a project of this magnitude and complexity, however, to avoid a certain degree of human error, in spite of the high degree of care and control exercised throughout the development process.

What we can assure you unequivocally is that we do stand behind our product, and that means that we will correct any mistake for which we are responsible, irrespectively of the time when such mistake is discovered or reported.

As I stated before, at The Rotonda we have created an outstanding project and we plan to use it as referral for future IDI projects. Certainly we must make sure that it is and continues to be a "good" referral.

Sincerely yours,



Giuseppe Cecchi
President

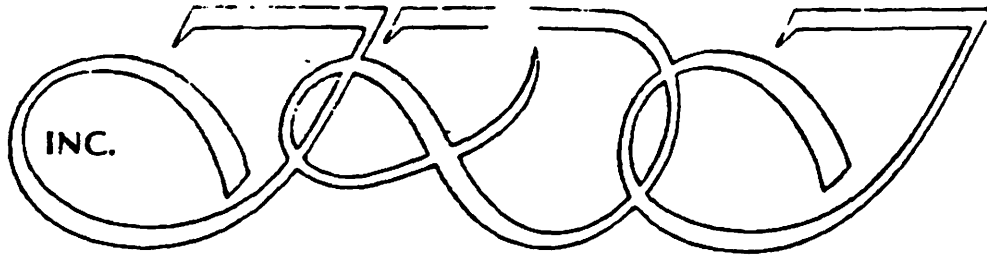
GC/gfs
Enclosure

cc: Members of The Rotonda Residents Advisory Council
Board of Directors, The Rotonda Unit Owners Association
William G. Thomas, Esquire

Exhibit B, Number 3

INTERNATIONAL DEVELOPERS,

INC.



August 31, 1979

Dear Members of The Rotonda Resident Advisory Council,

Following the receipt of your letter dated July 26, 1979, and our subsequent meeting on August 15th, this is to confirm in writing my answers to your letter and the other matters discussed during our August 15th meeting.

I believe we had a very productive meeting that resulted in a better understanding of our mutual concerns, goals and positions. More important of all we opened a direct line of communication between the Developer and the Association. I will make sure on my part to keep this direct line of communication open at all times in the future, since I believe it is the key element for a smooth transition to your self-government and it will benefit all parties involved. It is very important for me to be aware of your concerns and requirements, as well as for you to understand the development process of a project like The Rotonda and the position of the developer, its goals and responsibilities.

As I have indicated during our meeting, IDI is a real estate development company which believes in long-range planning and whose goal is to maintain continuing success in good and bad market conditions. To achieve our corporate goals, we feel we must be consumer oriented and build our future on the referral of our past accomplishments.

We see The Rotonda as the leader of a series of other great projects we plan to develop. As I mentioned to you, one of these projects is already in the planning stage: "Montebello", located just south of Alexandria, will consist of four 15-story buildings, with a total of 1,000 units. Construction and sales are scheduled to start in early 1980.

As you can see, aside from our good intentions and our moral and legal obligations, we have some very real economic reasons for making sure that The Rotonda is a good referral. We actually count on The Rotonda residents to be our most effective advertising.

As a result of our meeting, I realized a definite need for improving and increasing communication between the various entities involved in the creation of a new condominium community:

- . the developer
- . the developer's appointed first board of directors

August 31, 1979

page 2

- . the advisory committees and the advisory council
- . the management agent
- . the individual owners

Better communication will provide complete information to each of these entities about the others. Mutual knowledge of each others functions, responsibilities and obligations, will create a better understanding toward common problems and promote the team spirit needed to solve them. Further, an adequate level of communication and mutual information will make everybody comfortable and eliminate the worries about "what we don't know".

To improve communications and working relation between the parties I have taken the following actions:

1. With reference to the Developer:

- . I will meet periodically with the Advisory Council. I will also be available for meetings with individual committees as required. Richard Grizzard, project manager for The Rotonda, will accompany me in these meetings and will be available on a more continuous basis to follow up on providing the information required and implementing the decisions taken.
- . We will assemble and make available to the Board and to the Advisory Council explanatory material describing the design process followed for The Rotonda and the various inspection and control programs implemented during design and construction. The written material will also summarize and clarify the role, responsibilities and obligations of the developer.
- ✓ We will provide the Board and the Advisory Council with a legal opinion prepared by the firm of Thomas & Sewell dealing with the matter of warranties.
- . Mr. Grizzard will organize a tour of building #4 for interested members of the Board, of the Advisory Council and of the Facilities Committee. Building #4 at the present time offers the opportunity to see all the phases of interior construction. Key design consultants and inspectors will participate to the tour and will be available to answer questions together with the representatives of the construction company.
- . Mr. Grizzard will organize meetings with key design consultants, lender's inspectors and Fairfax County inspectors for interested members of the Board, of the Advisory Council and of the Facilities Committee.

August 31, 1979

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2. With reference to the Board of Directors

- . I realize that, as The Rotonda community grows and approaches the transition to self-government, the Board must become more responsive and efficient in its operation. It happens, however, that four out of five members of the Board being full time employees or officers of IDI, cannot adequately meet the time demand consistent with the Board activity.

I have therefore requested the resignation of two of the present Board members, namely Miss Costantini and Mr. Velenage, and I have appointed in their place Mr. Albert W. Highsmith, and Mrs. Barbara Bielecki.

- . Mr. Highsmith, who, I am sure most of you already know personally or by reputation, had an active role in the drafting of the Condominium Act of the State of Virginia. He has been Chairman of the Virginia Real Estate Commission and is considered an expert and an authority in the condominium field. Mr. Highsmith presently retired, has served as director and chairman of the Board of other new condominiums during the transition period.
- . Mrs. Bielecki is a resident of Parkfairfax, a community of 1,684 units just converted to condominium by IDI. Mrs. Bielecki was elected chairwoman of the Parkfairfax Residents Advisory Council in April 1978, when the first village of Parkfairfax became a condominium. Mrs. Bielecki chaired the Advisory Council all the way through the transition period until the election of the first residents' board which took place in July 1979.

On The Rotonda Board, Mrs. Bielecki will be a "full time" board member. This means that she will spend full time on Board matters and activities, and consequently have the opportunity and the time to be an effective liaison between the Board, the Advisory Council and the various committees.

- . Both new members bring to The Rotonda Board a unique level of knowledge and experience in the specific area of the transition period of a large new condominium community.

✓ Both new members do not have any employment relation with IDI except for serving on The Rotonda Board of Directors. (Mr. Highsmith has previously been chairman of the Board of Directors of Parkfairfax).

✓ In October, or sooner if possible, I will appoint to The Rotonda Board three new members, residents of The Rotonda, elected by the residents of The Rotonda.

August 31, 1979

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3. With reference to the Management Agent

- I have reviewed at length with Mr. Lyde Glenn of the Polinger Company the matters of attitude, of communication and of residents input and involvement in management.

I found Mr. Glenn very responsive and desirous to improve the relation between the management agent and the residents. To start, Mr. Glenn will organize several workshops with the appropriate committees to review contracts, operations, rules and regulations, etc. He will establish and maintain closer contact and communication with the advisory council and the committees, for the dual purpose of residents information and residents input.

I am confident that the relation between management agent and resident-owners will reach a very satisfactory level in the near future.

4. With reference to independent legal counsel

- As discussed at our meeting, legal counsel for the Owners Association can only be retained by the Board of Directors.

As I previously indicated to you, in the course of my experience I have seen other condominiums go through the transition without the need and the cost of "independent" legal counsel. At The Rotonda, however, due to the concern expressed by the Advisory Council, it seems to me that it would be advisable and beneficial for the Board to retain independent legal counsel for the Association. I have so recommended to the Board and I am sure that it will take prompt action on this matter.

5. With reference to independent auditors

- This also must be a Board of Directors action. Undoubtedly, at the time of transition a complete audit will be required by independent auditors. To allow the Association's auditors to familiarize themselves with the books and procedures of The Rotonda, it seems very advisable to retain them in time for participation in the closing of the operating year 1979. I have so recommended to the Board.

6. With reference to an independent architectural and engineering survey of The Rotonda

- Like for the previous two items, the decision on this one pertains to the Board of Directors. Because of the higher cost apparently involved and because it is discretionary, this decision is certainly more delicate and difficult than the previous ones.

August 31, 1979

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- . I personally feel that the action suggested is premature due to the present status of completion of the project and to the fact that not sufficient effort has been spent to determine the scope of the need before acting on such a large sum of money. Several steps can and should be taken before a realistic determination of the scope needed can be made. Some of those steps are outlined in point 1. above.
 - . The Developer is already spending in excess of \$750,000 to design The Rotonda and in excess of \$450,000 to follow-up, control and inspect its execution. This process involves 12 different independent consultants, including planners, architects and engineers.
All the material prepared and compiled for the developer (drawings, specifications, inspection reports, etc.) is available for review by knowledgeable members of the Board, the Advisory Council and/or appropriate committees.
In addition, plans review and inspections are periodically conducted by Fairfax County through its independent inspectors. This is a matter of record.
Further, plans review and inspections are periodically conducted by the various lenders, through their own independent consultants. These lenders, which in fact have by far the largest investment in The Rotonda, include The Equitable Life Assurance Society of the United States, Washington-Lee Savings and Loans, Metropolitan Mortgage Fund, the Veterans Administration, FNMA, FHLMC, and others.
 - . If after reviewing the available material and information and taking the steps outlined in point 1., certain areas of concern still persist, then a (specific scope) can be outlined for an independent survey. In conclusion, I am not opposed in principle but as a businessman I feel that before committing an expense one must be sure of what he really needs.
 - . Aside from the performance of a specific survey, a qualified independent consultant may be beneficial in assisting the Board, the Advisory Council and the Facilities Committee in the process of inspecting the common element as it is completed and included in the condominium. I have suggested to The Board to consider this matter.
7. With reference to the expiration of warranties
- . This matter, which seems to represent a major concern, will be dealt more appropriately in the legal opinion from Thomas and Sewell, which I will make available to you in the very near future.

