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Vol. 103 JANUARY 2003 CURRENT NEWS FOR COMMUNITY ASSOCIATIONS

CONDOMINIUM BUILDINGS SUBJECT TO RETROFITTING FOR FIRE SAFETY REQUIREMENTS

By Donna D. Berger, Esq.

Fires that occur within high-rise buildings pose the most risk for loss of life (both for occupants and firefighters) and severe property damage. While there is an inherent risk in combating any fire, one that rages within an inadequately protected high-rise building can rapidly become catastrophic.

High-rise fires are not only the stuff of blockbuster movies; they are the images that burn in a community's collective consciousness long after the flames have been doused. A fire that raged at the MGM Grand Hotel in Las Vegas resulted in 85 deaths and left a negative economic impact on hotel bookings for months following the tragedy. On a smaller scale, a recent Pinellas County high-rise condominium fire resulted in the death of two elderly occupants and serious injury to several firefighters. It is believed that the fire emanated from the kitchen of a unit on the fifth floor. One of the injured firefighters has filed suit against the association, alleging that the association failed to properly maintain its fire extinguishing system.

The potential for disaster in this arena has been known for some time. There has been a National Fire Protection Association (NFPA) Life Safety Code (LSC) (also known as NFPA-101) in place since 1991. This code has been adopted by all 50 states as a fire safety standard. In 1998, the Florida Legislature passed Chapter 98-287 which codified the Florida Building Code and incorporated the national fire safety standards into the new Florida Fire Prevention Code. At that time, the Florida Fire Code Advisory Council (FFCAC) heard testimony from potentially impacted parties around the State. The standards set forth in NFPA-101 that will impact condominium owners follow:

1. All existing high-rise buildings in excess of 75 feet in height, regardless of their use, must be protected throughout by a supervised automatic sprinkler system;
2. There is an exemption to this requirement for residential high-rise buildings where every dwelling unit has exterior access to an open-air walkway that leads to two remote stairwells. If there are

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In 2002, the Legislature changed the year end financial reporting requirements for condominiums, and there are now different rules for condominiums, cooperatives and homeowners' associations:

- ✓ Section 720.303(7), F.S. - Year end reports for homeowners' associations are due within 60 days after the close of the fiscal year. The association must provide either notice to all members that the financial report is available or a copy of the report to each member.
- ✓ Section 718.111(13), F.S. - For condominiums, reports are due within 90 days from the end of the fiscal year. However, within 21 days after the final financial report is completed by the association or received from a third party, but not later than 120 days from the end of the fiscal year, or other date set forth in the bylaws, the association must provide either notice that the financial report is available or a copy of the report to each member.
- ✓ Section 719.104(4), F.S. - In

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...BUILDINGS SUBJECT TO RETROFITTING...

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interior corridors, the exemption will not apply; and

- An exemption may be permitted if an Engineered Life Safety System (ELSS) has been approved by the authority having jurisdiction (i.e., the municipal Fire Marshal). For example, a fire sprinkler may not be necessary within each condominium unit if an engineer registered in the State of Florida determines that other fire safety features within the building code exceed code requirements, and the building is as safe as a building which is fully equipped with an automatic sprinkler system. An Engineered Life Safety System is usually comprised of a partial sprinkler system combined with some other life safety systems such as hard-wired fire alarm systems and fire doors. While an ELSS is less expensive than a full sprinkler system, there is no guarantee that a local Fire Marshal will find it to be an acceptable alternative to fully retrofitting a building with fire sprinklers. Obviously, the price tag attached to a complete retrofit work order will prove to be daunting to most, if not all, associations.



The official adoption of the NFPA 101 was on January 1, 2002. The fire service originally requested that communities be given only three to five years to retrofit their buildings with automatic fire sprinkler systems. Ultimately, however, a 12-year compliance timeframe was adopted in accordance with the FFCAC's recommendation. Thus, the deadline for compliance for all existing condominium buildings in excess of 75 feet is **December 31, 2014**. However, the Florida Fire Prevention Code defers to local authorities having jurisdiction with regard to implementing the more economical route of creating

an Engineered Life Safety System. This deferral is found in NFPA-1, Section 7-3.2.21.2.2 which reads,

"However, when a condominium decides to follow the more economical alternative route of the Engineered Life Safety System solution instead of a full sprinkler system solution, then the local fire department, which is the Authority Having Jurisdiction, may require that the implementation be performed in a shorter period of time."

Thus, any local Fire Department has the potential authority to require a high-rise residential building to compose and complete an Engineered Life Safety System in fewer than twelve (12) years. It will be necessary to check with your local fire department to accurately determine the exact deadline you will be facing.

This is an issue that will affect thousands of buildings across the State of Florida including many residential buildings, such as yours, and will involve the expenditure of millions of dollars to accomplish the retrofitting. The State Fire Marshal has already commenced building inspections and is sending out notices of noncompliance with the uniform fire safety standards. An association that receives one of these notices has 180 days to file an intent to comply with the NFPA-101 provisions. As mentioned above, local authorities may require implementation of these fire safety standards well before the December 31, 2014 deadline. **For example, Miami Dade County has imposed a three (3) year compliance deadline for those buildings wishing to install an ELSS.**

There are currently two (2) bills that may be considered in the legislative session which convenes on March 4, 2003. House Bill 165 would allow two-thirds (2/3rds) of the total voting interests of a condominium or cooperative association to opt out of the retrofitting requirements. Senate Bill 244 would exempt all buildings

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Did You Know ???

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a cooperative, year end financial reports are due within 90 days from the end of the fiscal year, and the corporation is still required to provide a copy of the report to every shareholder, at no charge.

- ✓ In condominiums and cooperatives, the type of year-end financial report depends upon the total amount of the budget. However, the level of reporting can be waived or reduced if approved by at least a majority of the votes cast at a duly noticed, convened and constituted meeting of the membership.
- ✓ For homeowners' associations, the year end financial reports are required to be either financial statements in accordance with generally accepted accounting principles, or financial reports of receipts and expenditures, prepared on a cash basis.
- ✓ If copies of year-end financial reports are requested by condominium unit owners or members of a homeowners' association, the association is required to provide the copies at no charge to the owner/member.

constructed on or before January 1, 2002 from the total sprinkler retrofit requirements but would empower the local authority having jurisdiction to grant such exemptions.

If our clients show sufficient interest, Becker & Poliakoff, P.A. will undertake a lobbying effort to work towards the successful passage of legislation which will be beneficial to condominium and cooperative owners statewide. If you are interested, please contact Donna Berger at dberger@becker-poliakoff.com or call 1-800-432-7712, ext. 4163, or 954-985-4163.

THEY'RE PLAYING OUR SONG

By Marc J. Randazza, Esq.

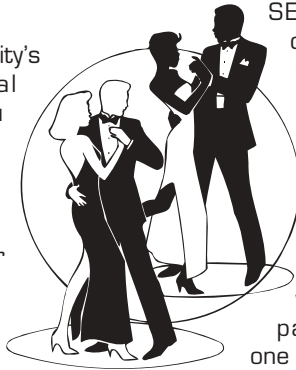
You walk into your community's clubhouse for the annual Valentine's Day dance. As you and your spouse enter, you hear Tony Bennett crooning through the loudspeakers. You smile, grasp her hand and say "Listen! They're playing *our* song."

You're wrong. As much as you may love it, it isn't *your* song. It's Tony Bennett's **intellectual property**, and like anything else, using someone else's property without permission is stealing, and the law forbids it.

In a restaurant or bar, open to the public, often the proprietor enhances the dining or drinking experience by entertaining patrons with music. This additional entertainment adds value to the restaurant or bar service, and whether the music comes from a purchased CD or over the airwaves, the owner of the copyright to that music has a property interest in the songs being played and a corresponding legal right to profit from its public performance.

Title 17 U.S.C. § 106(4) grants copyright owners the exclusive right to perform or to authorize the performance of their copyright works "Perform" under the copyright law means to either perform "directly or by means of any device or process." "Public performance" includes each step in the process by which the copyrighted work travels to the audience. Therefore, playing a concert is "performance," a radio broadcast of the concert is "performance," and a restaurant playing the radio broadcast of the concert is also a "performance." [See: *NFL v. Prime Time*, 211 F.3d 10 (2d. Cir. 2000)].

Under Title 17, any person or entity who performs, or allows others to perform, copyrighted music in a public place is legally responsible for obtaining prior permission from the copyright owner for this performance. Instead of each musician seeking copyright licensing fees from each potential performer or venue, artists sign up with copyright clearinghouses such as ASCAP, BMI, or



SESAC (the three main copyright clearinghouses).

Copyright owners enter into contracts with one of these clearinghouses which permits them to sell licenses for public performance or broadcast of the original copyright owner's musical work. When a business pays their licensing fee to one of the clearinghouses, that license allows the business to play any song on the clearinghouses' song list. To have the flexibility to play any song on the radio, businesses are well advised to purchase a license from ASCAP, BMI, and SESAC.

