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COURT UPENDS HOTEL CONDOMINIUM STRUCTURE

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In *IconBrickell Condominium No. Three Association, Inc. v. New Media Consulting*, the Florida Third District Court of Appeal, in an opinion dated October 7, 2020, upheld a condominium unit owner's challenge to the structure of the IconBrickell Condominium No. Three claiming that the declaration for condominium violated the Florida Condominium Act by giving ownership and control of facilities shared by the residential condominium and hotel condominium to the hotel unit owner. The court rejected the hotel unit owner's argument that the declaration for a hotel-condominium is different than a purely residential condominium and typical for a condominium with both residential units and hotel unit where a "majority of what would otherwise be considered common elements under control of a condominium association are instead placed into a separate condominium unit – the hotel unit – and are owned by the hotel unit owner," which the hotel unit owner argued is "essential to allow the hotel to control areas which are critical to its hotel business and to allow the hotel to conform to brand standards."

The IconBrickell Condominium No. Three contains 372 residential units, commercial units, and a hotel unit operated as the 148-key W Miami Hotel. The condominium is structured to minimize common elements; most condominium components, which are typically common elements, are designated as "shared facilities," which are owned and controlled by the owner of the hotel unit.
Specifically, the Declaration of Condominium states:

> The Condominium has been established in such a manner to minimize the Common Elements. Most components which are typical "common elements" of a condominium have instead been designated herein as part of the Shared Facilities of the Hotel Unit, including, without limitation, all property and installations required for the furnishing of utilities and other services to more than one Unit or the Common Elements, if any.

The Declaration of Condominium limited the common elements to property not included within the units and defined the "shared facilities" which are owned and controlled by the hotel owner as:

> Any structural components of the Improvements, . . . balconies, terraces and/or facades attached or affixed thereto . . . ; all utility, mechanical, electrical, telephonic, telephone switchboard, Life Safety Systems, telecommunications, plumbing and other systems, including, without limitation, all wires, conduits, pipes, ducts, transformers, cables and other apparatus used in the delivery of the utility, mechanical, telephonic, telecommunications, electrical, plumbing, Life Safety Systems and/or other services or systems; . . . all elevator shafts, elevator cabs, elevator cables and/or systems and/or equipment used in the operation of the elevators [traversing] the Condominium Property; and all trash rooms, trash chutes (if any) and any trash collection and/or disposal systems. In addition, the Shared Facilities include the following areas . . . the main hotel lobby and the residential lobby.

Although the shared facilities are owned and controlled by the hotel owner, the residential unit owners are responsible for the costs and expenses related to the shared facilities paid to the hotel owner.

After the hotel unit owner sought to impose a special assessment on the residential unit owners relating to the shared facilities, a residential unit owner brought a claim alleging that the designation of common elements and shared facilities in the declaration of condominium violated Florida's Condominium Act, which requires common undivided ownership of the common elements by unit owners. Recognizing that a condominium is a creature of statute and that all provisions of a condominium declaration must conform to the Condominium Act, the Court found that the lack of undivided ownership of the shared facilities and the shifting of expenses relating to shared facilities to residential unit owners, including assessments by the hotel unit owner that "remains unencumbered by certain statutory provisions regulating Condominium Association assessments," violated the Condominium Act. The court concluded that the effect of the "recharacterization [of common elements as shared facilities], and the resultant expropriation of undivided common ownership [of common elements], indubitably contravenes the edict of the [Condominium] Act." As a result, the court affirmed the trial court's requirement that the declaration of condominium is reformed to comply with Florida law.

This decision will undoubtedly be problematic for hotel unit owners in condominiums with minimal common elements. Significant questions remain for existing hotel condominiums considering how to remedy the situation in light of the court's opinion, including to what extent standard features can be stripped out of a condominium and to what extent residential unit owners can be responsible for costs and expenses relating to shared facilities that would otherwise be considered common elements. The court noted that its decision was limited to statutory required common elements, leaving open the possibility that not all facilities that are shared must be common elements. However, the court did not specify what components must be designated as common elements. Several open questions remain. For example, are those components necessary for the condominium's intended operation required to be designated as common elements? Are those components for which unit owners pay to maintain required to be defined as common elements? Are common elements limited to those integral to the condominium's operation but not shared with others? These open questions create uncertainty for existing hotel condominiums and the planning and structuring of future hotel condominiums.

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