

(Handwritten signature)
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February 3, 1997

Mr. Dennis Thresher
Enforcement Specialist
South Florida Field Office
1700 N.W. 64 Street, Suite 500
Ft. Lauderdale, FL 33309

Re: Lauderdale West / CASE NO. 950614CC30779
Our File No: 50-342 CMP

Dear Mr. Thresher:

This correspondence shall serve as a response to the Division of Condominium's October 3, 1996 issue statement and subsequent position and directives in this matter regarding the current budgeting and financial operations of Lauderdale West. Although the governing documents of Lauderdale West expressly state otherwise, you have indicated that it is the Division's position that the Condominium Act requires that Lauderdale West prepare and operate under 17 separate budgets for each of its condominiums as well as keep a separate accounting for the reserves for each of the 17 condominiums.¹ Additionally, you have requested that 17 separate annual financial statements be prepared for the condominiums.

As you are aware, Lauderdale West Association, Inc. strongly disagrees with the position being taken by the Division with respect to their budgeting and financial structure and the manner in which it must be managed. The Association has made every

¹ Although the Association has consistently objected to the Division's position, it has under express protest attempted to prepare 17 separate budgets for the condominiums and has encountered a number of significant difficulties. As agreed by the Division, the Association's attempt to temporarily honor the Division's directives shall not be deemed a waiver of any right to protest, object, appeal, review, or litigate any of the issues either within the Division or in the state courts.

attempt to cooperate with the division and has provided a number of documents to support its position that Lauderdale West has consistently maintained and operated the entire community consistent with the express provisions of the applicable Declarations of Condominium, Declarations of Restrictions, Articles of Incorporation, and Bylaws of the Lauderdale West Community properly recorded in the Official Books and Records of Broward County, Florida (also collectively referred to herein as "the governing documents of Lauderdale West").

In this response, we shall set forth the factual background relevant to these issues and the legal support for Lauderdale West's position with respect thereto.

FACTUAL BACKGROUND

Lauderdale West is a unique community comprised of 1,359 residences; 544 of which are condominium units and 815 of which are single family homes. The single family homes are located in three separate phases and are governed by three separate Declarations of Restrictions. The condominiums are not located in a high rise structure, but instead are located in 184 single story buildings, composed of 88 duplex buildings and 96 fourplex buildings.

As these condominium units were constructed in the early 1970's, the developer grouped them into separate condominiums and chronologically recorded separate declarations (although identical except as to the description of the number of condominium units) until at the conclusion of the construction of the development, there existed 17 separate condominiums with 17 identical condominium declarations for the 544 units. Curiously, some of the condominiums consist of as many as 68 units where others consist of as few as 12 units.

In order to clearly understand the Lauderdale West community, the purpose and development plan, as devised by the developer which are clearly set forth in the governing documents must be considered as they reflect the reasons and justifications for the consolidated management and operation of the community. The specific sections will be noted and discussed in the next section of this response.

As set forth by the governing documents, the entire community was to be operated and governed by one association. As determined by the developer and mandated by the Declaration of Condominium for each of the condominiums, one Board of Directors of the Association governs the entire community and that board is comprised of residents of both the single family homes and the condominiums. This community has operated under one association for over twenty (20) years and has in accordance with its governing documents prepared and operated under one budget for the 17 condominiums and prepared one annual financial statement for the 17 condominiums. *the 815 homes & the 815 ho*

Consolidated 2

The Association vehemently opposes any deviation from its governing documents and asserts that there is no legal justification for doing so.

LEGAL ANALYSIS

A position or directive by the Division requiring that Lauderdale West ignore the clear and express provisions of its governing documents and instead implement an entirely new format and method of budgeting and accounting would be an obvious unconstitutional impairment of vested contract rights.

A. Clear provisions of the Governing Documents

A review of the relevant portions of the Declaration of Condominiums, Bylaws and Articles of Incorporation clearly reflect the authority and, in fact, the obligation of the association to conduct its budgeting and financial operations in the consolidated manner in which it has done for more than twenty (20) years.

