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Hotel-Condominium Governance Litigation: Could IconBrickell Go National?

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Key Take: *The IconBrickell decision disrupted the Florida hotel-condominium market. Could the same thing happen in other jurisdictions?*

In 2020, the Florida Third District Court of Appeal issued the *IconBrickell* decision that has had a profound effect on the way practitioners and developers think about the legal landscape of mixed-use properties throughout the state of Florida, particularly branded residential condominiums. In *IconBrickell Condominium No. Three Association v. New Media Consulting*, 310 So.3d 477 (Fla. 3d DCA 2020), the Florida appellate court held that the condominium declaration that governed the property rights of owners at the W Hotel in downtown Miami violated that Florida Condominium Act and needed to be reformed. Specifically, the court held that the designation of certain property components as “shared facilities” that were owned in fee simple by the hotel unit

owner was a violation of the Florida Condominium Act, which requires those property rights to be held by all condominium unit owners as “common elements.”

The *IconBrickell* decision upended a long-held understanding that property held by a particular condominium unit owner could not be designated as common property controlled by the condominium. Over the past several decades, Florida lawyers and developers have relied on this interpretation of the Florida Condominium Act to develop mixed-use communities with a branded residential condominium component throughout the state of Florida, including developing luxury condominium-hotels up and down Miami Beach. Additionally, the *IconBrickell* decision unleashed a flood of litigation from condominium unit owners and condominium associations seeking to gain more control over not only condominium property but also the larger complexes in which the branded residential condominiums are housed.

The uncertainty caused by the *IconBrickell* decision has put billions, if not trillions, of dollars’ worth of commercial real estate investment in Florida in peril. This has had the effect of emboldening activist condominium unit owners and condominium associations, who see the threat of bringing *IconBrickell* claims as a good business tactic for extracting other concessions for residential condominium unit owners, such as reduced cost allocations for shared properties. Given the success of certain plaintiffs in Florida, it is possible, if not likely, that activist condominium unit owners and condominium associations throughout the United States may attempt to apply a similar legal strategy to other jurisdictions. Given the dramatic effect *IconBrickell* has had on the mixed-use landscape in Florida, developers and commercial lot owners in mixed-use projects that include a residential condominium component should be aware of the *IconBrickell* decision and its potential application to projections outside Florida.

IconBrickell is a mixed-use development in downtown Miami that consists of three towers, each one designated as a separate condominium that is governed by the Florida Condominium Act. The *IconBrickell* decision concerned Tower No. 3, which houses the W Hotel Miami, hundreds of residential units, a number of commercial units, and one “hotel unit” (the “IconBrickell Condominium”). Like all condominiums, the IconBrickell Condominium is governed by not only the Florida Condominium Act but also a recorded condominium declaration that runs with the land. The declaration details the specific property rights of the condominium and each of its unit owners, including the “common elements” of the condominium.

The Florida Condominium Act defines “common elements” in two separate provisions. Section 718.103 of the Condominium Act states, “‘Common elements’ means the portions of the condominium property not included in the units.” (Fla. Stat. § 718.103.) Additionally, Section 718.108(1) of the Condominium Act provides, “‘Common elements’ includes within its meaning the following:

- (a) The condominium property which is not included within the units.
- (b) Easements through units for conduits, ducts, plumbing, wiring, and other facilities for the furnishing of utility services to units and the common elements.
- (c) An easement of support in every portion of a unit which contributes to the support of a building.
- (d) The property and installations required for the furnishing of utilities and other services to more than one unit or to the common elements.” (Fla. Stat. § 718.108(1).)

Notably, Section 718.108 does not include mandatory language, such as “shall” or “must.” Instead, this

section was traditionally interpreted to be permissive, with developers generally understanding that any property within a unit could not be a common element.

The IconBrickell Condominium Declaration reflected this general understanding and created a “hotel unit” that included many of the property’s amenities, such as the lobby and pool. The hotel unit also expressly included “the property and installations required for the furnishing of utilities and other services to more than one unit or to the common elements, if any,” mirroring the language from Section 718.108(1)(d) of the Florida Condominium Act. *IconBrickell*, 310 So.3d at 479. Rather than designating this property as “common elements,” the IconBrickell Condominium Declaration designated such property as “Shared Facilities,” owned by the hotel unit owner.

This structure of property rights is common in mixed-use developments, particularly those that include a branded residential condominium component. This is because before branding a hotel and residence with a well-known hospitality brand, such as Ritz-Carlton, hotel management companies typically require that the hotel owner have a real property interest in all of the property that is required to run a hotel. In particular, hotel management companies require that hotel owner have control over life safety systems, including ingress and egress to the property. If a hotel owner loses control over such property, the hotel management company typically has the right to terminate the agreement and de-brand the property.

