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Reply to: *Lakewood Ranch*

MEMORANDUM

TO: MAYOR DUNCAN AND COMMISSIONERS

THROUGH: MAGGIE D. MOONEY-PORTALE, TOWN ATTORNEY

FROM: KELLY M. FERNANDEZ, ASSISTANT TOWN ATTORNEY

DATE: SEPTEMBER 21, 2015

RE: UPDATE ON COLONY BANKRUPTCY AND STATE COURT PROCEEDINGS

The purpose of this memorandum is to provide an overview of the events that have transpired in the various Colony-related bankruptcy and state court proceedings since the last comprehensive memorandum from the Town Attorney's Office dated June 8, 2015. While these proceedings are routinely reported on by our office and the local press, we continue to believe it is important for the Town Commission to receive our objective summary of what has occurred and where these proceedings presently stand. As with past memorandums, please note that this overview is based solely on a review of the pleadings filed in the cases and attendance at some of the bankruptcy hearings. We have not communicated with the parties or counsel for the parties in preparing this memorandum. Consequently, the parties may have a different perspective on the proceedings and their posture.

Colony Lender's Foreclosure Action in State Court Against Colony Beach & Tennis Club, Inc., Resorts Management, Inc., Colony Beach, Inc., et al.

On July 14, 2014, a foreclosure sale was held involving five parcels known as A-E, Unit A a/k/a Bar and Restaurant, Penthouse Unit 501, and Units F and G and Colony Lender was the winning bidder with a bid of \$15,200,001. An Amended Certificate of Title was issued on August 7, 2014 vesting title in Colony Lender. Although there remains dispute as to what lease interests, if any, were transferred as well (which is further described in the case summaries below), this case is final.

Bankruptcy Case involving Resorts Management, Inc., Colony Beach, Inc. and Colony Beach & Tennis Club, Inc. (the “triple debtors”)

(Bankruptcy Court Case Nos. 13-bk-348, 13-bk-350, and 13-bk-354)

This is the consolidated bankruptcy case involving Resorts Management, Inc., Colony Beach, Inc. and Colony Beach & Tennis Club, Inc. (“CBTC”). On May 14, 2014, the Trustee filed a Motion seeking the authority to sell by auction the assets of these three debtors, which at the time encompassed the property subject to Colony Lender’s foreclosure action plus the Pro Shop and Food/Beverage Unit and the Recreational Lease Rejection Damages Claim against the Association in the amount of \$2,223,391.70. Offers had been received from Unicorp, Core Development, Inc., and Eastland Investment Group, Inc. The Motion sought to sell the assets free and clear of all liens, including the Town’s claim for unpaid utility fees in the amount of \$5,915.45. Breakpointe, LLC and Colony Lender objected to the sale procedures. As a result, on July 1, 2014, Judge Moody of the U.S. District Court ordered the Bankruptcy Court to reinstate Colony Lender to its secured status as to the Recreational Lease Rejection Damages judgment (hereinafter “Rec Lease Judgment”). Note that these proceedings occurred prior to the July 14, 2014 foreclosure sale summarized above in which Colony Lender was the winning bidder.

On June 19, 2015, the Trustee filed a Motion for Authority to Compromise Controversy and Sell Property of the Estate Free and Clear of Certain Liens, Claims and Encumbrances which proposes resolution of the disputes and claims between the Trustee, Icard Merrill (who provided pre-petition legal services to the Debtors), and the Association. If approved, the Association would have paid \$625,000 in full and final settlement of the Rec Lease claims and related appeals and would have acquired all assets of the Debtors exclusive of cash held by the Trustee. Assets of the Debtors include Units C and E, voting rights and other control and management rights, interest in or rights related to the Partnership, and insurance claim rights. On June 22, 2015, Unicorp and Colony Lender filed a counterproposal re-stating Colony Lender’s assertion that it owns the Rec Lease and that the ownership of the Rec Lease Damages claim remains subject to litigation. Unicorp proposed to pay the Trustee \$1.472 million dollars and the Icard Merrill claim in full. On June 29, 2015, Icard Merrill filed notice of its rescission of the compromise with the Association based on mutual mistake of the underlying facts. On August 3, 2015, Unicorp filed notice that the claims of Icard Merrill had been transferred to it. On August 7, 2015, the Trustee withdrew his original Motion filed on June 19, 2015 and filed a new Motion for Authority to Compromise Controversy and Sell Property of the Estate related to a negotiated Agreement with Colony Lender/Unicorp. The Agreement called for Colony Lender/Unicorp to pay \$425,000 to the Trustee, waive the Icard Merrill claims, pay outstanding real estate taxes, and assume and indemnify the Trustee from all pending litigation. On August 28 and September 4, 2015, the Trustee’s Motion was heard and resulted in the Trustee entering into a Settlement and Sale Agreement with the Association whereby it agrees, in part, to a cash payment to the Trustee of approximately \$3.1 million dollars. The Judge and Trustee believed the sale to the Association would result in sufficient funds for the Trustee to resolve all claims, including the Town’s claim of \$5,915.45, and enable the estate to be closed or at least “hibernate” while remaining issues are resolved.

