COMMUNITY COUNSEL

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HOA DEVELOPERS AND RESERVE FUNDING

In an important decision recently handed down by the appellate court covering much of Central Florida, Centex Homes was ordered to pay almost $1 million dollars into the reserve account of an HOA it had developed.

Initially, Centex, as the developer, paid into the reserves about $32,000, but then stopped paying anything into the reserve account except what it collected from the individual homeowners. Instead it opted to fund the deficit in the operating account until turnover, some eight year later, entirely avoiding paying any further reserves under the theory that the deficit funding guarantee language in Section 720.308(1)(b), Fla. Stat. excuses a developer from paying "… property expenses and assessments…" when it funds the deficit. It argued that this language permitted it to not fund all assessment obligations, including reserves.

However, a husband and wife (lawyer) - lot owner brought suit seeking to have Centex pay the unfunded reserve portion of its unpaid assessments. They relied on language in Section 720.303(6)(d), Fla. Stat. which unequivocally requires that reserve accounts to be funded once established by the developer unless the failure to fully fund the reserves is approved by the members in advance on an annual basis.

In order to avoid any possible conflict in the language between the two sections of the law, the court read the language in Section 720.308(1)(b), Fla. Stat. narrowly, to exclude reserves from the meaning of "assessments" so as to mean only operating expenses.

The court also had no trouble finding that these homeowners had standing to raise the issue, even though they would not receive any direct return from Centex. The court reasoned that by virtue of the payment into the reserves by Centex, there was a real likelihood that these plaintiffs would avoid a future special assessment or increase in assessments to fund deferred maintenance of capital improvements, and this was sufficient to confer standing to bring the action.

The holding in this case will not apply unless the developer of the community establishes an obligation to pay reserves as part of the assessments paid by the lot owners. If payment of reserves is purely discretionary, then there is no obligation to pay reserves and hence no obligation on the part of either the lot owners or the developer to fund reserves. It is only when the funding of reserves is required or mandatory that the holding in this case will be applicable and a developer will be required to fund reserves, even if it is excused from paying other assessment obligations.

Homeowner associations established within the past ten (10) years would do well to examine their books and records to see if this holding may help them look back to their developers for possible additional financial contributions.

RECENT CASES

- PER THE VOTING PROCESS IN THE BYLAWS, AN ELECTION WAS HELD ON THE DATE SPECIFIED THEREIN AND A BOARD ELECTED. THAT BOARD WAS VALID AND IN POWER AND AN INJUNCTION AGAINST THAT BOARD WAS OVER TURNED ON APPEAL.
- WORDS MEAN SOMETHING. ALTHOUGH RECORDED COVENANTS REFERRED TO CONSENTING MEMBERS, THEY ALSO REFERRED TO "ALL MEMBERS," AND THIS WAS ENOUGH TO CREATE A CAUSE OF ACTION TO DETERMINE WHETHER THE COVENANTS WERE BINDING ON PLAINTIFF.

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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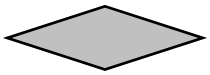
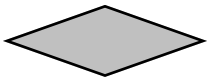
RECENT CASE SUMMARIES

In **M&M Property Management, LLC, vs. Palm-Aire Country Club Condominium Association No.2, Inc.**, 41 Fla. L. Weekly D2758b (Fla. 4th DCA, December 14, 2016) on February 29, 2016, the then-Board of Directors of Association attempted to postpone the annual board election scheduled for March 2, 2016. Although there was some ambiguity as to what exactly occurred at the February 29 meeting, the record could support the conclusion that the Board voted 6-3 in favor of postponement. There was no evidence that the members of Association voted to postpone the election. Thus, an election was held as scheduled on March 2. The dispute arose when Management Company refused to recognize the pre-March 2 Board, changed the bank accounts, and acted upon the instructions of the March 2 elected Board of directors. The trial court entered a temporary injunction and ordered Management Company to recognize the pre-March 2 Board and provide it with control and access over Association. On appeal to the Fourth District Court of Appeal, the appellate court noted that one of the requirements necessary for a temporary injunction is a substantial likelihood of success on the merits of the underlying case. On appeal, the appellate court reversed the trial court and found that there was not a substantial likelihood of success on the merits. The bylaws of Association set the date of the annual meeting and election for the first Wednesday in March, which in 2016 was March 2 and the members of Association had not voted to provide "different election procedures" allowing for postponement of the meeting solely on the basis of a majority vote of the membership.



In **Van Loan, et al., vs. Heather Hills Property Owner's Association, et al.**, 42 Fla. L. Weekly D80d (Fla. 2d DCA, December 30, 2016) Owners sued Association for declaratory relief, to quiet title, and for damages for slander of title. The community was founded in 1967. The community is comprised of six mobile home residential subdivisions. Each subdivision had a separately recorded plat and a set of restrictive covenants that was filed at the time the subdivision was developed. Neither the plats nor the restrictions contained any residential age restrictions. Association was incorporated in 1969 with the stated purpose of promoting recreational and charitable interests for those living in the community. Membership in Association was voluntary, and owners were not members of Association. In 2012, Association amended its articles of incorporation to provide that: "The record title holder of all lots shall be members." The amended articles also changed the purpose of Association to manage and operate Association as "a community intended and operated as 'housing for older persons' within the meaning of the Fair Housing Act Amendments of 1988." The amended articles were recorded with the secretary of state but were not recorded in the public records. Around the same time, Association adopted an "Additional Declaration of Covenants, Conditions, and Restrictions" which it then recorded in the public records. These amended restrictive covenants applied to each of the six subdivisions within the community and were recorded against the title to each and every lot therein. The declaration of amended restrictive covenants require that at least one person residing in each dwelling must be over the age of fifty-five, and they provide Association with the power "to approve in writing all sales, transfers or title, or leases of a lot, block, or parcel" after proof of buyer's age is provided. The amended declaration provides that it is "applicable to and binding upon the lots of all consenting property owners" situated in Association. However, the amended declaration subsequently states that "the owners who consent to and join in this Declaration do hereby impose upon the lots, blocks, or parcels of such owners in [Association]. . . . ***and all members of [Association]***" the covenants, restrictions and conditions set forth in the document. The amended declaration also states that it shall run with the land and be binding upon the present owners who have contemporaneously joined in the recording of this declaration. Owners did not consent to becoming members of Association or to living in an over-55 community and filed suit for declaratory relief, quiet title, and for damages for slander of title. Association moved to dismiss the complaint alleging that the amended declaration by its very terms only applied to "consenting" lot owners and therefore, since owners did not consent, the amended declaration did not apply to them. The trial court agreed and dismissed the complaint. On appeal to the Second District Court of appeal, the court noted that the complaint did in fact state valid causes of action supported by the documents attached to the complaint. The appellate court therefore reversed the trial court and remanded the case to the trial court for further proceedings.



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