

M E M O R A N D U M

DATE: August 24, 2012

TO: David Bullock
Town Manager

FROM: Robin Meyer, AICP, Director
Planning, Zoning and Building Department

RE : Resolution 2012-07
Extension of Nonconforming Use or Structure Abandonment Period
Colony Beach and Tennis Resort – 1620 Gulf of Mexico Drive

The Colony Beach and Tennis Resort, a longstanding tourism resort hotel development located at 1620 Gulf of Mexico Drive, has been closed since August 15, 2010. The Resort has density and structures that are legally nonconforming under the current Town Zoning Code. In accordance with Section 158.138 (B)(8)(a) of the code, a nonconforming use or structure that is no longer used shall be deemed abandoned after 12 months of non-use. Consequently, the nonconforming use and structures that make up the development known as the Colony would have become abandoned on August 15, 2011.

Section 158.138 (B)(8)(b) of the Zoning Code states: "However, should the period of nonuse or vacancy be caused by legal restraints upon the owner or lessee, the owner or lessee may set forth such grounds in a petition to the town commission and serve such petition on the planning and zoning official. The time may be extended by the town commission for good cause shown. The town commission may require the petitioner to decrease the nonconformity of the building or structure in one or more aspects of its nonconformity."

On April 13, 2011, the Colony Beach and Tennis Club Association, Inc., a not-for-profit corporation formed in 1973 ("the Association"), submitted to the Planning, Zoning and Building Director a request for an extension of time to comply with the regulations governing nonconforming uses and structures. The Town Commission subsequently granted an extension of the one year abandonment period to December 31, 2012, through Resolution 2011-17. The Resolution recognized that an additional extension of time may be requested. On July 27, 2012, the Planning, Zoning and Building Department received a letter from Donald E. Hemke, attorney for the Association, petitioning the Town of Longboat Key to approve a request for a second extension of time. The extension would allow the Colony until June 30, 2014, to reopen or redevelop the property in order to maintain, without question, the "grandfathered status" of the 237 tourism units at the Colony.

The current underlying zoning of the subject property is Tourist Resort Commercial (T-6), which allows the development of a maximum of six dwelling or tourism units per acre. Based upon 14.3 acres of land owned or controlled by the Association

abandonment of the nonconforming use or structure would reduce the maximum density that could be redeveloped or reopened to approximately 85 units, a loss of approximately 152 units. Based on 17.3 acres of land under single control or ownership, abandonment of the nonconforming use or structure would result in the allowable density -- being approximately 103 tourism units, but would still decrease the number of tourism units by approximately 134 units.

On August 24, 2012, the Town Attorney, David Persson, sent a letter (attached) to the Town Commission that provided a summary of the legal issues that have faced the Colony since the Town's prior extension. Staff has reviewed the options available to the Commission and provides a summary below.

The Commission may approve, approve with conditions or deny the request. Should the Commission deny the request, the Colony would have until December 31, 2012, to redevelop or use the nonconforming uses and structures without having been deemed abandoned in accordance with Section 158.138(B)(8)(a). In other words, the resort would need to be reopened in order to preserve the future use of its nonconformities.

The Association's experts and others have identified numerous problems and concerns regarding the existing structures and infrastructure. In order to reopen the resort, the applicant would be required to demonstrate compliance with all applicable codes including but not limited to Building Code, Life Safety Code, and Sanitary Code. Numerous issues have been previously identified and others may be revealed by subsequent inspections. Additionally, there are state laws that govern transient accommodations that must be met. Upon request, the Town has provided unit owners, (with a copy to the Association), a list of problems that needed to be successfully addressed prior to reoccupancy. The list of repairs to be done prior to use and occupancy is based upon the information that the Town has previously received regarding the structure in which the unit being requested to be occupied is located. Additional code requirements may be necessary once permit applications are submitted and inspections conducted.

Option 1, The Town Approves the Colony Request to Extend the Nonconforming Rights

Should the Town Commission approve the Colony's request to extend the nonconforming use abandonment date, staff recommends conditions that within thirty (30) days of adoption of this Resolution the Colony shall: 1) secure any unsafe buildings and stairways in compliance with Sections 150.04 - Minimum housing standards, 150.21 - Procedure for dangerous or unsanitary buildings, 150.22 - Procedure for buildings which are nuisances, and 150.71 - Requirements not covered by Code; 2) maintain the landscaping and irrigation on the portions of its property that are visible to the public and neighbors to a pre-shutdown condition; and 3) maintain the property free of all pests and vermin. If the Town believes that any of the conditions have not been met, it shall notify the Colony in writing and grant it a reasonable time to cure the deficiency. If the deficiency is not cured in a timely manner, a public hearing shall be held before the Town Commission to determine compliance with the requirements of

this Resolution. After receiving all evidence and testimony at the public hearing, if the Town Commission determines that the requirements of this Resolution have not been met, the Town Commission may take all necessary and appropriate actions including, but not limited to, upon sixty (60) days' notice, terminate the extension of time granted herein.

Option 2, The Town Denies the Request to Extend the Nonconforming Use Rights

If the Town denies the petition, the Colony will need to be reopened by December 31, 2012, or lose its rights to reopen or reuse all uses and structures not in compliance with today's Zoning Code.

Other Issues

In reviewing the Colony's request to extend its nonconforming use rights, staff has noted that during the time the resort has been closed the dunes and associated vegetation have taken over the site in front of the resort. Staff recommends that the representatives of the Colony contact the Florida Department of Environmental Protection (FDEP) prior to undertaking any action in this area. Beach vegetation and dunes are under jurisdiction of state law. The Town's previous approval of the continuation of nonconforming use rights or any subsequent approval does not affect state law regarding the dunes and associated vegetation. In addition, FDEP needs to approve plans for all construction that occurs to the gulf side of the Coastal Construction Control Line. State approval is also required by the Town Code

Recommendation

It is staff's opinion that multiple legal restraints have prohibited the timely redevelopment or reopening of the Colony. Staff has concerns regarding the continued deterioration of the Colony property while the legal issues are being resolved. Denial of this petition may add another layer of legal restraint that may further delay opening of the Colony. Therefore, staff recommends that the Town Commission grant the extension by the adoption of proposed Resolution 2012-07 subject to the conditions listed in the resolution, and if the conditions are not met, a hearing be held before the Town Commission to determine if the extension of time should be terminated prior to June 30, 2014.

Hankin, Persson, McClenathen, Cohen & Darnell

Attorneys and Counselors At Law
A Partnership of Professional Associations
1820 Ringling Boulevard
Sarasota, Florida 34236-5917

Lawrence M. Hankin
David P. Persson
Chad M. McClenathen*
Andrew H. Cohen
Robert W. Darnell
Michael T. Hankin
Kelly M. Fernandez**

David D. Davis (1955-2012)

Telephone (941) 365-4950
Facsimile (941) 365-3259
Email: dpersson@sarasotalawfirm.com

August 24, 2012

* Board Certified Real Estate

** Board Certified State and Fed. Govt. & Admin. Practice

The Honorable James L. Brown, Mayor
and Members of Town Commission
Town of Longboat Key
501 Bay Isles Road
Longboat Key, Florida 34228

RE: Extension of Time / Colony Non-Conformities

Dear Mayor Brown and Commissioners:

The Colony Beach and Tennis Club Association ("the Association") has filed a petition with the Town to extend the time to prevent abandonment of the grandfathered non-conforming uses and structures located within the Colony. In consultation with the Town Manager, we thought that it would be beneficial for an analysis of what has changed legally since the Town granted its prior extension last May. Additionally, this letter will outline the legal framework by which the Town Commission will make its determination in this quasi-judicial proceeding. Please remember this will be a quasi-judicial proceeding scheduled for September 4, 2012, and the rules of quasi-judicial process (disclosure of substantive conversations and ex parte communications) will be addressed at the onset of the proceeding.

FACTS

The Colony was built as a resort hotel in the early 1970's. It was constructed prior to the current federal, state and local flood regulations as well as the current Florida State building code. The Zoning Code has subsequently changed not only regarding setbacks and height, but also and, most importantly, density. The Colony is now zoned T6 which allows up to 6 units per acre rather than the 14 units per acre allowed at the time of its development approval. After it was built, approximately 15 acres were dedicated to condominium ownership and 237 condominium units were located on the property. The remaining portions of the property (approximately three acres) were not dedicated to condominium ownership. The interest in that property was transferred to various entities. Presently, Colony Lender has a 15% interest, Breakpoint, LLC, has a 5% interest and Dr. Klauber's related entities own the remaining 80%.

At the time the Colony was created, 232 of the 237 units were made part of a Limited Partnership Agreement ("the Partnership"). The Partnership was the entity that ran the Colony Beach and Tennis Resort.

Disputes among the parties arose and various legal actions were filed. Ultimately these matters were considered by the United States Bankruptcy Court in Tampa and, in 2010, the Bankruptcy Court ruled in favor of the Association on multiple significant matters. The Partnership went into reorganization and ultimately into Chapter 7 liquidation. The tourism operations at the Colony ceased on August 15, 2010, and the Association by action of the Bankruptcy Court was placed in charge of the 15 acre condominium property. The recreational lease on portions of the 3 acre parcel was determined by the Bankruptcy Court to be "unconscionable" and void. The Trustee for the Partnership appealed some, but not all, of the issues to the United States District Court in Tampa.

The Association Board of Directors as the new entity in control of the condominium parcel met with Town staff in early October 2010 to discuss the future of the tourism resort development and to discuss efforts to reopen the Colony. During this and subsequent meetings with the Town, multiple issues were discussed ranging from the pendency of the appeal by the Partnership, the requirements under the Zoning Code for recreational facilities, requirements under the State Building Code to provide safe transient accommodations, public health concerns regarding the potable water and sewer, flood regulations, building code regulations and other legal issues that impacted the Colony. The Association began the process of selecting a developer to assist it in reopening the Colony.

It became apparent by April 2011 that it was unrealistic to believe that the Colony could be reopened prior to August 16, 2011, when its grandfathered status would terminate. The Association filed a petition to extend the non-use deadline as provided under the Town's Zoning Code. Based upon the application, the Town conducted a quasi-judicial hearing, took public comment and reviewed the record. At the hearing and after much discussion, there was no objection from any of the property owners within the Colony (the Association and the owners of the outparcels) to the request of the Association and the Town granted by resolution an extension until December 31, 2012, with the condition that a hearing be held in March 2012 to hear the status of the efforts to reopen the Colony. That meeting, as you well know, occurred.

In July 2011, a little over two months after the Town granted the extension, the District Court reversed the Bankruptcy Court's prior final judgments and remanded the matter back to the Bankruptcy Court for further deliberations. In a pointed and lengthy decision, the District Court strongly disagreed with the findings of the Bankruptcy Court on key issues affecting the operation of the Colony. It raised questions whether the Partnership or the Association should be in control of the condominium property and whether the Partnership was entitled to significant damages from the Association. It also determined that the recreational lease was not unconscionable and not void. The District Court remanded the issues to the Bankruptcy Court for further proceedings.

The Association then attempted to appeal the District Court's ruling to the United States 11th Circuit Court of Appeals. The 11th Circuit denied the appeal without prejudice basically saying the appeal was not ripe for adjudication by the Appellate Court. The matter, therefore, went back to the Bankruptcy Court.

After the 11th Circuit's ruling, the Trustee for the Partnership filed a motion in the Bankruptcy Court to return control of the condominium property to the Partnership Trustee.

Meanwhile, the Colony had continued its process of selecting a developer. The Developer, who developed schematic plans for redevelopment of the property, had met on multiple occasions with Town staff and was involved in discussions with the unit owners of the Colony. The Association and the developer terminated their relationship in May of this year after the rulings by the District Court, the 11th Circuit, and the filing of the petition by the Partnership Trustee.

In early July of this year, a full-day hearing was conducted by the Bankruptcy Court to consider, among other things, whether the Partnership or the Association should be in control of the condominium property and the amount of damages that should be awarded to either party. The District Court had remanded this to the Bankruptcy Court with the instructions to "... either (1) vacate, amend, or issue each order necessary and appropriate to return the partnership to possession of the Colony units and recommend an award of \$7,751,470.00 to the Partnership or (2) leave the Partnership without the possession of the Colony units and recommend an award of \$20,646,312.00 to the partnership." The District Court also allowed the Bankruptcy Court to reconsider the Association's counterclaims against the Partnership.

The Bankruptcy Court has yet to rule. Any ruling from the Bankruptcy Court would be subject to the rights of appeal through the federal system. As of this writing, the Association controls the condominium property but that right of control is obviously in jeopardy.

TOWN CODE

Abandonment of non-conforming uses and structures are governed by Section 158.138(B)(8) of the Town's Zoning Code. Section 158.138(B)(8)(a) states that if a non-conforming use or structure is not used within one year, it is deemed to be abandoned. The Code then sets forth two methods by which that time period may be extended, but only one allows for an extension of a grandfathered use. Section 158.138(B)(8)(b) provides that the time for abandonment may be extended if the period of non-use or vacancy is caused by "legal restraints". The Code states "The time may be extended by the Town Commission for good cause shown. The Town Commission may require the petition to decrease the non-conformity of the building or structure and one or more aspects of its non-conformity."

The other manner in which the Colony may preserve its grandfathered status is to re-open the Colony as a resort hotel prior to December 31, 2012.

I will be calling you next week to answer any questions that you might have. In the meantime, please feel free to contact me as well.

Respectfully,



David P. Persson

DPP/dgb

cc: David Bullock
Robin Meyer
Charles Bartlett, Esq.
Donald Hemke, Esq.
David Siegal, Esq.
W. Andrew Adams
Morgan Bentley, Esq.
William Maloney
Trish Granger

RESOLUTION 2012-07

A RESOLUTION OF THE TOWN OF LONGBOAT KEY, FLORIDA, GRANTING THE REQUEST OF THE COLONY BEACH AND TENNIS CLUB ASSOCIATION, INC., FOR AN EXTENSION OF TIME TO COMPLY WITH THE REGULATIONS GOVERNING NONCONFORMING USES AND STRUCTURES FOR THE COLONY BEACH AND TENNIS CLUB, LOCATED AT 1620 GULF OF MEXICO DRIVE, ALLOWING ADDITIONAL TIME TO REOPEN THE TOURISM RESORT DEVELOPMENT IN ACCORDANCE WITH SECTION 158.138 (B)(8)(b) OF THE TOWN OF LONGBOAT KEY ZONING CODE; PROVIDING FOR SEVERABILITY; PROVIDING FOR AN EFFECTIVE DATE.

WHEREAS, at the request of Colony Beach Associates Ltd., the Town of Longboat Key ("the Town") at a special meeting of the Town Commission on November 21, 1972, approved the plot plan for the development of a 237 unit tourism resort hotel ("the Colony") on the land that consists of approximately 17.3 acres of land, located at 1620 Gulf of Mexico Drive; and,

WHEREAS, the zoning of the subject land at the time of the plot plan approval was H-2, which allowed for a maximum density of 14 units per acre of land; and,

WHEREAS, the current zoning for the Colony is T-6, allowing up to 6 units per acre; and,

WHEREAS, the Town issued a building permit for the construction of the tourism resort hotel on February 20, 1973, and the Colony was subsequently constructed; and,

WHEREAS, construction of the Colony occurred prior to current Federal, State and local Flood Regulations as well as the current State Building Code; and,

WHEREAS, on November 30, 1973, approximately 15 acres of the site were submitted to condominium ownership; and,

WHEREAS, the remaining approximately 3 acres were not dedicated to condominium ownership ("the Out Parcels"); and,

WHEREAS, the Colony Beach and Tennis Club Association, Inc. ("Association") is a not-for-profit corporation formed in 1973 and its membership is made up of the 237 tourist condominium units within the Colony; and,

WHEREAS, 232 of the 237 units entered into a Certificate of Agreement of Limited Partnership ("the Limited Partnership") dated December 27, 1973; and

WHEREAS, beginning in 1973, the Limited Partnership managed the Colony as a condominium resort hotel under the Agreement of Limited Partnership; and,

WHEREAS, the Limited Partnership filed for Chapter 11 under Federal bankruptcy codes and was converted on August 9, 2010, to Chapter 7 liquidation; and,

WHEREAS, the Colony closed on August 15, 2010; and,

WHEREAS, the Association was placed in possession and control of the Association property pursuant to the Bankruptcy Court order and final judgment; and,

WHEREAS, the Association Board and representatives from the Town met on October 7, 2010, to discuss the future of the tourism resort development; and,

WHEREAS, Section 158.138 (B)(8)(a) of the Town's Zoning Code provides that a nonconforming use or structure not used for a period of one year shall be considered abandoned and therefore all nonconforming uses or structures within the Colony could be deemed abandoned after August 15, 2011; and,

WHEREAS, the Association received a number of development proposals and worked diligently with the Town, but by April 2011 it became apparent that multiple legal restraints would prevent the Colony from reopening prior to the time of abandonment under the Town's Zoning Code; and,

WHEREAS, the Association therefor petitioned the Town for an extension of the one year period pursuant to Section 158.138 (B)(8)(b) of the Town's Zoning Code; and

WHEREAS, the owners of the Out Parcels did not object to the requested extension; and,

WHEREAS, after a public hearing on May 2, 2011, the Town Commission passed Resolution 2011-17 granting an extension of the abandonment provisions of the zoning code until December 31, 2012; and,

WHEREAS, on July 27, 2011, the United States District Court for the Middle District of Florida ("the District Court") reversed the Bankruptcy Court's prior final judgments and remanded the matter back to the Bankruptcy Court for further deliberations ; and,

WHEREAS, the District Court's order raised questions about whether the Partnership or the Association was in control of the Association property and whether the Partnership was entitled to significant damages against the Association; and,

WHEREAS, on October 14, 2011, the Association appealed the District Courts orders to the United States Eleventh Circuit Court of Appeals ("the Eleventh Circuit"); and,

WHEREAS, on March 2, 2012, the Eleventh Circuit dismissed the appeal without prejudice; and,

WHEREAS, on March 26, 2012, the Bankruptcy Trustee filed a motion in the Bankruptcy Court to return control of the Association property to the Partnership Trustee; and,

WHEREAS, the Association had previously selected a developer of the property but that relationship was terminated in May 2012 after the District Court's and Eleventh Circuit's rulings and the subsequent motion filed by the Bankruptcy Trustee; and,

WHEREAS, on July 13, 2012, the Bankruptcy Court conducted a full day hearing on this matter to consider, among other things, whether the Partnership or the Association should be in control of the Association property and the amount of damages that should be awarded to either party; and,

WHEREAS, no order has been issued by the Bankruptcy Court; and,

WHEREAS, an order issued by the Bankruptcy Court is subject to subsequent appeal; and,

WHEREAS, the Association believes the tourism resort cannot be redeveloped or reopened in a manner fitting to the resort prior to December 31, 2012; and,

WHEREAS, on July 30, 2012, the Association submitted a request for an extension of time to comply with the regulations governing nonconforming uses and structures for the Colony; and,

WHEREAS, the request for the extension is consistent with the provisions of the zoning code Section 158.138 (B)(8)(b), which allows the Town Commission to grant an extension of the period of time a nonconforming use or structure can remain unused or vacant if the nonuse or vacancy is caused by legal restraints upon the owner or lessee; and,

WHEREAS, pursuant to Section 158/138(B)(8)(b), the Town Commission may require the petitioner to decrease the nonconformity of the building or structure in one or more aspects of its nonconformity; and,

WHEREAS, abandonment of the nonconforming use or structure would result in the loss of tourism units that could be redeveloped or reopened in the future to approximately 85 units, a loss of approximately 152 units, if redevelopment is based on 14.3 acres of land currently controlled by the Association; and,

WHEREAS, under single control or ownership abandonment of the nonconforming use or structure would result in the loss of tourism units that could be redeveloped or reopened in the future to approximately 103 units, a loss of approximately 134 units, based on 17.3 acres of land; and,

WHEREAS, the Town Commission has determined that multiple legal constraints have prohibited the timely redevelopment or reopening of the Colony, and deems it in the public interest to grant an extension of the abandonment provision of Section 158.138(B)(8) to June 30, 2014, to provide additional time to redevelop or reopen the Colony.

NOW, THEREFORE, BE IT RESOLVED BY THE TOWN COMMISSION OF THE TOWN OF LONGBOAT KEY, FLORIDA, THAT:

SECTION 1. The above Whereas clauses are true and correct and are hereby ratified and confirmed.

SECTION 2. The Town Commission pursuant to 158.138 (B)(8)(b) of the Town's Zoning Code hereby grants the Colony Beach and Tennis Club Association, Inc., an extension of time until June 30, 2014, to redevelop or use the nonconforming uses and structures at the Colony without being deemed to have abandoned the nonconformities in accordance with Section 158 (B)(8)(a), subject to the following conditions. Within thirty (30) days of adoption of this Resolution the Colony shall: 1) secure any unsafe buildings and stairways in compliance with Section with Sections 150.04 - Minimum housing standards, 150.21 - Procedure for dangerous or unsanitary buildings, 150.22 - Procedure for buildings which are nuisances and 150.71 - Requirements not covered by Code;2) maintain the landscaping and irrigation on the portions of its property that are visible to the public and neighbors to a pre-shutdown condition; and 3) maintain the property free of all pests and vermin. If the Town believes that any of the conditions have not been met, it shall notify the Colony in writing and grant it a reasonable time to cure the deficiency. If the deficiency is not cured in a timely manner, a public hearing shall be held before the Town Commission to determine compliance with the requirements of this Resolution. After receiving all evidence and testimony at the public hearing, if the Town Commission determines that the requirements of this Resolution have not been met, the Town Commission may take all necessary and appropriate actions including, but not limited to, upon sixty (60) days' notice terminate the extension of time granted herein.

SECTION 3. In accordance with the terms of this Resolution, the subject property may be redeveloped or maintained at the existing density of 237 tourism units as tourism units are defined by the zoning code, as may be amended.

SECTION 4. Effective Date. This Resolution shall become effective immediately upon adoption.

Passed by the Town Commission of the Town of Longboat Key on the ____ day of _____, 2012.

James L. Brown, Mayor

ATTEST:

Trish Granger, Town Clerk



TOWN OF LONGBOAT KEY

Incorporated November 14, 1955

Town Hall
501 Bay Isles Road
Longboat Key, Florida 34228-3196
(941) 316-1999
SUNCOM 516-2760
Fax (941) 316-1656
www.longboatkey.org

August 24, 2012

Colony Beach & Tennis Club Association, Inc.
c/o Jay R. Yablon, Esquire
President
910 Northumberland Drive
Schenectady, New York 12309
jyablon@nycap.rr.com

Donald E. Hemke, Esquire
Carlton Fields, PA
Post Office Box 3239
Tampa, Florida 33601-3239
Attorney for Colony Beach & Tennis Club Association, Inc.
dhemke@carltonfields.com

Dr. Murray J. Klauber
Registered Agent for Colony Beach and Tennis Club, Inc.
and Colony Beach, Inc.
1620 Gulf of Mexico Drive
Longboat Key, Florida 34228
murfklauber@gmail.com

Charles J. Bartlett, Esquire
Icard Merrill Cullis, et al.
Post Office Box 4195
Sarasota, Florida 34230-4195
Attorney for Colony Beach and Tennis Club, Inc.
and Colony Beach, Inc.
cbartlett@icardmerrill.com

William E. Robertson, Esquire
Registered Agent for Colony Lender, LLC
Kirk Pinkerton
240 S. Pineapple Avenue, 6th Floor
Sarasota, Florida 34236
wrobertson@kirkpinkerton.com

David L. Siegel, Esquire
5313 N. Bay Road
Miami Beach, Florida 33140-2030
Attorney for Colony Lender, LLC
davidsiegel@the-beach.net



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Town Hall
501 Bay Isles Road
Longboat Key, Florida 34228-3196
(941) 316-1999
SUNCOM 516-2760
Fax (941) 316-1656
www.longboatkey.org

Breakpointe, LLC
c/o W. Andrew Adams, Manager
801 Mooreland Lane
Murfreesboro, TN 37128

Neal A. Sivyer, Esquire
Sivyer, Barlow, Watson, P.A.
401 E. Jackson Street, Suite 2225
Tampa, Florida 33602-5233
Attorney for Breakpointe, LLC
nsivyer@sbwlegal.com

To Whom It May Concern,

A public hearing has been scheduled to consider a request by the Colony Beach and Tennis Club Association, Inc. for an extension of time to comply with the regulations governing nonconforming uses and structures for the Colony Beach and Tennis Club located at 1620 Gulf of Mexico Drive, Longboat Key, FL.

The Town Commission has received numerous e-mails and correspondence regarding this request. As an identified interested party of this property, these documents are enclosed for your review prior to the public hearing scheduled for September 4, 2012. The hearing will be held at Longboat Key Town Hall, 501 Bay Isles Road, Longboat Key, FL. The meeting begins at 7:00 p.m. Please be advised that there are several other public hearings scheduled for this meeting, which may be considered prior to the extension request.

Any additional correspondence will be forwarded on Wednesday, August 29, 2012. Subsequent to that date, if you provide me (tgranger@longboatkey.org) with an e-mail address, I will forward the items daily. If you elect to receive a printed copy, additional correspondence will be available for distribution at the public hearing.

Please feel free to contact me if you have any questions.

Sincerely,

Trish Granger
Town Clerk



TOWN OF LONGBOAT KEY

Incorporated November 14, 1955

Town Hall
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Longboat Key, Florida 34228-3196
(941) 316-1999
SUNCOM 516-2760
Fax (941) 316-1656
www.longboatkey.org

cc:

Morgan R. Bentley, Esquire
Bentley & Bruning, P.A.
783 S. Orange Avenue, Suite 220
Sarasota, Florida 34236-4702

Mr. William Maloney
200 – 2nd Avenue South #463
St. Petersburg, Florida 33701
(Bankruptcy Trustee for Colony Beach & Tennis Club)

Jordi Guso, Esquire
Berger Singerman, LLP
1450 Brickell Avenue, Suite 1900
Miami, Florida 33131-3453
(Bankruptcy attorney for Colony Beach & Tennis Club)

Roberta A. Colton, Esquire
Trenam Kemker, P.A.
Post Office Box 1102
Tampa, Florida 33601-1102
(Bankruptcy attorney for Colony Beach & Tennis Club)

Jeffrey W. Warren, Esquire
Bush/Ross, Attorneys At Law
1801 N. Highland Avenue
Tampa, FL 33602

Trish Granger

From: Stan Adelman [stradel25@gmail.com]
Sent: Thursday, August 23, 2012 10:13 PM
To: Phillip Younger
Subject: Deny Colony club Extention Request

I have ben a resident of the Aquarius Club for 22 yrs and strongly support our President's request to you to deny the Colony Club's applicationt for an additional18 months extention. Additional time will not accomplish any thing but more requestsr for time. Enough is enough. Stanley R. Adelman, 1701 GMD, LBK

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Trish Granger

From: Patricia Zunz
Sent: Thursday, August 23, 2012 11:12 AM
To: George Wehrlin
Cc: Town Clerk
Subject: RE: Colony Beach & TC .. Town Meeting

Dear Mr. and Mrs. Wehrlin:

The situation at the Colony is complex and its prompt and proper resolution is a matter of great importance to all those directly involved, as well as to the community as a whole. Given your long personal and financial involvement with the Colony your thoughts as to a proper resolution are entitled to be heard. Therefore I strongly urge you to attend the Commission meeting scheduled for Tuesday, September 4 at 7:00pm when Colony related issues will be discussed.

If you will be unable to attend, please consider assisting us by submitting a letter explaining more specifically what role you think the Commission can play at this point in facilitating an amicable resolution among the contesting parties. I say this because your e-mail reflects a misperception that the Town bears some sort of responsibility for the current situation. The Town did not initiate, precipitate or participate in any of the disputes or lawsuits among the parties that led up to the unfortunate closing of the Colony. To date the Town has had only a limited role to play in the matter, essentially allowing the disputing parties an additional year to work out their differences on condition that they report back periodically on their progress. Regretfully, little or no progress has been made and the complex continues to deteriorate.

Pat Zunz

From: George Wehrlin [highyield70@yahoo.com]
Sent: Tuesday, August 21, 2012 12:17 PM
To: Patricia Zunz
Subject: Colony Beach & TC .. Town Meeting

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Dear Mrs. Zunz

It is with great distress that I am writing you about the circumstances concerning The Colony Beach & Tennis Club. We have been owners for nearly 35 years visiting 3-4 times a year. We own several Colony units (and a LBK Club unit) with a substantial investment in the site, notwithstanding the continued insurance, maintenance, and taxes we pay without being able to use our fee simple property due to regulations from the town and the other well known circumstances.

No one is more frustrated than the owners who are enduring this expensive, emotional, and frivolous trek we have been on for over 3 years. The owners have mediated and negotiated many times with Dr. Klauber, who calls himself "the General", to no avail. A settlement with him is impossible as the town of Long Boat Key knows from past experience. He has always settled his disputes with a law suit instead of working out a plausible solution. If the Town is waiting for a settlement with Dr. Klauber, you will be waiting for years until the suits pass through the courts leaving the Colony a decrepit eyesore on the key. No one wants that except Dr. Klauber who

feels the longer he delays us, the better he will fare.

To get The Colony back to a viable resort, the town and neighbors need to remove the road blocks and distractions that are inhibiting us from getting where we need to be without the influence of Dr. Klauber. The owner's board has worked an unbelievable amount of hours to get us to that point, but hurdles appear that we have to deal with and delay the outcome. To get all of us back on the island, use the restaurants, and buy at the shops, we need the town to help us get to that point rather than impeding us. We all want the same result; but until the law suits are decided (unless the town lets us open units and give us time to deal with the legal matters), the owners nor the town will have a Colony to visit or bring needed funds onto the island.

We had planned to sell our units at the Colony to buy a full time place on the island. Instead, it looks like we will never be able to relocate on the key or leave our units to our children who grew up on the Colony beach. The financial burden is great for those of us who are retired, with no end in sight. Please understand the predicament we are in, due to no cause of our own, to get the Colony back in operation for all of our sakes.

Dea and George Wehrlin

P.S. I am a member of the Morristown Field Club and played tennis with Ed many times in our Thursday Group

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Monica Wolfson
1701 Gulf of Mexico Drive
Longboat Key, FL 34228

TOWN OF LONGBOAT KEY
TOWN CLERK/ASST
2012 AUG 23 AM 11:14

August 19, 2012

Mr. Jim Brown
Longboat Key Town Commission
501 Bay Isles
Longboat Key, FL. 34228

Subject: The Colony Beach & Tennis Resort

In reference to the letter sent on 8/20/2012 from Aquarius Club Board of Directors. I have been a resident of Aquarius Club for 7 years and currently own 2 apartments. In the last 2 years I have been extremely disappointed with the slow deterioration of the once pristine Colony Resort. Since its deterioration, we have been experiencing an abundance of rodent problems, unwanted loitering and extremely unsafe conditions for our children. As our Aquarius Club Board of Directors mentioned enough is enough and I imply you not to grant any further extensions. For it has become an extreme burden on our once great community.

Owner – Aquarius Club

Monica Wolfson

Trish Granger

From: Jack Duncan
Sent: Wednesday, August 22, 2012 9:49 AM
To: George Wehrlin
Cc: Town Clerk
Subject: Re: Colony Beach and TC.. Town Meeting

Dear George and Dea

Thank you for your input. I agree that the parties involved have moved slowly to resolve the issues, that would ultimately allow Colony, to return to it's status as a premiere resort. And like you, I am very frustrated with the lack of progress. However, implying that Town Government in some way is "impeding" this process is flat out wrong. The Town is not a negotiating party in this ordeal and will continue to support any plan, that the negotiating parties can agree on, that will bring Colony back to a position of prominence on Longboat Key.

Jack Duncan
Commissioner, Longboat Key

On Aug 21, 2012, at 12:20 PM, George Wehrlin wrote:

Dear Mr. Duncan:

It is with great distress that I am writing you about the circumstances concerning The Colony Beach & Tennis Club. We have been owners for nearly 35 years visiting 3-4 times a year. We own several Colony units (and a LBK Club unit) with a substantial investment in the site, notwithstanding the continued insurance, maintenance, and taxes we pay without being able to use our fee simple property due to regulations from the town and the other well known circumstances.

No one is more frustrated than the owners who are enduring this expensive, emotional, and frivolous trek we have been on for over 3 years. The owners have mediated and negotiated many times with Dr. Klauber, who calls himself "the General", to no avail. A settlement with him is impossible as the town of Long Boat Key knows from past experience. He has always settled his disputes with a law suit instead of working out a plausible solution. If the Town is waiting for a settlement with Dr. Klauber, you will be waiting for years until the suits pass through the courts leaving the Colony a decrepit eyesore on the key. No one wants that except Dr. Klauber who feels the longer he delays us, the better he will fare.

To get The Colony back to a viable resort, the town and neighbors need to remove the road blocks and distractions that are inhibiting us from getting where we need to be without the influence of Dr.

Klauber. The owner's board has worked an unbelievable amount of hours to get us to that point, but hurdles appear that we have to deal with and delay the outcome. To get all of us back on the island, use the restaurants, and buy at the shops, we need the town to help us get to that point rather than impeding us. We all want the same result; but until the law suits are decided (unless the town lets us open units and give us time to deal with the legal matters), the owners nor the town will have a Colony to visit or bring needed funds onto the island.

We had planned to sell our units at the Colony to buy a full time place on the island. Instead, it looks like we will never be able to relocate on the key or leave our units to our children who grew up on the Colony beach. The financial burden is great for those of us who are retired, with no end in sight. Please understand the predicament we are in, due to no cause of our own, to get the Colony back in operation for all of our sakes.

Dea and George Wehrin



Trish Granger

From: Joanne Geller [jgsquared02@hotmail.com]
Sent: Wednesday, August 22, 2012 9:55 PM
Subject: FW: Colony Beach Club - Request for Extension
Attachments: Letter to Township.pdf; ATT00001..htm

Our names are Albert and Luba Geller and we have lived at 1701 Gulf of Mexico Drive, Apt. 504 for over 25 years. The situation regarding the now vacant Colony Beach property has been dragging on far too long. We are in full agreement with the letter attached from our board. We enjoyed a wonderful relationship in the past with The Colony for many years. It was a real benefit to be next door for a number of reasons. It added value to our property, a number of conveniences and also provided very good security. It has now become an eyesore with little or no security. We feel there is no reason to extend any more lengthy extensions, as enough time has elapsed for the two parties to make a deal. More time will not solve anything, it will only leave us neighboring residents with an unappealing scenery and a feeling of living in an unsafe area. I hope you will take this into consideration and get the process done in a timely fashion.

Yours Truly,

Albert and Luba Geller

AQUARIUS

Club

1701 Gulf of Mexico Drive
Longboat Key, FL 34228

August 10, 2012

Mr. Jim Brown
Longboat Key Town Commission
501 Bay Isles
Longboat Key, FL 34228

Subject: The Colony Beach & Tennis Resort

Dear Jim,

By way of introduction, this correspondence is written by unanimous consent of the 5 members of the Board of Directors of the Aquarius Club Condominium Association, 1701 Gulf of Mexico Drive, Longboat Key. The address is important in this matter in that we occupy the first building to the north of the Colony Beach & Tennis Resort.

It has come to our attention that the Colony Association has petitioned the Town Commission for an extension to the tourism use allowance for an additional 18 months, which, if allowed, would push the potential resolution date out to June 30, 2014. The Aquarius Club Board of Directors would vehemently oppose any action the Commission may take which allows for further delays in rectifying the legal dispute that keeps this once proud and vibrant property from quick regeneration. Our strong opposition is based on the following:

* The Town Commission has already provided the Colony Association a generous extension, which expires at the end of this year. The parties involved in this dispute have apparently squandered the initial extension period and from our perspective have made virtually no progress in resolving their issues. How could anyone believe an additional 18 months would do anything other than allow the continuing deterioration of the property! Why would the Commission give up the only leverage they appear to have in trying to move this process forward! To support this assertion that this will continue well into the future, see Donald E. Hemke of the firm of Carlton Fields' (Colony Association Attorney) twenty page letter of July 27, 2012, addressed to Robin Meyer, Planning Zoning and Building Director of the Town of Longboat Key which recites in considerable detail the history of dispute and litigation among the parties commencing 2010 to the present.

* In paragraph 7.4 of such letter it is set forth that "the Association is willing to continue to maintain the appearance of the Colony along Gulf of Mexico Drive and along its borders in order to minimize or avoid any adverse effects on the Colony's neighbors and on the town residence and visitors during the time extension." This affords us little comfort based on our experience over the last 2 years.

* The 6 story Aquarius Club building (unfortunately) has a clear vantage point over the Colony and are continuously dismayed at just how quickly this resort's property and buildings have deteriorated.

* The lack of maintenance and care for this resort raises significant concerns for possible negative health, safety, and financial affects on our property. Prospective buyers and renters at the Aquarius Club have vocalized issues relating to the current and very visible condition of the Colony and how it would effect their financial investments. This has been very discouraging, to say the least.

* Security issues associated with Colony vacancy are obvious and we have witnessed and reported suspicious activities on a number of occasions. For example, unlighted vehicles have been sighted on the beach in front of the Colony at night, which has raised significant concerns with our residents. These security issues place an unnecessary burden on our small police department.

* The Town itself must be experiencing lost revenues from among other items unpaid real estate taxes, lack of tourist spending, and the absence of hotel tax and rental fees.

* In its current condition the Colony has had a palpable negative impact on our property values and clearly has to be causing reputational damage to Longboat Key as a whole. Why would anyone on the Commission want to allow this to continue!

We are encouraged that certain Commissioners in the past have made public statements suggesting that no further extensions would be allowed. Obviously we support that viewpoint. We have always had an excellent working relationship with the Colony Association and Management and are certainly disappointed for them that their disputes continue, however enough is enough.

We implore you and the rest of the Commissioners to recognize the negative impacts the Colony dispute is having on its tax paying neighbors in good standing and accordingly respectfully request that the associations application to extend the time from December 31st, 2012, to maintain the grandfathered status of the 237 condo units and existing improvements at the Colony, be denied.

Should you want to discuss further please contact our office at 383-4223.

Sincerely,

Aquarius Club Board of Directors

Frank Morneau, President

Bob Boyd, Secretary

David Marsh, Vice President

Greg Van Howe, Vice President

Maryanne Wade, Treasurer

Trish Granger

From: Phillip Younger
Sent: Wednesday, August 22, 2012 4:34 PM
To: RASchiffer@aol.com
Cc: Town Clerk
Subject: RE: (no subject)

Thank you for your input. This is truly a complicated and awkward situation that benefits nobody and that nobody wants.

Phill Y.

From: RASchiffer@aol.com [RASchiffer@aol.com]
Sent: Wednesday, August 22, 2012 1:31 PM
To: Phillip Younger
Subject: Fwd: (no subject)

From: RASchiffer@aol.com
To: RASchiffer@aol.com
Sent: 8/22/2012 1:20:58 P.M. Eastern Daylight Time
Subj: (no subject)

To the Town Commissioners

My wife and I own a unit at the Aquarius Club, and are strongly opposed to any extension beyond the one in effect, which expires at the end of this year

We are in total agreement with the letter sent to Mr Brown on August 12 2012 , by our Board of Directors

We will not repeat the contents of that letter, but hope that you will not grant any extension

Many thanks for your kind consideration

Deana and Richard Schiffer

Trish Granger

From: Phillip Younger
Sent: Wednesday, August 22, 2012 9:39 AM
To: George Wehrlin
Cc: Town Clerk
Subject: RE: Colony Beach & TC

Thank you for your input. This is truly a complicated and awkward situation that benefits nobody and that nobody wants.

Phill Y.

From: George Wehrlin [highyield70@yahoo.com]
Sent: Tuesday, August 21, 2012 12:22 PM
To: Phillip Younger
Subject: Colony Beach & TC

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Dear r. Younger:

It is with great distress that I am writing you about the circumstances concerning The Colony Beach & Tennis Club. We have been owners for nearly 35 years visiting 3-4 times a year. We own several Colony units (and a LBK Club unit) with a substantial investment in the site, notwithstanding the continued insurance, maintenance, and taxes we pay without being able to use our fee simple property due to regulations from the town and the other well known circumstances.

No one is more frustrated than the owners who are enduring this expensive, emotional, and frivolous trek we have been on for over 3 years. The owners have mediated and negotiated many times with Dr. Klauber, who calls himself "the General", to no avail. A settlement with him is impossible as the town of Long Boat Key knows from past experience. He has always settled his disputes with a law suit instead of working out a plausible solution. If the Town is waiting for a settlement with Dr. Klauber, you will be waiting for years until the suits pass through the courts leaving the Colony a decrepit eyesore on the key. No one wants that except Dr. Klauber who feels the longer he delays us, the better he will fare.

To get The Colony back to a viable resort, the town and neighbors need to remove the road blocks and distractions that are inhibiting us from getting where we need to be without the influence of Dr. Klauber. The owner's board has worked an unbelievable amount of hours to get us to that point, but hurdles appear that we have to deal with and delay the outcome. To get all of us back on the island, use the restaurants, and buy at the shops, we need the town to help us get to that point rather than impeding us. We all want the same result; but until the law suits are decided (unless the town lets us open units and give us time to deal with the legal matters), the owners nor the town will have a Colony to visit or bring needed funds onto the island.

We had planned to sell our units at the Colony to buy a full time place on the island. Instead, it looks like we will never be able to relocate on the key or leave our units to our children who grew up on the Colony beach. The financial burden is great for those of us who are retired, with no end in sight. Please understand the predicament we are in, due to no cause of our own, to get the Colony back in operation for all of our sakes.

Dea and George Wehrlin

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Trish Granger

From: RASchiffer@aol.com
Sent: Wednesday, August 22, 2012 1:29 PM
To: James L. Brown
Subject: Fwd: (no subject)

From: RASchiffer@aol.com
To: RASchiffer@aol.com
Sent: 8/22/2012 1:20:58 P.M. Eastern Daylight Time
Subj: (no subject)

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Deana and Richard Schiffer

Trish Granger

From: David Brenner
Sent: Tuesday, August 21, 2012 3:10 PM
To: George Wehrlin
Cc: Town Clerk
Subject: RE: Colony Beach &TC . Town Meeting

Wehrlins...Thanks for your input. As a former unit owner at The Colony(until 1994), I appreciate your angst. Even though the Town is made out to be a "bad guy" in this tale, the fault lies with those , who you've identified, who have a direct interest in the property. We , in the Town government, are working tirelessly to find a resolution. Again, I appreciate your writing to me with your legitimate concern. Dave Brenner

From: George Wehrlin [highyield70@yahoo.com]
Sent: Tuesday, August 21, 2012 12:14 PM
To: David Brenner
Subject: Colony Beach &TC . Town Meeting

Dear Mr. Brenner:

It is with great distress that I am writing you about the circumstances concerning The Colony Beach & Tennis Club. We have been owners for nearly 35 years visiting 3-4 times a year. We own several Colony units (and a LBK Club unit) with a substantial investment in the site, notwithstanding the continued insurance, maintenance, and taxes we pay without being able to use our fee simple property due to regulations from the town and the other well known circumstances.

No one is more frustrated than the owners who are enduring this expensive, emotional, and frivolous trek we have been on for over 3 years. The owners have mediated and negotiated many times with Dr. Klauber, who calls himself "the General", to no avail. A settlement with him is impossible as the town of Long Boat Key knows from past experience. He has always settled his disputes with a law suit instead of working out a plausible solution. If the Town is waiting for a settlement with Dr. Klauber, you will be waiting for years until the suits pass through the courts leaving the Colony a decrepit eyesore on the key. No one wants that except Dr. Klauber who feels the longer he delays us, the better he will fare.

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Dea and George Wehrlin

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Trish Granger

From: George Wehrin [highyield70@yahoo.com]
Sent: Tuesday, August 21, 2012 12:17 PM
To: Patricia Zunz
Subject: Colony Beach & TC .. Town Meeting

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Dear Mrs. Zunz

It is with great distress that I am writing you about the circumstances concerning The Colony Beach & Tennis Club. We have been owners for nearly 35 years visiting 3-4 times a year. We own several Colony units (and a LBK Club unit) with a substantial investment in the site, notwithstanding the continued insurance, maintenance, and taxes we pay without being able to use our fee simple property due to regulations from the town and the other well known circumstances.

No one is more frustrated than the owners who are enduring this expensive, emotional, and frivolous trek we have been on for over 3 years. The owners have mediated and negotiated many times with Dr. Klauber, who calls himself "the General", to no avail. A settlement with him is impossible as the town of Long Boat Key knows from past experience. He has always settled his disputes with a law suit instead of working out a plausible solution. If the Town is waiting for a settlement with Dr. Klauber, you will be waiting for years until the suits pass through the courts leaving the Colony a decrepit eyesore on the key. No one wants that except Dr. Klauber who feels the longer he delays us, the better he will fare.

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Dea and George Wehrin

P.S. I am a member of the Morristown Field Club and played tennis with Ed many times in our Thursday Group

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Trish Granger

From: edkrepela [coastalmkt@aol.com]
Sent: Tuesday, August 21, 2012 4:24 PM
To: David Brenner
Subject: Re: Colony Calamity; Time for Some Tough Love

Guessing there could be a titch of wiggle room post drop-dead date. Gotta make em sweat Dave.
Ed

-----Original Message-----

From: David Brenner
To: COASTALMKT@aol.com
Cc: Town Clerk
Subject: RE: Colony Calamity; Time for Some Tough Love
Sent: Aug 21, 2012 2:37 PM

Ed...Thanks for your input. Dave Brenner

From: COASTALMKT@aol.com [COASTALMKT@aol.com]

Sent: Monday, August 20, 2012 11:39 AM

To: James L. Brown; David Brenner; Lynn Larson; Patricia Zunz; Phillip Younger; Jack Duncan; Terry Gans

Cc: Dave Bullock

Subject: Colony Calamity; Time for Some Tough Love

Dear Mayor Brown and Commission:

The concern, frustration and fear expressed by the Colony's immediate neighbors extends to all residents of Longboat Key. Please add to the issues of eyesore, health and diminished property values a very real threat to abandoned deteriorating wooden structures; fire!

I would also submit to the Colony Association Board that it is incorrect to state denial of still another extension would 'take away' 140 units. By the Association's inaction they are 'giving' the units away and that problem lies directly at their doorstep and that of their attorney's.

I attended the meeting where everyone anticipated an updated status report and instead there was an attempt to add more snake oil to their existing proposal. To your credit this was not allowed to happen. I also recall words to the effect "You have until December 31st; that's it!"

Mayor Brown and Longboat Key Commission, you are dealing with parties acting like errant kids, with no sense of urgency or personal responsibility, so to you I say enough is enough, its time for some good old fashioned Tough Love. No extension!

Ed Krepela
Longboat Key

Sent from my Verizon Wireless BlackBerry

LAW OFFICES
OF
RANDALL K. CRAIG

5000 EAST VIRGINIA, SUITE 1 • EVANSVILLE, INDIANA 47715
TELEPHONE (812) 477-3337 • TELEFAX (812) 477-3658
E-MAIL: rkc@rkcreiglaw.com
WEB SITE: www.rkcreiglaw.com

August 15, 2012

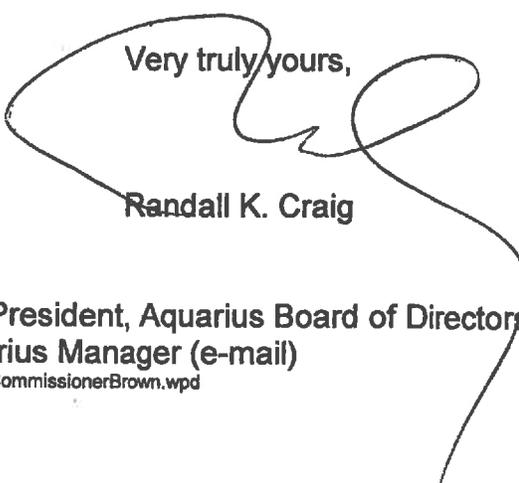
Attn: Jim Brown
Mayor and Town Commissioner, District 4
Town Hall
501 Bay Isles Road
Longboat Key, Florida 34228

Re: Colony Association

Dear Commissioner Brown:

I am an owner at the Aquarius Club. I received a copy of a letter sent to the Longboat Key Town Commissioners concerning the application for an extension of time requested by the Colony Beach Association. Please be advised that I concur with the position of the Board of Directors of the Aquarius Club, and I am likewise concerned about the condition and continuing deterioration of the Colony property. It is bad enough that the view on our side of the Aquarius Club is now blocked by Australian pines being allowed to grow by Sea Place, but now on the other side of the building we have a condition of squalor which is continually getting worse. In short, we are now being attacked from both sides. It is unfortunate that the Town Commission will not do anything about the dangerous and unsightly Australian pines on the Sea Place side of the Aquarius Club, but now it appears that the Town Commission is giving consideration to an extension of time which would allow further deterioration of the Colony property. I request that the Commissioners address both issues, and quickly. I definitely support the view of our Board of Directors and strenuously object to any further extensions of time in regard to the Colony Beach Association.

Very truly yours,


Randall K. Craig

RKC/db

cc: W. Frank Morneau, Sr., President, Aquarius Board of Directors (e-mail)
Ms. Debbie Fulton, Aquarius Manager (e-mail)

G:\Donna\LETTER\PERSONAL.RKCAquarius-LBKCommissionerBrown.wpd

TOWN OF LONGBOAT KEY
TOWN CLERK/ASO
2012 AUG 20 AM 11:21

8/16/12

Mayon and Commissioners

I totally agree with
my Bd. of Directors at
the Aquarius Club. I am a
owner of 2 apt's - since 1975
you must do something soon.

Bill W.

OWN OF LONGBEACH
1910 CLERK/ASS
2012 AUG 20 AM 11:21

Trish Granger

From: David Brenner
Sent: Monday, August 20, 2012 10:52 PM
To: Wfmorneausr@aol.com
Cc: Town Clerk
Subject: RE: (no subject)

Frank...Thanks again for keeping me in the loop. Dave Brenner

From: Wfmorneausr@aol.com [Wfmorneausr@aol.com]
Sent: Monday, August 20, 2012 12:21 AM
To: David Brenner
Subject: Re: (no subject)

Good (late) Evening

I have read a reasonable amount of press on the pros and cons of the Colony Assoc obtaining an extension beyond Dec/2012 . Gratefully , very little is in favor except for their own remarks .

On the subject of their statements , never until this date have we heard from their President or Board asking for any possible concerns we at the Aquarius might have and the damages we are incurring. Only now are they endeavoring to be "the good guys" and offering to employ our landscapers and place rat traps , etc. We have refrained from discussion so as to not interfere with your decision process. All of our comments to you still hold 100% .We must force them into action without waiting to the courts to give absolute directive which could take years.