To Members of The Rotonda Resident Advisory Council

August 31, 1979

page 6

- . I would like to state, however, that IDI's commitment to the Rotonda and its residents is one of substance and not one that will be affected by technicalities. We intend to deliver to you what we contracted to deliver, possibly more, but definitely no less. And if in the process we or our contractors did something wrong, we will make the appropriate repair, irrespectively of the expiration date of a formal warranty.

In closing, let me confirm to you that IDI's goal is similar to yours: that is to make The Rotonda an outstanding and happy place to live for its residents. I think we are on the right track so far. Lets work together toward the achievement of our common goal.

Sincerely,

INTERNATIONAL DEVELOPERS, INC.



Giuseppe Cecchi, President

cc: Member of the Board of Directors
Mr. Lyde Glenn

I M P O R T A N T

THREE HOMEOWNERS TO BE ELECTED TO THE ROTONDA BOARD OF DIRECTORS

Although permanent Rotonda homeowners will not elect a Board of Directors for the condominium until mid 1980, the developer has agreed to name three (3) resident homeowners to the Board of Directors in October of this year. This will give homeowner representatives the opportunity of participating in Board matters for a number of months prior to election of the first homeowner Board, to insure that the transition from the developer appointed Board to homeowner elected Board will be smooth and effective.

The three homeowners named in October will join the five present Board members, each of whom was also appointed by the developer. This eight member Board will then serve until mid 1980. At that time, a new nine person Board of Directors consisting entirely of homeowners will be elected, and responsibility for operating The Rotonda will then reside with the homeowners.

A "Nominating Petition" is attached for you to use if you wish to nominate one or more Rotonda homeowners as a candidate for the Board of Directors. A maximum of five (5) may be listed, and the Petition must be signed by at least one of the owners of your unit. Your completed Petition may be hand delivered or mailed to the Association Office, or it may be deposited in the Association box located in the mail room of your building. If you choose to mail your Petition, it should be addressed to The Rotonda Condominium Unit Owners Association, 8352 Greensboro Drive, McLean, Virginia 22102. Kindly mark on the front of your envelope "Nominating Petition". All Nominating Petitions, whether mailed or hand delivered, must be received at the Association office no later than 5:00 p.m. on September 14, 1979.

Any Rotonda homeowner, who has been nominated on at least ten (10) Nominating Petitions will become a candidate for appointment to the Board, unless such individual declines to accept his or her nomination. A "Selection Package" containing ballots, each candidate's name, and a brief biographical sketch will be distributed in late September, 1979. You will then be asked to select from the list of candidates nominated three individuals appointed to the Board for the duration of the transition period. If ownership of a unit is in the name of two or more persons, such joint owners will be limited to one common Nominating Petition.

All individuals who have binding contracts to purchase units in Building #3 will be eligible to vote.

The members of the Residents Advisory Council, to acquaint the community with some potential candidates for the Board (after having received advice from their respective Committee members), agreed upon the names of five Rotonda homeowners who they felt were highly qualified, on the basis of services performed by them on behalf of the homeowner committees, to handle the responsibilities imposed upon members of The Rotonda Board of Directors. These responsibilities, which are policy direction for the community under a budget of approximately two million dollars, are summarized in Article III, Section 2 of the Bylaws.

As most of you know, the Residents Advisory Council is composed of the Chairman and Vice Chairman of each of the five homeowner committees (i.e., Association Services and Facilities, Community Activities, Communications and Public Relations, Finance and Administration, and Rules). Membership on the committees is open to all Rotonda homeowners and those who have volunteered their services to one or more committees have had the opportunity to become acquainted with, and to observe the abilities and leadership qualities of, many of their fellow homeowners. Utilizing this knowledge and experience, the five homeowners agreed upon are, in order of preference:

1. Gloria D. Hawkes
2. Jimmie E. Buckles
3. Richard L. Nolan
4. George J. Paduda
5. Richard L. Fortune

This consensus simply reflects the views of the Residents Advisory Council (and indirectly the apparent consensus of the members of the five homeowner committees) and has no binding effect whatsoever insofar as the nominating process is concerned. If any one or more of the five named individuals is in fact to be nominated as a candidate, he or she will have to receive support on at least ten Nominating Petitions in the same manner as any other Rotonda homeowner.

Exhibit B, Number 4

THE ROTONDA ASSOCIATES

A SUBSIDIARY OF I.D.I.

September 28, 1979

Mr. Albert Highsmith
President
Rotonda Unit Owners Association

Dear Mr. Highsmith:

In response to the inquiries concerning the applicable time period for enforcing the statutory warranty by the Unit Owners Association against the Declarant, Rotonda Associates, we requested our attorneys to determine the applicable statute of limitations for enforcement of the structural warranty provided in the Virginia Condominium Act.

Our attorneys have informed us that there is a significant likelihood that the statutory warranty may be construed as an implied contract and that the applicable statute of limitations for enforcing the statutory warranty would be three years from the date the cause of action accrues. Our attorneys have further informed us that the applicable statute of limitations for enforcing a written contract is five years from the date of the accrual of the cause of action.

This letter shall constitute the agreement of the Declarant, The Rotonda Associates, that it will not invoke or raise the three year statute of limitations as a defense to any suit to enforce the statutory warranty which is instituted by the Unit Owners Association within five years of the date of the accrual of the cause of action.

Since the structural warranty is created by statute, we have been advised that the Declarant cannot modify or amend its provisions. While this agreement does not create a new warranty or modify the statutory warranty, it does, nonetheless, enable the Unit Owners Association to enforce the statutory warranty for a period of five years from the accrual of the cause of action, as compared to three years if the warranty is classified as an implied contract.

Sincerely yours,
THE ROTONDA ASSOCIATES

By: ROTONDA REALTY, INC. (General Partner)


Giuseppe Cecchi, President

GC/gfs

Original

FILED

1986 JAN 15 AM 10:25

V I R G I N I A

IN THE CIRCUIT COURT OF FAIRFAX COUNTY
WARREN E. BARRY
CLERK OF THE CIRCUIT COURT
OF FAIRFAX COUNTY, VA.

-----X
ROTUNDA CONDOMINIUM UNIT
OWNERS ASSOCIATION,

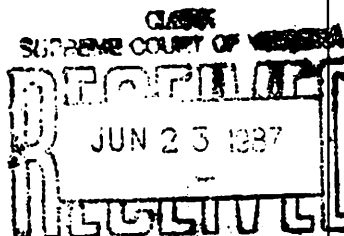
Plaintiff

vs.

THE ROTUNDA ASSOCIATION, et. al.,

Defendants
-----X

AT LAW NO. 70368



Fairfax, Virginia
Thursday, December 19, 1985

The above-entitled matter came on to be heard
before THE HONORABLE BERNARD JENNINGS, Judge, in and for
the Circuit Court of Fairfax County, in the Courthouse, Room
5-E, Fairfax, Virginia, beginning at 11:10 o'clock a.m.

APPEARANCES:

On behalf of the Plaintiff:

STEPHEN H. MORIARTY, ESQUIRE
Hyatt & Rhoads
1275 K Street
Washington, D. C. 20005

On behalf of the Defendants:

DAVID G. FISKE, ESQUIRE
Thomas & Fiske, P. C.
510 King Street, Suite 200
Alexandria, Virginia 22314

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1275 K STREET, N.W. - SUITE 900
WASHINGTON, D.C. 20005
(202) 898-1108

1 is dated January 21, 1980. That agreement addresses some of the
2 letters addressed in the issue, I mean, some of the issues
3 addressed in the letter. It acknowledges that there is
4 disputes as to the timing of suits. It acknowledges that
5 there's been some discussion about the discovery period, and
6 it says in there -- in fact, I think it probably expands the
7 discovery period, saying you don't have to discover these
8 things in the two-year warranty period; you can discover them
9 afterwards.

10 But then it specifically says there's a five year
11 statute. This is a negotiated agreement with both these
12 parties being represented by counsel, and they have agreed on
13 the five-year statute and this agreement supercedes any
14 exchange of correspondence some two years earlier and is very
15 specific as to what the statute is and what the discovery
16 period is on the warranty.

17 THE COURT: Is there anything in this agreement
18 that relates specifically to the letter-that Mr. Cecchi
19 wrote?

20 MR. FISKE: You mean by date or --

21 THE COURT: Either referring to subject matter.
22 I agree that that is really key, the letter itself.

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Do they make any specific mention of it?

