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Homeowners' Associations in Florida: *Issues and Analysis for the Real Estate Developer*

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Introduction

The population of Florida has nearly doubled since 1980.¹ As the population continues to grow, real estate developers build more homes and create more communities, many of which are (or will eventually be) governed by a homeowners' association (an "HOA"). There are currently more than 11,000 HOAs in Florida.²

An HOA is a not-for-profit corporation created pursuant to Florida Statutes, Chapter 617 and regulated under Chapter 720 for, among other reasons, the purposes of owning, managing, maintaining, repairing and/or replacing common property of a community.³ Such common property is deeded to the HOA by

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the developer prior to the turnover of the association from the developer to the homeowners⁴ (the "Turnover"). The HOA is governed by the recorded HOA documents (collectively, the "HOA Documents") which typically include the declaration of covenants and restrictions (the "Declaration"), the articles of incorporation of the HOA, the by-laws of the HOA, and any rules and regulations that may have been promulgated.

The HOA Documents, in conjunction with statutory requirements, determine the breadth and scope of the HOAs authority and role.⁵ This includes, among other rights, the right to make assessments, assert liens for non-payment of monies due and owing to the HOA, and assert general management and control of the common property.⁶ Developers can take advantage of the available contractual latitude of the HOA Documents which, if drafted properly, can provide significant protection and rights to the developer. After all, the HOA Documents are executed by the developer and drafted and recorded by the developer's attorney.

In this article, we will examine HOAs with attention to: (i) the preparation and meaning of the HOA Documents; (ii) what membership in an HOA means to homeowners; (iii) Florida appellate case law relevant to issues that drafters of HOA Documents should consider; and (iv) the developer's role with regard to the HOA and the HOA Documents.

The HOA and HOA Documents

An HOA is a regulated entity, subject to Florida Statutes, Chapter 617, which governs not-for-profit corporations, and Chapter 720, which specifically governs HOAs. As a general

rule, the parcels are owned in fee simple by the homeowner and typically improved with a residence. As mentioned, the HOA itself owns the common property (also known as "common areas"), upon which developers often construct certain common infrastructure such as recreational facilities (i.e., a pool, tot lot, clubhouse), common open spaces, roadways and parking areas.

The HOA Documents are recorded in the public records of the county in which the community is located prior to any homeowner closing on a home and, as such, become "title documents" (also known as "covenants running with the land") which subject the home to the terms of the HOA Documents and bind each homeowner to comply with the terms of the same. In other words, each homeowner agrees to and accepts the terms of the HOA Documents by closing and accepting title to his or her home.

The HOA Documents generally encumber both the individual residences and the common property. Although each set of HOA Documents is unique, most contain: (i) provisions explaining the rights and obligations of HOA membership including, without limitation, the obligation to pay assessments;⁷ (ii) use restrictions on the HOA and the homeowners with regard to use of the homes, the lots, and the common property; (iii) the developer's rights with regard to the HOA, the homeowners, and the community as a whole; and (iv) a copy of the articles of incorporation and by-laws of the HOA, which are typically recorded in the public records as exhibits to the Declaration, and the rules and regulations of the HOA, which are typically unrecorded.

Drafting and Interpreting HOA Documents

The drafting of HOA Documents is critically important to creating the rights and obligations of developers, the HOAs, the homeowners and even municipal governments and agencies that may have rights memorialized within the HOA Documents (i.e., the applicable water control district, city and/or county). Careful drafting, as well as the HOAs record of enforcing the covenants and restrictions contained in the HOA Documents, can have a significant impact on the outcome of a case relating to the interpretation of the language of the HOA Documents.

HOA Documents are the subject of voluminous case law in Florida, specifically with respect to the enforcement of the restrictive covenants contained therein. Certain restrictive covenants are disfavored under Florida law, and particularly where ambiguous, the same have been strictly construed against those who assert the power to limit and/or restrict the homeowner's free use of his or her real property.⁸ However, if the restrictive covenants set forth in the HOA Documents are unambiguous, clearly evidencing the intent of the parties, the covenants will typically be enforced according to their terms.⁹

In *Wilson v. Rex Quality Corp.*,¹⁰ the disputed restrictive covenant stated that a commercial sign could not be displayed “on any lot.” The HOA sued for enforcement of the restrictive covenant, arguing that the defendant/homeowner was in violation of the provision where such defendant/homeowner parked a vehicle on the lot which contained an advertisement painted thereon. The appellate court disagreed, reversing the trial court’s ruling, interpreting the text “on any lot” literally, and suggested that the covenant could have been written to restrict signs from being displayed “on any lot or vehicle,” but was not. The Wilson court reasoned that giving the words their “ordinary and obvious meaning,” the restrictive covenant only relates to signs posted on the lots, and not any vehicle parked on the lot.