I have not copied your fellow Commissioners in on this but please feel free to do so

Sincerely

Frank

In a message dated 8/15/2012 11:13:27 P.M. Eastern Daylight Time, dbrenner@longboatkey.org writes:

Frank...Thanks for your input. Your patience to date is commendable. Dave

From: Wfmorneausr@aol.com [Wfmorneausr@aol.com]
Sent: Wednesday, August 15, 2012 2:36 PM
To: David Brenner
Cc: gvanhowe@hotmail.com; aquariusclublbk@gmail.com
Subject: (no subject)

David

I only hope a pray your decline of an extension will force this issue to closure

Your time expended as Vice Mayor is sincerely appreciated.

If you desire anything further from us , please advise.We will have on of our Vice Presidents at the meeting who is more than capable of speaking should you so feel appropriate

Regards

Frank Morneau

Trish Granger

From: edkrepela [coastalmkt@aol.com]
Sent: Monday, August 20, 2012 4:42 PM
To: Jack Duncan
Subject: Re: Colony Calamity; Time for Some Tough Love

Thanks for getting back Jack. I will definitely try to attend.
Ed

Regards,

-----Original Message-----

From: Jack Duncan
To: <COASTALMKT@aol.com>
Cc: Town Clerk
Subject: Re: Colony Calamity; Time for Some Tough Love
Sent: Aug 20, 2012 12:18 PM

Mr Krepela

Thank you for your input. Your concerns are valid and consistent with my own. This issue will have to be thoroughly vetted before a final decision will be reached. I'm hoping the vetting process begins at our TCM on September 4th and that you are able to attend.
Thanks again

Jack Duncan,
Commissioner

On Aug 20, 2012, at 11:39 AM, <COASTALMKT@aol.com<mailto:COASTALMKT@aol.com>> wrote:

Dear Mayor Brown and Commission:

The concern, frustration and fear expressed by the Colony's immediate neighbors extends to all residents of Longboat Key. Please add to the issues of eyesore, health and diminished property values a very real threat to abandoned deteriorating wooden structures; fire!
I would also submit to the Colony Association Board that it is incorrect to state denial of still another extension would 'take away' 140 units. By the Association's inaction they are 'giving' the units away and that problem lies directly at their doorstep and that of their attorney's.
I attended the meeting where everyone anticipated an updated status report and instead there was an attempt to add more snake oil to their existing proposal. To your credit this was not allowed to happen. I also recall words to the effect "You have until December 31st; that's it!"
Mayor Brown and Longboat Key Commission, you are dealing with parties acting like errant kids, with no sense of urgency or personal responsibility, so to you I say enough is enough, its time for some good old fashioned Tough Love. No extension!

Ed Krepela
Longboat Key

Trish Granger

From: JFleetwood@aol.com
Sent: Monday, August 20, 2012 2:41 PM
To: David Brenner
Subject: TLBK Website Inquiry

David,

I sent the following email to the LBK News.

This is really a serious situation. I will lose a major percentage of my retirement fund.

I was planning on selling the Condo after a few years and buying a slightly larger unit that I could live in year round. Now this will not be possible...

The Colony has served as a gateway to Longboat Key for many generations. I know its an impossible situation right now, but progress is being made..

We want to fix up our units and use them and rent them. We did not do anything to deserve this.

What can we do to keep our homes.

Blake

Blake Fleetwood
phone 212 201 1828
nite 212 595 8537
cell 917 514 6958: reach him at jfleetwood@aol.com.

*Blake Fleetwood says: Your comment is awaiting moderation.
August 20, 2012 at 1:30 pm*

Downzoning will hashly punish 237 homeowners who are not responsible for what is happening.

These condos are the major retirement investment for many of these elderly people and this investment will be wiped out.

It is not fair and certainly un-american and cruel.

How can you take away a person's home like this?

Its not as if downzoning will lead to anything, but a dozen years of lawsuits among the parties and against the Town. Do you think these home owners are going to be wiped out quietly?

The land will lie deserted while everything works itself out. No tourist taxes would be paid, and the real estate taxes would be in limbo.

No developer would go near the place in a messed up legal limbo.

Progress is being made. Let us fix up our homes. Right now we can't even get a building permit to fix things up.

I can not believe the Town would do this to innocent families.

Blake Fleetwood
Colony Home Owner
jfleetwood@aol.com

<>

Blake Fleetwood
phone 212 201 1828
nite 212 595 8537
cell 917 514 6958: reach him at jfleetwood@aol.com.

Trish Granger

From: Anita Ruthling Klaussen [anitarklaussen@mac.com]
Sent: Monday, August 20, 2012 11:31 PM
To: Jack Duncan
Subject: Re: Colony request for extension / we are against ANY extensions

We are in Boston and have not been to LBK in the three years the Colony has been closed. We will be at the US Open on Sept. 4th:.... PLEASE stand firm. You will, no doubt, be inundated with the opposition and their sob stories....

We are furious at what has happened. So needless. Jobs, tax income, tourists - all lost to LBK due to the hostile board of directors who caused all this.

Thank you for your reply, Anita Ruthling Klaussen and Bud Collins

Anita Ruthling Klaussen



Enjoy our website
www.BudCollinsTennis.com

On Aug 20, 2012, at 8:36 PM, Jack Duncan wrote:

Dear Anita and Bud

Thank you for your input on this very important issue. I too share many of the same concerns, opinions and frustrations you have expressed in your recent email. On September 4th the Longboat Key Town Commission, at it's regular meeting, will be discussing the Association's request for an extension. I hope you will plan to attend this meeting and express your views.

Jack Duncan
Commissioner, Longboat Key

On Aug 20, 2012, at 1:20 PM, Anita Ruthling Klaussen wrote:

<<All information sent or received through this account is Public Record>>

We are long time owners (since 1972) of a unit at The Colony due to personal animosities among some people, we, the owners, have suffered a hostile takeover of a once proud resort by folks who want to totally change it from the nice, low key, "Old Florida" resort to a gold plated, gated community.

Instead of the original request of about \$45,000 to fix everything, the figures being thrown around now are in the hundreds of thousands of dollars. We won't be able to afford the new concept. We want the nice old Colony back.

We have suffered through years of nonsense, not being able to use our condo due to the stalling of the board. We have, frankly, had enough. We keep having to pay quarterly condo fees for NOTHING. These folks have had their chance and come up with NOTHING.

We urge the town on Longboat Key to DENY any further stalling tactics. Do not allow the deadline to be extended.

We hope you will stand firm.

Sincerely, Anita and Bud Collins

Anita Ruthling Klaussen

<DSC03497.jpg>

Enjoy our website

www.BudCollinsTennis.com<<http://www.BudCollinsTennis.com/>>

Trish Granger

From: Philip Robinson [philiprobinson3@me.com]
Sent: Saturday, August 18, 2012 10:27 AM
To: Jack Duncan; David Brenner; James L. Brown; Patricia Zunz; Terry Gans;
younger@longboatkey.org
Subject: Colony Club

Dear Sirs/Madams

I am writing to you as owner of an apartment in the Aquarius Club, next door to the Colony Club. I know that your Commission has received a letter from our Association President, Mr Frank Morneau about the above. Rather than the repeat the content of this letter, I would just like to endorse and put on record my concern about any continued delay with regard to the future of this site, based on the reasons expressed by Mr Morneau, and therefore any time extension should be denied Thank you for your consideration Philip Robinson Owner at the Aquarius Club

Trish Granger

From: Wfmorneausr@aol.com
Sent: Monday, August 20, 2012 12:22 AM
To: David Brenner
Subject: Re: (no subject)

Good (late) Evening

I have read a reasonable amount of press on the pros and cons of the Colony Assoc obtaining an extension beyond Dec/2012 . Gratefully , very little is in favor except for their own remarks .

On the subject of their statements , never until this date have we heard from their President or Board asking for any possible concerns we at the Aquarius might have and the damages we are incurring. Only now are they endeavoring to be "the good guys" and offering to employ our landscapers and place rat traps , etc. We have refrained from discussion so as to not interfere with your decision process. All of our comments to you still hold 100% .We must force them into action without waiting to the courts to give absolute directive which could take years.

I have not copied your fellow Commissioners in on this but please feel free to do so

Sincerely

Frank

In a message dated 8/15/2012 11:13:27 P.M. Eastern Daylight Time, dbrenner@longboatkey.org writes:

Frank...Thanks for your input. Your patience to date is commendable. Dave

From: Wfmorneausr@aol.com [Wfmorneausr@aol.com]
Sent: Wednesday, August 15, 2012 2:36 PM
To: David Brenner
Cc: gvanhowe@hotmail.com; aquariusclubbk@gmail.com
Subject: (no subject)

David

I only hope a pray your decline of an extension will force this issue to closure

Your time expended as Vice Mayor is sincerely appreciated.

If you desire anything further from us , please advise.We will have on of our Vice Presidents at the meeting who is more than capable of speaking should you so feel appropriate

Regards

Frank Morneau

AQUARIUS

C l u b

1701 Gulf of Mexico Drive
Longboat Key, FL 34228

August 13, 2012

Mr. Jim Brown
Longboat Key Town Commission
501 Bay Isles
Longboat Key, FL 34228

Subject: The Colony Beach & Tennis Resort

Dear Jim,

By way of introduction, this correspondence is written by unanimous consent of the 5 members of the Board of Directors of the Aquarius Club Condominium Association, 1701 Gulf of Mexico Drive, Longboat Key. The address is important in this matter in that we occupy the first building to the north of the Colony Beach & Tennis Resort.

It has come to our attention that the Colony Association has petitioned the Town Commission for an extension to the tourism use allowance for an additional 18 months, which, if allowed, would push the potential resolution date out to June 30, 2014. The Aquarius Club Board of Directors would vehemently oppose any action the Commission may take which allows for further delays in rectifying the legal dispute that keeps this once proud and vibrant property from quick regeneration. Our strong opposition is based on the following:

* The Town Commission has already provided the Colony Association a generous extension, which expires at the end of this year. The parties involved in this dispute have apparently squandered the initial extension period and from our perspective have made virtually no progress in resolving their issues. How could anyone believe an additional 18 months would do anything other than allow the continuing deterioration of the property! Why would the Commission give up the only leverage they appear to have in trying to move this process forward! To support this assertion that this will continue well into the future, see Donald E. Hemke of the firm of Carlton Fields' (Colony Association Attorney) twenty page letter of July 27, 2012, addressed to Robin Meyer, Planning Zoning and Building Director of the Town of Longboat Key which recites in considerable detail the history of dispute and litigation among the parties commencing 2010 to the present.

* In paragraph 7.4 of such letter it is set forth that "the Association is willing to continue to maintain the appearance of the Colony along Gulf of Mexico Drive and along its borders in order to minimize or avoid any adverse effects on the Colony's neighbors and on the town residence and visitors during the time extension." This affords us little comfort based on our experience over the last 2 years.

* The 6 story Aquarius Club building (unfortunately) has a clear vantage point over the Colony and are continuously dismayed at just how quickly this resort's property and buildings have deteriorated.

* The lack of maintenance and care for this resort raises significant concerns for possible negative health, safety, and financial affects on our property. Prospective buyers and renters at the Aquarius Club have vocalized issues relating to the current and very visible condition of the Colony and how it would effect their financial investments. This has been very discouraging, to say the least.

* Security issues associated with Colony vacancy are obvious and we have witnessed and reported suspicious activities on a number of occasions. For example, unlighted vehicles have been sighted on the beach in front of the Colony at night, which has raised significant concerns with our residents. These security issues place an unnecessary burden on our small police department.

* The Town itself must be experiencing lost revenues from among other items unpaid real estate taxes, lack of tourist spending, and the absence of hotel tax and rental fees.

* In its current condition the Colony has had a palpable negative impact on our property values and clearly has to be causing reputational damage to Longboat Key as a whole. Why would anyone on the Commission want to allow this to continue!

We are encouraged that certain Commissioners in the past have made public statements suggesting that no further extensions would be allowed. Obviously we support that viewpoint. We have always had an excellent working relationship with the Colony Association and Management and are certainly disappointed for them that their disputes continue, however enough is enough.

We implore you and the rest of the Commissioners to recognize the negative impacts the Colony dispute is having on its tax paying neighbors in good standing and accordingly respectfully request that the associations application to extend the time from December 31st, 2012, to maintain the grandfathered status of the 237 condo units and existing improvements at the Colony, be denied.

Should you want to discuss further please contact our office at 383-4223.

Sincerely,

Aquarius Club Board of Directors

Frank Morneau, President
Bob Boyd, Secretary
David Marsh, Vice President
Greg Van Howe, Vice President
Maryanne Wade, Treasurer

Trish Granger

From: marie niestrom [rieniesdon@msn.com]
Sent: Wednesday, August 15, 2012 2:46 PM
To: James L. Brown
Subject: colony exstension

TO COMMISSIONER JIM BROWN PLEASE JUST USE COMMON SENSE AND LOOK SOUTH AT THE LONGBOATKEY CLUB.THIS SHOULD INDICATE WHAT THE COLONY EXSTENSION WOULD CREATE WITHOUT FORCING BOTH SIDES TO FACE THE DATE THAT OUR TRUSTED COMMISSIONERS CLAIMED THEY WOULD NOT BEND.THE SLUMS OF LONGBOATKEY EXIST AND WOULD YOU BUY ANY WHERE NEAR THE COLONY,NOT KNOWING WHAT THE FUTURE MAY BRING.THIS IS GOING TO END UP IN THE COURTS AS LONG ASBOTH SIDES DRAW A LINE IN THE SAND.PLEEEZZZZZ!!!!!!! NO EXSTENSION.FORCE A DEAL TO ALL CONCERNED AT THE SLUMS OF LONGBOATKEY. DON NIESTROM APT603 AQUARIUS

Trish Granger

From: marie niestrom [rieniesdon@msn.com]
Sent: Wednesday, August 15, 2012 3:11 PM
To: Patricia Zunz
Subject: COLONY EXSTENSION

TO COMMISSIONER PATRICIA ZUNZ. I CANNOT BELIEVE THAT OUR COMMISSIONERS WOULD EVEN CONSIDER AN EXSTENSION THAT WHILE IT IS THE REQUEST OF THE ASSN.I BELIEVE THE GOOD DR.IS ALSO IN AGREEMENT BEHIND THE SCENES. WHY? DOC IS LIVING ON THE FOURTH FLOOR IN THE SLUMS OF LONGBOATKEY.HE LOVES THE PUBLICITY AND HIS EGO FEEDS ON THIS.REMEMBER HE BEAT LONGBOAT ONCE BEFORE AND HE IS NOT IN FEAR OF THE COMMISSIONERS.LOOK SOUTH AT THE KEYCLUB EMPTY FAIRWAYS WITH A REDUCTION OF DUES,EIGHTEEN HUNDRED LESS MEMBERS AND A POLICY THAT LET THE PUBLIC UTILIZE THE CLUB WITH A CREDIT CARD.PLEEZZZZZ !!!!!!! NO EXSTENSION.HOLD FIRM ON THE DATE BECAUSE THIS HEADED TO THE COURTS ANYWAY AND THE GOOD DR. DON'T LOSE. THIS IS A DIVORCE AND THEY WILL SETTLE WHEN DOC IS READY.LAST CHECK MULTI OWNERSHIP,THEIR IS MUCH SPECULATION GOING ON. NO NO NO EXSTENSION DON NIESTROM APT 603 THE AQUARIUS OVERLOOKING THE SLUMS OF LONGBOATKEY. FATHER PICK USED TO THIS A PARADISE. NOT ANYMORE

Trish Granger

From: marie niestrom [rieniesdon@msn.com]
Sent: Wednesday, August 15, 2012 12:41 PM
To: Lynn Larson
Subject: colony extension

TO COMMISSIONER LYNN LARSON. WITH ALL DUE RESPECT TO AN EXSTENSION FOR THE COLONY, HOW COULD YOU EVEN GIVE CONSIDERATION TO SUCH A REQUEST. LOOK NO FURTHER THAN THE KEY CLUB WITH THE LEGAL DELAYS AS MEMBERS RESIGN AND THE PRESTIGE OF THAT CLUB DETERIATES AS THE YEARS PASS. YOU CAN BET THE COLONY WILL ALSO END UP IN THE LEGAL SYSTEM. MORE TIME IS THE LAST CONSIDERATION THAT WOULD CONTINUE TO LOWER PROPERTY VALUES AS DR. KLAUBER STILL SITS IN HIS CONDO, AS THE UNIT OWNERS WILL NEVER AGREE AS A ASSN. TRUST ME, KLAUBER HISTORY OF THE LEGAL VICTORIES, SHOULD PUSH YOU TO RESPECT THE 12/31/2012 DATE DON NIESTROM APT 603 ACQUARIUS LOOKING DIRECTLY DOWN ON THE SLUMS OF LONGBOATKEY.

Trish Granger

From: marie niestrom [rieniesdon@msn.com]
Sent: Wednesday, August 15, 2012 2:30 PM
To: David Brenner
Subject: colony exstension

,TO COMMISSIONER DAVID BRENNER, THE ASSN.WANTS AN EXSTENSION.YOU GOT TO BE KIDDING.READ THE ASSN. BYLAWS.THEIR IS NO WAY THEY WILL EVER AGREE AMONG 262 INDIVIDUAL UNIT OWNERS.I REALIZE THEY ARE SOME SPEC OWNERS WITH MULTI VOTES WHO PLAY BOTH SIDES OF THE FENCE.LOOK SOUTH AT THAT THE EMPTY GOLF COURSES DUE TO LONGBOATKEY LEGAL FARCE THAT CREATED MASS RESIGNATIONS OVER THE PAST EIGHT YEARS.I BELEIVE YOU REALIZE THAT COLONY WILL ALSO HEAD THROUGH THE LEGAL SYSTEM AND DR.KLAUBER WILL PREVAIL.IF YOU KNOW THE GOOD DR.HE IS ENJOYING THIS EVERYDAY AS THE LOCAL NEWS CONTINUES SPELL HIS NAME CORRECTLY. THINK WHAT ELSE WOULD HE DO? PLEASE KEEP THIS A PREDICTION DR. WILL PREVAIL IN THE COURT SYSTEM AS HE DID PRIOR AGAINST THE ONCE BEAUTIFUL GULF OF MEXICO DR. PLEASE,,,,,!!!!!!! NO MORE EXSTENSIONS.THINK OF THIS AS A LABOR DISPUTE AND THEY WILL COME TO SOME TYPE OF AGREEMENT AT THE FINAL MEETING .BUT IT IS STILL GOING THROUGH THE LEGAL SYSTEM ASLONG AS DOC IS NOT HAPPY AND HIS EGO IS NOT FILLED DON NIESTROM APT603 AQUARIUS LOOKING DOWN ON THE SLUMS OF LONGBOATKEY WAITING FOR THE HOMELESS AT SUNSET SLEEP IN AT THE COLONY THR FINEST TENNIS RESORT IN FLORIDA. WHAT A LAUGH DON NIESTROM

Trish Granger

From: David Brenner
Sent: Wednesday, August 15, 2012 11:12 PM
To: Wfmorneausr@aol.com
Cc: Town Clerk
Subject: RE: (no subject)

Frank...Thanks for your input. Your patience to date is commendable. Dave

From: Wfmorneausr@aol.com [Wfmorneausr@aol.com]
Sent: Wednesday, August 15, 2012 2:36 PM
To: David Brenner
Cc: gvanhowe@hotmail.com; aquariusclubbk@gmail.com
Subject: (no subject)

David

I only hope a pray your decline of an extension will force this issue to closure

Your time expended as Vice Mayor is sincerely appreciated.

If you desire anything further from us , please advise.We will have on of our Vice Presidents at the meeting who is more than capable of speaking should you so feel appropriate

Regards

Frank Morneau

Trish Granger

From: Aquarius Club [aquariusclubbk@gmail.com]
Sent: Tuesday, August 14, 2012 8:29 AM
To: Terry Gans
Cc: Phyllis & Martin Vogel
Subject: Fwd: Colony Beach Club - Request for Extension

Sent on behalf of Phyllis Vogel

See below

Thanks,

Debbie Fulton, CAM, CMCA, AMS

aquariusclubbk@gmail.com

Phone: 941-383-4223

Fax: 941-383-0900

Begin forwarded message:

From: Phyllis Vogel <pmvogel@rcn.com>
Subject: Re: Colony Beach Club - Request for Extension
Date: August 13, 2012 3:28:55 PM EDT
To: aquariusclubbk@gmail.com (Aquarius Club)

I heartily agree with the letter written by the Aquarius Club. The deterioration of the Colony is both disgraceful to view and a health menace. You should view it for yourselves to appreciate the folly of an extension!

Phyllis Vogel

Aquarius Club #608

Trish Granger

From: David Brenner
Sent: Tuesday, August 14, 2012 10:03 AM
To: Linda Bull
Cc: Town Clerk
Subject: RE: colony extension

Thanks for your email. I admire your patience. Dave Brenner

From: Linda Bull [klbull84@att.net]
Sent: Tuesday, August 14, 2012 9:14 AM
To: David Brenner
Subject: colony extension

Dear Vice- Mayor Brenner,

As owners of # 208 at Aquarius Club, just north of the Colony property, we would like to confirm that we are in agreement with the letter sent by our Board of Directors. To grant another extension would, we feel, only continue the dispute and delays and do nothing to move the issue toward resolution. Given the condition of the Colony property and the lack of security, we are concerned for our property and property values and hope you will agree that no extension is the best course of action.

Thank you for your consideration.

Ken and Linda Bull

Trish Granger

From: maryanne wade [mtw44@aol.com]
Sent: Tuesday, August 14, 2012 11:07 AM
To: Lynn Larson; Jack Duncan; David Brenner; James L. Brown; Patricia Zunz; comtgans@longboatkey.org; Phillip Younger
Subject: Colony extension

Dear Commissioners,

I write to you with the understanding that you are currently deciding on extending the Colony's tourism use application for an additional eighteen months beyond December 2012.

I reside at the Aquarius Club Condominium which is the building directly north of the Colony property. I have lived there for ten years and currently own two units. I have always enjoyed my time in this beautiful community, however, the past few years the deteriorating conditions at the Colony have impacted my enjoyment here, as well as my financial investment. As is apparent to all, this property has become a blight in the neighborhood. Not only has the physical structure deteriorated, but also the beautiful beach at LBK has not been maintained. Though the property has been deserted for only a year, it has not been maintained for many years prior to that due to the ongoing dispute amongst the parties involved.

As a neighbor and taxpayer, I strongly object to an additional eighteen month extension for the land use. I feel it is time a resolution to this matter be decided for once and for all. To allow the parties until June 2014 to resolve this matter seems an extreme amount of time considering there are no plans for a resolution on board. You must also consider that there will be a considerable amount of planning and building time in addition that will bring the development of this property many years into the future.

I hope you give serious consideration to the taxpayers of Longboat Key and the community as a whole and vote "NO" to this application for extension.

Sincerely,

Maryanne Wade

Aquarius Club

1701 Gulf of Mexico Drive

Longboat Key, Florida

Trish Granger

From: sndda@aol.co.uk
Sent: Tuesday, August 14, 2012 10:32 AM
To: James L. Brown
Cc: Lynn Larson; Jack Duncan; David Brenner; Patricia Zunz; Terry Gans; Phillip Younger
Subject: ColonyBeach Club-Extention

Mr. J.Brown
Longboat Key Town Commission
501 Bay Isles
Longboat Key FL 34228

Dear Mayor

As a homeowner in the Aquarius Club 1701 Gulf of Mexico Drive Unit 404.
We would like to concur with the letter sent to you on the 10th August regarding the ongoing situation at the THE COLONY BEACH and TENNIS RESORT. from Mr Morneau the president of our Board of Directors.

Our unit overlooks the Colony as we live on the south side of our building, and for the last 2 years and since its closure we have watched it deteriorate significantly. This year especially it has become an eyesore from our point of view and i am sure for the people who walk the beach regularly they will have noticed the changes and not for the better. We have also as an association had to call the police to check out situations that have arisen regarding the buildings. The lack of maintenance and more importantly the health and safety of the building gives us great concern.

So we respectfully request that the EXTENTION APPLICATION to extend the time from the 31st December to the 30th June (another 18 months) be DENIED..The association has to get their act together and stop procrastinating. The time has now come when positive decisions to move forward have to be made regarding ...What is best for the future of the Colony or the land it sits on.

Sincerley

Mr.Mrs C. Sneddon Unit 404

Trish Granger

From: Dave Bullock
Sent: Thursday, August 16, 2012 3:31 PM
To: Lynn Larson
Cc: Town Clerk
Subject: RE: Colony Association request for extension

Commissioner Larson: I have done a bit of research on the appropriate process for the Commission to have such a discussion. We can chat about it when convenient with you.

-----Original Message-----

From: Lynn Larson
Sent: Thursday, August 16, 2012 2:05 PM
To: Dave Bullock
Cc: Town Clerk
Subject: Colony Association request for extension

I have read the letters from concerned citizens who are expressing their opinions on the Colony situation. I have also read correspondence from our town attorney who asks that we not express opinions on matters that may come before the Commission in a quasi-judicial hearing.

No matter where I go, or who I meet, I am asked questions about the Colony and can only answer that it is a very complicated situation that is not resolved.

I believe and feel that the other Commissioners would agree, if they were asked, that the Colony problem is one of our most important issues on the island.

That said, I am asking that a separate workshop be scheduled to let all parties involved express their opinions and allocate proper time for the Commission to listen and express any concerns and opinions in a public setting.

Our attorney has often said that this would be a great question, probably semester course, for law students. For that reason, it would be helpful to invite a law professor who may have some experience in these matters.

I welcome your input and look forward to a scheduled open meeting on this subject. Lynn

Sent from my iPad

Trish Granger

From: Cathy Meyer [cathymeyer@sympatico.ca]
Sent: Thursday, August 16, 2012 6:44 PM
To: Lynn Larson; Jack Duncan; David Brenner; James L. Brown; Patricia Zunz; Terry Gans; Phillip Younger
Subject: Colony Beach and Tennis Resort

Please accept this email as a full agreement to the letter sent to Mr. Phil Younger on August 13, 2012 from the Aquarius Club Board of Directors.

As an Aquarius owner, I fully agree with all the sentiments outlined.. I do hope the Town of Longboat Key will not extend the deadline of the Colony Beach and Tennis Resort. The time to act is now.

I trust that you and your fellow commissioners will take the words of our Board to heart and remain steadfast in maintaining the date previously set forth to the Colony Beach and Tennis Resort.

Sincerely,

Cathy Meyer
Cathy Meyer
416-627-1371

Trish Granger

From: David Brenner
Sent: Thursday, August 16, 2012 10:28 PM
To: marie niestrom
Cc: Town Clerk
Subject: RE: colony exstension

Thanks for your input. Dave Brenner, Vice-Mayor

From: marie niestrom [rieniesdon@msn.com]
Sent: Wednesday, August 15, 2012 2:29 PM
To: David Brenner
Subject: colony exstension

, TO COMMISSIONER DAVID BRENNER, THE ASSN.WANTS AN EXSTENSION.YOU GOT TO BE KIDDING.READ THE ASSN. BYLAWS.THEIR IS NO WAY THEY WILL EVER AGREE AMONG 262 INDIVIDUAL UNIT OWNERS.I REALIZE THEY ARE SOME SPEC OWNERS WITH MULTI VOTES WHO PLAY BOTH SIDES OF THE FENCE.LOOK SOUTH AT THAT THE EMPTY GOLF COURSES DUE TO LONGBOATKEY LEGAL FARCE THAT CREATED MASS RESIGNATIONS OVER THE PAST EIGHT YEARS.I BELEIVE YOU REALIZE THAT COLONY WILL ALSO HEAD THROUGH THE LEGAL SYSTEM AND DR.KLAUBER WILL PREVAIL.IF YOU KNOW THE GOOD DR.HE IS ENJOYING THIS EVERYDAY AS THE LOCAL NEWS CONTINUES SPELL HIS NAME CORRECTLY. THINK WHAT ELSE WOULD HE DO? PLEASE KEEP THIS A PREDICTION DR. WILL PREVAIL IN THE COURT SYSTEM AS HE DID PRIOR AGAINST THE ONCE BEAUTIFUL GULF OF MEXICO DR. PLEASE,,,,,!!!!!!! NO MORE EXSTENSIONS.THINK OF THIS AS A LABOR DISPUTE AND THEY WILL COME TO SOME TYPE OF AGREEMENT AT THE FINAL MEETING .BUT IT IS STILL GOING THROUGH THE LEGAL SYSTEM ASLONG AS DOC IS NOT HAPPY AND HIS EGO IS NOT FILLED . DON NIESTROM APT603 AQUARIUS LOOKING DOWN ON THE SLUMS OF LONGBOATKEY WAITING FOR THE HOMELESS AT SUNSET SLEEP IN AT THE COLONY THR FINEST TENNIS RESORT IN FLORIDA. WHAT A LAUGH DON NIESTROM

Trish Granger

From: David/Linda Van Howe [dvhpvh@aol.com]
Sent: Thursday, August 16, 2012 9:33 AM
To: David Brenner; James L. Brown
Subject: Fwd: Colony Extension

Please see the following email, sent to all commissioners in addition to yourselves. Please be advised that we oppose giving any further extension to the Colony Association and request that this matter be resolved as quickly as possible.

Thank you.

David/Linda Van Howe
dvhpvh@aol.com

-----Original Message-----

From: David/Linda Van Howe <dvhpvh@aol.com>
To: llarson <llarson@longboatkey.org>
Sent: Thu, Aug 16, 2012 9:28 am
Subject: Colony Extension

We are residents of the Aquarius Club next door to the Colony. We are opposed to any extension by the Colony Association. The Colony is already an eyesore and detrimental to our property values in its present state. We cannot imagine what extending it by an additional 18 months would do to the property and to our values here.

Therefore, we ask that you deny the Colony Association request for an extension and move a resolution forward as soon as possible.

Our Board here at the Aquarius Club has already sent the Commission a letter stating the position and we agree with it.

David/Linda Van Howe
dvhpvh@aol.com

Trish Granger

From: Skip Wilder [skipwilder@prodigy.net]
Sent: Saturday, August 25, 2012 5:49 PM
To: James L. Brown
Subject: Colony Beach & Tennis Resort
Attachments: Aug 25 2012 Letter Commissioner Brown.pdf

Dear Commissioner Brown,

Please see the attached letter addressed to you. Thank you for your consideration.

Alfred L. & Bonnie W. Wilder

3446 Winding Oaks Drive
Longboat Key, Florida 34228-4132
skipwilder@ieee.org
(941) 383-2574

August 25, 2012

VIA E-MAIL

Commissioner Jim Brown
Town of Longboat Key

Subject: Colony Beach & Tennis Resort

Dear Commissioner Brown:

As full-time Longboat Key residents and full-time taxpayers, we are shocked that you would threaten to change the zoning on this property from 237 units to 90 units. Clearly, the owners of the 147 units that you would vaporize are not going to sit still for that treatment – they're going to sue the Town of Longboat Key. And I suspect that existing laws governing property rights in this country would enable them to prevail. We do not want our tax dollars spent on defending and losing multiple law suits.

We're told that at 18 acres the Colony has the largest piece of beachfront property between Naples and Pensacola. It is a very valuable property. The Town of Longboat Key needs an upscale, large resort there bringing more tourism to our paradise – not another high-end condo. The parties will settle their disagreements, either in court or outside. Let them do it without interference.

Yours very truly,

Alfred L. Wilder

Bonnie W. Wilder

Trish Granger

From: David Brenner
Sent: Saturday, August 25, 2012 8:02 PM
To: Skip Wilder
Cc: Town Clerk
Subject: RE: Colony Beach & Tennis Resort

Wilders...Thanks for your input. Please attend the Commission meeting on Tuesday evening, September 4 , so others can hear your view of the matter. Dave Brenner

From: Skip Wilder [skipwilder@prodigy.net]
Sent: Saturday, August 25, 2012 5:47 PM
To: David Brenner
Subject: Colony Beach & Tennis Resort

Dear Commissioner Brenner,

Please see the attached letter addressed to you. Thank you for your consideration.

Trish Granger

From: Jack Duncan
Sent: Sunday, August 26, 2012 10:32 AM
To: Skip Wilder
Cc: Town Clerk
Subject: Re: Colony Beach & Tennis Resort

Dear Alfred and Bonnie

Thank you for your input.

Jack Duncan

On Aug 25, 2012, at 5:45 PM, Skip Wilder wrote:

Dear Commissioner Duncan,

Please see the attached letter addressed to you. Thank you for your consideration.
<Aug 25 2012 Letter Commissioner Duncan.pdf>

Trish Granger

From: Phillip Younger
Sent: Sunday, August 26, 2012 10:26 AM
To: Skip Wilder
Cc: Trish Granger; Town Clerk
Subject: RE: Colony Beach & Tennis Resort

Dear Mr. & Mrs. Wilder:

Thank you for your input. Your statement that I, personally, have threatened to let the Colony's rights elapse surprise me. To the contrary, I have never made any such threat. Simply put, you are wrong in your statement, and I wonder where you or anyone else obtained such an idea.

Others may have implied that they may be willing, or threatening in your words, to let the Colony's grandfather rights lapse, but this is due to an extreme amount of frustration with the lack of substantial progress relative to resolving the differences between the various Colony parties. And, I have most certainly voiced concern about the lack of progress, and aren't we all - including you - frustrated by that? Now, even your neighbors at the Aquarius Club are up in arms about the continued deterioration of your facility, and can you or anyone else blame them?

I fully recognize that this is truly a complicated and awkward situation that benefits nobody and that nobody wants. During this entire fiasco, I have striven to be extremely measured in my comments, neither threatening nor otherwise. Rest assured that as I do in each and every situation, I will listen carefully to all viewpoints, all other input, gather as much information as I can, evaluate all en toto, and vote the way that I have concluded is in the best overall interests of our community, its residents, taxpayers, and property owners.

Regards,

Phill Y.

From: Skip Wilder [skipwilder@prodigy.net]
Sent: Saturday, August 25, 2012 5:57 PM
To: Phillip Younger
Subject: Colony Beach & Tennis Resort

Dear Commissioner Younger,

Please see the attached letter addressed to you. Thank you for your consideration.

Trish Granger

From: Phillip Younger
Sent: Saturday, August 25, 2012 1:57 PM
To: Lauri & Richard Pollack
Cc: Town Clerk
Subject: RE: Colony

Thank you for your input. This is truly a complicated and awkward situation that benefits nobody and that nobody wants.

Phill Y.

From: Lauri & Richard Pollack [1winston1@comcast.net]
Sent: Saturday, August 25, 2012 1:38 PM
To: Phillip Younger
Subject: Colony

Dear Mr. Younger,

Please allow an extension to the Colony owners so that they will be able to come to an equitable conclusion which will benefit our entire Key. The Colony redevelopment is important to all of us who live here.

Thank you for your consideration.

Dr. Richard and Lauri Pollack

Trish Granger

From: David Brenner
Sent: Saturday, August 25, 2012 6:47 PM
To: Lauri & Richard Pollack
Cc: Town Clerk
Subject: RE: Colony

Thanks for your input. Dave Brenner

From: Lauri & Richard Pollack [1winston1@comcast.net]
Sent: Saturday, August 25, 2012 1:29 PM
To: David Brenner
Subject: Colony

Dear Mr. Brenner,

Please allow the Colony to retain their current density by extending the time allotted to come to a conclusion which will be beneficial not only to them, but, to our entire Key.

Dr. Richard and Lauri Pollack

Trish Granger

From: Lauri & Richard Pollack [1winston1@comcast.net]
Sent: Saturday, August 25, 2012 1:26 PM
To: Lynn Larson
Subject: Colony

Dear Ms. Larson,

Please allow the Colony owners more time to negotiate so that they do not lose their density allocation. This is very important not only to them, but to our entire Key.

Thank you in advance for your time.

Dr. Richard and Lauri Pollack

Trish Granger

From: Lauri & Richard Pollack [1winston1@comcast.net]
Sent: Saturday, August 25, 2012 1:28 PM
To: Jack Duncan
Subject: Colony

Dear Mr. Duncan,

Please allow the Colony owners more time to negotiate so that they can keep their density allocation. Thank you in advance for your time. This issue is very important to our entire Key.

Dr. Richard and Lauri Pollack

Trish Granger

From: Lauri & Richard Pollack [1winston1@comcast.net]
Sent: Saturday, August 25, 2012 1:31 PM
To: James L. Brown
Subject: Colony

Dear Mr. Brown,

Please allow the Colony owners an extension so that they might come to a conclusion which is beneficial to them and to our entire Key.

Thank you in advance.

Dr. Richard and Lauri Pollack

Trish Granger

From: Lauri & Richard Pollack [1winston1@comcast.net]
Sent: Saturday, August 25, 2012 1:35 PM
To: Patricia Zunz
Subject: Colony

Dear Ms. Zunz,

Please allow the Colony owners an extension so that they will be able to find a way to come to a conclusion which is beneficial to our entire Key. It is in the best interests of all residents to redevelop the Colony and to give them time to come to an equitable conclusion.

Thank you for your time.

Dr. Richard and Lauri Pollack

Trish Granger

From: Lauri & Richard Pollack [1winston1@comcast.net]
Sent: Saturday, August 25, 2012 1:37 PM
To: Terry Gans
Subject: Colony

Dear Commissioner Gans,

Please allow the Colony owners a time extension so that they will be able to come to an equitable conclusion which will not only benefit them, but, our entire Key.

Thank you for your consideration.

Dr. Richard and Lauri Pollack

Trish Granger

From: David Brenner
Sent: Saturday, August 25, 2012 6:50 PM
To: Joni Ross
Cc: Town Clerk
Subject: RE: TLBK Website Inquiry

Thank you for your input. I suggest you attend the Commission meeting, Tuesday night, September 4 for discussion. Dave Brenner

From: Joni Ross [joniross@verizon.net]
Sent: Saturday, August 25, 2012 5:19 PM
To: David Brenner
Subject: TLBK Website Inquiry

<<All information sent or received through this account is Public Record>>

> As well as being a condo owner at Fairway Bay, I am also a unit owner at the Colony. I would appreciate it greatly if you would support our Associations concerns regarding the meeting on September 4th. At this meeting, as you are aware we are asking the Town Commissioners to extend the deadline of 12/31/2012, to avoid loosing our grandfathered zoning. We, the Colony owners, the board members, as well as our developers have been working many hours each week to resolve our dilemma and put the pieces back together. This has proven to be an extremely difficult process.

> The Colony Beach has been a landmark and a draw for tourists for over 35 years. The Colony was the reason for my initial visit to LBK and most times, when I discuss how a LBK resident found our beautiful Key, they identify the Colony as the resort that brought them here in the first place. The existence of the Colony helps our island in so many obvious ways, from tax revenue, to purchases in our shops, to bringing in new residents and tourists to LBK. If our tourism zoning is abandoned by the Council, the zoning for 237 condo units would be reduced to less than 100 units. Therefore over 130 units would immediately loose their zoning rights. This would not accelerate the rebuilding of the Colony but would provide a huge obstacle to any conceivable settlement. The number of law suits that would emanate from this action is inconceivable. We are reaching a critical point in our potential settlement with Dr. Klauber, Colony Lender, and all the other parties involved in the project. Putting this additional obstacle and deadline on the deal is clearly not in the best interest of creating a settlement. Allowing the Colony Beach to redevelop as rapidly as possible is in every tax payers on LBK best interest!

>

> I would be glad to discuss this in any detail with any of our town commissioners. Your support would be greatly appreciated by me and our entire Association.

>

> Thanks for your time in reviewing this and hopefully your support in
> the very near future

> Mrs Joan A. Ross and Dr. Stuart Ross

Trish Granger

From: Phillip Younger
Sent: Saturday, August 25, 2012 5:30 PM
To: Joni Ross
Cc: Town Clerk
Subject: RE: TLBK Website Inquiry

Thank you for your input. This is truly a complicated and awkward situation that benefits nobody and that nobody wants.

Phill Y.

From: Joni Ross [joniross@verizon.net]
Sent: Saturday, August 25, 2012 5:19 PM
To: Phillip Younger
Subject: TLBK Website Inquiry

<<All information sent or received through this account is Public Record>>

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>

> Thanks for your time in reviewing this and hopefully your support in the very near future

> Mrs Joan A. Ross and Dr. Stuart Ross

Trish Granger

From: JbirnbaumUP@aol.com
Sent: Sunday, August 26, 2012 4:34 PM
To: Lynn Larson; Jack Duncan; David Brenner; James L. Brown; Patricia Zunz; Terry Gans; Phillip Younger
Subject: Colony: Commission Action

Dear Town Commissioner,

Aug. 26, 2012

We have been owners of a unit at the Colony since 1985. We are very distressed to learn that resident- owners of the Aquarius, our neighbors, are asking the Town Commissioner to not extend the period of time we need to develop a plan for the restoration of the Colony with the old grandfathered zoning, which allows for 237 units. We love the Colony as do my kids and grandkids. Disallowing an extension will no doubt lead to the death of the Colony.

Our association of owners has been working diligently trying to develop a restoration plan, within the time restraints asked for by the Commission, but has been stymied at every turn by Dr. Murf Klauber who is the most litigious person I have ever heard of. This man has refused to negotiate in any reasonable way and simply wants the death of the Colony. Failing to give us an extension will give Dr. Klauber what he wants and cause great personal and financial harm to all of the owners. I cannot believe that the Town Commission really wants this to happen, and cause such grief and hardship to hundreds of Colony owners that have been so supportive of Longboat. Please, please provide the extension that our Association is seeking.

Respectfully submitted,

Jerome and Sheila Birnbaum

Owners Colony Unit 711.

Trish Granger

From: David Brenner
Sent: Saturday, August 25, 2012 3:42 PM
To: Momlipton@aol.com
Cc: Town Clerk
Subject: RE: TLBK Website Inquiry

Thanks for your input. Dave Brenner

From: Momlipton@aol.com [Momlipton@aol.com]
Sent: Saturday, August 25, 2012 12:38 PM
To: David Brenner
Subject: TLBK Website Inquiry

Dear David,
I am an owner of unit 710 at the Colony. I know how frustrating this situation is for everyone but not extending our request to maintain our density will only make matters worse.
We are working hard to find a developer and have some possibilities but cutting our occupancy will cut our chances to make a deal.
Sincerely
Sissie (Helene) Lipton

Trish Granger

From: Phillip Younger
Sent: Friday, August 24, 2012 10:42 AM
To: Stan Adelman
Cc: Town Clerk
Subject: RE: Deny Colony club Extention Request

Thank you for your input. This is truly a complicated and awkward situation that benefits nobody and that nobody wants.

Phill Y.

From: Stan Adelman [stradel25@gmail.com]
Sent: Thursday, August 23, 2012 10:13 PM
To: Phillip Younger
Subject: Deny Colony club Extention Request

I have ben a resident of the Aquarius Club for 22 yrs and strongly support our President's request to you to deny the Colony Club's applicationt for an additional18 months extention. Additional time will not accomplish any thing but more requestsr for time. Enough is enough. Stanley R. Adelman, 1701 GMD, LBK

|

Trish Granger

From: Ruth Hollings [ruthol1620@aol.com]
Sent: Sunday, August 26, 2012 6:38 AM
To: Lynn Larson
Cc: David Brenner
Subject: Colony Beach & Tennis Resort

To the Commissioners of Longboat Key

We have been coming to the Colony beach and tennis resort for twenty four years, bringing our three children across the Atlantic three times a year for many of those years. About fifteen years ago we decided to buy a unit there.

Over those years we have made many friends, paid our taxes, and spent money in the local restaurants, supermarkets and water sports businesses. Our children loved the area, and it was our hope and theirs that we would one day enjoy our home from home with the next generation of grandchildren.

The situation that now exists at the Colony is not one that we sort, nor one where we have very much influence.

I can totally understand the frustration of our near neighbours, but they are still able to enjoy their units, walk the beach and have their families over for the holidays We are looking for support and help in this difficult and at times stressful situation, and cannot feel that the Town of Longboat Key will improve the situation by not allowing an extension of the time period to allow a resolution to our problems.

Many owners at the Colony have become permanent residents in the past. All have contributed to the local economy, but most importantly I feel have been good ambassadors for your beautiful Island. Please continue to give us your support and help try to get this difficult situation resolved.

Kind Regards
Ruth & Richard Hollings
Unit 213 Colony Beach & Tennis Resort

Sent from my iPad

Trish Granger

From: Jack Duncan
Sent: Sunday, August 26, 2012 10:40 AM
To: Stuart Ross
Cc: Town Clerk
Subject: Re: TLBK Website Inquiry

Dear Joan and Stuart

Thank you for your input. Your concerns are noted. I hope you plan to attend the meeting on September 4th and express how you feel.

Jack Duncan
Commissioner, Longboat Key

On Aug 25, 2012, at 5:18 PM, Stuart Ross wrote:

> <<All information sent or received through this account is Public Record>>

>

>

>> As well as being a condo owner at Fairway Bay, I am also a unit owner at the Colony. I would appreciate it greatly if you would support our Associations concerns regarding the meeting on September 4th. At this meeting, as you are aware we are asking the Town Commissioners to extend the deadline of 12/31/2012, to avoid losing our grandfathered zoning. We, the Colony owners, the board members, as well as our developers have been working many hours each week to resolve our dilemma and put the pieces back together. This has proven to be an extremely difficult process.

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>>

>> I would be glad to discuss this in any detail with any of our town commissioners. Your support would be greatly appreciated by me and our entire Association.

>>

>> Thanks for your time in reviewing this and hopefully your support in the very near future

>

>> Mrs Joan A. Ross and Dr. Stuart Ross

>

>

>

Trish Granger

From: Donna Barton [dbarton@sarasotalawfirm.com]
Sent: Friday, August 24, 2012 12:08 PM
To: Dave Bullock; Robin D. Meyer; cbartlett@icardmerrill.com; dhemke@carltonfields.com; dsiegal@assafandsiegal.com; aadams@mgmtsource.net; mbentley@bentleyandbruning.com; David Brenner; Jack Duncan; Terry Gans; Lynn Larson; Phillip Younger; Patricia Zunz; James L. Brown
Cc: nsivyer@sbwlegal.com; Trish Granger; David Persson
Subject: Extension of Time / Colony Non-Conformities
Attachments: SCAN6341_000.pdf

Please see the attached letter from Mr. Persson with regard to the Colony Non-Conformities.

Donna G. Barton

Assistant to Messrs. Persson and Cohen
Hankin, Persson, McClenathen, Cohen & Darnell
1820 Ringling Boulevard
Sarasota, Florida 34236
(941) 365-4950 (phone)
(941) 365-3259 (fax)

Hankin, Persson, McClenathen, Cohen & Darnell

Attorneys and Counselors At Law
A Partnership of Professional Associations
1820 Ringling Boulevard
Sarasota, Florida 34236-5917

Lawrence M. Hankin
David P. Persson
Chad M. McClenathen*
Andrew H. Cohen
Robert W. Darnell
Michael T. Hankin
Kelly M. Fernandez**

David D. Davis (1955-2012)

Telephone (941) 365-4950
Facsimile (941) 365-3259
Email: dpersson@sarasotalawfirm.com

August 24, 2012

* Board Certified Real Estate

** Board Certified State and Fed. Govt. & Admin. Practice

The Honorable James L. Brown, Mayor
and Members of Town Commission
Town of Longboat Key
501 Bay Isles Road
Longboat Key, Florida 34228

RE: Extension of Time / Colony Non-Conformities

Dear Mayor Brown and Commissioners:

The Colony Beach and Tennis Club Association ("the Association") has filed a petition with the Town to extend the time to prevent abandonment of the grandfathered non-conforming uses and structures located within the Colony. In consultation with the Town Manager, we thought that it would be beneficial for an analysis of what has changed legally since the Town granted its prior extension last May. Additionally, this letter will outline the legal framework by which the Town Commission will make its determination in this quasi-judicial proceeding. Please remember this will be a quasi-judicial proceeding scheduled for September 4, 2012, and the rules of quasi-judicial process (disclosure of substantive conversations and ex parte communications) will be addressed at the onset of the proceeding.

FACTS

The Colony was built as a resort hotel in the early 1970's. It was constructed prior to the current federal, state and local flood regulations as well as the current Florida State building code. The Zoning Code has subsequently changed not only regarding setbacks and height, but also and, most importantly, density. The Colony is now zoned T6 which allows up to 6 units per acre rather than the 14 units per acre allowed at the time of its development approval. After it was built, approximately 15 acres were dedicated to condominium ownership and 237 condominium units were located on the property. The remaining portions of the property (approximately three acres) were not dedicated to condominium ownership. The interest in that property was transferred to various entities. Presently, Colony Lender has a 15% interest, Breakpoint, LLC, has a 5% interest and Dr. Klauber's related entities own the remaining 80%.

At the time the Colony was created, 232 of the 237 units were made part of a Limited Partnership Agreement ("the Partnership"). The Partnership was the entity that ran the Colony Beach and Tennis Resort.

Disputes among the parties arose and various legal actions were filed. Ultimately these matters were considered by the United States Bankruptcy Court in Tampa and, in 2010, the Bankruptcy Court ruled in favor of the Association on multiple significant matters. The Partnership went into reorganization and ultimately into Chapter 7 liquidation. The tourism operations at the Colony ceased on August 15, 2010, and the Association by action of the Bankruptcy Court was placed in charge of the 15 acre condominium property. The recreational lease on portions of the 3 acre parcel was determined by the Bankruptcy Court to be "unconscionable" and void. The Trustee for the Partnership appealed some, but not all, of the issues to the United States District Court in Tampa.

The Association Board of Directors as the new entity in control of the condominium parcel met with Town staff in early October 2010 to discuss the future of the tourism resort development and to discuss efforts to reopen the Colony. During this and subsequent meetings with the Town, multiple issues were discussed ranging from the pendency of the appeal by the Partnership, the requirements under the Zoning Code for recreational facilities, requirements under the State Building Code to provide safe transient accommodations, public health concerns regarding the potable water and sewer, flood regulations, building code regulations and other legal issues that impacted the Colony. The Association began the process of selecting a developer to assist it in reopening the Colony.

It became apparent by April 2011 that it was unrealistic to believe that the Colony could be reopened prior to August 16, 2011, when its grandfathered status would terminate. The Association filed a petition to extend the non-use deadline as provided under the Town's Zoning Code. Based upon the application, the Town conducted a quasi-judicial hearing, took public comment and reviewed the record. At the hearing and after much discussion, there was no objection from any of the property owners within the Colony (the Association and the owners of the outparcels) to the request of the Association and the Town granted by resolution an extension until December 31, 2012, with the condition that a hearing be held in March 2012 to hear the status of the efforts to reopen the Colony. That meeting, as you well know, occurred.

In July 2011, a little over two months after the Town granted the extension, the District Court reversed the Bankruptcy Court's prior final judgments and remanded the matter back to the Bankruptcy Court for further deliberations. In a pointed and lengthy decision, the District Court strongly disagreed with the findings of the Bankruptcy Court on key issues affecting the operation of the Colony. It raised questions whether the Partnership or the Association should be in control of the condominium property and whether the Partnership was entitled to significant damages from the Association. It also determined that the recreational lease was not unconscionable and not void. The District Court remanded the issues to the Bankruptcy Court for further proceedings.

