ASSOCIATIONS AND LOANS—ARE YOU DOING IT RIGHT?

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June 7, 2022

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Whether your community needs to borrow money to pay for a roof replacement or installation of a swimming pool, it is imperative to know all the requirements and limitations your community has before starting the process. Therefore, the first step an association should take prior to applying for a loan is reaching out to its legal counsel to determine any requirements and/or limitations set forth in the governing documents and Colorado law.

Sometimes associations move forward with the loan process only to find out it did not comply with its legal requirements for approval. If this happens, an association may find itself in a difficult situation trying to keep its loan agreement from being terminated while attempting to obtain the requisite approval.

When examining an association's ability to borrow money, there are two separate legal questions that need to be answered:

1. Does the association have authority to borrow money?
2. Does the association have authority to pledge security for the loan?

Although directly related, associations must have authority for both of these actions in either their governing documents or at law. Currently, banks demand the association's income stream as security for loans, which is essentially the right to collect assessments should the association default on its loan obligations.

The date a community was created (pre v. post-Colorado Common Interest Ownership Act ("CCIOA")) is important to know for this analysis.

Pre-CCIOA Communities

Pre-CCIOA communities means those communities created before July 1, 1992. Such communities are only subject to the terms of the Colorado Revised Nonprofit Corporation Act ("CRNCA"), when it comes to borrowing money and pledging its income stream as security. The CRNCA explicitly authorizes associations to borrow money and pledge their income streams as collateral for loans without owner approval unless the governing documents provide otherwise.

Thus, if a pre-CCIOA community's documents are silent with respect to such community's authority to borrow money and pledge security, that association may lawfully enter into a loan transaction and pledge security without owner approval. On the other hand, if a pre-CCIOA association's governing documents set forth owner approval requirements with respect to borrowing money and/or pledging security, the association will be required to comply with such requirements.

Post-CCIOA Communities

Post-CCIOA communities are communities created after July 1, 1992. Post-CCIOA communities must comply with the specific language in CCIOA when it comes to loans because such provisions override the CRNCA.

When it comes to authority to borrow money and enter into loan transactions, post-CCIOA communities may do so without owner approval unless the governing documents require owner consent. However, the right to pledge future income as security for loans is separate and has a different requirement. Specifically, CCIOA provides that an association has a right to:

- Assign its right to future income, including the right to receive common expense assessments, but only to the extent the declaration expressly so provides . . . [emphasis added].

Based on the above, post-CCIOA communities can only pledge future income as security for loans if their declarations specifically allow this. If the declarations are silent, post-CCIOA communities do not have authority to pledge income as collateral. Furthermore, if declarations require owner approval to pledge collateral, the association will be required to comply with the requirement.

For more information about bank loans and pledging of collateral, please contact an Altitude attorney at 303.432.9999 or hoalaw@altitude.law.

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Tuesday, June 7th, 2022

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