First, as previously^e stated, the common purpose and development plan of Lauderdale West must be identified in order to understand the rational^e for the developer's provisions for consolidated accounting and budgeting for Lauderdale West. The pertinent portions of the provisions dealing with the community's purpose and development plan are as follows:

From the declarations:

"3. Development Plan: This condominium is one in a series of which may be constructed under a common plan known as Lauderdale West. All of the condominiums in Lauderdale West shall be operated and governed by the same association which is known as Lauderdale West Community Association, No.1, Inc., herein referred to as the Association. The association shall operate and govern a group of detached single family residences under a common plan of Lauderdale West. . . ."

From the articles of incorporation:

Article 2 Purpose:

"The purposes for which the Association is organized are:

2.1 To provide an entity pursuant to Section 12 of the Condominium Act, which is Chapter 711, Florida Statutes, for the operation of Condominium units. . . and to provided^e an entity for the operation and management of single family residences . . ."

Other provisions relevant to these issues are as follows:

From the declarations:

"2.5. Common expenses include: (a) expenses of administration; expenses of maintenance, operation, repair, or replacement of the common elements and of the portions of the apartments to be maintained by the association, expenses of maintenance, operation, repair and replacement of private roads and other facilities located within Lauderdale West and intended for the joint use and enjoyment of all members of the Association.

(b) expenses declared common expenses by provisions of this declaration or the bylaws."

"4.6 Liability for Common Expenses; Share of Common Surplus: Each Apartment owner shall be liable for a share of the common expenses of the Association applicable to the condominium apartments, and shall have a share in the common surplus of the Association applicable to condominium apartments, which share shall be a fraction the numerator of which shall be one and the denominator of which shall be the aggregate number (not to exceed 544) of apartments submitted to condominium form of ownership within Lauderdale West by the Developer."

"6.1 Share of Common Expense: Each apartment owner shall be liable for the proportionate share of the common expenses, and shall share in the common surplus, such shares being the same as set forth in paragraph 4.6 above."

From the Bylaws:

"6. Fiscal Management. The provisions for fiscal management of the Association set forth in the several declarations of condominium, the declaration of restrictions, and Articles of Incorporation, shall be supplemented by the following provisions:

. . . 6.2 Budgets. The Board of Directors shall adopt two budgets for each calendar year, one of which shall be with respect to the Association's responsibility relative to the several condominiums within Lauderdale West, and the other of which shall be with respect to the lands made subject to declarations of restrictions covering single family residential lots within Lauderdale West. Each such budget shall include the estimated funds required to defray the common expense and to provide and maintain funds for the foregoing accounts and reserves according to good accounting practices"

718 *eff. cc. time*
10/76

As previously stated the provisions of the governing documents, some of which have been quoted herein, obligate and authorize the Association of Lauderdale West to prepare and operate the community under two budgets, one for the single family homes and one for all of the condominiums. Further, the common expenses of the Association are to be shared by the condominiums and single family homes. The manner in which Lauderdale West has conducted its financial accounting and budgeting since the mid 1970's is clearly mandated by the governing documents of Lauderdale West.

Contrary to these clear provisions, the division seeks to have the Association change its method of budgeting and accounting by requiring that the Association, at its expense, prepare 17 separate budgets for each of the condominiums, maintain accounting of separate reserves for each condominium, and prepare 17 separate annual financial statements for each condominium.

B. Subsequent amendments to the Condominium Act do not have a retroactive effect upon the pre-existing declarations of condominiums

As its authority, the Division has stated that separate budgeting and accounting is required for each of the condominiums by the provisions of Florida Statutes, § 718.111 (12)(a)(11) and the administrative rules 61B-22.003(4)(a)(1) through (3) and 61B-22.006(4). However, those statutes and rules were enacted subsequent to the recording of each and every declaration of condominium of Lauderdale West.

The jurisprudence of this state has long recognized that in the absence of an explicit legislative expression, a substantive law is to be applied prospectively. See State Farm Mutual Ins. Co. v. Hassen, 650 So. 2d 128 (Fla. 2d DCA 1995). This rule mandates that statutes that interfere with vested rights will not be given retroactive effect. Id. The Florida Constitution, Article I, Section 10, expressly prohibits any law that impairs the obligations of contracts in order to protect the contracting parties.

A statute contravenes this constitutional prohibition against impairment of contracts when it has "the effect of rewriting antecedent contracts, that is, of changing the substantive rights of the parties to existing contracts." Id. The polestar of any analysis of whether a statute constitutionally impairs an existing contract is the fundamental principle that essentially no degree of impairment will be tolerated, no matter how laudable the underlying public policy considerations of the statute may be. Id.

