

PRACTICAL GUIDE TO ASSOCIATION SPECIAL ASSESSMENTS UNDER THE NABOR CONTRACT

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One of the most difficult hurdles in a real estate transaction is a “special assessment” by an association. Carefully understanding which party pays the special assessment prior to execution of the contract allows both the Buyer and Seller to set the expectations for the parties and negotiate any potential “deal killers” that may be lurking. This article focuses on special assessments by associations (both condominium and home associations) and not special assessments by governmental bodies.

What is an Special Assessment by an Association?

Under Florida law, a special assessment by an association is “any assessment levied against a unit owner other than the assessment required by a budget adopted annually.” Fl. Stat. §72020.103 (24). It should be noted that “levied” in this context means that the association has authorized the special assessment by a vote of the owners under the terms and conditions of the association. This does not necessarily mean that the assessment is yet payable – simply that its authorized by the association to be collected at a future date. Conversely, a common assessment is simply “a share of the funds which are required for the payment of common expenses, which from time to time is assessed against the unit owner.” Fl. Stat. 72020.103(1). In other words, the reoccurring expenses of the association that are paid on a monthly, quarterly, or annual basis by the members of the association. For example, after Irma many associations did not have enough funds to pay for the cleanup of damage from Irma, and thus levied a specific special assessment to pay for Irma damage cleanup. Regular landscaping maintenance would not be a special assessment because it was already a common expense set by the association budget.

Why Do Special Assessments Matter?

Special Assessments are a lien on the real property and collected by the association – which means that the association will first look to the current property owner to collect if a special assessment is not timely paid. Importantly, under the NABOR contract, the determination of which party to a real estate transaction will pay a special assessment is locked in at the time the contract is executed. Special assessments can be thousands of dollars and to properly negotiate the terms of the contract, including purchase price, the parties must understand who will ultimately pay for the special assessment prior to starting negotiations.

How Does NABOR Handle Special Assessments?

Under the NABOR 2019 Revision contract, a Seller is generally responsible to pay the full amount of a special assessment by an association at closing so long as the special assessment is levied by the association on or prior to the effective date of the contract and 1) the amount of the special assessment is known; 2) the identity of the lienor is known; and 3) the “property subject to the lien

or special assessment” is known.¹ If a special assessment is levied after the effective date of the contract (or does not otherwise fit in the requirements above) and is less than 1% of the purchase price, then the Buyer will be responsible for payment of the special assessment and not the Seller. If the amount of the special assessment levied after the effective date of the contract exceeds 1% of the purchase price and was not disclosed by the Seller to Buyer in writing, then the Buyer may terminate the contract unless the Seller agrees to pay difference between the amount of the special assessment and 1% of the purchase price. Therefore, a Buyer’s potential liability for a special assessment levied by an association after the effective date of the contract is limited to 1% of the purchase price.

Example Special Assessment under NABOR Contract

Assume \$9,000 Special Assessment by Association

Purchase Price	Effective Date of Contract	Date Special Assessment Levied by Association	Date Special Assessment to Be Fully Paid	Closing Date	Buyer Pays	Seller Pays
\$300,000	6/14/2020	4/1/2020	8/1/2020	7/15/2020	\$0	\$9,000
\$300,000	6/14/2020	6/14/2020	10/30/2020	7/15/2020	\$0	\$9,000
\$300,000	6/14/2020	6/15/2020	8/1/2020	7/15/2020	\$3,000	\$6,000 If seller elects to pay difference between 1% and special assessment, otherwise Buyer can terminate
\$1,000,000	6/14/2020	6/15/2020	7/30/2020	7/15/2020	\$9,000	\$0

What about Special Assessments Paid on a Payment Plan?

A common misconception by many Sellers is that they believe that a Buyer will take over any special assessments that are on a payment plan after closing; however, under the NABOR Contract, the Seller must pay the full amount of a special assessment at closing, regardless of whether it is owed under a payment plan. As a result, if an association levied a \$10,000 special assessment to be paid over a four-year period for a new clubhouse prior to the effective date of the sales contract, the Seller would still be responsible to pay the entire \$10,000 at closing. If this is not discussed or

¹ Requirements 2 and 3 are rarely an issue in an association special assessment given that the identity of the lienor is the association and the property subject to the lien is the property that is the subject of the sales contract.

understood ahead of time by the Seller, it could cause a big headache at closing when the Seller looks at the closing statement and realizes their sales proceeds will be \$10,000 less than expected.

Tips for Realtors

- ✓ A Buyer's realtor should always ask in writing if there is a pending special assessment or if the Seller has information on potential future special assessments.
- ✓ A Seller's realtor should always discuss potential special assessments up front with their client to make sure they understand how it will be handled at closing to avoid any surprises.
- ✓ If an unexpected special assessment comes up after the contract is executed, the parties should speak with their attorneys to make sure the special assessment is dealt with correctly at closing.
- ✓ Certain special assessments can be covered under insurance policies and a Seller should speak with an attorney about how it should be handled in a contract prior to executing a contract.
- ✓ It is much easier to deal with a \$10,000 special assessment ahead of time, as opposed to when the closing statement is sent around for approval just prior to closing.
- ✓ A Seller should always disclose any special assessments or potential special assessment to a Buyer.