The Association then attempted to appeal the District Court's ruling to the United States 11th Circuit Court of Appeals. The 11th Circuit denied the appeal without prejudice basically saying the appeal was not ripe for adjudication by the Appellate Court. The matter, therefore, went back to the Bankruptcy Court.

After the 11th Circuit's ruling, the Trustee for the Partnership filed a motion in the Bankruptcy Court to return control of the condominium property to the Partnership Trustee.

Meanwhile, the Colony had continued its process of selecting a developer. The Developer, who developed schematic plans for redevelopment of the property, had met on multiple occasions with Town staff and was involved in discussions with the unit owners of the Colony. The Association and the developer terminated their relationship in May of this year after the rulings by the District Court, the 11th Circuit, and the filing of the petition by the Partnership Trustee.

In early July of this year, a full-day hearing was conducted by the Bankruptcy Court to consider, among other things, whether the Partnership or the Association should be in control of the condominium property and the amount of damages that should be awarded to either party. The District Court had remanded this to the Bankruptcy Court with the instructions to "... either (1) vacate, amend, or issue each order necessary and appropriate to return the partnership to possession of the Colony units and recommend an award of \$7,751,470.00 to the Partnership or (2) leave the Partnership without the possession of the Colony units and recommend an award of \$20,646,312.00 to the partnership." The District Court also allowed the Bankruptcy Court to reconsider the Association's counterclaims against the Partnership.

The Bankruptcy Court has yet to rule. Any ruling from the Bankruptcy Court would be subject to the rights of appeal through the federal system. As of this writing, the Association controls the condominium property but that right of control is obviously in jeopardy.

TOWN CODE

Abandonment of non-conforming uses and structures are governed by Section 158.138(B)(8) of the Town's Zoning Code. Section 158.138(B)(8)(a) states that if a non-conforming use or structure is not used within one year, it is deemed to be abandoned. The Code then sets forth two methods by which that time period may be extended, but only one allows for an extension of a grandfathered use. Section 158.138(B)(8)(b) provides that the time for abandonment may be extended if the period of non-use or vacancy is caused by "legal restraints". The Code states "The time may be extended by the Town Commission for good cause shown. The Town Commission may require the petition to decrease the non-conformity of the building or structure and one or more aspects of its non-conformity."

The other manner in which the Colony may preserve its grandfathered status is to re-open the Colony as a resort hotel prior to December 31, 2012.

I will be calling you next week to answer any questions that you might have. In the meantime, please feel free to contact me as well.

Respectfully,



David P. Persson

DPP/dgb

cc: David Bullock
Robin Meyer
Charles Bartlett, Esq.
Donald Hemke, Esq.
David Siegal, Esq.
W. Andrew Adams
Morgan Bentley, Esq.
William Maloney
Trish Granger

Trish Granger

From: Bob Erazmus [boberazmus@yahoo.com]
Sent: Tuesday, August 28, 2012 1:13 AM
To: James L. Brown; David Brenner; Lynn Larson; Jack Duncan; Patricia Zunz; Terry Gans; Phillip Younger
Subject: Colony Extension Request

To All Longboat Key Town Commissioners:

My wife and I have been Colony owners for 34 years. At this critical and extremely stressful time in the Colony's history, I am asking the Longboat Key Town Commission at its Sept 4, 2012 meeting to extend the grandfathered density of 237 tourism units from December 31, 2012 to June 30, 2014.

1. Colony owners are innocent parties in a legal dispute initiated by Dr. Klauber in 2007. Since then we have been forced to incur significant legal fees just to defend ourselves. We don't deserve to incur financial disaster from lost density that would result from failure to extend the Dec 31, 2012 deadline just because Dr. Klauber adamantly refuses to settle matters on reasonable terms. "Legal constraints" to settlement are certainly not from lack of trying by our Association. A tremendous number of hours have been spent in formal and informal mediation meetings with Dr. Klauber without success. Generous offers made to Dr. Klauber and Colony Lender (mortgage holder on the recreation lease property) have been rejected. I assure you that our owners want a new Colony that everyone on Longboat Key can be proud of. But agreeing to grossly outrageous settlement demands just to settle does not make economic sense for our owners.

2. The town of Longboat Key benefits financially with more tax revenue from at least 237 units at the Colony, not less. Also, loss of significant density at the Colony to about 100 units would be inconsistent with the recent referendum on the Key allowing 250 additional tourism units.

3. Not extending the deadline would create a new legal dispute to an already complex legal situation and delay, not expedite resolution.

4. Serious discussions with prospective development partners are in process. Not extending the deadline complicates and delays contract negotiations with partners for the new and improved Colony. Gaining approval of an 18-acre plan by our owners and the town of Longboat Key as soon as possible is certainly our preference. But if settlement is not possible with Dr. Klauber and Colony Lender on reasonable terms, Colony owners at our April 2nd annual meeting unanimously approved proceeding expeditiously with a 15 acre redevelopment plan.

5. I sincerely sympathize with our neighbors at Aquarius who are frustrated by continued gridlock at the Colony. The Aquarius Board never communicated their concerns to the Colony Board. Instead they went directly to the town and have requested that the Dec 31, 2012 deadline not be extended. Our Association President has reached out to the Aquarius Board to discuss their issues regarding landscape maintenance at the Colony. We have been rebuffed. They won't talk to us. Colony owners want to be good neighbors. Grounds maintenance issues can be worked out, but we have to talk to each other.

I am asking each of you for your help and support at this very challenging time. Please extend the grandfathered density of 237 tourism units from December 31, 2012 to June 30, 2014.

Bob Erazmus

Unit 724
Colony Beach and Tennis Club

Trish Granger

From: David Brenner
Sent: Monday, August 27, 2012 3:48 PM
To: JFleetwood@aol.com
Cc: Town Clerk
Subject: RE: TLBK Website Inquiry

Blake....First, let me apologize for taking so long to reply. I've been out of town. Your concern is well understood. Please come to our meeting on September 4 so many others can hear your issue.

Dave

From: JFleetwood@aol.com [JFleetwood@aol.com]
Sent: Monday, August 20, 2012 2:40 PM
To: David Brenner
Subject: TLBK Website Inquiry

David,

I sent the following email to the LBK News.

This is really a serious situation. I will lose a major percentage of my retirement fund.

I was planning on selling the Condo after a few years and buying a slightly larger unit that I could live in year round. Now this will not be possible...

The Colony has served as a gateway to Longboat Key for many generations. I know its an impossible situation right now, but progress is being made..

We want to fix up our units and use them and rent them. We did not do anything to deserve this.

What can we do to keep our homes.

Blake

Blake Fleetwood
phone 212 201 1828
nite 212 595 8537
cell 917 514 6958: reach him at jfleetwood@aol.com<<mailto:jfleetwood@aol.com>>.

Blake Fleetwood says: Your comment is awaiting moderation.
August 20, 2012 at 1:30 pm<<http://www.lbknews.com/2012/08/18/colony-association-president-reassures-aquarius-residents/comment-page-1/#comment-67592>>

Downzoning will hashly punish 237 homeowners who are not responsible for what is happening.

These condos are the major retirement investment for many of these elderly people and this investment will be wiped out.

It is not fair and certainly un-american and cruel.

How can you take away a person's home like this?

Its not as if downzoning will lead to anything, but a dozen years of lawsuits among the parties and against the Town. Do you think these home owners are going to be wiped out quietly?

The land will lie deserted while everything works itself out. No tourist taxes would be paid, and the real estate taxes would be in limbo.

No developer would go near the place in a messed up legal limbo.

Progress is being made. Let us fix up our homes. Right now we can't even get a building permit to fix things up.

I can not believe the Town would do this to innocent families.

Blake Fleetwood
Colony Home Owner
jfleetwood@aol.com<<mailto:jfleetwood@aol.com>>

<>

Blake Fleetwood
phone 212 201 1828
nite 212 595 8537
cell 917 514 6958: reach him at jfleetwood@aol.com<<mailto:jfleetwood@aol.com>>.

Trish Granger

From: Skip Wilder [skipwilder@prodigy.net]
Sent: Monday, August 27, 2012 11:49 AM
To: Phillip Younger
Cc: Town Clerk; Trish Granger
Subject: Re: Colony Beach & Tennis Resort

Dear Commissioner Younger:

Thank you for your response.

Please re-read our letter.

It's not our facility and the Aquarius Club is not our neighbor; we do not own property at the Colony. Our concern is, and still is, if the Commission changes the zoning and vaporizes the property rights of 147 unit owners, the Town will face a myriad of law suits and the plaintiffs will likely prevail. As full time residents and taxpayers, we don't want to have to bear the legal bill for the Commission's bad decision.

Since the beginning of time, frustration has not been a good basis for either business or legal decisions.

Alfred L. Wilder
Bonnie W. Wilder
skipwilder@ieee.org

----- Original Message -----

From: "Phillip Younger" <pyounger@longboatkey.org>
To: "Skip Wilder" <skipwilder@ieee.org>
Cc: "Trish Granger" <tgranger@longboatkey.org>; "Town Clerk" <townclerk@longboatkey.org>
Sent: Sunday, August 26, 2012 10:25 AM
Subject: RE: Colony Beach & Tennis Resort

Dear Mr. & Mrs. Wilder:

Thank you for your input. Your statement that I, personally, have threatened to let the Colony's rights elapse surprise me. To the contrary, I have never made any such threat. Simply put, you are wrong in your statement, and I wonder where you or anyone else obtained such an idea.

Others may have implied that they may be willing, or threatening in your words, to let the Colony's grandfather rights lapse, but this is due to an extreme amount of frustration with the lack of substantial progress relative to resolving the differences between the various Colony parties. And, I have most certainly voiced concern about the lack of progress, and aren't we all - including you - frustrated by that? Now, even your neighbors at the Aquarius Club are up in arms about the continued deterioration of your facility, and can you or anyone else blame them?

I fully recognize that this is truly a complicated and awkward situation that benefits nobody and that nobody wants. During this entire fiasco, I have striven to be extremely measured in my comments, neither threatening nor otherwise. Rest assured that as I do in each and every situation, I will listen carefully to all viewpoints, all other input, gather as much information as I can, evaluate all en toto, and vote the way that I have concluded is in the best overall interests of our community, its residents, taxpayers, and property owners.

Regards,

Phill Y.

From: Skip Wilder [skipwilder@prodigy.net]
Sent: Saturday, August 25, 2012 5:57 PM
To: Phillip Younger
Subject: Colony Beach & Tennis Resort

Dear Commissioner Younger,

Please see the attached letter addressed to you. Thank you for your consideration.

Trish Granger

From: Skip Wilder [skipwilder@prodigy.net]
Sent: Monday, August 27, 2012 11:34 AM
To: James L. Brown
Cc: Town Clerk
Subject: Re: Colony Beach & Tennis Resort

Dear Commissioner Brown:

Please re-read our letter.

It's not our zoning status and it's not our association; we do not own property at the Colony. Our concern is, and still is, if the Commission changes the zoning and vaporizes the property rights of 147 unit owners, the Town will face a myriad of law suits and the plaintiffs will likely prevail. As full time residents and taxpayers, we don't want to have to bear the legal bill for the Commission's bad decision.

Since the beginning of time, frustration has not been a good basis for either business or legal decisions.

Alfred L. Wilder
Bonnie W. Wilder
skipwilder@ieee.org

----- Original Message -----

From: "James L. Brown" <jbrown@longboatkey.org>
To: "Skip Wilder" <skipwilder@ieee.org>
Cc: "Town Clerk" <townclerk@longboatkey.org>
Sent: Monday, August 27, 2012 9:21 AM
Subject: RE: Colony Beach & Tennis Resort

Dear Mr. & Mrs Wilder,

I am shocked that you would accuse me of actions that neither I or my fellow commissioners have taken. We, as a concerned commission, have done everything possible to perserve your zoning status including, as you well know, extending the deadline last year. I am also shocked that members of your association have not gotten upset with your current board until now. Why don't you attend our commission meeting next Tuesday evening and listen as I will and see what everyone has to say. Maybe together we can find a solution to your problem.

Jim Brown
Mayor

From: Skip Wilder [skipwilder@prodigy.net]
Sent: Saturday, August 25, 2012 5:49 PM
To: James L. Brown
Subject: Colony Beach & Tennis Resort

Dear Commissioner Brown,

Please see the attached letter addressed to you. Thank you for your consideration.

Trish Granger

From: Terry Gans
Sent: Monday, August 27, 2012 9:20 AM
To: Momlipton@aol.com
Cc: Town Clerk
Subject: RE: TLBK Website Inquiry

Thank you for your email regarding the Colony.

Terry Gans

From: Momlipton@aol.com [Momlipton@aol.com]
Sent: Saturday, August 25, 2012 12:43 PM
To: Terry Gans
Subject: TLBK Website Inquiry

I am an owner of unit 710 at the Colony. I know how frustrating this situation is for everyone but not extending our request to maintain our density will only make matters worse.

Opening up 40 or so units will not satisfy your need for tourism and who would want to stay at the Colony under these conditions except a few owner.

We are working hard to find a developer and have some possibilities but cutting our occupancy will cut our chances to make a deal.

Sincerely

Helene Lipton

Trish Granger

From: Terry Gans
Sent: Monday, August 27, 2012 9:18 AM
To: Lauri & Richard Pollack
Cc: Town Clerk
Subject: RE: Colony

Thank you for writing regarding the Colony. With all the complexities surrounding this, the one thing of which you can have confidence is that the Commission is considering facts, opinions, and legalities with the utmost concern and care.

Terry Gans

From: Lauri & Richard Pollack [1winston1@comcast.net]
Sent: Saturday, August 25, 2012 1:36 PM
To: Terry Gans
Subject: Colony

Dear Commissioner Gans,

Please allow the Colony owners a time extension so that they will be able to come to an equitable conclusion which will not only benefit them, but, our entire Key.

Thank you for your consideration.

Dr. Richard and Lauri Pollack

Trish Granger

From: Terry Gans
Sent: Monday, August 27, 2012 9:18 AM
To: Lauri & Richard Pollack
Cc: Town Clerk
Subject: RE: Colony

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Thank you for your consideration.

Dr. Richard and Lauri Pollack

Trish Granger

From: Terry Gans
Sent: Monday, August 27, 2012 9:17 AM
To: Skip Wilder
Cc: Town Clerk
Subject: RE: Colony Beach & Tennis Resort

Thank you for your email regarding the Colony. It is a complex--and for many an emotional--issue. I hope you can attend the Commission meeting on September 4 at 7 pm to listen and share any constructive ideas on this matter.

Terry Gans

From: Skip Wilder [skipwilder@prodigy.net]
Sent: Saturday, August 25, 2012 5:55 PM
To: Terry Gans
Subject: Colony Beach & Tennis Resort

Dear Commissioner Gans,

Please see the attached letter addressed to you. Thank you for your consideration.

Trish Granger

From: Terry Gans
Sent: Monday, August 27, 2012 9:15 AM
To: JbirnbaumUP@aol.com
Cc: Town Clerk
Subject: RE: Colony: Commission Action

Thank you your email regarding the Colony. I hope you can attend the Commission meeting at 7 pm September 4 where a discussion is on the agenda.

Terry Gans

From: JbirnbaumUP@aol.com [JbirnbaumUP@aol.com]
Sent: Sunday, August 26, 2012 4:33 PM
To: Lynn Larson; Jack Duncan; David Brenner; James L. Brown; Patricia Zunz; Terry Gans; Phillip Younger
Subject: Colony: Commission Action

Dear Town Commissioner,

Aug. 26, 2012

We have been owners of a unit at the Colony since 1985. We are very distressed to learn that resident- owners of the Aquarius, our neighbors, are asking the Town Commissioner to not extend the period of time we need to develop a plan for the restoration of the Colony with the old grandfathered zoning, which allows for 237 units. We love the Colony as do my kids and grandkids. Disallowing an extension will no doubt lead to the death of the Colony.

Our association of owners has been working diligently trying to develop a restoration plan, within the time restraints asked for by the Commission, but has been stymied at every turn by Dr. Murf Klauber who is the most litigious person I have ever heard of. This man has refused to negotiate in any reasonable way and simply wants the death of the Colony. Failing to give us an extension will give Dr. Klauber what he wants and cause great personal and financial harm to all of the owners. I cannot believe that the Town Commission really wants this to happen, and cause such grief and hardship to hundreds of Colony owners that have been so supportive of Longboat. Please, please provide the extension that our Association is seeking.

Respectfully submitted,
Jerome and Sheila Birnbaum
Owners Colony Unit 711.

Trish Granger

From: Phillip Younger
Sent: Monday, August 27, 2012 10:39 AM
To: Stan Adelman; jduncan@lonboatkey.org
Cc: Town Clerk
Subject: RE: Deny Colony club Extention Request

COPY OF RECORD

Thank you for your input. This is a complicated and awkward situation that benefits nobody and that nobody wants.

Phill Y.

From: Stan Adelman [stradel25@gmail.com]
Sent: Friday, August 24, 2012 7:24 PM
To: jduncan@lonboatkey.org
Subject: Fwd: Deny Colony club Extention Request

----- Forwarded message -----

From: Stan Adelman <stradel25@gmail.com<mailto:stradel25@gmail.com>>
Date: Thu, Aug 23, 2012 at 10:13 PM
Subject: Deny Colony club Extention Request
To: pyounger@longboatkey.org<mailto:pyounger@longboatkey.org>

I have ben a resident of the Aquarius Club for 22 yrs and strongly support our President's request to you to deny the Colony Club's applicationt for an additional18 months extention. Additional time will not accomplish any thing but more requestsr for time. Enough is enough. Stanley R. Adelman, 1701 GMD, LBK

I

Trish Granger

From: JbirnbaumUP@aol.com
Sent: Monday, August 27, 2012 12:10 PM
To: Terry Gans
Subject: Re: Colony: Commission Action

Mr. Gans, Thank you. Yes, I plan to be there.
Jerry Birnbaum

In a message dated 8/27/2012 9:16:34 A.M. Eastern Daylight Time, tgans@longboatkey.org writes:

Thank you your email regarding the Colony. I hope you can attend the Commission meeting at 7 pm September 4 where a discussion is on the agenda.

Terry Gans

From: JbirnbaumUP@aol.com [JbirnbaumUP@aol.com]
Sent: Sunday, August 26, 2012 4:33 PM
To: Lynn Larson; Jack Duncan; David Brenner; James L. Brown; Patricia Zunz; Terry Gans; Phillip Younger
Subject: Colony: Commission Action

Dear Town Commissioner, Aug. 26, 2012

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Respectfully submitted,
Jerome and Sheila Birnbaum
Owners Colony Unit 711.

Trish Granger

From: James L. Brown
Sent: Monday, August 27, 2012 9:22 AM
To: Skip Wilder
Cc: Town Clerk
Subject: RE: Colony Beach & Tennis Resort

Dear Mr. & Mrs Wilder,

I am shocked that you would accuse me of actions that neither I or my fellow commissioners have taken. We, as a concerned commission, have done everything possible to preserve your zoning status including, as you well know, extending the deadline last year. I am also shocked that members of your association have not gotten upset with your current board until now. Why don't you attend our commission meeting next Tuesday evening and listen as I will and see what everyone has to say. Maybe together we can find a solution to your problem.

Jim Brown
Mayor

From: Skip Wilder [skipwilder@prodigy.net]
Sent: Saturday, August 25, 2012 5:49 PM
To: James L. Brown
Subject: Colony Beach & Tennis Resort

Dear Commissioner Brown,

Please see the attached letter addressed to you. Thank you for your consideration.

Trish Granger

From: gmazzola@comcast.net
Sent: Monday, August 27, 2012 2:10 PM
To: Lynn Larson; Jack Duncan; David Brenner; James L. Brown; Patricia Zunz; Terry Gans; Phillip Younger
Subject: Colony extension to June,2014

I am a Florida resident with a condo at the Aquarius Club on Longboat Key, and have owned same for 37 yrs. This memo is to strongly agree with the letter sent by the Board of Directors to the Township commissioners requesting that you deny the request being made at this time to extend once again the time limit to reach some resolution to the tortuous negotiations that have been a total disgrace to this point in time. You are reasoning, reputable individuals, and it is time to act in the majority to deny this request for another extension! Enough is enough!!!!!!!!!!!!!! Dr. Gus J Mazzola

From: Martin Edelman <mseelman1@aol.com>
To: MSEDELMAN1 <MSEDELMAN1@aol.com>
Subject: Extension request by Colony owners
Date: Sat, Aug 25, 2012 1:32 pm

August 25, 2012

To all LBK commissioners:
(LARSON,,DUNCAN,BRENNER,BROWN,ZUNZ,GANS,YOUNGER)

My wife and I urge you to please grant the December 31, 2013 extension request by Colony owners. Anything less than a full or comparable return to a Colony Beach Resort could be a disaster to the entire town.....We also live close to the shut facility and are not happy with its present condition—but I feel confident that the two (or more) sides in this ongoing saga are now finally realizing their folly in delaying and are now acting in a manner which should bring the problem to solution, especially of the town of LBK puts as much pressure as possible on the parties involved.

Respectfully,
Martin Edelman
Carol Edelman
The Players Club
1465 Gulf of Mexico Drive B401
Longboat Key, nFL 34228

A handwritten signature in black ink, appearing to read "Martin Edelman", written in a cursive style.

Trish Granger

From: Robert Israeloff [boisraeloff@yahoo.com]
Sent: Tuesday, August 28, 2012 3:46 PM
To: James L. Brown
Subject: Colony

Dear Commissioners: I am writing in support of granting an extension to the Colony owners with regard to the zoning requirements for the 18-acre property. As a resident of Longboat Key, and a former owner of a Colony unit which introduced me to the island in 1973, I want the site restored to its former importance as a contributor to the economic health of our town. Regardless of the outcome of the legal battles among the various parties, a site zoned for approximately 100 units is worth far less than one that allows for the current 237 units. Without an extension, any owner or investor, past, present or future, would be far less likely to spend significant dollars to reclaim 100 units as compared to 237 units. The Town would be taking action against its own economic future. Sincerely, Robert Israeloff, 455 Longboat Club Road, apt 704, Longboat Key, FL 34228

Trish Granger

From: David Brenner
Sent: Wednesday, August 29, 2012 7:37 AM
To: Trish Granger
Cc: Town Clerk
Subject: FW: Colony beach and Tennis Club.... Town Meeting
Attachments: Letter to LBK Commissioners CBTC 8 28 2012.doc

Trish...Could you contact the Wehrins and let them know about the live streaming of our meeting?
Thanks. Dave Brenner

From: George Wehrlin [highyield70@yahoo.com]
Sent: Tuesday, August 28, 2012 9:06 PM
To: Patricia Zunz
Cc: David Brenner; Jack Duncan
Subject: Colony beach and Tennis Club.... Town Meeting

Dear. Commissioner Zunz:

Thank you for responding to our email on this very important issue.

I have responded to your email with the enclosed attachment.

I also cc'd Commissioners Brenner and Duncan as they also were kind enough to respond to my email.

We can not attend the town Meeting in person but will on the call and available should you desire to speak to us. I will be around all weekend .

I also attached our email here for you convenience.

Sincerely,

George and Dea Wehrlin
973 543 4011

Dea and George Wehrlin
Units 146 & 741 at the Colony
Long Boat Key, Florida
973-543-4011

August 28th, 2012

xxxxxxxxxxxxxxxxxx

Dear Commissioner Zunz:

Thank you for the response to our email and for your interest in us attending the meeting. Unfortunately, we are unable to attend the upcoming meeting, but we will be available by the phone conference to follow the proceedings and address any issues you desire.

In no way did I mean that the town was responsible for the litigation and or current circumstances. Our concern is how the town is/ is not facilitating the progress to get the Colony back into operation at the present time. The following items are the points to which we were referring in our email.

1. Threatening us with abandonment or not extending the time puts undo pressure on us to settle with Dr. Klauber and others, which is not possible with the present attitude and demands.

2. The requirement of the commissioners for us to settle with Dr. Klauber before we could proceed with our plan means we are at a stand still.

3. We and many owners were distressed at the inconsiderate attitude of some of the Commissioners to vote NO immediately and not to listen to the plan that was in play with Club Holdings at the March meeting. They traveled from Colorado to participate in this meeting and were shut off from presenting their plan to show the Commissioners that we were making progress to find a resolution to our problems.

The main priority of the Commissioners should be to give us more cooperation to help GET THE COLONY OPEN AS SOON AS POSSIBLE. Some suggestions follow:

1. Work with us to facilitate and accept a 15 or 18 acre plan depending on the present negotiations. We do not need the three acres to build a beautiful resort on the island. The law suit with Dr. Klauber could go on for years if a 15 acre plan is not possible, resulting in major financial losses for the owners and the town resulting in further litigation.

2. Remove the settlement with Dr, Klauber and Colony partners as a necessary condition for moving forward to a final plan.

3. Remove the threat of abandonment which would result in great losses to the owners and the town.

4. Allow us to open a group of units immediately.

5. Temporarily limit and waive restrictions, outside the safety issues, for us to open a group of units.

5. Set up some tax incentives to open the Colony sooner.

6. Allow the Colony to pay off existing bills owed to the town after the opening of the Colony.

Hopefully these thoughts are helpful to you and the other Commissioners to GET THE COLONY OPEN in the near future.

Sincerely,
George and Dea Wehrlin

Dea and George Wehrlin
Units 146 & 741 at the Colony
Long Boat Key, Florida
973-543-4011

August 28th, 2012

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Hopefully these thoughts are helpful to you and the other Commissioners to **GET THE COLONY OPEN** in the near future.

Sincerely,
George and Dea Wehrlin

Trish Granger

From: George Wehrin [highyield70@yahoo.com]
Sent: Tuesday, August 28, 2012 9:07 PM
To: Patricia Zunz
Cc: David Brenner; Jack Duncan
Subject: Colony beach and Tennis Club.... Town Meeting
Attachments: Letter to LBK Commissioners CBTC 8 28 2012.doc

Dear Commissioner Zunz:

Thank you for responding to our email on this very important issue.

I have responded to your email with the enclosed attachment.

I also cc'd Commissioners Brenner and Duncan as they also were kind enough to respond to my email.

We can not attend the town Meeting in person but will on the call and available should you desire to speak to us. I will be around all weekend .

I also attached our email here for you convenience.

Sincerely,

George and Dea Wehrin

973 543 4011

Dea and George Wehrin

August 28th, 2012

Units 146 & 741 at the Colony

Long Boat Key, Florida

973-543-4011

xxxxxxxxxxxxxxxxxxxx

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Hopefully these thoughts are helpful to you and the other Commissioners to **GET THE COLONY OPEN** in the near future.

Sincerely,

George and Dea Wehrin

Trish Granger

From: Jack Duncan
Sent: Tuesday, August 28, 2012 9:49 AM
To: Bob Erazmus
Cc: Town Clerk
Subject: Re: Colony Extension Request

Bob

I agree this is a very complicated and frustrating issue. I appreciate your thoughts and your taking the time to express them in writing. I look forward to seeing you at the meeting on 9/4/2012 where you can express your thoughts in a public forum.

Jack Duncan
Commissioner, Longboat Key

On Aug 28, 2012, at 1:12 AM, Bob Erazmus wrote:

To All Longboat Key Town Commissioners:

My wife and I have been Colony owners for 34 years. At this critical and extremely stressful time in the Colony's history, I am asking the Longboat Key Town Commission at its Sept 4, 2012 meeting to extend the grandfathered density of 237 tourism units from December 31, 2012 to June 30, 2014.

1. Colony owners are innocent parties in a legal dispute initiated by Dr. Klauber in 2007. Since then we have been forced to incur significant legal fees just to defend ourselves. We don't deserve to incur financial disaster from lost density that would result from failure to extend the Dec 31, 2012 deadline just because Dr. Klauber adamantly refuses to settle matters on reasonable terms. "Legal constraints" to settlement are certainly not from lack of trying by our Association. A tremendous number of hours have been spent in formal and informal mediation meetings with Dr. Klauber without success. Generous offers made to Dr. Klauber and Colony Lender (mortgage holder on the recreation lease property) have been rejected. I assure you that our owners want a new Colony that everyone on Longboat Key can be proud of. But agreeing to grossly outrageous settlement demands just to settle does not make economic sense for our owners.

2. The town of Longboat Key benefits financially with more tax revenue from at least 237 units at the Colony, not less. Also, loss of significant density at the Colony to about 100 units would be inconsistent with the recent referendum on the Key allowing 250 additional tourism units.

3. Not extending the deadline would create a new legal dispute to an already complex legal situation and delay, not expedite resolution.

4. Serious discussions with prospective development partners are in process. Not extending the deadline complicates and delays contract negotiations with partners for the new and improved Colony. Gaining approval of an 18-acre plan by our owners and the town of Longboat Key as soon

as possible is certainly our preference. But if settlement is not possible with Dr. Klauber and Colony Lender on reasonable terms, Colony owners at our April 2nd annual meeting unanimously approved proceeding expeditiously with a 15 acre redevelopment plan.

5. I sincerely sympathize with our neighbors at Aquarius who are frustrated by continued gridlock at the Colony. The Aquarius Board never communicated their concerns to the Colony Board. Instead they went directly to the town and have requested that the Dec 31, 2012 deadline not be extended. Our Association President has reached out to the Aquarius Board to discuss their issues regarding landscape maintenance at the Colony. We have been rebuffed. They won't talk to us. Colony owners want to be good neighbors. Grounds maintenance issues can be worked out, but we have to talk to each other.

I am asking each of you for your help and support at this very challenging time. Please extend the grandfathered density of 237 tourism units from December 31, 2012 to June 30, 2014.

Bob Erazmus
Unit 724
Colony Beach and Tennis Club



ATTORNEYS AT LAW

4221 W. Boy Scout Boulevard | Suite 1000
Tampa, Florida 33607-5780
P.O. Box 3239 | Tampa, Florida 33601-3239
813.223.7000 | fax 813.229.4133
www.carltonfields.com

Atlanta
Miami
Orlando
St. Petersburg
Tallahassee
Tampa
West Palm Beach

Donald E. Hemke
813-229-4101 Direct Dial
dhemk@carltonfields.com

July 27, 2012

Robin Meyer
Planning, Zoning and Building Director
Town of Longboat Key
501 Bay Isles Road
Longboat Key, FL 34228-3196

VIA FEDERAL EXPRESS
and VIA EMAIL rmeyer@longboatkey.org
(email without exhibits)

Subject: 1620 Gulf of Mexico Drive – The Colony
Discontinued Use – Nonconforming Land Use/Structures

Dear Mr. Meyer:

Pursuant to Town of Longboat Key Zoning Code 158.138(B)(8)(b), the Colony Beach and Tennis Club Association ("the Association") petitions the Town Commission to extend the time from December 31, 2012, through June 30, 2014 (or to such further time as the Town Commission may deem appropriate under the totality of the circumstances), for the Association to use or occupy condominium resort units at The Colony, 1620 Gulf of Mexico Drive ("the Colony") in order to maintain, without question, the "grandfathered status" of the 237 condominium units and existing improvements at the Colony.

The Association would represent that Colony Lender, which holds a 15 percent interest in the three recreational acres at 1620 Gulf of Mexico Drive, which holds the mortgage on the Klauber-related entities' 80 percent interest in the three recreational acres, and which holds a mortgage on other Klauber-related entities' interests at the Colony, and Breakpointe, LLC, which holds a five percent interest in the three recreational acres, have authorized the Association to represent in this petition that they have no objection to the Town Commission granting the Association's petition to extend the "deadline" of December 31, 2012.

Introduction.

On November 21, 1972, the Town Commission approved a plot plan for 237 units at the Colony. The zoning then in effect was H-2, 14 units per acre, which translated to the 237 units over the approximately 18 acres which Colony Beach Associates, Ltd. ("CBA") owned at 1620 Gulf of Mexico Drive. Apparently unbeknownst to the Town, CBA subsequently effectively subdivided the 18 acres it owned. On November 30, 1973, CBA submitted only approximately 15 of the 18 acres to condominium ownership; the declaration of condominium established 237 condominium units on the 15 acres. One day prior to submitting the approximately 15 acres (and 237 condominium units) to condominium ownership, CBA on November 29, 1973, had

leased four non-contiguous parcels totaling approximately three of the approximately 18 acres to the Association (rather than including those three acres within the condominium). Beginning in 1974, CBA would deed and assign undivided interests in the approximately three acres to William W. Merrill, to First Diversified Properties, to Herbert P. Field, and Colony Beach Club, Inc. of Longboat, and to Colony Beach, Inc.

In the early and mid 1970s, the 237 condominium units, including 232 tourism units, were constructed on 15 acres of condominium land at the Colony; the 232 tourism units were sold to individual unit owners ("Unit Owners"). The Unit Owners also became limited partners in the Colony Beach and Tennis Club, Ltd. ("the Partnership"), which rented tourism units at the Colony to third parties up to mid-August, 2010. The 232 tourism units would be included in a rental pool 11 months yearly under terms of the partnership agreement as a quid pro quo for the Unit Owners being permitted to retain the use of their individual units 30 days yearly without charge as guests at the Colony resort. On August 9, 2010, the Partnership's bankruptcy was converted from a Chapter 11 reorganization to a Chapter 7 liquidation, and tourism operations at the Colony ceased on August 15, 2010.

As of mid-August 2010, the zoning for the Colony was T-6, six units per acre, which would permit 90 units on the 15 acres of condominium land at the Colony. Thus, approximately 147 of the 237 existing units on the 15 acres of condominium land at the Colony would become nonconforming as to density if the 147 existing units were not "grandfathered."

With the condominium units at the Colony no longer being rented, Town staff opined that the grandfathered status of the 237 condominium units was in jeopardy unless rental operations at the Colony resumed no later than August 15, 2011. Town Code 158.138 provides that "a nonconforming building or structure not used or occupied in a lawful manner or vacant for a period of one year or more shall be considered an abandonment. . . ."

By April 13, 2011, it was crystal-clear that "legal restraints" would preclude tourism operations from being resumed at the Colony by August 15, 2011. Among the "legal restraints" were that owners of the 232 tourism units were no longer required to rent their units (with the liquidation of Partnership pursuant to the Bankruptcy Court order of August 9, 2010), that the Association lacks authority to operate a hotel or resort, and that the Association needs to select a developer and to negotiate a deal to structure and/or restructure the relationship between the Unit Owners, the Association, and a developer to rehabilitate or redevelop the Colony as a first-class resort.

Thus, on April 13, 2011, the Association—then in possession and control of the underlying property at the Colony pursuant to the Bankruptcy Court order and final judgment of August 13, 2010—applied to extend the August 15, 2011, "deadline" to December 31, 2012, for the Association and Unit Owners to rent, use or occupy the condominium resort units at the Colony in order to maintain their "grandfathered" status. Town Code 158.138 provides that "should the period of nonuse or vacancy be caused by legal restraints upon the owner. . . , the

owner. . . . may set forth such grounds in a petition to the Town Commission," and "[t]he time may be extended by the Town Commission for good cause shown. . . ."

At the Town Commission hearing on May 2, 2011, the Town Commission granted the extension, finding that the Association "has diligently worked with the Town in good faith for the past six months with the goal of reopening the Colony," that extending the deadline from August 15, 2011, through December 31, 2012, "is consistent with the zoning code Section 158.138(B)(8)(b), which allows the Town Commission to grant an extension of the period of time a nonconforming use or structure can remain unused or vacant if the nonuse or vacancy is caused by legal restraints upon the owner or lessees," and that "multiple legal constraints have prohibited the timely redevelopment or reopening of the Colony, and [that the Town Commission] deems it in the public interest to extend the one year abandonment period. . . .to provide the Association time to redevelop or reopen the Colony." The Town Commission granted the extension to December 31, 2012, with the explicit recognition that there may be need for further extensions beyond December 31, 2012. The Town Commission indicated that a hearing would be held in March 2012 "to evaluate progress made. . . .in recognition that an additional extension of time may be requested." The Town Commission specified that "[a]ny additional extension must be acted upon prior to December 31, 2012." A copy of Town Resolution 2011-17 granting the extension through December 31, 2012, is attached as Exhibit A hereto.

Subsequent to May 2, 2011, additional unforeseen "legal restraints" have arisen which have precluded the Colony from resuming first-class rental operations prior to December 31, 2012, to wit, the United States District Court for the Middle District of Florida ("the District Court") on July 27, 2011, reversed a bankruptcy court final judgment of November 9, 2009, and on October 12, 2011, remanded certain proceedings to the Bankruptcy Court for the Middle District of Florida ("the Bankruptcy Court"). The District Court's orders of July 27, 2011, and of October 12, 2011, raised questions concerning whether the Partnership, on the one hand, or the Association and Unit Owners, on the other hand, have the right to possess and control the 15-acre condominium property at the Colony and raised the prospect of a damage award in excess of \$20 million against the Association, all of which effectively precludes financing the rehabilitation or redevelopment of the Colony pending further legal determinations or resolution among the parties which has not occurred to date. The Bankruptcy Court conducted a full-day hearing on July 13, 2012, to consider, inter alia, whether to vacate its order and final judgment ejecting the Partnership from possession of the condominium property, but has not, to date, announced any decisions. Even once the Bankruptcy Court rules on whether to vacate its ejection order and final judgment, its decision will be subject to appeal to the District Court, whose decision in turn will be subject to appeal to the Eleventh United States Court of Appeals ("Eleventh Circuit"), and based on at least one of the legal issues involved perhaps even to the United States Supreme Court.

As will be detailed at pages 8 through 12 below, the District Court's orders of July 27, 2011, and of October 12, 2011, the Bankruptcy Court's full-day hearing of July 13, 2012, and related events have precluded the Association and Unit Owners from going forward with the

rehabilitation or redevelopment of the Colony in order to resume first-class rental operations at the Colony prior to December 31, 2012.

Now, the details:

Partnership's monetary and declaratory claims against the Association.

1. On April 30, 2007, "the Partnership" filed in state court a complaint against the Association seeking, among other things, monetary damages and declaratory relief that the Association was required to assess the Unit Owners for the Partnership's operating losses and the costs of renovating the Colony.

2. On October 29, 2008, the Association filed a voluntary petition for relief under Chapter 11 in the Bankruptcy Court.

3. On November 5, 2008, the Association removed the Partnership's complaint of April 30, 2007, from state court to the Bankruptcy Court as an adversary proceeding ("the Partnership Adversary Proceeding").

4. On July 31, 2009, the Bankruptcy Court ruled orally in favor of the Association in the Partnership Adversary Proceeding, and on November 9, 2009, the Bankruptcy Court entered a final judgment, among other things, disallowing the Partnership's claims in their entirety and denying the Partnership's request to assess the Unit Owners to fund ongoing operations of the Partnership or to pay for repair and renovations of the Colony. A copy of the final judgment of November 9, 2009, is attached as Exhibit B hereto.

5. On November 19, 2009, the Partnership appealed the Bankruptcy Court's final judgment in the Partnership Adversary Proceeding to the District Court (which would not decide the appeal until July 27, 2011, 21 months later, the order of July 27, 2011, being one of the "legal restraints" giving rise to the instant petition to extend the deadline of December 31, 2012).

Association's ejectment claim against the Partnership.

6. On March 1, 2010, the Association and certain Unit Owners filed a complaint in Bankruptcy Court against the Partnership, seeking to terminate the Partnership's rights of use and to eject the Partnership from possession of the condominium units and condominium common elements at the Colony. A copy of the complaint is attached as Exhibit C hereto.

7. On August 13, 2010, the Bankruptcy Court entered an order and final judgment that, among other things, ejected the Partnership from possession of the 232 tourism units and condominium common elements at the Colony and terminated the Partnership's right of use of the tourism units and common elements at the Colony. Copies of the Bankruptcy Court's ejectment

order and ejectment final judgment of August 13, 2010, are attached as Composite Exhibit D hereto.

8. The Partnership did ***not*** appeal the ejectment order and ejectment final judgment of August 13, 2010.

Association's attempts to rehabilitate or redevelop the condominiums.

9. Subsequent to the order and final judgment of August 13, 2010, the Association has undertaken efforts to structure a relationship between the Unit Owners, the Association, and a developer/resort operator, and to rehabilitate or redevelop the condominium units to permit them to be used as first-class tourism units, as will be further detailed in paragraphs 10 through 15 below. As of July 27, 2012, the Association has incurred approximately \$650,000 in consultant, development, and legal fees and in costs in attempting to structure the relationship, in soliciting and reviewing proposals to rehabilitate or redevelop the condominium units at the Colony, and in working with Town staff in responding to land use, zoning, and development issues applicable to the rehabilitation or redevelopment at the Colony, and in preparing for and attending Town Commission hearings of May 2, 2011, and of March 5, 2012. The Association also spent almost \$250,000 in maintenance at the Colony and has spent more than more \$750,000 to maintain insurance on the Colony. Certainly redevelopment-related and maintenance-related expenditures—conservatively totaling almost \$1.7 million (over \$7,000 for each of the 232 tourism units)—negate any possible inference that the Association has abandoned the Colony.

10. More specifically, after interviewing five possible consultants from a list of over 20 candidates, the Association on October 22, 2010, hired Joel Rosen of Horizon Hospitality Group, Inc. and Horwath HTL, one of the leading hospitality consultants in the world, as the strategic consultant for long-range planning for the Colony to study the market for restoring the Colony to a first-class tourist resort. Mr. Rosen completed a first-phase study of the situation at the Colony and of the tourism markets in Longboat Key and elsewhere. He also surveyed the Unit Owners with respect to the short-term and long-term future at the Colony.

11. On March 9, 2011, the Association provided the Unit Owners at the Colony with an interim report from Mr. Rosen summarizing the progress in the process to identify prospective rehabilitation/redevelopment partners/operators interested in the Colony and summarizing the expressions of interest received from eight prospective rehabilitation/redevelopment/operational partners. On March 15, 2011, the Association provided the Unit Owners an updated report from Mr. Rosen reflecting six additional expressions of interest from prospective rehabilitation/redevelopment/operational partners. On March 28, 2011, expressions of interest/proposals from sixteen developers were presented at the Association's annual membership meeting.

12. Between March 28, 2011, and September 27, 2011, the Association's board of directors, with input from Unit Owners and from consultants, reviewed and narrowed the 16

expressions of interest/proposals. On September 27, 2011, the Association's board of directors recommended Club Holdings, LLC, to be the partner for resurrecting and thereafter operating the Colony.

13. On November 22, 2011, the Association entered into a development agreement with Club Holdings Ventures, LLC. The development agreement addressed numerous preliminary issues, including the need to procure funding and to manage the actual redevelopment of the Colony. The development agreement would run through March 2015. An amendment to the development agreement provided that either the Association or Club Holdings Ventures, LLC could terminate the development agreement up to May 15, 2012.

14. By March 5, 2012, Club Holdings Ventures, LLC, had developed a site plan and a pricing structure for the redevelopment of the Colony ("Club Holdings plan").

15. Prior to the annual meeting of Unit Owners in Longboat Key on April 2, 2012, and April 3, 2012, Club Holdings Ventures, LLC had circulated the Club Holdings plan to Unit Owners. On April 2, 2012, and April 3, 2012, Unit Owners were able to question Club Holdings Ventures, LLC concerning the Club Holdings plan.

16. On May 14, 2012, the Association terminated the development agreement with Club Holdings Ventures, LLC because the "legal restraints" to rehabilitation or redevelopment were very much more substantial than Club Holdings, LLC and Club Holdings Ventures, LLC, originally envisioned, those "restraints" including the District Court's order of October 12, 2011 (see paragraph 31 below), which was issued two weeks after the Association's board of directors recommended Club Holdings, LLC. The Association spent \$150,000 with Club Holdings Ventures, LLC during the period of time between September 27, 2011, when the Association's board recommended Club Holdings, LLC, and May 15, 2012, when the Association terminated the development agreement with Club Holdings Ventures, LLC.

17. Almost immediately upon termination of the development agreement with Club Holdings Ventures, LLC, four development entities which had participated in the initial selection process contacted the Association to indicate renewed interest in being selected as the consultant/developer going forward. The Association also appointed an advisory committee of Unit Owners knowledgeable and experienced in real estate development and investment to assist the Association's board of directors in expeditiously considering and selecting a replacement to Club Holdings Ventures, LLC.

18. In sum, since August 15, 2010, and since May 2, 2011, the Association and its members have diligently spent time, effort, and monies toward planning to rehabilitate or redevelop and to revitalize the Colony. The Association hired a world-class hospitality consulting firm to survey the Unit Owners' desires, to study the tourism market in Longboat Key and elsewhere, to solicit interest from developers who would be interested in reformulating the legal relationships at the Colony and in physically rehabilitating and/or redeveloping the Colony, and to advise the Association throughout; reviewed proposals from 16 would-be developers;

narrowed the would-be developers to a "final four;" selected Club Holdings, LLC, as the would-be developer and entered into a development agreement with Club Holdings Ventures, LLC, only to be required to terminate the development agreement with Club Holdings Ventures, LLC, in light of the "legal restraints" of July 27, 2011, and of October 12, 2011, which effectively precluded rehabilitation or redevelopment with Club Holdings Ventures, LLC. These "legal restraints" have persisted unabated to date.

Association's working with Town to resolve land use/zoning issues to facilitate rehabilitation/redevelopment of the Colony.

19. The Association also has worked closely with Town staff in reviewing 40 years' of records concerning the Colony and Town codes, in working through "zoning issues," including but not being limited to issues concerning "recreation lands," PUDs, ODPs, and site plans, and FEMA, and in inspecting the condominium resort units at the Colony in connection with rehabilitating, redeveloping, and reopening the Colony.

20. Less than two months from the Bankruptcy Court's ejectment order and ejectment final judgment of August 13, 2010, the Association met with the then Town Manager, the then Town Planning, Zoning and Building Director, and the Town Attorney to discuss physical conditions, use, rehabilitation and/or redevelopment, zoning and land use issues concerning the Colony. On October 22, 2010, the then Town Planning, Zoning and Building Director wrote the Association, *inter alia*, that the condominium units' physical condition and various zoning issues, including "the availability of recreational facilities," would need to be resolved in order to permit the Town to allow the occupancy of any of the units at the Colony. The then Planning, Zoning and Building Director also indicated that any "grandfathered" nonconformities would disappear if the nonconforming use was "not used for a period of one year."

21. To respond to the concerns in the Town's letter of October 22, 2010, the Association hired the undersigned attorney. On January 4, 2011, Mr. Hemke responded to the Town's letter of October 22, 2010, and to the Town Attorney's email of November 17, 2010.

22. On January 24, 2011, the Town Attorney responded that the Association was "grandfathered" from being required to have any active recreation spaces. (The Association, however, also had effectively obtained the right-to-use the three non-condominium recreational acres at the Colony if there were a requirement for active recreation space, via an option from Breakpointe, LLC, to purchase Breakpointe's undivided five percent interest in the three recreational acres.)

23. On January 26, 2011, the then Town Planning, Zoning and Building Director wrote the Association that she agreed with the Town Attorney's letter of January 24, 2011, thereby resolving "the availability of recreational facilities" issue she had raised in her letter of October 22, 2010.

24. On March 3, 2011, the then Town Planning, Zoning and Building Director wrote the Association, reminding it that should a nonconforming use not be used for one year it would be considered abandoned. She advised that the Town Commission had power to extend the one-year period.

25. On April 13, 2011, the Association petitioned to extend the one-year period from August 15, 2011, through December 31, 2012, and on May 2, 2011, the Town Commission granted the extension through December 31, 2012. See pages 2-3 above and Exhibit A attached hereto.

26. Subsequent to May 2, 2011, the Association has submitted an 18-acre development plan to Town staff, has had discussions and has exchanged correspondence with Town staff concerning the Association's ability to apply for PUD, ODP, or site plan approval for a 15-acre plan, and has explored the possibility of reopening limited tourism use at the Colony involving perhaps 30 or 40 tourism units without full rehabilitation or full redevelopment of the Colony if such limited reopening were determined to be necessary to preserve the "grandfathered" rights at the Colony.

27. On February 28, 2012, the Association transmitted to Town staff Club Holdings Ventures, LLC's proposed 18-acre plan to rehabilitate and redevelop the Colony.

28. On February 29, 2012, the Association's land use attorney wrote the Town Attorney detailing that the Association alone (without the joinder of the owners or mortgage holders of the three recreational acres) may legally apply for PUD, ODP, or site plan approval for the 15 acres.

District Court's reversal of Bankruptcy Court's final judgment on Partnership monetary claims and remedies order suggesting that Bankruptcy Court could return Partnership to possession of Colony units.

29. As was previously noted in paragraph 5 above, the Partnership appealed the final judgment of November 9, 2009, to the District Court. On July 27, 2011, the District Court reversed the Bankruptcy Court's final judgment disallowing the Partnership's claims against the Association and directed the parties to submit "papers. . . discuss[ing] the precise form of the remedy that the respective party recommends as a consequence of their district court's reversal of the bankruptcy court." A copy of the District Court's reversal of July 27, 2011, is attached as Exhibit E hereto.

30. On August 5, 2011, the Partnership submitted a brief on remedies, noting its desire to have

"the Association complete the necessary repairs and renovations in order to reestablish the use of the property as a condominium resort hotel under the management of the Partnership. To that end, the Partnership requests the following relief:

"a. An order directing the Association to perform the necessary repairs and renovations to the common elements and the unit exteriors in order to allow the partnership to resume its operation of the hotel as a luxury resort hotel. . . .

"b. An order vacating (or directing the bankruptcy court to vacate) the Final Judgment entered by the bankruptcy court in Adversary Proceeding Case No. 8:09-bk-22611-KRM in the partnership's bankruptcy terminating the partnership's right to possession of the condominium units, as well as any order in the Association's bankruptcy proceeding that is inconsistent with [the District Court's] appellate opinion. . . .

"e. Entry of such other and further orders as may be necessary to provide for restoration of the hotel operation under the management of the Partnership. . . .

"If the Court is disinclined for any reason to direct the Association to perform the necessary repairs and renovations and to place the Partnership back in control of the units for purposes of operating a condominium resort hotel, then Partnership would request the Court instead to render judgment based upon the alternative model under Dr. Fishkind's scenario 2, which model contemplates the repairs are not made and the Partnership thus loses the benefit of the continued ability to operate the hotel. . . ."

A copy of the Partnership's submittal of August 5, 2011, is attached as Exhibit F hereto.

