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Course Correcting the Florida Condominium Act in the Aftermath of the *IconBrickell* Decision: Key Amendments to Florida's Condominium Act and Looking Ahead

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Key Take: *Amendments to Florida's Condominium Act enacted after the* IconBrickell *decision will likely chill the proliferation of similar lawsuits moving forward, but there could be challenges regarding the retroactivity of the amendments.*

Prior to October 2020, property developers, condominium boards, and legal practitioners in Florida observed a long-held understanding that property owned by a particular condominium unit — such as a hotel or commercial unit — could not be designated as common property controlled by the condominium. This understanding largely stemmed from how the term "common elements" was defined under the Florida Condominium Act. Section 718.103 of the Florida Condominium Act provided that

"'[c]ommon elements' means the portions of the condominium property not included in the units," and Section 718.108(1) provided that "[c]ommon elements" includes:

> (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).)

The lack of mandatory language, such as "shall" or "must," led to the interpretation that property designated as a "unit" and belonging to a specific unit owner could not be construed as a common element. However, the Third District Court of Appeal's 2020 decision in *IconBrickell* dramatically disrupted this principle.

The *IconBrickell* case centered on one of three towers that comprise a large mixed-used development in downtown Miami. The tower at issue includes the W Hotel Miami, residential condominium units, and commercial units (collectively, the IconBrickell Condominium). The IconBrickell Condominium is governed by a recorded condominium declaration that runs with the land. The declaration detailed what were referred to as "Shared Facilities," which designated certain property as being specifically owned by the hotel unit owner.

This delineation of property owned by the hotel unit has been a cornerstone of mixed-use condominium declarations because hospitality brands typically require the hotel owner have a real property interest in each part of the property that will be managed by the hotel. This enables the hotel owner to maintain control over brand identity and life safety systems.

The plaintiff condominium association in *IconBrickell* argued that the definition of "common elements" in the IconBrickell Condominium Declaration violated the Condominium Act by designating property as solely owned by the hotel unit. The Third District Court of Appeal agreed, holding that the declaration violated the Condominium Act by designating certain property components owned by the W Hotel as "shared facilities" when the Condominium Act required those property rights to be held by all condominium unit owners as "common elements."[1]

Since then, the industry has seen a rise in lawsuits brought by condominium unit owners and condominium associations seeking to obtain a similar outcome and expand the condominium's property interest over elements that had not been submitted as condominium property under the governing declaration.

After *IconBrickell* decision, Florida courts took two distinct interpretations of the decision. On one hand, some Florida courts have determined that declarations at issue are factually distinguishable from the declaration in *IconBrickell* and ruled that these declarations comport with the Condominium Act.[2] On the other hand, other Florida courts have invalidated condominium declarations as "illegal" for "recharacterizing 'common-elements' as "Shared Facilities."[3]

But the instability caused by *IconBrickell* may soon be a thing of the past due to significant amendments to the Condominium Act that came into effect this summer. While the majority of the amendments aim

to address safety concerns brought to the fore by the Champlain Towers collapse in 2021, the *IconBrickell* decision was a contributing factor to the amendments impacting Section 718.103 — defining condominium property — and Section 718.407 — defining the conditions and the disclosure requirements for the creation of condominiums within a portion of a building.[4] These two amendments essentially nullify the legal arguments asserted by condominium unit owners in the wake of the *IconBrickell* decision, namely, that shared facilities are actually part of the condominium property as easements and rights appurtenant to the condominium.

Redefining "Condominium Property" and Delineating Ownership of Certain Elements in a Mixed-Use Property

Prior to the recent Condominium Act amendment, condominium property was defined as "the lands, leaseholds and personal property that are subjected to condominium ownership — whether or not contiguous, and all improvements thereon and all easements and rights appurtenant thereto intended for use in connection with the condominium." Section 718.103(14) of the Condominium Act now defines "[c]ondominium property" as "the lands, leaseholds, and improvements, any personal property, and all easements and rights appurtenant thereto, regardless of whether contiguous, which are subject to condominium ownership."

The previous language describing condominium property led to challenges of the structure of mixed-use properties. The now-deleted language in particular was used by condominium unit owners to argue that the shared facilities of a mixed-use property were actually property of the condominium element because the shared facilities could be interpreted as "easements and rights appurtenant thereto ***intended for use in connection with the condominium***." Now, the amendment provides an expressly narrow understanding of condominium

property limited to property that is "***subject to condominium ownership***."

The recently enacted amendments also include the creation of Section 718.407, which specifically addresses mixed-use condominiums. Section 718.407(2) states, "The common elements of a condominium created within a portion of a building or within a multiple parcel building are only those portions of the building submitted to the condominium form of ownership, excluding the units of such condominium."[5] This provision specifies that a condominium's common elements are solely those that are owned outright by the condominium element, thereby eliminating any ambiguity about common elements or shared facilities (a term commonly used in declarations for mixed-use facilities).

