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June 2, 2015

VIA EMAIL lwest-vpres@lauderdalewest.org

Ms. Joanne Mazur Hill, President
Lauderdale West Community Association No. 1
1530 NW 82nd Avenue
Plantation, Florida 33322-4638

RE: LAUDERDALE WEST COMMUNITY ASSOCIATION NO. 1, INC.
OUR FILE NO. 12933.000

Dear Joanne:

You asked us to do research as to (i) whether the Association is responsible for maintaining expanded driveways that were expanded in Sections Two, Three and Four; as well as all future maintenances thereon; (ii) cost of maintenance on balustrades installed on the patios by unit owners; and (iii) whether the Association may remove landscaping materials on the condominiums' properties in Section One.

For purposes of this letter, it will be assumed that all expanded driveways and balustrades were made after the developer sold the lot to the owner.

DRIVEWAY EXPANSION ISSUE

Section 6 of the Declaration of Restrictions for Sections Two, Three and Four, as amended, states the following:

(C) Exterior Maintenance and Repair of Buildings. The exterior of all residence buildings in the SUBDIVISIONS shall be maintained and repaired by the ASSOCIATION, the cost of which is hereby declared to be a COMMON EXPENSE and charged to the budget of the LOT/DETACHED HOME OWNERS of the ASSOCIATION, and there is hereby reserved in favor of the ASSOCIATION the right to enter upon all of the SUBDIVISIONS and residence buildings located hereon for the purpose of conducting a periodic program of exterior maintenance and repair, which maintenance and repair shall include, but shall not be limited to repainting and repair of exterior walls, shutters, trim, eaves, roofs, or any portion of the foregoing. This shall also include the replacement of roof size as constructed by Developer. The times when such maintenance, repair and replacement are to be performed and the extent thereof shall be determined by the BOARD in its sole discretion. The owner of each IMPROVED LOT in the SUBDIVISION is hereby made liable to the ASSOCIATION for a prorata share as hereinafter set forth, of such COMMON EXPENSE. The ASSOCIATION shall not be responsible for repairing or replacing a building or

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structure which in the BOARD'S opinion, shall have been destroyed, nor shall the ASSOCIATION be responsible for repairs beyond the exterior surfaces of buildings, all such repairs being the responsibility of the LOT OWNER.

(D) Private Road and Driveways. The ASSOCIATION shall be responsible for the maintenance and repair of all private roads and driveways, and other facilities intended for the joint use and enjoyment of its members located within the PROJECT AREA, the cost of which is hereby declared to be a COMMON EXPENSE of the ASSOCIATION, and there is hereby reserved in favor of the ASSOCIATION the right to enter upon all portions of the SUBDIVISION for such purposes. The owners of all IMPROVED LOTS in the SUBDIVISION are hereby made liable to the ASSOCIATION for a prorata share, as hereinafter set forth, of such COMMON EXPENSE.

The Association should keep in mind its unique status among community associations in terms of structure. If, assuming arguendo, the Association is truly a condominium as has been opined by the Department of Business and Professional Regulation on multiple occasions, then F.S. 718.113(2)(b) would control. F.S. 718.113(2)(b) provides:

There shall not be any material alteration of, or substantial addition to, the common elements of any condominium operated by a multicondominium association unless approved in the manner provided in the declaration of the affected condominium or condominiums as originally recorded or as amended under the procedures provided therein. If a declaration as originally recorded or as amended under the procedures provided therein does not specify a procedure for approving such an alteration or addition, the approval of 75 percent of the total voting interests of each affected condominium is required. This subsection does not prohibit a provision in any declaration, articles of incorporation, or bylaws as originally recorded or as amended under the procedures provided therein requiring the approval of unit owners in any condominium operated by the same association or requiring board approval before a material alteration or substantial addition to the common elements is permitted. This paragraph is intended to clarify existing law and applies to associations existing on the effective date of this act.