Not all performances of copyrighted materials are necessarily copyright infringement. There is a "common sense" exemption that Congress has written into the copyright laws at 17 U.S.C. § 110(5)(a). A business may turn on the radio for its customers' enjoyment as long as: (1) The radio is of a kind commonly used in private homes; (2) no direct charge is made to hear the transmission; and, (3) the transmission is not further transmitted to the public.

In 1998, Congress passed the Fairness of Music Licensing Act (Title II, Pub.L. No. 105-298, 112 Stat. 2830), which granted a specific exemption for bars and restaurants that are smaller than 3,750 gross square feet. This Act supersedes prior case law and gives bright line rules to help businesses determine whether they are exempt from licensing requirements.

- (1) The exemption applies only to the performance of non-dramatic musical works;
- (2) The exemption applies only to transmissions intended to be received by the general public;
- (3) The communicated broadcast must originate from a radio station licensed by the Federal Communication Commission;
- (4) At least one license must be paid to the copyright owner; for example, by the radio station;
- (5) There must be no direct charge to hear the music; and,

(6) The music must not be further transmitted.

If the business is not a foodservice or drinking establishment, then it may still qualify for the exemption, if it covers less than 2,000 sq. feet, and its sound system has less than a total of six loudspeakers and less than four loudspeakers in any one room or adjoining outdoor space. This exemption was crafted so that a small business need not fear the act of simply turning on the radio [See: *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151 (1975)].

If your association maintains a clubhouse, restaurant, or bar, your board of directors should look carefully at whether the association is exposing itself to liability by violating the copyright laws. One little radio on the counter isn't likely to raise a problem, but if, as a whole, the sound system is not the type commonly used in homes, the exemption is likely lost, and playing the stereo could result in some hefty fines [See: *SMI v. Claires Boutiques, Inc.*, 949 F.2d 1482, 1492 (7th Cir. 1991)].

For the purposes of the copyright laws, a performance is "public" if it takes place "at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered." Therefore, performances in social clubs, fraternal society meetings, summer camps, schools, and condominium clubhouses are "public performances" under the copyright laws.

ASCAP, BMI, and SESAC have been quite successful in prosecuting copyright infringement suits against businesses that do not properly obtain and pay for licenses. If your association is sued and loses a copyright infringement suit, you could be facing anywhere from minimum damages of \$250 per infringement up through statutory damages as high as \$2,500 per infringement.

Additionally, it is the norm that the court will also assess attorney's fees against the infringing party. Truly blatant cases can result in criminal charges against the infringer.

In *Re: Westwood Community Two Association, Inc. v. Barbee*, 293 F.3d 1332 (11th Cir. 2002), the United States Court of Appeal for the Eleventh Circuit held that an unofficial committee of homeowners had standing to appeal an order requiring each homeowner in the Westwood Two Community to pay a \$7,250.00 special assessment or risk having their homes liened. The Westwood Community Two Association, Inc. (the "Association") had previously filed for bankruptcy protection in the United States District Court for the Southern District of Florida as a result of successful litigation brought against the homeowners' association alleging violations of both the Federal and Florida Fair Housing Acts. After conducting a trial on the adversarial claims, the bankruptcy court allowed the discrimination claims to stand, which resulted in the Association facing liability in excess of one million dollars, including sums for compensatory and punitive damages.

The court-appointed trustee of the bankruptcy estate sought reconsideration of the bankruptcy court's decision to allow the claims. When the bankruptcy court denied the motion for reconsideration, the trustee elected not to file an appeal to the district court, and instead took the position that, pursuant to the Association's governing documents, the trustee had authority to specially assess each homeowner their pro rata share of the Association's liability (\$7,250.00 per home) in order to satisfy the judgments.

After the trustee sought collection of the special assessment, a group of homeowners calling themselves the "Unofficial Ad-Hoc Committee for Westwood Community Two" filed an action in the bankruptcy court challenging the special assessment by claiming its members did not engage in any of the wrongful conduct that led to the claims. The bankruptcy court ruled in favor of the trustee, finding that the trustee had the power to impose the special assessment, and authorize its collection. The Unofficial Committee appealed the bankruptcy court's rulings to the federal district court, but their appeal was denied under that court's determination that the committee lacked standing to challenge the bankruptcy court's ruling. The Committee then appealed to the

The Eleventh Circuit held that the Unofficial Committee did have standing to appeal the bankruptcy court's order as its members were "personally aggrieved" under the bankruptcy court's order. The court noted that "generally, only the bankruptcy trustee may appeal an order from the bankruptcy court." However, the court recognized an exception to this rule for purposes of appeal where a person's interests are "directly and adversely affected pecuniarily by the [bankruptcy court's] order." The court indicated that standing may be conferred in bankruptcy matters where the appellant has a financial stake that the challenged order diminishes, increases, burdens, or impairs rights. Based on that holding, the Eleventh Circuit remanded the matter to the district court for consideration of the Unofficial Committee's claims that they should not be specially assessed their pro rata share of the claim amount since the members alleged they did not participate in any of the wrongdoing which resulted in the claim.

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CASENOTES

“BE WARY OF FAIR HOUSING ISSUES WHEN ENFORCING COVENANTS”

Do your governing documents contain prohibitions against commercial or business uses of the residences? Do your governing documents contain language, which restricts the occupancy of the dwellings to single-family residential purposes? Most community association documents do contain these or similar provisions, and the widely held belief among homeowners and community leaders is that such restrictions would prohibit a for-profit corporation from operating a group home in the community. However, this is not necessarily the case.

In *Dornbach v. Holley*, 2002 WL 31875013 (Fla. 2nd DCA) 2002 (Not Released for Final Publication), the Second District Court of Appeal issued a preliminary opinion effectively allowing homeowners within a deed-restricted community to lease their property to a for-profit corporation named Res-Care Florida, Inc. to operate a group home that would house between four and six developmentally disabled adults. The Court concluded that any attempt to prevent the use of the home in this manner constituted illegal discrimination in violation of the Fair Housing Act.

Both the Federal and Florida Fair Housing Acts prohibit discrimination against handicapped persons. An entity may discriminate against

handicapped persons in three (3) ways:

Intentional Discrimination – which is generally described in the case as any action motivated by a desire to prevent a handicapped person or persons from residing in the community but can also be proven by having different standards or terms and conditions of the housing for different groups that are protected by the Acts.

Incidental Discrimination - this occurs when any act or actions result in creating different terms and conditions for different classes of people or that make the property unavailable for handicapped persons; and

Failure to Make Reasonable Accommodations/Modifications – this occurs when a handicapped person’s request for modifications is denied, thereby depriving him or her of the ability to enjoy the subject residence.

In this case, while intentional discrimination was not proven, the Court found a refusal to make a reasonable accommodation when the enforcement of the restrictions against business or commercial use and the requirement for single-family residences resulted in making the property unavailable for these handicapped residents. Therefore, the Court ruled in favor of the property owner and allowed the group home use.



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Community Up-Date™

Vol.103 DECEMBER 2003

CURRENT NEWS FOR COMMUNITY ASSOCIATIONS

ISSUES FACING ASSOCIATIONS

When One of Their Members Files for Bankruptcy

By: *Ivan J. Reich, Esq.*

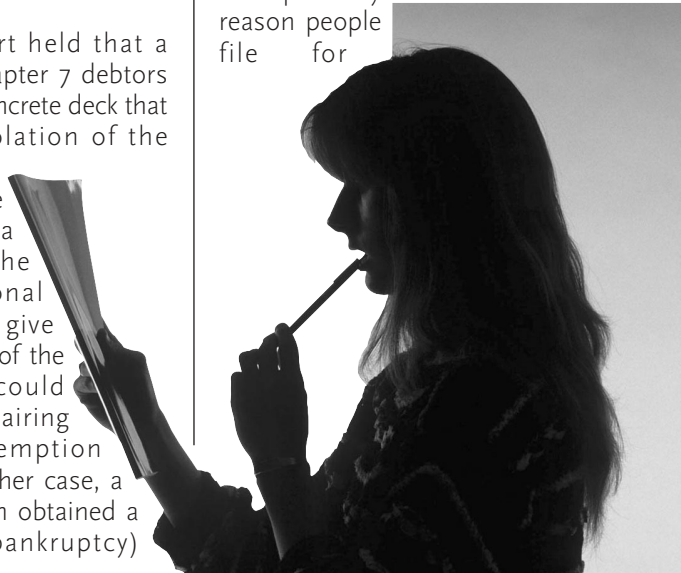
In today's economy, an increasing number of individuals are dealing with their own financial situation by opting to liquidate their assets under Chapter 7 or reorganize under Chapters 11 or 13 of the Bankruptcy Code. This article is intended to address some of the issues that face an association when one of its members decides to file for bankruptcy.

Generally, Florida's constitution protects its residents' homestead (the home in which they reside) from being impaired by judicial liens (liens obtained by judgment). If an association obtained a judgment against a unit owner/homeowner, could that judgment be avoided by the debtor as a judicial lien impairing the individual's homestead? The answer is no.

