The Community Association Lawyers

600 Washington Avenue, 15th Floor • Saint Louis • Missouri • 63101
Phone: (314) 727-8989, Web: thecalawyers.com

Todd J. Billy
Direct: (314) 425-4967
todd@thecalawyers.com
Licensed in Missouri and Illinois

October 15, 2021
(via e-mail: jon@broadmoorinvestors.com)

Board of Trustees
Four Seasons Subdivision
Mr. Jonathan Wolff, President
615 Broadmoor Drive
Chesterfield, MO 63017

Re: Four Seasons Subdivision
Amendment Changing Allocated Interests

Dear Board:

This responds to a request for guidance by the Board of Trustees of Four Seasons of Chesterfield Homeowners' Association with respect to the validity of an amendment.

A. Background. Four Seasons Subdivision was formed in 1962 with a variety of different housing styles and products with the premier amenity being the Four Seasons Country Club, which is owned and operated by the Association.

Since 1962, the community surrounding Four Seasons Subdivision has transformed. The metropolitan area is now generally considered to have too many golf courses for its population. Four Seasons is now wholly within the city limits of Chesterfield, which is less than 35 years old and has seen exponential growth.

As times pass, a community might discover that their governing documents (recorded declaration, indenture, by-laws, etc.) might no longer reflect the best interests of the community. To change the governing documents, they must be amended.

The Board provided an “Eighth Amendment” and requested our guidance as to its validity and enforceability, which was purported to have been adopted by two-thirds of the votes in the Association.

B. Source of Authority. Missouri has no statutory framework for planned communities such as Four Seasons. Thus, the primary source for legal authority is the "Trust Agreement and Indenture of Restrictions of Four Seasons Subdivision" recorded in Book 4821, Page 454 of the records of St. Louis County, Missouri, as amended, ("Indenture").

However, the Indenture is not the sole source of authority. With the lack of a statutory framework, Missouri courts look to the Restatement (Third) of Property: Servitudes ("Restatement") as being a persuasive treatise on that subject. Courts can also look to best industry practices as well as uniform acts proposed by the Uniform Law Commission ("Commission"); these uniform acts include the Uniform Condominium Act (which was adopted in Missouri in 1983), the Uniform Planned Community Act, and the Uniform Common Interest Ownership Act and its Bill of Rights. For convenience, we refer to these collectively as "Uniform Acts" as all identically address this topic.

While the term "Indenture" is the title of Four Seasons' recorded covenants, the document can (and often is) called different things. The more contemporary approach is to use the term "declaration." We will use "Indenture" when we are speaking specifically about the Association's recorded governing documents. We will use "Declaration" when referring to that document in general.

1. Allocated Interests. Whenever an association is formed by virtue of a recorded Declaration, the Declaration is to set forth two different types of allocated interests: (1) voting, and (2) assessments. Voting refers to how the votes are allocated to each lot. Assessments refers to each lot's share of expenses of the association.

2. Amendments. Prior to a Missouri Supreme Court case decided in 2018, there was no universally accepted method to amend a Declaration. Some attorneys would assert that all amendments required unanimous consent regardless of what the Declaration said if the amendment added a "new burden;" this was based upon several cases at a time when Missouri had a very small number of homeowners' associations. Some practitioners argued that an amendment would be valid so long as the current Declaration addressed the topic being amended in some fashion.

A small number of practitioners (including myself) took the approach found in the uniform acts and the Restatement that an amendment to a Declaration is valid and enforceable so long as it is adopted pursuant to the amendment procedure within the Declaration unless: (1) it involves selling common ground or terminating the association, which requires 80% votes in the association, or (2) it involves changing the use of the property from, say, residential to commercial, or vice-versa, or it changes the allocated interests, which all would require unanimous consent.

In 2018, a lawsuit was resolved at the Missouri Supreme Court that found that an amendment adding a prohibition on subdivision of a lot does not require unanimous consent—the amendment need only follow the amendment procedure of the Declaration.

D. Analysis. While the Missouri Supreme Court decision greatly clarified amendments in the context of community association law, the question involved did not relate to whether the allocated interests can be changed by amendment. We suspect that a court would find that such an amendment requires unanimous consent pursuant to the Restatement and the uniform acts as being persuasive.

The rationale behind unanimous consent for an amendment related to allocated interests is quite practical. Without the protection of unanimous consent, a majority of owners could impose all of the burdens, including the obligation to substantially pay all assessments without the ability to have a meaningful voice, if they have one at all.

Also, a court should be skeptical of such an amendment from the outset. Unlike, say, the Fourth Amendment changing the amount of the assessment that impacts everyone, an amendment changing the allocated interests has a direct negative impact on some owners solely for the benefit of the others. While it may seem desirous to argue fairness, fairness is not a legal doctrine granting the authority of a court to ignore a Declaration or ignore that each owner acquired title to their lot with the agreement and understanding as to those allocated interests.

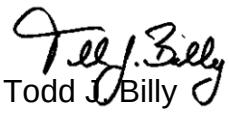
In light of the foregoing, the Eighth Amendment was not properly adopted since it did not obtain unanimous consent.

E. Moving Forward. We understand how and why a majority of owners may want to amend the allocated interests to their benefit even if the change is based upon a good-faith “better way” of doing it. Your community is certainly not the first to explore changing the allocated interests based upon a different formula. Nonetheless, unanimous consent is required to do so.

We recognize that a different attorney may very well disagree with this analysis, and that would be his or her opinion, which is why we provided our sources of authority, experience, and rationale. A final determination can only come from a lawsuit that is litigated to its conclusion. While we have confidence in our opinion and the sources we rely upon, we urge the community to move forward onto more pressing matters of the community. Small fortunes can be wasted on lawsuits that can often cause more division and pull attention and time away from the overall long-term needs of the community.

F. Conclusion. We trust the foregoing is responsive to the Board's request and that the Board will contact us if it has any additional questions or desires further assistance. Your attention to this matter is appreciated.

Very truly yours,



Todd J. Billy