



Memorandum

To: Paul Dejulio; Florida River Estates Board
From: Eggleston Kosnik, LLC
Date: November 6, 2018
Re: Debt and Vote for Assessment

You asked whether the Board has authority to approve a large dollar amount project. The short answer to your question is that the Board has authority to enter into contracts for capital projects and is not restricted by a dollar amount. However, the cost of the project must be included in the Association's budget, which is subject to a veto by the members. In addition, there may be other reasons for the Board to conclude that owner approval is appropriate prior to entering into certain contracts.

FRE Governing Documents

The FRE Governing Documents authorize the Board to assess and do not restrict its contracting authority. Pursuant to the FRE Declaration, the Board can determine a Capital Account Fee from time to time. *See* Sec. 12.5. There is no limitation on the amount of the Capital Account Fee. The Board's authority is not limited by the Bylaws. Section 14 of the Bylaws allows for the Board to incur debt and sign contracts. It is not followed by any monetary limitation.

The Board should continue to stress to the members that what is being proposed is a Capital project and any assessment would be a Capital Account fee. This is the language used in the Declaration, and the Board will want to use the same terminology.

Colorado Common Interest Ownership Act (CCIOA)

CCIOA does not restrict the ability of the Board to incur debt. Associations are expressly authorized to incur liabilities and there is no monetary limitation. *See* C.R.S. § 38-33.3-302. There is no vote of the members required by CCIOA in order for a Board to incur debt. However, the repayment of debt needs to be reflected in the budget. An Association must follow the procedures in CCIOA prior to adopting a budget. These requirements are as follows:

Within ninety days after adoption of a proposed budget ... the executive board shall mail, by first-class mail, or otherwise deliver, including posting the proposed budget on the association's website, a summary of the budget to all the unit owners and shall set a date for a meeting of the unit owners to consider the budget. The meeting must occur within a reasonable time after mailing or other delivery of the summary, or as allowed for in the

bylaws. The executive board shall give notice to the unit owners of the meeting as allowed for in the bylaws. C.R.S. § 38-33.3-303.

The members then have the ability to veto the budget at the meeting. Thus, the Board must include the debt repayment in the budget and the members have the right to review and veto the budget. So, the members have an indirect right to approve of the project. To be clear, the members are not approving the debt repayment and budget, but have the ability to veto it. The Board does not have to go obtain votes to approve the project.

Reasons Why a Member Vote would be Required/Preferred.

1. CCIOA does require a vote of the owners if the loan will subject the common elements (water facilities) to a security interest. C.R.S. § 38-33.3-312. If the loan is secured by FRE's water facilities, then the members will need to vote on it.

2. Many lenders will require a vote of the owners in conjunction with the loan.

3. An owner could challenge FRE's Governing Documents. Although FRE's Governing Documents provide authority for the Board to incur debt and adopt a Capital Account Fee, the documents are sparse. There is always a possibility that a member could challenge the documents. The Board may want to obtain debt approval through a vote as an added precaution in case there is a challenge from a member.

You may already be doing this, but the Board may use the survey to choose the preferred option. The Board can then present the members with a ballot on the one option. This provides additional legal protection and is likely what the lender would want to see. Finally, as previously mentioned, if the fiber optic or gas is included in the debt, then there does need to be a vote of the owners and an amendment of the Declaration. The Declaration does not expressly permit assessments for projects outside of water projects.