In one case, the Court held that a judgment requiring Chapter 7 debtors to remove a pool and concrete deck that they had built, in violation of the restrictive covenants governing the appearance of homes in a community, was in the nature of a personal mandate, and did not give rise to a "judicial lien," of the kind which debtors could avoid as allegedly impairing their homestead exemption rights. Similarly, in another case, a homeowners association obtained a pre-petition (before bankruptcy)

judgment against a Chapter 7 debtor-homeowner for unpaid monthly assessments, late fees, interest, and attorney's fees and costs. The debtor subsequently moved to avoid the lien on the grounds that it impaired her homestead exemption. The Court held that the nature of the lien was a security interest, despite being in the form of a final judgment, and thus, it was not an avoidable "judicial lien." Although the judgment in favor of the creditor-homeowners association for unpaid assessments appeared at first blush to be a "lien obtained by judgment" within the Bankruptcy Code's definition of a judicial lien, substantively, the lien stemmed from a security interest through the parties' declaration of covenants and, thus, was in the nature of a security interest.

The primary reason people file for



bankruptcy is to obtain a discharge (or wipe out) of their pre-bankruptcy debts. Normally, however that discharge does not apply to debts incurred after the filing of the bankruptcy. However, homeowners associations face a unique dilemma that other creditors don't face, and this has led to a split amongst the courts. This problem arises because the debtor will be living in his home after the bankruptcy filing and continuing to accrue monthly maintenance and other expenses due to the association. One theory that debtors like is that their obligations under the declaration should be discharged since the indebtedness incurred under the declaration was created pre-petition.

For example, in one case from the Middle District of Florida, the Court, ruling on a homeowners association's motion to compel a Chapter 7 debtor to reaffirm, redeem, or surrender, held that a debtor's obligation for post-petition homeowners association assessments would survive his Chapter 7 discharge, as a condition of his continued ownership of the lot that was subject to these assessments, regardless of whether the debtor reaffirmed the debt.

In that case, the Judge notes that there are actually three different lines of case authority on the dischargeability of post-petition assessments to community associations. Florida cases have been split on the issue. One line of authority has held that post-petition assessments are not dischargeable because the

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Issues cont.

obligation to pay assessments arises from a covenant running with the land. A second line of authority has held that post-petition assessments are dischargeable because they arose from a pre-petition contract. A third line has taken a compromise position that post-petition assessments are dischargeable unless the debtor resided in or leased the unit.

The Judge in that case noted that, in 1994, Congress attempted to resolve this split of authority by enacting Bankruptcy Code Section 523(a)(16), which provides:

A discharge ... does not discharge an individual debtor from any debt—

*(16) for a fee or assessment that becomes due and payable after the order for relief to a membership association with respect to the debtor's interest in a dwelling unit that has **condominium ownership or in a share of a cooperative housing corporation**, but only if such fee or assessment is payable for a period during which—*

*(A) the debtor physically occupied a dwelling unit in the **condominium or cooperative project**; or*

(B) the debtor rented the dwelling unit to a tenant and received payments from the tenant for such period, but nothing in this paragraph shall except from discharge the debt of a debtor for a membership association fee or assessment for a period arising before entry of the order for relief in a pending or subsequent bankruptcy case. (emphasis added)

While this amendment may have solved the problem for condominium and cooperative associations, unfortunately,



direct reference to homeowners associations is missing from the statute, although the legislative history seems to imply coverage for homeowners associations. [See 140 Cong. Rec. H10770 (daily ed. October 4, 1994), “[T]his Section amends Section 523(a) of the Bankruptcy Code to except from discharge those fees that become due to condominiums, cooperatives, or similar membership associations after the filing of a petition...”] On the other hand, however, another court has since extensively reviewed the legislative history of Section 523(a)(16), including Senate floor comments, and concluded that Section 523(a)(16) did not extend to homeowners associations.

As such, there is still much confusion on the issue as it relates to homeowners associations, and associations should proceed with caution and consult with a qualified bankruptcy attorney when seeking to enforce a post-petition assessment. This is because, in Florida, there still exists a decision by another judge in the Middle District, which is still good law, even though it was decided before the 1994 Bankruptcy Code amendment, in which the Chapter 7 debtors moved for contempt and sanctions based on a homeowners association's alleged violations of the discharge order, and the Court held that the debtor homeowners' obligation to the homeowners association for fees that became due post-petition was a

“pre-petition debt” discharged in Chapter 7, which the association could not attempt to collect without violating the discharge order.

In order to assist the debtor through the bankruptcy process and assist in the administration of the estate, the Bankruptcy Code allows for the priority payment of certain

administrative expenses of the debtor's estate incurred post-petition over those of other unsecured creditors so long as they are an actual and necessary cost of preserving the estate. In a 1989 case out of Tennessee involving a Florida condominium, the condominium association moved for allowance, as an administrative expense, of the maintenance and condominium assessment fees accruing post-petition against condominium units owned by the debtor. The Bankruptcy Court in Tennessee held that a claim for maintenance and condominium assessment fees asserted by a condominium association was not entitled to an “administrative expense” priority as an “actual” and “necessary” cost of preserving the estate, absent a showing that the assessments were actually utilized to preserve and benefit the individual condominium units owned by the debtor, and not the condominium community as whole.

In a 1986 case from the Middle District of Florida, the Chapter 11 debtor moved to hold a condominium association in contempt for violation of the automatic stay, and the association moved to allow the filing of a lien. The Court held that the post-petition recordation of a claim of lien on a debtor's condominium did not relate back to any time pre-petition, and violated the automatic stay because, under Florida law (as it was written at the time), a lien was only effective when recorded.

The Court found that, on one hand, under the Bankruptcy Code, the post-petition recordation of a mechanic's lien for work performed pre-petition relates back to time pre-petition under Florida law, and the lien defeats or has priority over the rights of a trustee or a debtor holding status of a hypothetical lien creditor under the Bankruptcy Code, so that the filing of a lien would be permissible post-petition for the purpose of perfecting a mechanic's lien. However, also under the Bankruptcy

Issues cont.

Code, the court found that the post-recording filing of liens, which, in contrast to mechanic's liens, are effective only upon recording under Florida law (as it was written at that time), did not relate back to any time pre-petition, and therefore violates the automatic stay.

In response to that case, the Florida Legislature in 1990 amended Fla. Stat. §718.116 by adding subsection (5) to state that a condominium association lien to secure the payment of assessments is effective from and shall relate back to the recording of the original declaration of condominium, or, in the case of lien on a parcel located in a phase condominium, the last to occur of the recording of the original declaration or amendment thereto creating the parcel.

Now, after the 1990 amendments creating §718.116(5), F.S., condominium associations do not need to seek stay

relief to record and perfect their pre-petition lien rights, and are treated as other statutory lien holders, such as materialmen and mechanics' lien holders, in their ability to pursue this remedy unimpeded by the automatic stay. However, since homeowners associations are not covered by a similarly applicable statute, homeowners associations would be covered under the old case law holding that such liens did not relate back to any time pre-petition and, therefore, an attempt to perfect them post-petition violates the automatic stay.

The interplay between bankruptcy and association law creates other interesting and complex issues for associations in enforcing their rights. If trends continue as predicted, more associations will be facing unit owner bankruptcies and they will need to know how to navigate the post-petition waters.

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Did You Know

Many communities have begun to explore a satellite system, otherwise referred to as Satellite Master Antenna Television (SMATV), as an alternative to cable. Although the individual unit owners have the right to install a satellite dish within the parameters defined in the OTARD (Over The Air Reception Device) rules promulgated by the Federal Communications Commission, the installation of a master antenna or master dish by the association is considered to be an alteration to the common elements of a condominium or cooperative.

- There are varying levels of approval required for a bulk cable contract as opposed to a bulk contract with a provider of SMATV.
- A bulk cable contract can be approved by the Board of Directors without the need for a membership vote, pursuant to Sections 718.113 and 719.101(1)(b), Florida Statutes.
- A contract for SMATV, however, involves the installation of a satellite dish on the common elements or association property; it will also be subject to Sections 718.113 and 719.101(1)(b), Florida Statutes, but as an alteration, it will require approval by the members as provided for in the Declaration of Condominium for alterations to the common elements or association property or, if the Declaration is silent, the approval of at least seventy-five percent (75%) of the total membership.
- Although a bulk cable contract is subject to certain cancellation rights by the owners in a condominium, the installation of a satellite dish will almost always require approval before installation.

CASENOTES

PROTECTION FROM Competition

Non-competition agreements sometimes arise in the context of community associations, especially in the arena of hiring security guards formerly employed by previous security companies. Although the case of *Wolf, D.V.M. v. James G. Barrie, P.A.*, 28 FLW D2233 (Fla. 2nd DCA, 2003), is not directly on point, it does set forth the basic law on the issue of non-compete clauses in Florida contracts.

In 1992, Wolf began practicing veterinary ophthalmology at The Animal Eye Clinic, a division of Barrie. At the beginning of the business relationship, Wolf signed a non-compete clause that prohibited him from engaging in or having any interest in any activity or venture, which involved the practice of veterinary ophthalmology within certain Florida counties, for a minimum period of 12 months following his termination of employment.