Also of note in this case, on August 20, 2014, the Trustee filed a Motion seeking to: (1) have the Bankruptcy Court issue sanctions against Colony Lender for willfully violating the automatic stay due to a letter sent to the unit owners on August 15, 2014 demanding amounts due under the Recreational Facilities Lease (“Rec Lease”) totaling approximately \$5,116,664.24; and (2) to quiet title to an 80% interest in the Rec Lease Judgment. Colony Lender filed a Response asserting, in part: (1) its demand letter to the unit owners was solely regarding the Rec Lease that it acquired as part of the foreclosure sale and not the Rec Lease Judgment; (2) the Declaration of Condominium makes unit owners personally liable for the rent stream due under the Rec Lease; (3) the Bankruptcy Court has no jurisdiction over the individual unit owners; and (4) Colony Lender acknowledges that personal property was not conveyed as part of the foreclosure sale, but states Judge Moody determined that the Rec Lease Judgment is not personal property apart from the real estate interests. The Association, in its representative capacity for all unit owners, also filed a motion for sanctions against Colony Lender as well as Charles Whittall and David Siegal. Colony Lender argued the individual unit owners have no standing to bring such a motion, nor can one counsel (attorney Warren) represent all unit owners without conflicts of interest. Colony Lender also argued that while it believes it does own a 95% share of the Rec Lease and the Rec Lease Judgment, it has done nothing to formally assert its ownership. Furthermore, it believes that if there is dispute as to whether the Rec Lease conveyed with the foreclosure sale, the state court should decide the matter. On March 18, 2015, Judge May issued a Memorandum Opinion on Motions for Sanctions finding the automatic stay was only lifted as to real property and therefore the stay had been violated. On May 12, 2015, an Order Regarding Equitable Relief and Sanctions for Colony Lender/Unicorp’s stay violations was entered, which provides in part that the Rent Collection Action (described below) must be dismissed. The final evidentiary hearing on damages and sanctions will be held on November 2 and 3, 2015.

Relatedly, on September 4, 2014, the Trustee initiated an adversary proceeding (Case No. 14-ap-776) requesting the Bankruptcy Court to determine the interests of CBI, CBTC, and Colony Lender under the Rec Lease and Rec Lease Judgment. The Trustee claims that Colony Lender: (1) did not acquire any claims under the Rec Lease at the foreclosure sale based on the description of the property included in the Notice of Sale and the Amended Certificate of Title; and (2) the foreclosure sale extinguished any security interest or liens Colony Lender had under the Rec Lease as result of having its secured claim satisfied and paid in full by its \$15,200,001 bid for the Rec Lease Property. Colony Lender’s position is essentially that the Rec Lease and Rec Lease Judgment did convey with the Certificate of Title. Argument was heard on June 5, 2015, but a ruling has not yet been issued.

Bankruptcy Case involving Colony Beach & Tennis Club, Ltd. (“the Partnership”)

(Bankruptcy Court Case No. 09-bk-22611)

The assets in this case are approximately \$225,000.00 in cash and the estate’s rights in appeals. On June 3, 2015, the Trustee filed an Expedited Motion for Entry of Order (A) Approving Competitive Bidding and Sale Procedures; (B) Scheduling Dates to Conduct Auction and Hearing to Consider Final Approval of Sale; and (C) Granting Related Relief. Therein the Trustee identified that he had entered into a letter agreement for the sale of the estate assets with Unicorp Acquisitions, LLC. For the sum of \$3.5 million, Unicorp would acquire the Trustee’s right, title and interest in (i) the

Recommended Judgment against the Association and (ii) all other property of every kind and description and rights of any kind or nature that make up or may make up the Partnership's bankruptcy estate with the exception of cash held by the Estate. The Trustee also expressed an intent to solicit higher and better offers. The court granted to Trustee's Motion over the Association's objection. Bids were due by July 30, 2015 and four were submitted by the following: the Association, Unicorp, Naeco, LLC, and Bluewater Oceanfront Investments, LLC. The auction to select the successful bidder was scheduled for September 8, 2015. However, prior to the start of the auction, the Trustee announced that the Association had enhanced its bid, in part due to being awarded the "triple debtor" assets, and the Trustee wished to proceed forward with a sale of the Partnership's assets to the Association. The Association's offer included the payment of \$3 million dollars in cash, the dismissal of the appeal case involving the \$23 million dollar recommended judgment against the Association, and the disallowance of the Association's claims against the Partnership estate. After much argument from the parties, Judge May accepted the business judgment of the Trustee that the Association's settlement offer-type bid was the highest and best offer received and that the resulting settlement of most, if not all, of the pending litigation was better than any additional cash that might be paid by the other bidders. This sale should result in the Town's claims (\$50,904.78 and \$33,592.82) being paid in full.

Bankruptcy Case involving Colony Investors, Inc.

(Bankruptcy Court Case No. 14-bk-5269)

This Chapter 7 bankruptcy case was filed on May 8, 2014. The Town has no claims filed in this matter and there are few assets. On September 8, 2015, an auction of the assets was held and they were awarded to the Association.