In *McMillan v. Oaks of Spring Hill Homeowner’s Ass’n, Inc.*¹¹ an HOA brought an action against homeowners who had placed a prefabricated shed on their property in violation of the restrictive covenants contained in the HOA Documents. In its review of the facts, the court noted that: (i) the HOA Documents stated that no sheds (or other lean-to or detached buildings) are permitted to be “erected” upon any lot; (ii) the homeowners were placed on notice by the HOA that placing a pre-constructed shed on their lot would violate the HOA Documents; and (iii) despite the foregoing, the homeowners placed a pre-constructed shed on their lot.

After the trial court granted the HOAs motion for summary judgment, the homeowners appealed, arguing that they had not “erected” a shed on their lot, but rather, had “placed” a pre-built shed on the same. The Fifth District Court of Appeal of Florida found that while Florida law makes clear that restrictive covenants should be narrowly construed, such restrictive covenants should not be construed in such a way that would defeat their plain and obvious intent. Accordingly, because the plain and obvious purpose of the restrictive covenant in the instant case was to keep sheds out of the community, the court affirmed the decision of the trial court and granted the HOA’s request for an injunction requiring the homeowners to remove their shed.

In *Bessemer v. Gersten*,¹² the Florida Supreme Court ruled that a developer’s recreation assessment lien could take priority over a property owner’s homestead rights. In *Bessemer*, the developer had filed a Declaration which stated that: (i) purchasers of homes within the HOA would have to pay a monthly recreation assessment fee; and (ii) the developer “shall have a lien upon such owner’s lot for the aforesaid amount of \$10.00 per month until such amount is paid ...” The Florida Supreme Court held that this language served as acquiescence by the homeowner of the receipt of title subject to a pre-existing lien, and as such, had priority over the homeowner’s constitutional homestead rights.

Limitations on the Enforcement of HOA Documents

Notwithstanding express language in the HOA Documents, Florida courts have determined that an HOA can, in effect, waive its rights to enforce the restrictive covenants contained in its own HOA Documents through certain courses of action, or by the failure of the HOA to act at all. In *Woodlands Civic Assoc. Inc. v. Darrow*,¹³ an HOA brought an action to enforce a deed restriction limiting the use of a specific lot within the HOA subdivision (being used for a chiropractic office) to residential purposes, relying on the plain language of the restriction, which stated as follows: “[n]o lot shall be used except for residential purposes.”

However, the appellate court, affirming the trial court’s ruling, soundly rejected the HOA’s argument, relying upon the equitable principles of waiver. The court recited certain of the

underlying facts, including that the immediate prior owner of the property had: (i) used the property for business for years; (ii) advertised the property for sale as a commercial location; and (iii) renovated the building’s exterior for commercial use, all in an open and obvious fashion without any objection by the HOA. Further, the lot owner made additional commercial improvements to the property for two months without any HOA complaints. The Darrow court reasoned that “the instant facts present a classic case of waiver so as to estop [the HOA] from enforcing its deed restrictions against [the lot owner].”¹⁴

While the HOA Documents covenants govern the homeowners, they are not enforced without regard to their reasonableness. Courts have held that if an HOA restrictive covenant is unreasonable or arbitrary, or if it is implemented in an unreasonable or arbitrary manner, it shall not be judicially enforced.¹⁵ For example, in *Robertson*,¹⁶ the Florida Fifth District Court of Appeal dealt with a situation where the Master Declaration which governed the HOA stated that all roofs were required to have grey, asphalt shingles. The homeowner built a house with a brown roof, for which the homeowner had received no HOA approval. The HOA sued for violation of the HOA Documents.

In reversing the trial court’s award of summary judgment in favor of the HOA, the appellate court queried whether the roof color requirement was reasonable, identifying that there was no record evidence on this point. Further, the court was interested in whether other houses were exempted from this requirement, and/or otherwise in compliance with the required color scheme. The court determined that because there was no evidence provided as to the “reasonableness” of the restrictive covenant, no evidence showing that the other homes in the subdivision were in compliance (or required to be in compliance), and no evidence showing whether other homes were exempted from such covenant, summary judgment was inappropriate. Accordingly, the case was remanded to the trial court to determine whether this restrictive covenant was reasonable and whether the same was being consistently obeyed and enforced throughout the subdivision.