In July 2002, Barrie sold the assets of The Animal Eye Clinic to another company. Wolf began working as an independent contractor with this new company but did not sign a non-compete agreement with them. Several months later, Wolf terminated his arrangement with the new company and opened his own veterinary ophthalmology practice. One month after that, Barrie rescinded its asset purchase agreement and filed a lawsuit against Wolf, seeking to enforce the terms of its 1992 non-compete clause.

Florida courts have held as follows:

- The existence of a legitimate business interest of the employer that requires protection is a condition precedent to the validity of a non-compete covenant;
- The employer must be engaged in the business that the covenant seeks to protect;
- If the employer is not in a like business, it

has no legitimate interest in protecting against competition in that business;

- An employer which abandons its business may not enforce a covenant not to compete;
- The proper test to be applied is whether the interest it was designed to protect is still outstanding in the covenant; and
- Once an employee resigns, an employer cannot later fire that employee in order to gain the benefit of a restrictive covenant that applied only when the employee was terminated.

The court held that Barrie cannot enforce the 1992 restrictive covenant against Wolf since Wolf was not terminated (the company was sold), and when Wolf opened his new practice, Barrie had no legitimate business interest to protect from Wolf's competition.

In the case of *Wimberly v. Securities Technology Group, Inc.*, 29 FLW D421 (Fla. 4th DCA, 2004), the trial court and the appellate court both held that the plaintiff/appellant, David Wimberly, did not have a disability under the Florida Civil Rights Act ("FCRA"), s. 760.01-11, Florida Statutes, or under the Americans with Disabilities Act ("ADA"), 42 U.S.C. s.12101-12213 (1998).

Florida courts construe the Florida Civil Rights Act in conformity with the Americans with Disabilities Act so a disability discrimination cause of action is analyzed under the ADA. The ADA defines a disability as:

1. A physical or mental impairment that substantially limits one or more of the major life activities of such individual;

2. A record of such impairment; or
3. Being regarded as having such impairment.

Mr. Wimberly claimed that he had a disability that met the parameters of #1 above.

Moreover, the United States Supreme Court has noted that "merely having an impairment does not make one disabled for purposes of the ADA. Claimants also need to demonstrate that the impairment limits a major life activity." [See *Toyota Motor Mfg. Ky., Inc. v. Williams*, 534 U.S. 184, 195 (2002).] One of the salient points of that case was that walking constituted a major life activity. For there to be a disability within the meaning of the ADA,

there must be a substantial limitation on a major life activity to the point that the disabled person must be completely unable to perform the activity or be significantly restricted in performing the activity compared to an average person.

Mr. Wimberly was found to have a slight limp that caused him to move slower than he previously had. However, this limp did not substantially limit his ability to walk and, thus, did not amount to a substantial limitation. The trial court granted summary judgment in favor of the defendants and the appellate court affirmed.

"ADA" Claim Limp



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Vol.103 NOVEMBER 2003

CURRENT NEWS FOR COMMUNITY ASSOCIATIONS

THE FAIR HOUSING ACT AND REASONABLE Accommodations for the Handicapped

By: JoAnn Nesta Burnett

With increasing frequency, associations are forced to address a resident's request for a handicap accommodation under the Fair Housing Act. Title VIII of the Civil Rights Act of 1968, a/k/a The Fair Housing Amendments Act, located at 42 U.S.C. §3601 et. seq. (1968), was enacted by Congress as a means of preventing housing discrimination based upon race, color, religion, sex and national origin. In 1988, Congress enacted the Fair Housing Amendments Act (FHAA), codified at 42 U.S.C. §3602 (1988), which expanded the scope of the Act to include under its cloak of protection, discrimination based upon "familial status" and "handicap."

One of the fundamental policy considerations in expanding the FHAA to include handicapped persons was to prohibit practices that restrict the choices of individuals with disabilities to live where they wish or that discourage or obstruct those choices in a community, neighborhood or development. How should the association evaluate and respond to such a request? First, it is vital to determine whether the individual requesting the accommodation is entitled to relief under the FHAA.

The definition of what constitutes a "handicap" is found in 42 U.S.C. 3602(h), which states,

"[h]andicap' means, with respect to a person— (1) a physical or mental impairment which substantially limits one or more of such person's major life activities, (2) a record of having such impairment, or (3) being regarded as having such an impairment, but such term does not include current, illegal use of or addiction to a controlled substance...."

In analyzing the definition of "handicap," Courts have expressly determined that the term "substantially limits" suggests "considerable" or "to a large degree" and, therefore, precludes impairments that interfere with performing manual tasks in only a minor or slight manner. Moreover, "major life activities" refers to those activities that are of central importance to daily life. In other words, the impairment must be such as to prevent or severely restrict the individual from doing activities that are of central importance to most people's daily lives. The impairment must also be long term or permanent.

In order to establish that the impairment satisfies the definition of "handicap," the Courts have stated that it is insufficient to merely submit evidence of a medical diagnosis of an impairment. Instead, the FHAA requires the claimant to offer evidence that the extent of the limitation caused by the impairment is substantial. This definition must be applied on



a case-by-case basis. An individualized assessment of the effect of an impairment is particularly necessary when the impairment is one whose symptoms vary widely from person to person.

Once an individual demonstrates a handicap in accordance with the definition above, the Fair Housing Act is implicated. The Fair Housing Act prohibits (a) a refusal to permit, at the expense of the handicapped person, reasonable modifications of existing premises occupied or to be occupied by such person if such modifications may be necessary to afford such person full enjoyment of the premises; or (b) a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling.

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URGENT ALERT Adelfia Cable Files for Bankruptcy

Those associations having bulk contracts with Adelfia should all be aware that Adelfia filed for protection under the Bankruptcy Code. Many of you received notices from the Bankruptcy Court over the past month with a proof of claim form. As we previously advised, the deadline for filing proofs of claim was January 9, 2004. However, the proof of claim form was sent because your association has an existing bulk contract with Adelfia. Under the Bankruptcy Code, this is referred to as an executory contract. Unless Adelfia has defaulted under the bulk contract by not providing service or has sent the association a motion under the Bankruptcy Code to terminate the existing contract, there was no requirement to file a proof of claim before January 9, 2004. If Adelfia attempts to use the bankruptcy as a means of terminating its existing contract with your association, you will be given an opportunity at that time to file a proof of claim for the damages resulting from the early termination of the contract.

cont. on page 2

Fair Housing cont.

In interpreting what constitutes a reasonable accommodation, Congress has stated that the reasonable accommodation requirement does not entail an obligation to do everything humanly possible to accommodate a disabled person; cost (to the defendant) and benefit (to the plaintiff) merit consideration as well. Similarly, the concept of necessity must illustrate that the desired accommodation will affirmatively enhance a disabled person's quality of life by ameliorating the effects of the disability. The following case summaries describe the types of situations in which the Courts have evaluated discrimination claims under the FHAA for failing to make reasonable accommodations in rules, policies, practices and services for handicapped individuals.

In the case of *United States v. Cohen-Strong @ California Mobile Home Park Management Co.*, 29 F.3d 1413 (9th Cir. 1994), a mobile home owner alleged that the California Mobile Home Park Management Co. had discriminated against her in violation of the FHAA by refusing to waive guest fees charged against her handicapped daughter's home health care aid. The Mobile Home Park's policy was to charge residents a fee of \$1.50 per day for the presence of long term guests and \$25.00 per month for guest parking. Defendants argued that any fee, which is generally applicable to all residents of a housing community, could not constitute discrimination. The Court denied the mobile home owner relief under the FHAA, finding that a waiver of the guest and parking fees at issue was not necessary to afford Ms. Cohen-Strong equal opportunity to use and enjoy her dwelling.

One of the most prevalent and controversial accommodations under the FHAA concerns requests to house pets for certain medicinal and/or service-oriented functions. See Gary A. Poliakov, "Prescription Pets: The New Miracle Drug," *CAI's Journal of Community Association Law*, Vol. 12, No. 2 (1999); and Becker & Poliakov, P.A.'s *Community Update*, October 1999. The acceptance of service animals trained to assist sight or hearing impaired individuals is not debatable. However, there is a dispute when dealing with requests to waive pet restrictions based upon claims that a pet is necessary for everything from companionship to relieving symptoms of depression and arthritis.

One of the unsettled issues dealing with pets as an accommodation is whether the pet must have certain discernable skills related to the owner's handicap. In *Bronk v. Ineichen*, 54 F.3d 425 (7th Cir. 1995), the Court determined that

the FHAA requires, at a minimum, a showing that the desired accommodation will affirmatively enhance the disabled plaintiff's quality of life by ameliorating the effects of the disability. In this type of situation, a hearing dog is per se reasonable within the meaning of the FHAA. Despite the per se reasonableness of this type of accommodation, the Court found that the dog in question had no discernible skills. The landlord was able to demonstrate that the dog in question was not a hearing dog and that he had not been certified at a training center and, therefore, the accommodation was unreasonable.