31. On October 12, 2011, the District Court remanded the Partnership Adversary Proceeding to the Bankruptcy Court, finding that "the possession of the Colony units requires the bankruptcy court's consideration" and remanding with instructions to "either (1) vacate, amend, or issue each order necessary and appropriate to return the Partnership to possession of the Colony units and recommend an award of \$7,751,470 to the Partnership or (2) leave the Partnership without possession of the Colony units and recommend an award of \$20,646,312 to the Partnership." The District Court also instructed that the Bankruptcy Court could reconsider the Association's counterclaims in the Partnership Adversary Proceeding. The District Court's order placed the Association's right to continued possession of the condominium units in jeopardy in light of the alternative choices provided to the Bankruptcy Court upon remand. The District Court's order effected a serious "legal restraint" on the Association's ability to rehabilitate or redevelop the Colony by raising for the first time the prospect that the final, non-appealed ejectment order and final judgment of August 13, 2010, could be vacated. A copy of the order of October 12, 2011, is attached as Exhibit G hereto.

32. On October 14, 2011, the Association, wanting a "quick" effectively final judicial decision on the right of possession to the tourism units and to the condominium common elements, appealed the District Court's orders of July 27, 2011, and of October 12, 2011, to the Eleventh Circuit. The Partnership, however, moved to dismiss the appeal as premature. Copies of the Partnership's motions to dismiss are attached as Composite Exhibit H hereto.

33. On March 2, 2012, the Eleventh Circuit dismissed the Association's appeals as premature, without prejudice to the Association's right to appeal the District Court's reversal of the Bankruptcy Court's rejection of the Partnership's claims and of any possible vacating of the Bankruptcy Court's order and final judgment of ejectment once the case is ripe for appeal. A copy of the Eleventh Circuit's decision is attached as Exhibit I hereto.

34. On March 26, 2012, the Bankruptcy Trustee filed a motion to vacate the ejectment order and ejectment judgment of August 13, 2010, to "return. . . possession of the Colony units to the Partnership Trustee," and to "deliver. . . possession of the Colony to the Partnership." A copy of the Bankruptcy Trustee's motion is attached as Exhibit J hereto.

35. On May 2, 2012, the Bankruptcy Court held a status hearing on, *inter alia*, the Partnership's request and the Bankruptcy Trustee's motion to vacate the ejectment order and the ejectment final judgment. The Bankruptcy Trustee requested "the Court vacate the August 13th, 2010 final judgment in the ejectment adversary proceeding that awarded possession of the units. . . in the Colony, to the Association and the Unit Owners" (transcript at 6-7). The Bankruptcy Court requested the parties to further brief the issues relating to the ejectment (transcript at 42). The Bankruptcy Court held a full-day hearing for July 13, 2012, to consider, *inter alia*, the motion to vacate the ejectment order and ejectment final judgment (transcript at 52). A copy of the transcript of the status hearing of May 2, 2012, is attached as Exhibit K hereto.

36. The Bankruptcy Court, as of July 27, 2012, has announced no decisions stemming from the hearing of July 13, 2012. Regardless of what the Bankruptcy Court decides, such decision will not remove all "legal restraints" on rehabilitation/redevelopment of the Colony. As the Town attorney correctly noted during the Colony discussion at the Town Commission meeting on July 2, 2012, any party dissatisfied with the Bankruptcy Court's decision could appeal to the District Court, and any party dissatisfied with the District Court's order on appeal could appeal to the Eleventh Circuit. Any party dissatisfied with the Eleventh Circuit's decision could attempt to appeal to the United States Supreme Court.

Impact of the District Court's reversal of July 27, 2011, District Court's remedies order of October 12, 2011, the Bankruptcy Court's the full-day hearing of July 13, 2012, and related events on the Association's rehabilitation/redevelopment attempts.

37. Although the Association views the ejectment order and ejectment final judgment as being the law of the case and final because there was no timely appeal from the order and final judgment (see paragraph 8 above), the District Court's orders of July 27, 2011, and of October 12, 2011, the Partnership's and Trustee's attempts to vacate the ejectment order and ejectment final judgment, the Bankruptcy Court's full-day hearing of July 13, 2012, the possibility of an appeal of any decision of the Bankruptcy Court to the District Court and, in turn, to the Eleventh Circuit, and the possibility of an attempted appeal to the Supreme Court, have certainly

created uncertainty in connection with planning, financing, and undertaking the rehabilitation/redevelopment of the Colony.

38. The uncertainty, which unquestionably scares developers, investors and financiers, and which did adversely impact Club Holdings Ventures, LLC, has been well publicized. See paragraphs 39 through 41 below.

39. On December 11, 2011, the Longboat Observer article, "Klauber says developers need his approval," quoted the Partnership's attorney as characterizing the Association's development plan without Dr. Klauber's concurrence as a "complete pipedream." The Longboat Observer quoted the Partnership's attorney as indicating that as long as the Partnership could be reinstated no one will lend; "as long as that is a possibility"—that the Partnership could be reinstated and resume possession and control of the condominium units—"I don't believe there is a lender who would"

40. On December 17, 2011, as another example, the Longboat News reported, "Colony Association, Klauber clash," noting that the District Court "ruled in October on appeal from Klauber that the lower Bankruptcy Court in essence got the case wrong and Klauber is entitled to damages or reinstatement of the management agreement. . . That ruling completely reversed the trajectory of the case, which until then had seen a bankruptcy judge dissolve the management agreement. . . ."

41. On December 31, 2011, as a final example, the Longboat Key News, in its "2011 Year in Review: Colony court battles rage on," noted that "[t]he Colony's redevelopment plans have been ongoing this year, with the question of not only who will be chosen to redevelop the property by the Colony Association members, but also whether the association will even be in charge of choosing the redevelopment plan, or if it will be former Colony Chairman Dr. Murray 'Murf' Klauber."

42. Finally, at least one Town commissioner during the Town Manager's status report on the Colony on July 2, 2012, questioned how the Town could grant permits

"when ownership [at the Colony] is in question with the courts. Well the ownership that's in question is the who directs the Colony and. . . it is the gravity of that problem that has been really brought to the fore this year. As you will recall the Bankruptcy Court put the Association in charge clearly, the District Court judge put it into a question. . . which is going back to the bankruptcy judge. Dr. Klauber may be back in charge. . . .[T]here was a partnership agreement that set up who was going to run things. The Bankruptcy Court judge rejected that partnership agreement, terminated it and one of the issues coming back now is to restore the partnership agreement and that would put Dr. Klauber back in charge so we don't know who's operating that. . . ."

Dr. Klauber and the Bankruptcy Trustee for the Partnership have resisted the Association's attempts to rehabilitate or redevelop the Colony.

43. Dr. Klauber's and the Bankruptcy Trustee's resistance to the Association's attempts to rehabilitate or redevelop the Colony also may have adversely affected the Association's ability to quickly rehabilitate/redevelop and reopen the Colony.

44. On December 12, 2011, for example, Dr. Klauber wrote the Town Manager in response to reports that the Association planned to file applications to rehabilitate and/or redevelop the Colony. Dr. Klauber warned

"neither I, nor the entities which I control, consent to the redevelopment. . . .I will suffer substantial monetary damages if the Town approves a redevelopment plan affecting our interests without our consent. . . .Approval by the Town of any plan for redevelopment of the Colony to which I do not consent will result in substantial financial damages to me and the entities I control."

45. On December 23, 2011, as another example, the attorney for the Bankruptcy Trustee for the Partnership wrote the Association demanding that

"the Association and unit owners cease and desist from taking any further action to seek, or obtain approval of, a redevelopment of the Colony which contemplates the demolition of any existing units. The parties should endeavor to maintain the status quo pending the outcome of the appeal. It would be grossly inequitable and detrimental to the Partnership's bankruptcy estate for the Association and the unit owners to pursue the contemplated redevelopment of the Colony at this time given the potential possessory rights granted to the Partnership by the Remand Orders [of October 12, 2011]."

46. On January 25, 2012, as a final example, Dr. Klauber and his attorney were quoted in the Longboat Key Observer that "redevelopment was not within the purview of the Association."

Association's attempt to resolve outstanding disputes with Dr. Klauber, the Partnership, and Colony Lender.

47. The Association, directly and through Club Holdings Ventures, LLC, has made numerous attempts to resolve differences with Dr. Klauber, the Partnership, and Colony Lender in order to permit the Association to include the three recreational acres at the Colony as a consolidated development together with the 15 acres within the condominium. The attempts have been inside and outside court-ordered mediation.

48. As for mediations, on October 12, 2011, the District Court ordered the Partnership and the Association to mediate their disputes no later than December 16, 2011. On December 9, 2011, the Eleventh Circuit ordered the Partnership and the Association to mediate their disputes no later than January 5, 2012.

49. The mediations have been impasse and all the settlement attempts thus far have been unsuccessful.

Reopening a small number of tourism units, akin to the Partnership's operations in August 2010, to preserve the grandfathered density without the first-class rehabilitation or redevelopment being in place would be detrimental to the Colony and to Longboat Key.

50. Without a final judicial determination concerning whether the Bankruptcy Trustee/Partnership, or the Unit Owners/Association will be in possession and control of the condominium units to undertake their rehabilitation and redevelopment, without a settlement among the Association, the Partnership, and Colony Lender, or without a time extension of the December 31, 2012, "deadline," the Unit Owners and the Association would have no alternative but to proceed to resume tourism operations akin to what was in existence as of mid-August 2010 without the first-class rehabilitation or redevelopment being in place in order to avoid losing their "grandfathered" rights. The alternative of resuming limited tourism operations without first-class rehabilitation or redevelopment at the Colony would, however, be highly detrimental to the Colony longterm and to Longboat Key.

51. Since the early 1970s, the Colony has been a first-class one-of-a-kind tourism destination on the Gulf of Mexico. It often hosted nationally- and internationally-known individuals from government (including at least two Presidents and a Vice President), politics (such as presidential candidates), business, entertainment, and sports. It hosted many people who would later buy property, and end up residing, within Longboat Key and neighboring jurisdictions. It is no overstatement to say that many people who now live in Longboat Key and the greater Sarasota area first fell in love with Longboat Key and nearby areas while visiting at the Colony. As the Longboat Key News observed on December 30, 2011, "the Colony for more than a generation was an engine for upscale visitors and future property owners. . . .But a complex web of ownership and contractual and legal disputes clouds the hope for a rapid resolution." The Longboat Observer similarly noted on January 4, 2012, that the Colony was "once so prominent it was known as Longboat Key's Ellis Island—i.e., the place where many residents got their first glimpse of the New World that would become their home."

52. In the early 2000s, however, the Colony fell into less favorable circumstances. The Partnership, which ran the Colony since its inception in the early 1970s, went into bankruptcy and is now in liquidation; and the Colony has been closed as a tourist resort since August 15, 2010. The present condition of condominium units, grounds, and infrastructure at the Colony is far from desirable.

53. While limited tourism operations could be resumed at the Colony by December 31, 2012, such resumption would be costly, probably wasteful, and almost certainly damaging to the Colony "brand" and to the Longboat Key "brand." It would be better for the Association, for the Unit Owners, for Dr. Klauber and his entities if they survive Colony Lender's pending

foreclosure action, for Colony Lender, and for the Town that the Colony be re-opened in a way that makes good business sense, to avoid significant, wasteful short-term expenses which may not be consistent with the long-term rehabilitation or redevelopment of the Colony, and most importantly to avoid damaging the "brands" which the Colony and Longboat Key have spent years to develop.

54. Indeed, Dr. Klauber, the Colony's founder, Colony Lender, Longboat Key media, the Town Mayor, Town commissioners, and Town staff appear to share the view that a quick-fix reopening, without first-class rehabilitation and redevelopment, would damage the Colony longterm and would damage Longboat Key.

As for Dr. Klauber:

55. On March 3, 2011, when the Association was planning a "limited reopening" akin to what the Partnership was renting in mid-August 2010, Dr. Klauber posted on concerned4colony, the Unit Owners' on-line discussion forum, that he was against any such "limited" reopening.

56. On March 25, 2011, when the Association was continuing to plan repairs which would have permitted certain units to reopen, Dr. Klauber posted on concerned4colony that

"[n]o matter how small or undercover you attempt to make the reopening, there is no disputing The Colony's world-renowned recognition, reputation and newsworthiness that a reopening is. The media WILL pick up on it and, the Colony brand will be forever tarnished by an opening of the property in any state other than one to celebrate as a fully rehabilitated resort. There are expectations that have been created and by not being able to come close to those is a dangerous game to play.

Indeed, as of March 25, 2011 (when he posted on concerned4colony), and as of May 2, 2011 (when he joined in the Association's earlier petition to extend the "deadline" from August 15, 2011, to December 31, 2012), Dr. Klauber certainly favored extending the deadline, rather than a hurried opening which would damage the Longboat Key and the Colony "brands." His posting of March 25, 2011, included:

"The Town has made it clear that there is an option for an extension of the August [15, 2011] deadline that is pretty simple, low cost or no cost. There is no urgency to get reopened and I don't think anyone would argue that with the board's statement of their 'deliberate' approach to the future of the resort, using this opportunity to ensure all i's are dotted and t's crossed before investing 10's of thousands of dollars in a quick fix is likely not the best use of our hard-earned money. . . ."

57. Most recently, Dr. Klauber was quoted in the Longboat Key News article of June 16, 2012, "Colony rehab efforts causing waves," that "I would have a lawsuit that would shake the nation" if a small group of Colony units were opened in an attempt to reopen the resort in order to avoid losing the grandfathered density. The Longboat Key News reported that

"Klauber said he is disappointed and shocked that some owners would contemplate opening up in such a limited fashion.

"I would not let anyone take a look at that property today for the world. Affluent people from New York, Atlanta and Chicago would see a horror. We are a simple, beach-elegant island and those owners are not paying attention to this," said Klauber.

"Klauber said, 'Building the reputation of the Colony took decades and a fast push to reopen to preserve zoning would be the worst thing for the image of Longboat Key and especially for the future of the Colony'."

Colony Lender:

58. Colony Lender owns an undivided 15 percent interest in the three recreational acres, holds a mortgage on the Klauber-related entities' undivided 80 percent interest in the three recreational acres, and holds a mortgage on other Klauber-related properties at the Colony. These mortgages are presently in the process of being foreclosed. Because Colony Lender has not seen this petition to extend the "deadline" of December 31, 2012, it would be unfair to request Colony Lender to agree with the detailed factual recitations in this 20-page petition to extend the "deadline" of December 31, 2012. Colony Lender, however, has authorized the Association to represent that it has no objection to the Town Commission granting the Association's instant application to extend the "deadline" of December 31, 2012.

Breakpointe:

59. Breakpointe owns an undivided five percent interest in the three recreational acres. Because Breakpointe, like Colony Lender, has not seen the Association's petition to extend the "deadline" of December 31, 2012, it also would be unfair to request Breakpointe to agree with the detailed factual recitations in this 20-page petition to extend the "deadline" of December 31, 2012. Like Colony Lender, however, Breakpointe has authorized the Association to represent that it has no objection to the Town Commission granting the Association's instant application to extend the "deadline" of December 31, 2012.

The media:

60. On August 20, 2010, Al Green, a former Town commissioner and a columnist for the Longboat News, wrote "The Colony? Final Chapter," noting that "no one wants to vacation in a rundown boarded up housing development that could quickly come to look like downtown Detroit."

61. On March 2, 2012, for example, the Longboat Key News noted that "much of the economic future of Longboat Key [is] hanging in the balance. . . . [T]he commissioners should not feel pressured to approve something or encourage something other than what is best for that site. The Association and Klauber have spoken about restoring the Colony to its legacy. That vision must be achieved if not exceeded. Let's not let the frustration of time dragging drive us to find a path behind the scenes for an inferior result."

62. On June 16, 2012, as another example, the Longboat Key News, in its editorial "Town needs to rethink Colony," editorialized that

"Some owners are taking steps to do ad hoc renovation of a pod or a few pods and hope to qualify that as a reopening of the resort and avoid the abandonment of the units.

"That prospect is alarming. We have a Colony sign with the letters fallen off, we have debris and rot and termites and decay. We have units that were barely habitable, and now left stagnant for two years. And are resources being squandered in such an initiative? To what end? All these machinations to avoid what the Commission thought would be an effective stick.

"Let us remember what the Colony needs to be. As Colony founder Dr. Murf Klauber eloquently said, 'Building the reputation of the Colony took decades and a fast push to reopen to preserve zoning would be the worst thing for the image of Longboat Key and especially for the future of the Colony. . . .

"The sane approach and smart approach is for our Town leaders to not take any action to take away the units from the Colony. The smart move would be for the Commission to continue the grandfathering, minimally until the end of 2013 with requirements of the parties maintaining a level of landscaping and signage that at least to the public driving by masks the rat maze of beachside tenement houses and soiled nest of legal entanglements. And this needs to be done quickly.

"The Town should not play the role of pushing or discouraging development; the market and owners ought make those decisions. . . ."

Mayor, Town commissioners, and Town staff.

63. As the Town has recognized almost from the closing of the Colony in mid-August 2010, "[t]he short and long-term viability of the Colony Beach and Tennis Resort is a mutual concern and goal." Town Attorney letter of December 8, 2010, to Mayor and Commissioners.

64. During the discussion on the Colony at the Town Commission meeting of July 2, 2012, Mayor Brown, Commissioner Younger, and the Town Attorney, *inter alia*, seemed to recognize the shortsightedness of effectively forcing the Association and Unit Owners to re-open

tourism units prior to December 31, 2012, without the first-class rehabilitation or redevelopment at the Colony in order to preserve the grandfathered densities. Mayor Brown stated that because of the "problem" of the December 31, 2012, deadline, Unit Owners were moving ahead with a reopening "against better judgment. . . .Who would want to down there and live. . . in declining, decaying. I don't even want to call it a resort right now." Commissioner Younger agreed that the deadline of December 31, 2012, "may be forcing some things that aren't good." The Town Attorney characterized plans for such a reopening as putting "lipstick on a pig."

Refusing to extend the "deadline" of December 31, 2012, and declaring that the Colony no longer has "grandfathered" rights to the 237 condominium units would undercut the voters' overwhelming referendum vote to increase tourism units in Longboat Key and would detriment ambience, commercial activity, other tourism establishments, and the economy in Longboat Key and neighboring jurisdictions.

65. There is no public interest in attempting to eliminate the Colony's "grandfathered" density. Indeed, such elimination would be contrary to the public interest. If the "grandfathered" status were eliminated, the Town would lose up to 142 units which have traditionally been used for tourism (232 "grandfathered" tourism units minus 90 tourism units which would be permitted if there were no "grandfathering").

66. Voters within the Town of Longboat Key voted 81 percent in the March 2008 referendum to authorize an ordinance which would create a pool of 250 additional tourism units which could be allocated within the Town to help make up for the loss of approximately 250 tourism units earlier in the 2000s. In placing the allocation of 250 tourism units on the referendum, the Town was concerned about the loss in vitality and economic activity inherent in the reduction of tourism units within Longboat Key.

67. The March 2008 referendum stemmed from a year-long visioning plan the Town Planning and Zoning Board ("PZB") undertook.

68. Underlying the 81 percent vote to add 250 tourism units within Longboat Key was voters' recognition of the economic importance of tourism, such as one resident would express in the Longboat Observer of February 22, 2012. "Since the teardown of the Holiday Inn and the demise of the Colony, the tourist crowd has dwindled by tens of thousands. That's business up and down the Key."

69. Subsequent to the referendum, the referendum subcommittee for the PZB held various hearings concerning drafting an ordinance to implement the referendum. The draft cover letter of the chairman of the PZB to the Town Commission of June 10, 2008, noted that

"[t]he need to facilitate the restoration/redevelopment of some of our aging. . . tourism properties was initially established in the visioning process and confirmed in the

overwhelming voter support for the referenda questions. In particular maintaining and/or restoring the historic tourism of the Town of Longboat Key is considered to be in furtherance of the health, safety, and general welfare of the citizens of Longboat Key." It was determined that historic tourism has helped establish and maintain a level of commercial enterprise which might not otherwise exist and which makes Longboat Key unique, has added greatly to the convenience and lifestyle of our citizens and visitors, and has helped establish and maintain property values because of that lifestyle and because it provide a constant stream of potential buyers."

70. On May 4, 2009, the Town Commission enacted an ordinance implementing the voters' decision. A copy of LBK Code 158.180 implementing the referendum is attached as Exhibit L hereto.

71. As late as February 7, 2011, the Town Commission adopted an updated vision plan (Resolution 2011-13). The updated vision plan noted that

"[t]he Town's major resorts are over 20 years old and showing their age. . . .The Colony Beach and Tennis Resort is currently in a state of flux and the property is in need of revitalization or redevelopment. . . .The number of units devoted exclusively to tourism use has decreased as resort operators have found the economics of operating in a highly seasonal environment difficult to sustain."

The updated vision plan lists under strengths that

"Longboat Key has recently had a reasonable balance of residential, tourism and commercial land uses such that we are not trying to reinvent the wheel or establish totally new segments. The Town is working to reliance and reinvigorate the community before any further significant decline occurs. . . .Current and future tourism developments generate a greater need for retail businesses and services than could otherwise be supported, provide future places to stay for visiting relatives."

Further, the updated vision plan noted that

"tourism is an important part of the economy which supports retail services, real estate and restaurants, beach renourishment and other quality of life features of the Town. Many LBK residents came to Longboat Key as tourists or visitors. Tourism is part of the Town's history. This plan proposes that it continue to be part of the future. . . .Residents benefit by having tourists on the island."

72. As for the Colony in particular, persons renting at the Colony help support businesses on Longboat Key and neighboring jurisdictions. Many persons who have rented units at the Colony have purchased homes within Longboat Key and neighboring jurisdictions.

73. Any loss of units available for tourism use at the Colony is certainly not in the public interest when the Town's voters, the Town's Planning and Zoning Board, and the Town

Commission have consistently and overwhelmingly recognized that the loss of units available for tourism use within Longboat Key is not only not in the public interest, but is a major problem. Rather, the voters, the Town PZB, and the Town Commission have recognized that tourism use inures to, and is fundamental to, the Town's ambience and economic vitality. The loss of approximately 140 tourism units at the Colony would effectively undercut the voters' decision in the March 2008 referendum and the Town Commissioners' enactment in May 2009 of LBK Code 158.180 to add 250 tourism units within Longboat Key into one that would net only approximately 110 additional tourism units. The loss of approximately 140 tourism units would be contrary to the manifest public interests of Longboat Key as expressed by the voters, would be contrary to the expressed views of Town Commissioners and other Town leaders, and would defy common sense.

74. The Association is willing to continue to maintain the appearance of the Colony along Gulf of Mexico Drive and along its borders in order to minimize or avoid any adverse affects on the Colony's neighbors and on the Town's residents and visitors during the time extension. Further, the Association is willing to respond with all due diligence to any specific issues on the condominium property which the Town may bring to the Association's attention from time to time.

Eliminating 142 existing tourism units at the Colony would almost inevitably involve further complex, costly, time-consuming and avoidable litigation, and would be unfair to the individual Unit Owners who have invested in, and paid taxes to, the Town.

75. Deeming the "grandfathered" condominium units "abandoned" also would create almost unimaginably thorny problems for the 237 fee simple Unit Owners at the Colony, which problems would inevitably spill over to the Town and easily become the subject of even more costly, time-consuming, and avoidable litigation.

76. Indeed at the discussion concerning the Colony at the Town Commission meeting of July 2, 2012, various commissioners and Town staff recognized the unfairness the "legal restraints" have imposed on the Unit Owners. One commissioner, for example, pointed out that it would be a "big deal" to the Unit Owners to "lose 130-odd units" at the Colony. Another commissioner, as another example, pointed out that Unit Owners may be "dead" prior to the court system resolving the "legal restraints."

Length of extension.

76. In light of the highly unusual real estate and legal relationships at the Colony, in light of the ongoing litigation (including litigation between Colony Lender and Klauber-related entities and litigation between the Association and Klauber-related entities), and in light of the complexities of bringing a second developer on-board with the approval of 75 percent of the Unit Owners for a multi-million dollar rehabilitation and/or redevelopment, it is clear that it will take considerable time to reopen the Colony as a first-class resort which would be a credit to the Town

Robin Meyer
July 27, 2012
Page 20

of Longboat Key. The Association, therefore, would request an 18-month extension through June 30, 2014, or to such further time as the Town Commission may deem appropriate under the totality of the circumstances. The Association also would be willing to provide periodic status updates to the Town during the time extension, as was suggested at the Town Commission meeting of July 2, 2012.

Conclusion. The Town Commission should grant the Association's application to extend the "deadline" of December 31, 2012, through June 30, 2014 (or to such further time as the Town Commission deems appropriate under the circumstances).

The Association wants to do everything possible to rehabilitate or redevelop the Colony so that it can reopen the Colony as a first-class tourist-oriented development, something which will benefit both the Unit Owners and the Town of Longboat Key. Due to "legal restraints," however, the Colony cannot be re-opened as a first-class tourist-oriented development prior to December 31, 2012. Most optimistically, a first-class resort at the Colony cannot be reopened until June 30, 2014.

The Association certainly appreciates the frustration the Town has voiced concerning the delay in reopening a first-class resort at the Colony. But the Association would point out that its 232 Unit Owners also are frustrated because the "legal restraints" at the Colony have precluded the Unit Owners from personally using their units and from obtaining economic benefits from their units for more than two years (while at the same time being assessed approximately \$1,650,000 to maintain, preserve development rights, and plan and implement a first-class rehabilitation or redevelopment at the Colony). Let me assure the Town that the Association and the owners of the 232 tourism units will continue to do whatever it can to expedite the rehabilitation, redevelopment, and reopening of the first-class resort at the Colony.

Thank you for the consideration you, your staff, the Town Manager, the Town Attorney, and the Town Commission will provide this petition to extend the "deadline" of December 31, 2012.

If you or anyone at the Town has any questions or concerns, or I can provide any further assistance in expediting the Town Commission's consideration of this request to extend the time, please let me know. I can be reached at 813-229-4101 (direct), 813-205-1735 (cell), or dhemk@carltonfields.com.

Very truly yours,

Donald E. Hemke

Copy furnished
Dave Bullock, Town Manager (via dbullock@longboatkey.org) (without exhibits)
David Persson, Town Attorney (via dpersson@sarasotalawfirm.com) (without exhibits)
Jay Yablon, President, Colony Beach and Tennis Club Association, Inc.

RESOLUTION 2011-17

A RESOLUTION OF THE TOWN OF LONGBOAT KEY, FLORIDA, GRANTING THE COLONY BEACH AND TENNIS CLUB ASSOCIATION, INC., AN EXTENSION OF TIME TO COMPLY WITH THE REGULATIONS GOVERNING NONCONFORMING USES AND STRUCTURES FOR THE COLONY BEACH AND TENNIS CLUB, LOCATED AT 1620 GULF OF MEXICO DRIVE, ALLOWING THE ASSOCIATION ADDITIONAL TIME TO REOPEN THE TOURISM RESORT DEVELOPMENT IN ACCORDANCE WITH SECTION 158.138 (B)(8)(b) OF THE TOWN OF LONGBOAT KEY ZONING CODE; PROVIDING FOR SERVERABILITY; PROVIDING FOR AN EFFECTIVE DATE.

WHEREAS, on November 21, 1972, the Town of Longboat Key ("the Town") at a special meeting of the Town Commission approved the plot plan for the development of a 237 unit tourism resort hotel ("the Colony") on the land that consists of approximately 17.3 acres of land, located at 1620 Gulf of Mexico Drive; and,

WHEREAS, the zoning of the subject land at the time of the plot plan approval was H-2, which allowed for a maximum density of 14 units per acre of land; and,

WHEREAS, the Town issued a building permit for the construction of the tourism resort hotel on February 20, 1973; and,

WHEREAS, the Colony Beach and Tennis Club Association, Inc. ("Association") is a not-for-profit corporation formed in 1973; and,

WHEREAS, 232 of the 237 units were entered into and subject to a Certificate of Agreement of Limited Partnership dated December 27, 1973; and

WHEREAS, the Limited Partnership filed for Chapter 11 under Federal bankruptcy codes and was converted on August 9, 2010, to Chapter 7 liquidation; and,

WHEREAS, the Colony has been closed since August 15, 2010; and,

WHEREAS, the tourism units were deemed to be no longer physically suitable for occupancy; and,

WHEREAS, the Association Board and representatives from the Town met on October 7, 2010, to discuss the future of the tourism resort development; and,

WHEREAS, it was determined that Section 158.138 (B)(8)(a) of the Town's Zoning Code regarding the abandonment of a nonconforming use or structure applied to the Colony, with the period of one year ending on August 15, 2011; and,

WHEREAS, the Association Board of Directors has diligently worked with the Town in good faith for the past six months with the goal of reopening the Colony prior to August 15, 2011; and,

WHEREAS, the Association has received a number of professional proposals to redevelop the site or revive the existing development; and,

WHEREAS, the Association believes the tourism resort cannot be redeveloped or reopened in a manner fitting to the resort prior to August 15, 2011; and,

WHEREAS, on April 14, 2011, the Association submitted a request for an extension of time to comply with the regulations governing nonconforming uses and structures for the Colony Beach and Tennis Club, located at 1620 Gulf of Mexico Drive; and,

WHEREAS, all property owners within the Colony Beach and Tennis Resort have joined in this application; and

WHEREAS, the request for the extension is consistent with the provisions of the zoning code Section 158.138 (B)(8)(b), which allows the Town Commission to grant an extension of the period of time a nonconforming use or structure can remain unused or vacant if the nonuse or vacancy is caused by legal restraints upon the owner or lessee; and,

WHEREAS, the current underlying zoning of the subject property is Tourist Resort Commercial (T-6), which allows the development of a maximum of six (6) units per acre; and,

WHEREAS, under single control or ownership abandonment of the nonconforming use or structure would result in the loss of tourism units that could be redeveloped or reopened in the future to approximately 103 units, a loss of approximately 134 units, based on 17.3 acres of land; and,

WHEREAS, the Town Commission has determined that multiple legal constraints have prohibited the timely redevelopment or reopening of the Colony, and deems it in the public interest to extend the one year abandonment period to December 31, 2012, to provide the Association time to redevelop or reopen the Colony.

NOW, THEREFORE, BE IT RESOLVED BY THE TOWN COMMISSION OF THE TOWN OF LONGBOAT KEY, FLORIDA, THAT:

SECTION 1. The above Whereas clauses are true and correct and are hereby ratified and confirmed.

SECTION 2. The Town Commission pursuant to 158.138 (B)(8)(b) of the Town's Zoning Code hereby grants the extension of the time until December 31, 2012, to redevelop or use the nonconforming uses and structures at the Colony without being deemed to have been abandoned in accordance with Section 158 (B)(8)(a).

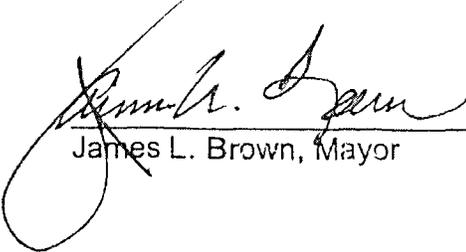
SECTION 3. In order to evaluate progress made and in recognition that an additional extension of time may be requested, a hearing shall be held at the regular meeting of the Town Commission in March 2012, or at a time mutually agreed upon to

examine and determine the status of the efforts to redevelop or reopen the Colony. Any additional extension must be acted upon prior to December 31, 2012.

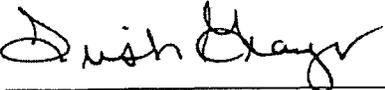
SECTION 4. In accordance with the terms of this Resolution, the subject property may be redeveloped or maintained at the existing density of 237 tourism units as that term is defined by the zoning code, as may be amended.

SECTION 5. Effective Date. This Resolution shall become effective immediately upon adoption.

Passed by the Town Commission of the Town of Longboat Key on the 2nd day of May, 2011.


James L. Brown, Mayor

ATTEST:


Trish Granger, Town Clerk

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

In re:

Case No. 8:08-bk-16972-KRM
Chapter 11

COLONY BEACH AND TENNIS CLUB
ASSOCIATION, INC.,

Debtor.

_____ /
COLONY BEACH & TENNIS CLUB, LTD.,

Plaintiff,

vs.

Adv. Pro. No.: 8:08-ap-00567-KRM

COLONY BEACH AND TENNIS CLUB
ASSOCIATION, INC.,

Defendant.

_____ /
COLONY BEACH AND TENNIS CLUB
ASSOCIATION, INC.,

Third-Party Plaintiff,

vs.

RESORTS MANAGEMENT, INC., AND
COLONY BEACH & TENNIS CLUB, INC.,

Third-Party Defendants.

_____ /

FINAL JUDGMENT

THIS PROCEEDING came before the Court to consider the entry of a Final Judgment in this adversary proceeding. The Court has entered its Memorandum Opinion and Order on (A) Debtor's Objection to Claim Numbers 13 and 14, (B) Partnership's Claims for Declaratory and

Injunctive Relief, and (C) Debtor's Counterclaims and Third-Party Claims, and it is appropriate to enter a Final Judgment. Accordingly, it is:

ORDERED:

1. The Debtor's Objection to Claim No. 13 of Colony Beach & Tennis Club, Ltd. is sustained and Claim No. 13 is disallowed in its entirety.

2. The Debtor's Objection to Claim No. 14 of Colony Beach & Tennis Club, Inc. is sustained and Claim No. 14 is disallowed in its entirety.

3. The claims of Colony Beach & Tennis Club, Ltd. (the "**Partnership**") seeking recovery of damages against the Colony Beach & Tennis Club Association, Inc. (the "**Association**") for an alleged breach of (a) an agreement entered into on December 1, 1984 (the "**1984 Agreement**") and (b) the Declaration of Condominium, Articles of Incorporation of the Association, and the Bylaws of the Association, asserted in Count I of the Complaint, are denied.

4. The request of the Partnership seeking declaratory relief that the Association is obligated to assess its members for the deficiency amounts of the Partnership for the fiscal year beginning May 1, 2007 (and subsequent years) and to additionally assess its members for the cost of the major work and, on a continuing basis, to maintain The Colony condominium as a "first class resort hotel," asserted in Count II of the Complaint, is denied.

5. The request of the Partnership seeking temporary and permanent injunctive relief requiring the Association to assess its members for the deficiency amounts of the Partnership for the fiscal year beginning May 1, 2007 and for the costs of the major work required, asserted in Count III of the Complaint, is denied.

6. The request of the Association seeking declaratory relief that the 1984 Agreement is *ultra vires* and invalid, asserted in Count I of the Amended Counterclaim, is granted.

7. The claims of the Association seeking (a) an equitable accounting of the Partnership, asserted in Count II of the Amended Counterclaim, and (b) recovery of damages against the Partnership for breach of the 1984 Agreement, asserted in Count III of the Amended Counterclaim, are denied as moot as a result of the disallowance and denial of the claims of the Partnership asserted against the Association.

8. The claims of the Association seeking recovery of damages against Resorts Management, Inc. asserted in (a) Count I of the Amended Third-Party Complaint for breach of fiduciary duty under the 1984 Agreement, (b) Count II of the Amended Third-Party Complaint for breach of contract under the 1984 Agreement, and (c) Count III of the Amended Third-Party Complaint for indemnification under the 1984 Agreement are denied as moot as a result of the disallowance and denial of the claims of the Partnership asserted against the Association.

9. The claims of the Association seeking recovery of damages against Colony Beach & Tennis Club, Inc. asserted in (a) Count IV of the Amended Third-Party Complaint for breach of contract under the 1984 Agreement and a management agreement and (b) Count V of the Amended Third-Party Complaint for breach of fiduciary duty under the 1984 Agreement are denied as moot as a result of the disallowance and denial of the claims of the Partnership against the Association.

DONE and **ORDERED** in Chambers in Tampa, Florida on November 9, 2009.



K. RODNEY MAY
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

In re:

Case No.: 8:09-bk-22611-KRM
Chapter 11

COLONY BEACH & TENNIS CLUB,
LTD.,

Debtor.

Adv. Pro. No.: 8:10-ap-____-KRM

COLONY BEACH & TENNIS CLUB
ASSOCIATION, INC., a Florida not-for-
profit corporation, ANDY and DOTTY
ADAMS, WILLIAM ANDREW ADAMS,
ROBERT F. and MARGARET M.
ERAZMUS, FAYTEL INCORPORATED,
RUTH B. KREINDLER, HELENE
LIPTON, BRUCE V. PINSKY, SHELDON
and CAROL RABIN, LEONARD A.
SIUDARA, BARRY A. SPIEGEL, and JAY
R. YABLON,

Plaintiffs,

vs.

COLONY BEACH & TENNIS CLUB,
LTD., a Florida limited partnership,

Defendant.

COMPLAINT FOR EJECTMENT

Plaintiffs, Colony Beach & Tennis Club Association, Inc. (the “**Association**”), on behalf of all owners of condominium units at the condominium identified as Colony Beach & Tennis Club, a Condominium Resort Hotel, located at 1620 Gulf of Mexico Drive, Longboat Key Sarasota County, Florida (“**The Colony**”), and certain individual unit owners at The Colony including Andy and Dotty Adams, William Andrew Adams, Robert F. and Margaret M. Erasmus, Faytel Incorporated, Ruth B. Kreindler, Helene Lipton, Bruce V. Pinsky, Sheldon and

Carol Rabin, Leonard A. Siudara, Barry A. Spiegel, and Jay R. Yablon (the “**Unit Owner Plaintiffs**”) (collectively, the Association and the Unit Owner Plaintiffs will be referred to as the “**Plaintiffs**”), by and through undersigned counsel, file this Complaint For Ejectment and, in support thereof, respectfully state as follows:

JURISDICTION AND VENUE

1. This is an adversary proceeding brought pursuant to Rule 7001 of the Federal Rules of Bankruptcy Procedure seeking to recover possession of real property in Sarasota County, Florida.
2. This Court has jurisdiction over this proceeding pursuant to 28 U.S.C. § 1334.
3. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) and (O).
4. Venue is proper in this Court pursuant to 28 U.S.C. § 1409(a).

THE PARTIES

5. The Association is a not-for-profit corporation formed in 1973 under Chapter 617 of the Florida Statutes. The Debtor was established as a condominium association pursuant to that certain Declaration of Condominium of Colony Beach & Tennis Club dated November 29, 1973 recorded in the Official Records of the Clerk of the Court for Sarasota County, OR Book 1025, Page 200 (the “**Declaration**”).
6. The Association’s membership consists of the owners of the 237 condominium units (the “**Unit Owners**”) at The Colony.
7. Pursuant to applicable law, the Association is authorized to bring this action in its name on behalf of all Unit Owners because it concerns matters of common interest to most or all Unit Owners.

8. Each of the Unit Owners may join in this action. Further, any Unit Owner may opt out of participation in this action. The Association will serve a copy of this complaint on all Unit Owners to inform them of their right to join in this action or to opt out of this action.

9. Plaintiffs Andy and Dotty Adams are the owners of Club House Unit 403, COLONY BEACH AND TENNIS CLUB, a condominium Resort Hotel according to the Declaration of Condominium as recorded in Official Records Book 1025, Pages 200 through 277, and amendments thereto, as per plat thereof, recorded in Condominium Book 7, Pages 12, 12A through 12F, and amendments thereto, Public Records of Sarasota County, Florida, to which they claim title by a conveyance on April 1, 1996 recorded in Official Records Book 2838 at page 520 of the public records of Sarasota County, Florida.

10. Plaintiffs Andy and Dotty Adams are also the owners of Club House Unit 411, COLONY BEACH AND TENNIS CLUB, a condominium Resort Hotel according to the Declaration of Condominium as recorded in Official Records Book 1025, Pages 200 through 277, and amendments thereto, as per plat thereof, recorded in Condominium Book 7, Pages 12, 12A through 12F, and amendments thereto, Public Records of Sarasota County, Florida, to which they claim title by a conveyance on December 12, 1996 recorded in Official Records Book 2920 at page 1361 of the public records of Sarasota County, Florida.

11. Plaintiff William Andrew Adams is the owner of Club House Unit 405, COLONY BEACH AND TENNIS CLUB, a condominium Resort Hotel according to the Declaration of Condominium as recorded in Official Records Book 1025, Pages 200 through 277, and amendments thereto, as per plat thereof, recorded in Condominium Book 7, Pages 12, 12A through 12F, and amendments thereto, Public Records of Sarasota County, Florida, to

which he claims title by a conveyance on August 31, 2007 recorded in Official Records Instrument Number 2007139095 of the public records of Sarasota County, Florida.

12. Plaintiff William Andrew Adams is also the owner of Unit 203-S, COLONY BEACH AND TENNIS CLUB, a condominium Resort Hotel according to the Declaration of Condominium as recorded in Official Records Book 1025, Pages 200 through 277, and amendments thereto, as per plat thereof, recorded in Condominium Book 7, Pages 12, 12A through 12F, and amendments thereto, Public Records of Sarasota County, Florida, to which he claims title by a conveyance on August 31, 2007 recorded in Official Records Instrument Number 2007139097 of the public records of Sarasota County, Florida.

13. Plaintiffs Robert F. and Margaret M. Erasmus are the owners of a one-half interest in Unit 224-N, COLONY BEACH AND TENNIS CLUB, a condominium Resort Hotel according to the Declaration of Condominium as recorded in Official Records Book 1025, Pages 200 through 277, and amendments thereto, as per plat thereof, recorded in Condominium Book 7, Pages 12, 12A through 12F, and amendments thereto, Public Records of Sarasota County, Florida, to which they claim title by a conveyance on October 23, 1978 recorded in Official Records Book 1266 at page 2198 of the public records of Sarasota County, Florida.

14. Plaintiff Faytel Incorporated is the owner of Unit 124-N, COLONY BEACH AND TENNIS CLUB, a condominium Resort Hotel according to the Declaration of Condominium as recorded in Official Records Book 1025, Pages 200 through 277, and amendments thereto, as per plat thereof, recorded in Condominium Book 7, Pages 12, 12A through 12F, and amendments thereto, Public Records of Sarasota County, Florida, to which it claims title by a conveyance on September 8, 1989 recorded in Official Records Book 2151 at page 31 of the public records of Sarasota County, Florida.

15. Plaintiff Ruth B. Kreindler is the owner of Beach Unit 1B, COLONY BEACH AND TENNIS CLUB, a condominium Resort Hotel according to the Declaration of Condominium as recorded in Official Records Book 1025, Pages 200 through 277, and amendments thereto, as per plat thereof, recorded in Condominium Book 7, Pages 12, 12A through 12F, and amendments thereto, Public Records of Sarasota County, Florida, to which she claims title by a conveyance on February 14, 1978 recorded in Official Records Book 1222 at page 1076 of the public records of Sarasota County, Florida.

16. Plaintiff Helene Lipton is the owner of Unit 210-N, COLONY BEACH AND TENNIS CLUB, a condominium Resort Hotel according to the Declaration of Condominium as recorded in Official Records Book 1025, Pages 200 through 277, and amendments thereto, as per plat thereof, recorded in Condominium Book 7, Pages 12, 12A through 12F, and amendments thereto, Public Records of Sarasota County, Florida, to which she claims title by a conveyance on March 7, 1990 recorded in Official Records Book 2194 at page 146 of the public records of Sarasota County, Florida.

17. Plaintiff Bruce V. Pinsky is the owner of a one-third interest in Units 126-N, 126-S and 221, COLONY BEACH AND TENNIS CLUB, a condominium Resort Hotel according to the Declaration of Condominium as recorded in Official Records Book 1025, Pages 200 through 277, and amendments thereto, as per plat thereof, recorded in Condominium Book 7, Pages 12, 12A through 12F, and amendments thereto, Public Records of Sarasota County, Florida, to which he claims title by a conveyance on August 1, 2007 recorded in Official Records Instrument Number 20077121413 of the public records of Sarasota County, Florida.

18. Plaintiffs Sheldon and Carol Rabin are the owners of Unit 11-B, COLONY BEACH AND TENNIS CLUB, a condominium Resort Hotel according to the Declaration of

Condominium as recorded in Official Records Book 1025, Pages 200 through 277, and amendments thereto, as per plat thereof, recorded in Condominium Book 7, Pages 12, 12A through 12F, and amendments thereto, Public Records of Sarasota County, Florida, to which they claim title by a conveyance on May 23, 1994 recorded in Official Records Book 2635 at page 307 of the public records of Sarasota County, Florida.

19. Plaintiff Leonard A. Siudara is the owner of Unit 127-N, COLONY BEACH AND TENNIS CLUB, a condominium Resort Hotel according to the Declaration of Condominium as recorded in Official Records Book 1025, Pages 200 through 277, and amendments thereto, as per plat thereof, recorded in Condominium Book 7, Pages 12, 12A through 12F, and amendments thereto, Public Records of Sarasota County, Florida, to which he claims title by a conveyance on February 26, 1999 recorded in Official Records Instrument Number 19999028298 of the public records of Sarasota County, Florida.

20. Plaintiff Barry A. Spiegel is the owner of Unit 249-S, COLONY BEACH AND TENNIS CLUB, a condominium Resort Hotel according to the Declaration of Condominium as recorded in Official Records Book 1025, Pages 200 through 277, and amendments thereto, as per plat thereof, recorded in Condominium Book 7, Pages 12, 12A through 12F, and amendments thereto, Public Records of Sarasota County, Florida, to which he claims title by a conveyance on February 2, 1987 recorded in Official Records Book 1926 at page 1977 of the public records of Sarasota County, Florida.

21. Plaintiff Jay R. Yablon is the owner of Unit 222-S, COLONY BEACH AND TENNIS CLUB, a condominium Resort Hotel according to the Declaration of Condominium as recorded in Official Records Book 1025, Pages 200 through 277, and amendments thereto, as per plat thereof, recorded in Condominium Book 7, Pages 12, 12A through 12F, and amendments

thereto, Public Records of Sarasota County, Florida, to which he claims title by a conveyance on January 28, 2009 recorded in Official Records Instrument Number 200901046 of the public records of Sarasota County, Florida.

22. Defendant, Colony Beach & Tennis Club, Ltd. (the “**Partnership**”), is a Florida limited partnership with its principal place of business located at 1620 Gulf of Mexico Dr., Longboat Key, Florida 34228 in Sarasota County, Florida.

23. On October 5, 2009 (the “**Petition Date**”), the Partnership filed a voluntary petition for relief under Chapter 11 of title 11, United States Code (the “**Bankruptcy Code**”).

24. The Partnership is operating its business as a debtor-in-possession pursuant to Sections 1107 and 1108 of the Bankruptcy Code.

GENERAL ALLEGATIONS

25. The Partnership was formed, concurrently with the establishment of the condominium, pursuant to the Certificate and Agreement of Limited Partnership dated as of December 27, 1973 (as amended, the “**Partnership Agreement**”).

26. The Partnership was formed to operate and manage the condominium units at The Colony as rental accommodations in the operation of a hotel (the “**Hotel**”). The Partnership is responsible for all aspects of operation of the Hotel.

27. The Partnership is in possession of all but five of the condominium units at The Colony to which the Unit Owners claim title as shown by the conveyances described in Paragraphs 9 through 21 above (as to the Unit Owner Plaintiffs) and as reflected in the public records of Sarasota County, Florida (as to the remaining Unit Owners) (the “**Units**”).

28. The Partnership has failed to comply with the preconditions to its right of use or possession of the Units.

29. Specifically, although each of the Unit Owner Plaintiffs and almost all of the Unit Owners made timely and proper reservations, the Partnership has failed to provide the Unit Owner Plaintiffs and those Unit Owners who made reservations with their permitted occupation of the unit they own at The Colony rent free for up to a maximum of thirty days during each calendar year. The Partnership has also failed to bear all expenses of (a) the Association, including but not limited to (i) expenditures for repairs, maintenance and insurance of the common areas as described in the Declaration, (ii) expenditures for capital improvements, and (iii) lease payments to be made pursuant to the terms of a recreational facilities lease; (b) all expenses of maintenance and repair of the interior of the condominium units used by the Hotel; and (c) all expenses of acquisition, financing, maintenance, repair and replacement of the furniture and furnishings of the Units.

30. The Unit Owners have asserted substantial unsecured claims against the Partnership for the damages that arose prior to the Petition Date related to the actions of the Partnership described in Paragraph 29 above.

31. The Unit Owners will also assert substantial administrative expense claims against the Partnership for the damages that have continued after the Petition Date related to the continuing actions of the Partnership described in Paragraph 29 above.

COUNT I

32. Plaintiffs reallege and reincorporate the allegations of paragraphs 1 through 31 as if fully stated herein.

33. The Partnership is using the Units without the consent of the Plaintiffs and against the Plaintiffs' wishes.

34. The Partnership refuses to deliver possession of the Units to Plaintiffs.

WHEREFORE, Plaintiffs demand judgment for possession of the Units and such other and further relief as is just and proper.

Dated: Tampa, Florida
March 1, 2010

BUSH ROSS, P.A.
Post Office Box 3913
Tampa, Florida 33601-3913
(813) 224-9255
(813) 223-9620 (telecopy)
Counsel for the Plaintiffs

By: /s/ Jeffrey W. Warren
Jeffrey W. Warren
Florida Bar No. 150024
jwarren@bushross.com
Adam Lawton Alpert
Florida Bar No.: 0490857
aalpert@bushross.com

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

In re:

Case No.: 8:09-bk-22611-KRM
Chapter 11

COLONY BEACH & TENNIS CLUB, LTD.,
Debtor.

COLONY BEACH & TENNIS CLUB
ASSOCIATION, INC., DOTTY ADAMS,
WILLIAM ANDREW ADAMS, ROBERT F.
and MARGARET M. ERAZMUS, FAYTEL
INCORPORATED, RUTH B. KREINDLER,
HELENE LIPTON, BRUCE V. PINSKY,
SHELDON and CAROL RABIN, LEONARD
A. SIUDARA, BARRY A. SPIEGEL, and JAY
R. YABLON,

Plaintiffs,

vs.

Adv. Pro. No.: 8:10-ap-00242-KRM

COLONY BEACH & TENNIS CLUB, LTD.,
a Florida limited partnership,

Defendant.

ORDER GRANTING RELIEF OF EJECTMENT

THIS PROCEEDING came on for preliminary hearing on August 9, 2010 upon the Complaint for Ejectment (the "**Complaint**") filed Colony Beach & Tennis Club Association, Inc. (the "**Association**"), on behalf of all owners of condominium units at the condominium identified as Colony Beach & Tennis Club, a Condominium Resort Hotel, located at 1620 Gulf of Mexico Drive, Longboat Key Sarasota County, Florida ("**The Colony**"), and certain individual unit owners at The Colony including Andy and Dotty Adams, William Andrew Adams, Robert F. and Margaret M. Erazmus, Faytel Incorporated, Ruth B. Kreindler, Helene Lipton, Bruce V. Pinsky, Sheldon and Carol Rabin, Leonard A. Siudara, Barry A. Spiegel, and Jay R. Yablon (the "**Unit Owner Plaintiffs**") (collectively, the Association and the Unit Owner Plaintiffs will be referred to as the

“**Plaintiffs**”). The Court has reviewed the Complaint and the entire record in both this proceeding and the Chapter 11 case of the Debtor, Colony Beach & Tennis Club, Ltd. (the “**Partnership**”). The Court has also reviewed the record in the proceedings in the Chapter 11 case of the Association, Case No. 8:08-bk-16972-KRM, and the adversary proceeding involving the Partnership and the Association, Adv.:8:08-ap-00567-KRM. The Court has also heard the arguments of counsel and otherwise being advised in the premises, for the reasons stated orally and recorded in open court, which shall constitute the decision of this Court, the Court finds that it is appropriate to grant the relief sought in the Complaint.

