Weaving Around The Thorny Branches Of Dual Community Association Membership

By D. Michael Arendall, Esq., Zinzow Law, LLC, Palm Harbor, Florida


M. ARENDALL

You are sitting at your desk, sipping your first cup of coffee, and checking emails, some of which you saw overnight – attorneys in modern practice hardly keep bankers' hours – and the receptionist buzzes your line. Your presence is requested at the front desk, and when you arrive there the process server delivers the sour news and a stack of pleadings. "You've been served." Your association client, its community association management firm, and your firm are all named as defendants, and you recognize the plaintiffs in the Federal court action as four recent thorns-in-your-side condominium owners in your client's association. After asking that another pot of coffee be put on to brew, and before telephoning your association client's president or your carrier, you sit down to try to unwind how you got here.

But more on that later; first, a refresher about the genesis of association-style living.

During the twentieth century an overwhelming number of Americans decided to settle in homesteads that fused the best features of old and new America. We sought out the convenience of urban city-dwelling paired with the frontier-like individualism of possessing our own dirt or our own four walls. By the mid-1940s, the concept was a reality. On the site of a potato field on Long Island, New York, the first modern planned development was born, marketed primarily to returning servicemen and purchased with low-interest loans guaranteed by the government that had just sent them to war.[1]

The concept of planned developments caught fire and spread across the nation, including Florida, where homeowners' and condominium associations now thrive. Most often, homeowners' and condominium associations exist independent of one another. They are governed by separate chapters of the *Florida Statutes* that contain differing provisions on a host of governance and other matters, and they receive starkly differing degrees of regulatory oversight by the state. Yet, creative developers have increasingly begun to craft mixed-format communities that mandate membership in coextensive condominium and homeowners' associations, a scheme neither directly sanctioned nor prohibited by Florida state law. Developers set out to create a system where condominium owners could govern their own affairs, but also enjoy broader recreational and other amenities managed by a different association for the benefit of a wider group of people, including single-family homeowners in separate segments of the development.

The amenities were, no doubt, attractive at first blush. But the fiscal consequence, nay burden, of such an arrangement is plain: condominium owners are bound to pay their condominium dues and then fork over more dues to a separate association to sustain the recreational amenities. On occasion, condominium owners in these dual association communities have cried foul or have attempted to secede altogether, believing the dual-mandated association setup to be fundamentally unfair, akin to double taxation, or claiming lack of use of the amenities. Naturally, the amenities associations fight back against an attempted exodus by a large chunk of their dues-paying members, necessitating court interpretation of the interplay between Florida's community association statutes and common law real estate doctrines.

In the mid-1980s, the First District Court of Appeal encountered such a dispute.[2] Eighty owners of a condominium resort in Walton County objected to the developer's mandate that they, along with other neighboring condominium and homeowners' associations, "enjoy" membership in an association responsible for the maintenance of roads, lakes, and canals, as well as landscaping, lighting, security, and a number of other community features.[3] The court described the recreational association as a "master" association comprised of constituent condominium and homeowners' associations.[4] At issue was language in the condominium declaration, as well as in the deed that originally conveyed the swath of land to the developer, that allowed condominium owners to utilize recreational and other amenities if they met the developer's conditions, namely the payment of dues.[5] The trial judge concluded that the developer's requirement of membership dues was a reasonable condition for use of the amenities.[6] On appeal, the judgment was affirmed, with the court declaring as fully enforceable contractual provisions that give developers absolute discretion to set terms and conditions for the use of amenities, as long as the terms and conditions are fair and reasonable.[7] Critically, the court found nothing unreasonable or improper in a developer's mandate that condominium owners be members of an amenities homeowners' association which, according to the court of appeal, "provide for necessary upkeep in the face of high absentee ownership."[8]

Under firmly rooted real estate legal doctrines, developers are permitted to bind property owners and their successors in title to ownership in associations that provide amenities to a planned community through real covenants written into deeds. Real covenants differ in form, duration, and enforceability from personal covenants that apply to particular

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owners. Unlike personal covenants that apply between specific parties, real covenants run with and bind the land itself, not individual owners. They are created when (i) the liabilities or rights under the covenant are intended to and do pass to subsequent owners, (ii) the covenant touches, relates to, or involves the land in a way that enhances the value of the property or renders the land more convenient or beneficial to the owner, and (iii) the party against whom the covenant is being enforced has notice of the covenant.[9]

For example, a real covenant embedded in a recorded deed for land upon which a condominium is built might contain the following language: "Each owner of each residential condominium unit built on the land conveyed by this deed shall be required to join and maintain memberships in the association known as..., providing recreational and support amenities to said land." Such a covenant meets the requirements established by Florida law for an enforceable, binding membership obligation upon the condominium owners.[10] The notice of such covenant, one of its legally essential features, is provided via the constructive notice[11] or implied actual notice[12] principles of the law, even where the covenant is contained in the original deed of the larger tract and not the individual deeds to the respective condominium owners.[13] Equally important to the long-term sustainability of amenities associations, courts are not permitted to modify real covenants to make them more or less fair or equitable to one party or another.[14] Owners who protest a properly constructed dual membership scheme by citing lack of notice, arguing lack of use of the amenities, or asserting lack of political influence in the amenities association will find little sympathy inside a courtroom because of the clear dictates of established real estate law.

