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Jed Frankel
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Jed L. Frankel says condominium declarations should be carefully drafted because Florida law provides that declarations are to be strictly construed with ambiguity construed against the developer, who is ultimately responsible for their content. A8.

Condo declarations are critical should conflict arise

By Jed L. Frankel

It almost goes without saying that inherent in virtually all condominium projects is conflict between the condominium developer and the unit owners — especially once unit owners assume control of the governing condominium association.

When owners assume control, developers typically have their attorneys draft declarations and other constituent documents that reserve as many rights as possible for themselves, often at the expense of unit owners. Unassigned parking spaces and storage units become very valuable commodities as a building fills up with new unit owners, and a developer's attempt to continue to exert control over these elements is often time grounds for dispute. Developer reservation of rights are not limited to parking spaces and storage areas but can extend to other elements such as boat docks and other non-unit areas.

In a decision important to developers as well as community associations across Florida, the Third District Court of Appeal recently recognized a developer's right to maintain control over unassigned limited common element parking and storage spaces, even after turnover of control of the condominium association to unit owners in the case of Courvoisier Courts, LLC v. Courvoisier Courts Condominium Association, Inc.

In that case, two weeks before the developer turned over control to unit owners as required by Florida Statute 718.301, it transferred the remaining unassigned parking and storage spaces to a penthouse unit that it had not yet sold. In doing so, it made it possible to sell the parking and storage spaces to individual unit owners at a later date. The unit owner controlled association objected to the transfer and took steps to challenge it.

As part of a construction-defect lawsuit against the developer, the condominium association challenged the developer's transfer to itself on the unassigned parking and storage spaces, seeking a declaration from the court that it was of no effect. The association and the developer each filed motions asserting their rights to the spaces, and the trial court ruled in favor of the association, ordering the developer to turn over those limited common elements still in its possession to the association.

The developer appealed, arguing that the plain language of the declaration provision dealing with the limited common elements in question gave it the right to the unassigned parking spaces and storage spaces until it sold all units that it owned in the condominium. Even though the developer turned over control of the association to the unit owners, it still had not sold all of its units in the building. The association countered that the developer's rights to the unassigned parking and storage spaces ended at turnover based upon another section of the declaration dealing with "easements" which the association took control of at turnover.

The Third District rejected the association's argument and reversed the trial court's order. The appellate court looked at the clear and unambiguous language of the declaration provision, which specifically gave the developer the right to unassigned spaces or storage spaces until it sold all of its units in the building. In doing so, the court rejected the association's attempt to create ambiguity by incorporating language from the separate easement provision.

Florida courts have long held that declarations of condominium are more than a "mere contract spelling out the rights and obligations of the parties" and assume attributes of a covenant running with the land, setting forth the extent and limits of use of the real property. By statute, a copy of the declaration of condominium and other governing documents setting forth the rights of the association, the unit owners and the developer must be provided to a purchaser in advance of taking title to a condominium unit.

The Third District's decision was not only in line with precedent but confirmed a valuable right for developers — they can create enforceable rights for themselves in the condominium documents that rights continue even after unit owners are in control of the condominium association. Ensuring the continuation of such rights can be critical for a developer, especially once it no longer controls the condominium association. Similarly, it is critical for unit owners taking control of their condominium association to realize what the association controls and what rights the developer maintains.

Florida law also provides that declarations are to be strictly construed with ambiguity construed against the developer, which is ultimately responsible for their content. Accordingly, when going through the process of preparing documents to create a condominium, such as the declaration of condominium, articles of incorporation and by-laws for the association, developers should take great care and work closely with counsel to ensure that the specific rights that may be important to them are protected and unambiguously stated in a clear provision like that the Third District enforced in the developer's favor. Similarly, when purchasing a condominium unit, prospective purchasers should carefully review the documents provided to them as well and question any items that cause them concern prior to closing.

Jed L. Frankel is a shareholder in the Florida community association law firm of Eisinger Brown Lewis Frankel and Chaiet, which represents more than 600 condominium and homeowners associations throughout Florida. Frankel heads up the firm's litigation department and also handles appellate work.