COMMUNITY COUNSEL

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CAN WE COLLECT AN INITIAL ASSESSMENT?

I am often asked to draft amendments to the governing documents of associations allowing them to collect money from new buyers of homes as a new source of assessment income. The idea is certainly appealing. At the time of closing it seems that everyone and their most remote relative has a hand out to collect a fee of some sort, so why shouldn't the new community association get in on the action?

A properly drafted amendment can do the trick for an HOA, even allowing the amount of the fee, generally styled as an "initial assessment," to be increased over time without need of a further amendment. The drafter should be careful to exclude transfers via lien foreclosure or lease, and transfers that are technical, such as those that only change the name of the owners without changing the real identity, like the creation of a family trust or a life estate and remainder interest. If the assessment is chargeable only to the new buyer, it will be that much easier to get the current owners to vote in favor of adopting an amendment of this type.

But while these practical considerations are the main concern for Florida HOAs, the situation is much different for Florida condominiums. The barriers to adoption of this additional source of income are substantially different due to statutory limitations found exclusively in the Florida Condominium Act, and as a result it is likely that the process will be daunting to the point of discouragement.

There are two main factors that come into play in the context of condominiums. The first is that assessments are their main source of income. This means that attempts to characterize the charge as anything other than an assessment will come to naught. The Division has ruled that condominium associations have limited authority to impose other types of charges not authorized by the Condominium Act. If the money is intended to be used to pay common expenses, then the money will be an assessment.

Second, Section 718.110(4), Fla. Stat. requires that any change in how the members share the common expenses must be approved by both the impacted owner and the holders of liens on the affected units. These changes are treated differently for two reasons. First, they will impact some owners disproportionately to others and those hardest hit may not be the ones who can most easily absorb the extra burden. Second, should one or more owners default, the extra financial burden will fall to the holders of mortgages of the units involved, and the Florida Legislature is ***very*** protective of mortgage lenders in this state.

As a result, the change for condominiums will require a documentary amendment needing approval of **both** unit owners and mortgage holders. Getting mortgage holder approval can be an arduous and expensive proposition, involving procuring title examinations for many units and endless correspondence that is met by nothing more than silence.

Note that the result will be different if the original documents provide for an initial assessment for developer use. The foregoing applies only to attempts to add the charge by amendment to existing governing documents.

RECENT CASES

- ASSOCIATION, AS PLAINTIFF BEARS THE BURDEN OF DISPROVING DEFENDANT'S DEFENSES, INCLUDING THAT HER CLAIM THAT SPECIAL ASSESSMENT WAS FOR UNAUTHORIZED PURPOSES HAD BEEN HEARD AND DECIDED ALREADY.
- A MATERIAL ISSUE OF FACT REMAINED FOR TRIAL AS TO WHETHER OWNERS OF LAND INTENDED TO BE BOUND BY AMENDMENTS MADE TO COVENANTS - TO WHICH THEIR LAND WAS SUBJECT - MADE AFTER THE LAND WAS SOLD.

THE INFORMATION GIVEN IS SUMMARY IN NATURE, FOR EDUCATIONAL PURPOSES. IT IS NOT INTENDED AS SPECIFIC OR DETAILED LEGAL ADVICE. ALWAYS SEEK INDEPENDENT LEGAL COUNSEL FOR ADVICE ON YOUR UNIQUE SITUATION.

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RECENT CASE SUMMARIES

In **Fern vs. Eagles' Reserve Homeowner's Association, Inc.**, 40 Fla. L. Weekly D595a (Fla. 2d DCA, March 6, 2015) Association brought an action to enforce special assessments against Owner. Association is a community of townhouses and villas that was constructed prior to 2001. Apparently, the initial buildings in the community were poorly constructed. These units required substantial reconstruction, whereas newer units required little or no repair. The members of Association divided into two camps – the owners of older units who maintained that Association had the power and the duty to perform extensive repairs on the townhouses, and the owners of the newer units who maintained that the repairs were primarily the responsibility of the unit owners. In this case, Owner was an owner of a newer unit. After considerable litigation and appeals in earlier cases involving the interpretation of the phrase "exterior of the Dwelling Units", the Second District Court of Appeal reversed the trial court's broad interpretation of the phrase and held that Association only had the authority to maintain the outer surfaces of the dwelling units. During the prior litigation, several special assessments were levied against Owner for the repairs to the units completed as ordered by the trial court, but prior to the reversal by the appellate court. In the instant lawsuit, Association was suing to recover more than $70,000 in special assessments levied against Owner. Owner raised as a defense that she was not required to pay an assessment for unauthorized expenditures by Association. The final judgment entered by the trial court noted that Owner "objected multiple times, in various forums, to her legal obligation to pay the special assessments at issue in this matter." On appeal, the appellate court noted that this finding of fact was entirely correct. However, the record did not demonstrate that Owner's defense was barred by res judicata or collateral estoppel or otherwise resolved in a prior action. In reversing the trial court's final judgment against Owner, the appellate court noted that Owner was not required to obtain a prior ruling in her favor on her defense; Association was required to establish that the defense had been resolved by some order in a prior proceeding that was binding on Owner. Because there had never been an earlier decision on this defense binding on Owner, Association had not proven its case that Owner's defense was barred by res judicata or collateral estoppel.

In **Fiore vs. Hilliker**, 40 Fla. L. Weekly D656a (Fla. 2d DCA, March 13, 2015) a dispute arose between adjacent land owners over the continued applicability of covenants and restrictions. Prior to 1985, the property owned by both litigants was owned by Developer. Developer also owned a large parcel of adjacent land that was developed by Developer as The Shallows subdivision. In 1984, Developer recorded a document entitled "The Restrictions As to Use for The Shallows." In 1985, Developer contracted to sell the Hilliker property to Robert and Anne Sonn, Hilliker's predecessors in title. Specifically, Sonns purchased the property in dispute along with lot 11 of The Shallows subdivision. The deed stated that the conveyed property, including both the separate parcel and lot 11, was subject to the restrictions described in an attached Schedule B. Schedule B specifically provided that the properties would be subject to The Shallows restrictions. In 1986, Developer sold the adjacent property to Fiores. In 1989, an amendment to The Shallows restrictions was recorded and purported to extend its applicable time for an additional ten years. In 1998, the Sonns conveyed their property (the disputed parcel and lot 11) to Hilliker subject to the "restrictions of record." On June 3, 2013, Hilliker filed the instant action asking the trial court to rule that The Shallows restrictions no longer encumbered his property because the twenty-year limit specified in the original restrictions had expired in 2004. Hilliker further alleged that the 1989 amendment to the restrictions extending that term was not applicable to his property because The Shallows restrictions were not amended until after the 1985 Developer-to-Sonn deed conveyance. Hilliker moved for and was granted a summary judgment by the trial court, thus holding that the restrictions were no longer binding on Hilliker. On appeal, the Second District Court reversed entry of summary judgment finding that the intent of Developer and Sonns to be bound by future amendments to The Shallows restrictions was a disputed issue of fact which could not be resolved on summary judgment.

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