Colony Lender's Partition Action Against Breakpointe, LLC

(Sarasota Circuit Court Case No. 2014 CA 005028 NC)

(Bankruptcy Court Case No. 14-ap-00810-KRM)

On August 28, 2014, Colony Lender, filed a partition action against Breakpointe, LLC which is controlled by Andy Adams. As a result of the completion of Colony Lender's foreclosure action, Colony Lender and Breakpointe are tenants in common with Colony Lender having a 95% ownership interest in the recreation outparcels and Breakpointe having the remaining 5% ownership interest. Colony Lender is seeking partition by sale of the property, rather than physical division, due to the composition of the subject property and the parties' divergent intentions and economic interests for the property. On September 12, 2014, Breakpointe filed a Notice of Removal of the action to the Bankruptcy Court as an adversarial proceeding to the consolidated case involving Resorts Management, Inc., Colony Beach, Inc. and Colony Beach & Tennis Club, Inc., due to the unresolved issues involving the Rec Lease Judgment. On September 26, 2014, Colony Lender filed a Response in opposition stating it is seeking partition of the real property acquired at the foreclosure sale and not the Rec Lease Judgment. Subsequently, on October 14, 2014, Colony Lender filed a Motion in the Bankruptcy Court requesting that the proceeding be remanded to the Circuit Court for the same reasons expressed in its Response. On April 20, 2015, the Motion was denied and Colony Lender appealed the ruling the same day. On September 14, 2015, Colony Lender filed a Motion to Remand seeking to have this matter sent back to state court due to the sale of the estate assets to the Association.

Colony Lender's Action to Collect Rent from Unit Owners in State Court

(Sarasota Circuit Court Case No. 2014 CA 005408 NC)

On September 16, 2014, Colony Lender filed an action against virtually every unit owner in state court for breach of contract. Colony Lender alleges that it is the successor by purchase and foreclosure to the Rec Lease. The Rec Lease is further alleged to be part of the Declaration of Condominium and thereby subjects the unit owners to personal joint and several liability for all amounts due under the Rec Lease and the performance of all obligations thereunder. Colony Lender is seeking to collect: (1) rent and interest from October 29, 2008 through August 15, 2014 in the sum of \$4,594,276.40, plus rent that continues to accrue; (2) tax arrears plus interest in the sum of \$525,244.82; and (3) a reasonable attorney's fee for collection efforts for sums due, plus costs. Colony Lender is also pursuing each unit owner for unpaid real estate taxes, interest, and penalties and future accruing rent. On March 20, 2015, the unit owners being collectively represented by Jeff Warren filed a Motion to Dismiss on the basis that the Complaint violated the bankruptcy stay, Colony Lender lacked standing to bring the suit because it owns no rights under the Rec Lease and it fails to state a cognizable cause of action. On June 26, 2015, Colony Lender voluntarily dismissed the case due to its failure to obtain a stay of Judge May's sanctions Order in the Partnership bankruptcy case.

Rabin (Unit Owners) Action Against Association and Board for Injunctive Relief

(Sarasota Circuit Court Case No. 2014 CA 001912 NC)

On April 1, 2015, Sheldon and Carol Rabin filed a Complaint against the Association and its directors seeking a mandatory injunction. They alleged that the Board violated the law governing condominiums (Chapter 718, Florida Statutes) and the Declaration by refusing to maintain and repair the common elements and structural support members of the individual units. The refusal to act resulted in the property being uninhabitable and threatened with demolition by the Town. The Rabins own a unit seaward of the coastal construction control line. On May 15, 2015, a Final Judgment was entered in favor of the Rabins. It requires the Association to retain Karins Engineering to provide an estimate and plan to get each unit habitable, prepare and adopt within 60 days a budget, and develop a plan to collect current and past due assessments. The court retained jurisdiction to address future related issues. On May 29, 2015, the Association filed notice that it retained Karins Engineering as required. The Association then filed its Notice of Appeal of the Final Judgment on June 12, 2015 and on June 15, 2015 filed a Motion for Stay of Enforcement of Final Judgment Pending Appeal. On June 17, 2015, Plaintiffs filed a Motion to Show Cause as to why the Association should not be held in contempt for failing to comply with the Final Judgment. A hearing on all Motions was scheduled for September 1, 2015, but then continued to October 1, 2015.

Conclusion

The Association's acquisition (assuming the sales close) of the estate assets in the cases involving the Colony Beach & Tennis Club, Ltd., Resorts Management, Inc., Colony Beach, Inc. Colony Beach & Tennis Club, Inc., and Colony Investors, Inc. has brought clarity to the ownership interests at the Colony. The Association has essentially gained control of the entire property except for the four outparcels. Colony Lender retains a 95% ownership interest in the four outparcels (Breakpointe,

LLC retains the other 5%) and apparently intends to continue to litigate its right to the Rec Lease (mentioned above). In addition, the lawsuit filed by the Rabins remains pending and active. So while a significant step forward has been made in resolving pending litigation such that redevelopment plans can begin, a great deal remains to be addressed.

We hope that you find this memorandum helpful. As always, if you have any questions regarding these matters please do not hesitate to contact us.



End of Agenda Item