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COMMUNITY UPDATE

INSIGHTS, ANALYSIS & IDEAS FOR COMMUNITY LEADERS SINCE 1980

Termination of the Condominium form of Ownership

Membership Approval Requirements

Imagine you purchased a unit in a condominium in 2006, and took out a mortgage to help pay for that unit. You use the unit as your primary residence and, despite now being upside down on the value of the property, have timely made all of your mortgage payments and condominium association assessment payments. The developer of the condominium had difficulty selling units due to the crash of the real estate market, so many of the units are still owned by the developer. Then, within the past few days you receive a letter that tells you that the condominium is being terminated and the entire property, including what used to be your condominium unit, is being sold to a third party without your permission or consent. Imagine your condominium unit being valued in today's market, instead of what you purchased it at, and having to find a new place to live. Finally, imagine still owing money on your mortgage even though you no longer own the property.

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This exact scenario is playing out with increasing frequency throughout the State of Florida. Developers who were originally unsuccessful in selling condominium units and certain investors are taking advantage of what had been a little utilized change in Florida law in order to convert those condominium projects to apartment complexes in order to benefit from the currently booming rental market.

What is a termination of a condominium? If a condominium is terminated, the individual condominium units which used to be separately owned no longer exist. The land on which the condominium sits essentially reverts back to what existed at the time the condominium was originally created through the recording of the declaration of condominium, and the property is no longer owned by the individual unit owners, but rather by a designated third party (called the Termination Trustee). Each unit owner becomes a beneficiary of the proceeds resulting from the sale of the property most commonly in the same percentage the unit owner had of the common elements, common surplus and common expenses. For example, if there are 100 units in the condominium, and each unit owner had a $1/100^{th}$ interest in the common elements, each unit owner would likely then have a $1/100^{th}$ interest in the overall property after the termination is effective. The Termination Trustee then has the authority to sell the overall property and each former owner of a unit would be entitled to that owner's financial interest in that property, after taking out certain items, including expenses of the Termination Trustee and outstanding monetary obligations of the condominium association. In

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addition, if the unit owner has a mortgage, any remaining proceeds paid out will go to the bank/lender that holds the mortgage prior to the unit owner receiving anything. Unfortunately for affected unit owners, the termination of the condominium does not result in a termination of the unit owner's responsibilities under the note that was secured by the mortgage. A unit owner in this situation should contact his or her lender to determine what options exist.

Prior to July 1, 2007, Section 718.117 of the Florida Statutes provided that a condominium could only be terminated in accordance with the terms of the declaration of condominium or, absent a provision in the declaration, with the consent of 100% of the unit owners and the written consent of 100% of the lien holders (such as mortgagees). Many declarations of condominium provided that termination took the approval of 100% of the unit owners and lien holders to match the language of Section 718.117. The Florida Legislature then attempted to make substantive changes to Section 718.117 during the 2006 legislative session, which included the ability for optional termination of a condominium on any basis by a smaller fraction of the total voting interests. That bill was vetoed by Governor Jeb Bush due to various concerns, including property rights of existing unit owners and the unintended consequences of allowing one owner to purchase 80% of the units and seek termination of the condominium with the ultimate goal of redevelopment.

The Legislature brought the changes to Section 718.117 back in the 2007 legislative session, and this time they were signed into law by Governor Charlie Crist and became effective on July 1, 2007. The Florida Senate's staff analysis of the proposed amendments centered on the problems created by the destruction of condominium property caused by hurricanes, specifically Hurricane Andrew in August 1992. Badly damaged condominiums were unable to be terminated, as many unit owners were either non-responsive or unable to be located, which acted as an automatic rejection of the termination. Interestingly, there was no mention of problems created by the hurricanes that impacted Florida in 2004, 2005 or 2006. The Staff Report also contained a recommendation from the Department of Business and Professional Regulation that the Legislature should not permit optional termination of a condominium to be applied retroactively.