1
2 MR. FISKE: I don't think, Your Honor, the
3 letter is specifically addressed in the agreement. The
4 agreement acknowledges that there have been concerns by
5 the Unit Owners Association as to the same substantive
6 issues, but then the agreement goes on to address those
7 issues.

8 And it is our position certainly that as to the
9 structural warranty, the parties are bound by this agreement,
10 and can't, then, go back behind that agreement to bootstrap
11 themselves on some earlier correspondence.

12 It is also interesting to note, Your Honor, that
13 in terms of the accrual issue, this agreement doesn't change
14 the accrual of cause of action. It doesn't purport to do that.

15 It says when it accrues and it is fascinating that
16 on the first two pages of the agreement, it sets forth the
17 building numbers, the completion date and the date of first
18 conveyance as to three of the buildings which is very
19 consistent with the theory we are asking this Court to adopt;
20 that the parties therefore addressed the issue of the accrual
21 because they put it specifically in this agreement as to the
22 dates of completion and the dates of conveyance.

1 right to repair it. In that case the Court held, the Supreme
2 Court of Virginia held that cause of action for breach of the
3 warranty did not arise until that promise was broken. I don't
4 have the Virginia cite, I have Southeastern 286, page 232.

5 I suggest as far as those dates that were reflected
6 in the warranty agreement, certainly they set forth the time of
7 the beginning of the two-year warranty period. They did not
8 attempt to set forth the five-year accrual period, and I
9 suggest it's for- a logical reason. No one could tell when it
10 was going to be until the warranty was breached.

11 There's no question but those dates have an
12 importance, but it's to the two-year warranty period, not the
13 statute of limitations. Thank you very much.

14 THE COURT: Well, I think there's a lot of merit
15 to what each of you have to say. I would agree with Mr. Fiske
16 that the subsequent attempt to repair do not total, or
17 really do not have any effect on the statute of limitations.

18 I don't agree with him, though, that this agreement
19 in effect would cause a merger-or circumvent, or would eliminate
20 any commitment that the president of International
21 Developers had made in this letter which is set forth in
22 Exhibit B-3, and-I think he is, in effect, warranted to, or

1 will take care of any, or his corporation will take care of
2 any problems -- these are my words now, not his -- but any
3 problems, in effect, that would arise.

4 It says, we intend to deliver to you what we
5 contracted to deliver, possibly more but definitely no less,
6 and if in the process we or our contractors did something
7 wrong, we will make the appropriate repair irrespectively of
8 the expiration date of the formal warranty, and I don't
9 think the agreement that Mr. Fiske has mentioned would
10 overcome that commitment.

11 So I would deny your plea in bar, Mr. Fiske.
12 You can note an exception if you'd like to note it.
13 Mr. Moriarty, you can prepare an appropriate Order.

14 MR. MORIARTY: Yes, sir.

15 THE COURT: Incidentally, gentlemen, I think this
16 is a case -- I've seen the Pleadings on it -- and it is a case
17 that sort of cries out for something to be done so far as
18 settlement is concerned, and I hope you all would divert some
19 of your expertise to that, as distinguished from some of the
20 technical aspects of it.

21 (Whereupon, at 11:50 o'clock a.m., the above-
22 entitled case was concluded.)

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WASHINGTON, D.C. 20005
(202) 898-1108

V I R G I N I A :

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

THE ROTONDA CONDOMINIUM UNIT
OWNERS ASSOCIATION,

Plaintiff,

v.

THE ROTONDA ASSOCIATES

and

ROTONDA DEVELOPMENT CORPORATION

and

ROTONDA REALTY, INCORPORATED,

Defendants.

AT LAW NO. 70368

ORDER

THE ABOVE-STYLED CASE, having come before this Court on Thursday, December 19, 1985, for a hearing on the merits of the Defendants' Amended Plea in Bar as to Counts I and II of the Plaintiff's Motion for Judgment, and the Court having received the Briefs of the Plaintiff and Defendants, the Exhibits of the Plaintiff and Defendants, and having heard argument of counsel for both parties, it is hereby

ORDERED, that the Defendants' Amended Plea in Bar is DENIED without prejudice to raising the issues referenced therein at trial.

Date

January 24, 1986

BARNARD F. JENNINGS
JUDGE, CIRCUIT COURT

SEEN ~~AND~~ OBJECTED TO, as to the
lack of prejudice attaching to the
denial of the Amended Plan in Bar:

Stephen H. Moriarty

Stephen H. Moriarty
Hyatt & Rhoads, P.C.
1275 K Street, N.W., Suite 1100
Washington, D.C. 20005
(202) 682-1800
Counsel for Plaintiff

SEEN AND EXCEPTED TO:

Ronald L. Lord

David G. Fiske
Ronald L. Lord
510 King Street, Suite 200
Alexandria, Virginia 22313
(703) 836-8400
Counsel for Defendants

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

THE ROTONDA CONDOMINIUM UNIT
OWNERS ASSOCIATION,

Plaintiff,

vs.

THE ROTONDA ASSOCIATES,

and

ROTONDA DEVELOPMENT CORPORATION,

and

ROTONDA REALTY, INCORPORATED,

Defendants.

AT LAW NO. 70368

PLAINTIFF'S FIRST AMENDED AD DAMNUM

COMES NOW the Plaintiff, The Rotonda Condominium Unit Owners Association, by counsel, and pursuant to the Court's granting of its leave to amend the Ad Damnum of the Motion for Judgment, hereby amends the Ad Damnum as follows:

COUNT I

The Plaintiff demands judgment against the Defendants, jointly and severally, in the amount of \$3,496,000.00, plus costs, and such further relief as the Court deems proper.

COUNT II

The Plaintiff demands judgment against the Defendants, jointly and severally, in the amount of \$3,496,000.00, plus costs, and such further relief as the Court deems proper.

COUNT III

The Plaintiff demands judgment against the Defendants, jointly and severally, in the amount of \$3,235,600.00, plus costs, and such further relief as the Court deems proper.

THE ROTONDA CONDOMINIUM
UNIT OWNERS ASSOCIATION

By: Stephen H. Moriarty
Stephen H. Moriarty
Counsel for the Plaintiff

HYATT & RHOADS, P.C.
1275 K Street, N.W.
Suite 1100
Washington, D.C. 20005
(202)682-1800

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was hand-delivered to the office of Susan M. Cardenas, Esquire, Thomas & Fiske, P.C., 510 King Street, Suite 200, Alexandria, Virginia 22314, this 23rd day of December, 1986.

Stephen H. Moriarty
Stephen H. Moriarty

BYLAWS

OF

THE ROTONDA CONDOMINIUM

(McLean, Fairfax County, Virginia)

BYLAWSARTICLE IPlan of Unit Ownership

Section 1. Applicability. These Bylaws provide for the governance of the Condominium* pursuant to the requirements of Article 3 of the Condominium Act. The Property, located in McLean, Fairfax County, Virginia, and more particularly described in the Declaration, has been submitted to the provisions of the Condominium Act by recordation simultaneously herewith of the Declaration among the land records of Fairfax County, Virginia.

Section 2. Compliance. Pursuant to the provisions of section 55-79.53 of the Condominium Act, every Unit Owner and all those entitled to occupy a Unit shall comply with these Bylaws.

Section 3. Office. The office of the Condominium, the Unit Owners Association, and the Board of Directors shall be located at the Property or at such other place as may be designated from time to time by the Board of Directors.

ARTICLE IIUnit Owners Association

Section 1. Composition. The Unit Owners Association shall consist of all of the Unit Owners acting as a group in accordance with the Condominium Act pursuant to the Declaration and these Bylaws. For all purposes the Unit Owners Association shall act merely as an agent for the Unit Owners as a group. The Unit Owners Association shall have the responsibility of administering the Condominium, establishing the means and methods of collecting assessments and charges, arranging for the management of the Condominium and performing all of the other acts that may be required or permitted to be performed by the Unit Owners Association by the Condominium Act and the Declaration. Except as to those matters which the Condominium Act specifically requires to be performed by the vote of the Unit Owners Association, the foregoing responsibilities shall be performed by the Board of Directors or Managing Agent as more particularly set forth in Article III of these Bylaws.

*Capitalized terms used herein without definition shall have the meanings specified for such terms in the Declaration to which these Bylaws are attached as Exhibit C or, if not defined therein, the meanings specified for such terms in §55-79.41 of the Virginia Condominium Act.

favor of only another Unit Owner, a Mortgagee or the Declarant. Proxies shall be duly executed in writing, shall be valid only for the particular meeting designated therein and must be filed with the Secretary before the appointed time of the meeting. Such proxy shall be deemed revoked only upon actual receipt by the person presiding over the meeting of notice of revocation from any of the persons owning such Unit. Except with respect to proxies in favor of a Mortgagee, no proxy shall in any event be valid for a period in excess of one hundred and eighty days after the execution thereof.

Section 11. Quorum. Except as otherwise provided in these Bylaws, the presence in person or by proxy of Unit Owners of twenty-five percent or more of the aggregate Percentage Interests shall constitute a quorum at all meetings of the Unit Owners Association.

