Subject: Re: RE: Reserve study

From: Don Duncan (chapcan2@yahoo.com)

To: cmt@vf-law.com;

Date: Tuesday, April 21, 2015 8:36 PM

Thank you for your attention to this situation.

Sent from Yahoo Mail on Android

From:"Christopher M. Tingey" <cmt@vf-law.com>
Date:Tue, Apr 21, 2015 at 19:33
Subject:RE: Reserve study

Don:

Your documents do not require reserves or a reserve account. So, in my opinion, you are not required by law to fund a reserve account separately. Further, though my prior e-mail may have implied otherwise, I do not believe that once you have a reserve study performed, you opt into a reserve account requirement.

Before explaining my rationale for the conclusions above, please let me explain an issue from my prior e-mail on reserves and the consequences of the Board having a reserve study done. In my prior e-mail, I unintentionally implied that the Board "opted-in" to the reserve study requirements found in ORS 94.595 simply by having a reserve study done. Unfortunately, that implication was not accurate, nor was it my intent to communicate as much, and my word-smithing in the prior e-mail was sloppy. To the extent that I

caused confusion, I apologize. The bottom line is that the Board's choice to have a reserve study done does not automatically, by itself, opt the Association into the reserve study and maintenance plan requirements of ORS 94.595. Rather, the Board's choice to have a reserve study done is a business judgment that the Board can make on its own with or without a requirement that the Association maintain a reserve account. Here is why.

The statutory reserve study and maintenance plan requirement is as follows:

(5)(a) ***If the declaration or bylaws require a reserve account***, the reserve study requirements of subsection (3) of this section and the maintenance plan requirements of subsection (4) of this section first apply to the association of a subdivision that meets the definition of a planned community under ORS 94.550 and is recorded prior to October 23, 1999, when:

(A) The board of directors adopts a resolution in compliance with the bylaws that applies the requirements of subsections (3) and (4) of this section to the association; or

(B) A petition signed by a majority of owners is submitted to the board of directors mandating that the requirements of subsections (3) and (4) of this section apply to the association.

ORS 94.595(5)(a) (emphasis added). The threshold requirement of this statute is that the declaration or bylaws of the planned community recorded before October 23, 1999, must require a reserve account. If that requirement is not there, then the analysis never gets to the "opt-in" options set forth in subsections (A) and (B) of 94.595(5)(a). Your governing documents do not require a reserve account. Therefore, we never get to the "opt-in" options under the statute. In other words, the statute simply does not apply to Cross Creek.

Now, nothing in ORS 94.595, nor elsewhere in the Planned Community Act or in Cross Creek's governing documents require that the Association maintain a reserve account. As a result, the Board may set up some other means for replacement and maintenance. To do so would require a majority vote of a quorum of all 7 board members (if all 7 are present at the meeting, then 4 of 7 would have to vote in favor of the procedure). Whether you call it a "reserve account," or a "capital improvement account" or some other named account, though, the principle is still the same: you are collecting money now to pay for maintenance and repairs to structures that will need work done in the future. But, whatever name you call it, it is still a reserve. And, with the capital items you have in your subdivision, as well as the exterior of the dwellings, each Board member has a fiduciary obligation to keep them maintained and in good repair. (See Bylaws, Article VIII, Section 2(f) and (g)). A failure to do so could subject the board members, individually, and the Association to liability.

As you are aware, collecting any money for reserves (or such other name that you call it) will require a vote of the owners for an increase of the annual assessments ***if*** the amount assessed exceeds $240.00/lot/year. Article IX, Section (a) of the Declaration limits the amount you can charge for annual assessments to $240/lot/year unless a majority of the owners vote for an increase. Similarly, Article IX, Section (g) allows for a special assessment of up to $25.00/lot if two-thirds of the owners vote in favor, but a special assessment may only be levied "in emergency situations of community wide crisis." So, the more realistic approach to a shortfall of capital improvement maintenance and repair funds is an increase of the annual assessments.

In the end, though, in my opinion the best solution would be to amend Article IX of your Declaration. Such a vote, though, would require affirmative approval of 75% of all owners (not the Board). However, because you'd already have to garner a majority or two-thirds vote of all owners to approve an increase in assessments or a special assessment,

respectively, anyway, why not see if you can amend the Declaration to set up a better procedure for your Association. For example, you could amend to allow annual increases in the annual assessment of a fixed amount (say 5% or 10%) over the prior year's amount per lot or annual assessment increases to the Consumer Price Index. Then, if you need an annual increase above that, you could still require approval of a majority of the owners. That way, you get an annual increase that allows for inflation and cost-of-living increases, but it is limited so the Board cannot go crazy and provides the owners an opportunity to provide a check and balance.

Similarly, you could amend the special assessment provisions to allow an amount for certain expenditures that the Board can adopt on its own, while having a cap above which an owner vote is required. The problem now is that $25.00/lot does not get you very far in today's economy. Even if you had multiple assessments in a year (because Article IX, Section (g) does not limit it to one special assessment per year), they each would require an owner vote, which would be difficult to obtain. So, an amendment to allow some discretion to the Board to levy a special assessment, even limited to certain things like the pool, clubhouse, or capital improvements or expenditures, would make life easier and more efficient for everyone.

Finally, since I'm talking about owner votes versus board votes, I want to make sure a couple of principles are clear. First, the Board has seven (7) members (aka, directors or board members) who are elected by the owners. Board members conduct business at board meetings and have all authority provided by law and your governing documents, except as reserved back to the owners. For most action, only a Board vote is required. Your governing documents specifically call out those situations when an owner vote, not a Board vote, is required. We have already discussed three examples, although each of their voting thresholds are different: (1) increase in the annual assessment amount per lot (requires affirmative vote of 51% of owners), (2) levying a special assessment (requires affirmative vote of two-thirds of the owners), and (3) amending the Declaration (requires affirmative

vote of 75% of the owners) or Bylaws (requires affirmative vote of 51% of the owners). But, absent that specific call-out, the Board, not the owners, takes the action.

Now, in addition to the Board, your documents provide for corporate officers of the Association. Article XI, Section 1 of the Bylaws specifies that the Association must have at least four (4) officers: a president, vice president, secretary, and treasurer. The Board, though, if it deems it is necessary, may create other officers as well. Officers are elected or appointed by a majority vote of the Board. Of the four officers specifically required by Article XI, Section 1, the president and vice president must also be members of the Board. **However, the secretary and treasurer do not have to be members of the Board. They may be, but they do not have to be**. The Bylaws give the Board discretion to elect someone who is not a Board member to serve as the secretary or treasurer. The Bylaws also allow one person to serve as both the secretary and treasurer; but, the president and vice president must be different people from each other and from the secretary and treasurer.

I bring all of this up because there is often confusion about who carries out the directives of the Board. Sometimes it is an officer. Sometimes it is a Board member. But, in all cases, only the Board members vote; officers cannot vote. When a Board member also holds an officer position, that Board member is acting as a Board member (director), not an officer when she or he votes. It sometimes gets confusing when an owner vote is required—how is a person who is an owner and a Board member (director) and an officer voting? In that instance, the person is acting and voting as an owner. But on Board matters, she or he is voting as a Board member (director).

In the end, it is my opinion that the Board should vote to implement some kind of reserve or capital improvement fund for the Association, with the ultimate goal being a vote of the owners to amend the Declaration to provide a means to assess for funding it. That will enable the Association to have the means necessary to preserve the capital improvements throughout the project.

If you have any questions, please call or e-mail me.

Chris

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