In *IconBrickell*, a condominium unit owner sued the condominium association claiming the definition of “common elements” in the IconBrickell Condominium Declaration violated the Florida Condominium Act by designating required property to the sole ownership and control of the hotel owner. The *IconBrickell* court, in a ruling that shocked developers and legal practitioners, held the definition of “common elements” set forth in Section

718.108(1) of the Florida Condominium Act created a “clear and unambiguous” requirement that all the property listed in that definition be included as common elements belonging to the condominium.

The *IconBrickell* court wrote, “Despite this plainly penned legislative preemption, here, intrepidly mirroring the words of the Act, the Declaration designates ‘all property and installations required for the furnishing of utilities and other services to more than one unit or to the Common Elements, if any,’ along with the ‘wires, conduits, pipes, ducts, transformers, cables,’ residential lobby and elevators, and communal trash disposal systems as shared facilities.” (*IconBrickell*, 310 So.3d at 481.) The court continued, “This recharacterization, and the resultant expropriation of undivided common ownership, indubitably contravenes the edict of the Act.” (*Id.*) However, the court “decline[d] to embrace the broader proposition that the transfer of ownership and control of any amenities traditionally designated as common elements violates the spirit, if not the letter, of the law.” (*Id.*) In other words, the court declined to address whether amenities, such as the hotel pool and gym, were required to be common elements under the Florida Condominium Act.

The *IconBrickell* decision has caused significant upheaval and confusion in the development of mixed-use properties throughout the state of Florida. This is, in part, because the practical effect of the *IconBrickell* decision is not clear. For example, while the plaintiff sought reformation, the *IconBrickell* decision made clear in a footnote that the condominium association was “merely directed” to reform the *IconBrickell* Condominium Declaration, not that the court’s decision and order had the effect of reforming the declaration. Thereafter, the declaration was not reformed.

Yet condominium unit owners and condominium associations throughout Florida have grasped onto the *IconBrickell* decision as a way to change the

balance of power in mixed-use developments. Over the past three years, numerous associations and individual unit owners have filed lawsuits against hotel owners, seeking to transfer the hotel owner's property to the ownership and control of the condominium. In most cases, the plaintiffs have had limited success. In others, such as the case of *Central Carillon Beach Condominium Ass'n, Inc. v. Carillon Hotel, LLC, et al.*, the lower court questioned the viability of mixed-use hotel-condominium projects under Florida law and issued an order redesignating significant property of the hotel owner to the condominium unit owners.

In light of the uncertainty caused by the *IconBrickell* decision in Florida, as well as the potential significant shift in leverage that such claims provide to disenchanted condominium unit owners in a mixed-use property, developers and investors considering investment in and/or who have significant holdings in a mixed-use development with a hotel-condominium component should be aware of the potential application of *IconBrickell* outside of Florida.

Fortunately, some jurisdictions, such as New York, have statutes that seemingly contemplate and expressly permit the type of mixed-use building that was challenged in *IconBrickell*. For example, the New York Condominium Act defines common elements to "mean and include" certain property components, "unless otherwise provided in the declaration." (N.Y. Real. Prop. Law § 339-e(3).) Thus, under the New York Condominium Act, the statutory regime provides default rules that may be modified by developers in the recorded condominium declaration. In these jurisdictions, condominium unit owners are likely to have an uphill battle if they attempt to redesignate "shared facilities" that are owned by a single commercial unit owner to be common elements owned and controlled by the condominium.

Other jurisdictions have enacted condominium statutes that are more similar to the Florida Condominium Act where a condominium unit owner may be able to persuasively analogize the *IconBrickell* decision. For example, under the New Jersey Condominium Act, the definition of “common elements” includes a list of various categories of real property. Similar to the Florida Condominium Act, the New Jersey Condominium Act does not contain any language indicating that the list of common elements is mandatory. Rather, Section 46:8B-3(d) of the New Jersey Condominium Act states, “Common elements’ means:” and then lists various property, including “basements,” “elevators,” “gardens,” and “parking areas and driveways.” While many condominium developments in New Jersey may have some of this property, many likely do not contain all of the property listed as possible common elements under the New Jersey Condominium Act. This weighs in favor of an argument that the list of “common elements” is permissive, not prescriptive. However, a New Jersey court may read these words to be mandatory, which, in the context of mixed-use developments, could lead to a similar situation of uncertain property rights, as occurred in Florida after the release of the *IconBrickell* decision.

Given the unclear statutory construct of certain condominium regimes throughout the United States, as well as the potential for aggrieved condominium unit owners to seek a means of gaining leverage in a mixed-use development, there is a real possibility that the holding in *IconBrickell* could be expanded to other jurisdictions. You should consult with counsel knowledgeable about the laws of your jurisdiction if you have an interest in commercial property in a mixed-use condominium-hotel development or are considering such an investment.