Section 12. Conduct of Meetings. The President shall preside over all meetings of the Unit Owners Association and the Secretary shall keep the minutes of the meeting and record in a minute book all resolutions adopted at the meeting as well as a record of all transactions occurring thereat. The President may appoint a person to serve as parliamentarian at any meeting of the Unit Owners Association. The then current edition of Robert's Rules of Order shall govern the conduct of all meetings of the Unit Owners Association when not in conflict with the Declaration, these Bylaws or the Condominium Act. All votes shall be tallied by tellers appointed by the President or other officer presiding over the meeting.

ARTICLE III

Board of Directors

Section 1. Number and Qualification. The affairs of the Unit Owners Association shall be governed by a Board of Directors. Until deeds of conveyance representing more than seventy-five percent of the aggregate Percentage Interests shall have been delivered to Unit Owners by the Declarant, and thereafter until their successors shall have been elected by the Unit Owners, the Board of Directors shall consist of such persons as may be designated by the Declarant; provided, however, that the foregoing power of designation shall not extend beyond the maximum time permitted by section 55-79.74(a) of the Condominium Act. The Board of Directors shall be composed of nine persons, all of whom shall be Unit Owners or spouses of Unit Owners, Mortgagees (or designees of Mortgagees) or designees of the Declarant; provided, however, that, anything in these Bylaws to the contrary notwithstanding, so long as the Declarant owns Units representing twenty-five percent or more of the aggregate Percentage Interests (but in no event after the expiration of the maximum time permitted by section 55-79.74(a) of the Condominium Act) the Board of Directors shall be composed of five persons designated by the Declarant. The Declarant may increase the number of directors to a maximum of nine during the period of Declarant's control. The Declarant shall have the right in its sole discretion to replace such Directors as may be so designated, and to designate their successors. The time limit on the period of Declarant's control shall commence upon settlement of the first Unit to be sold in any portion of the Condominium.

Section 2. Powers and Duties. The Board of Directors shall have all of the powers and duties necessary for the administration of the affairs of the Unit Owners Association and may do all such acts and things as are not by the Condominium Act, the Declaration or by these Bylaws required to be exercised and done by the Unit Owners Association. The Board of Directors shall have the power from time to time to adopt any Rules and Regulations deemed necessary for the benefit and enjoyment of the Condominium; provided, however, that such Rules and Regulations shall not be in conflict with the Condominium Act, the Declaration or these Bylaws. The Board of Directors shall delegate to one of its members or to a person employed for such purpose the authority to act on behalf of the Board of Directors on such matters relating to the duties of the Managing Agent (as defined in Section 3 of this Article), if any, which may arise between meetings of the Board of Directors as the Board of Directors deems appropriate. In addition to the duties imposed by these Bylaws or by any resolution of the Unit Owners Association that may hereafter be adopted, the Board of Directors shall on behalf of the Unit Owners Association:

(a) Prepare an annual budget, in which there shall be established the assessments of each Unit Owner for the Common Expenses.

(b) Make assessments against Unit Owners to defray the costs and expenses of the Condominium, establish the means and methods of collecting such assessments from the Unit Owners and establish the period of the installment payment of the annual assessment for Common Expenses. Unless otherwise determined by the Board of Directors, the annual assessment against each Unit Owner for his proportionate share of the Common Expenses shall be payable in equal monthly installments, each such installment to be due and payable in advance on the first day of each month for such month.

(c) Provide for the operation, care, upkeep and maintenance of all of the Property and services of the Condominium.

(d) Designate, hire and dismiss the personnel necessary for the maintenance, operation, repair and replacement of the Common Elements and provide services for the Property and, where appropriate, provide for the compensation of such personnel and for the purchase of equipment, supplies and material to be used by such personnel in the performance of their duties, which supplies and equipment shall be deemed part of the Property.

(e) Collect the assessments against the Unit Owners, deposit the proceeds thereof in bank depositories designated by the Board of Directors and use the proceeds to carry out the administration of the Property.

(f) Make and amend the Rules and Regulations.

(g) Open bank accounts on behalf of the Unit Owners Association and designate the signatories thereon.

(h) Make, or contract for the making of, repairs, additions and improvements to or alterations of the Property, and repairs to and restoration of the Property, in accordance with these Bylaws, after damage or destruction by fire or other casualty, or as a result of condemnation or eminent domain proceedings.

(i) Enforce by legal means the provisions of the Declaration, these Bylaws and the Rules and Regulations and act on behalf of the Unit Owners with respect to all matters arising out of any eminent domain proceeding.

(j) Obtain and carry insurance against casualties and liabilities, as provided in Article VI of these Bylaws, pay the premiums therefor and adjust and settle any claims thereunder.

(k) Pay the cost of all authorized services rendered to the Unit Owners Association and not billed to Unit Owners of individual Units or otherwise provided for in Article V, Sections 1 and 2 of these Bylaws.

(l) Keep books with detailed accounts in chronological order of the receipts and expenditures affecting the Property, and the administration of the Condominium, specifying the expenses of maintenance and repair of the Common Elements and any other expenses incurred. Such books and vouchers accrediting the entries thereupon shall be available for examination by the Unit Owners, their duly authorized agents or attorneys, during general business hours on working days at the times and in the manner set and announced by the Board of Directors for the general knowledge of the Unit Owners. All books and records shall be kept in accordance with good and accepted accounting practices, and the same shall be audited at least once each year by an independent accountant retained by the Board of Directors who shall not be a resident of the Condominium or a Unit Owner. The cost of such audit shall be a Common Expense.

(m) Notify a Mortgagee of any default hereunder by the Unit Owner of the Unit subject to such Mortgage, in the event such default continues for a period exceeding thirty days.

(n) Borrow money on behalf of the Condominium when required in connection with any one instance relating to the operation, care, upkeep and maintenance of the Common Elements, provided, however, that the consent of at least two-thirds in number and in Percentage Interest of all Unit Owners, obtained at a meeting duly called and held for such purpose in accordance with the provisions of these Bylaws, shall be required to borrow any sum in excess of Ten Thousand Dollars. If any sum borrowed by the Board of Directors on behalf of the Condominium pursuant to the authority contained in this paragraph (n) is not repaid by the Unit Owners Association, a Unit Owner who pays to the creditor a percentage of the total amount due equal to his Percentage Interest in the Condominium shall be entitled to obtain from the creditor a release of any judgment or other lien which such creditor shall have filed or shall have the right to file against such Unit Owner's Condominium Unit.

(o) Acquire, hold and dispose of Condominium Units and mortgage the same if such expenditures and hypothecations are included in the budget adopted by the Unit Owners Association.

(p) In its sole discretion, designate from time to time certain Common Elements as "Reserved Common Elements" and impose such restrictions and conditions on the use thereof as the Board of Directors deems appropriate.

(q) Furnish the statement required by section 55-79.97 of the Condominium Act, within ten days after the receipt of a written request therefor from any Unit Owner substantially in the form set forth on Exhibit A to these Bylaws and designated "Certificate for Resale".

(r) Do such other things and acts not inconsistent with the Condominium Act, the Declaration or these Bylaws which the Board of Directors may be authorized to do by a resolution of the Unit Owners Association.

Section 3. Managing Agent. The Board of Directors shall employ for the Condominium a "Managing Agent" at a compensation to be established by the Board of Directors.

(a) **Requirements.** The Managing Agent shall be a bona fide business enterprise, unaffiliated with the Declarant, which manages common interest residential communities. Such firm shall have a minimum of two years experience in real estate community management and shall employ persons possessing a high level of competence in the technical skills necessary to proper management of the Condominium. The Managing Agent must be able to advise the Board of Directors regarding the administrative operation of the Condominium and shall employ personnel expert in the areas of condominium insurance, accounting, labor relations and condominium regulation.

(b) **Duties.** The Managing Agent shall perform such duties and services as the Board of Directors shall authorize, including but not limited to the duties listed in paragraphs (a), (c), (d), (e), (h), (i), (j), (k), (l), (m), (q), and (r) of Section 2 of this Article III. The Board of Directors may delegate to the Managing Agent all of the powers granted to the Board of Directors by these Bylaws other than the powers set forth in paragraphs (b), (f), (g), (n), (o), and (p) of Section 2 of this Article III. The Managing Agent shall perform the obligations, duties and services relating to management of the property, the rights of Mortgagees and the maintenance of reserve funds in compliance with the provisions of these Bylaws.

(c) **Standards.** The Board of Directors shall impose appropriate standards of performance upon the Managing Agent. Unless the Managing Agent is instructed otherwise by the Board of Directors:

(1) the accrual method of accounting shall be employed;

(2) two or more persons shall be responsible for handling cash to maintain adequate financial control procedures;

(3) cash accounts of the Unit Owners Association shall not be commingled with any other accounts;

(4) no remuneration shall be accepted by the Managing Agent from vendors, independent contractors or others providing goods or services to the Unit Owners Association whether in the form of commissions, finders fees, service fees or otherwise; any discounts received shall benefit the Unit Owners Association;

(5) any financial or other interest which the Managing Agent may have in any firm providing goods or services to the Unit Owners Association shall be disclosed promptly to the Board of Directors; and

cc 6

(6) a monthly financial report shall be prepared for the Unit Owners Association disclosing:

(A) all income and disbursement activity for the preceding month;

(B) the status of all accounts in an "actual" versus "projected" (budget) format; and

(C) any actual or pending obligations which are in excess of budgeted amounts by an amount exceeding the operating reserves or ten percent of a major budget category (as distinct from a specific line item in an expanded chart of accounts).