In this case, the declaration is a contract and each and every unit owner is a contracting party entitled to the rights and obligations that have been vested by the recording of the

declaration. It is well established that the law in existence on the date of recording the declaration is as controlling as if engrafted onto the documents. See Suntide Condominium Association, Inc. v. Division of Florida Land Sales and Condominiums, 463 So. 2d 314 (Fla. 1st DCA 1984).

At the time that the Lauderdale West declarations of condominium were recorded in 1973-1974, the applicable statute of the Condominium Act then in effect required only as follows:

§ 711.12(7) - "The association shall maintain accounting records according to good accounting practices which shall be open to inspection by unit owners at reasonable times and written summaries of which shall be supplied at least annually to unit owners. Such records shall include:

(a) A record of all receipts and expenditures. . . "

See Fla. Stat. § 711.12 (7) (1973).

At that relevant time (i.e. the time that the declaration was recorded), there was no statutory or administrative requirement that each condominium maintain a separate accounting or budget. To the contrary, the statute quoted above only required good accounting practices which has at all times been satisfied by the Association. Here, the governing documents established the manner and method by which the Lauderdale West Association should manage and operate the finances and budgets of the Association which in every way complied with the existing law at the time of the recording of the declarations.

Clearly, any attempt by the Division to require that the Association disregard the express terms of that contract in order to comply with a subsequent statute or rule would be a violation of each unit owners constitutional right to freedom from impairment of contract. Thus, the requirements of any later enacted legislation simply cannot be forced upon this Association. Not only would the Division's actions be unconstitutional, but such actions would directly contravene the previous decisions of the Courts of this state which as quoted herein will not tolerate any degree of impairment of contractual rights.

Before 1976, a condominium association was required to maintain accounting records according to good accounting practices. After 1976, the law required that the association maintain accounting records for each condominium (Supp. 1976). Thereafter, in 1984, the statute required that condominium associations which operate more than one condominium must maintain separate accounting records and establish a separate budget for each condominium operated. See Condominium Association of La Mer Estates, Inc. v. Semel, 610 So. 2d 569 (Fla. 4th DCA 1992).

In addition to the foregoing, the parties to that contract, i.e. the unit owners and the developer, did not agree that subsequent changes or amendments to the Condominium Act would be applicable. It has been established by the Florida Supreme Court that a condominium declaration is subject to amendments to the Condominium Act only when the declaration so provides. Greenbriar Condominium Apartments II Association, Inc. v. Koch, 480 So. 2d 131 (Fla. 2d DCA 1985) citing Angora Enterprises v. Cole, 439 So. 2d 832 (Fla. 1983).

In this case, the relevant portions of the Lauderdale West Declarations of Condominium state only as follows with respect to the existing Condominium Act:

"1. Purpose: The purpose of this declaration is to submit the lands herein described and the improvements thereon to the condominium form of ownership and use in the manner provided by Chapter 711, Florida Statutes, herein called the Condominium Act."

Here, the declaration in no way provides that it will be subject to subsequent amendments, and therefore the Condominium Act as it existed at the time of the recording of the declarations will apply to determine the requirements and obligations of Lauderdale West with respect to its financial and budgeting methods.

In response to a request for support of the Division's position on this matter, the Association was directed to the Division's Declaratory Statement in the matter of In Re Innisbrook Condominium Association, Inc., Docket No. DS91265, filed October 21, 1993. A close review of that declaratory statement reveals that the facts in that case are clearly distinguishable from those present here. In Innisbrook, the declarations and the bylaws did not contain any provision either expressly or impliedly providing for consolidated financial operations for the twenty-eight condominiums. (See paragraph 8, page 3 and paragraph 9, page 4). As a result, the Division stated that there was no contractual right contained in the declaration and bylaws that could be unconstitutionally impaired.

Contrary to Innisbrook, the declaration and bylaws of Lauderdale West expressly require the consolidated budgeting and financial operations of the condominiums as previously quoted herein. These substantial and crucial differences make the decision in Innisbrook totally inapplicable to the determination in this case. Accordingly, the findings of fact and conclusions of law set forth in that declaratory statement by its own analysis are not appropriate in this case.

