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COMMUNITY UPDATE

INSIGHTS, ANALYSIS & IDEAS FOR COMMUNITY LEADERS SINCE 1980

Guarding Against Future Financial Losses

Is an Assessment Escrow Appropriate?

By Bradley Rothenberg, Esq.
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An assessment escrow is a tool for financial freedom. Imagine the day when you can make owners pay for their own collections and foreclosures, without overburdening the Association.

Here's how it works. An assessment escrow requires all new purchasers to place a sum of money in escrow with the Association at their time of purchase. It can be six, twelve, or even eighteen month's worth of assessments. The purchaser deposits that sum with the Association for use if the owner is delinquent in the payment of any monetary obligation to the Association. The owner must replenish the escrow if it is utilized on his behalf, and is entitled to return of the escrow upon sale of his unit or after a period of time of timely payments.

Implementation of an assessment escrow requires the drafting and adoption of an amendment to the governing documents. Upon circulation of the proposed amendment to the community, expect a backlash from local realtors. They will act as if the sky is falling. They will argue buyers will favor neighboring communities without an assessment escrow. In an already fragile economy, why would we put up more obstacles to purchase, they will ask.

Well, let's do the math…If units sell for $100,000, assessments are $2,000 annually, and the Association has a 24 month assessment escrow, do you honestly believe someone will purchase a unit for $100,000, but pass on the unit for $104,000 (knowing the $4,000 is still their money and only being held for a certain period of time)? Respectfully, I don't. Here's why…without this requirement the community next door can have 20% or 30% delinquencies. In fact, delinquencies are preventing people from qualifying for mortgages in the condominium down the block, because lenders won't lend in a community with a high delinquency rate. On the other hand, your community is likely to enjoy a low delinquency

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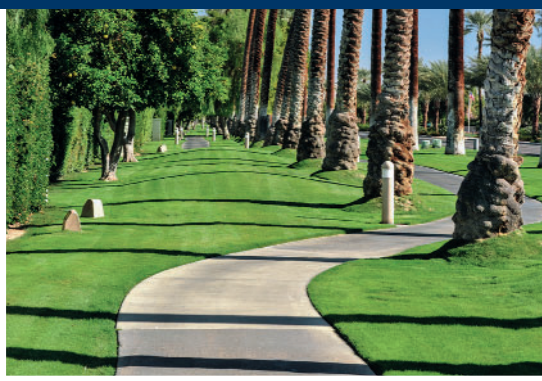

MEADOWS AT MARTIN DOWNS AND THE LIMITS TO HOA COMMON AREA ALTERATION BY THE BOARD OF DIRECTORS

By Jay Roberts, Esq.
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Frequent readers of the Community Updates know that there are many distinctions between the law that governs condominium associations and the law that governs homeowners associations. One big issue that condominium associations often confront is the "material alteration" of the common elements concept. In the condominium context, "material alteration" has been defined by Florida courts to mean "to palpably or perceptively vary or change the form, shape, elements or specifications of a building from its original design or plan, or existing condition, in such a manner as to appreciably affect or influence its functions, use or appearance." *Sterling Village Condominium, Inc. v. Breitenbach*, 251 So. 2d 685, 687 (Fla. 4th DCA 1971). However, there is no such provision related to material alterations of the common areas in a HOA community contained in the Homeowners Association Act.

Why is there not a statutory provision in the Homeowners Association Act, and does that mean that the Board in an HOA has the unfettered right to change the common areas without consent of the members? Although the Homeowners Association Act does not answer the question, two likely reasons are that (1) owners of condominium units also have an undivided ownership interest in the common elements of the condominium, which is not typically the case with common areas in a HOA community; and (2) common elements include things such as the exterior of the condominium building, support easements running through the condominium units as well as common amenities, etc.; whereas common areas in a HOA community typically are only things like common amenities and common parking. Therefore, it could be that the legislature did not believe it to be as vital to ensure that owners have a statutory right to vote on alterations to common areas in a HOA community, as it did for common elements in a condominium.

However, just because HOA community owners do not have a statutory right to vote on changes to the common areas, does not mean that a Board of a HOA has unfettered to rights to change the common areas as it pleases. As the case of *Swain v. The Meadows at Martin Downs Homeowners Association, Inc.*, 59 So. 3d 258 (Fla. 4th DCA 2011) (*"Meadows at Martin Downs"*) explains, an HOA Board is bound by the association's governing documents (i.e. declaration of covenants, articles of incorporation, and bylaws) regardless of the fact that a specific prohibition or limitation (e.g. limitation of the common area alteration) was not contained in the Homeowners Association Act.

In *Meadows at Martin Downs*, two owners of a lot within the HOA community filed a lawsuit to challenge the authority of the HOA Board which was seeking to replace a fenced-in portion of the common area parking lot, which was used to store building materials, with a permanent maintenance facility. The trial court granted the association's

motion for summary judgment against the challenging owners, which meant that the trial court determined that there were no disputed issues of material fact, and that as a matter of law, the association's Board, solely, had the power to change the fenced-in portion of the common area parking lot into a permanent maintenance facility.