(d) Limitations. Subject to the provisions of section 55-79.74(b) of the Condominium Act, during the period when persons designated by the Declarant constitute a majority of the Board of Directors, the Board of Directors may employ a Managing Agent for a term not to exceed one year. The Unit Owners Association and the Board of Directors shall not undertake "self-management" or fail to employ a Managing Agent without the consent of a Majority of the Unit Owners and the consent of Mortgagees together holding seventy-five percent or more of the Mortgages on Condominium Units. Any contract with the Managing Agent must provide that it may be terminated with cause on no more than thirty days written notice and without cause on no more than ninety days written notice; the term of any such contract may not exceed one year.

Section 4. Election and Term of Office.

(a) At the first annual meeting of the Unit Owners Association, the term of office of three members of the Board of Directors shall be fixed at three years, the term of office of three members of the Board of Directors shall be fixed at two years, and the term of office of three members of the Board of Directors shall be fixed at one year. At the expiration of the initial term of office of each member of the initial Board of Directors, a successor shall be elected to serve for a term of three years. The members of the Board of Directors shall hold office until their respective successors shall have been elected by the Unit Owners Association.

(b) Persons qualified to be members of the Board of Directors may be nominated for election only as follows:

(1) Any Unit Owner may submit to the Secretary at least thirty days before the meeting at which the election is to be held a nominating petition signed by Unit Owners owning at least ten Units, a statement that the person nominated is willing to serve on the Board of Directors and a biographical sketch of the nominee. The Secretary shall mail or hand-deliver the submitted items to every Unit Owner along with the notice of such meeting; or

(2) Nominations may be submitted from the floor at the meeting at which the election is held for each vacancy on the Board of Directors for which no more than one person has been nominated by petition.

Section 5. Removal or Resignation of Members of the Board of Directors. Except with respect to directors designated by Declarant, at any regular or special meeting duly called, any one or more of the members of the Board of Directors may be removed with or without cause by a Majority of the Unit Owners and a successor may then and there be elected to fill the vacancy thus created. Any director whose removal has been proposed by the Unit Owners shall be given at least seven days' notice of the time, place and purpose of the meeting and shall be given an opportunity to be heard at the meeting. A member of the Board of Directors may resign at any time and shall be deemed to have resigned upon disposition of his Unit as provided for officers in section 55-79.78(a) of the Condominium Act.

Section 6. Vacancies. Vacancies in the Board of Directors caused by any reason other than the removal of a director by a vote of the Unit Owners Association shall be filled by a vote of a majority of the remaining Directors at a special meeting of the Board of Directors held for such purpose promptly after the occurrence of any such vacancy, even though the directors present at such meeting may constitute less than a quorum. Each person so elected shall be a member of the Board of Directors for the remainder of the term of the member being replaced and until a successor shall be elected at the next annual meeting of the Unit Owners Association. Notwithstanding anything to the contrary in this Section or in the preceding Section 5, so long as the Declarant owns twenty-five percent or more of the aggregate Percentage Interests, (but in no event after the expiration of the maximum time permitted by section 55-79.74(a) of the Condominium Act) the Declarant shall designate the successor to any resigned or removed member previously designated by the Declarant.

Section 7. Organization Meeting. The first meeting of the Board of Directors following the annual meeting of the Unit Owners Association shall be held within thirty days thereafter at such time and place as shall be fixed by the Unit Owners Association at the meeting at which such Board of Directors shall have been elected, and no notice shall be necessary to the newly elected members of the Board of Directors in order legally to constitute such meeting, providing a majority of the whole Board of Directors shall be present thereat.

Section 8. Regular Meetings. Regular meetings of the Board of Directors may be held at such time and place as shall be determined from time to time by a majority of the directors, but such meetings shall be held at least once every four months during each fiscal year. Notice of regular meetings of the Board of Directors shall be given to each director, by mail or telegraph, at least three business days prior to the day named for such meeting.

Section 9. Special Meetings. Special meetings of the Board of Directors may be called by the President on three business days notice to each director, given by mail or telegraph, which notice shall state the time, place and purpose of the meeting. Special meetings of the Board of Directors shall be called by the President or Secretary in like manner and on like notice on the written request of at least two directors.

Section 10. Waiver of Notice. Any director may at any time, in writing, waive notice of any meeting of the Board of Directors, and such waiver shall be deemed equivalent to the giving of such notice. Attendance by a director at any meeting of the Board of Directors shall constitute a waiver of notice by him of the time, place and purpose of such meeting. If all directors are present at any meeting of the Board of Directors, no notice shall be required and any business may be transacted at such meeting.

Section 11. Quorum of Board of Directors. At all meetings of the Board of Directors a majority of the directors shall constitute a quorum for the transaction of business, and the votes of a majority of the directors present at a meeting at which a quorum is present shall constitute the decision of the Board of Directors. If at any meeting of the Board of Directors there shall be less than a quorum present, a majority of those present may adjourn the meeting from time to time. At any such adjourned meeting at which a quorum is present, any business which might have been transacted at the meeting originally called may be transacted without further notice.

Section 12. Fidelity Bonds. As required by Article VI Section 4(a) hereof, there shall be obtained fidelity bonds in an amount not less than one-half the total annual condominium assessments for the year (in such form and such greater amounts as may be required by the Mortgagees) for all officers, directors and employees of the Unit Owners Association, including without limitation the Managing Agent, handling or responsible for Condominium funds. The premiums on such bonds shall constitute a Common Expense.

Section 13. Compensation. No director shall receive any compensation from the Condominium for acting as such.

Section 14. Conduct of Meetings. The President shall preside over all meetings of the Board of Directors and the Secretary shall keep a minute book of the Board of Directors recording therein all resolutions adopted by the Board of Directors and a record of all transactions and proceedings occurring at such meetings. The then current edition of Robert's Rules of Order shall govern the conduct of the meetings of the Board of Directors when not in conflict with the Declaration, these Bylaws or the Condominium Act.

Section 15. Action Without Meeting. Any action by the Board of Directors required or permitted to be taken at any meeting may be taken without a meeting if all of the members of the Board of Directors shall individually or collectively consent in writing to such action. Any such written consent shall be filed with the minutes of the proceedings of the Board of Directors.

Section 16. Liability of the Board of Directors, Officers, Unit Owners and Unit Owners Association. (a) The officers and members of the Board of Directors shall not be liable to the Unit Owners Association for any mistake of judgment, negligence or otherwise, except for their own individual willful misconduct or bad faith. The Unit Owners Association shall indemnify and hold harmless each of the officers and directors from and against all contractual liability to others arising out of contracts made by the officers or the Board of Directors on behalf of the Unit Owners Association unless any such contract shall have been made in bad faith or contrary to the provisions of the Condominium Act, the Declaration or these Bylaws, except to the extent that such liability is covered by directors and officers liability insurance. Officers and members of the Board of Directors shall have no personal liability with

respect to any contract made by them on behalf of the Unit Owners Association. The liability of any Unit Owner arising out of any contract made by the officers or Board of Directors, or out of the aforesaid indemnity in favor of the members of the Board of Directors or officers, or for damages as a result of injuries arising in connection with the Common Elements solely by virtue of his ownership of a Percentage Interest therein or for liabilities incurred by the Unit Owners Association, shall be limited to the total liability multiplied by his Percentage Interest. Every agreement made by the officers, the Board of Directors or the Managing Agent on behalf of the Unit Owners Association shall, if obtainable, provide that the officers, the members of the Board of Directors or the Managing Agent, as the case may be, are acting only as agents for the Unit Owners' Association and shall have no personal liability thereunder (except as Unit Owners), and that each Unit Owner's liability thereunder shall be limited to the total liability thereunder multiplied by his Percentage Interest.

(b) The Unit Owners Association shall not be liable for any failure of water supply or other services to be obtained by the Unit Owners Association or paid for as a Common Expense, or for injury or damage to Person or property caused by the elements or by the Unit Owner of any Condominium Unit, or any other Person, or resulting from electricity, water, snow or ice which may leak or flow from any portion of the Common Elements or from any pipe, drain, conduit, appliance or equipment. The Unit Owners Association shall not be liable to any Unit Owner for loss or damage, by theft or otherwise, of articles which may be stored upon any of the Common Elements. No diminution or abatement of any assessments, as herein elsewhere provided, shall be claimed or allowed for inconvenience or discomfort arising from the making of repairs or improvements to the Common Elements or from any action taken by the Unit Owners Association to comply with any law, ordinance or with the order or directive of any municipal or other governmental authority.