Accordingly, it is **ORDERED**:

1. That the Plaintiffs’ request to eject the Partnership from possession and use of the condominium units and the appurtenances to such units, including but not limited to, the common elements and the common surplus (collectively, the “**Units**”) at COLONY BEACH AND TENNIS CLUB, a condominium Resort Hotel according to the Declaration of Condominium as recorded in Official Records Book 1025, Pages 200 through 277, and the amendments thereto, as per plat thereof, recorded in Condominium Book 7, Pages 12, 12A through 12F, and amendments thereto, Public Records of Sarasota County, Florida is **GRANTED**.

2. That the right of the use of the Units for occupancy by third parties as rental accommodations in connection with the business of the Partnership granted to the Partnership under Article 10 of the Certificate and Agreement of Limited Partnership for Colony Beach & Tennis Club, Ltd, recorded in Official Record Book 1028 at page 33 of the Public Records of Sarasota County, Florida, is terminated.

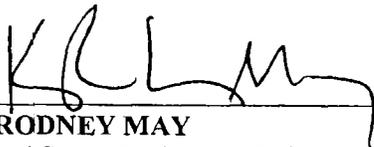
3. That the Defendant’s Motion to Abstain (Doc. No. 7) is denied, as moot.

4. That the Defendant’s Motion to Dismiss Complaint (Doc. No. 9) is denied, as moot.

5. That the Joint Motion of Certain Unit Owners to Intervene in Complaint for Ejectment:8:10-ap-00242-KRM (Doc. No. 14) is denied as moot.

6. A separate Final Judgment will be entered consistent with this Order.

DONE and **ORDERED** in Tampa, Florida on August 13, 2010.



K. RODNEY MAY
United States Bankruptcy Judge

Copies provided via CM/ECF.

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

In re:

Case No.: 8:09-bk-22611-KRM
Chapter 11

COLONY BEACH & TENNIS CLUB, LTD.,
Debtor.

COLONY BEACH & TENNIS CLUB
ASSOCIATION, INC., DOTTY ADAMS,
WILLIAM ANDREW ADAMS, ROBERT F.
and MARGARET M. ERAZMUS, FAYTEL
INCORPORATED, RUTH B. KREINDLER,
HELENE LIPTON, BRUCE V. PINSKY,
SHELDON and CAROL RABIN, LEONARD
A. SIUDARA, BARRY A. SPIEGEL, and JAY
R. YABLON,

Plaintiffs,

vs.

Adv. Pro. No.: 8:10-ap-00242-KRM

COLONY BEACH & TENNIS CLUB, LTD.,
a Florida limited partnership,

Defendant.

FINAL JUDGMENT

THIS PROCEEDING came before the Court to consider the entry of a final judgment in this adversary proceeding. The Court has entered its Order Granting Relief of Ejectment and it is appropriate to enter a final judgment.

Accordingly, it is **ORDERED**:

1. That the Plaintiffs' request to eject the Partnership from all possession and use of the condominium units and the appurtenances to such units, including but not limited to, the common elements and the common surplus (collectively, the "Units") at COLONY BEACH AND TENNIS

CLUB, a condominium Resort Hotel according to the Declaration of Condominium as recorded in Official Records Book 1025, Pages 200 through 277, and the amendments thereto, as per plat thereof, recorded in Condominium Book 7, Pages 12, 12A through 12F, and amendments thereto, Public Records of Sarasota County, Florida is **GRANTED**.

2. That the right of the use of the Units for occupancy by third parties as rental accommodations in connection with the business of the Partnership granted to the Partnership under Article 10 of the Certificate and Agreement of Limited Partnership for Colony Beach & Tennis Club, Ltd, recorded in Official Record Book 1028 at page 33 of the Public Records of Sarasota County, Florida, is terminated.

DONE and ORDERED in Tampa, Florida on August 13, 2010.



K. RODNEY MAY
United States Bankruptcy Judge

Copies provided via CM/ECF.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

In re

COLONY BEACH & TENNIS CLUB
ASSOCIATION, INC.,

COLONY BEACH & TENNIS CLUB, Ltd.,
RESORTS MANAGEMENT, INC., and
COLONY BEACH & TENNIS CLUB, INC.,

Appellants,

v.

CASE NO.: 8:09-cv-2560-T-23

COLONY BEACH & TENNIS CLUB
ASSOCIATION, INC.,

Appellee.

ORDER

Colony Beach & Tennis Club, Ltd., ("the Partnership") appeals (Doc. 16) a November 9, 2009, bankruptcy court judgment and order. (Docs. 1-4, 1-5) The Colony Beach & Tennis Club Association, Inc., ("the Association") responds, (Doc. 21) and the Partnership replies. (Doc. 24) The dominant issue on appeal is whether the documents governing the Colony Beach & Tennis Club ("the Colony") require the Association (through assessment of the Association's members) or the Partnership (through the revenue of the Colony Beach & Tennis Club's resort hotel ("the hotel")) to pay for repairs to the common elements of the Colony.

BACKGROUND

In 1973, Dr. Murray Klauber founded the Colony, a condominium complex and resort hotel in Sarasota, Florida. Each purchaser of a condominium unit (a "unit owner") at the Colony is both a member of the Association and a limited partner in the Partnership. Dr. Klauber is the general partner of the Partnership, the general partner controls the Partnership, and the general partner and the Partnership control and operate the hotel at the Colony. Katherine Moulton is the general manager of the hotel.

A Declaration of Condominium ("the Declaration") governs the Colony and the Association. The Declaration states that "[t]he maintenance and operation of the common elements [of the Colony] . . . shall be the responsibility of the Association as a common expense." (Ex. 13 Art. 6.5) In addition, Article 6 of the Association's By-Laws requires the Association to establish a reserve for deferred maintenance of the common elements and empowers the Association to assess each unit owner (as an Association member). A Limited Partnership Agreement ("the Partnership Agreement") governs the Partnership. The Partnership Agreement grants each unit owner (as a limited partner) thirty days of rent-free use of that owner's unit annually and authorizes the Partnership to operate each unit as a hotel accommodation during the balance of the year. (Ex. 22 Art. 10) The Partnership Agreement grants to each limited partner an aliquot portion of a "preferential amount" – the first \$1.398 million – of the hotel's annual profit, plus half the profit above the preferential amount (with the other half granted to the general partner). (Ex. 22 Art. 11) The Partnership Agreement immunizes each limited partner

from liability for any loss from the hotel's operation. (Ex. 22 Art. 7.5) A 1984 Agreement, central to the parties' dispute, simplifies the exchange of money between the Association and the Partnership. The 1984 Agreement permits the Partnership to commit that portion of the hotel's profit that is owed to the limited partners to pay directly the Association's bill for repair to the common elements. (Ex. 27 ¶ 2)

In December, 2004, the Association's Board of Directors ("the Association Board" or "the Board") discussed the common elements' urgent need for extensive repair. (Sal Zizza, the President of the Association at the time, testified that the common elements' dilapidation was obvious long before this discussion). See generally (Ex. 100) The Board hired an engineering firm to estimate the cost of repair, and the firm estimated \$10 million in repair and renovation. The Partnership urged the Association to pay for necessary repair, but in December, 2005, the unit owners voted to reject a \$10.6 million "emergency assessment" for repair and improvement of the common elements. In December, 2006, the unit owners rejected a second proposed assessment and elected three new Board members. The new Board audited the Partnership and ceased re-paying the Partnership for many operational expenses that are the Association's responsibility under the Declaration.

In April, 2007, the Partnership sued the Association in state court. Asserting state law claims for the Association's breach of the governing documents, the Partnership sought (1) damages, (2) a determination that the governing documents compel the Association to assess the unit owners both for \$2.1 million that the Partnership spent on the Association's behalf and for the money to repair the common elements, and (3) an

injunction compelling the Association to assess the unit owners. The Association alleged that the 1984 Agreement is ultra vires (and that the Partnership in any event breached the 1984 Agreement) and alleged both state law counter-claims against the Partnership and third-party claims against the general partner and Colony Beach & Tennis Club, Inc. The Association sought damages and an equitable accounting of the Partnership's operation of the hotel.

Eighteen months after the Partnership initiated the state court action and shortly before the state court trial, the Association claimed bankruptcy. The Partnership filed the state law claims in the bankruptcy proceeding but also moved for remand or for abstention on the ground that the state law claims are not a "core" proceeding within a bankruptcy court's mandatory jurisdiction.

The bankruptcy court denied remand and held a bench trial, which occurred in May and June, 2009. At a July 31, 2009, hearing and in a November 9, 2009, order the bankruptcy court disallowed the Partnership's claims, found the 1984 Agreement ultra vires, found the Partnership's damage calculation prohibitively speculative, denied the Partnership relief, and declared "moot" the Association's other counter-claims and third-party claims.

The Partnership argues in this appeal that each claim is a "non-core" proceeding, that the bankruptcy court incorrectly interpreted the governing documents, that the Association's obligation to pay for repair of the common elements persists despite the two votes to reject an assessment, that the 1984 Agreement is valid, that the

Partnership's damage calculation is sound, and that the Association's claims are not moot.

DISCUSSION

1. Core and Non-Core Proceedings

"[B]ankruptcy courts are not Article III courts and therefore may not exercise the judicial power of the United States." In re Parklane/Atlanta Joint Venture, 927 F.2d 532, 538 (11th Cir. 1991). Consequently, a bankruptcy court may not exercise jurisdiction over "all civil proceedings . . . related to cases under [the bankruptcy code]," because although "the restructuring of debtor-creditor relations . . . is at the core of the federal bankruptcy power, the adjudication of state-created private rights, such as the right to recover contract damages . . . obviously is not." Northern Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 71 (1982) (plurality opinion).¹

"In order to avoid the constitutional problems discussed by the Supreme Court in Northern Pipeline . . . , Congress created [in 28 U.S.C. § 157] the distinction between core and non-core proceedings." Control Center, LLC v. Lauer, 288 B.R. 269, 274 (M.D. Fla. 2002) (Conway, J.). A bankruptcy court may issue a final order on a core

¹ See also, Northern Pipeline, 458 U.S. at 86 n.39 (plurality opinion) ("Our precedents make it clear that the constitutional requirements for the exercise of the judicial power must be met at all stages of adjudication, and not only on appeal, where the court is restricted to considerations of law, as well as the nature of the case as it has been shaped at the trial level") and at 91 (Rehnquist, J., concurring) ("[under the unconstitutional portion of the Bankruptcy Reform Act of 1978, 28 U.S.C. § 1471,] [a]ll matters of fact and law . . . are to be resolved by the bankruptcy court in the first instance, with only traditional appellate review by Art. III courts apparently contemplated. Acting in this manner the bankruptcy court is not [merely] an "adjunct" of either the district court or the court of appeals."); Commodity Futures Trading Com'n v. Schor, 478 U.S. 833, 852-53 (1986) (distinguishing proper statutory empowerment of agency tribunal to adjudicate "a particularized area of law" (a common law counter-claim by customers in a CFTC reparation proceeding against a broker) from "the jurisdiction of the bankruptcy courts found unconstitutional in Northern Pipeline, which) extended to broadly 'all civil proceedings arising under title 11 or arising in or related to cases under title 11.") (emphasis in original) (quoting Northern Pipeline, 458 U.S. at 85).

proceeding, which a district court reviews *de novo* as to conclusions of law and for clear error as to findings of fact. 28 U.S.C. § 157(b); Fed.R.Bankr.P. 8013. A bankruptcy court may only propose findings of fact and conclusions of law on a non-core proceeding, with the district court entering a final order "after reviewing *de novo* those matters to which any party . . . object[s]." 28 U.S.C. § 157(c)(1); Fed.R.Bankr.P. 9033.

Ruling from the bench² that each Partnership claim is a core proceeding, the bankruptcy court stated, "Claims were asserted against the [Association] . . . in the state court action – claims were made against the Association by the very filing of the lawsuit . . . and that is inherently a core matter, the adjudication of those claims." 8:08-ap-567-KRM, Doc. 14 at 83. Elaborating on behalf of the bankruptcy court, the Association asserts that each claim qualifies as a core proceeding because Section 157 states that a core proceeding includes "allowance or disallowance of claims against the estate," "counter[-]claims by the estate against persons filing claims against the estate," and "other proceedings affecting . . . the adjustment of the debtor-creditor . . . relationship." 28 U.S.C. § 157(b)(2).

The Partnership correctly asserts that the bankruptcy court erred. Section 157 "conform[s] the bankruptcy statutes to the dictates of [Northern Pipeline] . . . , [which] was concerned about . . . the plenary adjudication by bankruptcy courts of proceedings related only peripherally to an adjudication of bankruptcy." *In re Toledo*, 170 F.3d 1340,

² The bankruptcy court issued a written order that states "for the reasons stated and recorded in open court, which shall constitute the decision of the Court, . . ." Case No: 8:08-ap-567-KRM (Doc. 12 at 2).

1349 (11th Cir. 1999) (quotations omitted). Conforming Section 157 to Northern Pipeline, the Eleventh Circuit concludes:

If [a] proceeding does not invoke a substantive right created by the federal bankruptcy law and is one that could exist outside of bankruptcy it is not a core proceeding; it may be *related* to the bankruptcy because of its potential effect, but under section 157(c)(1) it is a . . . non-core proceeding.

170 F.3d at 1348 (emphasis in original) (quoting In re Wood, 825 F.2d 90, 97 (5th Cir. 1987)). The bankruptcy court acknowledged both that the Partnership initiated the claims in state court and that each claim “could exist outside of bankruptcy.” Further, as in Northern Pipeline, each claim, including each Association counter-claim, presents a matter – the condominium form of real estate ownership and relations among the participants in that form of ownership – singularly and emphatically, preeminently and pervasively, governed by Florida law. To the governance of the condominium form of real estate ownership and those participating, the federal bankruptcy law is an awkward and unwelcome intruder. Each claim is a non-core proceeding. Accord In re Toledo, 170 F.3d at 1350 (finding a proceeding non-core that “sought to vindicate state-created common-law rights but did not utilize any process specially established by the Bankruptcy Code”); In re Happy Hocker Pawn Shop, Inc., 212 Fed.Appx. 811 (11th Cir. 2006) (holding that each state law claim was a non-core proceeding in part because no claim “invoke[d] a substantive right created by bankruptcy law” and each claim “could arise outside of bankruptcy law”); Lauer, 288 B.R. at 276-77 (finding the debtor’s state law claim for money damages and for an injunction non-core proceedings because each was not “[a] matter[] concerning the administration of the estate” or a “proceeding[]

affecting . . . the adjustment of the debtor-creditor . . . relationship" under Section 157(b)(2)).

Article III confirms that each claim of the Partnership is a non-core proceeding, an affinity – however strong³ – between a claim and a category of Section 157(b)(2) notwithstanding. If the Partnership's purely state law claims, asserted in state court, qualify as a core proceeding, "virtually any claim would entitle a bankruptcy court to enter final judgment," and "[Section] 157 would ignore the constitutional proscription limiting the jurisdiction of bankruptcy courts as set forth by the Supreme Court in Northern Pipeline." Lauer, 288 B.R. at 276 (quotation omitted). Because each claim is a non-core proceeding, the bankruptcy court's findings of fact and conclusions of law receive de novo review.

2. The Governing Documents

Under the documents governing the Association and the Partnership, the Association bears ultimate responsibility to pay for repair and maintenance of the Colony's common elements. The Declaration states, "the maintenance and operation of the common elements [of the Colony] shall be the responsibility of the Association as a common expense." (Ex. 13 Art. 6.5) The "common elements" includes "the condominium property not included in the units." (Ex. 13 Art. 3.12) Further, Article Six

³ The Supreme Court recently acknowledged, in a manner that fully supports the result in this appeal, the tension between the categories of core proceeding in Section 157(b) and the requirements of Article III. Stern v. Marshall holds that the debtor's state law counter-claim for tortious interference is a core proceeding "under the plain text of Section 157(b)(2)(C)" (the same provision under which the Association asserts its counter-claims are core proceedings), but that Article III prohibits a bankruptcy court's entering final judgment on the counter-claim. 131 S.Ct. 2594 (2011) (Roberts, C.J.). In short, "[t]he Bankruptcy Court . . . lacked the constitutional authority to enter a final judgment on a state law counterclaim that is not resolved in the process of ruling on a creditor's proof of claim." 131 S.Ct. at 2620.

requires the Association to "maintain, repair and replace at the Association's expense: . . . [a]ll portions of a Unit, except interior surfaces, contributing to the support of the Unit" (Ex. 13 Art. 6.2) Article Three of the Declaration delegates other "common expenses" to the Association in detail:

3.13 *Common Expenses.* The common expenses include:

(a) Expenses of administration; expenses of maintenance, operation, repair or replacement of the common elements, and of the portions, if any, of Units to be maintained by the Association, including but not limited to:

(i) Fire and other casualty and liability insurance

(iii) Costs of water, operation and maintenance of sewage facilities, electricity and other utilities which are not metered to the individual Condominium Units.

(iv) Labor, materials and supplies used in conjunction with the common elements.

(vi) Damages to the Condominium property in excess of insurance coverage.

(vii) Salary of a resident manager, his assistants and agents, and expenses only incurred in the management of the Condominium property.

(viii) All other costs and expenses that may be duly incurred by the Association through its Board of Directors from time to time in operating, protecting, managing and conserving the Condominium property and in carrying out its duties and responsibilities as provided by the Condominium Act, this Declaration, the Articles of Incorporation or the Bylaws of the Association.

(c) Expenses declared common expenses by provisions of this Declaration or the Bylaws.

(d) Any valid charge against the Condominium as a whole.

(Ex. 13 Art. 3.13) (emphasis in original); see also (Ex. 13 Art. 9.2, 9.4) (declaring insurance premiums a common expense of the Association); (Ex. 13 Art. 10.3, 10.5) (declaring payment for repair after casualty the responsibility of the unit owners and the Association). The Declaration empowers the Association, pursuant to Florida's Condominium Act and the By-Laws of the Association, to assess a unit owner "for common expenses" and to impose a lien for a unit owner's unpaid assessment. (Ex. 13 Art. 7.1, 7.4)

Erroneously interpreting Article 7.2, the bankruptcy court concluded that "[Article] 7.2 of the Declaration relieves Unit Owners who have made their units available to the Partnership [for use by the hotel] from paying assessments." (Doc. 1-5 at 6) This formulation startles because Article 7.2 plainly relieves a unit owner from assessment "only to the extent that the Partnership makes such payments and assumes all other responsibilities of a unit owner in that regard."⁴

The bankruptcy court quoted also Article 6.3(a), which requires a unit owner to maintain "portions of his Unit" that are not the responsibility of the Association. Article 6.3 states that a unit owner need not maintain the unit "so long as . . . the Partnership is maintaining and repairing such unit." Article 6.3 is not germane both because the Partnership seeks money to repair only the common elements, which Article 6.3 does not address, and because Article 6.3, like Article 7.2, requires the unit owners to pay maintenance and repair not paid by the Partnership.

⁴ When ruling from the bench the bankruptcy judge stated that the "starting point of [the Partnership's] argument is rather appealing, [that the] Declaration of Condominium [] says that the Association is responsible for the maintenance, repair and replacement of the common elements." Case No. 8:08-ap-567-KRM (Doc. 101 at 12) The written order ignores the "only to the extent" clause without explaining the abrupt change from the statement at the hearing.

The Articles of Incorporation of the Association empower the Association to assess the unit owners for the financial responsibilities of the Association in the Declaration. (Ex. 14 Art. 3.2) The By-Laws of the Association require the Association Board to:

adopt a budget for each calendar year that . . . include[s] the estimated funds required to defray the common expenses and to provide and maintain funds for . . . reserves [for maintenance that occurs "less frequently than annually," see Art. 6.1,] according to good accounting practices.

(Ex. 15 Art. 6.2) The bankruptcy court noted that "[l]ike the Declaration and the Articles, the By[-]laws contain an express provision that Unit Owners who have made their units available to the Partnership are expressly relieved from paying assessments." (Doc. 1-5 at 11) Again the bankruptcy court erroneously failed to enforce the limiting clause that relieves the unit owners only "to the extent" that the Partnership pays. (Ex. 15 Art. 6.5)

The Partnership Agreement grants the Partnership control of the hotel at the Colony and allows the Partnership to rent each unit eleven months a year. (Ex. 22 Art. 7, Art. 10) The bankruptcy court emphasized that the Partnership Agreement "makes clear that the Limited Partners are not subject to assessment and have no personal liability for the Partnership's debts." (Doc. 1-5 at 12, 33); see (Ex. 22 Art 8.1) However, only in the role of limited partner is a unit owner not subject to assessment. Each unit owner is both a limited partner and a member of the Association, (Ex. 22 Art. 6.1(d)), and the Association may assess a member. The Partnership concurs that a unit owner is not responsible, either as a limited partner or as a member of the

Association, for retirement of the Partnership's debt. In this action the Partnership seeks money, not for retirement of the Partnership's debt but for maintenance of the common elements of the Colony, a solemn, fundamental, and unalterable statutory duty of the Association and its members, the unit owners.

Ruling that the Association is not subject to the 1984 Agreement, the bankruptcy court nevertheless applied the 1984 Agreement in some instances, albeit inconsistently. Compare (Doc. 1-5 at 29) ("The Association's Governing Documents were not amended to incorporate the assessment mechanisms or any other terms or provisions of the 1984 Agreement") with (Doc. 1-5 at 36) (concluding that the 1984 Agreement requires a vote of the unit owners to assess for the cost of repair). The Partnership correctly asserts that the 1984 Agreement alters only the process by which the Association pays for repair of the common elements but preserves the Association's obligation to pay for repair to the common elements.

The preamble of the 1984 Agreement states in part:

WHEREAS, the Association is responsible for payment of certain obligations pertaining to [the Colony], including the establishment of reserves therefore, all of which are described in the Declaration . . . (hereinafter together the "Obligations") including, without limitation, [] expenditures for repairs, maintenance and insurance of the Common Areas as described in the Declaration [and] expenditures for capital improvements

Before the 1984 Agreement, the Partnership distributed money from the hotel's profitable operation to each unit owner in the unit owner's capacity as a limited partner and, in turn, the Partnership sought money for repair of the common elements from each unit owner in the unit owner's capacity as a member of the Association. The 1984

Agreement – and a “Tenth Amendment,” which merely implements the 1984 Agreement in the Partnership Agreement – removes the unnecessary payment from the Partnership to the Association of money that the Partnership will reclaim to satisfy the Association’s obligation to pay for common element repair. (Trial transcript (“Tr.”) 5/26/09 at 57-58). The parties agree that the 1984 Agreement relieves the Association from paying for repair of the common elements at least “to the extent cash is available to the Partnership” for the repair. (Ex. 27 ¶ 2); see also (Ex. 27, preamble). However, the bankruptcy court erroneously (and inexplicably) declared that, with the 1984 Agreement and the Tenth Amendment, “[t]he Partnership became directly responsible for payment of all . . . expenses relating to the common elements.” (Doc. 1-5 at 32) The Association and the bankruptcy judge overlook the conspicuous and inescapable “solely to the extent cash is available” qualification that dramatically controls the meaning of the 1984 Agreement. Because of the qualification, the Partnership is free to pay for repair of the common elements solely with money otherwise payable to the unit owners in their capacity as limited partners. The 1984 Agreement and Tenth Amendment transfer initial, but not final, responsibility to the Partnership for such expenses.

The bankruptcy court erroneously concluded that the 1984 Agreement defines “obligations” “broadly . . . to include everything . . . that the Partnership would have had to pay in order to operate and maintain the Hotel.” (Doc. 1-5 at 14) On the contrary, nothing in the 1984 Agreement extends “obligations” beyond the Declaration’s definition of the Association’s common expenses. Compare (Ex. 13 Art. 6.2) and (Ex. 13 Art.

10.3, 10.5) (Requiring the Association to pay for repair of the common elements and for casualty damage to the common elements) with (1984 Agree. ¶ 2) (defining the “obligations” of the Association to include paying for repair of the common elements and for casualty damage to the common elements). Further, the 1984 Agreement repeatedly confirms that “the Obligations” are the responsibility of the Association (Ex. 27 preamble, ¶¶ 2, 5); the day-to-day operating expenses of the hotel, payable by the Partnership, are therefore not an “obligation” under the 1984 Agreement. Yet the bankruptcy court stated that the 1984 Agreement allows the Association to determine whether to “fund cash flow shortfalls . . . that the Partnership [can]not pay.” (Doc. 1-5 at 17); see also (Doc. 1-5 at 41). The bankruptcy court again conflated the hotel's operating cost (for which the Association bears no responsibility) and the common element repair cost (for which the Association bears full responsibility).

Paragraph two of the 1984 Agreement directs the Partnership to establish “such reserves as are deemed necessary and appropriate for the continued operation of the [Colony] as a first class resort hotel.” (Ex. 27 ¶ 2) The bankruptcy court concluded that the 1984 Agreement and the Tenth Amendment require the Partnership to establish reserves for “necessary capital repairs,” “replacement costs,” and “the preservation of the Colony,” and the bankruptcy court found that the Partnership’s reserves “were woefully inadequate” and insufficient “to operate the Hotel as . . . a first class resort hotel.” (Doc. 1-5 at 18, 20)

The bankruptcy court erred by conflating reserves for repair of the common elements with reserves for operation of the hotel. Because the hotel cannot operate

nullify paragraph ten, which requires the Partnership to pay only forty-five thousand dollars annually for common element maintenance. The bankruptcy court's interpretation of the 1984 Agreement is therefore fundamentally flawed and untenable.

3. Other Bankruptcy Court Holdings

The Declaration manifestly commands that "maintenance and operation of the common elements . . . shall be the responsibility of the Association as a common expense."⁶ (Ex. 13 Art. 6.5) Nothing presented to the bankruptcy court overcomes this plain and obvious mandate.

The bankruptcy court stated that "[t]he Declaration provides no specific or affirmative obligations and sets no standard that the Association must achieve in the maintenance and repair of The Colony." (Doc. 1-5 at 31) The standard, however, is explicit in the Declaration's mandate by operation of the plain language employed. "Maintenance" is "the labor of keeping something (as buildings or equipment) in a state of repair or efficiency: care, upkeep," Webster's Third New International Dictionary ("Webster's"), 1362 (1976), and "upkeep" is "the act of maintaining in good condition." Webster's at 2517. Additionally, the Declaration requires the Association to pay for "repair" and "replacement" of the common elements. (Ex. 13 Art. 3.13(a)) To "repair" is to "restor[e] to a state of soundness." Webster's at 1923. To "replace" is to "place again: restore to a former place, position, or condition" or to "supply an equivalent for." Webster's at 1925. The Partnership argues – persuasively, given the ordinary and plain

⁶ The declaration of a condominium "is the condominium's 'constitution.'" 5 Boyer, Florida Real Estate Transactions § 190.10[1] (2010). "An association's authority is derived from the declaration and the bylaws provided the bylaws are not inconsistent with the declaration." Boyer, supra, § 190.10[1]. "[The] declaration . . . is more than a simple contract spelling out mutual rights and obligations of the parties to it. It assumes some of the attributes of a covenant running with the land." Boyer, supra, § 190.10[1].

meaning of "maintain," "replace," and "repair" – that the Declaration obligates the Association to keep the common elements in a condition similar to the condition of the Colony in 1973. Certainly, this standard leaves some opportunity for reasoned disagreement. For example, some materials used in 1973 are no longer sold, which leaves the parties to debate what current product best approaches "replacement." New government regulations prohibit certain rebuilding (Tr. 5/27/09 at 40-45, 79), which prohibition leaves the parties to debate whether a required change in the structure of a building qualifies as a "replacement" (or as near a replacement as reasonably feasible). In any event, an adequate standard exists by which to ensure that the Association maintains the Colony. If intractable dispute occurs, the parties may repair to the state court for a speedy determination of what is reasonable (thereby conforming with Florida's condominium laws and avoiding the disastrous implosion of an attractive, established, beachfront development).

The bankruptcy court suggested that the 1984 Agreement and the Tenth Amendment grant the Partnership so much control over the budget of the Association that the Association was relieved from paying for repair of the common elements. (Doc. 1-5 at 14-15) How an increase in the Partnership's control over the Association's budget nullifies the unambiguous language of the Declaration ("maintenance and operation of the common elements . . . shall be the responsibility of the Association"), the bankruptcy court does not cogently explain. In practice, the Association remained involved with, and informed about, the budget. The minutes of the Association Board

without the common elements of the Colony, the bankruptcy court assumed that the Partnership must establish reserves sufficient to repair the common elements. However, the 1984 Agreement states in the preamble that “the Association is responsible for payment of certain obligations pertaining to the [Colony], including the establishment of reserves[. These obligations] are described in the Declaration” (Ex. 27 preamble). The By-Laws (which the Declaration requires the Association to follow, see (Ex. 13 Art 8.1, 8.5)) direct the Association to establish reserves for deferred maintenance and for “replacement required because of damage, depreciation or obsolescence.” (Ex. 15 Art.6.1-2) The accord established throughout the governing documents assigns payment for operation of the hotel to the Partnership and assigns payment for maintenance of the common elements of the Colony to the Association. The 1984 Agreement upsets this scheme once only, in paragraph ten, which requires the Partnership annually to pay forty-five thousand dollars into a “capital reserve account” on behalf of the Association.⁵ (Ex. 27 ¶ 10). The bankruptcy court nevertheless concluded erroneously that paragraph two of the 1984 Agreement implicitly shifts to the Partnership full responsibility to pay for repair of the common elements. Given the structure of the balance of the governing documents, paragraph two, construed disinterestedly and reasonably, directs the Partnership to establish reserves for the operation of the hotel. Cf. (Tr. 5/26/09 at 97) Requiring the Partnership to establish the full reserves necessary to pay for repair of the common elements would

⁵ The Partnership never paid a full forty-five thousand dollars into this capital reserve account, but only because, as testimony at trial and the minutes of Association Board meetings show, the Association voluntarily waived the establishment of additional reserves. (Ex. 273 at 7-8; Ex. 279 at 1; Ex. 283 at 4; Tr. 5/26/09 at 92)

meetings in the record show that the Board approved each proposed budget. (Ex. 279 at 2; Ex. 282 at 1; Ex. 285 at 1; Ex. 289 at 1)

Noting that an "emergency" assessment requires unit owner approval (Ex. 15 Art. 6.6) and that the 2005 and 2006 proposed assessments were an "emergency" assessment, the bankruptcy court concluded that "the Partnership [cannot] force the Association to make an assessment [that] the Unit Owners twice voted [] down." (Doc. 1-5 at 35) This formulation is oversimple and erroneous. The 2005 and 2006 proposed assessments required the Association to pay for alteration of the common elements and were an "emergency" assessment. The Partnership concurs that an emergency assessment requires a vote of the unit owners. See (Ex. 13 Art. 6.6) (requiring unit owner approval of "alteration" or "improvement" of the common elements). The Partnership correctly submits, on the other hand, that the rejected 2005 and 2006 proposed assessments differ from the assessment the Partnership seeks in this action. The assessment the Partnership seeks would address only the cost of maintenance and repair of the common elements. The Association could have implemented the assessment without an "emergency" assessment. Nothing in the Declaration or By-Laws impedes the Association's including the cost of repair to the common elements in an annual assessment.⁷

The bankruptcy court concluded erroneously that the Association cannot assess the unit owners even for repair of the common elements unless a majority of the unit

⁷ Again, resort to Florida's mature and persuasive statutory arrangement benefits everyone. Section 718.112, Florida Statutes, mandates the contents of the by-laws of every condominium association in Florida. Section 718.112(2)(e)(2.a) requires that the by-laws empower the unit owners to vote down an annual assessment that exceeds 115% of the assessment for the preceding year. However, Section 718.112(2)(e)(2.b) explicitly excludes from the percent-increase calculation "reasonable reserves for repair or replacement of the condominium property [and] anticipated expenses of the association which the board does not expect to be incurred on a regular or annual basis."

owners vote to approve the assessment. The bankruptcy court's conclusion is utterly foreign to Florida's statutory regime, which is calculated to ensure the maintenance and repair of the common elements enjoyed by each of Florida's 1.3 million condominium residents. The bankruptcy court reasoned that the 1984 Agreement, which provides that the Association shall pay for "major capital improvements" through "special assessment" (Ex. 27 ¶ 2), "distinguishes between an assessment needed to make capital repairs and improvements and an assessment to fund the Association's annual budget. By this distinction," the bankruptcy court continued, "it is manifest that an assessment for repairs . . . must be put to a vote of the Unit Owners." (Doc. 1-5 at 36) This conclusion is wholly erroneous and unsupportable. No mention of "special" assessment occurs in the Declaration or By-Laws. The bankruptcy court asserted that Section 718.103, Florida Statutes, requires that a "special" assessment "be accompanied by a notice which sets forth the specific purpose or purposes of [the] special assessment." (Doc. 1-5 at 36) (quotation omitted). Manifestly, a notice requirement is not a vote requirement. In fact, condominium boards often pay for maintenance and repair by passing a "special" assessment without a unit owner vote. See, e.g., George v. Beach Club Villas Condo. Assoc., 833 So.2d 816 (Fla. 3d DCA 2002); Farrington v. Casa Solana Condo. Ass'n, Inc., 517 So. 2d 70 (Fla. 3d DCA 1987); Cottrell v. Thornton, 449 So.2d 1291 (Fla. 2d DCA 1984).⁸

⁸ Cottrell includes an especially informative passage:

We are often faced with appeals which are similar in nature to this appeal. One area of misunderstanding seems to derive from the fact that a necessary repair . . . may involve a major expenditure of funds. The fact that a major expenditure is involved in making a substantial, necessary repair does not convert the repair into a material or substantial addition or alteration . . . which would trigger a required vote of the unit owners. That is not to say, however, that condominium owners are not without a solution to this frequent

(continued...)

Even were a vote required, the bankruptcy court failed to explain on what ground the unit owners may casually "vote away" the obligation of the Association to pay for repairs to the common elements. The governing statute, the governing documents, and common sense reject this notion. In fact, "Maintenance and operation of the common elements . . . shall be the responsibility of the Association as a common expense." (Ex. 13 Art. 6.5) With a sufficiently large super-majority the unit owners may amend the Declaration (Ex. 13 Art. 15.3), but a simple majority of the unit owners may not vote in effect to nullify the Declaration. In all instances, the declaration must conform to Florida's statutory requirement.

The bankruptcy court held that the Board's refusal to implement assessments for repairs without a vote was a proper exercise of the Board's business judgment. In the words of the bankruptcy court, "the Board . . . determined in good faith that the Association would not benefit from assessing the members to rebuild The Colony," and "[t]he Partnership's attempts to supplant the Board's decision with that of this Court . . . , or the Partnership's opinion of what is best for the Association[,] ignore the business judgement [sic] rule." (Doc. 1-5 at 38, 40)

Without support in law or logic, the bankruptcy court imports and applies "the business judgment rule" to free the Association from the fundamental obligations

⁸(...continued)

problem. We strongly urge that before conflicts arise that require resort to the courts, the owners should consider whether it is desirable to amend the condominium documents to place a restriction on the amounts that could be expended to make necessary repairs without a prior vote of the owners.

449 So.2d at 1292 (emphasis removed). As in Cottrell, the governing documents of the Colony include no limit on the repair expenditures the Association Board may assess without a unit owner vote.

required by statute and memorialized in the Declaration. But the business judgment rule is no license for a condominium association to break with impunity from an obligation that in the moment displeases the association. If the Association can exploit the business judgment rule to escape paying for repair of the common elements, the Association may use the business judgment rule to escape honoring any purportedly binding document or contract, and each agreement the Association enters is entirely illusory because only in effect so long as the Association benefits. This reasoning, like the conclusion that the unit owners may vote to rescind a binding obligation, is untenable. Cf. Frank H. Easterbrook and Daniel R. Fischel, The Corporate Contract, 89 Colum. L. Rev. 1416, 1429 (Nov. 1989).

An erroneous assumption underlying the bankruptcy court's result is that the business judgment rule protects an Association's board not only from a member suit, but also from a third-party suit to enforce the lawful obligation of the Association to a third-party. The bankruptcy court apparently believes that the business judgment rule empowers the Association to repudiate a contract or other obligation merely because the Association in the moment concludes that the contract does not favor the Association. The business judgment rule has no such meaning and no such effect. Of course, a board member must use business judgment to further the interests of the association, and the business judgment rule (as the rule applies to a condominium association) "protects the [a]ssociation's decisions so long as the [a]ssociation acts in a reasonable manner." Garcia v. Crescent Plaza Condo. Ass'n, Inc., 813 So.2d 975, 978 (Fla. 2d DCA 2002) (citing Farrington v. Casa Solana Condo. Ass'n, Inc., 517 So.2d 70,

72 (Fla. 3d DCA 1987)). But the business judgment rule is not a weapon permitting the Association to renege on statutory, contractual, and other obligations on a whim (or even after solemn deliberation). The business judgment rule applies to a corporate governance dispute instigated by a member and protects an individual board member from personal liability. The business judgment rule does not empower a corporation to escape the consequences of the corporation's actions toward the outside world. If the Association Board flouts the statutes, violates the Declaration, lets the Colony crumble, and drives the Partnership to ruin, the Association as a whole may not escape the consequences merely because the Board intentionally inflicted the harm to further the perceived self-interest of the Association.

The bankruptcy court concluded that "the 1984 Agreement is ultra vires to the extent it may be interpreted to require the Association to assess the Unit Owners to fund operation shortfalls of the Partnership." (Doc. 1-5 41-44) As discussed earlier, see sec. 2, supra, the 1984 Agreement never obligates the Association to pay for the operation of the Partnership or the hotel. The bankruptcy court noted that "[a] condominium association may exercise only those powers enumerated in the Condominium Act," (Doc. 1-5 at 43) (quoting Towerhouse Condo. v. Millman, 475 So. 2d 674, 676 (Fla. 1985)), but, as the bankruptcy court acknowledged, Florida's Condominium Act empowers the Association to maintain and repair the common elements. Fla. Stat. § 718.111 (authorizing a condominium association to enter into contracts and collect assessments to maintain and repair common elements); see also sec. 4, infra. Even if the 1984 Agreement were ultra vires as applied to the

Association and even if the Partnership must follow the 1984 Agreement but the Association need not, the Association's obligation under the Declaration to pay for the repair of the common elements remains. See sec. 2, supra.

An undercurrent in the bankruptcy court's decision is that putative mismanagement by the Partnership excuses the Association's ignoring the obligation to pay for repair of the common elements. However, the bankruptcy court vaguely but unmistakably attributes to the Partnership impropriety, but explicitly declines to adjudge the existence or effect of the supposed impropriety:

[this Court makes no] finding of impropriety or malfeasance in the operations of the Partnership. However, . . . it is important to the analysis of this case that [] accounting issues and questions were discovered by the Association at a time when the Partnership was saying it did not have money and was requesting that assessments be made

(Doc. 1-5 at 22) In the ruling from the bench, the bankruptcy judge stated:

some, if not all [the alleged accounting improprieties] were disclosed and rectified But the fact that they occurred at all I think is enough to justify what the Association did [i.e., refuse to pay for repairs in 2007].

8:08-ap-567-KRM, (Doc. 101 at 19-20). Without finding that the Partnership violated the governing documents, the bankruptcy court admonishes the Partnership. The bankruptcy court finds that the Partnership deserves no redress even if the Association violated the governing documents. The bankruptcy court left the allegations to linger as a spectral yet perceptible suggestion that the Partnership is in a general sense an unworthy claimant.

If the bankruptcy court believed that the Partnership's accounting or other practices relieved the Association of the obligation to honor the governing documents, the bankruptcy court needed to say so explicitly and attempt to explain why. The bankruptcy court certainly presented no reason that an accounting impropriety, if

proven, justifies entirely dissolving the Association's obligation to pay for repair of the common elements. Even if the Partnership's accounting or operation of the hotel harmed the Association, the proper course is not wholesale annulment of the governing documents but rather an orderly claim under the applicable law of Florida, including especially Chapter 718.

Another assumption floating ominously yet indeterminately in the background of the bankruptcy court's decision is that the Association deserves release from the obligation to pay for repairs because the governing documents are unfair. The bankruptcy court noted that the general partner prepared the Association's budget, that "[t]he larger the amount of expenses that the General Partner allocated to the Association's 'Obligations,' the greater the amount of distribution the General Partner [] receive[d]" (Doc. 1-5 at 15-16), and that the general partner received a distribution even when the Partnership sustained a loss. (Doc. 1-5 at 21) The bankruptcy court mentioned also that "[t]he Preferential Amount was set in 1973, but there [i]s no formula for any change [to that amount] over time." (Doc. 1-5 at 16)

The portrayal of the unit owners as trapped in an onerous agreement is unfounded. The Partnership estimates that the average rent value of a unit owner's yearly, thirty-day use of a unit was \$12,750. (Ex. 38) The interior of a unit was maintained by the Partnership with hotel revenue (revenue generated, of course, entirely through the efforts of the Partnership), and unrebutted evidence shows that between 1987 and 2008 the Partnership contributed over \$27 million of hotel revenue toward repair of the common elements and nearly \$5 million toward the real estate

taxes of the units. (Ex. 38) Overall, from 1987 to 2008 the unit owners received \$33.76 million in distributions. Over the same period, the general partner received \$4.59 million. (Ex. 38) For decades, a unit owner effectively received a free thirty-day stay at a beachfront condominium each year plus the appreciation in value of the initial investment in the Colony. See (Ex. 153) and (Tr. 5/26/09 at 118-23) (estimating the average appreciation in value of a unit as of 2006). About this component of the arrangement – the value of the Colony to the unit owners throughout past decades – the bankruptcy court said not a word:

Given the historical value figures and the fact that the revenue for maintaining the Colony for decades came entirely from the effort of the Partnership, where is the unfairness? To the extent the Partnership exercised control over the Association's budget, until 2005 the Partnership exercised control over money generated by the Partnership, and the Association Board approved the budget the Partnership proposed. (Tr. 5/21/09 at 67, Tr. 5/29/06 at 110) Although the general partner indeed received a larger distribution if the cost of maintenance of the common elements rose above the preferential amount, the general partner was authorized to pay only for repair or restoration of the common elements and was therefore unable to deliberately generate excessive maintenance costs. The Partnership could not spend money on an improvement or alteration of the common elements and unilaterally charge the cost to the Association; an improvement or alteration required unit owner approval.⁹ Although

⁹ To repeat, if the Partnership attempted to charge the Association for an improvement to the common elements or for a hotel operating expense, the Association's recourse is to prove damages. The Association failed to prove any damages before the bankruptcy court. (Doc. 1-5 at 4 n.1) ("the [Association] did not present any evidence as to any damages it suffered").

the general partner received distributions after the hotel began to lose money, those distributions were matched dollar-for-dollar (on top of the \$1.398 million preferential amount) with distributions that paid the obligation of the unit owners; the unit owners therefore continued each year to enjoy thirty days use of a unit at the Colony (plus the appertinent benefits) for dramatically less than cost. For example, when the hotel operated at a loss in 2006 and 2007, the general partner managed the hotel and received a few hundred thousand dollars while each unit owner contributed nothing and received heavily subsidized use of a beachfront condominium and the associated amenities.

The bankruptcy court is correct that the Colony's governing documents "must be strictly construed to assure those investing in [the] condominium property that 'what the buyer sees the buyer gets.'" (Doc. 1-5 at 29) (quoting Sterling Village Condo., Inc. v. Breitenbach, 251 So.2d 685, 688 (Fla. 4th DCA 1971)). The distributions to the general partner were in accord with the governing documents (this, too, is "fairness"). That the preferential amount is constant over time is in accord with the governing documents. Someone interested in becoming a unit owner in the Colony enjoyed full disclosure – guaranteed by Florida's condominium laws – of the governing documents. A buyer saw exactly what a buyer would get.

Above all, a buyer could see that "maintenance and operation of the common elements . . . shall be the responsibility of the Association as a common expense." (Ex. 13 Art. 6.5)

4. Florida Law

The plain language of the Declaration and the other governing documents resolves this appeal, but, more fundamentally, the Condominium Act, Chapter 718, Florida Statutes, resolves this appeal. Florida law intricately and pervasively regulates the creation, form, operation, and governance (and, when necessary, the dissolution) of the condominium form of ownership, including the condominium unit owners' association. The parties' dispute is entirely familiar to this statutory scheme (and entirely alien to bankruptcy law).

"The Condominium Act expressly provides that the Association is responsible for the maintenance and repair of the common elements." 5 Boyer, Florida Real Estate Transactions, § 190.20[2][c] (2010); see Fla. Stat. § 718.113(1). Under the Condominium Act, an association board has both the authority and the duty to maintain the common elements. See Ralph v. Envoy Point Condo. Ass'n, Inc., 455 So.2d 454, 455 (Fla. 2d DCA 1984); Boyer, supra, § 190.11[6]. In fulfilling the duty to maintain the common elements, the board may assess the members for common expenses without a vote of the unit members. Section 718.115(1)(a), Florida Statutes, states that, "Common expenses include the expenses of the operation, maintenance, repair, replacement, or protection of the common elements and association property." Section 718.115(2) states that, "Except as otherwise provided in [the Condominium Act], funds for payment of the common expenses . . . shall be collected by assessments against the units." Boyer adds that:

Unless provided otherwise in the condominium documents, a vote of unit owners generally is not required to levy a special assessment for

condominium repair work, where the work is not a material alteration of the condominium property

Boyer, supra, § 190.44[2]; see also Cottrell v. Thornton, 449 So.2d 1291 (Fla. 2d DCA 1984). A board may assess the members even for an alteration if the alteration is also a necessary repair to the common elements. "Simply because necessary work for maintenance may also constitute alterations or improvements does not nullify a condominium board's authority and duty to maintain the condominium common elements." Ralph, 455 So.2d at 455 (holding that an association board could assess the members, without a member vote, to pay for a vertical sea-wall to protect the common elements from storm damage because "if work was necessary, board authority was sufficient").

"A condominium association may be liable for damages that result from negligent maintenance of the common elements." Boyer, supra, § 190.20[2][e]; see, e.g., Coronado Condo. Ass'n v. Scher, 533 So.2d 295 (Fla. 3d DCA 1988) ("[the] unit owners . . . sued the . . . association for negligent maintenance of a sanitary sewer in the common elements [and] won an order requiring the association to conform with its duties under the Condominium Act"). In other words, the Condominium Act requires the association to prevent deterioration of the common elements. Rather than allow the common elements to deteriorate, the Condominium Act states:

In circumstances that may create economic waste, areas of disrepair, or obsolescence of a condominium property for its intended use and thereby lower property tax values, the Legislature . . . finds that it is the public policy of this state . . . to preserve the value of the property interests and the rights of alienation thereof that owners have in the condominium property

Fla Stat. § 718.117(1). The method to preserve the value of the condominium is “termination [of the condominium] because of economic waste or impossibility.” Fla. Stat. § 718.117(2). Termination, however, requires the approval of a super-majority of the members. Fla. Stat. § 718.117(2); (Ex. 13 Art. 16). In this action, rather than comply with the statutory command to “terminate” in the statutorily prescribed manner, the Association stopped paying for maintenance of the common elements.

The Condominium Act plainly states not only that an association must maintain the common elements but states also that “[t]he liability for assessments may not be avoided by waiver of the use or enjoyment of any common elements or by abandonment of the unit for which the assessments are made.” Fla. Stat. § 718.116(2). In this action, a majority of the members effectively attempted to avoid liability for assessment by waiving en masse the “enjoyment of any common elements” (which eventually deteriorated beyond use). This attempt violated en masse Section 718.116(2).

Further, by allowing the Colony to deteriorate, the Board and the majority of the members impermissibly altered the common elements to the detriment of a minority of the members. (Ex. 13 Art. 15.3); cf. Boyer, supra, § 190[7][e][iii]. The Condominium Act requires that “no material alteration . . . to the common elements [occur] except in a manner provided in the declaration” Fla. Stat. § 718.113(2)(a). “The purpose of [this] provision[is] to protect the [unit] purchaser against unanticipated changes in the common elements which could dramatically affect the cost and enjoyment associated with owning a condominium.” Wellington Prop. Mgmt. v. Parc Corniche Condo. Ass’n, Inc., 755 So.2d 824, 826 (Fla. 5th DCA 2000). Deterioration of the common elements is

an "alteration" and a "change" against which the Condominium Act protects the members who favor repairing the common elements.

In addition, Florida law requires an association to honor agreements with third-parties such as the Partnership. "The law simply does not," for example, "allow an association to borrow money and then absolve itself from repayment through its declaration or by-laws." Carmelitas Holding Company v. Paradise Beach Resort St. Augustine, 675 So.2d 660, 661 (Fla. 5th DCA 1996); see Boyer, supra, § 190.20[2][c] (citing Carmelitas Holding Company). Carmelitas Holding Company holds that a homeowners association:

cannot assert that repayment of a debt is ultra vires in an attempt to invalidate what was otherwise a permissible corporate action – borrowing money . . . to meet the expenses of operating the association and maintaining the association's property.

675 So.2d at 661. Similarly, the Association cannot escape the obligation to maintain the common elements for use by the Partnership by declaring the obligation ultra vires.

In sum, each matter the bankruptcy court found important was a mischievous distraction because Florida law requires the Association to pay for maintenance of the common elements.