Conversely, in the case of *In re Kenna Homes Cooperative Corporation*, 557 S.E.2d 787 (W. Va. 2001), a resident challenged the cooperative's occupancy regulation prohibiting animals, except for service animals, that provided that such service animals must be properly trained and certified for the particular disability. The association's rule further required that residents provide the cooperative with a certificate from a physician specializing in the field of the claimed disability, certifying that the resident suffers from the claimed disability. The court found that such a restriction was proper and could be implemented in such a manner as not to violate the FHAA. Further, the court expressly found that even if a service animal were otherwise trained or certified, the animal may be a nuisance to other residents and the owner must maintain good sanitary conditions with respect to the service animal. The resident would also be financially responsible for any damage caused by the service animal.

Despite the line of cases enforcing "no pet" provisions involving claims of medical necessity, there are a number of cases in which the courts have sided with the pet owner. In one such case, a tenant sought to keep a cat to alleviate his mental anxiety, pain and depression, which resulted from a medical disability known as fibromyalgia, a musculoskeletal condition. The owner presented expert physician testimony that the cat he sought to keep provided him therapeutic benefits by relieving his anxiety and depression. The Administrative Law Judge (ALJ) ruled against the housing provider which refused to waive its no pet policy. § 25, 145 HUD v. Dutra, No. HUD ALJ 90-93-1753-8, (HUD Office of Administrative Law Judges 11-12-96).

A similar decision was rendered in a case involving a tenant suffering from depression who sought to keep a dog. The ALJ agreed with the tenant that her depression was a mental handicap protected by the Act's anti-

Urgent cont.

This is a good opportunity to review the terms of your bulk contract and be prepared in the event Adelphia determines that the rate being charged to your association is so far under market that the contract is not in the best interests of Adelphia and should be terminated. If Adelphia makes this determination, the Bankruptcy Court will in all likelihood allow Adelphia to terminate the contract and Adelphia will then attempt to re-negotiate a contract with your association for higher rates. The best way to prepare for this is to be mindful of the term left on your contract, as well as the other options for bulk television services available to your association.

Should you receive any further documentation from the bankruptcy, you are strongly encouraged to contact your association counsel immediately.

discrimination provisions. He also agreed with the tenant's expert witnesses who opined that the dog was a necessary therapeutic device to alleviate the tenant's symptoms. § 25, 080 HUD v. Riverbay, NO HUD ALJ 02-93-0320-1, (HUD Office of Administrative Law Judges 9-8-94).

Unlike "no pet" provisions, the cases addressing the issuance of parking spaces as an accommodation under the FHAA are much more uniform. The common defense asserted by most associations is that parking spaces are considered "common elements" owned by each unit owner as tenants in common pursuant to the governing documents. The governing documents generally provide that the declaration cannot be altered except by amendment unanimously approved by all unit owners affected, or some variation thereof. Courts have almost unanimously rejected this argument.

For example, in *Gittleman v. Woodhaven Condominium Association, Inc.*, 972 F. Supp. 894 (Dist.Ct. N.J. 1997), the District Court reviewed the existing case law regarding the issuance of a parking space as an accommodation and, in rejecting the association's defense that it was unable to provide the space based upon the declaration, found that the association was "duty bound" to provide the complainant with a space. The

Fair Housing cont.

undisputed facts acknowledged by the Court were that the association's Master Deed expressly provided that parking spaces in the condominium and common elements are for the "non-exclusive use of the unit owners," and that the Master Deed precluded the association from granting a parking space to a handicapped unit owner without the prior approval of at least 2/3rds of the unit owners.

In rejecting the association's defense that it lacked the ability or authority to grant the unit owner's request for a parking space to accommodate his handicap, the *Gittleman* court found that a condominium association is "duty bound to (1) avoid enforcing provisions of the Master Deed that have discriminating effects; and (2) regulate the use of the common elements so as to comply with the requirements of the FHA." The court explained that its decision was based upon "two primary grounds: (1) that to the extent the Master Deed contains provisions that, either on their face or as applied, violate the FHAA, they cannot be enforced as written; and (2) that the association, in its role as manager of the common elements, is the entity charged with enforcing the Master Deed, and therefore, is the proper party to sue under these circumstances.

There are situations that do not fall within a neatly defined category. For example, in *Marthon v. Maple Grove Condominium Association*, 101 F. Supp. 2d 1041 (N.D. Ill. 2000), an association sought to evict an owner based upon its nuisance provision. This case involved a unit owner who lived in his unit with his wife for nearly 12 years. The unit owner suffered from Tourette's Syndrome, causing him to involuntarily clear his throat, hoot, bark, stomp, and on occasion, vocalize socially inappropriate words and phrases. The association's president at the time happened to move in to the unit directly above the Tourette's sufferer and claimed that as a result of the utterances, she was often kept awake at night causing her serious medical conditions. Further, the unit owner directly below the Tourette's sufferer, who resided in her unit for quite some time, also began to complain about the noise.

Based upon these complaints, the association brought an eviction action on the grounds that the noise constituted an offensive activity that had become an annoyance or nuisance to other unit owners, in violation of the "Nuisance" prohibition. The association contended that nothing in the FHAA requires that a dwelling be made available to an individual whose tenancy would constitute a

direct threat to the health or safety of other individuals. Without ruling on the merits of the case, the court stated that an accommodation must facilitate a disabled individual's ability to function, and it must survive a cost benefit balancing that takes both parties' needs into account. However, the court intimated that to allow the association to evict the Tourette's sufferer, especially when the complainant moved in several years after the Tourette's sufferer, would be unfair or unjust.

The following case summaries address an association's duty to allow or deny a request to modify the existing building or premises.

In *HUD v. Ocean Sands, Inc. No. HUD DALJ 04-90-0231-1 (HUD Office of Admin. Law Judges 9-3-93)*, the ALJ found that a condominium association's failure to permit a disabled resident to install a wheelchair lift and wooden walkways that would enable him to leave his apartment and use the common facilities of the condominium, constituted discrimination on the basis of handicap under the FHAA.

Conversely, in *Doral II Condominium Association v. Pennsylvania Human Relations Commission*, 779 A.2d 605 (Pa. Commw. Ct. 2001), a resident of the condominium sought to install a chair lift to aid him in taking his incapacitated wife to required kidney dialysis appointments. The association denied the request. The Court found for the association and explained that the evidence demonstrated that the reason the Board rejected the requested modifications was because the applicant was unable to install the lift without violating the local building code, and there was a substantial threat to the health and safety of persons using the building's stairway. Once the association determines that a reasonable accommodation is necessary under the FHAA, requiring a modification of the common elements, such as a wheelchair ramp, an elevator, or a lift, how can the association protect itself in the event someone is injured in or on the modification? The most effective method for protecting the association from liability is to request the individual installing the modification to purchase a casualty and liability insurance policy covering the modification. Should someone sustain injuries in or on the modification, the individual, and theoretically the association, will be insulated up to the policy limits.

Additionally, the association could request that the individual making the modification execute an indemnification agreement stating

that, in the event someone is injured in or on the modification, the association will be indemnified for any and all damages it sustains. In other words, if the association is required to pay a portion or all of a judgment amount, along with attorney's fees and costs in defending an action, the indemnitor agrees to assume and pay those amounts on behalf of the association. However, a personal injury money judgment can be quite substantial and, therefore, this indemnification agreement should be coupled with the insurance policy to protect the association in the event the individual unit owner is unable to satisfy the judgment from personal assets.

The association should also request that the individual installing the modification agree to maintain and service it. For example, if an elevator is installed to permit access to a third floor unit, the individual should be required to maintain the elevator in proper working condition so that little Jimmy does not hop in and plummet three stories sustaining serious injuries. Moreover, the individual should agree to maintain the modification for his/her own personal use and to prevent others from using it. Once other unit owners begin using the modification on a regular basis, the modification may be deemed to be association property, thereby defeating any of the association's contractual indemnification rights.

When the modification is no longer needed, the individual should agree to remove it, if possible, or to agree that the modification shall be a covenant running with the unit, requiring any subsequent purchaser(s) to maintain, insure and indemnify the association as long as the modification exists. For instance, if a wheelchair ramp is installed, the individual will most likely be able to remove the ramp once it is no longer needed. However, modifications such as elevators are not as easily removed. Since the modification will remain on the property, the owners of the affected unit must agree to maintain, service and insure the modification and to indemnify the association so long as the modification exists.

What does all of this mean? There remains a great deal of conflict and confusion regarding many of the issues governed by the FHAA. As case law evolves, so too does the uncertainty of what constitutes a violation of the FHAA and what necessitates and constitutes a reasonable accommodation. Until such time as the courts come to a consensus on these issues, associations, owners, tenants and residents will be required to turn to the courts for the answers.

