Three Legal Opinion Pieces from Poliakoff Backer Law Firm

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Court Invalidates Amendment Reducing Vote Requirement

The right of condominium unit owners to amend their declaration of condominium has been confirmed by many appellate courts in Florida. In 2002, the Florida Supreme Court confirmed the principal that the Condominium Act provides broad amendment powers to unit owners limited only by the specific provisions of the Act and the procedures in a condominium's governing documents. See, *Woodside Village v. Jahren* 806 So.2d 452 (Fla. 2002) [confirmed the right of owners to ban leasing despite objections from owners who purchased relying on a right to lease].

In some condominiums, the developer-prepared documents imposed high thresholds for owners to approve declaration amendments. In some communities, the threshold was set so high that it is nearly impossible to obtain sufficient votes to make any changes. In many instances, amendment efforts fail more because of a lack of interest and participation by the owners than specific objection to the subject matter of the proposed amendments. Many community association attorneys have urged clients to put their efforts into seeking unit owner support for a change to lower the threshold for amendments so that future amendments may be more easily approved by the owners. A recent case out of the Florida Third District Court of Appeal (which hears appeals from Miami-Dade and Monroe County trial courts) calls into question the validity of that practical fix.

The Tropicana Condominium in Sunny Isles, Florida had language in its developer-created declaration requiring 100% unit owner approval to terminate the condominium. Amendments to the declaration required only 51% unit owner approval unless the proposed amendment altered the voting rights of any of the owners. Amendments which altered the voting rights of owners required 100% approval. In 2022, the Tropicana association obtained 51% unit owner approval to amend the termination language in the declaration to allow for termination of the condominium with 80% unit owner approval rather than the 100% approval originally required. Some owners objected and argued that the amendment was not properly approved since it altered their voting rights and would have required 100% unit owner approval. The association responded by confirming that the owners voting rights remained the same since each unit owner still had one vote

per unit. The trial court agreed with the association and denied the owners' request for a temporary injunction to stop implementation of the amendment.

On appeal, the Third District Court of Appeal agreed with the objecting unit owners and held that the amendment to the declaration reducing the percentage required to terminate the condominium “materially altered unit owners’ voting rights” by removing each owners’ individual right to veto a termination effort. In this case, the court construed the concept of *voting rights* to be something more than just the weight of an individual owners’ vote and added the element of the *power* of a single vote when the declaration requires 100% approval to the analysis. That is a novel concept the application of which may be limited to instances where an amendment changes a 100% approval requirement to something less, but it remains to be seen whether it may also be argued to limit *any* changes to amendment thresholds in declaration where similar language exists on the basis that it reduces the influence of a minority of owners to stifle a proposed amendment.

Court Holds that Code Enforcement Liens Do Not Bind Condominium Units or Common Elements

Occasionally, a municipality will site a condominium with code violations and may pursue fines for the association’s failure to comply.

In 2006, a Palm Beach County condominium known as Green Terrace Phase II Condominium was the subject of a City of West Palm Beach code enforcement action concerning alleged housing code violations and was fined. The City recorded a lien against the condominium which was not paid.

In February, 2024, the Fourth District Court of Appeal, the appellate court that hears appeals from trial courts in Palm Beach, Broward, St. Lucie, Martin, Indian River, and Okeechobee Counties held that such liens do not bind the common elements and do not bind the individual units.

A West Palm Beach City code enforcement special magistrate issued an order imposing a lien after repairs required by a prior order had not been made. The code enforcement fine assessed Green Terrace $100.00 per day, accruing until the violations were sufficiently addressed. The code enforcement order stated that a lien was being imposed pursuant to section 162.09, Florida Statutes (2006), and that once recorded, it would constitute a lien over certain real and personal property: “This Order shall be recorded in the Public Records of Palm Beach County, Florida and shall constitute a lien against all real property, and all personal property, owned by the

Respondent(s) within Palm Beach County, Florida, pursuant to Fla. Stat. 162.09." The order did not state the lien was against any individual unit owner or owners and no individual unit owner was listed as a respondent. No legal description of the property was included in the order, and no notice was provided to individual unit owners.