Section 17. Common or Interested Directors. Each member of the Board of Directors shall exercise his powers and duties in good faith and with a view to the interests of the Condominium. No contract or other transaction between the Unit Owners Association and any of its directors, or between the Unit Owners Association and any corporation, firm or association (including the Declarant) in which any of the directors of the Unit Owners Association are directors or officers or are pecuniarily or otherwise interested, is either void or voidable because any such director is present at the meeting of the Board of Directors or any committee thereof which authorizes or approves the contract or transaction, or because his vote is counted for such purpose, if any of the conditions specified in any of the following subparagraphs exists:

(a) The fact of the common directorate or interest is disclosed or known to the Board of Directors or a majority thereof or noted in the minutes, and the Board of Directors authorizes, approves or ratifies such contract or transaction in good faith by a vote sufficient for the purpose; or

(b) The fact of the common directorate or interest is disclosed or known to at least a majority of the Unit Owners (by percentage), and the Unit Owners approve or ratify the contract or transaction in good faith by a vote sufficient for the purpose; or

(c) The contract or transaction is commercially reasonable to the Unit Owners Association at the time it is authorized, ratified, approved or executed.

Any common or interested directors may be counted in determining the presence of a quorum of any meeting of the Board of Directors or committee thereof which authorizes, approves or ratifies any contract or transaction, and may vote thereat to authorize any contract or transaction with like force and effect as if such director were not such director or officer of such Unit Owners Association or not so interested.

Section 18. Covenants Committee. The Board of Directors shall establish a Covenants Committee, consisting of three or five members appointed by the Board of Directors, each to serve for a term of one year, in order to assure that the Condominium shall always be maintained in a manner:

- (1) providing for visual harmony and soundness of repair;
- (2) avoiding activities deleterious to the esthetic or property values of the Condominium;
- (3) furthering the comfort of the Unit Owners, their guests and tenants; and
- (4) promoting the general welfare of the Condominium community.

(a) Powers. The Covenants Committee shall regulate the external design, appearance, use and maintenance of the Common Elements. The Covenants Committee shall have the power to issue a cease and desist request to a Unit Owner, his guests, invitees, or lessees whose actions are inconsistent with the provisions of the Condominium Act, the Condominium Instruments, the Rules and Regulations or resolutions of the Board of Directors (upon petition of any Unit Owner or upon its own motion). The Covenants Committee shall from time to time, as required, provide interpretations of the Condominium Instruments, Rules and Regulations and resolutions pursuant to the intents, provisions and qualifications thereof when requested to do so by a Unit Owner or the Board of Directors. Any action, ruling or decision of the Covenants Committee may be appealed to the Board of Directors by any party deemed by the Board of Directors to have standing as an aggrieved party and a vote of a quorum of the Board of Directors may modify or reverse any such action, ruling or decision.

(b) Authority. The Covenants Committee shall have such additional duties, power and authority as the Board of Directors may from time to time provide by resolution. The Board of Directors may relieve the Covenants Committee of any of its duties, powers and authority either generally or on a case by case basis by vote of a quorum thereof. The Covenants Committee shall carry out its duties and exercise its powers and authority in the manner provided for in the Rules and Regulations or by resolution of the Board of Directors.

ARTICLE IV

OFFICERS

Section 1. Designation. The principal officers of the Unit Owners Association shall be the President, the Vice

AFFIDAVIT

I, Peter Timoshenko, a unit owner at The Rotonda Condominium, do hereby attest that the following is a true and accurate statement of facts:

1. In July of 1985 I was the President of the Board of Directors of The Rotonda Condominium Unit Owners Association.

2. On July 17, 1985, I presided at an Executive Meeting of the Board of Directors, at which time the Board addressed the issue of filing a Motion for Judgment, against the Developers of the Condominium, to seek redress for structural deficiencies.

3. Following a general discussion of all pertinent facts known to the Board on this issue, and upon a motion duly seconded, the Board of Directors voted to authorize the Association's attorneys, Hyatt & Rhoads, to file a Motion for Judgment against the Developers of the Condominium.

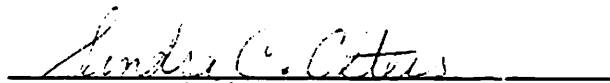
4. The attorneys were subsequently instructed to proceed in accordance with the Board's resolution.


Peter Timoshenko

~~City of Alexandria~~
~~COUNTY OF FAIRFAX~~

STATE OF VIRGINIA To Wit:

Subscribed and sworn to before me this 25th day of February, 1987.


Notary Public

My Commission expires: July 24, 1987.

1 V I R G I N I A :

2 IN THE CIRCUIT COURT OF FAIRFAX COUNTY

3 MAY -8/87 AM 10:27
WARREN E. BARRY
CLERK OF THE CIRCUIT COURT
OF FAIRFAX COUNTY, VA

4 THE ROTONDA CONDOMINIUM)
5 UNIT OWNERS ASSOCIATION,)

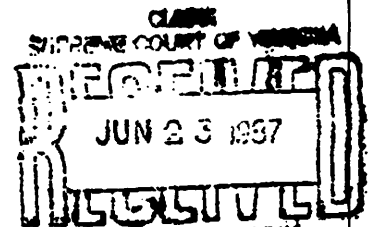
6 Plaintiff,)

7 versus)

AT LAW NO. 70368

8 THE ROTONDA ASSOCIATES,)
9 et. al.,)

10 Defendants.)



12 Fairfax, Virginia

13 Monday, March 9, 1987

14 The above-entitled action came on to be heard before
15 the Honorable Lewis H. Griffith, a Judge in and for the
16 Circuit Court of Fairfax County, in Courtroom 5-C,
17 Fairfax County Judicial Center, 4110 Chain Bridge Road,
18 Fairfax, Virginia 22030, beginning at approximately
19 10:30 o'clock a.m.
20
21
22
23

DUPLICATE ORIGINAL

SHARON C. COMMANDER & ASSOCIATES

5101 OVERLOOK PARK
ANNANDALE, VIRGINIA 22003

425-7099

P R O C E E D I N G S

(The Court Reporter was sworn.)

THE COURT: Let the record reflect this is the case of The Rotonda Condominium Unit Owners Association, Plaintiff, versus The Rotonda Associates, et al., Defendants, Law Number 70368.

Are counsel for the Plaintiffs ready?

MR. DOWNER: Yes, Your Honor.

THE COURT: Are counsel for the Defendants ready?

MR. FISKE: Yes, Your Honor.

THE COURT: For the purposes of the record then, let's just recite that you are going to give me just brief opening comments concerning what this case is about, so that I will be prepared to rule on your preliminary motions.

Let me inquire first if you are going to move for a rule on the witnesses who are going to testify in this case?

MR. DOWNER: Yes, Your Honor.

THE COURT: I will leave it up to counsel to make sure that no witnesses come into the courtroom during the presentation of testimony in evidence and

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1 MR. FISKE: Your Honor, I must say I would
2 have nothing to add on the statute of limitations issue.
3 I think we have certainly covered that. Of course, we
4 urge the Court to read the brief and cases and, especially,
5 the letters.

6 THE COURT: The letters and the agreement of
7 January of 1980?

8 MR. FISKE: That is correct, Your Honor.

9 MR. MORIARTY: Is it my understanding Mr.
10 Coffey is not going to address that specifically?

11 MR. COFFEY: I am not going to be addressing
12 that.

13 MR. MORIARTY: As Your Honor is probably aware,
14 we have a different opinion as to the substance of our
15 facts.

16 Right off the bat, I guess what I ought to do
17 is address the facts which I believe our evidence will
18 show.

19 The Court is well aware of the theory of
20 equitable estoppel, and I will go into that in a moment
21 but, first of all, I want to just tell the Judge right
22 up front where I think we are going to go with our
23 evidence. I don't think you can decide it otherwise,

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1 without knowing that.

2 We will put on evidence that the developer
3 made promises, both in writing and orally, that he would
4 not turn his back on the association, that he would not be
5 bound by technicalities -- I am using his words -- and he
6 would, in fact, deal with structural deficiencies for
7 which either he or his contractors were responsible.
8 Those, essentially, are the promises upon which we are
9 relying.

10 In addition to those, there were the actions
11 in conformance with those statements. I am not going to
12 try to stand here and tell you that Mr. Cecchi made those
13 statements in 1979, and six years later our folks sued
14 and said, Where's the action.

15 In 1980, he did work. In fact, through 1984,
16 and even into 1985, he was attempting certain repairs
17 of the common elements. Obviously, the reasons we are
18 here today is because those repairs didn't solve the
19 problems.

20 Our evidence will be that people relied on
21 those statements in conjunction with his actions in
22 conformance with his own statements.

23 I suggest you take a look at the Defendants' own

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1 exhibit here. You would see that, for example, Building 3,
2 the first unit was conveyed in August of 1979. Five years
3 from that would be August of 1984.

4 We will put on evidence that on Building 3
5 they were doing work on the bricks and the flashing,
6 common elements, in the Spring of 1985, nearly eight
7 months after their own claim that the statute of limitations
8 would have run.

9 I say that is only important because of the
10 next step of the equitable estoppel theory, and that is
11 reliance. I suggest our people relied on those statements
12 and the actions to their forbearance of any lawsuit.

13 The recurring question you will hear throughout
14 the course of the Plaintiffs' evidence, which will have to
15 be answered, is: Why didn't you sue earlier?

16 And to a man, they will state they didn't think
17 they had to. There were congenial attitudes on the part
18 of the developer, both Mr. Cecchi and his righthand man,
19 Mr. Richard Grizzard, who was a vice president of the
20 developer's company, and, in fact, was located in an
21 office on the property for several years.