There is serious doubt that the DBPR's prior ruling regarding the Association's status as a pure condominium remains intact. The Department of Community Affairs, the predecessor entity to the Department of Economic Opportunity, opined that at least Sections Two, Three and Four of the Association were homeowner associations pursuant to F.S. 720. Since the DBPR's last opinion on the Association's status as a condominium, there have been two cases from the DBPR that have regressed from the DBPR's previous stance. *In re Petition for Declaratory Statement for Aventura Marina One Condominium Association, Inc.*, DC 2008-028 (2008) and *in re Petition for Declaratory Statement – Lugano Village Association, Inc.*, DS 2011-061 (2011) have created a new concept of hybrid entities where an association is both a condominium and a homeowners association simultaneously. The sometimes less-than-helpful rule that developed from these cases is that with respect to hybrid associations, a hybrid association is subject to Chapter 718, Florida Statutes, with respect to condominium property, and subject to Chapter 720, Florida Statutes, with respect to homeowner property, could be argued to remove Sections Two, Three and Four from F.S. 718.113's material alteration requirement.

Generally, it is our understanding that the Association approves alterations to the properties so long as the owner agrees to maintain the change, notwithstanding the Association's Declaration. In the case of driveways, the Association would generally

approve an owner's request to alter the driveway to accommodate additional cars so long as the owner agrees to maintain the modified driveway notwithstanding Section 6(D) of the Declaration of Restrictions.

The course and custom of letting the owners who expand the driveways maintain the driveways proves instructive on the issue. It serves as evidence of the agreement between the Association and the unit owner with respect to the driveways.

One of the significant issues in this particular case is whether the Association can prove the agreement to shift the responsibility of the maintenance of the driveways over to the owner. It is impossible based on the aerals from the Broward County Property Appraiser to determine when the driveways were built because of a tree blocking the view of the driveway that was removed in approximately 2005 or 2006. Could the notice of approval that was issue contain the agreement for the owner to maintain the driveway and could that agreement been with the other records that were destroyed by the fire?

Therefore, it may be possible, if the unit owner decides to challenge the Association's position, for the Association to prevail in this matter.

BALUSTRADES MAINTENANCE ISSUE

With respect to the balustrades, pursuant to 6(C) of the Declaration of Restrictions as quoted above, the Association is responsible for their painting, and the owner is arguably responsible for the costs.

It is our understanding, however, that like the driveway expansions, the Association has maintained the position with the owners that the owners are responsible for the maintenance of the balustrades. The course and custom of letting the owners who had balustrades installed to the patio area as an after-market upgrade to their property maintain those balustrades does prove instructive on the issue.

Therefore, it is possible to show that the unit owner is responsible for the maintenance of the balustrade.

LANDSCAPING

Lastly, with respect to the landscape materials planted by owners in Section One, there are seven things an association cannot prohibit a unit owner doing to the exterior of their unit:

1. Install hurricane protection such as shutters, impact glass, etc. if the governing documents provide the unit owner is responsible for such protection. F.S. 718.113(5)
2. Install a religious symbol outside of their door not to exceed 3 inches wide, 6 inches high, and 1.5 inches deep. F.S. 718.113 (6)

3. A flag not to exceed 4 ½ feet by 6 feet of the United States, and on Armed Forces Day, Memorial Day, Flag Day, Independence Day, and Veterans Day, a flag of one of the military branches. F.S. 718.113(4)
4. Install certain alternative energy devices such as a solar collector. F.S. 163.04(2).
5. Install such reasonable alteration to accommodate a disability. 42 USC 3601 et seq.
6. A satellite dish in accordance with the OTARD regulations adopted by the FCC. 47 CFR 1.4000.
7. Their air conditioning unit on the roof.

These are the seven things an association may not prohibit outside a unit. Otherwise, the Association has broad power to prohibit anything on the common elements or any portion of the association property or condominium property which is to be maintained by the association including prohibiting additional plants and shrubs planted by unit owners in Section One. Please note, however, that the Association must be careful to ensure that to remove the landscaping installed by unit owners, it must be done uniformly; i.e., all landscaping installed by unit owners in Section One must be removed. Otherwise, an owner may have an argument regarding selective enforcement against the Association.

If you have any further questions, please do not hesitate to contact us.

Sincerely,

FRANK WEINBERG & BLACK, PL


Fik Steven A. Weinberg, Esq.
For the Firm

JMM:SAW