CASENOTES

VERBAL EVIDENCE REQUIRED To Clarify Ambiguity

A group of homeowners in Northern Florida sought clarification from the Court as to the enforceability of a leasing amendment. In the case of *Barnett, et. al. vs. Destiny Owners Association, Inc* (28 FLW D2392, 1st DCA, October 17, 2003), the homeowners sought to invalidate an amendment to the Association's By-Laws which prohibited them from leasing their homes for a term of less than six (6) months. The original Declaration of Easements, Covenants and Restrictions contained language providing that "...Nothing herein shall be deemed to prevent the Owner from leasing the House subject to all the

provisions of the Declaration, Articles and By-Laws." Instead of amending the Declaration to restrict leasing, which would have required an owners' vote, the Board of Directors unilaterally amended the By-Laws to include a prohibition against leasing the houses for a period of less than six (6) consecutive months. The homeowners argued that the Declaration language was ambiguous as the phrase in question could mean that leasing the house subjected the parties to all the provisions in the Declaration, Articles and By-Laws, or it could mean that the right to lease is subject to restriction by the Declaration, Articles and By-Laws. The Court of Appeal overturned the trial court's

ruling that the provision was unambiguous. Since the meaning could be fairly understood in more ways than one, the trial court should have construed the contract and considered verbal testimony to determine the parties' intent. Parol (verbal) evidence was important due to the ambiguity, and the trial court erred in prohibiting the Developer's testimony regarding the intent of the provision. Thus, the Appellate Court reversed the findings and ordered further proceedings at the trial court level in order to clear the ambiguity, which would, in turn, resolve the issue of whether the By-Law amendment to restrict leasing was valid.

Ask and You Shall Receive (HOPEFULLY)

In the case of *Walter D. Padow v. Knollwood Club Association, Inc.* (Fla. 4th DCA), Case No. 4D02-470, the court held that a condominium unit owner waived his claim for attorney's fees under the Condominium Act by failing to sufficiently raise the issue in his pleadings.

In the trial court proceeding, the association filed a complaint against the unit owner to foreclose its lien for unpaid assessments or to obtain a judgment for money damages. Approximately one year into the litigation, the owner sent a check to the association for the delinquent assessment, and the association subsequently dismissed its complaint.

The owner then filed a motion to tax costs and attorney's fees, citing

Sections 57.105 and 768.79, Florida Statutes, which deal with frivolous attorney's fees and offers of judgment. However, he only made a generalized reference to "FLA. Ch. 718". Thereafter, the owner filed a supplemental memorandum, which for the first time included a claim for attorney's fees under Section 718.303(1), Florida Statutes, which specifically provides that the prevailing party in certain legal actions brought by a condominium unit owner or condominium association is entitled to recover reasonable attorney's fees.

Since the unit owner failed to sufficiently state his claim for attorney's fees under Section 718.303, F.S., in the pleadings, the failure to do so constituted a waiver of the claim. The policy behind this ruling is to provide notice to the opposing party that attorney's fees will

be sought so that the opposing party can make an informed decision on whether to pursue a claim, dismiss it or settle. The reference to "FLA. Ch. 718" was insufficient to raise a claim for attorney's fees, and the unit owner did not bring the specific statute to the court's attention until after the hearing. The motion for attorney's fees was therefore untimely. Based upon this case, it is important for both condominium associations and condominium owners to seek fees at the appropriate time in the initial pleadings by properly referencing the specific Florida Statute.





LAW OFFICES

BECKER & POLIAKOFF, P.A.

Community Up-Date™

Vol.103 OCTOBER 2003

CURRENT NEWS FOR COMMUNITY ASSOCIATIONS

Buyer **BEWARE!**

By: *Alex Chris Costopoulos, Esq.*

For many years, real estate transactions in the State of Florida were governed by the doctrine of *Caveat Emptor*, Latin for "Let the buyer beware". Unscrupulous sellers who knew of leaky roofs, flooding basements, cracked foundations and other defects in residential housing had no duty at all to disclose those problems to a potential purchaser. In Florida, that all changed in 1985.

It began in May of 1982 when the Davis family entered into a contract to buy the Johnson family home for \$310,000.00. Shortly after deposit payments of \$5,000.00 and \$26,000.00 were made, the Davis family realized that the Johnson home had a leaky roof. A subsequent inspection revealed that the roof was inherently defective and would have to be replaced. The Davis family wanted their deposits back, and a lawsuit ensued. The case was appealed

all the way to the Florida Supreme Court, which changed the law of the State of Florida in the now famous case of *Johnson v. Davis*, 480 So.2d 625 (Fla.S.Ct. 1985). In this case, the Florida Supreme Court ruled that, **if the seller of a house knows of facts materially affecting the value of the property, which are not readily observable and are not known to the buyer, the seller is under a duty to disclose them to the buyer.**

This became a watershed decision which extended protections to buyers of new and used houses, but the decision was never understood to include commercial transactions. The ruling in *Johnson v. Davis* was designed to protect the average unsophisticated, residential homebuyer from unscrupulous sellers.

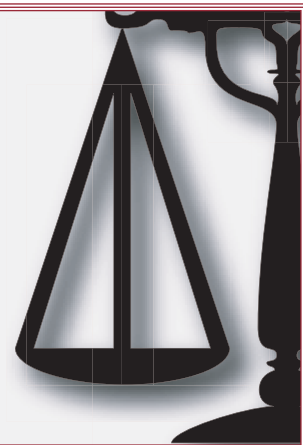
It was never intended, and does not apply, to sophisticated purchasers of commercial property, such as stores, factories, strip malls, hotels, etc. Purchasers of commercial properties

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URGENT ALERT!!!

Adelphia Cable Files for Bankruptcy

Adelphia Cable has filed for bankruptcy. If you have a bulk contract with Adelphia, the bankruptcy could have a significant, and in some cases, an adverse impact on your community. Many of you may be receiving notice in the mail from the Bankruptcy Court with a Proof of Claim form. It is very important that you respond in a timely manner to the Proof of Claim and any other notices from the Bankruptcy Court that deal with your contract. **The Proof of Claim deadline is January 9, 2004.**



cont. on page 2

Beware cont.

are still expected to look out for themselves.

This brings us to a situation faced by many community associations throughout the State of Florida. What about units or lots purchased specifically to be used as rental properties? Many times, investors, or groups of investors (often acting as partnerships or corporations), will choose to purchase properties in Florida for rental purposes. These include both long term and short term rentals of any residential community association property (so long as the governing documents allow rentals). Do the protections of *Johnson v. Davis* apply to residential property purchased for commercial purposes?

The Third District Court of Appeal recently addressed this very issue in the case of *Agrobin v. Botanica*, 28 FLW D1868 (Fla. 3rd DCA 2003). In this case, an investor created a corporation (Agrobin) for the purpose of purchasing a condominium unit on Key Biscayne from another corporation (Botanica). Subsequently, it was discovered that the unit had a leakage problem; Agrobin sued Botanica for failing to disclose the leakage problem (which Botanica knew about) based on *Johnson v. Davis*. Agrobin claimed that the condominium was bought as a vacation home **but did not dispute that it was renting out the condominium**. The lower Court ruled that the condominium unit was purchased by a corporation for a commercial venture and, therefore, *Johnson v. Davis* did **not** apply and the seller did **not** have a duty to disclose the defect. The Appellate Court affirmed this decision.

Based on both *Johnson and Agrobin*, an owner seeking to sell his or her residential property has two different



disclosure requirements, depending on what type of use the potential purchaser intends. For example, an owner of a house in a subdivision near Disney would be required to

disclose any latent (meaning hidden) but known defects in that house to a potential purchaser who is interested in purchasing the house as his or her residence. However, if the potential purchaser intended to rent the house to tourists, then, under *Agrobin v. Botanica*, there would be no duty to disclose such defects. Likewise, an owner of a high-rise condominium unit would **have a duty** to disclose defects to a purchaser who intended to have her son live in the condominium rent-free, but potentially would **have no duty** to disclose if that same purchaser was to rent the condominium unit to her sister-law-for three years.

Because the *Agrobin v. Botanica* case is so new, a body of case law which establishes the exact parameters of the Court's decision does not yet exist. Many questions remain unresolved. For example, what if a purchaser buys a condominium unit near the university for her daughter to occupy for four years, but then after graduation, intends to utilize it as a rental property? Or, what if, while the daughter is attending college, she has a roommate who pays rent? Over the course of the next few years, Courts will have ample opportunity to decide numerous cases and provide greater guidance as to exactly what type of purchase constitutes a "commercial venture" and what type does not. In the meantime, it is always wiser to err on the side of caution. Sellers should disclose any known latent defects and buyers should **always** have a licensed and bonded home inspector do a thorough examination of the residence.

Urgent cont.

Adelphia is rejecting some of the bulk contracts, with permission from the Bankruptcy Court, because the rates are simply not high enough. If you receive a motion to terminate your contract, it is important that you have counsel to protect you and to make sure that any damage claims that result from the termination of the contract are pursued in the bankruptcy proceeding. In many cases, Adelphia may terminate the existing contract and follow up with a proposal for new service at a rate that is more advantageous to Adelphia. In other cases, the community may not receive an offer from Adelphia or may be forced to consider the alternative, which would be satellite. Converting to satellite will require you to evaluate your documents to determine whether or not a membership vote is required to install the equipment and could involve significant start-up costs, if Adelphia is not willing to relinquish its rights to use the wiring, which is likely.

If you are interested in taking steps to protect your rights in the Adelphia bankruptcy, please contact your Association attorney immediately. While different communities may have different objectives, whether to stay with Adelphia or to go to satellite, you may still have claims against the Bankruptcy estate which should be protected and pursued to the extent feasible.