Similarly, in *Payne v. Cudjoe Gardens Property Owners Assoc., Inc.* the subdivision in question was governed by an HOA whose governing HOA Documents subjected each property to certain set-back restrictions. The homeowners in question failed to submit their building plans to the HOA for approval, and the HOA sued for an injunction requiring compliance with the HOA Documents. The trial court granted the HOA’s motion for summary judgment requiring compliance with the restrictive covenant; however, on appeal, the homeowners presented evidence that numerous other homeowners within the subdivision had violated (or were currently in violation of) the restrictive covenant at bar.

Accordingly, the Third District Court of Appeal of Florida reversed the trial court’s award of summary judgment, finding that additional evidence was required in order to determine: (i) how many other property owners were in violation of this requirement; (ii) whether these violators received variances to exempt them from this requirement; and accordingly, (iii) whether the enforcement of this provision against the homeowner/defendant in the instant case was arbitrary or unreasonable. The court made clear that where evidence may exist which would demonstrate that an HOA was enforcing a restrictive covenant arbitrarily and unreasonably (i.e., enforcing such restrictive covenant against some, but not all, homeowners without justification), no decision to uphold the enforcement of such restrictive covenant would be made upon motion for summary judgment,

as such decisions regarding genuine issues of material facts require a finding by a judge or a jury upon presentation of all of the evidence.

It is important to note that although the developer typically has the unilateral right to amend the HOA Documents prior to the Turnover, after the Turnover the HOA Documents typically require approval by 66% of the Board and, in many cases, 75% of the total voting membership.¹³ As such, problems with the HOA Documents and/or undesired provisions can be very difficult to delete or modify after the Turnover occurs.

The Obligation to Pay HOA Assessments and Fines

As previously noted, each homeowner is legally obligated to make assessment payments to the HOA and there is typically no defense for the failure to do so (except bankruptcy), including the failure of the HOA to properly maintain the buildings and/or common property. In *Abbey Park Homeowners Ass'n v. Bowen*,¹⁹ the court held that the HOA's failure to maintain the HOA's common property was not a defense to the homeowner's

failure to pay fees that were due and owing. The appellate court reasoned that because the homeowner's obligation to pay the fees, as set forth in the applicable HOA Documents, "was conditioned solely on her acquisition of title," the defense of the HOA's failing to maintain the common property failed as a matter of law.²⁰

Contrary to the homeowner's (almost) unconditional obligation to pay assessments to the HOA as noted above, the right of the HOA to impose and collect fines against homeowners is conditioned on both the current language of Florida Statutes, Chapter 720 and the provisions of the HOA Documents. In *Zerquera v. Centennial*

Homeowners' Assoc.,²¹ the Florida Third District Court of Appeal concluded that the homeowner purchased a home subject to the HOA Documents, which did not provide that the fines assessed by the HOA for violation of the applicable restrictions and covenants would be treated as assessments (which were explicitly a "continuing lien on the property"), but did give the HOA the ability to amend the HOA Documents in a reasonable manner. Two years later, the HOA amended HOA Documents, setting forth expressly that the fines would be considered assessments, and thus become a continuing lien on the property.

Subsequently, four years later, the homeowner was fined \$200 for violating certain HOA restrictions, and upon non-payment, the HOA moved to foreclose against the homeowner's property. The homeowner objected, stating that he took ownership of the home prior to the amendment to the HOA Documents permitting a foreclosure based upon a fine for a violation. Attorney's fees and costs requested by the HOA in the foreclosure action by this point exceeded \$30,000. The *Zerquera* court rejected the homeowner's argument, finding in favor of the HOA, reasoning that the homeowner had sufficient constructive notice that the fine constituted a "continuing lien." Thus, the foreclosure could proceed against the homeowner's homestead because, among other reasons, the homeowner had notice that the HOA Documents could be modified.

Developer's Rights Under the HOA Documents

Developers (also referred to as "declarants" under certain HOA Documents) are the creators of the HOA Documents, and execute the same²² prior to their recording in the public records. Many of the developer's rights are memorialized in the HOA Documents including, without limitation, easement rights, development rights, marketing rights, and the right to control the HOA prior to the Turnover. If the Documents are drafted properly, the developer has the unilateral right to amend the HOA Documents any time prior to the Turnover. In fact, if the developer's lawyer drafts quality HOA Documents, they can be very effective in protecting the rights of the developer.

The HOA Documents should always provide the developer with all of the legal rights it needs to successfully develop the community, including keeping control of the HOA until Turnover. The HOA Documents should also include effective disclaimers of liability to the HOA and the homeowners regarding the property, in favor of the developer, and properly disclose each homeowner's obligations with regard to the HOA, the home, and the community. However, if the HOA Documents are not drafted carefully in order to protect the developer, are not customized to fit the particular community, or are not drafted with a comprehensive understanding of Florida law, the HOA Documents can become problematic for the developer.