CONCLUSION

In sum, the Association is entitled to continue to operate its budget and financial recordkeeping for the condominiums in the consolidated manner called for by its governing documents. Once the Division has had the opportunity to review this response, the Lauderdale West Association requests that the Division reconsider its previous directive and recognize the unique organization of this community and the express authority of this Association to continue to operate in the consolidated manner in which it has done for the past twenty (20) years.

The Association feels strongly concerning this matter, and will seek all remedies and redress available under Florida law with respect to these issues as the need may arise. We appreciate your consideration of this matter.

Please feel free to contact me with any questions.

Very truly yours,

Cristina M. Pierson
For the Firm

cc: Miriam Moshen, President
Lauderdale West
Reid Baker, Esq.

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STATE OF FLORIDA
DEPARTMENT OF BUSINESS REGULATION

THE JOHNS BUILDING
725 SOUTH BRONOUGH STREET
TALLAHASSEE, FLORIDA 32399-1030

Bob Martinez, Governor
E. James Kearney, Secretary

April 6, 1987

Richard E. Coates, Director
Division of Florida Land
Sales, Condominiums and
Mobile Homes

Soloman Kash
1133 N.W. 84th Avenue
Plantation, FL 33322

RE: 70216-CI-4756

Dear Mr. Kash:

This letter is in response to your inquiry of February 9, 1987. Our Division is charged with the enforcement of Chapter 718, Florida Statutes, known as the Condominium Act. We are authorized to create rules in the Florida Administrative Code necessary to implement, interpret, and enforce the Condominium Act.

The Condominium Act does give the board of directors the authority to adopt reasonable rules and regulations concerning the common elements. If identification tags are necessary to insure proper use of the common elements then charging a nominal fee for the production cost of the tags would seem appropriate.

The board of directors may only charge a transfer fee in connection with the lease of a unit when the association is required by your documents to approve such transfer and a fee for such approval is provided for in the declaration, articles, or bylaws. This fee may not exceed \$50.00. If the lease or sublease is a renewal no charge can be made.

I hope the above has been helpful to you. Should you have any further questions regarding the Condominium Act please feel free to contact our office.

Sincerely,

A handwritten signature in cursive script, appearing to read 'Paula S. Hrabko'.

Paula S. Hrabko, Specialist
Education Section
Bureau of Condominiums
(904) 488-0725

PSH/1p

Copy

STATE OF FLORIDA
DEPARTMENT OF BUSINESS REGULATION

Division of Florida Land Sales, Condominiums and Mobile Homes

Lawton Chiles, Governor

Janet E. Ferris, Secretary

February 6, 1992

Honorable Norman Ostrau
400 N.W. 73rd Avenue
Plantation, FL 33317-2204

Re: Lauderdale West Community Association No. 1, Inc.; Status

Dear Representative Ostrau:

The Office of the General Counsel has reviewed your inquiry with attachments. Essentially, you had requested a statement of position from the Division as to whether the Lauderdale West Community Association No. 1, Inc., is a condominium association governed by Chapter 718, Florida Statutes. The Division has concluded that the subject association should be considered subject to Chapter 718, Florida Statutes, as to that portion of its operations regulating condominiums.

According to the documents which you included as exhibits to your correspondence, it was initially contemplated that the association would operate all of the condominiums to be built in Lauderdale West as well as the detached single family residences under the common plan of Lauderdale West. Membership in the association is composed of both condominium unit owners and single family homeowners. The association operates both condominium and non-condominium property. Administratively, according to its documents the association is required to prepare two budgets, one for its condominium unit owners and one for its homeowner members. Some of the common expenses of the condominiums include a proportionate share of those expenses necessary to maintain property used in common by both condominium and non-condominium homeowners.

Under Section 718.111(1)(a), Florida Statutes, the operation of a condominium shall be by a condominium association. Also, under the definition provided in Section 718.103(2), Florida Statutes, a condominium association is that corporate entity responsible for the operation of a condominium.


Honorable Norman Ostrau
February 6, 1992
Page 2

The operation of the various condominiums located within Lauderdale West is by the Lauderdale West Community Association No. 1, Inc. The various documents reflect that the association operates the condominiums and that the association was intended to operate, as to the condominium unit owners, within the framework provided by Chapter 711, Florida Statutes, the predecessor to Chapter 718, Florida Statutes. Accordingly, as to its condominium membership, the association should be considered a condominium association governed by the Condominium Act.

