COUNSEL'S COMMENTS

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CAPITAL CONTRIBUTIONS FOR CONDOMINIUM ASSOCIATIONS ARE NOT UNIVERSALLY INVALID

Not since the case of *Walker v. Briarwood Condo Association,* 274 N.J. Super. 422 (App. Div. 1994) declaring that fines were not authorized by the New Jersey Condominium Act has there been so much dismay displayed by so many condominium associations and their professionals as with the recent decision of *Micheve, L.L.C. v. Wyndham Place at Freehold Condominium Association,* Docket No. A-1014-04T2 (App. Div. 2005) which invalidates capital contributions imposed by board resolution against resale purchasers of condominium units. Although both cases are prime examples of the old adage that "bad facts make bad law", the many nuances of the *Micheve* case compel me to add my voice to the chorus of legal pundits expressing their opinions about the *Micheve* case and its significance to New Jersey condominium associations. **Importantly, it does not apply to homeowner associations or to cooperatives.** Moreover, it is my opinion that the *Micheve* case has limited application to the condominium associations based upon its operable facts.

FACTUAL BACKGROUND

The facts are simple. The Wyndham Association Board imposed by resolution a $750.00 non-refundable working capital contribution without the benefit of any authority in the master deed and by-laws for the condominium. Existing unit owners had apparently not been previously required to make such a contribution and the proceeds from this assessment served as an additional revenue source to be used "to pay common expenses for the maintenance repair and replacement of the common elements from which all unit owners benefit."

ISSUES

Specifically, there are three main elements upon which the Court's rationale is based: (i) discrimination against new owners; (ii) a narrow focus on the statutory definition of common expenses and (iii) the imposition of the capital contribution by board resolution rather than by an amendment to the master deed or by-laws. Accordingly, I would address each of these issues independently.

Discrimination Against New Unit Owners

The first prong of the Court's opinion is premised on the fact that the capital contribution did not apply to all unit owners but solely to the unit owners who acquired title after the board resolution became effective. According to the Court, this resulted in the subsidization of the common expense assessments of the existing unit owners by the new unit owners who paid the capital contributions and, therefore, discriminated against the new unit owners. In reaching its conclusion, the Court cited both *Thanasoulis v. Winston Towers 200 Ass'n.,* 110 N.J. 650 (1988) where a discriminatory parking *[Continues on page 10.]*

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fee against non-resident owners was declared invalid and *Chin v. Coventry Square Condo. Ass'n.*, 270 N.J. Super. 323 (App. Div. 1994), holding that a rental fee charged against non-resident owners was "a discriminatory revenue-raising device assessed only against a discrete class of unit owners". However, it should be noted that both the *Thanasoulis* case and the *Chin* case involved fees that were imposed upon unit owners who were existing members of the association and not upon prospective members who must pay the capital contribution as a condition precedent before becoming a member.

In my view, the discrimination argument would also be negated in the *Micheve* case if all prior unit owners had paid a capital contribution in a similar amount as is commonly required by the governing documents of many condominium associations. Obviously, it might be more problematic if the resale capital contribution was more than the initial capital contribution. Parenthetically, one of the legal requirements for FNMA approval of condominium projects is that "an initial working capital fund" be established "in an amount that is at least equal to two (2) months of the estimated common charges for each unit."

Statutory Definition of Common Expenses

A second principal focus of the Court's opinion in the *Micheve* case is the definition of common expenses as set forth in N.J.S.A. 46:8B-3e and the

provisions of N.J.S.A. 46:8B-17 which states in pertinent part that: "The common expenses shall be charged to unit owners according to percentage of their respective undivided interest in the common elements as set forth in the master deed and amendments thereto or in such other portions as may be provided in the master deed or by-laws." The master deed and by-laws for *Wyndham Place* mandated that "the common expenses should be assessed among the unit owners according to their respective interests in the common elements". If the percentage interest of all unit owners is not equal, it is understandable that a flat fee of $750.00 for capital contribution could be deemed to be in violation of the Condominium Act if indeed a contract purchaser is deemed to be a unit owner at the time the fee is paid. However, if in fact, the percentage interests for every unit were equal, I would submit that the Court's reasoning might be flawed with respect to the disproportionality of the capital contribution based upon the definition of common expenses.

...a rental fee charged against non-resident owners was "a discriminatory revenue-raising device assessed only against a discrete class of unit owners".