The Fourth District Court of Appeal disagreed and reversed the trial court's summary judgment. Specifically, the appellate court stated that the governing document provisions could be read in a way to create a disputed issue of material fact regarding whether the association's Board had the unilateral authority to build the permanent maintenance facility, and therefore, the case was not proper to be concluded by summary judgment. In reaching this conclusion, and reversing the trial court, the appellate court cited several provisions of the Declaration of Covenants and Restrictions ("Covenants") which created, in the appellate court's opinion, a genuine issue of material fact. These provisions include statements regarding the association's right [by and through the Board] to maintain, repair, and replace the common areas. However, there was also a provision in the Covenants that appeared, in the appellate court's view, to limit actions that could be taken to convey, encumber, abandon, partition or subdivide any of the common areas without the approval of lenders holding mortgages within the HOA community. Also, notably, the *Meadows at Martin Downs* court points out that there was not an express provision in the Covenants that gave the Board the right to construct the permanent maintenance facility. By the time the case went back down for non-jury trial, the Meadows at Martin Downs association had passed various amendments which left no doubt as to the association's ability to make the change to the common area parking lot, and therefore the change was deemed to be a valid undertaking.

The take away from *Meadows of Martin Downs* is that while the Homeowners Association Act is not as detailed as the Condominium Act, HOA Boards remain constrained by the powers granted in the HOA's governing documents. Prior to taking on expansive or controversial projects without soliciting a member vote, it is wise for a Board to ensure that taking such action is properly within the scope of its delegated powers under the governing documents.

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rate, because it has an aggressive collection and foreclosure policy. **Moreover, it has $4,000 in escrow from every owner to use against if he or she becomes delinquent in the payment of any monetary obligation to the Association.**

I know I want to buy in a community with a low delinquency rate, rather than a community with a high delinquency rate. Don't you? Besides, being proactive at the front end (with an escrow requirement) sends a message: owners must pay assessments.

An assessment escrow won't affect current unit owners, because you cannot impose this requirement retroactively. Since the escrow is only held from persons who purchase after the date the effective date of the amendment, the amendment is wildly popular with current owners, and easy to pass. However, this action is not without risk and I have to warn you that an assessment escrow is considered by some to be a transfer fee, thus prohibited by the Condominium Act. Ask your community association attorney whether an assessment escrow is an option for your community. It may be exactly the type of preventive medicine your community needs to combat future delinquencies.

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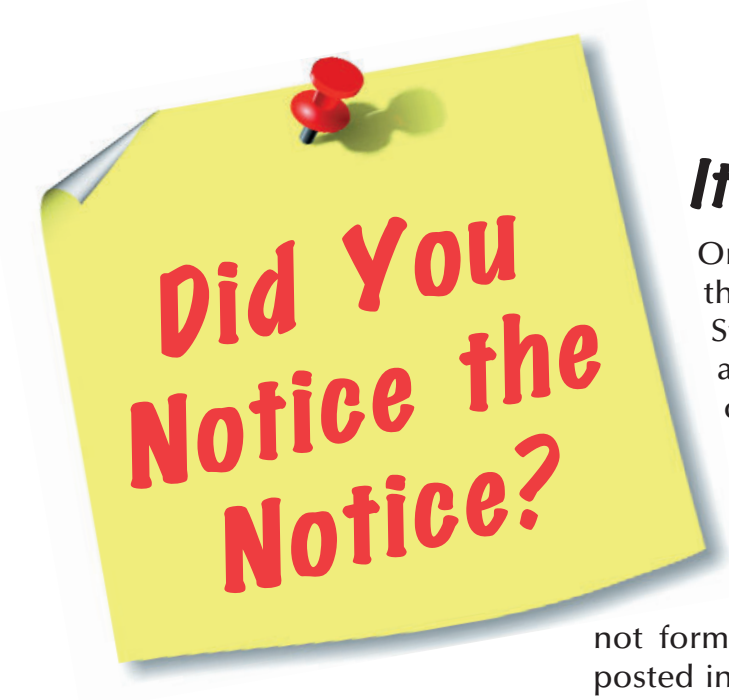

It's Official . . .

One of the most frequently overlooked requirements in the Florida Condominium Act, Chapter 718, Florida Statutes, is the requirement that the board of directors adopt a rule designating a specific location on the condominium or association property to post notices of board meetings. This express requirement is contained in Section 718.112(2)(c)1., Florida Statutes (2013). Many associations have a bulletin board or other area at the condominium where notice would logically be posted. Many associations, however, have not formally adopted a rule establishing that notice shall be posted in a specific area. The requirement to specifically adopt the location where notice will be posted is a statutory requirement and doing so would help the association to demonstrate that notice was properly posted if ever challenged. As such all associations should adopt a rule and establishing the official location for posting notice.

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