Feeling confident in their firm legal footing, homeowners' associations may turn to the courts to enforce the covenants that bind condominium owners to dual membership and the accompanying dues. But this path is not without its thorns. Notwithstanding the association class action provisions of Florida's civil procedure rules that permit the condominium association to be named and served as the class representative of all similarly situated owners,[15] condominium owners may try to attack the personal jurisdictional of the court for lack of personal service upon them. They may also challenge the defending condominium association's authority to obtain discovery from the class member owners, whether for the same jurisdictional issues or practical ones created by the absence of any association power to compel discovery compliance by the individual condominium owners. Every litigator knows about the power of an untimely or unanswered Request for Admissions, but the warm glow of that discovery tactic is dulled significantly if the court begins to question who was responsible for answering the request: the owner or the class representative association. Realistically, the path can be long and arduous for a homeowners' association to endure on its way to a final judgment in its favor or other favorable resolution to a dual membership challenge.

Practitioners and stakeholders should be wary of the potential for an even more complex minefield as layers of the dual membership onion are peeled back. Condominium owners and their boards who, upon receiving the amenities association's monthly or annual dues notices and demands for nonpayment, are angry at their perceived double taxation (perhaps without meaningful representation) may seek out counsel to pursue Federal Fair Debt Collection Practices Act ("FDCPA") and Florida Consumer Collection Practices Act ("FCCPA") claims against the homeowners' association, its community association manager, and the association's general or collections counsel. These claims, some of which assert, for example, that the association, board, manager, or association attorney are seeking to collect sums that are not lawfully due or are taking action that the owners believe cannot legally be taken, can drag in liability insurers for the association, manager, or counsel, depending on the severity of the perceived threat, further adding complexity to the dispute and the threat of higher insurance premiums.

Even if the merits of FDCPA and FCCPA claims are tenuous at best, the reality is that the cost of defense of such claims through trial militates in favor of early settlement and dollars being paid to complaining condominium owners. Unlike state court litigation, where attorneys largely dictate the pace of the case, Federal court litigation is driven by strictly-enforced Federal court rules of procedure and by lifetime-appointed judges, driving up litigation costs and the pace of the attorneys' fee meter. Further, the boards of amenities homeowners' associations that are sued on FDCPA and FCCPA claims may be compelled by their fiduciary duties to explore unsavory avenues for relief, such as malpractice or other tort claims, against the community association manager or general counsel that triggered the collection letters, lien threats, or litigation.

There are practical business reasons for creating a single recreational amenities association that serves the many diverse constituent communities of a planned development. By spreading the expenses associated with operating recreational facilities and amenities amongst a larger membership body, the amenities association can help keep per-owner dues lower and can blunt the severity of future dues increases. Creative planned community developers can look outside of traditional association schemes in offering their properties for sale and, in so doing, may be able to cloak long-term financial obligations as attractive amenities. But the knowledge of an experienced real estate litigator can also be invaluable in dodging the many thorns that can snag the unwary traveler down the dual association membership path.

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D. Michael Arendall, Esq. *is a real estate and commercial law practitioner at Zinzow Law in Palm Harbor. He is AV Preeminent® Peer Review Rated™ by Martindale Hubbell®, and he is a graduate of Old Dominion University in Norfolk, Va. (B.S.) and of Stetson University College of Law (J.D.) in Gulfport, Fla. In addition to its construction, real estate and appellate practice areas, Zinzow Law represents community associations in complex litigation. Michael's email address is marendall@zinzowlaw.com.*

Endnotes

1 James F. Peltz, *It Started With Levittown in 1947: Nation's 1st Planned Community Transformed Suburbia*, Los Angeles Times (June 21, 1988).

2 *Scott v. Sandestin Corporation*, 491 So. 2d 334 (Fla. 1st DCA 1986).

3 *Id.* at 334.

4 *Id.*

5 *Id.* at 334-35.

6 *Id.* at 335.

7 *Id.*

8 *Id.*

9 *See Maule Indus., Inc. v. Sheffield Steel Products, Inc.*, 105 So. 2d 798, 801 (Fla. 3d DCA 1958); *PGA North II of Fla., LLC v. Div. of Admin., State Dept. of Trans.*, 126 So. 3d 1150, 1153 (Fla. 4th DCA 2012).

10 *Bessemer v. Gersten*, 381 So. 2d 1344, 1347 (Fla. 1980) ("[a] developer, in carrying out a uniform plan of development for a residential subdivision, may arrange for the provision of services to the subdivision or for the maintenance of facilities devoted to common use, and may bind the purchasers of homes there to pay for them. In this case, all of the elements of an affirmative covenant running with the land have been established.").

11 *See, e.g., Hagan v. Sabal Palms, Inc.*, 186 So. 2d 302, 311-12 (Fla. 2d DCA 1966) ("And the authorities are practically unanimous in holding that the recorded deed containing such restrictions is not necessarily the immediate deed by which the instant owner takes or has taken title; it may be in an antecedent deed, even the deed from the original common grantor.").

12 *Id.* at 313 (the law precludes an owner from remaining willfully ignorant of a thing readily ascertainable when the means of knowledge is at hand).

13 *Id.* at 311-12.

14 *AC Associates v. First Nat. Bank of Fla.*, 453 So. 2d 1121, 1129-30 (Fla. 2d DCA 1984).

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