When hiring a contractor to perform any type of construction work on association property, the association may require payment and/or performance bonds to protect the association's interest.

- A payment bond protects association property from liens by unpaid subcontractors and suppliers, by requiring the lienors to seek payment directly from the contractor and its bond surety.
- A performance bond guarantees the contractor will properly perform all its work under the contract and, if the contractor fails to do so, an authorized insurance company will step in and complete the work or pay for somebody else to complete it.
- If the performance bond incorporates the entire construction contract by reference, then it is possible the bond surety may be liable for warranty items the contractor does not repair itself.
- If a bond surety notifies an association that the contractor is experiencing financial problems on the project, the association should refrain from making further payments to the contractor without the surety's consent. Payments made without the surety's consent, under these circumstances, may waive any rights the association has under the bond.
- If the contractor fails to fully perform all work on the project, the association must serve all notices and follow all procedures required by the bond documents or else the association may waive its rights under the performance bond. Additionally, the association may not undertake any corrective or completion work itself or retain another contractor to do so without first giving the bond surety the opportunity to do the work or pay for same.
- When an association properly makes a claim against a performance bond, the performance bond surety usually has one of the following options: hire a contractor to complete the work at the surety's expense, pay for the association to hire a contractor of their choosing to complete the work, or pay the association an agreed upon sum of money and let the association decide whether to retain a replacement contractor or not. However, some bonds provide for different forms of relief, so the bond document should be read carefully.
- A payment bond provided by the contractor will not insulate the association's property from liens unless the bond is recorded in the public records together with a Notice of Commencement.
- A payment bond does not protect the association property from a lien if the contractor hired by the association is unpaid. It prevents liens from subcontractors and suppliers, but the general contractor contracting directly with the association still has rights to file a lien against the association property if payment is not made.

INSURANCE ALERT!

All condominium associations are reminded that the amendment to Section 718.111(11), Florida Statutes, pertaining to insurance for condominium associations and unit owners, goes into effect on January 1, 2004.

Check with your association attorney about the possibility of amending your documents to reduce your coverage requirements and with your insurance agent about amending your coverage to conform to the Statute.

For those expecting premium rebates because of the new ability to curtail association coverage, please be advised that the insurance industry treats these amendments as revenue neutral.

Accordingly, there will not be premium rebates for policies already in effect.

You've got MY VOTE

In a recent Arbitration case, *Cecchi v. Key Colony No. 2 Condominium Association, Inc.*, Case No. 02-5678, the Arbitrator ruled that the corporate owner of a condominium unit cannot designate a person unrelated to the Corporation as "voting representative" on a voting certificate. Section 718.103 (29) of the Florida Condominium Act defines a voting certificate as "a document which designates... the corporate... representative who is authorized to vote on behalf of a condominium unit that is owned by any [corporate] entity." In the *Key Colony* case, a number of corporations owning units at the condominium completed voting certificates identifying the Association's Manager as the "voting representative," entitling him to vote on behalf of these corporate unit owners at condominium membership meetings and, in particular, for the election of directors. An arbitration action was brought challenging this practice on the ground that allowing a corporate unit owner to select a voting representative who was neither a director,

officer, nor employee, of the corporation was tantamount to allowing a corporate unit owner to utilize a prohibited "general proxy" in the election of directors.

A "general proxy" gives the proxy holder unfettered ability to vote in whatever manner the **proxy holder** desires. One reason the Condominium Act prohibits the use of general proxies in the election of directors (with certain exceptions, such as timeshare condominiums and condominiums which have "opted out" of the statutory election of directors procedure) is to prevent individuals with no direct ownership connection to the units from collecting proxies from unit owners and thereby controlling the outcome of elections. Although a voting certificate is different from a proxy, the selection of an individual as "Voting Representative" **with no direct connection to the Corporation owning the unit** can arguably have the same effect as a prohibited general proxy, since such "unaffiliated Voting Representative" will be able to vote for whichever directors he or she

may want without oversight by the corporate unit owner.

The Arbitrator found such a result particularly troubling, if the unaffiliated Voting Representative also happened to be a director on the condominium board, or an association employee such as the manager. This increased the concern that such an unaffiliated voting representative, by being named on numerous corporate voting certificates, could control the election of condominium directors in favor of perpetuating the terms of incumbent directors. Hence, the Arbitrator held that, in a non-timeshare condominium which has not "opted out," the Voting Representative selected by a corporate unit owner to vote in the condominium's election of directors must either be a director, officer, employee or stockholder of the particular corporation, or must have an affiliation formally recognized in the corporation's documents (such as in the articles of incorporation, bylaws, or a corporate resolution).

The issue presented in the case of *Neuman v. Grandview at Emerald Hills, Inc.*, 2003 Fla. App. LEXIS 18388 (Fla. 4th DCA, 2003), is whether a condominium rule banning the holding of religious services in the auditorium of a condominium constitutes a violation of Section 718.123, Florida Statutes, which prohibits boards from passing rules that would unreasonably restrict a unit owner's right to peaceably assemble on the common elements.

The Grandview at Emerald Hills, Inc. is a condominium association with 442 members. The common elements of Grandview include an auditorium that members can reserve for social gatherings and meetings. In 1982, the Grandview Board passed a rule which provided that the auditorium could be used for meetings or functions of groups, including religious groups, when at least eighty (80%) percent of the members of said groups were Grandview residents. For many years, the only reservations made for the use of the auditorium were for the purpose of birthday or anniversary celebrations.

In January 2001, however, approximately forty (40) unit owners reserved the auditorium regularly on Saturday mornings for the stated purpose of holding a party, but they actually were conducting religious services. When it was discovered that the auditorium was being reserved to conduct religious services, other Grandview members complained that this should be an improper use of the common elements. After holding a meeting and soliciting unit owner input (70% of the owners voted in favor of prohibiting the holding of religious services in the auditorium), the Board voted unanimously to amend the auditorium rule to prohibit religious services. The Board's reasoning was that it did not want to have a common element tied up for exclusive use on a regular basis and to avoid conflicts between different religious groups competing for the space.

Appellants in this case argued that the Board's rule violated their Constitutional rights and violated Section 718.123, F.S., since, in their minds, religious services fell within the category of a "peaceable assembly." The lower court found

that since there was no state action involved, the unit owners' Constitutional rights of freedom of speech and religion were not breached by Grandview's rule. Moreover, the lower court also ruled that Grandview's rule was a reasonable restriction on the use of the common elements and, thus, did not violate Section 718.123 of the Condominium Act.

The Appellate Court affirmed the lower court's ruling, basing its decision on the statutory test of reasonableness for rules regarding the operation of common elements. The rule preventing the use of the auditorium for religious services was reasonable in light of the Board's concern for a serious potential for conflict of use, which could arise among competing religious groups. Having polled the members and determined that a majority of the members approved of the ban, the Board's rule assured that the auditorium was "available to unit owners in the condominium or condominiums served thereby and their invited guests."

Rites DENIED



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Community Up-Date™

Vol.103 SEPTEMBER 2003

CURRENT NEWS FOR COMMUNITY ASSOCIATIONS

TORTIOUS INTERFERENCE CLAIMS Against Community Associations

By: J. Kevin Miller, Esq.

What is tortious interference and what does it mean to a community association? The tort of intentional interference with a contractual or business relationship, also known as a tortious interference claim, is a cause of action recognized by Florida law which could impact community associations. The elements of this type of claim are:

- the existence of an advantageous business relationship, typically between two parties, under which the plaintiff has legal rights;
- an intentional and unjustified interference with that relationship by the defendant, who is not a party to the original business relationship; and
- damage to the plaintiff as a result thereof.

The day to day operation of a community association is filled with circumstances and opportunities that could give rise to an intentional interference claim for the unwary association. A review of the existing case law in Florida illustrates that most commonly these claims arise out of prospective contractual relations or existing employment contracts. The following are some examples of how an association might face such a claim.

Community Association Manager, John Smith, enjoys a well-deserved reputation as one of the pre-eminent on-site managers within your town. Your current

association manager's contract expires next month, and she has no intention to sign a contract extension because her long planned and well-deserved retirement is within reach. Mr. Smith's reputation precedes him, and your current manager recommends him highly as her successor. Your board president contacts Mr. Smith regarding his interest in leaving his current association for yours. Some informal negotiations continue within the days to come, and when salary is discussed, Mr. Smith becomes very interested in the more lucrative position with your association. Your board president extends an offer to Mr. Smith and within two weeks Mr. Smith is happily your new association manager. Some weeks later, your new registered agent, Mr. Smith, is served with a complaint naming your association as defendant and alleging that your association intentionally interfered with the contractual relationship between Mr. Smith and his former employer.

cont. on page 2

TIDBITS Did You Know

During the course of litigation and sometimes arbitration, the parties take part in a formal process of obtaining information from one another known as "discovery". Discovery can take various forms, as follows:

- "Interrogatories" are written questions which must be answered under oath by the party on whom they are served within thirty days.
- A "deposition" is an oral examination of a party or witness under oath before a certified court reporter who records all of the questions and answers. The questions and answers may be later transcribed for review by the parties and for presentation to the court.
- A "subpoena" will be issued to any non-party witness who is scheduled to be deposed. A subpoena will be served on the witness by a certified process server in a manner similar to the service of a complaint. Failure to appear at a deposition or for testimony at trial in accordance with a duly issued subpoena may subject the witness to sanctions for contempt of court.

cont. on page 2

Tortious cont.