5. Damages and Mootness

The bankruptcy court rejected the Partnership's claim for damages on many grounds, each of which is flawed. Several of the reasons for rejecting damages rely on the bankruptcy court's faulty interpretation of the 1984 Agreement and the Tenth Amendment. Under a proper reading of the governing documents, the Partnership's pre-petition and post-petition damages arise from the Association's failure to pay for

repair and maintenance of the common elements. The pre-petition damages arise directly from the Association's refusal to pay the obligations before the Partnership sued the Association. The Partnership's expert, Dr. Henry Fishkind, demonstrated the post-petition damages with a conventional damages calculation, which shows that if the Association had repaired the common elements promptly, the revenue of the hotel (and thus the Partnership) would have dramatically recovered from the late-2000's decline. See (Ex. 121)

Although the bankruptcy court ruled that the Association is not responsible for damages because the Colony had needed repair for years and the Partnership under-reported the cost of the needed repair (Doc. 1-5 at 45-46), the Colony's needing repair long before the Partnership demanded repair excuses the Association from nothing. The bankruptcy court noted that the poor condition of the Colony impaired the hotel's profits "for at least the past fifteen years" (Doc. 1-5 at 45), but the Partnership seeks no damages for the decline in hotel revenue that occurred before the Partnership asked the Association to pay for repair. (Ex. 121 at 10-11, 16-17) The Partnership has no obligation promptly to alert the Association to each incipient need for repair. In any case, no evidence shows that delaying repair increased the cost of repair. If delay increased the cost, the Partnership bears no blame. The Partnership must pay for the repair to the common elements only to the extent cash is available from hotel revenue to do so. (Ex. 27 ¶ 2) The statutory responsibility of the Association includes ensuring the common elements remain in good repair and establishing an adequate financial reserve for major and exigent repair. (Ex. 13 Art. 6.5; Ex. 15 Art.6.1-2) Nor is the "under-reporting" cited by the bankruptcy court a problem for the Partnership. In 2005,

the Association hired an engineering firm to undertake a professional estimate of the cost of repair of the Colony. Before the Association hired the firm, Katherine Moulton prepared a yearly estimate, which almost inevitably was an amount far less than the estimate of the professional firm. The 1984 Agreement requires only that the Partnership each year prepare for the Association's review a budget that details the "obligations" paid by the Partnership. Nothing in the governing documents entitles the Association to rely on a Partnership-produced estimate of needed repair or needed reserves for future repair. Regardless, Moulton testified that she kept the Association Board's members aware that major repair to the common elements would cost more than the Association's reserves (Tr. 5/27/09 at 11-12), yet the Association Board and the Association consistently voted to waive reserves anyway. E.g. (Ex. 273 at 7-8; Ex. 279 at 1; Ex. 283 at 4) The Association Board knew both that Moulton's estimates were low and that the Colony, built in 1973, would eventually need extensive repair.

Finding that "the Hotel [at the Colony] operated at a loss for six of the last eight years," the bankruptcy court rejected the Partnership's damage claim in part because of the Partnership's losses. (Doc. 1-5 at 46-47) At an Association Board meeting in December, 2004, the Board discussed the common elements' dilapidated condition and decided to hire the engineering firm to assess the cost of repair. (Ex. 51) Annual hotel profit at the time of the meeting was over a half-million dollars. (Ex. 38) In a July, 2005, letter, the Partnership's attorney informed the Association's attorney of the urgent need for repair of the common elements. (Ex. 149) The letter concludes by asking the Board:

as [the Board] is required to do under the various Colony documents, [to] commence the process to preserve and protect the Colony by implementing . . . the repairs that are necessary and the assessments associated therewith.

(Ex. 149) The hotel's profit in 2005 was \$360 thousand. At that time, the hotel had earned a profit in sixteen of the preceding nineteen years. (Ex. 38) In December, 2006, when the Partnership implored the Association Board to approve a budget including several million dollars for repair of the common elements (Ex. 54), the hotel had begun to lose money. (Ex. 38) Four of the six losing years the bankruptcy court cited occurred after the Association first breached the Declaration by refusing to pay for repair of the common elements, and the Partnership was profitable when the breach began. The bankruptcy court's rejection of damages due to "the Hotel's history of being unprofitable" was clear error.

The Partnership presented four damage scenarios, each of which the bankruptcy court rejected because "[t]he occupancy rate and average daily rate that the Partnership used to calculate damages [in each scenario] ha[s] never been attained." (Doc. 1-5 at 46) "Difficulty in proving damages or uncertainty as to amount," however, is not fatal to a plaintiff's claim for recovery. Forest's Mens Shop v. Schmidt, 536 So.2d 334, 336 (Fla. 4th DCA 1988). Rather, a plaintiff need show a reasonable basis for computing an approximate amount of damages. Sampley Enterprises, Inc. v. Laurilla, 404 So.2d 841, 842 (Fla. 5th DCA 1981); Devon Medical, Inc. v. Ryvmed Medical, Inc., 60 So.3d 1125, 1128 (Fla. 4th DCA 2011). The Partnership's expert reasoned that after renovation the hotel would out-perform the average hotel occupancy rate in Sarasota because the hotel, on the beach and renovated, would "be newer than [the] average [hotel] and []

would have a superior location to the average hotel.” (Tr. 5/22/09 at 29) In this light, the expert’s five percent increase in hotel occupancy above the market average (Ex. 121 at 6), was modest and reasonable. The average daily rate the expert adopted, \$280, was “attained” by the hotel in the past and is consistent with the hotel’s performance before the Colony’s facilities degraded. (Tr. 5/22/09 at 30) (Of course, a fact-finder might find \$260 or \$220 or another rent established by the facts; finding a fault in \$280 fails to justify collapsing to zero rent or declaring the rent unknowable.)

The bankruptcy court concluded that “[t]he Partnership’s damage model is based on a number of contingencies and assumptions,” specifically that the Partnership, despite defaulting on a loan in 2006 (Ex. 177), could obtain the capital necessary to renovate the interior of each unit and that the Association could obtain a loan for the repair of the common elements. (Doc. 1-5 at 48) The Partnership tried, but failed, to show that a bank offered a loan to the Partnership for interior renovation contingent upon the Association paying for repair to the common elements. See (Tr. 6/1/09 at 75-78) However, if the Partnership failed to obtain a loan, the failure occurred as, and likely because, the Association failed to honor the obligation to pay for repairing the common elements. Cf. Whitney v. Citibank, N.A., 782 F.2d 1106, 1118 (2d Cir 1986) (“When a difficulty faced in calculating damages is attributable to the defendant’s misconduct, some uncertainty may be tolerated”) (citing Bigelow v. RKO Radio Pictures, 317 U.S. 251, 264-65 (1946)).¹⁰ By the time the Partnership defaulted, the Association

¹⁰ “[A] stricter standard of proof is necessary for [the] fact of damage than for [the] amount of damage.” Yoder Bros., Inc. v. California-Florida Plant Corp., 537 F.2d 1347, 1371 n.24 (5th Cir. 1976). Failure to obtain a loan for interior renovation might reduce the Partnership’s lost profits. However, because of the superior location and past profitability of the Colony, the Partnership’s regaining profitability after repair to the common elements alone is hard to doubt. See (Ex. 121)

was already breaching the Declaration. The Partnership was likely far more credit-worthy earlier, when the hotel was still profitable. As for the assumption that the Association could obtain a loan, the bankruptcy court's faulting the Partnership for assuming the Association could pay for repair of the common elements is slightly bizarre. A damage calculation estimates the plaintiff's position "but for" the defendant's wrongful conduct. The damage calculation presented by the Partnership necessarily treats the Association's paying for repair of the common elements – whether by a loan or by assessment of the unit owners – as a benchmark.

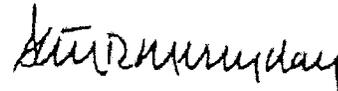
Finally, the Partnership objects that the bankruptcy court erred in finding the Association's counter-claims moot. However, the bankruptcy court added the condition that each counter-claim and third-party claim will receive reconsideration if any of the rulings in favor of the Association are reversed. (Doc. 1-5 at 49 n.5) The contemplated reversals occur, and the reconsideration must occur also. The Partnership's objection to the finding of mootness is moot.

CONCLUSION

The challenged orders of the bankruptcy court and each order of the bankruptcy court in this action that is inconsistent with this order are **REVERSED**. The district court (1) **STAYS** this order pending further order of the district court, retains jurisdiction of the proceeding, and withholds the issuance of instructions to the bankruptcy court; (2) directs that the parties submit by **August 5, 2011**, a paper (one paper for each side and only one paper for both this appeal and the companion appeal in Case No. 8:10-cv-913-T-23) of seven or fewer pages that

discusses the precise form of the remedy that the respective party recommends as a consequence of the district court's reversal of the bankruptcy court, and (3) sets a hearing for **August 11, 2011, at 1:30 p.m.** to hear argument on the form of the remedy. Counsel for each party shall appear at the hearing prepared and authorized to address the prospect of court-ordered mediation (including the issues of when, where, and by whom the mediation will be conducted)..

ORDERED in Tampa, Florida, on July 27, 2011.



STEVEN D. MERRYDAY
UNITED STATES DISTRICT JUDGE

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION**

In re:

**COLONY BEACH & TENNIS CLUB
ASSOCIATION, INC.**
_____ /

**COLONY BEACH & TENNIS CLUB, LTD.,
RESORTS MANAGEMENT, INC., and
COLONY BEACH & TENNIS CLUB, INC.,**

Appellants,

v.

CASE NO.: 8:09-cv-2560-T-23

**COLONY BEACH & TENNIS CLUB
ASSOCIATION, INC.**
_____ /

Appellee.

**COLONY BEACH & TENNIS CLUB, INC.,
and COLONY BEACH, INC.**

Appellants,

v.

CASE NO.: 8:10-cv-913-T-23

**COLONY BEACH & TENNIS CLUB
ASSOCIATION, INC.,**
_____ /

Appellee.

APPELLANTS' BRIEF ON REMEDIES

Charles J. Bartlett, Esq.
Florida Bar No. 273422
Mark C. Dungan, Esq.
Florida Bar No.: 0106666
ICARD, MERRILL, CULLIS, TIMM,
FUREN & GINSBURG, P.A.
2033 Main Street, Suite 600
Sarasota, FL 34237
(941)366-8100
Attorneys for Appellants

I. Introduction.

The Court directed counsel in its July 27, 2011 Orders to provide a Brief to the Court outlining the specific remedies sought by the parties in each case based upon the rulings of the Court. Set forth below are Appellants' requests to the Court for the entry of Final Judgments in its favor and against the Appellee Association consistent with the rulings of this Court in its appellate opinions.

II. The renovation/damages case (Case No.: 8:09-cv-535-T-33).

At the heart of this case is the Partnership's position now adopted by the Court, that the Association bears the duty and obligation to maintain and repair the common elements and the exterior of the condominium units in accordance with the requirements of the Declaration of Condominium, not only for the benefit of the unit owners, but also for the benefit of the Partnership in its use of the condominium units for the operation of a luxury resort hotel.

In its July 27, 2011 Order, this Court made the following observations, which bear on the remedies sought by the Partnership in this appeal:

If the Association Board flouts the statutes, violates the Declaration, lets the Colony crumble, and drives the Partnership to ruin, the Association as a whole may not escape the consequences merely because the Board intentionally inflicted the harm to further the perceived self-interest of the Association.

* * *

Under a proper reading of the governing documents, the Partnership's pre-petition and post-petition damages arise from the Association's failure to pay for repair and maintenance of the common elements. The pre-petition damages arise directly from the Association's refusal to pay the obligations before the Partnership sued the Association. The Partnership's expert, Dr. Henry Fishkind, demonstrated the post-petition damages with a conventional damages calculation, which shows that if the Association had repaired the common elements promptly, the revenue of the hotel (and thus the Partnership) would have dramatically recovered from the late-2000's decline ... the [Partnership's] expert's five percent increase in hotel occupancy above the market average (Ex. 121 at 6), was modest and reasonable.

In its Order, the Court articulated both the Partnership's right to damages and the finding that the Partnership's expert's testimony concerning them was reasonable.

Regarding pre-petition damages, the Court should enter judgment in favor of the Partnership and against the Association in the principal amount of \$2,238,732.99, plus prejudgment interest. This sum represents the amount of Association expenses paid by the Partnership after the Partnership notified the Association that it could no longer pay the Association's expenses out of available cash flow and prior to the filing of the Association's bankruptcy petition in October, 2007. The amount of those expenses, billed monthly from the Partnership to the Association, is set forth in Partnership's Exhibit 141, which contains not only monthly reconciliations and invoices to the Association, but also the backup material to justify each and every of the listed amounts. There is no evidence in the record to suggest in any way that the claimed expenses were not reasonable or not rendered for the benefit of the Association. The Association instead relied solely on the defense that it was liable for none of the expenses, regardless of reasonableness. In light of this Court's ruling, the entire amount of pre-petition expenses should be awarded to the Partnership in the form of a money judgment. Pre-judgment interest at the applicable statutory rates should be calculated on the amount of expenses from their respective due dates as evidenced by the invoices rendered by the Partnership to the Association.

Regarding post-petition damages, the Partnership is entitled to a money judgment in its favor and against the Association based upon the damage analysis prepared by and testified to by Dr. Fishkind, the Partnership's expert at trial. More specifically, the Court should adopt the damage analysis presented in scenario 2 by Dr. Fishkind, in light of the delay by the Association in constructing the needed repairs and renovations to the condominium common elements and unit

exteriors. Dr. Fishkind's analysis under scenario 2 presents two divergent possibilities, one being that the Association does undertake the necessary repairs and renovations at some point in time and the other contemplating that the repairs and renovations are never done. The analysis shows that damages to the Partnership in the event that construction is delayed until May 1, 2010 would be in the amount of \$7,751,470.00. Alternatively, the analysis shows that if the necessary repairs were never done that the damages to the Partnership would be equal to the sum of \$20,646,312.00.

Notwithstanding that more than a year has passed since the May, 2010 date shown in Dr. Fishkind's analysis, the Partnership is still desirous of having the Association complete the necessary repairs and renovations in order to reestablish the use of the property as a condominium resort hotel under the management of the Partnership. To that end, the Partnership requests the following relief:

- a. An order directing the Association to perform the necessary repairs and renovations to the common elements and the unit exteriors in order to allow the Partnership to resume its operation of the hotel as a luxury resort hotel and further directing the Association to assess and collect from the unit owners sufficient funds to pay for same and to pay the money judgments to be entered by the Court for damages.
- b. An order vacating (or directing the bankruptcy court to vacate) the Final Judgment entered by the bankruptcy court in Adversary Proceeding Case No. 8:09-bk-22611-KRM in the Partnership's bankruptcy terminating the Partnership's right to possession of the condominium units, as well as any order in the Association's bankruptcy proceeding that is inconsistent with this Court's appellate opinion.
- c. An order providing for the future appointment of a receiver to operate the Association and assess the unit owners in the event that the Association fails to properly and timely undertake

the repairs and renovations as directed by the Court.

- d. Entry of a money judgment in favor of the Partnership and against the Association in the amount of \$7,751,470.00, plus prejudgment interest from May 1, 2007.
- e. Entry of such other and further orders as may be necessary to provide for restoration of the hotel operation under the management of the Partnership.
- f. Retention of jurisdiction by the Court to oversee the implementation of the above.

If the Court is disinclined for any reason to direct the Association to perform the necessary repairs and renovations and to place the Partnership back in control of the units for purposes of operating a condominium resort hotel, then the Partnership would request that the Court instead render judgment based upon the alternative model under Dr. Fishkind's scenario 2, which model contemplates the repairs are not made and the Partnership thus loses the benefit of the continued ability to operate the hotel. As indicated above, damages under that model are equal to the sum of \$20,646,312.00, to which prejudgment interest should be added from May 1, 2007.

Regardless of which damage model the Court adopts, the Partnership is also entitled to damages in the amount of \$261,459.25, plus prejudgment interest, for post-petition expenses of the Association paid by Partnership as reflected in Partnership's Exhibit 39. Like the pre-petition expenses, the Association did not take issue with any of the specific expenses reflected in the Exhibit, but only asserted that it was not liable for any of the expenses paid by the Partnership, notwithstanding that they are clearly Association expenses under the operative documents.

Under either of the alternatives presented above, the Partnership should also be awarded its attorneys' fees and costs at the trial and appellate levels in an amount to be set by the Court following the submission of whatever affidavits and testimony are required by the Court to establish

the amount of reasonable fees and costs to be awarded.

III. The Recreational Lease Case (Case No.: 8:10-cv-00913-T-23).

The central issue in this adversary proceeding was the contention by the Association that the Recreational Facilities Lease at the Colony was unconscionable. In the Association's bankruptcy proceeding, it elected to reject the Recreational Facilities Lease and the Lease has now been terminated as a result of that rejection. Rejection of the Lease, however, entitles the Appellants in that case to rejection damages pursuant to 11 USC Section 502(b)(6). According to the formula set forth in the Statute, the Appellants are entitled to a judgment for an amount equal to the sum of the rent due pursuant to the Recreational Facilities Lease for a period of three (3) years from the date of filing of the petition.

At trial, the Association's evidence focused solely on the now failed attempt to prove that the Recreational Facilities Lease is unconscionable. This Court has found that the Association did not prove, either statutorily or under the common law test, that the Recreational Facilities Lease was unenforceable. The Association did not contest the evidence appellants presented as to the amount of damages resulting from the Association's rejection of the Recreational Facilities Lease. Pursuant to the calculations set forth in Defendant's exhibits 123, 133 and 134, the following amounts are due:

- a. Rent, per paragraph 6 of the Recreational Facilities Lease, of \$653,000.00 per year for three years;
- b. Real estate taxes, per paragraph 7.2 of the Recreational Facilities Lease of \$81,769.48 for 2007, \$73,734.64 for 2008 and \$73,734.64 for 2009; and
- c. Insurance, per paragraph 7.2 of the Recreational Facilities Lease of \$13,416.00 per year for three years.

The Defendant's uncontested damage total is \$2,228,486.60, to which should be added prejudgment interest at the rate prescribed in paragraph 22.3 of the Lease (10% per annum) from the date of rejection of the Lease.

The specific relief sought by the Appellants in this case is the entry of a money judgment in favor of Appellants and against the Association in the principal amount set forth above, plus prejudgment interest, attorneys' fees and costs in an amount to be determined by the Court and an Order directing assessment of the unit owners to pay same in full. Appellants are entitled to attorneys' fees for enforcement of the Lease pursuant to paragraph 22.6 of the Recreational Facilities Lease.

Finally, if and to the extent necessary to correct the defective rulings of the bankruptcy court as reflected in this Court's order, the Court should direct the bankruptcy court to vacate its rejection of claims number 16, 19, 20 and 21 filed in the Association's bankruptcy and any provisions of the Association's plan of reorganization or the Bankruptcy Court's order confirming that plan that are inconsistent with this Court's appellate opinions.

IV. The Association's Counterclaims

The Court indicated in its order in the renovation/damages case that the Association's counterclaims, which had been "denied as moot" by the bankruptcy court were no longer moot as a result of the reversal by this Court of the bankruptcy court's rulings. It is anticipated that the Association will likely view that ruling as an invitation to have a new trial on the Association's counterclaims. To the contrary, appellants assert that the Association had a full and fair opportunity to introduce whatever evidence it sought to have heard by the bankruptcy court at the trial of this action. Providing the Association with a fresh opportunity to try its counterclaims would be to

provide the Association a “second bite of the apple”. Additionally, the Association did not appeal the denial of the relief sought in its counterclaims and this Court is thus precluded from granting relief to the Association reversing that denial.

To the extent that the Court determines to review the denial on the merits, however, the Court should limit its review to the record in the trial court to determine whether or not there is evidence in the record to sustain the Associations’ counterclaims. Based upon the review of the record, if the Court determines that the association met its burden and proved its counterclaims, the Court should render judgment accordingly. Alternatively, if the Association failed to provide evidence sufficient to sustain its counterclaims at trial, then the Court should enter judgment in favor of appellant and against the Association on the Association’s counterclaims.

It should be noted that the Association apparently made a strategic decision at trial not to introduce evidence sufficient to sustain its counterclaims, whether in anticipation of a favorable ruling on the main claims or for some other reason. While the Association may now regret having failed to avail itself of the opportunity to introduce evidence in support of its counterclaims, the fact is that the Association had its chance to try its counterclaims and should not be afforded a second opportunity to try those claims.

Respectfully submitted,

ICARD, MERRILL, CULLIS, TIMM,
FUREN & GINSBURG, P.A.
2033 Main Street, Suite 600
Sarasota, Florida 34237
941/366-8100

/s/ Charles J. Bartlett
CHARLES J. BARTLETT, ESQ.
Florida Bar No. 273422
Attorneys for Appellants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of August, 2011, a true and correct copy of the foregoing has been provided through the Court's CM/ECF Noticing System and/or by U.S. Mail to:

Colony Beach & Tennis Club Assn., Inc.
1620 Gulf of Mexico Drive
Longboat Key, FL 34228

Jeffrey W. Warren, Esq.
Buss Ross, P.A.
P.O. Box 3913
Tampa, Florida 33601-3913

United States Trustee
Attn: Benjamin E. Lambers
501 E. Polk Street, Suite 1200
Tampa, Florida 33602

M. Lewis Hall, III, Esq.
Kevin Bruning, Esq.
Williams Parker
200 S. Orange Avenue
Sarasota, FL 34236-6796

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

In re

COLONY BEACH & TENNIS CLUB
ASSOCIATION, INC.,

_____ /

COLONY BEACH & TENNIS CLUB, Ltd.,
RESORTS MANAGEMENT, INC., and
COLONY BEACH & TENNIS CLUB, INC.,

Appellants,

v.

CASE NO.: 8:09-cv-2560-T-23

COLONY BEACH & TENNIS CLUB
ASSOCIATION, INC.,

Appellee.

_____ /

ORDER

The Colony Beach & Tennis Club needs repair, and Colony Beach & Tennis Club, Ltd., (“the Partnership”) and Colony Beach & Tennis Club Association, Inc., (“the Association”) dispute who must pay. Reversing the bankruptcy court, a July 27, 2011, order (Doc. 28; 2011 WL 3169486) answers that the Association, under both the governing documents of the Colony and the Florida Condominium Act, is responsible for repair and maintenance of the Colony’s common element. The order (with which, for obvious reason, familiarity is assumed) stays the effect of the order to permit

consultation with the parties and pending a subsequent order, this order, on the form of the remedy.

Two Proposals

In response to a specific invitation, each party submitted a paper recommending a remedy (in this appeal and in a companion appeal, Case No. 8:10-cv-913-T-23), and a hearing occurred. (Doc. 33)

The Association favors (Doc. 29) remand to the bankruptcy court for a new trial to calculate damages and to assess the validity of the Association's counter-claims. The Partnership prefers (Doc. 30) that the district court enter a judgment and close the case without a return to the bankruptcy court. Specifically, the Partnership requests a money judgment (compensating several forms of damage, enumerated below) and an order that directs the Association to repair the Colony's common elements, that authorizes the appointment of a receiver if repair does not punctually occur, and that retains jurisdiction "to oversee implementation" of the order to repair.

The Partnership's proposal is complicated by the Partnership's loss of the Colony's units in a bankruptcy proceeding, Case No. 8:09-bk-22611-KRM. Noting that the Partnership would retain possession but for the Association's wrongful refusal to repair, the Partnership seeks "an order vacating (or directing the bankruptcy court to vacate) the Final Judgment [that] terminat[es] the Partnership's right to possession . . . , as well as any order in the Association's bankruptcy proceeding that is inconsistent with this Court's Appellate opinion." (Doc. 30 at 3)

If the Partnership cannot regain the Colony units, the Partnership requests in the alternative a larger money judgment. If restored to ownership of the Colony units (as

repaired in accord with the governing documents), the Partnership seeks \$7,751,470.00 in damages; if denied restoration of ownership of the Colony units, the Partnership seeks \$20,646,312.00 in damages. In either event, the Partnership claims \$2,238,732.99 for Association expenses that the Partnership paid after the Association's unilateral cessation of payments in May, 2007, but before the Association's bankruptcy petition in November, 2008, and the Partnership claims \$261,459.25 for Association expenses that the Partnership paid after the Association's bankruptcy petition. For each sum the Partnership demands pre-judgment interest. The Partnership moved (Doc. 31) for attorney fees and costs, which motion the Partnership was instructed (Doc. 36) to submit anew after a final judgment.

A Delicate Matter

In August, 2010, the bankruptcy court converted the Partnership's bankruptcy from a Chapter 11 re-organization to a Chapter 7 liquidation and ejected the Partnership from possession of the Colony units. 8:09-bk-22611 (Doc. 336); Case No. 8:10-ap-242-KRM (Doc. 22).

The Association's counsel explained the purpose of the ejectment at a hearing before the bankruptcy judge:

What we cannot have [] is this situation where . . . the unit owners [] come back and restore or rebuild their units, and then [] the Partnership [] claim[s], "Aha, now we're happy, you've done what we wanted to do at your expense, we're going to take back possession and we're going to operate the hotel like we see fit under the Partnership. That's the reason why the remedy of ejectment is so important[,] to end that "aha" moment that would occur somewhere down the road

8:10-ap-242 (Doc. 26 at 27). The July 27th order reversing the bankruptcy court eviscerates the Association's stated purpose for ejecting the Partnership. Net of any consideration of the complexities of bankruptcy, the Partnership rightly should regain the Colony units with the common elements repaired at the Association's expense.

Unfortunately, the bankruptcies of both the Association and the Partnership continued apace while this action was for eighteen months pending on appeal. In consequence, the Partnership's counsel candidly observed:

Frankly, [return of possession to the Partnership] certainly is the more difficult path in terms of the things that need to be done. The simple way to deal with this case, although it's not the way the Partnership prefers, . . . is to treat what's done as done, make an award of damages to the Partnership that would compensate the Partnership for what it lost, and move on. And if that's what the court's pre-disposition is, then while that's not our preference, that's certainly an outcome the circumstances would warrant.

(Doc. 33 at 13) An instruction to the bankruptcy court to restore the Partnership's possession of the Colony units "though the heavens fall" could introduce into the bankruptcy of the Association or of the Partnership some latent but potent mischief. With each bankruptcy at a mature stage, the bankruptcy court is favorably situated to recommend a result that maximally vindicates the Partnership's rights and minimally upsets in either bankruptcy the decisions that are unduly difficult or impossible to reverse.

Although the possession of the Colony units requires the bankruptcy court's consideration, the damages owed to the Partnership does not. That matter has been fully tried to completion. At trial, the Partnership presented an expert, Dr. Henry Fishkind, who calculated the Partnership's damages under four scenarios, two of which

remain pertinent. Dr. Fishkind calculates damages of \$7,751,470 with a return of the Colony units, common elements repaired, to the Partnership and damages of \$20,646,312 with no return.

The July 27th order concludes that Dr. Fishkind's analysis is reasonable. Dr. Fishkind conducted "a conventional damages calculation" with "modest and reasonable" assumptions about the Partnership's revenue after repair and with proper estimates of the Partnership's position "but for" the Association's wrongful conduct. (Doc. 28 at 30-35; 2011 WL 3169486 at *15-*17) The Partnership at trial provided valid damages calculations.

The Association's request for further fact-finding on damages is misplaced. The Association's few criticisms of Dr. Fishkind's work are repeated in the bankruptcy court's order and are answered in the July 27th order. See Case No. 8:08-ap-567-KRM (Doc. 96 at 33-34), (Doc. 104 at 45-48). The Association entered no alternative measure of damages into the record. Arguing that the deterioration of the Colony is the Partnership's fault and that the Colony's design is "functionally obsolete," the Association pursued an all-or-nothing strategy. The Association's argument was not that the Partnership should receive less money but rather that the Partnership must receive no money. The argument fails. The Association provides no cogent reason for a further investigation into damages. A trial occurred; no second trial is needed.

A Narrow Opportunity

The July 27th order contemplates a reconsideration of the Association's counter-claims, which the bankruptcy court declared "moot." The Partnership correctly submits that the Association enjoyed a full and fair opportunity to introduce to the bankruptcy

court evidence supporting the counter-claims. A new argument on the counter-claims is properly bounded by the record that the parties constructed at trial. Yet, with no addition to the record, the Association's counter-claims are probably futile because the bankruptcy court ruled, and the district court agrees, that the Association failed to prove damages. Most or all of the record is transparently extraneous to the Association's counter-claims. However, the record is voluminous, and the Association seeks an opportunity to search for an offset to the Partnership's damages. If (and only if) the bankruptcy court agrees that a second look at the existing record (and only the existing record) is necessary to confirm that the Association evidenced no damages, a non-evidentiary hearing on the counter-claims may occur.

On the other hand, the itemized accounts that support the Partnership's demand for pre-petition and post-petition damages are detailed and exhaustive. The July 27th order establishes that the Partnership paid the pre-petition and post-petition expenditures to maintain the Colony's common elements on the Association's behalf. Accordingly, the pre-petition and post-petition damages are not subject to question on remand.

An Instruction

Under Bankruptcy Rule 9033(d) ("The district court may . . . re[-]commit" a non-core proceeding "to the bankruptcy judge with instructions"), this action is re-committed to the bankruptcy court, which is directed to render proposed findings of fact and conclusions of law consistent with and implementing the following instructions.

1. The bankruptcy court shall either (1) vacate, amend, or issue each order necessary and appropriate to return the Partnership to possession of the Colony units

and recommend an award of \$7,751,470 to the Partnership or (2) leave the Partnership without possession of the Colony units and recommend an award of \$20,646,312 to the Partnership.

2. The bankruptcy court may in its discretion re-consider the finding that the Association proved no damages and allow the Association to establish the counter-claims and to identify evidence of damage based solely on the extant record. Alternatively, the bankruptcy court should affirm that the Association failed to show damages and conclude that the counter-claims are without foundation.

The stay is **DISSOLVED** and this action is **RE-COMMITTED** for proceedings consistent with the July 27th order and this order and for the issuance of a report and recommendation.

ORDERED in Tampa, Florida, on October 12, 2011.



STEVEN D. MERRYDAY
UNITED STATES DISTRICT JUDGE

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH JUDICIAL CIRCUIT**

**COLONY BEACH & TENNIS CLUB
ASSOCIATION, INC.,**

Debtor.

**COLONY BEACH & TENNIS CLUB
ASSOCIATION, INC.**

Appellant,

v.

CASE NO.: 11-14836

CASE NO.: 8:10-cv-00913-T-23

**COLONY BEACH & TENNIS CLUB, INC.
and COLONY BEACH, INC.,**

Appellees.

**APPELLEES' MOTION TO DISMISS APPEAL
AND INCORPORATED MEMORANDUM OF LAW IN SUPPORT**

COME NOW, the Appellees, COLONY BEACH & TENNIS CLUB, INC. and COLONY BEACH, INC., by and through their undersigned counsel, and file this Motion to Dismiss Appeal and Incorporated Memorandum of Law in Support, and would state:

I. Introduction and brief facts.

Simply put, the Orders on appeal in the instant case are not "final," appealable orders. The District Court remanded the matter to the Bankruptcy Court with instructions to make further proposed findings of fact and recommendations concerning the ultimate relief to be awarded by the District Court in accord with the Orders on appeal in this case.

By way of history, the instant appeal concerns The Colony Beach & Tennis Club (the “Colony”), which was, for decades, an internationally known resort. The resort earned its reputation, in part, from its tennis facilities. The recreational facilities were not simply “amenities,” they were a major part of the hotel’s reputation and are a major draw for hotel guests world wide. When the Colony was formed, Colony Beach, Inc’s predecessor in interest entered into a Recreational Facilities Lease with the Association concerning the recreational facilities, which included: a swimming pool, twelve tennis courts, a locker room condominium unit, and a meeting room and clubhouse condominium unit.

The Colony presented a unique business model in which unit owners invested in a limited partnership, specifically, the Colony Beach & Tennis Club, Ltd. (the “Partnership”), with their investment secured by a condominium unit that each Limited Partner must purchase in order to invest and become a Limited Partner. Historically, the Partnership operated the hotel and maintained the recreational and other facilities. For decades, the Partnership was able to pay the costs attendant therewith through hotel revenues. However, as one would expect, over decades of use, the buildings deteriorated. Couple this with recent storm activity and major repairs and renovations became necessary.

For the first time, the unit owners were called upon to pay their expenses. They, by and through the Association, flatly refused. The Association decided instead to systematically pick apart the hotel operation and claim that every dollar spent by the Partnership over the years should have belonged to it such that the unit owners should *never* be called upon to pay anything. Ultimately, the Association filed Chapter 11 Bankruptcy in order to avoid its obligations to the Partnership. Part of the Association’s strategy involved a challenge to the recreational facilities lease. The instant

appeal concerns the adversary proceeding in which the Association challenged the validity and enforceability of the Recreation Lease.

The trial in this case took place over two days, May 18, 2009-May 19, 2009. Following trial, the Bankruptcy Court entered its Memorandum Opinion and Order. In one of the Orders on appeal, which this Court rendered on July 27, 2011, the Court emphatically reversed the decision of the Bankruptcy Court, finding, among other things, that 1) the Bankruptcy Court should never have entered a final judgment in the case as it was a non-core matter such that the Bankruptcy Court should have submitted proposed findings of fact and conclusions of law to the District Court which, in turn, should have entered the final judgment after a *de novo* review, and 2) that the Association failed to establish that the Recreation Lease was unconscionable. In the July 27, 2011 Order, the Court ordered that the parties brief the Court on the remedies which may be provided in light of the reversal. The parties complied and the Court heard oral argument on the matter, resulting in the other Order on appeal. Specifically, on October 12, 2011, the Court entered the other Order on appeal. After discussing the respective parties' arguments, this Court entered the following ruling:

Under Bankruptcy Rule 9033(d) ("The district court may . . . re[-]commit" a non-core proceeding "to the bankruptcy judge with instructions"), this action is remanded to the bankruptcy court, which is directed to render proposed findings of fact and conclusions of law in accord with the following instructions.

1. The bankruptcy court is directed to vacate the rejection of claims 16, 19, 20, and 21, which arise from the rejection of the Lease.
2. After considering argument from the parties based on only the extant record, the bankruptcy court shall recommend an amount of damages owed to the Partnership and the other lessors for the Association's rejection of the Lease. The bankruptcy court should not hear argument on either mitigation or offset, for which the Association's opportunity to argue has passed.
3. The Partnership fails to explain why alteration of the Association's

bankruptcy re-organization or the bankruptcy court's confirmation is necessary and the Partnership cites no provision of the re-organization or the confirmation that purportedly conflicts with the July 27th order. If the Partnership seeks a specific change to the reorganization or the bankruptcy court's confirmation, the Partnership may propose the change to the bankruptcy court and explain both why the change is necessary and how the change is authorized. The bankruptcy court may consider the Partnership's proposal and act accordingly.

The stay is **VACATED** and this action is **RE-COMMITTED** for proceedings consistent with the July 27th order and this order

As is clear from the foregoing, the Court did not enter a "final," appealable Order. Rather, the Court remanded the case to the Bankruptcy Court to make further proposed findings and recommendations in keeping with the dictates of the July 27, 2011 Order and the October 12, 2011 Order. Based on these proposed findings and recommendations, the District Court would enter a Final Judgment which, at that time, would be appealable to this Court.

II. Discussion.

The appealability of Bankruptcy Orders is governed by 28 U.S.C. §158, entitled "Appeals," which provides, in relevant part, as follows:

- (a) The district courts of the United States shall have jurisdiction to hear appeals
 - (1) from final judgments, orders, and decrees;
 - (2) from interlocutory orders and decrees issued under section 1121(d) of title 11 increasing or reducing the time periods referred to in section 1121 of such title; and
 - (3) with leave of the court, from other interlocutory orders and decrees; and, with leave of the court, from interlocutory orders and decrees, of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title. An appeal under this subsection shall be taken only to the district court for the judicial district in which the bankruptcy judge is serving.

In keeping with these principles, 28 U.S.C. §1291, entitled "Final decisions of district courts," provides as follows:

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

The Orders on appeal in this case are 1) *not* "final," 2) they were not issued under "1121(d) of title 11" and, 3) the Appellant has *not* obtained leave of court to commence the instant appeals.

As the Eleventh Circuit, in In re Atlas, 210 F.3d 1305 (11th Cir. (Fla.) 2000), held:

"The jurisdiction of this court in bankruptcy proceedings is limited to final decisions of the district court." In re Culton, 111 F.3d 92, 93 (11th Cir.1997). "[A] final order in a bankruptcy proceeding is one that ends the litigation on the merits and leaves nothing for the court to do but execute its judgment." Id. An order granting judgment on the issue of liability but requiring an assessment of damages is not considered an appealable final order for purposes of 28 U.S.C. § 1291. See Liberty Mutual Ins. Co. v. Wetzel, 424 U.S. 737, 742, 96 S.Ct. 1202, 1205-06, 47 L.Ed.2d 435 (1976).

See also, Commodore Holdings, Inc. v. Exxon Mobil Corp., 331 F.3d 1257 (11th Cir. (Fla.) 2003)(holding that "[t]his court is without jurisdiction to review an appeal of a bankruptcy order unless it is a final decision. 28 U.S.C. § 158(d). [internal citation omitted] 'A final order in a bankruptcy proceeding is one which ends the litigation on the merits and leaves nothing for the court to do but execute judgment.'"); In re Charter Co., 778 F.2d 617 (11th Cir. (Fla.) 1985)(holding that order which permitted debtors, as affiliated entities, to continue prepetition cash management practices involving transfers of funds between them, was an interlocutory order which was not appealable as of right where order left unresolved issue of whether debtors had already made unlawful transfers and did not address possible remedies if such transfers had taken place.); In re

Hillsborough Holdings Corp., 116 F.3d 1391 (11th Cir. (Fla.) 1997)(holding that, for purposes of appeal, “final orders” are those that end litigation on the merits and leave nothing for court to do but execute judgment.); In re Boca Arena, Inc., 184 F.3d 1285 (11th Cir. (Fla.) 1999)(holding that, while bankruptcy court order need not be the last order concluding bankruptcy proceeding as whole, in order to qualify as “final” order for purpose of appeal, it must nonetheless finally resolve adversary proceeding, controversy, or entire bankruptcy proceeding on merits and leave nothing for court to do but to execute its judgment.); Commodore Holdings, Inc. v. Exxon Mobil Corp., 331 F.3d 1257 (11th Cir. (Fla.) 2003)(holding that a “final order” in a bankruptcy proceeding, from which an appeal will lie as of right, is one which ends litigation on merits and leaves nothing for court to do but execute judgment. 28 U.S.C.A. § 158(d)).

Perhaps most closely on point with regard to the procedural posture of this appeal, the Fifth Circuit, in In re Caddo Parish-Villas South, Ltd., 174 F.3d 624 (5th Cir. (Tex.) 1999), held that a District Court’s order is *not* a “final order” that may be appealed to the Court of Appeals, where that order reverses an order of the bankruptcy court and remands the case to the bankruptcy court for “significant further proceedings.” The court noted that whether a district court order remanding a case to the bankruptcy court requires “significant further proceedings” for purposes of determining whether the order is a “final” or not, turns on whether the order calls on the bankruptcy court to perform a judicial function or a purely ministerial function. The court observed that judicial functions entail significant further proceedings while ministerial functions do not. Finally, the court concluded that the fact that a legal determination may be relatively easy to make because it is governed by a clear rule of law does not transform a judicial function into a ministerial function.

The Orders on appeal in this case resolved several issues, but certainly not to the point of

“finality” that is required for the immediate appeal of the Orders. The fact is, the Orders on appeal do not award the Appellees any damages, or any other relief for that matter. Rather, the Orders set the stage for the Bankruptcy Court to make further proposed findings and recommendations, with the ultimate Final Judgment to be issued by the District Court. As such, the Orders on appeal are, as a matter of law, non-final and, therefore, not appealable. See also, In re Donovan, 532 F.3d 1134 (11th Cir. Fla. 2008)(holding that, to be “final,” a bankruptcy court order must completely resolve all of the issues pertaining to a discrete claim, *including issues as to the proper relief*.); In re Saber, 264 F.3d 1317 (11th Cir. 2001)(holding that a “final judgment” of a bankruptcy court, from which an appeal will lie, is one that gives one party what they want; either plaintiff receives the relief he/she sought, or defendant receives judgment ending controversy.); In re Atlas, 210 F.3d 1305 (11th Cir. (Fla.) 2000)(holding that an order granting judgment on the issue of liability but requiring an assessment of damages is not considered an appealable final order.).

Specifically, the District Court, in its remand to the Bankruptcy Court, directed the Bankruptcy Court to consider argument from the parties (based only on the extant record) and to thereafter recommend an amount of damages owed to the Partnership and the other lessors based upon the Association’s rejection of the lease. Additionally, the District Court provided the opportunity for the Partnership to seek further changes to the prior orders entered by the Bankruptcy Court and for the Bankruptcy Court to consider same and act accordingly. In light of the District Court’s remand of the matter to the Bankruptcy Court with instructions, it will be necessary for the Bankruptcy Court to further consider the matters described above and then to enter proposed findings of fact, conclusions of law and a recommended amount of damages for further review by the District Court, at which time a final judgment could then be entered by the District Court in accordance with

28 U.S.C. §157(c)(1). Only then will the judicial labor in this case be complete to the point that an appeal from an adverse final judgment by the District Court would be appealable. To determine otherwise would be in contravention of existing law and would provide for the likelihood of successive appeals.

III. Conclusion.

In sum, the Orders on appeal in this case are not "final" as would provide the Appellant with the right to immediate review. Rather, the Orders remand the matter to the Bankruptcy Court to resolve several issues outlined by the Court and to provide further proposed findings and recommendations to the District Court. As such, the Orders are not appealable at this time and the Court should dismiss the instant appeal.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th day of October, 2011, a true and correct copy of the foregoing has been provided by U.S. Mail to:

Colony Beach & Tennis Club Assn, Inc.
1620 Gulf of Mexico Drive
Longboat Key, FL 34228

Jeffrey W. Warren, Esquire
Bush Ross PA
P.O. Box 3913
Tampa, FL 33601-3913

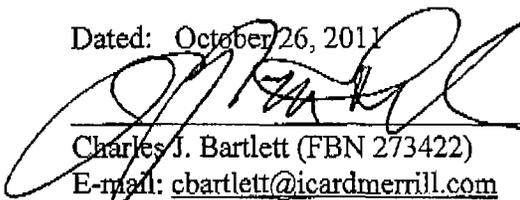
United States Trustee
Attn: Benjamin E. Lambers
501 East Polk Street, Suite 1200
Tampa, FL 33602

M. Lewis Hall, III, Esquire
Kevin Bruning, Esquire
William Parker
200 S. Orange Avenue
Sarasota, FL 34236-6796

Robert A. Soriano, Esquire
625 East Twiggs Street, Suite 100
Tampa, FL 33602

Steven D. Hutton, Esquire
Steven D. Hutton, P.L.
240 South Pineapple Avenue
Suite 801
Sarasota, FL 34236

Dated: October 26, 2011



for:

Charles J. Bartlett (FBN 273422)

E-mail: cbartlett@icardmerrill.com

Mark C. Dungan (FBN 0106666)

E-mail: mdungan@icardmerrill.com

ICARD, MERRILL, CULLIS, TIMM, FUREN &
GINSBURG, P.A.

2033 Main Street, Suite 600

Sarasota, Florida 34237

Telephone: (941) 366-8100

Facsimile: (941) 366-6384

Attorneys for Colony Beach & Tennis Club, Inc. and
Colony Beach, Inc.

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH JUDICIAL CIRCUIT**

**COLONY BEACH & TENNIS CLUB
ASSOCIATION, INC.,**

Debtor.

**COLONY BEACH & TENNIS CLUB
ASSOCIATION, INC.**

Appellant,

v.

**CASE NO.: 11-14838
L/T CASE NO.: 8:09-cv-2560-T-23**

**COLONY BEACH & TENNIS CLUB, LTD.,
RESORTS MANAGEMENT, INC., and
COLONY BEACH & TENNIS CLUB, INC.,**

Appellees.

**APPELLEES' MOTION TO DISMISS APPEAL
AND INCORPORATED MEMORANDUM OF LAW IN SUPPORT**

COME NOW, the Appellees, COLONY BEACH & TENNIS CLUB, LTD., RESORTS MANAGEMENT, INC., and COLONY BEACH & TENNIS CLUB, INC., by and through their undersigned counsel, and file this Motion to Dismiss Appeal and Incorporated Memorandum of Law in Support, and would state:

I. Introduction and brief facts.

Simply put, the Orders on appeal in the instant case are not "final," appealable orders. The District Court remanded the matter to the Bankruptcy Court with instructions to make further proposed findings of fact and recommendations concerning the ultimate relief to be awarded by the District Court in accord with the Orders on appeal in this case.

By way of history, the instant appeal concerns The Colony Beach & Tennis Club (the "Colony"), which was, for decades, an internationally known tennis resort. The initial Complaint filed by the COLONY BEACH & TENNIS CLUB, LTD. (the "Partnership") in state court concerned a dispute between the Partnership and the Association regarding repair and refurbishment costs associated with the Colony and the ultimate financial responsibility for the costs. In essence, the Partnership alleged that it was the job of the unit owners pursuant to the operative documents to bear the cost of repair and refurbishment of the unit exteriors and common elements.

In 2005-2006, despite repeated demand, the Association refused to assess the unit owners for much needed repairs and costs attendant with maintenance and upkeep of the exterior of the units and common elements. The Partnership filed suit in state court and, in response, the Association filed Chapter 11 Bankruptcy.

The state court case was tried as an adversary proceeding in the bankruptcy case, resulting in a Final Judgment in the Association's favor. The Bankruptcy Court adopted the Association's proposed order nearly verbatim, which included a highly pejorative, and often inaccurate, set of factual findings and equally erroneous conclusions of law. The District Court reversed the Bankruptcy Court's Order on appeal. Specifically, in one of the Orders on appeal in this proceeding (which the Court rendered on July 27, 2011), the District Court emphatically reversed the decision of the Bankruptcy Court, finding, among other things, that 1) the Bankruptcy Court should never have entered a final judgment in the case as it was a non-core matter such that the Bankruptcy Court should have submitted proposed findings of fact and conclusions of law to the District Court which, in turn, should have entered the final judgment after a *de novo* review, and 2) that the governing documents do, in fact, impose on the Association the responsibility to pay for the necessary

maintenance and repairs. In the July 27, 2011 Order, the District Court ordered that the parties brief the court on the remedies which should be provided in light of the reversal. The parties complied and the Court heard oral argument on the matter, resulting in the other Order on appeal in this proceeding. Specifically, on October 12, 2011, the District Court entered the other Order on appeal. In it, after discussing the respective parties' arguments, the Court entered the following ruling:

Under Bankruptcy Rule 9033(d) ("The district court may . . . re[-]commit" a non-core proceeding "to the bankruptcy judge with instructions"), this action is re-committed to the bankruptcy court, which is directed to render proposed findings of fact and conclusions of law consistent with and implementing the following instructions.

1. The bankruptcy court shall either (1) vacate, amend, or issue each order necessary and appropriate to return the Partnership to possession of the Colony units and recommend an award of \$7,751,470 to the Partnership or (2) leave the Partnership without possession of the Colony units and recommend an award of \$20,646,312 to the Partnership.
2. The bankruptcy court may in its discretion re-consider the finding that the Association proved no damages and allow the Association to establish the counterclaims and to identify evidence of damage based solely on the extant record. Alternatively, the bankruptcy court should affirm that the Association failed to show damages and conclude that the counter-claims are without foundation.

The stay is **DISSOLVED** and this action is **RE-COMMITTED** for proceedings consistent with the July 27th order and this order and for the issuance of a report and recommendation.

As is clear from the foregoing, the Court did not enter a "final," appealable Order. Rather, the Court remanded the case to the Bankruptcy Court to make further proposed findings and recommendations in keeping with the dictates of the July 27, 2011 Order and the October 12, 2011 Order. Based on these proposed findings and recommendations, the District Court would enter a Final Judgment which, at that time, would be appealable to this Court.

II. Discussion.

The appealability of Bankruptcy Orders is governed by 28 U.S.C. §158, entitled "Appeals,"

which provides, in relevant part, as follows:

- (a) The district courts of the United States shall have jurisdiction to hear appeals
 - (1) from final judgments, orders, and decrees;
 - (2) from interlocutory orders and decrees issued under section 1121(d) of title 11 increasing or reducing the time periods referred to in section 1121 of such title; and
 - (3) with leave of the court, from other interlocutory orders and decrees; and, with leave of the court, from interlocutory orders and decrees, of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title. An appeal under this subsection shall be taken only to the district court for the judicial district in which the bankruptcy judge is serving.

In keeping with these principles, 28 U.S.C. §1291, entitled "Final decisions of district courts," provides as follows:

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292© and (d) and 1295 of this title.

The Orders on appeal in this case are 1) *not* "final," 2) they were not issued under "1121(d) of title 11," and 3) the Appellant has *not* obtained leave of court to commence the instant appeals.

As the Eleventh Circuit Court of Appeals, in In re Atlas, 210 F.3d 1305 (11th Cir. (Fla.) 2000), held:

"The jurisdiction of this court in bankruptcy proceedings is limited to final decisions of the district court." In re Culton, 111 F.3d 92, 93 (11th Cir.1997). "[A] final order in a bankruptcy proceeding is one that ends the litigation on the merits and leaves nothing for the court to do but execute its judgment." Id. An order granting judgment on the issue of liability but requiring an assessment of damages is not considered an appealable final order for purposes of 28 U.S.C. § 1291. See Liberty Mutual Ins. Co. v. Wetzel, 424 U.S. 737, 742, 96 S.Ct.

1202, 1205-06, 47 L.Ed.2d 435 (1976).

See also, Commodore Holdings, Inc. v. Exxon Mobil Corp., 331 F.3d 1257 (11th Cir. (Fla.) 2003)(holding that “[t]his court is without jurisdiction to review an appeal of a bankruptcy order unless it is a final decision. 28 U.S.C. § 158(d). [internal citation omitted] ‘A final order in a bankruptcy proceeding is one which ends the litigation on the merits and leaves nothing for the court to do but execute judgment.’”); In re Charter Co., 778 F.2d 617 (11th Cir. (Fla.) 1985)(holding that order which permitted debtors, as affiliated entities, to continue prepetition cash management practices involving transfers of funds between them, was an interlocutory order which was not appealable as of right where order left unresolved issue of whether debtors had already made unlawful transfers and did not address possible remedies if such transfers had taken place.); In re Hillsborough Holdings Corp., 116 F.3d 1391 (11th Cir. (Fla.) 1997)(holding that, for purposes of appeal, “final orders” are those that end litigation on the merits and leave nothing for court to do but execute judgment.); In re Boca Arena, Inc., 184 F.3d 1285 (11th Cir. (Fla.) 1999)(holding that, while bankruptcy court order need not be the last order concluding bankruptcy proceeding as whole, in order to qualify as “final” order for purpose of appeal, it must nonetheless finally resolve adversary proceeding, controversy, or entire bankruptcy proceeding on merits and leave nothing for court to do but to execute its judgment.); Commodore Holdings, Inc. v. Exxon Mobil Corp., 331 F.3d 1257 (11th Cir. (Fla.) 2003)(holding that a “final order” in a bankruptcy proceeding, from which an appeal will lie as of right, is one which ends litigation on merits and leaves nothing for court to do but execute judgment. 28 U.S.C.A. § 158(d)).

Perhaps most closely on point with regard to the procedural posture of this appeal, the Fifth Circuit, in In re Caddo Parish-Villas South, Ltd., 174 F.3d 624 (5th Cir. (Tex.) 1999), held that a

District Court's order is *not* a "final order" that may be appealed to the Court of Appeals, where that order reverses an order of the bankruptcy court and remands the case to the bankruptcy court for "significant further proceedings." The court noted that whether a district court order remanding a case to the bankruptcy court requires "significant further proceedings" for purposes of determining whether the order is a "final" or not, turns on whether the order calls on the bankruptcy court to perform a judicial function or a purely ministerial function. The court observed that judicial functions entail significant further proceedings while ministerial functions do not. Finally, the court concluded that the fact that a legal determination may be relatively easy to make because it is governed by a clear rule of law does not transform a judicial function into a ministerial function.