22 There were actions in response to the associa-
23 tion's requests for particular common element problems to

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1 be addressed.

2 The final, and certainly important, element in
3 any equitable estoppel theory is that in fact you did
4 suffer damages, something to your detriment. I suggest
5 our expert opinions, as testified to, somewhere in excess
6 of \$3,000,000, will clearly establish that.

7 I have to take issue with the argument that
8 equitable estoppel requires fraud. Certainly, the Boykins
9 case referred to fraud in that case, and among other
10 things held that since there wasn't any they were going to
11 grant the motion to strike.

12 In a later case, Lataif versus Commercial
13 Industries Construction, Incorporated, in 1982, in the
14 State of Virginia, it was held -- in fact, they reversed
15 a motion to strike which was granted, where the trial
16 judge overruled the argument that there was an equitable
17 estoppel case to be made and did not let it go to the
18 jury.

19 The Court, in Lataif, said: Elements necessary
20 to establish equitable estoppel absent the showing of
21 fraud are a representation, reliance, change of position,
22 and detriment. That is what we are going to try to show.

23 We are not going to try to come in here and show

1 that Mr. Cecchi, in 1979, said, I'm going to lie to these
2 people and here we go. We are not going to try to put
3 that kind of thing on.

4 The agreement, itself, Mr. Downer earlier
5 referred to, and Mr. Fiske adequately explained that.

6 I think if you have had an opportunity to read
7 the agreement, or, if you haven't, you shortly will,
8 and you will see it clearly refers to whether or not
9 there is three years or five years, and it contractually
10 binds both the association and the developer to a five-
11 year statute of limitations to enforce, I believe it's
12 called, claims with regard to the structural common
13 elements.

14 Whether or not it is ambiguous, I suggest, is
15 a question of argument, because it does not say what
16 accrual means. It does say from point of accrual, but it
17 never says what accrual is, and it very well could have
18 at that time.

19 Since that document was signed in January of
20 1980, you have had the benefit of the Harbor Gate case
21 just last summer which comes out and tell us what it is.

22 Well, I don't think we can hold people who
23 are not lawyers, in any event, to understanding what the

1 Supreme Court of Virginia was going to do six years later.

2 The essential point is, Your Honor, that the
3 developer, throughout the course of these years when the
4 lawsuit was not being filed, consistently was responding.

5 In fact, he would sometimes go so far as to
6 bring his subcontractors back out, who were the original
7 constructors, to come back and address whatever repairs
8 our folks said they felt needed to be resolved.

9 The people we are going to rely on to testify
10 are not only members of the board of directors, but other
11 individuals who were on committees or just had dealings
12 with the committees. In fact, one of the past presidents,
13 a practicing lawyer, is now sitting as arbitrator in
14 federal forums. I suggest that that is important as to
15 his testimony, only because it shows that he is certainly
16 the kind of fellow who would be aware of what a statute
17 of limitations can mean.

18 People like that are going to testify that
19 they just weren't worried about it. They felt that
20 Mr. Cecchi was reliable, and he was giving evidence that
21 should be relied upon. In fact, they did just that.

22 The evidence will further show that these
23 people didn't just sit back and ignore this possibility.

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1 Another project of Mr. Cecchi's was being sued at the same
2 time, and our people were aware of that. Despite that,
3 they declined to file a suit because they didn't think
4 they needed to. Their problems were being addressed, so
5 they thought.

6 Finally, in roughly February of 1984, a member
7 of the structures and facilities committee suggested to
8 the board that they cease any further negotiation with
9 the developer, because the problems weren't being met to
10 his satisfaction.

11 The board overruled him and said, essentially,
12 We believe we are still on the right track, we are still
13 negotiating with the developer, and they declined his
14 recommendation. That would have been in February of 1984,
15 and well before the expiration of at least one more
16 building.

17 I point that out not to show that these people
18 were lawyers or judges, but they were not totally ignorant
19 of the issue of the statute of limitations, but if they
20 were asked, "Why didn't you sue," they would feel like
21 we had nothing to sue about.

22 I suggest that this is certainly a factual
23 question, whether a jury or judge is sitting as the trier

1 of fact, that must be resolved as to whether these people
2 are credible, whether the reliance is justified.

3 Certainly, that is not the sort of thing, I
4 would suggest, given the evidence I have proffered which,
5 I believe, we will be able to establish over the next two
6 to three days, can be ruled as a matter of law as
7 insufficient to overcome the issue of equitable estoppel
8 requirements.

9 MR. FISKE: Your Honor, I guess I am a little
10 surprised, because the lawyers themselves represented to
11 their clients in their Rostrum, the newsletter, Here's
12 when these suits need to be filed.

13 This reference to Harbor Gate, the Harbor Gate
14 clarified something that for years has been a mystery.
15 It wasn't a mystery as between these parties, because
16 they negotiated a deal, and the deal was five years.
17 That was an arm's-length negotiation between two inde-
18 pendent law firms on behalf of two independent client
19 entities.

20 All Harbor Gate clarifies for us is the
21 accrual of the cause of action issue. The five years is
22 set in that agreement.

23 This reliance issue, Your Honor, doesn't rise

1 statutory warranty on those four buildings, nor should it
2 go forward on the negligent construction count just on
3 the general statute of limitations theory. And they really
4 haven't addressed that. They have sort of danced around,
5 but nowhere have they alleged some cause of action on
6 promises and letters, or promises arising because of
7 someone doing some work at the project.

8 Your Honor, I would submit that when the Court
9 looks at these documents, you will see an arm's-length
10 negotiation, some letters that the law firm representing
11 the Plaintiffs, and present counsel, advised their clients,
12 You can't rely on those. There was an agreement nego-
13 tiated. The dates were set. Everybody knew what the dates
14 were. Suit wasn't filed. It should not go forward.

15 Your Honor, I don't want
16 to argue against myself here, because I think the facts
17 speak very loudly, but if we are in a situation where
18 for some reason the Court feels like it needs to hear
19 evidence on this, I would strongly urge on behalf of
20 our clients that we seek some form of bifurcation.

21 Frankly, Your Honor, the representations that
22 counsel just made, you can take those as a given, and
23 they simply don't give rise to an estoppel.

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A F T E R N O O N S E S S I O N

3:15 p.m.

THE COURT: For the purposes of the record, let me simply relate that I have reviewed the pleadings, that I have reviewed the memoranda which have been submitted, and my notes of the argument of counsel.

Directing my attention first to the plea in bar to the statute of limitations, the plea in bar as to the statute of limitations is granted as to Count I and Count II of the Motion for Judgment.

Count I relates to a breach of warranty under the Condominium Act. Mr. Cecchi's letters do not rise to the requirements to negate the Defendants' ability to impose the statute of limitations under the doctrine of equitable estoppel.

The language of the agreement of January, 1980, specifically is obviously an attempt to allay the fears of the Association as to the time period for when an action accrues under 55-79.79C, and the agreement which was entered into, in my opinion, incorporates any prior representations or letters which were prepared and sent by Mr. Cecchi, and for that reason.

As to Count II, negligent construction, if there

1 is such an action in Virginia, it likewise is barred by
2 the five-year statute of limitations, and, therefore, the
3 plea in bar as to Count II is granted.

4 As to Count III, I don't know. I want to hear
5 from you some more. What is negligent repair? It is a
6 tort action, right?

7 MR. MORIARTY: Yes, sir.

8 THE COURT: So is it your position, Mr. Moriarty,
9 that the Plaintiffs are entitled to recover for any
10 tortious act which has occurred in the five-year period
11 prior to the time that you filed the Motion for Judgment?

12 MR. MORIARTY: Actually, Your Honor, I don't
13 believe there has been a plea in bar as to the statute
14 of limitations as to Count III. That has not been
15 raised at this point, so I don't think we need to argue that.

16 THE COURT: That is why I had a lot of trouble.

17 MR. MORIARTY: Does that answer your question?

18 THE COURT: Yes, it does.

19 MR. COFFEY: Your Honor, I think that goes to
20 the question that we raised in our motion to dismiss
21 Counts II and III.

22 I don't think that the tort action that they
23 have alleged rises above the statutory duty of a warranty.

1 exhibits. It said: If we or our contractors have done
2 anything wrong, we will come back and fix it. That is
3 where the duty came from. He held himself out as having
4 that duty and assuming that duty.

5 MR. COFFEY: Your Honor, again, that is not
6 alleged in the complaint. All we have is a statutory
7 warranty and then a breach of that legal duty, as they
8 put it, in Count III of their complaint.

9 As Your Honor has noted, the letters of
10 Mr. Cecchi are subsumed in the warranty agreement.

11 THE COURT: Right.

12 MR. COFFEY: The mere cost of repair for
13 economic damage is exactly the remedy that they are
14 entitled to, if they prove it, under the statutory
15 warranty which, again, refers to structural defects as
16 constituting defects which require repair, replacement,
17 renovation, or restoration.

18 THE COURT: Is there any reference in the
19 condominium statute with respect to repairs?

20 MR. COFFEY: It is contained in the definition
21 of structural defect.

22 THE COURT: Right. But other than that?

23 MR. COFFEY: That is the only reference, Your

1 Honor.

2 To recognize a cause of action for negligent
3 repair, given the language of the statutory warranty,
4 would allow them to rise above what would otherwise be
5 required of the developer under the statutory warranty.