The situation existing within this development is atypical in the sense that the subject association administers both condominium and non-condominium property and has as its membership both condominium and non-condominium homeowners. It would be more typical in this type of development scheme for the condominium unit owners to have their own condominium association, for the single family residents homeowners to have their own homeowners' association, and for an umbrella association be set up to administer properties used in common. However, in your case the developer chose not to proceed in this manner, and instead formed only a single association with dual functions. This difference in structure should serve to distinguish your situation from that described by the court in Downey v. Jungle Den, 525 So.2d 438 (Fla. 5th DCA 1988) in which the court determined that where membership in the recreation association was exclusively condominium unit owners, the association was subject to Chapter 718, Florida Statutes.

I trust that I have been of assistance to you in your inquiry.

Sincerely,



Henry M. Solares
Director

KMS/lgs

cc: Karl M. Scheuerman
Chief Attorney

Deborah Miller, Director
Legislative Affairs

2322S

Handwritten: 11/16/05

THE BUREAU AND YOU - COMPLYING WITH CONDOMINIUM LAWS & RULES

By

Alexander M. Knight, Chief
Bureau of Condominiums

Under the best of circumstances the operation of a condominium is a complex matter. Even without the myriad of laws, rules and regulations the day to day operation of even the smallest communities is difficult at best. Add to the operation of the condominium the requirements of declarations, by-laws and the statute, the job becomes even more difficult. Difficult, but not impossible.

It is possible to operate a condominium efficiently thanks in large part to the many opportunities available to unit owners to become better educated and informed on the various regulations. Because condominiums are creatures of statute, the operation of the condominium is governed by statute. As head of the Bureau responsible for the regulation of condominiums, I have been asked here today to discuss the operation of the condominium from the perspective of the state, or put another way, "What does the Bureau expect from lay officers and directors?"

One way to answer that question is to approach it from the negative, and ask, "what we don't expect?" We don't hold the unit owner controlled association to the same standard as we do for developers. While we expect the association, whether controlled by the unit owners or the developer to comply fully with the requirements of the Condominium Act, we are much less forgiving of developers who violate the law. A few statistics may be helpful in illustrating this point. In the packet of information there are included three graphs. The first, titled "Cases By Respondent" refers to investigations handled by the Bureau for the years 1982 through 1985. Respondent refers to the subject of the investigation which is either the developer or the unit owner controlled association. (We further define developer investigations into two categories: Developer/Filing for violations relating to the requirements that a developer file with the Bureau certain documents prior to offering units to the public; and Developer/Assn. for violations relating to the operation of the association during the time of developer control.) As you can see the unit owner controlled association is the subject of most of the Division's investigations.

The next two graphs illustrate the formal administrative enforcement proceedings initiated by the Division: "1984

Dockets Issued" and "1985 Dockets Issued". As you can see, although unit owner controlled associations accounted for approximately 65 percent of the investigation they only accounted for 18 percent of the formal administrative proceedings. The reason for the variance is twofold. First, it is a part of the developer's business responsibility to know of and comply with all applicable laws and rules. Further, a significant number of problems we encounter with owner controlled associations are the result of the developer not complying with the requirements of condominium law in the operation of the association and thus getting the association off to a bad start. Accordingly, the developer should be held to a higher standard. Second, we recognize most associations are making a good faith effort to comply with the law and we are willing to work with them. Approximately 40 percent of the cases against unit owner controlled associations are resolved through voluntary compliance. Of the remainder, 25 percent are determined to be outside our jurisdiction (ie. document violations) and in another 20 to 25 percent of the cases, we prove the allegation(s) to be unfounded. Only an average of 4 percent of the investigation against an owner controlled association are ultimately resolved through formal proceedings.

Again, we expect the association to comply with all applicable laws, regardless of who is in control. While we do not hold the owner controlled association to the same standards as we do for developers when it comes to exercising our discretion to initiate enforcement proceedings, we do have high expectations of the owner controlled association.