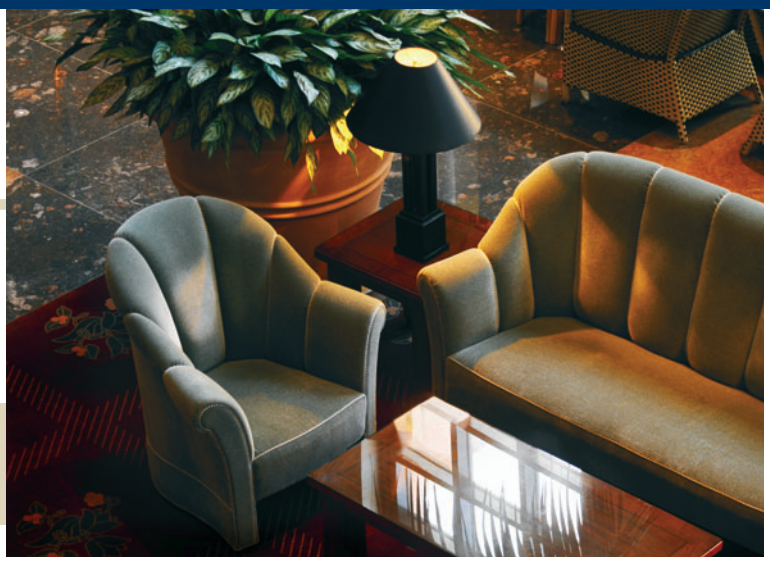
If a condominium is terminated, the individual condominium unit which used to be separately owned no longer exists.

Despite the recommendation, the law that went into effect on July 1, 2007 purports to allow retroactive application to all condominiums that were then in existence and provides two kinds of termination: (1) for economic waste or impossibility; and (2) optional termination. Termination for economic waste or impossibility would most likely occur as a result of a hurricane or other natural disaster, where it would be prohibitively costly to rebuild a condominium. In order to terminate a condominium for economic waste or impossibility, the termination must be approved by either the number of voting interests required to amend the declaration of condominium or the number of voting interests required to approve a termination as set forth in the declaration, whichever is less. Approval of lien holders is not required if there are less than 75% of the units in a timeshare plan.

A condominium can now also be terminated through the optional termination provision of Section 718.117. There does not need to be a reason or any justification for this type of termination. In an optional termination, if at least 80% of the unit owners approve a plan of termination, and not more than 10% of unit owners object to that termination plan through a negative vote or through written objections. The approval of lien holders is also no longer an absolute requirement if there are less than 75% of the units in a timeshare plan. Almost all of the condominium terminations now taking place are the optional variety. Typically, the developer or another entity owns more than 80% of the condominium units and then pursues the termination. Unless the non-developer unit owners are aware of what is taking place, the number of objections usually does not reach the 10% threshold necessary to defeat the termination.

If a declaration of condominium only permitted termination to occur with the approval of 100% of the unit owners, Section 718.117 would appear to allow a condominium to be terminated with lower thresholds regardless of that language. Both methods of termination require the existence of a written Termination Plan, which must be recorded in the public records of the county where the condominium is located. The Termination Plan needs to contain specific items and be delivered to unit owners within certain time periods pursuant to Section 718.117, so if the condominium association is considering any type of termination, the association's legal counsel should be consulted.

Material Alterations



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We receive numerous questions from our condominium association clients regarding proposed "material alterations" to the common elements. In general, the board is empowered with authority to maintain the common elements. However, certain changes to the common elements may be considered a "material alteration" which may require unit owner approval. Florida courts have held that a material alteration is one which "palpably or perceptively varies or changes the form, shape, elements or specifications" of the common elements "in such a manner as to appreciably effect or influence its function, use or appearance." Sterling Village Condominium, Inc. v. Breitenbach, 251 So.2d 685 (Fla. 4th DCA 1971).

In many instances the material alteration questions we receive pertain to redecorating common elements, such as a lobby area. If the change in the new décor theme of the lobby is considered a material alteration (as opposed to routine maintenance/replacement), approval of the unit owners may be required. Section 718.113(2)(a), Florida Statutes, requires 75% of the total voting interests to approve a material alteration unless the declaration provides for an alternative approval method/standard. Many condominium association declarations contain a provision which specifically establishes a unit owner approval standard for material alterations to the common elements. Other governing documents specifically carve out exceptions whereby the board of directors alone can approve certain material alterations without the need to obtain unit owner approval. For example, many governing documents will grant the board discretion to approve a material alteration if the cost of said alteration is below a specific dollar amount. This area of condominium law is complex and there are additional considerations which may impact the ultimate analysis (e.g. what if the alteration is required to comply with code, etc.), which are beyond the scope of this article.