6 Under the statutory warranty, we have the duty
7 to convey a project that is without those defects for a
8 certain period of time.

9 To say that, if you come in and do a repair
10 and you do it wrong, now you are on the hook for another
11 period of time, then you fall into the classic Boykins
12 situation, really, where you are performing --

13 THE COURT: Ten years for a roof.

14 MR. COFFEY: That's right.

15 THE COURT: And your response to that is --

16 MR. MORIARTY: It is the common-law duty, not
17 the statutory duty. What we are asking for is relief
18 based on things he didn't have to do, but he came out and
19 did it in any event.

20 THE COURT: Is there a common-law duty in
21 addition to the statutory duty?

22 MR. COFFEY: Your Honor, it is our position,
23 when you are talking about a condominium, that is a

1 THE COURT: Mr. Moriarty, your damages in
2 Count III are purely an economic loss, aren't they?

3 MR. MORIARTY: They were calculated on a cost to
4 repair.

5 THE COURT: Doesn't an action for a purely
6 economic loss have to arise out of contract or breach of
7 warranty?

8 MR. MORIARTY: At this point, to be honest, I
9 have not reviewed the cases since we argued this particular
10 issue roughly a year-and-a-half ago.

11 Our obvious claim is that, based on the
12 negligent actions, we have been put to a loss. Based on
13 that, we are alleging the cost of that loss.

14 THE COURT: Mr. Coffey, do you have any
15 comments you want to make on that?

16 MR. COFFEY: Again, Your Honor, because it is
17 purely an economic loss, they don't rise above what is
18 claimed in the statutory warranty.

19 Again, I point out, in Count III of their
20 complaint -- well, I don't have any further comments to
21 make, Your Honor.

22 THE COURT: If it won't confuse me, point it
23 out.

1 ~~MR. COFFEY: I don't think it is necessary,~~
2 ~~Your Honor.~~

3 THE COURT: Count III is dismissed.

4 You can't proceed to recover purely an economic
5 loss based on negligence and, in order to recover a
6 purely economic loss, it has to be based on breach of
7 contract or warranty.

8 MR. COFFEY: Your Honor, in light of Your
9 Honor's ruling, I wonder if we could get some parameters
10 established if tomorrow's trial goes forward based upon
11 Building 5.

12 The damages that the Plaintiffs have provided
13 to us in their responses to interrogatories and in their
14 estimate of repair relate to all of the buildings. It
15 is not broken down, building by building.

16 I think that in light of Your Honor's ruling,
17 certainly it would be appropriate for the Plaintiffs to
18 provide us prior to trial with a breakdown of what they
19 claim the items of repair are going to be for each
20 element as to Building 5.

21 MR. DOWNER: Your Honor, certainly that would
22 be appropriate in light of today's ruling by the Court.

23 THE COURT: Yes.

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1 what it was. Certainly as to relationship and the reasons
2 that these individuals constructed the building the way
3 they did, I think it is certainly relevant and pertinent
4 to this jury's evaluation of what was done.

5 MR. FISKE: Your Honor, the "why" doesn't
6 matter. It is a statutory warranty claim. It is like
7 that podium. It either fits or it doesn't fit. And why
8 I might have built it that way or had the court build it
9 a certain way, or if we agreed to split the profits, has
10 no relevance at all. It is there. It either is or isn't
11 within the statute. That is what the case is at this
12 point. There are no punitives here.

13 THE COURT: The motion in limine is granted
14 as to the Majestic contract.

15 Anything else?

16 MR. MORIARTY: Yes, sir, one brief item. For
17 the purposes of the record, I would inquire of the Court
18 whether you would accept my earlier argument as to what
19 our lay witnesses would have testified to as an offer of
20 proof, or would you prefer that I make one on the record?

21 THE COURT: Say that again.

22 MR. MORIARTY: At this point, what I would like
23 to do is make an offer of proof as to what our lay witnesses

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1 would have testified to regarding the equitable estoppel
2 issues, unless the Court is willing to accept what I
3 earlier argued.

4 THE COURT: I am willing to accept what you
5 earlier argued.

6 MR. FISKE: Your Honor, we, in effect, offered
7 that in our argument. For purposes of this motion, we
8 took them as proof.

9 MR. MORIARTY: I believed that was correct, but
10 rather than find out later we should have done it --

11 Thank you.

12 THE COURT: Anything else?

13 MR. COFFEY: Your Honor, I guess the only other
14 thing to address -- and we don't have to do it on the
15 record -- we would just like to get an idea from them
16 the order of their witnesses for the next couple days.

17 THE COURT: Let's go off the record.

18 (Discussion off the record.)

19 (Whereupon, at 3:50 o'clock p.m., the hearing
20 was concluded.)

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COMMONWEALTH OF VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

THE ROTONDA CONDOMINIUM UNIT
OWNERS ASSOCIATION,

Plaintiff,

v.

THE ROTONDA ASSOCIATES, INC.,

and

ROTONDA DEVELOPMENT CORPORATION,

and

ROTONDA REALTY, INCORPORATED,

Defendants.

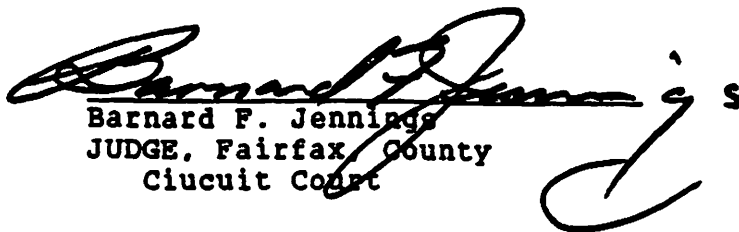
AT LAW NO. 70368

ORDER

This matter having come before the Court on Friday, February 27, 1987, upon the Motion for Summary Judgment of the Defendants on the issue of the Standing of the Plaintiff to maintain this action, and the Court having heard the arguments of counsel for all parties it is hereby


ORDERED, that the Defendants' Motion is denied, with leave to renew the Motion at trial.

ENTERED, this 11th day of March, 1987.


Barnard F. Jennings
JUDGE, Fairfax County
Circuit Court

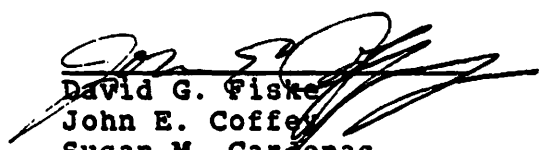
WE ASK FOR THIS:

HYATT & RHOADS, P.C.


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Stephen H. Moriarty
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Counsel for the Plaintiff

SEEN AND OBJECTED:

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(704) 863-8400
Counsel for Defendants

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**THE ROTONDA CONDOMINIUM
UNIT OWNERS ASSOCIATION,**

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At Law No. 70368

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UPON MOTION OF THE DEFENDANTS, and

The Court having considered the Defendants' Renewed Plea in Bar, and Motion to Dismiss Counts II and III, and having reviewed the briefs submitted by counsel, and considered the argument of counsel, and

IT APPEARING TO THE COURT that, as to Count I of the Motion for Judgment, the Defendants' Renewed Plea in Bar should be granted with respect to Phases 1 through 4 of the Rotonda Condominium, and

IT FURTHER APPEARING TO THE COURT that, with respect to Count II of the Motion for Judgment, the Defendants' Renewed Plea in Bar should be granted with respect to all Phases of the Rotonda Condominium, and

IT FURTHER APPEARING TO THE COURT that, with respect to Count III of the Motion for Judgment, the Defendants' Motion to Dismiss Count III should be granted with respect to all Phases of the Rotonda Condominium,

IT IS THEREFORE ADJUDGED, ORDERED AND DECREED that Count I of the Motion for Judgment be, and the same is hereby, dismissed with prejudice with respect to Phases 1 through 4 of the Condominium, and

IT IS FURTHER ADJUDGED, ORDERED AND DECREED that Count II of the Motion for Judgment be, and the same is hereby, dismissed with prejudice as to all Phases of the Condominium, and

IT IS FURTHER ADJUDGED, ORDERED AND DECREED that Count III of the Motion for Judgment be, and the same is hereby, dismissed with prejudice as to all Phases of the Condominium.

Entered this 1st day of April, 1987. *LHG*

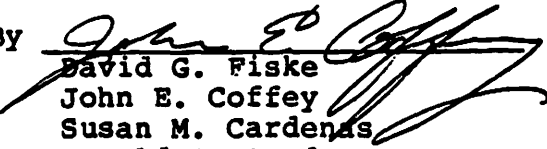


Judge Lewis H. Griffith
Fairfax Circuit Court

WE ASK FOR THIS:

THOMAS & FISKE, P.C.


By


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By


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Counsel for the Plaintiff

ASSIGNMENTS OF ERROR.

1. The lower court erred in permitting the Defendants to renew their Amended Plea in Bar at trial, after previously denying the Plea.
2. The trial court erred in granting the Defendants' Renewed Amended Plea in Bar as to Counts I and II.
3. The trial court erred in ruling upon the Defendants' Renewed Amended Plea in Bar prior to the beginning of the trial.
4. The trial court erred in granting the Defendants' Motion to Dismiss Count III.