The Orders on appeal in this case resolved several issues, but certainly not to the point of "finality" that is required for the immediate appeal of the Orders. The fact is, the Orders on appeal do not award the Appellees any damages, or any other relief for that matter. Rather, the Orders set the stage for the Bankruptcy Court to make further proposed findings and recommendations, with the ultimate Final Judgment to be issued by the District Court. As such, the Orders on appeal are, as a matter of law, non-final and, therefore, not appealable. See also, In re Donovan, 532 F.3d 1134 (11th Cir. Fla. 2008)(holding that, to be "final," a bankruptcy court order must completely resolve all of the issues pertaining to a discrete claim, *including issues as to the proper relief*.); In re Saber, 264 F.3d 1317 (11th Cir. 2001)(holding that a "final judgment" of a bankruptcy court, from which an appeal will lie, is one that gives one party what they want: either plaintiff receives the relief he/she sought, or defendant receives judgment ending controversy.); In re Atlas, 210 F.3d 1305 (11th Cir. (Fla.) 2000)(holding that an order granting judgment on the issue of liability but requiring an assessment of damages is not considered an appealable final order.).

Specifically, and without limitation, while the District Court provided specific instructions to the Bankruptcy Court on remand as to a number of matters, the District Court left it up to the Bankruptcy Court on remand to either return the Partnership to possession of the condominium units and recommend an award of \$7,751,470.00 to the Partnership or, alternatively, to leave the Partnership without possession of the Colony units and recommend an award of \$20,646,312.00 to the Partnership. Additionally, the District Court permitted the Bankruptcy Court in its discretion to reconsider the finding that the Association proved no damages and to allow the Association to identify evidence of damages proved at trial in the extant record. Since the District Court determined that this was a non-core proceeding, the Bankruptcy Court will then, following remand, again make proposed findings of fact and conclusions of law, following which the District Court will consider those findings and recommendations and enter a final judgment as provided in 28 U.S.C. §157(c)(1). Only then will the judicial labor in this case be complete to the point that an appeal from an adverse final judgment entered by the District Court would be appealable. To determine otherwise would be in contravention of existing law and would provide for the likelihood of successive appeals.

III. Conclusion.

In sum, the Orders on appeal in this case are not "final" as would provide the Appellant with the right to immediate review. Rather, the Orders remand the matter to the Bankruptcy Court to resolve several issues outlined by the Court and to provide further proposed findings and recommendations to the District Court. As such, the Orders are not appealable at this time and the Court should dismiss the instant appeal.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of October, 2011, a true and correct copy of the foregoing has been provided by U.S. Mail to:

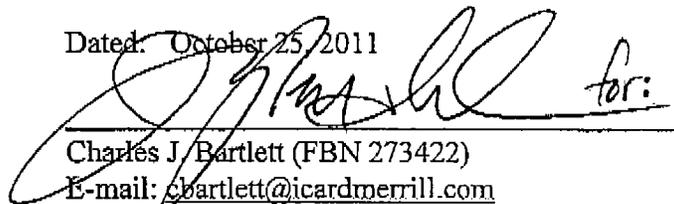
Colony Beach & Tennis Club Assn, Inc.
1620 Gulf of Mexico Drive
Longboat Key, FL 34228

Jeffrey W. Warren, Esquire
Bush Ross PA
P.O. Box 3913
Tampa, FL 33601-3913

United States Trustee
Attn: Benjamin E. Lambers
501 East Polk Street, Suite 1200
Tampa, FL 33602

M. Lewis Hall, III, Esquire
Kevin Bruning, Esquire
William Parker
200 S. Orange Avenue
Sarasota, FL 34236-6796

Dated: October 25, 2011

 for:

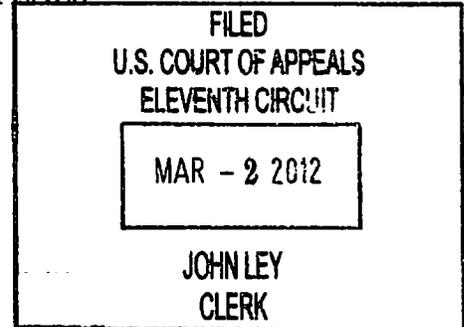
Charles J. Bartlett (FBN 273422)
E-mail: cbartlett@icardmerrill.com
Mark C. Dungan (FBN 0106666)
E-mail: mdungan@icardmerrill.com

ICARD, MERRILL, CULLIS, TIMM, FUREN &
GINSBURG, P.A.
2033 Main Street, Suite 600
Sarasota, Florida 34237
Telephone: (941) 366-8100
Facsimile: (941) 366-6384
Attorneys for Colony Beach & Tennis Club, Inc. and
Colony Beach, Inc.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 11-14838-F



In Re: COLONY BEACH & TENNIS CLUB
ASSOCIATION, INC.,

Debtor.

COLONY BEACH & TENNIS CLUB, LTD.,
RESORTS MANAGEMENT, INC.,
COLONY BEACH & TENNIS CLUB, INC.,

Plaintiffs-Appellees,

versus

COLONY BEACH & TENNIS CLUB ASSOCIATION, INC.,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida

Before: TJOFLAT, BARKETT, and MARTIN, Circuit Judges.

BY THE COURT:

The appellees' motion to dismiss the appeal for lack of jurisdiction is GRANTED. The district court's July 27, 2011 and October 12, 2011 orders are not final decisions under 28 U.S.C. § 158(d). *See Barben v. Donovan (In re Donovan)*, 532 F.3d 1134, 1136 (11th Cir. 2008); *Guy v. Dzikowski (In re Atlas)*, 210 F.3d 1305, 1307 (11th Cir. 2000). The orders require more than

performance of a ministerial duty. *See Briglevich v. Rees (In re Briglevich)*, 847 F.2d 759, 760-61 (11th Cir. 1988).

Nor do the orders fall within a recognized exception to the final-judgment rule. The issues presented are reviewable on appeal from a final judgment, the issues presented are not fundamental to the further conduct of the case, and the appellant has not alleged irreparable injury. *See TCL Investors v. Brookside Sav. & Loan Ass'n (In re TCL Investors)*, 775 F.2d 1516, 1518-19 (11th Cir. 1985); *Lockwood v. Snookies, Inc. (In re F.D.R. Hickory House, Inc.)*, 60 F.3d 724, 727 (11th Cir. 1995); *Charter Co. v. Prudential Ins. Co. of Am. (In re Charter Co.)*, 778 F.2d 617, 622 (11th Cir. 1985).

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

IN RE: Chapter 7 Case
COLONY BEACH & TENNIS CLUB, LTD., Case No. 8:09-bk-22611-KRM
Debtor.

**TRUSTEE'S MOTION TO (I) VACATE FINAL JUDGMENT
AND ORDER GRANTING RELIEF OF EJECTMENT
AND (II) ENFORCE REMAND**

William Maloney, the Chapter 7 trustee (the "Trustee") for the bankruptcy estate of Colony Beach & Tennis Club, Ltd. (the "Debtor" or the "Partnership"), by and through undersigned counsel, and pursuant to Fed. R. Civ. P. 60(b) and 11 U.S.C. § 105, files this Motion to (i) Vacate Final Judgment and Order Granting Relief of Ejectment and (ii) Enforce Remand (the "Motion"). In support of this Motion, the Trustee states:

I. Jurisdiction and Venue

1. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

II. Background

2. On October 5, 2009 (the "Petition Date"), the Debtor commenced this case by filing a voluntary petition under Chapter 11, title 11, United States Code, 11 U.S.C. § 101-1531 (the "Bankruptcy Code").

3. Prior to the Petition Date, the Partnership and the Colony Beach & Tennis Club Association, Inc. (the "Association") were involved in two separate state court litigation matters relating to the Colony Beach & Tennis Club, a condominium complex and resort hotel (the "Property").

4. In litigation filed in April 2007, the Partnership sued the Association asserting, *inter alia*, that the Association had breached the governing documents of the Partnership and the Property, namely the Declaration of Condominium that governed the Property and the Association, and the Limited Partnership Agreement that governed the Partnership (the “Claim Litigation”).

5. In litigation filed in February 2008, the Partnership sued the Association for breach of contract and for a declaration of the Association’s financial obligation under a ninety-nine-year recreational lease (the “Lease”) between the Partnership and the Association (the “Lease Litigation”).

6. In October 2008, before trial in either of these state court litigation cases, the Association filed a voluntary petition under Chapter 11 of the Bankruptcy Code in this Court, Case No.: 8:08-bk-16972-KRM (the “Association Bankruptcy Case”).

7. The Association removed the Lease Litigation to the Association Bankruptcy Case, seeking the Court’s determination that the Lease was unconscionable. The Partnership filed motions for abstention and remand, which was denied.

8. In the Association Bankruptcy Case, this Court held a bench trial on the Claim Litigation, resulting in its November 9, 2009 order that, *inter alia*, disallowed the Partnership’s claims against the Association (the “Claim Order”).

9. After a separate trial in the Lease Litigation, this Court, in the Association Bankruptcy Case, determined that the Lease was unconscionable and disallowed the Partnership’s claims against the estate deriving from the Lease (the “Lease Order”).

10. The Partnership appealed both the Claim Order ((District Court Case 8:09-cv-02560-SDM (the “Claim Order Appeal”)) and the Lease Order ((District Court Case 8:10-cv-

00913-SDM (the “Lease Order Appeal”)) to the United States District Court, Middle District of Florida, which matters were both assigned to Judge Steven D. Merryday (the “District Court”).

11. Subsequently, on March 1, 2010, the Association, on behalf of all owners of condominium units at the Property, along with certain individual unit owners (collectively, with the Association, the “Plaintiffs”), filed an adversary proceeding in this bankruptcy case against the Debtor (Adv. Pro. No.: 8:10-ap-00242-KRM)(the “Ejectment Adversary Proceeding”). In the Ejectment Adversary Proceeding, the Plaintiffs sought possession of all the condominium units at the Property (the “Units”) in the possession of the Debtor, and ejectment of the Debtor from those Units.

12. On August 13, 2010, this Court, in the Ejectment Adversary Proceeding, entered a *Final Judgment* [Adv. D.E. 23] and an *Order Granting Relief of Ejectment* [Adv. D.E. 22] in favor of the Plaintiffs granting their request to eject the Partnership from the Property and the Units and terminating the Partnership’s right to rent out the Units (the “Ejectment Judgment and Order”).

13. On the same date, this Court entered its *Order Converting Case to Chapter 7* [D.E. 336] and appointed William Maloney as Chapter 7 Trustee. On the same day, the Trustee discontinued all business operations at the Debtor’s Property.

14. On July 27, 2011, the District Court entered orders in the Claim Order Appeal (ECF No. 28) and the Lease Order Appeal (ECF No. 32) reversing the Claim Order and the Lease Order and directing the parties to recommend proposed remedies for the court to consider as a result of each of the reversals.

15. On October 12, 2011, the District Court, after reviewing the remedies recommended by the respective parties, entered additional orders (the “Supplemental Orders”) providing further direction and remanding the matter to this Court with specific instructions.

16. In its October 12, 2011 order in the Claim Order Appeal (ECF No. 38)(the “October 12, 2011 District Court Claim Order”) attached hereto as **Exhibit A**, the District Court specifically addressed the Ejectment Judgment and Order entered by the Court in this bankruptcy proceeding, declaring that: “[t]he July 27th order reversing the bankruptcy court eviscerates the Association’s stated purpose for ejecting the Partnership. Net of any consideration of the complexities of bankruptcy, the Partnership rightly should regain the Colony units with the common elements repaired at the Association’s expense.” October 12, 2011 District Court Claim Order at 4.

17. Moreover, the District Court remanded the matter to this Court with instructions to “either (1) vacate, amend, or issue each order necessary and appropriate to return the Partnership to possession of the Colony units and recommend an award of \$7,751,470 to the Partnership or (2) leave the Partnership without possession of the Colony units and recommend an award of \$20,646,312 to the Partnership.” October 12, 2011 District Court Claim Order at 6-7.

18. The Association subsequently appealed both the District Court Claim Order and the District Court Lease Order to the Eleventh Circuit Court of Appeals. The Eleventh Circuit directed the parties to attend mediation. The parties participated in at least two mediation sessions. Earlier this month, the mediator declared in impasse.

19. On March 2, 2012, the Eleventh Circuit Court of Appeals dismissed both of the Association’s appeals for lack of jurisdiction.

20. Meanwhile, the Association has been in possession of the condominium units and common elements since the entry of the Ejectment Judgment and Order. The Trustee believes that the Association has failed to maintain the units and common elements even to the limited extent provided in the Association’s plan of reorganization. Upon information and belief, the units are essentially abandoned and most do not have electric power or other utilities. The

Colony has fallen into a state of disrepair to the extent that the Town of Longboat Key has initiated code enforcement proceedings against the Association. Notwithstanding the clear direction in the July 27, 2011 Order in the Claim Order Appeal and the Supplemental Order entered by the District Court on October 12, 2011 that the Association has a continuing obligation to maintain the units and common areas, the Association has persistently failed to provide even minimal maintenance and repair to prevent further deterioration of the condominium units and common elements. Nor has the Association assessed any unit owner for the cost of maintaining the common elements. Despite its haste to “retake” possession of the Colony, the Association has done nothing to preserve and maintain the property.

21. The Association’s failure to maintain the units and common elements in its possession and has endangered the zoning for the entire property. The Town of Longboat Key has granted an extension to resume the resort use until December 31, 2012, but has made it clear that the granting of any further extensions is unlikely. In the event that the favorable zoning of the property is lost through the inaction of the Association, the permissible density on the property will be reduced to less than 100 units from the current density of approximately 240 units, which would effectively foreclose any possibility of restoring the hotel operation forever.

III Argument

22. Pursuant to Fed. R. Civ. P. 60(b), (Grounds for Relief from a Final Judgment, Order or Proceeding), the court may relieve a party from a final judgment, order, or proceeding if “(5) the judgment . . . is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or (6) any other reason that justifies relief.”

23. Pursuant to Rule 60(c), “a motion under Rule 60(b) must be made within a reasonable time.” Given the very recent entry of the orders by the Eleventh Circuit dismissing

the appeals, as well as the various District Court orders, this Motion is most definitively timely filed.

24. The District Court's July 27, 2011 orders reversing the Claim Order and the Lease Order, as well as the October 12, 2011 District Court Claim Order, provide this Court with a firm and unequivocal basis to relieve the Partnership from the Ejectment Order and Judgment. Among its numerous directives, the District Court ruled that this Court erred in determining that the Partnership had no claim against the Association, that the Lease between the Partnership and the Association was unconscionable, and, most importantly, that the Partnership had no right to possession of the Property.

25. The Ejectment Order and Judgment were based on the erroneous determinations by this Court that the Lease was unconscionable and that the Association had no obligations to the Partnership. The District Court held to the contrary, reversed this Court's orders and, very specifically and definitively stated: **"The July 27th order reversing the bankruptcy court eviscerates the Association's stated purpose for ejecting the Partnership. Net of any consideration of the complexities of bankruptcy, the Partnership rightly should regain the Colony units with the common elements repaired at the Association's expense."** (emphasis added). There could be no clearer direction to reverse an order and judgment under Rule 60(b).

26. In October 12, 2011 District Court Claim Order, the District Court remanded the matter to this Court with instructions to "either (1) vacate, amend, or issue each order necessary and appropriate to return the Partnership to possession of the Colony units and recommend an award of \$7,751,470 to the Partnership or (2) leave the Partnership without possession of the Colony units and recommend an award of \$20,646,312 to the Partnership." October 12, 2011 District Court Claim Order at 6-7 (the "Remand"). By this Motion, the Trustee requests that the

Court enforce the Remand by restoring the Partnership to possession of the Colony and award it an allowed claim against the Association in the amount of \$7,751,470.

WHEREFORE, the Trustee respectfully request that the Court enter an Order vacating the *Final Judgment* and the *Order Granting Relief of Ejectment*, enforcing the Remand, including by delivering possession of the Colony to the Partnership, scheduling a status conference, and granting such further relief as the Court deems just and proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the forgoing was served electronically via the Court's CM/ECF system on the attached Electronic Mail Notice List on March 26, 2012.

Dated: March 26, 2012

Respectfully submitted,

BERGER SINGERMAN, P.A.
Counsel for the Trustee
200 S. Biscayne Boulevard, Suite 1000
Miami, FL 33131
Telephone (305) 755-9500
Facsimile (305) 714-4340

By: /s/ Jordi Gusó

Jordi Gusó
Florida Bar No. 863580
jguso@bergersingerman.com

Electronic Mailing Notice List

Adam L Alpert on behalf of Creditor Colony Beach & Tennis Club Association, Inc.
aalpert@bushross.com, bnkecf@bushross.com; ebishop@bushross.com

Michael D Assaf on behalf of Creditor Colony Lender, LLC
massaf@assafandsiegal.com

Michael W Cochran on behalf of Debtor Colony Beach & Tennis Club, Ltd.
mcochran@icardmerrill.com

Roberta A Colton on behalf of Debtor Colony Beach & Tennis Club, Ltd.
racolton@trenam.com, dhayes2@trenam.com; jfollman@trenam.com

Ronald M Emanuel on behalf of Creditor Flatiron Capital, a division of Wells Fargo Bank, N.A.
ron.emmanuel@emanlaw.com, meri.greenberger@emanlaw.com

Kelly Martinson Fernandez on behalf of Creditor Town of Longboat Key
kfernandez@sarasotalawfirm.com

Jordi Guso on behalf of Trustee William Maloney
jguso@bergersingerman.com, fsellers@bergersingerman.com; cfile@bergersingerman.com

Dennis M Haley on behalf of Creditor Tencon Beach Association
ecf@winegarden-law.com

M Lewis Hall on behalf of Creditor Tencon Beach Association
lhall@williamsparker.com, tpayne@williamsparker.com

Gordon L Kiester on behalf of Creditor Dept Of Revenue, State of Florida
kiesterd@dor.state.fl.us

Benjamin E. Lambers on behalf of U.S. Trustee United States Trustee - TPA
Ben.E.Lambers@usdoj.gov

Stanley J Levy on behalf of Creditor Stanley Levy
slevy@lpklaw.com

Stephanie C Lieb on behalf of Debtor Colony Beach & Tennis Club, Ltd.
slieb@trenam.com, dhayes2@trenam.com; jfollman@trenam.com

Frank F McGinn on behalf of Creditor Iron Mountain Information Management, Inc.
ffm@bostonbusinesslaw.com

C Read Sawczyn on behalf of Creditor BreakPointe, LLC
rsawczyn@sbwlegal.com, ehirshfeld@sbwlegal.com

David M Siegal on behalf of Creditor Colony Lender, LLC
d.siegal@siegalaw.com, m.spinicci@siegalaw.com

Dylan G Trache on behalf of Interested Party Navigators Insurance Company
dtrache@wileyrein.com, rours@wileyrein.com; vmorrison@wileyrein.com

United States Trustee - TPA7
USTPRegion21_TP.ECF@USDOJ.GOV

Lori V Vaughan on behalf of Debtor Colony Beach & Tennis Club, Ltd.
lvaughan@trenam.com, lkfloyd@trenam.com

Jeffrey W. Warren on behalf of Creditor Colony Beach & Tennis Club Association, Inc.
jwarren@bushross.com, mlinares@bushross.com; bnkecf@bushross.com

Mark J. Wolfson on behalf of Creditor Bank of America
mwolfson@foley.com, choffman@foley.com; jhayes@foley.com

Mark J. Wolfson on behalf of Creditor Colony Lender, LLC
choffman@foley.com; jhayes@foley.com

EXHIBIT "A"

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

In re

COLONY BEACH & TENNIS CLUB
ASSOCIATION, INC.,

COLONY BEACH & TENNIS CLUB, Ltd.,
RESORTS MANAGEMENT, INC., and
COLONY BEACH & TENNIS CLUB, INC.,

Appellants,

v.

CASE NO.: 8:09-cv-2560-T-23

COLONY BEACH & TENNIS CLUB
ASSOCIATION, INC.,

Appellee.

ORDER

The Colony Beach & Tennis Club needs repair, and Colony Beach & Tennis Club, Ltd., ("the Partnership") and Colony Beach & Tennis Club Association, Inc., ("the Association") dispute who must pay. Reversing the bankruptcy court, a July 27, 2011, order (Doc. 28; 2011 WL 3169486) answers that the Association, under both the governing documents of the Colony and the Florida Condominium Act, is responsible for repair and maintenance of the Colony's common element. The order (with which, for obvious reason, familiarity is assumed) stays the effect of the order to permit

consultation with the parties and pending a subsequent order, this order, on the form of the remedy.

Two Proposals

In response to a specific invitation, each party submitted a paper recommending a remedy (in this appeal and in a companion appeal, Case No. 8:10-cv-913-T-23), and a hearing occurred. (Doc. 33)

The Association favors (Doc. 29) remand to the bankruptcy court for a new trial to calculate damages and to assess the validity of the Association's counter-claims. The Partnership prefers (Doc. 30) that the district court enter a judgment and close the case without a return to the bankruptcy court. Specifically, the Partnership requests a money judgment (compensating several forms of damage, enumerated below) and an order that directs the Association to repair the Colony's common elements, that authorizes the appointment of a receiver if repair does not punctually occur, and that retains jurisdiction "to oversee implementation" of the order to repair.

The Partnership's proposal is complicated by the Partnership's loss of the Colony's units in a bankruptcy proceeding, Case No. 8:09-bk-22611-KRM. Noting that the Partnership would retain possession but for the Association's wrongful refusal to repair, the Partnership seeks "an order vacating (or directing the bankruptcy court to vacate) the Final Judgment [that] terminat[es] the Partnership's right to possession . . . , as well as any order in the Association's bankruptcy proceeding that is inconsistent with this Court's Appellate opinion." (Doc. 30 at 3)

If the Partnership cannot regain the Colony units, the Partnership requests in the alternative a larger money judgment. If restored to ownership of the Colony units (as

repaired in accord with the governing documents), the Partnership seeks \$7,751,470.00 in damages; if denied restoration of ownership of the Colony units, the Partnership seeks \$20,646,312.00 in damages. In either event, the Partnership claims \$2,238,732.99 for Association expenses that the Partnership paid after the Association's unilateral cessation of payments in May, 2007, but before the Association's bankruptcy petition in November, 2008, and the Partnership claims \$261,459.25 for Association expenses that the Partnership paid after the Association's bankruptcy petition. For each sum the Partnership demands pre-judgment interest. The Partnership moved (Doc. 31) for attorney fees and costs, which motion the Partnership was instructed (Doc. 36) to submit anew after a final judgment.

A Delicate Matter

In August, 2010, the bankruptcy court converted the Partnership's bankruptcy from a Chapter 11 re-organization to a Chapter 7 liquidation and ejected the Partnership from possession of the Colony units. 8:09-bk-22611 (Doc. 336); Case No. 8:10-ap-242-KRM (Doc. 22).

The Association's counsel explained the purpose of the ejection at a hearing before the bankruptcy judge:

What we cannot have [] is this situation where . . . the unit owners [] come back and restore or rebuild their units, and then [] the Partnership [] claim[s], "Aha, now we're happy, you've done what we wanted to do at your expense, we're going to take back possession and we're going to operate the hotel like we see fit under the Partnership. That's the reason why the remedy of ejection is so important[,] to end that "aha" moment that would occur somewhere down the road

8:10-ap-242 (Doc. 26 at 27). The July 27th order reversing the bankruptcy court eviscerates the Association's stated purpose for ejecting the Partnership. Net of any consideration of the complexities of bankruptcy, the Partnership rightly should regain the Colony units with the common elements repaired at the Association's expense.

Unfortunately, the bankruptcies of both the Association and the Partnership continued apace while this action was for eighteen months pending on appeal. In consequence, the Partnership's counsel candidly observed:

Frankly, [return of possession to the Partnership] certainly is the more difficult path in terms of the things that need to be done. The simple way to deal with this case, although it's not the way the Partnership prefers, . . . is to treat what's done as done, make an award of damages to the Partnership that would compensate the Partnership for what it lost, and move on. And if that's what the court's pre-disposition is, then while that's not our preference, that's certainly an outcome the circumstances would warrant.

(Doc. 33 at 13) An instruction to the bankruptcy court to restore the Partnership's possession of the Colony units "though the heavens fall" could introduce into the bankruptcy of the Association or of the Partnership some latent but potent mischief. With each bankruptcy at a mature stage, the bankruptcy court is favorably situated to recommend a result that maximally vindicates the Partnership's rights and minimally upsets in either bankruptcy the decisions that are unduly difficult or impossible to reverse.

Although the possession of the Colony units requires the bankruptcy court's consideration, the damages owed to the Partnership does not. That matter has been fully tried to completion. At trial, the Partnership presented an expert, Dr. Henry Fishkind, who calculated the Partnership's damages under four scenarios, two of which

remain pertinent. Dr. Fishkind calculates damages of \$7,751,470 with a return of the Colony units, common elements repaired, to the Partnership and damages of \$20,646,312 with no return.

The July 27th order concludes that Dr. Fishkind's analysis is reasonable. Dr. Fishkind conducted "a conventional damages calculation" with "modest and reasonable" assumptions about the Partnership's revenue after repair and with proper estimates of the Partnership's position "but for" the Association's wrongful conduct. (Doc. 28 at 30-35; 2011 WL 3169486 at *15-*17) The Partnership at trial provided valid damages calculations.

The Association's request for further fact-finding on damages is misplaced. The Association's few criticisms of Dr. Fishkind's work are repeated in the bankruptcy court's order and are answered in the July 27th order. See Case No. 8:08-ap-567-KRM (Doc. 96 at 33-34), (Doc. 104 at 45-48). The Association entered no alternative measure of damages into the record. Arguing that the deterioration of the Colony is the Partnership's fault and that the Colony's design is "functionally obsolete," the Association pursued an all-or-nothing strategy. The Association's argument was not that the Partnership should receive less money but rather that the Partnership must receive no money. The argument fails. The Association provides no cogent reason for a further investigation into damages. A trial occurred; no second trial is needed.

A Narrow Opportunity

The July 27th order contemplates a reconsideration of the Association's counter-claims, which the bankruptcy court declared "moot." The Partnership correctly submits that the Association enjoyed a full and fair opportunity to introduce to the bankruptcy

court evidence supporting the counter-claims. A new argument on the counter-claims is properly bounded by the record that the parties constructed at trial. Yet, with no addition to the record, the Association's counter-claims are probably futile because the bankruptcy court ruled, and the district court agrees, that the Association failed to prove damages. Most or all of the record is transparently extraneous to the Association's counter-claims. However, the record is voluminous, and the Association seeks an opportunity to search for an offset to the Partnership's damages. If (and only if) the bankruptcy court agrees that a second look at the existing record (and only the existing record) is necessary to confirm that the Association evidenced no damages, a non-evidentiary hearing on the counter-claims may occur.

On the other hand, the itemized accounts that support the Partnership's demand for pre-petition and post-petition damages are detailed and exhaustive. The July 27th order establishes that the Partnership paid the pre-petition and post-petition expenditures to maintain the Colony's common elements on the Association's behalf. Accordingly, the pre-petition and post-petition damages are not subject to question on remand.

An Instruction

Under Bankruptcy Rule 9033(d) ("The district court may . . . re[-]commit" a non-core proceeding "to the bankruptcy judge with instructions"), this action is re-committed to the bankruptcy court, which is directed to render proposed findings of fact and conclusions of law consistent with and implementing the following instructions.

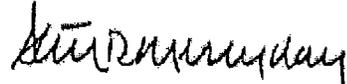
1. The bankruptcy court shall either (1) vacate, amend, or issue each order necessary and appropriate to return the Partnership to possession of the Colony units

and recommend an award of \$7,751,470 to the Partnership or (2) leave the Partnership without possession of the Colony units and recommend an award of \$20,646,312 to the Partnership.

2. The bankruptcy court may in its discretion re-consider the finding that the Association proved no damages and allow the Association to establish the counter-claims and to identify evidence of damage based solely on the extant record. Alternatively, the bankruptcy court should affirm that the Association failed to show damages and conclude that the counter-claims are without foundation.

The stay is **DISSOLVED** and this action is **RE-COMMITTED** for proceedings consistent with the July 27th order and this order and for the issuance of a report and recommendation.

ORDERED in Tampa, Florida, on October 12, 2011.



STEVEN D. MERRYDAY
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

IN RE: :
: :
COLONY BEACH & TENNIS : Case No. 8:08-bk-16972-KRM
CLUB ASSOCIATION : Chapter 11
: Adv. No. 8:08-ap-00567-KRM
Debtor : Adv. No. 8:08-ap-00568-KRM
----- :
: :
COLONY BEACH & TENNIS : Case No. 8:09-bk-22611-KRM
CLUB, LTD. : Chapter 7
: Adv. No. 8:10-ap-00242-KRM
Debtor :
----- :

Sam M. Gibbons
U.S. Courthouse
801 N. Florida Avenue
Tampa, Florida 33602
Held May 2, 2012

TRANSCRIPT OF HEARING

[Re: 08-bk-16972] Motion to Vacate Administrative Claim Order, Motion to Allow Administrative Expense Claim(s) Filed by Roberta A. Colton on behalf of Trustee William Maloney (Doc. #321); Response to Partnership Trustee's Motion to (I) Vacate Administrative Claim Order and (II) for Entry of an Order Allowing Administrative Expense Claims, filed by Adam L. Alpert on behalf of Debtor Colony Beach & Tennis Club Association, Inc. (Doc. #327).....

[NATURE OF PROCEEDINGS CONTINUED ON NEXT PAGE]

BEFORE THE HONORABLE K. RODNEY MAY
UNITED STATES BANKRUPTCY JUDGE

*PROCEEDINGS DIGITALLY RECORDED BY COURT PERSONNEL.
TRANSCRIPT PRODUCED BY TRANSCRIPTION SERVICE
APPROVED BY ADMINISTRATIVE OFFICE OF U.S. COURTS.*

[NATURE OF PROCEEDINGS CONTINUED FROM PREVIOUS PAGE]

.....[Re: 08-ap-00567] Motion to (I) Vacate Final Judgment and Order Granting Relief of Ejectment in Adversary Proceeding 10-242 and (II) to Enter a Report and Recommendation and to Enforce the District Court's Remand Instructions by the Partnership Trustee (Doc. #147); Initial Response to the Partnership Trustee's Motion to Vacate Final Judgment and Motion for Scheduling Order on Association's Counterclaims, filed by Jeffrey W. Warren on behalf of 3rd Party Plaintiff Colony Beach & Tennis Club Association, Inc. (Doc. #152); [Re: 08-ap-00568] Motion to Vacate the Rejection of Claims 16, 19, 20 and 21 and to Enter a Report and Recommendation Consistent with the District Court's Remand Instructions Filed by Michael W. Cochran on behalf of Defendants Colony Beach & Tennis Club, Inc., Colony Beach, Inc. (Doc. #129); Initial Response to the Motion of Colony Beach & Tennis Club, Inc. and Colony Beach, Inc. to Vacate the Rejection of Claims 16, 19, 20 and 21 and Motion for Scheduling Order on Calculation of Rejection Damages, filed by Jeffrey W. Warren on behalf of Plaintiff Colony Beach & Tennis Club Association, Inc. (Doc. #132); [Re: 09-bk-22611] Motion to (I) Vacate Final Judgment and Order Granting Relief of Ejectment and (II) Enforce Remand by the Trustee (Doc. 530); Response to Trustee's Motion to Vacate Final Judgment, filed by Adam L. Alpert on behalf of Creditor Colony Beach & Tennis Club Association, Inc. (Doc. #536); [Re: 10-ap-00242] Motion to Vacate Final Judgment and Order Granting Relief of Ejectment in Adversary 8:10-ap-00242 and (II) to Enter a Report and Recommendation and to Enforce the District Court's Remand Instructions filed by Jordi Guso on behalf of Trustee William Maloney (Doc. #32); Response to Partnership Trustee's Motion to Vacate Final Judgment, filed by Adam L. Alpert on behalf of Plaintiffs Andy and Dotty Adams, William Andrew Adams, Colony Beach & Tennis Club Association, Inc., Robert and Margaret Erasmus, Faytel Incorporated, Ruth B. Kreindler, Helene Lipton, Bruce V. Pinsky, Sheldon and Carol Rabin, Leonard A. Siudara, Barry A. Spiegel, Jay T. Yablon (Doc. #38)

A P P E A R A N C E S

For Colony Beach & Tennis Club Association, and Unit Owner Plaintiffs in Adv. 10-242

JEFFREY WARREN, Esquire
LAUREN PILKINGTON, Esquire

For Colony Beach & Tennis Club, Inc., Colony Beach, Inc., and as Special Counsel to the Ch. 7 Trustee

CHARLES BARTLETT, Esquire

For the Ch. 7 Trustee

JORDI GUSO, Esquire

As Special Counsel to the Ch. 7 Trustee

ROBERTA COLTON, Esquire

Also Present

William Maloney
Chapter 7 Trustee

Also by Phone

Barry Spiegel
Jay Yablon
Katherine Moulton

P R O C E E D I N G S

(Proceedings commenced at 1:59 p.m.)

THE COURTROOM DEPUTY: This Court is back in session. You may be seated.

THE COURT: Thank you, Ms. Frensley. If you would call our case, please.

THE COURTROOM DEPUTY: Case No. 08-16972, Colony Beach & Tennis Club Association, Adversary 08-567 and Adversary 08-568. And also Colony Beach & Tennis Club, Ltd., 09-22611 and Adversary 10-242. And we have three parties on the phone.

THE COURT: All right. Let's take appearances in the courtroom.

MR. GUSO: Good afternoon, Your Honor. Jordi Guso of Berger Singerman on behalf of William Maloney, the Chapter 7 Trustee, and Mr. Maloney is present in the courtroom, Your Honor.

THE COURT: Thank you.

MR. WARREN: Good afternoon, Your Honor. Jeffrey Warren on behalf of the Colony Beach & Tennis Club, Association, the Reorganized Debtor in its Chapter 11 case, and we're also here on behalf of the Unit Owners who are Plaintiffs in Adversary 242 in the Partnership bankruptcy case.

THE COURT: Okay.

1 MR. WARREN: And I have with me in court Lauren
2 Pilkington, who is working with me on these matters.

3 THE COURT: Thank you.

4 MS. COLTON: Good afternoon, Your Honor.
5 Roberta Colton. We serve as special counsel to the
6 Chapter 7 Trustee with respect to the issues in the
7 Association's bankruptcy case, along with Mr. Bartlett,
8 who will introduce himself.

9 MR. BARTLETT: Good afternoon, Your Honor.
10 Charles Bartlett, here on behalf of Colony Beach & Tennis
11 Club, Inc. and Colony Beach, Inc. in Adversary 568, and as
12 Special Counsel to the bankruptcy Trustee in the
13 Partnership's bankruptcy.

14 THE COURT: Thank you. Anyone else?

15 (No response.)

16 THE COURT: All right. On the phone?

17 MR. SPIEGEL: Barry Spiegel.

18 THE COURT: Mr. Siegel?

19 MR. SPIEGEL: Spiegel.

20 THE COURT: Spiegel, I'm sorry. And who else is
21 on the phone?

22 MR. YABLON: Good afternoon, Your Honor. Jay
23 Yablon for the Colony Beach & Tennis Club Association.

24 THE COURT: Thank you.

25 MS. MOULTON: And this is Katherine Moulton.

1 THE COURT: Okay. All right, Mr. Guso, do you
2 want to set the table here?

3 MR. GUSO: I shall, Your Honor. Thank you.
4 Your Honor, we are before the Court to consider the five
5 matters that are reflected on the calendar.

6 THE COURT: Uh-huh.

7 MR. GUSO: Your Honor, I will be addressing the
8 last two matters on the calendar, the Motion to Vacate
9 Final Judgment of Ejectment, Docket Entry No. 32, in
10 Adversary 10-00242.

11 THE COURT: Uh-huh.

12 MR. GUSO: Which I'll refer to, for purposes of
13 the record, as the ejectment adversary proceeding. As
14 well, Your Honor, the Motion to Vacate Final Judgment of
15 Ejectment and Enforce Remand filed in the Partnership's
16 main case at ECF No. 530.

17 THE COURT: Okay.

18 MR. GUSO: Although they are the last matters on
19 the calendar, Your Honor, we submit that they ought to be
20 considered first, as they are at the core of the relief
21 that the Trustee seeks today in the various papers that
22 are before the Court.

23 Pursuant to these two motions, Your Honor, the
24 Trustee requests that the Court vacate the August 13th,
25 2010 final judgment in the ejectment adversary proceeding

1 that awarded possession of the units as defined in the
2 motions, Your Honor, in the Colony, to the Association and
3 the Unit Owners.

4 All of the matters on the Court's calendar this
5 afternoon are intertwined and come before Your Honor
6 pursuant to the directives of District Judge Merryday's
7 order of October 12, 2011.

8 Your Honor, there's a lot of ambient noise;
9 I just want to make sure Your Honor can hear me.

10 THE COURT: I can hear you fine. Go ahead.

11 MR. GUSO: Thank you, sir. Your Honor, that
12 order is attached as Exhibit A to each of the Trustee's
13 motions. And I will refer to Judge Merryday's order of
14 October 12th, 2011 as the remand order.

15 The remand order implements and gives direction
16 to Judge Merryday's rulings of July 27th, 2011 in two
17 appeals. The first is the appeal of Your Honor's November
18 9th, 2009 order disallowing the Partnership's claims in
19 the Association's bankruptcy case. And the second is the
20 appeal of Your Honor's order finding that the Recreational
21 Facility Lease, as that term has been defined in these
22 proceedings, was unconscionable.

23 In his July 27, 2011 orders, Judge Merryday
24 reversed each of these orders. In reversing the order
25 disallowing the Partnership's claims against the

1 Association, Judge Merryday found that the Unit Owners had
2 an obligation to pay for repairs to the common elements at
3 the Colony, because under the documents governing the
4 Association and the Partnership, the Association bears
5 ultimate responsibility to pay for repair and maintenance
6 to the Colony's common elements. In the separate order,
7 Judge Merryday found that the Recreational Facilities
8 Lease was not unconscionable.

9 Thereafter, on October 11th, 2011, Judge
10 Merryday entered the remand order. The Association took
11 an appeal of Judge Merryday's orders to the Eleventh
12 Circuit. As the Court will recall, from the various
13 status conferences that we had before Your Honor in the
14 past, the Eleventh Circuit directed the parties to
15 participate in mediation, and the parties participated in
16 at least two mediation conferences.

17 In March, the mediator appointed by the
18 Eleventh Circuit declared an impasse, and the Eleventh
19 Circuit dismissed the Association's appeals for lack of
20 jurisdiction. I opened by telling Your Honor that the
21 Trustee seeks to vacate the final judgment in the eviction
22 -- in the ejectment adversary proceeding.

23 The October 11th, 2011 remand order specifically
24 addressed the final judgment of ejectment and the
25 Trustee's rights to relief from it.

1 Judge Merryday wrote as follows, "The July 27th
2 order reversing the Bankruptcy Court eviscerates the
3 Association's stated purpose for ejecting the Partnership.
4 Net of any consideration of the complexities of the
5 bankruptcy, the Partnership rightly should regain the
6 Colony units with the common elements repaired at the
7 Association's expense."

8 And, Your Honor, I'm quoting from page 4 of
9 the October 11, 2011 remand order. In this regard, Your
10 Honor --

11 THE COURT: Well, there are two of them.
12 You're looking at -- let's see, Document No. 38 or 42?

13 MR. GUSO: The one I'm citing the Court to,
14 Your Honor, is Exhibit A to the Motion to Vacate the
15 Final Judgment of Ejectment. It's entered in Case
16 No. 9-2560-T-23.

17 THE COURT: Okay. I'm there.

18 MR. GUSO: Thank you, Your Honor. Your Honor,
19 in this regard, the remand order gives express instruction
20 to this Court. It recommits the case back to Your Honor
21 with the express instruction to either vacate, amend, or
22 issue each order necessary and appropriate to return the
23 Partnership to possession of the Colony units and
24 recommend an award of \$7,751,470 to the Partnership or
25 (2) leave the Partnership without possession of the Colony

1 units and recommend an award of \$20,646,312 to the
2 Partnership. And, Your Honor, that is contained on pages
3 6 and 7 of the remand order.

4 THE COURT: Uh-huh.

5 MR. GUSO: And there is, in our view, no
6 ambiguity in the language. The instruction is, most
7 respectfully, clear.

8 And in light of the express instructions of
9 Judge Merryday, that is to vacate, amend or issue each
10 order necessary to return the Partnership to possession of
11 the Colony units, and pursuant to Rule 60(b) of the
12 Federal Rules of Civil Procedure, the Trustee requests
13 that Your Honor vacate the final judgment of ejectment and
14 remove, Your Honor, pursuant to two subsections of Rule
15 60(b), Rule 60(b)(5) and Rule 60(b)(6).

16 Pursuant to Rule 60(b)(5), the Court may relieve
17 a party from a final judgment order or proceeding if the
18 judgment is based on an earlier judgment that has been
19 reversed or vacated, or applying it prospectively is no
20 longer equitable, or under subsection (6) of that Rule,
21 Your Honor, the Court can vacate the judgment for any
22 other reason that justifies relief.

23 The case law tells us that Rule 60(b) seeks to
24 balance the desire for finality of judgments with the
25 desire to do justice. And I cite Your Honor, to *Seven*

1 *Elves, Inc. v. Eskenazi*, 635 F.2d 396, a Fifth Circuit
2 opinion from 1991.

3 And under Rule 60(b)(5), in particular, that
4 rule concerns the reversal of a prior judgment in the same
5 case that was a predicate for the later ruling, rather
6 than reversal of decisional law. And I cite Your Honor to
7 *Aldrich v. Belmore*, 226 B.R. 433, and *Tomlin v. McDaniel*,
8 865 F.2d 209, a Ninth Circuit decision from 1989.

9 The cases also tell us, Your Honor, that for
10 a judgment to be subject to Rule 60(b)(5), the prior
11 judgment must be a necessary element of the decision
12 giving rise to the cause of action or a successful
13 defense. And *Lubben v. Selective Service System, Local*
14 *Bd. No. 27*, 453 F.2d 645, a First Circuit case from 1972,
15 tells us that.

16 So, Your Honor, if we were to look at the
17 complaint in the ejectment adversary proceeding, it
18 consists of one count, a claim for ejectment. That claim
19 is based principally on the allegations contained in
20 paragraph 29 of the ejectment complaint, which alleges in
21 pertinent part as follows:

22 "The Partnership has also failed to bear all
23 expenses of the Association including, but not limited to,
24 expenditures for repairs, maintenance and insurance of
25 the common areas, as described in the declaration,

1 expenditures for capital improvements, and lease payments
2 to be made pursuant to the terms of a Recreational
3 Facilities Lease, all expenses of maintenance and repair
4 of the interior of the condominium units used by the
5 hotel, and all expenses of acquisition, financing,
6 maintenance, repair and replacement of the furniture and
7 furnishings of the units." And, Your Honor, that quote
8 comes from paragraph 29 of the complaint.

9 Paragraph 30 of the complaint alleges that, "The
10 Unit Owners will also assert substantial administrative
11 expense claims against the Partnership for the damages
12 that have continued after the petition date related to the
13 continuing actions of the Partnership described in
14 paragraph 29 above."

15 That is, Your Honor, the ejectment action was
16 based exclusively or nearly exclusively on the assertion
17 that the Partnership had an obligation to pay for the
18 expenses of maintaining the Colony.

19 That assertion was a necessary element to
20 support the ejectment cause of action. That assertion,
21 Judge Merryday tells us, is now error. Judge Merryday
22 unqualifiedly found that the Partnership had no such duty
23 to maintain the Colony or the units. Rather, it was and
24 is the obligation of the Unit Owners and the Association
25 to pay for the cost of repairs and maintenance to the

1 Colony.

2 Accordingly, Your Honor, we submit that Rule
3 60(b) relief is appropriate because the final judgment of
4 ejectment was predicated or based on a finding that has
5 now been reversed.

6 THE COURT: All right.

7 MR. GUSO: The Trustee requests that the Court
8 enforce the remand order by restoring the Partnership to
9 possession of the Colony and award it an allowed claim
10 against the Association in the amount of \$7,751,470.

11 In our view, this is the remedy that, as Judge
12 Merryday wrote, "maximally vindicates the Partnership's
13 rights and minimally upsets in either bankruptcy the
14 decisions that are unduly difficult or impossible to
15 reverse." And I'm citing from page 4 of the remand order.

16 And I think it's important, Your Honor, to
17 stress the language used by Judge Merryday. We ask Your
18 Honor to order relief that maximally vindicates the
19 Partnership's rights. We suggest to Your Honor that
20 restoring the Partnership with possession is the only
21 remedy that does that, that maximally vindicates the
22 Partnership's rights.

23 We suggest to Your Honor that ejectment
24 appears to be easily reversed, and that the \$7.7 million
25 claim, approximately, can be paid, as provided in the

1 Association's confirmed Chapter 11 plan. By our
2 calculation, the payments due to the Partnership
3 approximate \$387,000 per quarter plus 6 percent
4 interest on the unpaid balance.

5 If placed back in possession of the units, the
6 Trustee intends to convert the Partnership's Chapter 7
7 case to a case under Chapter 11, and once repairs are made
8 to the property, the Trustee can operate the Colony as he
9 previously had operated during the short period of time
10 when he was in control of the Chapter 11, or arrange a
11 sale.

12 Alternatively, Your Honor, and frankly our
13 second option, is that the Partnership -- excuse me.
14 The Partnership be awarded an allowed claim against the
15 Association in the approximate amount of \$20.6 million
16 consistent with the remand order.

17 This would appear, from our perspective, Your
18 Honor, to be more difficult because under this scenario
19 the Association would have to assess each of the Unit
20 Owners for that \$20.6 million claim plus the 6 percent
21 interest entitled -- which the payable on that claim over
22 a period of five years is nearly \$1 million per quarter.

23 Your Honor, for these reasons, we request that
24 the Court grant the Trustee's motion in the ejectment
25 adversary proceeding, vacate the final judgment, and

1 enforce the remand, as the Trustee has requested.

2 THE COURT: All right. Ms. Colton, did you have
3 anything to add?

4 MS. COLTON: Just a little bit of clarification,
5 Your Honor. Obviously, the motion, with respect to the
6 ejectment action, has been filed both in the ejectment
7 action which is in the Partnership's bankruptcy and
8 as part of the remand motion that we filed in the
9 Association's bankruptcy case and the adversary that
10 had been reversed because of the overlap that was
11 expressed by Judge Merryday.

12 I think it's important to go back to the source
13 of what was decided here. This case, the adversary
14 proceeding that Mr. Bartlett and I are special counsel,
15 started as primarily a declaratory judgment action in
16 State Court, basically to determine who had the
17 responsibility for the common elements -- the
18 maintenance of the common elements.

19 And that's really what -- if you take a look at
20 the -- what Mr. Guso has called the remand order, which is
21 actually a recommit order, where Judge Merryday says, his
22 conclusion -- or the declaration that should have governed
23 the proceedings going forward was the Association, under
24 both the governing documents of the Colony, and the
25 Florida Condominium Act is responsible for the repair

1 and maintenance of the Colony common element.

2 And that declaration, once it was made,
3 obviously had ramifications, not only for the claim that
4 this Court was deciding, but for almost every other order
5 that came in the case that came subsequent. Obviously,
6 once it was determined that the Association had no
7 responsibility for common area maintenance, the
8 Partnership ended up in bankruptcy, the Partnership's
9 plan was found not to be feasible because the Court was
10 saying that the Partnership had the responsibility for
11 those maintenance fees and couldn't do it.

12 And so what we have now is a situation where
13 we're trying to undo it, but we're trying to undo it
14 consistent with Judge Merryday's mandate that we do it as
15 feasible as possible. So we are doing it with respect to
16 only two orders that we're asking the Court to reconsider.

17 Judge Merryday suggested that there might be
18 a bunch of other orders, and I think the Association has
19 had the concern that there might be other orders. They
20 suggested that this is somehow a collateral attack on the
21 Chapter 11 plan of the Association. That's not true.
22 We're fine with the plan. Whatever the claim is, it's
23 going to be paid out over five years with 6 percent
24 interest.

25 We're also fine with the proposed payment for

1 the administrative claim. We just believe that now we're
2 entitled to an administrative claim. So the plan is going
3 to be left in place. We're also fine with the injunction
4 that will kick in once the Association starts making its
5 payments to the Partnership. The Unit Owners will have
6 that injunction so long as the Association continues to
7 make the payment. So the plan is going to remain intact.

8 The Association has argued that the District
9 Court doesn't have jurisdiction over the ejectment
10 proceeding, and that the District Court was reaching too
11 far.

12 First of all, with respect, this Court was not
13 instructed to evaluate the scope of the District Court's
14 jurisdiction, but the fact of the matter remains is that
15 we are asking the Court to overturn or to vacate two
16 orders. One is the ejectment order and one is the order
17 denying an administrative claim to the Partnership that
18 was entered in the Association's case.

19 Unit Owners have argued and the Association have
20 argued that they have relied on the ejectment order going
21 forward. And that's the issue that's put to this Court
22 today, really, is possession or no possession.

23 There's not -- the Court has determined --
24 the District Court said the Bankruptcy Court has to have
25 some input upon whether or not there's possession given

1 back to the Trustee, because the Bankruptcy Court is
2 uniquely qualified to evaluate the bankruptcy effects of
3 transferring that possession and the complications that
4 might arise.

5 And there is one complication that does arise,
6 and that is that the Bankruptcy Court has appointed a
7 Chapter 11 Trustee who then became the Chapter 7 Trustee.
8 So possession technically would not go back to the
9 Partnership; it would go back to the Trustee who's
10 standing in the shoes of the Partnership.

11 And we recognize that complication, and that's
12 one of the complications I think that Judge Merryday was
13 anticipating that this Court would resolve in determining
14 whether possession or no possession.

15 The second issue which has been raised by the
16 Association -- and this may be an issue of fact on which
17 the Court may want further consideration. But that is,
18 the Association is arguing, "Well, back in 2010, when you
19 entered that ejectment order, we relied upon it and we
20 took certain steps in reliance upon that order, and it's a
21 final order."

22 If you read the Association's response
23 carefully, they do say that they've done -- they've hired
24 some professionals to evaluate it, they've talked to a
25 developer. I don't know if there's a binding contract.

1 But those are things that they probably would have done
2 and should have done pursuant to their Chapter 11 plan
3 anyway, without possession of the Unit Owners -- of the
4 units themselves.