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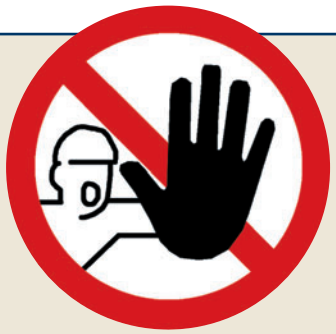
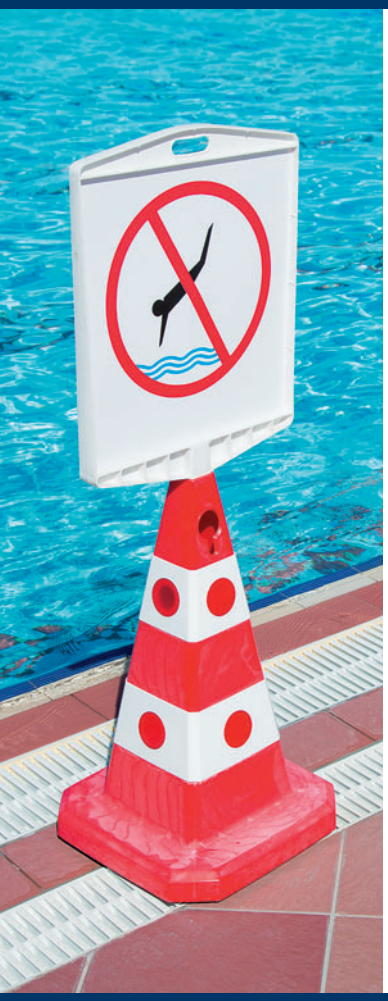


However, if an Association desires to suspend use rights for delinquency in paying a monetary obligation, the notice of hearing requirements do not apply. All such monetary suspensions, however, must be approved at a properly noticed Board meeting. Upon approval, the Association must notify the unit owner and, if applicable, the occupants, licensees or invitees by mail or hand delivery.

The right to suspend use rights, for either violation, does not apply in a condominium to limited common elements intended to be used only by that unit, common elements needed to access the unit, utility services provided to the unit, parking spaces or elevators. In a Homeowners Association the suspension may not impair the right of an owner or occupant to have vehicular and pedestrian ingress and egress from the parcel including, but not limited to, the right to park.

In the event you intend to exercise this remedy for non compliance or non payment, please consult with your Association attorney.



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SUSPENSION OF USE RIGHTS

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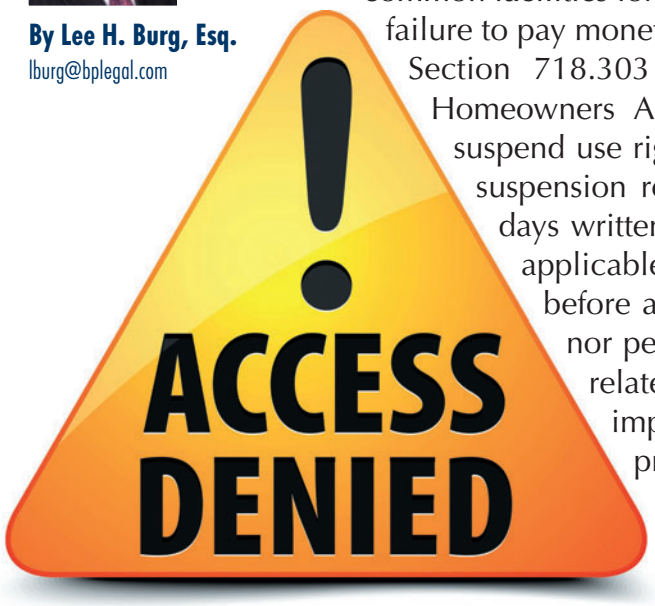

Both the Condominium Act and the Homeowners Association Act allow the suspension of use rights of an owner, tenants, guests or invitees for use of the common facilities for the failure to comply with the governing documents or for the failure to pay monetary obligations to the Association. This remedy is contained in Section 718.303 of the Condominium Act and Section 720.305 of the Homeowners Association Act. In both Acts, if an Association intends to suspend use rights for failure to comply with the governing documents such suspension requires the Association to first provide at least fourteen (14) days written notice and an opportunity for a hearing to the owner and if applicable, the occupant, licensee or invitee. The hearing must be held before a committee of other owners who are neither Board members nor persons residing in the Board member's household or otherwise related. If the committee does not agree the suspension may not be imposed. If the Association imposes a suspension, the Board must provide written notice thereof by mail or hand delivery. The notice and hearing procedures are required for "due process" so that the owner has the right to appear and defend.

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