Over a decade after the City levied the fine, it had remained unpaid. During that period, one of Green Terrace's condominium units was the subject of a tax certificate and a tax deed sale. Apparently, the bidding for the unit exceeded the amount that was owed on the outstanding tax certificates and there was a surplus remaining after the sale. The former owner of the unit and the City of West Palm Beach both claimed that they were entitled to the surplus. The City's Clerk, being unsure as to how the surplus should be distributed, filed an interpleader action requesting that the court determine how the funds should be distributed.

The City cited section 197.582(2)(a), Florida Statutes (2022) to the court and argued that law required the clerk to distribute a portion of the surplus to governmental holders of recorded liens "against the property." The City reasoned that its code enforcement lien was against Green Terrace's common elements, and because each condominium unit owned a proportional share of Green Terrace's common elements, the lien was also against the unit that was sold at the tax sale.

The former unit owner argued that the code enforcement lien was not a "lien against the property" of Green Terrace, because the lien was not filed against the units. Even though the trial court agreed with the City, the appellate disagreed and reversed the trial court by holding that a municipal lien for code violation fines against a condominium's common elements does not bind the unit owners and does not create a lien on the common elements or the units.

The Florida Condominium Act provides in Section 718.121 that liens against a condominium as a whole are prohibited without the unanimous consent of the condominium unit owners. The statute provides in pertinent part: "Subsequent to recording the declaration and while the property remains subject to the declaration, no liens of any nature are valid against the condominium property as a whole except with the unanimous consent of the unit owners. During this period, liens may arise or be created only against individual condominium parcels." The appellate court held that the law applies to all types of liens, including code enforcement liens and prohibits code enforcement liens that are placed on a condominium as a whole without the unanimous consent of the unit owners. The court drew a distinction between municipal code enforcement liens and construction (mechanics) liens because the same statute prohibiting liens without owner

consent contained an exception that authorized liens against all units when labor is performed on or materials furnished to the common elements. Such liens may be the basis for the filing of a lien against all condominium parcels in the proportions for which the owners are liable for common expenses.

If you are either an association or a unit owner who is faced with collection of a municipal lien for code violations, you should contact your attorney to discuss your legal rights and how this case may affect them.

Federal Corporate Transparency Act RULED UNCONSTITUTIONAL

As readers of *BackerReport* may recall, our January 2024 issue explained the impact of the federal law titled the Corporate Transparency Act (CTA) and described how invasive and time consuming it was anticipated to be for Florida community associations who were not exempt from its requirements.

In summary, the federal law was sponsored by Florida's Senator Marco Rubio and others in 2019, enacted by Congress on January 1, 2021 despite a presidential veto and went into effect January 1, 2024. The new law requires community association directors and others to disclose significant private personal information to the government simply because they served on the board. The deadline for compliance is January 1, 2025.

The CTA mandates all new companies formed or qualified to do business in the United States (and by January 1, 2025, all companies formed or qualified to do business in the US prior to January 1, 2024) to report beneficial ownership information (BOI) to the U.S. Treasury Department’s Financial Crimes Enforcement Network (FinCEN). There are substantial civil and criminal penalties for willful reporting violations. As of the date of this article, there have been no amendments to the law to exempt community associations from the mandates of the law even though the stated purpose of the law is to prevent individuals from using anonymous shell corporations to engage

in illicit activities like money laundering, sex trafficking, fraud, and terrorist financing.

We had written here that there was an effort being made by trade groups and others to seek clarification about the filing requirements and an effort is being made to add community associations to the list of exempt companies, but were unaware that the National Small Business Association had already filed suit against the United States government challenging the validity of the law under the United States Constitution. The suit was filed in the United States District Court for the Northern District of Alabama. On March 1, 2024, that court filed a Memorandum Opinion which held that the law was unconstitutional (a judgment will be entered later) as the court held that the law cannot be justified as an exercise of Congress' enumerated powers. The court noted that the government's intent and reasons for the law may have been "smart," but "Congress sometimes enacts smart laws that violate the Constitution..." and explained that this case illustrates that principle.

It is likely that, once a judgment is entered, the government will appeal the District Court's decision to the 11th Circuit Court of Appeal. That is the same appellate court that hears appeals from Florida Federal Courts so an opinion from the 11th Circuit will guide how courts in Florida's District Court's will rule on the issue. With any luck, we will have a decision before the January 1, 2025 compliance deadline is upon us. Stay tuned.