Adding to the clarity provided in Section 718.103(14), Sections 718.407(3)(a)-(c) provide a series of details about mixed-use property and ownership delineations that must be included in a condominium declaration. This includes expressly stating in the declaration, "The portions of the building which are included in the condominium and which are excluded";[6] "The party responsible for maintaining and operating those portions of the building which are shared facilities, including, but not limited to, the roof, the exterior of the building, the windows, the balconies, the elevators, the building lobby, the corridors, the recreational amenities, and the utilities";[7] and "the manner in which the expenses for the maintenance and operation of the shared facilities will be apportioned."[8]

It is important to note that Section 718.103(14) and Sections 718.407(1) and (2) apply retroactively. However, statutory footnotes for these sections of the law state that "such amendments do not revive or reinstate any right or interest that has been fully and finally adjudicated as invalid before October 1, 2024." Section 718.407(3), in the absence of clear

legislative intent to apply retroactively, is presumed to apply prospectively.[9]

Possible Challenges to the Amendments and Recommendations to Practitioners

Practitioners and developers are generally optimistic that these amendments will lead to fewer lawsuits seeking to reform the declarations of mixed-use properties. However, there will likely be future litigation regarding the retroactive application of these amendments and about whether the declarations at issue incorporate the amendments to the Condominium Act.

When analyzing whether a statute will be applied retroactively, Florida courts use a two-pronged test set forth in *Florida Ins. Guar. Ass'n, Inc. v. Devon Neighborhood Ass'n, Inc.*, 67 So.3d 187 (Fla. 2011). Under this test, courts first determine whether the legislature intended for the statute to apply retroactively.[10] If the court determines that the legislature did not intend for the statute to apply retroactively, then the court does not address the second prong.[11] Where there the language of the statute contains an express command to be applied retroactively, then "there is no need to resort to these canons of statutory construction."[12] If the statute evinces the legislative intent to be applied retroactively, then the court will determine whether such application is constitutionally permissible.

Florida courts will invalidate the retroactivity of a statute if it "impairs vested rights, creates new obligations, or imposes new penalties."[13] However, statues that are remedial in nature do not violate the constitutional prohibition on retroactivity.[14] A remedial statute seeks to "correct or remedy a problem or redress an injury."[15] Additionally, statutory amendments that were enacted following a controversy with the law are routinely understood to be "interpretation[s] of the original law" and not substantive changes of law that require retroactivity analysis.[16]

Condominium associations may attempt to challenge the amendments as unconstitutionally impairing their property rights which, under the *IconBrickell* framework, included a broader scope of what property comprises common elements belonging to the condominium unit. However, these challenges may prove unsuccessful given that statutory footnotes on Section 718.103(14) and Sections 718.407(1) and (2) of the Condominium Act state that these provisions "shall apply retroactively," and the fact that these amendments were made in response to the ambiguity in the law caused by the *IconBrickell* decision. Indeed, the statutory footnotes implicate that these amendments are remedial, stating that "[t]he amendments made to ss. 718.103(14) ... and s. 718.407(1), (2), and (6) ... are intended to clarify existing law."

Additionally, legal actions could transpire based on whether or not the condominium declarations governing mixed-use properties contain language incorporating amendments to the Condominium Act. Some condominium declarations will expressly incorporate amendments to the Condominium Act or other relevant statutes by stating that the declaration is "governed as amended" by such statutes. Thus, these declarations automatically account for any changes in the law and obviate the need to amend or modify the declaration to conform with statutory amendments. However, some declarations may contain language that does not expressly incorporate statutory amendments or may not reference amendments whatsoever. This renders these declarations susceptible to violating the law and open the door to legal liability.

All parties owning and/or operating in mixed-use developments will need to examine the relevant declaration and analyze whether the declaration contains language incorporating amendments to the Condominium Act. Hopefully, these amendments will end the era of ambiguity and conflicting case law caused by the *IconBrickell* decision.

[1] For further analysis of the *IconBrickell* decision, please see Leisure Law Insider Vol. 2 (Feb. 2024), *Hotel-Condominium Governance Litigation: Could IconBrickell Go National?*

[2] *See, e.g.*, *2399 Collins Ave. Condo. Ass'n, Inc. v. 2377 Collins Resort, L.P.*, No. 2020-022304-CA-01 (Fla. Cir. Ct. Dec. 21, 2023); *Castillo Grand Hotel Condominium Residences Association, Inc. v. Watermark Capital Partners, LLC., et al.*, Case No. 19-021992 (Fla. Cir. Ct. Dec. 28, 2022), *aff'd* 2024 WL 3289396 (Fla. 4th DCA July 3, 2024).

[3] *Cent. Carillon Beach Condo. Ass'n, Inc. v. Carillon Hotel, LLC*, Nos. 2016-011172-CA-01, 2016-007886-CA-01, 2023 WL 1429624, at *1-2 (Fla. Cir. Ct. Jan. 31, 2023).

[4] Fla. House of Rep. Staff Analysis, HB 1021 at 30-31 (Feb. 26, 2024), https://www.flsenate.gov/Session/Bill/2024/1021/Analyses/h1021e.COM.PDF.

[5] Fla. Stat. § 718.407(2)

[6] Fla. Stat. § 718.407(3)(a)

[7] Fla. Stat. § 718.407(3)(b)

[8] Fla. Stat. § 718.407(3)(c)

[9] See *Metro. Dade Cnty. v. Chase Fed. Hous. Corp.*, 737 So.2d 494, 499 (Fla. 1999).

[10] *Id.* at 194-96.

[11] *Id.*

[12] *Chase Fed. Hous. Corp.*, 737 So.2d at 500.

[13] *Campus Comms., Inc. v. Earnhardt*, 821 So.2d 388, 396 (Fla. 5th DCA 2002).

[14] *Id.*

[15] *Id.*

[16] *Chase Fed. Hous. Corp.*, at 503.