5 There's nothing that suggests -- and I don't
6 believe that the Association is going to argue they
7 have done nothing to refurbish the units. They have
8 not maintained the units since the ejectment order was
9 entered in 2010.

10 They have not provided even the basic
11 maintenance that they said that they would provide in
12 their confirmed Chapter 11 plan. They have retained some
13 professionals; I'm sure Mr. Warren will explain that.
14 But they have not done anything.

15 In fact, to give possession back to the Trustee
16 at this point would actually prejudice the Trustee because
17 the property hasn't been maintained since the ejectment
18 order has been entered. They've just simply let it sit
19 there while they evaluate the situation.

20 They also say, "Well, Your Honor shouldn't
21 vacate these orders, the ejectment order" -- and I'll get
22 to the administrative claim order as well -- "because
23 there was no appeal. They should have appealed. They
24 waived their right to appeal, so those are final and
25 binding."

1 But that's kind of a circuitous argument because
2 Rule 60(b)(5) -- or 60(b) in general -- relates to final
3 orders that weren't appealed. You're looking for relief
4 from a final judgment. In fact, there has to be a final
5 judgment or order before you can get relief under Rule
6 60(b). So that's kind of a red herring.

7 They also argued that the ejectment order is not
8 prospective. And that's not really what we are seeking,
9 and that's -- although it's been mentioned in our papers.
10 But the primary reason that we're asking for the ejectment
11 order and the administrative claim order to be vacated is
12 because both are based on an earlier judgment that has
13 been reversed or vacated. That's plainly our case.

14 And the reason I say that, Judge, to do the job
15 that we need to do, you really need three documents today.
16 One is the October recommit order dated October 12th, 2011
17 from Judge Merryday, which are the instructions of what we
18 are supposed to do today. And the other are the two
19 orders that we're asking to be vacated or from which we
20 seek relief, based on Rule 60(b)(5).

21 And those are Docket No. 289 in the
22 Association's bankruptcy case and Docket No. 22 in the
23 ejectment adversary proceeding, 10-242. Both of the
24 orders entered by this Court explicitly say in the order
25 that they are based on the findings in the adversary

1 proceeding that has been reversed.

2 They are based essentially on the declaration,
3 the judgment that this Court entered, that the Association
4 has no responsibility for common area maintenance. And
5 that declaration has now been reversed.

6 On the ejectment order, this Court specifically
7 notes that you've reviewed the proceedings in the
8 Association's bankruptcy case, and in the adversary
9 proceeding involving the Partnership and the Association,
10 and entering the ejectment order in the Partnership case.
11 The declaration that was entered in the Association case
12 affected the Partnership case.

13 In the order denying the emergency motion of
14 Colony Beach & Tennis Club, denying them an administrative
15 claim, in footnote 1 -- well, the Court actually makes its
16 first finding, "The Association's governing documents do
17 not obligate the Association to reimburse the Partnership
18 for any amounts paid by the Partnership for the operation
19 of the Colony."

20 And then in footnote 1, "This Court announced
21 its oral ruling on the motion on July 31, 2009 in
22 connection with the announcement of its oral ruling in the
23 adversary proceeding, 8-567. The Court also relies upon
24 the findings of facts and conclusions of law made by the
25 Court on July 31, 2009 with respect to the resolution of

1 the claims asserted in the Partnership adversary which
2 will be memorialized by a separate order."

3 So we have two orders. Both indicate on their
4 face that the Court relied upon those findings and that
5 declaration, and that's what we're seeking relief under,
6 Rule 60(b)(5).

7 There is an argument that's been raised by the
8 Association that the Trustee lacks standing because he
9 is a Liquidating Trustee in a Chapter 7 case and doesn't
10 have the authority to do business. That's something
11 that's obviously easily remedied. The Trustee could ask
12 temporarily for authority to operate. The Trustee could
13 also convert this case, as Mr. Guso indicated, back to
14 Chapter 11 and provide -- and file his own plan and
15 continue on.

16 There's one other aspect of the recommit order
17 that Judge Merryday provides, and that has to do with the
18 counterclaim that was asserted by the Association in the
19 adversary proceeding that was removed from State Court.
20 I'm going to allow Mr. Bartlett to address most of that,
21 but basically what Judge Merryday says is that Your Honor
22 has the discretion to decide if you want to go back and
23 review the record to see if there is any evidence to
24 support the counterclaim.

25 Judge Merryday reviewed the record and

1 determined that there was not, but he wanted to give
2 you the opportunity to look at it again.

3 THE COURT: Well, I think he wanted to give
4 Mr. Warren a chance to reargue that --

5 MS. COLTON: Correct.

6 THE COURT: -- based on the existing record.

7 MS. COLTON: Correct.

8 THE COURT: And that was the opportunity given
9 to the Association.

10 MS. COLTON: That's exactly right, Your Honor.
11 That's exactly right. and I'll let Mr. --

12 THE COURT: Well, what I want to do is I want to
13 stick to what Mr. Guso has teed up. I don't know if you
14 feel like you've been jumped here a little bit, but I want
15 to -- I mean, it's all tied together.

16 MS. COLTON: Correct.

17 THE COURT: It is. but it seems to me this is
18 a natural breaking point, because you are arguing in
19 rebuttal points that Mr. Warren hasn't yet made, and --

20 MS. COLTON: Well, they're in his papers, Your
21 Honor.

22 THE COURT: They are in his papers.

23 MS. COLTON: Right.

24 THE COURT: And before Mr. Bartlett goes down
25 the road of arguing against a counterclaim, I think I need

1 to let Mr. Warren have --

2 MS. COLTON: No problem.

3 THE COURT: -- time at the podium.

4 MS. COLTON: No problem.

5 MR. WARREN: Your Honor, this hearing reminds me
6 of the Celotex days when every counsel in the room was
7 very irritated at me when I was given the opportunity by
8 Judge Baynes to set the table for what we were going to
9 talk about, and I made my argument.

10 And, you know, I now know what it feels like for
11 those lawyers to have been in that set of circumstances
12 because Your Honor asked Mr. Guso to set the table and
13 we've now heard a series of arguments.

14 And I want to be respectful of the District
15 Court, and we're not here to do anything other than follow
16 the instructions and to be aware of and to do the things
17 that we're required to do.

18 However, what we're here for in the first
19 instance of the arguments are brand new contentions that
20 don't come from the District Court's actions, meaning the
21 Partnership ejection adversary proceeding, and the final
22 judgment entered in that proceeding, you know, was not
23 before the District Judge. It came well after. And
24 although there is an effort to lump together a series of
25 events and activities, there is a timeline and a

1 continuum.

2 And instead of them being mixed together, which
3 creates the confusion that we think caused issues with the
4 District Court, in part, but you have to compartmentalize
5 these items, and you have to look at them independently
6 and isolate them and see where they take the judicial
7 determinations that this Court has. And so let me just --
8 you know, I'll set the whole table as to what I understand
9 we're here to do today.

10 The Trustee has filed five separate motions,
11 Your Honor. They filed in the Partnership case -- meaning
12 in the case where the Chapter 7 Trustee is operating or is
13 functioning -- they filed the motion to vacate the
14 ejectment judgment.

15 We pointed out that that was really not the
16 proper place for that motion to be filed, and it got
17 subsequently filed in Adversary 242, so that's the second
18 motion.

19 Your Honor, the Partnership case -- and although
20 Judge Merryday pulls things into his determinations or his
21 discussions of determinations -- was a totally separate
22 bankruptcy case.

23 Most importantly, and most critically, the
24 claims that were before Judge Merryday, arising out of
25 the Association's liabilities, are not the same parties

1 who were involved in the ejectment action, because the
2 ejectment action is between the Unit Owners and the
3 Partnership. It's not the Association. The Association
4 doesn't own units. The Association wasn't the Plaintiff
5 in the ejectment action. It was the Unit Owners.

6 And the Association brought that claim, as well
7 as individual Unit Owners, but the Association's actions
8 were for the benefit of the Unit Owners, not for the
9 Association. So the confusion that has reigned for a long
10 time that doesn't ever seem to get cleared up, is that
11 when you talk about the ejectment, it's an issue between
12 Unit Owners and the Partnership. It's not between the
13 Association.

14 And so consequently, when the District Court
15 made its comments with respect to alternative relief and
16 things of that nature, it wasn't recognizing the plain
17 undisputed fact that the ejectment proceeding was between
18 Unit Owners and the Partnership, not the Association and
19 the Partnership.

20 And so the matters before the District Court
21 were the allowance or disallowance of monetary claims
22 against the Association. That confusion hopefully, you
23 know, as a result of the matters that will be before the
24 Court now, can get resolved.

25 But, Your Honor, in ruling on the Partnership's

1 motion in Adversary 242 or in its main case is not acting
2 at the direction of the District Court in connection with
3 the remand or recommitment, or whatever you wish to call
4 the two orders, that were entered by Judge Merryday.

5 You know, this Court is acting as the presiding
6 court over the Partnership case in Adversary 242. And so
7 consequently this Court's not going to be rendering a
8 report and recommendation or a proposed findings of fact
9 and conclusions of law with respect to these two motions
10 because these motions don't come to Your Honor as a result
11 of anything other than relief requested pursuant to the
12 Federal Rules of Bankruptcy Procedure that permit someone
13 like the Chapter 7 Trustee to come and ask this Court for
14 relief as to those judgments. And so that's a very, very
15 critical fundamental point with respect to where we stand.

16 There's a third motion that's been filed by
17 the Chapter 7 Trustee, and that motion also talks about
18 the ejectment action. And that motion was filed in
19 Adversary 567, which is the adversary proceeding in the
20 Association's bankruptcy case. And, you know, the Chapter
21 7 Trustee asked for the Court to grant relief with respect
22 to the ejectment action as part of granting relief in 567.

23 In that context, Your Honor, that motion, we
24 believe, is not properly before the Court for argument
25 today because we're here on a status conference pursuant

1 to Your Honor's order that scheduled the hearings today.

2 In Adversary 567, we have filed an initial
3 response with respect to those particular assertions by
4 the Trustee. And although there's a lot of overlap, I
5 want the Court to know that in that proceeding, the
6 District Court has reversed Your Honor's ruling.

7 So consequently, in Adversary 567, there is no
8 need to vacate any orders, because the District Court has
9 reversed those orders and remanded them to this Court.

10 There's also another motion filed in Adversary
11 568 in the Association's bankruptcy case. And we
12 haven't talked about that today, but that deals with
13 the Recreational Facilities Lease, and so we have a motion
14 to vacate Your Honor's orders disallowing claims in that
15 proceeding. And again, you know, that's not necessary,
16 because the District Court reversed Your Honor's decision.
17 And so that matter is not a proper matter with respect to
18 where we are today.

19 The fifth motion filed by the Chapter 7
20 Trustee was a motion to vacate an order disallowing an
21 administrative expense claim by the Partnership in the
22 Association's case.

23 And, again, that matter was not on appeal. That
24 matter was not before Judge Merryday. And that matter
25 comes to this Court for this Court to render a final

1 determination with respect to the relief requested to a
2 final judgment, that was not appealed, that can no longer
3 be appealed, and that dealt with an administrative claim
4 against the Association.

5 So those are the five motions that are filed by
6 the Chapter 7 Trustee. I would submit, Your Honor, that
7 there are two other matters that are before the Court, and
8 those are the matters that come to the Court as a result
9 of the remands from the District Court.

10 Specifically, the Court has at Docket Entry 145
11 the District Court's order with respect to Adversary 567,
12 and I believe that that's properly before the Court today
13 for a status conference with respect to how do we proceed
14 to deal with the matters that the District Court has sent
15 to this Court.

16 And the seventh matter, or the last matter,
17 is Docket 128, which is the District Court orders in
18 Adversary 568 which, again, is the instructions to this
19 Court for this Court to act.

20 And so based upon the order that was entered by
21 this Court when the cases were reopened, we're here today
22 on a status conference with respect to those matters. And
23 what we have proposed to counsel for the Chapter 7 Trustee
24 and counsel for Dr. Klauber's entities, Colony Beach &
25 Tennis Club, Inc. and Colony Beach, Inc. -- which is Mr.

1 Bartlett wearing one hat, and he's special counsel to the
2 Chapter 7 Trustee wearing another hat -- is that we have a
3 briefing schedule with respect to those matters whereby
4 the Association would present to the Court in writing its
5 contentions and arguments. And then there would be a
6 period of time for the other parties to respond, and the
7 Court would schedule a hearing --

8 THE COURT: You say you've made a proposal or
9 you have an agreement?

10 MR. WARREN: We do not have an agreement,
11 Your Honor. We made a proposal, and we incorporated that
12 proposal in our initial responses to the Trustee's motions
13 in Adversary 567 and 568. But what we did propose, and
14 I know now this afternoon that there seems to be an
15 agreement, that the threshold issue should be this Court's
16 determination as to whether or not the final judgment in
17 the ejectment adversary can or should be vacated.

18 And so we submitted that that's the threshold
19 issue; that's the issue that should be argued. It could
20 be argued today; it could be argued another time. You
21 know, we wanted to provide to the Court a robust response
22 touching on what we thought were all the important bases
23 with respect to that issue.

24 And that would take care of the two pleadings in
25 the Partnership case, because the Adversary 242 would be

1 the direct matter where the motions would be dealt with.
2 And that would also take care of the motion that was filed
3 in the Partnership main case.

4 And to the extent that similar relief was
5 requested in the motion filed in Adversary 567, we would
6 submit that that requested relief was premature and
7 inappropriate, and to the extend that it's denied, it
8 would be without prejudice until such time as the Court
9 determines the main issue, which is: Does this Court
10 believe there's a legal and proper basis for it to vacate
11 its final judgment in Adversary 242?

12 And so, you know, that's the whole picture of
13 everything that's out there. And at this time, Your
14 Honor, I'd be happy to respond to the ejection argument.

15 It seems as though counsel want to proceed in
16 that regard, but I'd like to have an understanding as to
17 whether or not we're on the right track with respect to
18 what the Court wants us to do as to the remand in 567 and
19 in 568, because it seems to me as though we have some work
20 to do. But we've already done quite a bit of it. You
21 know, we think it would be helpful to the Court, and
22 certainly would be a matter of due process to our clients,
23 to have the opportunity to present our case.

24 It is correct that we sought an appeal of Judge
25 Merryday's orders to the Eleventh Circuit. What is also

1 correct is that the Chapter 7 Trustee and the two Dr.
2 Klauber entities in both appeals moved to dismiss those
3 appeals, urging that they weren't final judgments and that
4 there was a lot of work for this Court to do with respect
5 to those matters. So therefore the Eleventh Circuit
6 shouldn't consider our appeals; they were premature.

7 The Eleventh Circuit agreed with those positions
8 and dismissed those appeals only because it concluded that
9 they weren't final orders and they didn't fit within an
10 exception to the final order rule. And this Court had
11 more than ministerial duties to do in connection with
12 those two adversary proceedings or claims allowance
13 proceedings.

14 And so for them to come today and try to urge
15 that this Court can just sort of roll right through these
16 things is a little strange, given the position they took
17 with the Eleventh Circuit, successfully bringing us back
18 to this Court, when we wanted to have the issues that we
19 had with the District Court's rulings, determined at an
20 early basis.

21 And so I also want the Court to know that
22 although Mr. Guso was very accurate in what he said, to a
23 certain extent, the Eleventh Circuit mediation services do
24 not impasse anything. You know, that mediation was
25 concluded but not closed. And as long as the matter

1 stayed on appeal at the Eleventh Circuit, the Eleventh
2 Circuit mediation services were available.

3 However, after -- shortly after that decision
4 was made by the mediator, the Eleventh Circuit made its
5 rulings in both cases and determined that it wasn't going
6 to take our appeal.

7 So I just want the Court to know that, you know,
8 the Eleventh Circuit wasn't reacting to the mediation
9 issues, because the Eleventh Circuit never knows what's
10 happening in the mediations. And I don't know that Mr.
11 Guso meant to convey something like that, but I wanted the
12 Court to know that there was no connection between those
13 particular items.

14 But if the Court could let me know now, I mean,
15 we're here by an order that set the status conference.
16 And to me, the status conference can be used, you know,
17 very quickly to sort of set a briefing schedule.

18 THE COURT: Well, it seems to me -- I mean,
19 there are lots of different approaches here. One approach
20 would be to say, "Mr. Guso, you're right, I'm going to
21 vacate the ejectment, restore possession, judgment of
22 \$7 million, we'll restore the proofs of claim on the
23 leases and 2 million plus dollar claim, and you can take
24 your appeal and try to get your point of view fixed.

25 Or we can spend a more deliberate approach.

1 And I'm not saying that's how I would rule, but I'm saying
2 that's one way to go ahead and send this back where
3 apparently you want to be.

4 The other is to take a more deliberate approach
5 and, as you say, a briefing schedule. Ms. Colton referred
6 to potential factual issues. I'm looking at the remand --
7 and going backwards now from the ejection, putting that
8 at the back of the bus. I mean, it looks to me like Judge
9 Merryday has said I'm to use my discretion to determine
10 whether you have a claim for -- a counterclaim for
11 offsetting damages based on the existing record.

12 MR. WARREN: That's correct, Your Honor.

13 THE COURT: And then that's all. And then in
14 568, I'm not sure. It's a little puzzling because on one
15 page, it says, "The Partnership requests a money judgment
16 for \$2.2 million," and the other is directing the
17 Association to do stuff. But paragraph 2 of the
18 instructions is I'm supposed to recommend an amount of
19 damages owed to the Partnership and the other lessors for
20 the Association's rejection of the lease.

21 So that's a factual issue as to whether there's
22 anything owed other than \$2.2 million.

23 MR. WARREN: Your Honor, if I may interrupt.
24 We remain confused about a lot of things the District
25 Court did, but I think when the District Court referred

1 to Partnership in 568, it was not referring to the
2 Partnership that Mr. Maloney serves as the Chapter 7
3 Trustee, but a defined term that the District Court
4 created to combine --

5 THE COURT: For the four -- for the four owners
6 of the --

7 MR. WARREN: Actually to combine Colony Beach &
8 Tennis Club, Inc. and Colony Beach, Inc. And I'm not
9 saying --

10 THE COURT: Well, you had two other parties.

11 MR. WARREN: There were two -- that's --
12 and they didn't appeal, Your Honor, and just --

13 THE COURT: Oh, okay, I didn't --

14 MR. WARREN: Merrill and Field did not appeal --

15 THE COURT: All right.

16 MR. WARREN: -- and so when we deal with the 568
17 issues --

18 THE COURT: But their claims are to be
19 overturned? Merrill and --

20 MR. WARREN: That's -- just so the Court will
21 know, Judge Merryday's order identified, you know --

22 THE COURT: Merrill and Field.

23 MR. WARREN: -- I think it was Claims 16, 19,
24 20, 21 --

25 THE COURT: But that includes Merrill's and

1 Field's claims.

2 MR. WARREN: Yes, Your Honor. Yeah, but they
3 didn't appeal.

4 THE COURT: Okay.

5 MR. WARREN: And so --

6 THE COURT: I think I understand that. I think
7 -- I saw that confusion because it seemed like it was
8 talking about the Partnership, but I understand --

9 MR. WARREN: I wanted the Court to know --

10 THE COURT: -- who the lessor -- who the
11 lessors --

12 MR. WARREN: I don't think that the Partner --
13 and if anybody, counsel, disagrees -- I don't think that
14 the District Court intended to have the Chapter 7 Trustee
15 for the Partnership involved in the 568.

16 THE COURT: But my confusion was whether --
17 on one page, it seems like there's a dollar amount for
18 damages. On the other page it's I'm supposed to determine
19 what the amount of damages is. And so I could -- on a
20 deliberate schedule, I could say -- I could set forth a
21 period of time for -- in 568, for Mr. Bartlett to give me
22 a statement of particulars and what the effect of
23 overturning the disallowance of claims is, or whether
24 you're fine with \$2.2 million and we move the ship along.

25 And on your side, whether you want a chance to

1 itemize and articulate based on the existing record what
2 offsetting counterclaim you have.

3 MR. WARREN: Just so Your Honor knows, in 568,
4 I think the District Court was clear that we don't get the
5 right to make arguments with respect to settlement.

6 THE COURT: No. But I'm talking about in 568,
7 Mr. Bartlett, as to whether it's \$2.2 million, done, or
8 whether it's some other amount and you want to argue it.

9 MR. BARTLETT: No, Your Honor. It is the 2.2.
10 2.2 is a round-off, but it is --

11 THE COURT: So when Judge Merryday says, "After
12 considering argument from the parties, based only on the
13 extant record, this Court is to recommend an amount of
14 damages owed to the Partnership" -- I guess the Rec.
15 Lessors -- "and the other lessors for the Association's
16 rejection of the lease."

17 MR. WARREN: And Your Honor, what we propose to
18 do in 5 --

19 THE COURT: Well, let me finish my thought. And
20 as to whether there's anything that needs to be done on
21 that.

22 MR. BARTLETT: Well, Your Honor, I don't think
23 that there is because I think that the evidence in the
24 record is what it is, and it went in without dispute as to
25 what the computations were.

1 THE COURT: No, but is it \$2.2 million or is --

2 MR. BARTLETT: It's 2.26 or 2.228,486.60 is the
3 number.

4 THE COURT: And there's no more fine-tuning you
5 wish to do?

6 MR. BARTLETT: No, Your Honor. There is not.

7 THE COURT: Okay.

8 MR. BARTLETT: And, you know, our --

9 THE COURT: So it seems to me like 568 is done.

10 MR. WARREN: No, Your Honor. We would not agree
11 that it is. And what we --

12 THE COURT: Okay.

13 MR. WARREN: What we proposed was that 568 is a
14 lot simpler than 567.

15 THE COURT: I get that.

16 MR. WARREN: And there's not a threshold issue
17 with respect to 568. What we proposed was that ten days
18 from today, we would file, you know, what we would
19 anticipate would be our argument or contention to the
20 Court with respect to what the Court should rule on with
21 respect to the remand to the Court which we submit is not
22 a ministerial acceptance of Mr. Bartlett's number or else
23 we'd be at the Eleventh Circuit now.

24 THE COURT: Well, I wasn't accepting it. I was
25 asking him whether he wanted to fine-tune it.

1 MR. WARREN: Right.

2 THE COURT: I was asking Mr. Bartlett what he
3 wanted to do, not telling you what I'm going to do. And
4 if he doesn't want to present anything more on behalf of
5 the Rec. Lessors, then I'm not sure what I need to do.
6 And that was my thought process. But go ahead; finish
7 your thought.

8 MR. WARREN: And what I was going to submit,
9 Your Honor, was that within ten days we would file our
10 submissions, Mr. Bartlett would have an opportunity to
11 respond, whatever time he needed, and then the Court could
12 schedule a hearing where we could argue those issues. And
13 I am going to sort of ask the Court, as we go forward, if
14 we can separate some of these matters.

15 As the Court probably recognizes, there are
16 several lawyers on the other side and it's harder for us
17 to sort of keep up with multiple arguments at the same
18 time. So I'd like to have a separate hearing with respect
19 to 568 from other matters. I know typically convenience-
20 wise we want to keep things together but it's quite
21 burdensome for us to deal with, today, five motions.

22 THE COURT: Well, I feel -- on one hand, I feel
23 like you're selling yourself way too short, but I think
24 your proposal, it's a fair one. I mean, there's nothing
25 unfair about what you've just said.

1 MR. BARTLETT: Well, Your Honor, my only concern
2 about it is that I'm not sure, because I don't know what
3 the issues are, honestly, that Mr. Warren is going to
4 raise in his response to the motion.

5 The only real issue he raised was whether or not
6 Merrill and Field's claims were going to be included or
7 not included. And I think Judge Merryday has, rightly or
8 wrongly, passed on that issue. So I don't think that's an
9 issue for you decide so --

10 THE COURT: Well, Judge Merryday -- there's some
11 ambiguity here, but he listed the claims.

12 MR. BARNETT: Right.

13 THE COURT: And I assume that these claims that
14 are listed include a Merrill and Field claim.

15 MR. BARTLETT: And --

16 THE COURT: A Merrill and Field claim. So we're
17 going to go down that path pretty literally.

18 MR. BARTLETT: And there may be an issue on
19 that. I don't know what other issues there are, so I
20 don't know whether a hearing is really going to be
21 necessary or whether we can conclude the matter with our
22 briefs, because I don't know what points in addition to
23 that --

24 THE COURT: Well, I think it helps me --

25 MR. BARTLETT: -- Mr. Warren intends to raise.

1 THE COURT: Without making you run up and down
2 the highway, I mean it makes -- I think, I find it helpful
3 to have the hearing, just to make sure I'm not missing
4 something from the written submissions.

5 I guess what -- here's what I'm inclined to do,
6 is to adopt some kind of a briefing schedule or a written
7 submission schedule, maybe 14 days for the Association to
8 lay out its blueprint for what issues need to be dealt
9 with and their position on each, and how I should rule in
10 response to the instructions. And that would be on 567,
11 568 and 242, and the Partnership issues that have been
12 raised as to ejection. You would have 14 days to
13 respond.

14 I would also ask each side to submit an
15 affidavit of an appropriate individual, whether it be the
16 chairman of the Association or Ms. Moulton, let's say --
17 the chairman of the Association, an affidavit as to what
18 -- what's the status of the units.

19 Ms. Colton said that it appears that they've
20 just been sitting there ever since I've made my ruling.
21 You've had some reports. I don't want to debate that
22 right now but I'd like an affidavit laying it all out as
23 to what the Unit Owners -- you're here on behalf of both.

24 MR. WARREN: Yes, Your Honor.

25 THE COURT: The Unit Owners have -- what they

1 have, what they've done, how they've relied on the
2 ejectment. I have to decide these. Whether I decide them
3 within the context of Judge Merryday's instructions is
4 what you've tried to pull apart. But I have motions by
5 the Trustee to restore the Partnership and the Trusteeship
6 to possession, and I'll deal with those. But I'd like to
7 know what the factual issues are.

8 MR. WARREN: The only request I have, Your
9 Honor, if we could perhaps stagger the two, so that we had
10 maybe 14 days from now for 568 and 21 days for 567.

11 THE COURT: That'd be --

12 MR. WARREN: Rather than have -- and when I say
13 567, I'm including the relief with respect to Adversary
14 242 because I sort of view the three motions that the
15 Trustee filed --

16 THE COURT: All right.

17 MR. WARREN: -- to be somewhat seeking the same
18 remedy, to a certain extent, meaning that --

19 THE COURT: Right.

20 MR. WARREN: -- you know, the vacation in 242,
21 the vacation in the Partnership case and the vacation in
22 567.

23 THE COURT: All right. Okay.

24 MR. WARREN: And I'm just asking for that extra
25 week's worth of time to give us a little more space to put

1 together a proper declaration.

2 THE COURT: Mr. Bartlett?

3 MR. BARTLETT: Your Honor, I think there are
4 three things that are going to be at issue in 567.

5 THE COURT: Uh-huh.

6 MR. BARTLETT: And it might be helpful for both
7 the Court and for counsel if those issues were briefed
8 separately. One being the ejectment issue, which is
9 obviously a significant issue, one being the issue with
10 regard to the counterclaims, and whether or not the
11 Association is intending to seek some kind of a setoff,
12 what it's based on, all that sort of thing, which is
13 really a separate and compartmentalized thing.

14 And I'm gathering that although Judge Merryday
15 left it up to you as to whether you were even going to
16 consider that, I gather that you're at least going to
17 consider it to the point of allowing the parties to brief.
18 I gather that's your decision on that.

19 And the third is the admin. claim, the \$261,000,
20 which is sort of a separate compartment as well. If those
21 three are briefed separately, I think it might help the
22 Court as well as counsel, since I think we're going to
23 have different people doing the briefs on different
24 things.

25 THE COURT: Does that make sense to you?

1 MR. WARREN: Yes, Your honor.

2 THE COURT: It makes sense to me.

3 MR. BARTLETT: Yeah. One other thing I just
4 want to make sure we don't lose sight of, Your Honor, is
5 that in 567 --

6 THE COURT: Right.

7 MR. BARTLETT: -- there is an additional
8 prepetition damage claim of 2 million 500 and some odd
9 thousand dollars that Judge Merryday ruled gets tacked on
10 to either the \$7 million or the \$20 million judgment,
11 depending on what Your Honor rules on the ejectment issue.

12 And I mean, we can certainly talk about that in
13 the papers but I didn't want to lose sight of that because
14 it wasn't mentioned in the earlier presentations, Your
15 Honor, so I --

16 THE COURT: I don't remember that.

17 MR. BARTLETT: Your Honor, it's in the --

18 THE COURT: No, I mean, it's not something --

19 MR. BARTLETT: Oh.

20 THE COURT: -- we really litigated here. It was
21 something --

22 MR. BARTLETT: No. It is, Your Honor.

23 THE COURT: It is? I just don't remember.

24 MR. BARTLETT: It was a prepetition damage claim
25 by the Association for Association expenses that had been

1 paid by the Partnership pre-filing.

2 THE COURT: Okay.

3 MR. BARTLETT: A claim by the Partnership,
4 excuse me. I meant --

5 MR. WARREN: It was by the Partnership against
6 the Association, is what Mr. Bartlett --

7 MR. BARTLETT: Right, I got it backwards but --

8 THE COURT: Okay. I mean, I just -- I've just
9 forgotten that. That piece of it.

10 MR. BARTLETT: Okay. And in Judge Merryday's
11 order, he indicates that you're not to revisit that, that
12 that's going to be a part of the -- should be a part of
13 the damage award under either alternative, and I just
14 didn't want to --

15 THE COURT: It's not included in his 7 million
16 or 20 --

17 MR. BARTLETT: And it's not included in the 20
18 either. It's in addition to --

19 MR. WARREN: We'll be respectful of the --
20 I mean, it doesn't do us any good to ask Your Court to do
21 -- this Court to do something that was contrary to what
22 the District Court directed it to do.

23 THE COURT: Right.

24 MR. WARREN: So I understand what Mr. Bartlett
25 is talking about, and I think he's correct, although we've

1 somewhat briefed the administrative expense issue as well,
2 I think, supporting things with declarations so that
3 there's a record for the Court. And if there's a dispute,
4 then the Court can deal with that.

5 THE COURT: And I talked mostly about your
6 side's declaration. I would like one from Ms. -- whoever,
7 maybe Ms. Moulton or maybe the Trustee, Mr. Maloney --
8 as to what's been done at the Colony property since the
9 ejectment, what kind of activity, who's doing what to the
10 property, as best as you know from firsthand knowledge.
11 And we'll see if there's any kind of factual dispute there
12 as to the ejectment.

13 You know, I'm thinking that the issue really is
14 whether: Would I have entered the final judgment, if this
15 had been the state of the affairs on the other matters?
16 And as I recall the ejectment matter -- and I don't recall
17 this being in the papers -- that the ejectment was
18 partially -- it was premised not only on the Partnership
19 not paying expenses, but it was that these folks have
20 deeds to these units.

21 And the Partnership's right to use the units for
22 eleven months out of the year was premised on their
23 getting the use of one month out of the year. And that
24 that deal had completely evaporated. And they have deeds.
25 And that was -- as I recall it, that was part of the basis

1 for the ejection.

2 MR. WARREN: Your Honor's correct. We had a sep
3 -- just to refresh Your Honor, we had a separate adversary
4 proceeding evidentiary hearing on that issue, with respect
5 to the ejection. I'm sorry, I'm misspeaking. With
6 respect to the administrative expense claim --

7 THE COURT: Right.

8 MR. WARREN: -- we had a separate evidentiary
9 hearing with respect to those issues and --

10 THE COURT: I'm not prejudging anything. I'm
11 not going back to a previous thought process and saying I
12 disagree with you. I'm just saying there was more to it
13 than that, as I recall. And that may be decisive; it may
14 not be.

15 MR. WARREN: Your Honor, could we perhaps create
16 dates? Is the Court wanting us to file things in sequence
17 or contemporaneously?

18 THE COURT: Let me ask you this. Is this
19 something you all would like to step out into the privacy
20 of your offices and work through a schedule or do you want
21 me to just do it right now? I'll be glad to do it either
22 way.

23 MR. BARTLETT: Well, Your Honor, I think you've
24 already done it for 568 and I'm fine with that. It's 14
25 and 14 as I remember it.

1 THE COURT: Well, Mr. Warren suggested something
2 different.

3 MR. BARTLETT: I think he actually suggested 10
4 and 10 but --

5 MR. WARREN: No, that's the -- for 568, yeah.

6 THE COURT: Okay, 14 and 14. Okay.

7 MR. WARREN: 14 and 14 for 568 is perfectly
8 good.

9 MR. GUSO: 21 days is acceptable on the other,
10 Your Honor, and we'll have 21 days to respond.

11 THE COURT: I'm sorry, Mr. Guso. I didn't hear
12 you.

13 MR. GUSO: I apologize, Your Honor.

14 THE COURT: 21?

15 MR. GUSO: I believe Mr. Warren suggested 21
16 days for the other matters.

17 THE COURT: 21 and 28 -- or excuse me. 21 and
18 21?

19 MR. GUSO: Yes, sir.

20 THE COURT: For 567?

21 MR. WARREN: Yes, Your Honor. And then --

22 THE COURT: 21 plus 21.

23 MR. GUSO: Yes, sir.

24 THE COURT: And that would be 567 and the
25 ejectment motions.

1 MR. GUSO: Yes, sir.

2 THE COURT: Mr. Bartlett suggested basically
3 three different briefs. I don't know if it's three
4 different briefs?

5 MR. WARREN: The third one is the administrative
6 expense claim and --

7 MS. COLTON: That was --

8 MR. WARREN: -- again, Ms. Colton will --

9 THE COURT: My question is whether we need three
10 separate briefs or whether we simply need a brief that
11 delineates those three issues.

12 MR. WARREN: Your Honor, I would submit that it
13 would be more proper to have three separate briefs.

14 THE COURT: That's fine. You're --

15 MS. COLTON: I'm happy to do that, Your Honor.
16 And on the -- I don't know that there was a suggestion on
17 the administrative claim one. I think both of us have
18 pretty much briefed that thoroughly. Do you need 21 days
19 for that?

20 MR. WARREN: I don't need 21 days for that, Your
21 Honor.

22 MS. COLTON: Yeah. Why don't we just do 14 and
23 14 on that one?

24 MR. WARREN: Well, I'm trying to stagger things
25 a little bit.

1 MS. COLTON: If you want to, we'll --

2 THE COURT: Why don't we just make it simple,
3 not having all these different deadlines. If you want to
4 drop it into the court, you can drop it into the court
5 tomorrow. But for 568, 14 days plus 14 days to respond.
6 And Ms. Frensley's going to give us some times here for
7 568.

8 As to 567, it's going to be 21 plus 21. Those
9 are going to be multiple briefs dealing with the issues
10 of ejection, counterclaims that the Association might
11 have -- a counterclaim -- and the administrative claim.

12 MS. COLTON: Right.

13 THE COURT: And you can hold your written
14 submissions on the administrative claim or you can drop
15 them into the court; I don't care. But rather than having
16 to keep track of all these different deadlines -- what's
17 14 days plus 14 days?

18 THE COURTROOM DEPUTY: Judge, the first
19 available date I have is Thursday, May --

20 THE COURT: No, this is not a hearing. This is
21 just counting days.

22 THE COURTROOM DEPUTY: Oh, okay. 14 days from
23 today?

24 THE COURT: Yeah.

25 THE COURTROOM DEPUTY: That's May 16th.

1 THE COURT: May 16th is the first brief in 568.
2 So, Ms. Frensley, if you would just make a scorecard along
3 these lines. May 16th, the Association's submission on
4 568. And on May -- two weeks after that?

5 THE COURTROOM DEPUTY: Is May 30th.

6 THE COURT: May 30th is the Trustee --

7 MR. BATES: Actually, Your Honor, it's Colony
8 Beach & Tennis --

9 THE COURT: And, no, it's the Lessors.

10 MR. BATES: Thank you.

11 THE COURT: I'm sorry, it's the Lessors. And
12 you can just designate it that way. Mr. Bartlett on
13 behalf of the Lessors.

14 Now, on 5-23, May 23rd, the Association is to
15 have its three briefs -- I guess it's the Association and
16 the Unit Owners. Maybe the Unit Owners on the ejectment
17 issue. But it's the Association and the Unit Owners on
18 567 and the ejectment. Three briefs. The ejectment
19 motion.

20 And 21 days after that would be -- one, two,
21 three -- that's June 14th, I think. June 14th for the
22 Trustee and the Partnership to respond.

23 And then we can set -- you said two hearings,
24 Mr. Warren?

25 MR. WARREN: I think it might be simpler if

1 we had, you know, one hearing in 568, one hearing in 567
2 and the ejectment together, and then a hearing on the
3 administrative claim, meaning there are three distinct
4 aspects and three different remedies and results. And
5 they can --

6 THE COURT: They could be on one day, couldn't
7 they?

8 MS. COLTON: Exactly.

9 MR. BATES: Exactly.

10 MR. WARREN: Well, if that works for everybody
11 else, we'll adjust to that, Your Honor. I had --

12 THE COURT: I mean, I don't mind --

13 MS. COLTON: That would make sense, Your Honor.
14 Just put it out far enough so that they all could be on
15 one day and save everybody a trip up here.

16 MR. BATES: Right.

17 THE COURT: Right. So we need a day in July
18 probably.

19 THE COURTROOM DEPUTY: (Conferring with Court
20 regarding dates.)

21 THE COURT: Okay. We could do Friday, July
22 13th. Friday the 13th. We have all day. And that's
23 not --

24 MR. WARREN: I think that date's fine, Your
25 Honor, for us.

1 THE COURT: I mean, if you're not going to be
2 brain-dead by 3:00 o'clock. I mean, that's the only thing
3 I'm thinking about.

4 MR. WARREN: Your Honor, we'll be fine.

5 THE COURT: It's better to just get it out.

6 MR. WARREN: We'll be fine.

7 THE COURT: July 13th all day. And I don't
8 really care what goes first. The afternoon, we have more
9 time. So if you want to do the ejection in the morning
10 and 567 in the afternoon?

11 MR. WARREN: Well --

12 THE COURT: 568 in the afternoon? Do you want
13 to think about that and reach some agreement?

14 MS. COLTON: I think we'll probably all be here
15 for all of it, so I don't know that it makes that much --

16 MR. WARREN: If everybody's going to be here for
17 all of it, Your Honor, maybe what we could do would be
18 just to set them and counsel will let Your Honor know the
19 sequence in advance but --

20 THE COURT: I'll let you all kind of decide on a
21 sequence --

22 MR. WARREN: Okay.

23 THE COURT: -- if it makes sense --

24 MS. COLTON: That's fine, Your Honor.

25 THE COURT: -- because I don't have a sense of

1 what's going to take more time and how you're going to
2 remain fresh. So we have that 9:30 to 12:00 slot and, you
3 know, we can use that. And then we have probably two
4 logical slots in the afternoon. And just however you want
5 to divide it up, okay?

6 MR. WARREN: We'll confer and --

7 MS. COLTON: Sure.

8 MR. WARREN: -- let the Court know.

9 THE COURT: July 13th at 9:30.

10 MS. COLTON: The reason that I stood, Your
11 Honor, is that I just wanted to confirm that our affidavit
12 would be due at the same day as our submission.

13 THE COURT: Yes.

14 MS. COLTON: Just wanted to confirm that.

15 THE COURT: Yes, thank you. And I think the
16 affidavits -- let me think about this -- deal with the
17 ejectment, so it would be the -- let's think about that.
18 The first brief is due May 23rd -- yeah, okay, in 567,
19 and the affidavits will be due when your submissions are
20 filed.

21 MS. COLTON: Very good, Your Honor. Thank you.

22 THE COURT: And if anybody wants any relief from
23 this, any opportunity to file a brief reply, I think you
24 can do that prior to the hearing, okay?

25 MS. COLTON: Thank you.

1 MR. WARREN: Thank you, Your Honor.

2 THE COURT: Is there anything else we need to do
3 today?

4 MR. WARREN: No, Your Honor.

5 MR. BARTLETT: No, sir.

6 THE COURT: All right.

7 MS. COLTON: Great, thank you.

8 THE COURT: Well, thank you all very much for
9 your excellent presentations today. It's very helpful to
10 me, and it's a very difficult process we're going through,
11 and I appreciate your professionalism.

12 MR. GUSO: Thank you, Your Honor.

13 THE COURT: And we'll be in recess.

14 THE COURTROOM DEPUTY: All rise.

15 (Proceedings concluded at 3:08 p.m.)
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C E R T I F I C A T E

I certify that the foregoing is the official verbatim transcript, prepared to the best degree possible from the digital audio recording and logs provided by the court.

I further certify that I am neither counsel for, nor related to, nor an employee of, any of the parties to the action in which this hearing was taken.

I further certify that I have no personal interest in the outcome of the action.

Dated this 8th day of May, 2012.



Cheryl Culver, CCR, B-1281
Certified Court Reporter
State of Florida Notary Public

Administrative Office of U.S. Courts
Approved Transcriber

158.180 - Distribution of 250 tourism units.

- (A) It is the intent of this section to govern the eligibility for and allocation of the 250 tourism units authorized by referendum election held on March 18, 2008. Approval, approval with conditions, or disapproval shall be by vote after public hearing before the town commission, pursuant to the provisions of this section.

It is further the intention of this section that the quality and location of such units shall benefit the public interest of Longboat Key, while being compatible with and not detrimental to the character of the area. The terms "tourism unit" and "tourism use" as used in this section shall be defined by section 158.006 Definitions, as amended, in this Zoning Code.

- (B) Groups of eligibility. The following are eligible to apply for additional tourism units based upon applicable conditions as described under this section:
- (1) Tourism developments.
 - (a) Tourism zoned or residentially zoned properties with an existing legal tourism use.
 - (b) Two or more contiguous tourism developments or tourism zoned properties may merge to create one larger development lot as defined in section 158.006
 - (2) Commercial, office and marina zoned property with a conforming principal use may be eligible for tourism units.
 - (a) For commercial and office zoned property, the tourism use shall not exceed that allowed for an accessory use, as defined.
 - (b) For marina zoned property, marina must be its principal use, and no more than 33 percent of the buildable land area shall be allowed for total floor area of the tourism use. The total allowable floor area shall include the square footage of common use areas and open terraces, but not garages and nonhabitable basement spaces.
 - (3) Tourism units under this section are allowed in residential districts as provided in subsection (B)(1) only and are not permitted in OS-A, OS-P, OS-C, PD, NPD and GPD zoning districts.
 - (4) Properties with existing PUD overlays may be eligible based upon the underlying zoning district. The existing PUD overlay shall become null and void upon approval of the ODP amendment application. All property owners within the PUD shall join in the ODP amendment application in order for the application to be processed by the town.
- (C) Review. The standards of the underlying zoning district in which the subject property is located shall remain in effect. In order to grant approval or approval with conditions, the town must find by competent substantial evidence that the project is in the best interest of the health, safety and welfare of the town and its citizens and does not adversely impact or affect the public interest. Projects shall be reviewed, evaluated, ranked, approved, approved with conditions, or disapproved in accordance with the following criteria, as well as the criteria set forth in section (D) below. The criteria listed below are in prioritized order with the most important listed first. Projects that require a departure from the standards of the zoning code, or do not meet zoning constraints, must demonstrate by clear and convincing evidence that the projects are so beneficial to the town as to warrant the granting of the requested departure or allowing the zoning constraints to be exceeded. In reviewing a proposed project, the town shall consider:

- (1) *Existing developments.* Whether the project:
 - (a) Meets current zoning constraints and would not need departures.
 - (b) Meets current zoning constraints and would need departures for the additional units.
 - (c) Does not meet current zoning constraints and would not need further departures.
 - (d) Does not meet current zoning constraints and would need further departures.
 - (2) *Sufficiency of the land area.* The site on which the project is to be located must be of sufficient size to accommodate the mass and scale of the proposed project, as well as to protect against adverse impacts to the adjacent parcels and surrounding area. Two or more contiguous existing tourism developments or tourism zoned properties that are merged shall be considered one lot for this consideration, in which case the underlying zoning district of each respective lot shall govern.
 - (3) *Number of units.*
 - (a) Proposed projects that appropriately utilize a greater number of available tourism units.
 - (b) Proposed projects that appropriately result in a greater total number of tourism units.
 - (4) *Open space.* Whether the proposed project preserves a larger percentage of open space than required by this Zoning Code.
 - (5) *Off-street parking.* Whether the impacts of off-street parking is minimized through the maximization of understructure parking, the utilization of parking waivers, and the strict application of the minimum parking calculations as per section 158.128 of this Code.
 - (6) *Setbacks.* Whether the proposed project maintains or surpasses the required gulf and pass waterfront yards.
 - (7) *Building height.* With no order of preference, the proposed structures':
 - (a) Distance from structures on adjacent properties.
 - (b) Distance from setback lines.
 - (c) Distance from rights-of-way.
 - (d) Relationship to the height of other on-site structures.
 - (e) Relationship to the height of off-site structures.
 - (8) Traffic circulation and impacts.
 - (9) Minimization of potable water usage (e.g., utilization of alternative water sources).
 - (10) Minimization of stormwater runoff.
- (D) Site considerations and compatibility review criteria. Projects shall be reviewed according to the criteria listed below which are in prioritized order with the most important listed first:
- (1) *Character compatibility.* Projects shall be compatible with and not detrimental to the character, including the use, of the area taking into consideration the adjacent property's potential development under the zoning code.
 - (2) *Consolidation of properties.* The potential positive impacts that are likely to occur from the consolidation of smaller development sites resulting in a larger development site.
 - (3) *Quality of development.*
 - (a) The proposed architecture enhances both the site and the surroundings.
 - (b) The proposed landscaping and tree preservation and plantings.
 - (c)

- The proposed on-site amenities and recreational opportunities serving the development.
- (4) *Quality of life.*
 - (a) Proximity and connection to beach or bay access.
 - (b) Proximity and connection to existing commercial.
 - (c) Proximity and connection to existing off-site recreational opportunities.
 - (d) Pedestrian walkability and bicycle accessibility
 - (E) Initial application review period. Since the town cannot anticipate whether requests for the utilization of the tourism units will exceed the 250 units available, upon the adoption of the ordinance enacting this section, a minimum initial 60-day application period shall be implemented to allow for the submission of all completed applications. At any time prior to a recommendation to the town commission on these initial applications, the planning and zoning board may, by majority vote, extend the initial 60-day application period as well as the review period if the board finds that to do so is necessary and proper to insure the orderly and fair evaluation of projects seeking to utilize some or all of the tourism units to be allocated hereunder. Upon expiration of the initial application period, the planning zoning and building director, or designee, shall review, rank and prioritize all applications, and forward the applications, together with recommendations, to the planning and zoning board.
 - (1) These applications shall be considered as a group before the planning and zoning board. The planning and zoning board shall provide recommendations to the town commission as to which, if any, projects meet the criteria for approval. If the total number of tourism units requested for projects that meet the criteria as determined by the planning and zoning board exceeds 250 units, then the planning and zoning board shall rank those projects from highest to lowest as part of its recommendation to the town commission.
 - (2) These applications forwarded by the planning and zoning board shall be considered as a group by the town commission. The town commission shall determine which projects, if any, meet the criteria of this section. If the total number of tourism units in projects that meet the criteria for approval exceeds 250, then the town commission shall rank those projects from highest to lowest. Projects shall be approved and units shall be committed by the town in accordance with this section starting with the project ranked highest.
 - (3) If after the allocation of tourism units to the ranked project(s), there are units remaining but the next ranked project requires more units than are available, then the next ranked project shall be given the opportunity during the allocation determination of the town commission to make a minor modification to the number of units requested in order to comply with the number of units available. There shall be a finding that the proposed minor modification does not adversely impact the rankings of the pending applications in order for the units to be allocated.
 - (4) If the next ranked project is unable to make acceptable minor modifications as described above, then the applicant(s) of the remaining ranked projects shall be given the opportunity to amend their application(s) and the remaining project(s) shall be ranked based on the criteria contained within subsections (C) and (D). Amended application(s) shall be submitted within 60 days from the initial allocation determination of the town commission. The projects approved and allocated units may proceed through the remaining approval processes.
 - (5) Ranked projects, for which the requested number of units cannot be committed, shall be kept under consideration until the site plan application period as described in

subsection (G) for the committed units has lapsed. If there are available units as a result of subsection (G), these project(s) will be considered for the ranking, allocation, and assignment of any unused units along with any other applications that may be submitted and reviewed during the interim utilizing the process and procedure for ranking and allocation outlined above.

- (F) After the initial application review period. If there are units that remain available for distribution, all applications will be reviewed as they are completed in accordance with the provisions of this Code and the criteria and standards set forth above. The town shall provide no guarantees or assurances of approval and no development permits or land uses based on the utilization of the 250 tourism units shall be granted until the review and determination of the initial applications is completed by the town.
- (G) Application and review process. Applications for eligibility and distribution of the 250 additional tourism units shall follow the procedures for and be approved, approved with conditions, or denied as an outline development plan (ODP) that shall include a binding concept plan. The necessary units to implement the binding concept plan shall be committed by the town upon the plan's approval, contingent upon the requirements of this Code. Upon approval of the ODP and binding concept plan, the applicant shall have no more than six months for the town to receive a complete application for final site plan approval. Failure to submit a complete application within six months, or submitting a complete site plan application within six months that is denied after all appeals are exhausted, shall result in the loss of the tourism units committed to the project, and the units shall become available for other proposed developments within the town.
 - (1) Concurrent review and approval of the ODP and final site plan is allowed.
 - (2) Concurrent review and approval of applications for voluntary rebuild, in accordance with section 158.140, and applications for 250 tourism units, under this section, is allowed.
 - (a) However, in such case the ODP and final site plan review applications must also be reviewed and approved concurrently.
 - (b) The final site plan shall replace the need for a binding concept plan as described in subsection (F).
- (H) Site plan expiration. The final site plan for the construction of additional tourism units shall expire 24 months after the date of approval if a complete application for building permit has not been submitted to the town and a building permit issued. Allocated tourism units associated with an expired site plan shall become available for other proposed developments within the town.
- (I) As a condition of approval, the applicant agrees to voluntarily forgo any underlying residential use of the subject property without a future amendment to the ODP.
- (J) Committed tourism units that are not approved as part of the final site plan shall become available for other proposed developments within the town.
- (K) Tourism units that are approved by final site plan, but not approved as part of construction plans, shall require a site plan amendment through public hearing. Units not constructed shall be removed from the allowable density of the subject parcel and become available for other proposed developments within the town. Units constructed but subsequently removed shall revert to the town for future allocation.
- (L) Conflicting Code provisions. Should the provisions eligibility and distribution of the 250 additional tourism units under this section for and the provisions of sections 158.065 through 158.103 conflict, the provisions for eligibility and distribution of the 250 additional tourism units shall prevail.

(Ord. No. 2008-34, § 3, 5-4-09)