For example, in *Hill v. Palm Beach Polo, Inc.*,²³ a homeowner sued the developer of a residential real estate development claiming that the developer had exceeded its authority under its own HOA Documents when it attempted to amend the assessment provisions of such HOA Documents. The Fourth District Court of Appeal summarized the relevant provisions of the HOA Documents by stating that, as drafted, the HOA Documents provided the developer the authority to "alter, modify, change, revoke, rescind, or cancel any or all of the restrictive covenants contained herein." All other changes to the HOA Documents required a two-thirds vote of the HOA's board of directors and voting members.

In its analysis of the case, the court noted that pursuant to Florida law, the term "restrictive covenant" is understood to mean "an agreement between landowners that their property will be used only for specified purposes or in a specified manner."²⁴ The Court further noted the analysis in the *Bessemer* case, which provided that assessments imposed by a developer upon lots within a subdivision constitute "affirmative restrictions." Accordingly, the court held that the developer could not amend the assessment provisions of its HOA Documents because the same did not provide the developer with the authority to amend such affirmative restrictions, but rather, only provided the developer the power to amend the restrictive covenants.

Conclusion

This article is intended to provide some basic knowledge and understanding regarding HOAs in Florida. While not completely exhaustive, it has stressed the importance of carefully drafting HOA Documents. It is a complex area of the law and form documents not tailored to the specific community and circumstance may be insufficient to properly protect the interests of the developer and/or the HOA.

As the number of HOAs continues to grow in Florida, so will the need for lawyers versed in HOA law who are able to understand and interpret their clients' HOA Documents and give good counsel relating to the same. Additionally, title agents, lenders, and purchasers should make sure to carefully review the applicable HOA Documents prior to closing on a property, in order to fully understand the legal effect against the property.

Endnotes:

1 U.S. Census Bureau. 1980 Census of Population, Vol. 1, Chap. A, Part 11 (1982); University of Florida, Bureau of Economic and Business Research. Florida Population Estimates for Counties and Municipalities April 1, 2007.

2 2008 1st Qtr Florida Community Association Reference Directories (<http://www.sunshinelist.com>). This figure does not include the additional registered condominium associations in Florida.

3 One of the main distinctions between an HOA and a condominium association, pursuant to Chapter 718, Florida Statutes, is that the HOA actually owns the common property used by the homeowners, as opposed to a condominium where each unit owner owns an equal undivided fractional interest in the common elements; the condominium association does not own any real property, but does manage and maintain the same.

4 Transition of HOA control from the developer to the homeowners pursuant to Florida Statutes, Section 720.307 typically occurs three months after 90 percent of the parcels, in all phases of the community that will ultimately be operated by the HOA, have been conveyed to members.

5 Highland Lakes Property Owners Association, Inc. v. Schlack, 724 So.2d 621 (Fla. 5th DCA 1999).

6 Palm Beach County v. Cove Club Inv. Ltd., 734 So.2d 379 (Fla. 1999).

7 The payment of these assessments by each homeowner is secured by a lien right in favor of the HOA pursuant to the terms of the Declaration and Florida Statutes.

8 Shields v. Andros Isle Property Owners Assoc., Inc., 872 So.2d 1003 (Fla. 4th DCA 2004) (citing cases).

9 Id.

10 839 So.2d 928 (Fla. 2d DCA 2003).

11 754 So.2d 160 (Fla. 5th DCA 2000).

12 381 So.2d 1344 (Fla. 1980).

13 765 So.2d 874 (Fla. 5th DCA 2000).

14 Id. at 876.

15 Robertson v. Countryside PUD Residential Homeowner, 751 So.2d 674 (Fla. 5th DCA 2000) (citing cases).

16 Id.

17 837 So.2d 458 (Fla. 3d DCA 2003).

18 However, the approval requirements to amend HOA documents varies and sometimes is as low as a majority of the board and 75% of the votes present at a properly noticed meeting at which there is a quorum of members.

19 508 So.2d 554 (Fla. 4th DCA 1987).

20 Id.

21 752 So.2d 694 (Fla. 3d DCA 2000).

22 All other land owners and other entities with an interest in the property (including the developer's lender) must also "consent" or "join in" the Declaration prior to it being recorded in the public records by the developer.

23 717 So.2d 1080 (Fla. 4th DCA 1998).

24 Boyer, Florida Real Estate Transactions, Section 111.01, at 111-5 (1997 Ed.).