First, we expect the officers and directors to recognize the association is more than a business. The association is responsible for the operation of the condominium, but the condominium is more than painting and mowing, more than pools and parking lots. The condominium is people. There are social responsibilities that must be accepted by those who serve as the leaders of a community. The board's primary social responsibility is to provide that kind of leadership which promotes community in the association. The board must know how to organize people and unify them toward a common goal. The board must understand the benefits of effective communication and the importance of soliciting input and ideas from the membership (for example, committees, projects, newsletters, surveys, etc.). The board must realize it has to foster a feeling among the members that they belong to a group and their participation and self-giving is necessary if the group is to survive. These are the intangibles of leadership. No statute or regulatory agency alone possesses the power or influence to provide for a healthy condominium community--it has to come from these intangibles of leadership.

The board must possess a vision. They must ask

questions that go beyond the mere fulfillment of following the letter of the law. For example, one board wanted to construct a fence around the perimeter of the condominium property. They knew the project was controversial and sought legal advice, and were advised of various legal interpretations which would allow them to accomplish this goal. Never, however did they consider the questions of, "is it fair to all?" or "will this build a better community?" The operation of a condominium association should be at higher standards than other corporations because of the social implications for each unit owner in each decision made by the leaders.

Secondly, we expect the officers and directors to understand that as condominiums are creatures of statute, the association operation is strictly governed by both the Condominium Act and the individual condominium documents. These provisions represent a covenant relationship between each unit owner. When you bought your unit, you accepted this covenant as the principles by which you shall live together. The importance of this covenant should be emphasized over and over, especially when new owners join your condominium. The board must make decisions within the guidelines of the documents and make sure the membership understands the rationale of the decisions--why the decision was made, what authority allowed the decision to be implemented. The membership needs to be constantly educated by the board on its duties and responsibilities. This will foster trust in the board and its business decisions and its duty to follow the applicable requirements of law.

Thirdly, even though the operation of the condominium can be very complex there is an abundance of help available. This event today, is but one example of the many educational opportunities available to unit owners. Because there is so much help available, both from our Bureau and the private sector, we expect the leaders of the communities to take advantage of it.

Finally, we just expect the association to make a good faith effort to comply. Of those cases that go on to formal enforcement proceedings, some are legitimate disputes which need the decision of a third party hearing officer or court. However, many involve simple issues that come up over and over again within the same community, such as denying access to unit owners to books and records, improper proxies, no financial statement or improper budgets. When the association demonstrates that it will not comply we are not hesitant to utilize our enforcement authority. Most associations however, do make a good faith effort to comply, and in the end that all anyone can ask.

LAUDERDALE WEST NEWS

AUGUST 2005

SPAM OFF!

continued from page 5

have no control. One resident rode over my feet. He thought it was funny. Not funny.

These motorized wheelchairs are wonderful. Let's keep them safe. Please learn to use them. Please don't let people say "these people should not be driving". Follow the rules. Maybe if you're lucky, you will not hurt somebody or kill somebody. Cars and all motorized vehicles must be used correctly.

Sandy Spector

Shortcut is Dangerous

To all the people who cut through the parking lot of the main clubhouse: It is exactly 1/10th of a mile from the entrance to the clubhouse to NW 11th Street and it is exactly 1/10th of a mile if you went around the clubhouse to NW 11th Street. Don't believe me? Clock it!

Now that you know this information, maybe those of you who cut through to save time will go around as you should.

Sandy Spector

Notice to Single Family Home Owners

From the Board of Directors

Our documents require that all owners of single family homes shall obtain insurance coverage at their own expense on their own residence buildings and on their own personal property and for their personal liability and living expense.

The Association carries no (ZERO) insurance on the lot/detached houses in Parcel C, which consists of Sections II, III and IV, of Lauderdale West. In order to maintain the character of the community, the Association requires owners of single family homes to purchase insurance on their houses, including insurance on the roof. The Association will not be responsible for replacing uninsured buildings or roofs and other insurable building damage due to hurricanes or any insurable perils. ♦

Watch Out!!!

School starts August 8th this year, one week earlier than last year. Take extra care when driving and watch out for the little folks!

WHILE WE MOURN

By Mirlam Moshen

In recent weeks, we as a community have suffered a number of losses of friends and neighbors. While we mourn their passing, let's pause to give note to the fleeting span of life. Let's give thought—serious thought—to giving those around us a little more understanding, a little more pleasure. Let's soften our criticism, let's offer our help, so that all of us may enjoy our lives.

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