Imposition of Capital Contribution Assessment By Board Resolution

Finally, although the Court did not have to address the fact that there was no authority in the master deed or by-laws for the imposition of a capital contribution either by board resolution or automatically under the master deed or by-laws, it seems clear that if a capital contribution was independently authorized or mandated under the master deed or by-laws, a different result might have been reached by the Court. More specifically as a result of the *Briarcliff* case, supra., N.J.S.A. 46:8B-15(g) was enacted to give a condominium association "such other powers as maybe set forth in the master deed or by-laws, **if not prohibited** by [the Condominium Act] or any other law of this State". [Emphasis added]Moreover, N.J.S.A. 46:8B-15(e) provides in pertinent part that "the Association may levy and collect assessments duly made by the Association for its share of common expenses **or otherwise**...if authorized by the master deed or by-laws".

Accordingly, I would submit that the holding of the *Micheve* case would not apply to the imposition of a capital contribution that was authorized by the master deed or by-laws of a condominium association, notwithstanding the fact that the proceeds might be used as a revenue source to offset the common expense assessments imposed by the Association, particularly if the capital contribution is proportionate to each unit owner's obligation to pay other common expenses. Otherwise, the two provisions of the Condominium Act cited above would be *[Continues on page 12.]*

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rendered meaningless in the absence of any statutory prohibition against non-refundable capital contribution assessments.

Indeed, there are many examples of revenue sources for condominium associations applicable to only some unit owners which are utilized to reduce common expense assessments imposed against all unit owners. These include, parking charges, rental fees, user fees, reserved common element fees, etc. Therefore, because of the provisions N.J.S.A. 46:8B-15(e) and (g) aforesaid there would seem to be no authority for prohibiting the assessment of non-refundable capital contributions or other membership fees, based upon the narrow interpretation of common expenses set forth in the *Micheve* case, provided that authority for such assessment, contribution or fees are set forth in the master deed or by-laws and not authorized solely by board resolution.

Summary

In summary, it is my view that the *Micheve* case should be interpreted narrowly and restricted to its facts. Arguably, court decisions prohibiting discriminatory assessments among condominium unit owners as in the *Thanasoulis* and *Chin* cases do not apply where a capital contribution is required as a condition precedent to membership in the condominium association. Clearly, in any event, there must be authority in the master deed or by-laws to impose such capital contribution requirements as contemplated by N.J.S.A. 46:8B-15(e) and (g), respectively. A board resolution standing alone is not enough.

The developers of new condominium projects should continue to include such authority in the governing documents for new property and existing condominiums whose governing documents have authorized the imposition of capital contribution assessments from inception would seemingly be on safe grounds to (i) continue to collect such assessments on resales if authorized by the master deed or by-laws or (ii) amend the governing documents to mandate such resale assessments in the future if the authority previously existed with respect to original unit owners. However, if there is no such authority in place with respect to original unit owners or if the amount of the contribution is increased for resales, the validity of such an amendment to the governing documents may be more tenuous in light of the prohibitions against discrimination in the *Thanasoulis, Chin* and *Micheve* cases.

In any event, there are no black or white answers to the issues raised by the *Micheve* case. The conclusions are fact sensitive and will be driven by the circumstances applicable to each condominium association which addresses the issues raised. Most importantly, the readers of this article are expressly cautioned not to rely upon any of the opinions expressed herein, but to consult the attorney for their respective condominium associations and/or other independent counsel for competent legal advice with respect to (i) the validity of capital contribution assessments in their particular condominium and (ii) the development of a strategy for responding to those who assume that the *Micheve* case has universal application to all condominiums.

Finally, in view of the uncertainty caused by the *Micheve* case and the budgetary significance of capital contributions and membership fees to condominium associations, an amendment to the New Jersey Condominium Act expressly authorizing these assessments as well as transfer fees to Sellers would seem to been an appropriate initiative for NJ/CAI and the New Jersey Legislature to pursue. ■

Although the Micheve case did not address the case of Sulcov v. 2100 Linwood Owners, 303 N.J. Super 13 (App. Div. 1997) recognizing the validity of properly imposed flip or transfer fees charged by cooperative associations to sellers of co-op shares where the flip fees apply equally to all shareholders who sell their interest in the units, there would arguably not be any discrimination among condominium unit owners if a condominium association imposed a transfer fee upon each sale of a condominium unit.

If you are interested in receiving a copy of the *Wyndham* Case decision, please contact the CAI-NJ office at (609) 588-0030.

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