What now is your association's liability to Mr. Smith's former employer? The answer to that question is, as it is with most answers to legal questions, *that depends*.

The foregoing fact scenario is incomplete with respect to several important facts. Firstly, what knowledge did your association have regarding Mr. Smith's contract with his now former employer? If the association did have knowledge concerning the contractual relationship, what did it know and did it rise to the level of *intentional interference*? What are the potential damages? Unfortunately, regardless of what the facts are or are not, all parties concerned will likely have a different interpretation of the facts. Further, those facts are probably only going to become more clear, as will an understanding of the association's potential liability and exposure to damages, after litigation ensues, the discovery process commences, and any number of depositions are taken. All of which, regardless of liability for your association, will necessarily require representation by counsel and the accumulation of legal fees.

It is easy to imagine a number of similar scenarios. For example, the association hires a favorite security guard for full-time employment. The association contracts for services from a large corporation that provides security services to businesses and community associations and currently the security guard works two nights a week for the association. The association subsequently faces litigation with the security guard's former employer, again claiming intentional interference with an employment contract.

However, there need not be an employment contract or even an existing contract to establish a claim for intentional interference with a contractual or business relationship. An association may face such claims for intentionally interfering with potential contracts.

In the case of *Barnett and Klein Corporation vs. The President of Palm Beach – A Condominium, Inc.*, 426 So.2d 1074 (Fla. 4th DCA 1983), a condominium association was sued for alleged interference with a unit owner's lease of his unit to a prospective tenant. In this case, the court found evidence that a condominium unit owner entered into a contract to lease his unit to a prospective tenant. The contract between the owner and the tenant was frustrated solely and exclusively because of the unjustified action of the condominium association in denying approval of the lease. The unit owner suffered damages (loss of rental income) as a result of the association's action, and thus the final elements for a tortious interference with a contractual relationship claim was established.

In that case, the association's unjustified action was in its enforcement of a board rule, specifying that unit owners who held title prior to March 12, 1979 could lease their units once a year, whereas unit owners who took title after that date were limited to one

TIDBITS cont.

- A "request for production" is a written request from one party to another, seeking documents and things which are relevant to the lawsuit or which may lead to relevant evidence. A response is required within thirty days of service.
- A "request for admissions" is a discovery tool by which one party serves a series of statements upon the other and asks such party to admit or deny the statements. If a party fails or refuses to admit any fact which is ultimately shown to be true, the answering party may be held liable for the opposing party's attorneys' fees incurred in proving such fact. If a party fails to respond to a request for admissions within thirty days, the facts contained in the request will be deemed admitted for purposes of trial.

rental every two years. The court found that where the association's bylaws stated that all rules and regulations "shall be equally applicable to all members, and uniform in their application and effect," it could not simultaneously enforce a house rule inconsistent with this provision of the bylaws.

Restrictions on leasing agreements and rights to approve both unit owners and tenants for occupancy are commonplace for most associations. Consequently, community associations must be cautious in any decision not to approve a unit owner or tenant for occupancy. Further consideration should be given to any existing or proposed restrictions concerning approval for occupancy and criteria for making such determinations. Otherwise, the unwary association may find itself in the unenviable position of defending its actions through litigation.

So You Want To SERVE ON THE BOARD OF DIRECTORS

By: Guy M. Shir, Esq.

So you want to serve on your association's board of directors, but you are told you don't qualify for board membership. Well, you ask yourself, how can that husband and wife serve together? How can that tenant serve on the board of directors?

Serving on an association's board of directors is both a function of its restrictive covenants, as well as the Florida Statutes. Section 617.0802(1) of the Florida not-for-profit Statute provides that directors for not-for-profit corporations, like associations, must be natural persons who are 18 years of age or older, but need not be residents of the state or members of the corporation unless the articles of incorporation or bylaws so require. Moreover, the association's articles of incorporation and bylaws may require additional qualifications for directors, but may not prohibit any member of the association from serving on the board.

As applied to condominiums, the Division of Florida Land Sales, Condominiums, and Mobile Homes has interpreted Florida Statutes with regards to membership on the board of directors. Section 718.112(2)(d)3, Florida Statutes, provides that the members of the board of administration shall be elected by written ballot or voting machine and that any owner or other eligible person desiring to be a candidate for the board of administration must give written notice to the association not less than 40 days before the scheduled election.

Prior to 1998, the Division of Land Sales interpreted the statutory provision "any owner" to mean that every unit owner in a condominium had the right to be a candidate for the board and prohibited residency requirements for board membership. In the matter of *Hollybrook Golf and Tennis Club Condominium, Inc.*, Declaratory Statement, Docket No. DS96193, September 26, 1996, the Division declared that under Section 718.112(2)(d)3, Florida Statutes, and Florida Administrative Code Rule 61B-

23.002(5), (9), every unit owner has a right to be a candidate for a position on the board of directors.

However, in 1998, the Florida Condominium Act was amended to add that, "in order to be a candidate for the board, a person must meet the requirements set forth in their declaration and must be eligible to vote in the jurisdiction of his or her residence. This provision shall also apply to any person designated by a corporation as a board candidate. Therefore, a person who has been convicted of any felony by any court of record in the United States and who has not had his or her right to vote restored pursuant to law in the jurisdiction of his or her residency, is not eligible for board membership." After this 1998 amendment, many communities rushed to add as many restrictions to board eligibility as possible, including residency requirements, prohibitions against delinquent owners serving on a board, as well as prohibitions against spouses serving simultaneously on the board.

Within a year of the 1998 amendment, the Statute was once again changed. As the Statute now reads, any unit owner desiring to be a candidate for board membership may serve on an association's board of directors. No longer is a potential candidate restrained from running for the board of directors by the provisions of the association's declaration of condominium, as long as he or she is an owner at the condominium. The only exception is if the person has been convicted of any felony by any court of record in the United States and has not had his or her right to vote restored pursuant to law in the jurisdiction of his or her residence. The Statute does not address membership by tenants or other non-unit owners.

In addition to the Statutory requirements and prohibitions to serving on the board of

directors, one should look to the association's declaration for any restrictions or requirements regarding non-owners seeking to serve on the association's board of directors. For example, if the governing documents don't specify that a member of the board must be a unit owner, then non-owners, such as tenants, can serve on the board. Currently, any documentary restrictions against spouses serving together on the board cannot be enforced since they are both eligible to serve on the board, pursuant to s.718.112(2)(d)3. Obviously, there is often the perception that they will create a voting block, but most members are sensitive to this possibility and won't elect spouses to a board simultaneously. It is important to note that if spouses did serve simultaneously on a board, they would have two votes as members of the board of directors, but still have only one vote with respect to their unit, when voting on matters brought before the association. The dual vote would only apply in their capacity as board members.

So good luck on serving on your association's board of directors. While it can be thankless, it can also prove to be a worthwhile experience in serving your community.

CASENOTES

Who's GRANDFATHERED IN Anyway?

In the case of *Gulf and Bay Club Condominium Association, Inc. vs. Diamantino Assuncao And Rose Assuncao*, Arbitration Case No. 02-4468, the owners, Mr. & Mrs. Assuncao, wanted to renovate their dining room floor and replace the existing tile with new tile. They wrote a letter to the Association in August 2001, informing it of their intention but did not receive permission from the Board before starting and completing the re-tiling. The Association petitioned for the removal of the new tile and won.

The dining room had originally been built by the developer with vinyl flooring but that was replaced with tile in 1988 or 1989. At that time, the Declaration of Condominium did not prohibit tile floors. However, in March 1995, the Association properly amended its Declaration to prohibit tile or other hard floor coverings in the units, except in the foyer, bathroom, kitchen and hallway. The amended provision specifically stated that existing tile flooring would be allowed to remain (or "grandfathered in") but did not address whether it could be replaced with new tile.

In October 2002, the Association again amended that provision to specifically allow the

grandfathering in of tiles which existed prior to January 1, 1995, but prohibited replacing the existing tile or hard surface if the replacement did not comply with the amended Declaration provision. Of note is that the amended Declaration provision still did not allow tile in a dining room. Accordingly, new tile in the dining room was prohibited.

The owners argued that the amendment was invalid because it was more restrictive than the Declaration in effect at the time of their purchase. However, based upon the case of *Woodside Village Condominium v. Jahren*, 806 So.2d 452 (Fla. 2002), the Arbitrator ruled that since condominium purchasers are on notice that the Declaration may be amended, a properly adopted amendment can be upheld and is valid. The owners also claimed that the Declaration provision, as amended, was too vague to be enforced. However, the Arbitrator found the sections relating to the issues in controversy were not vague at all.

The Arbitrator noted that the amended Declaration should not be applied retroactively and, therefore, the 1988 tile would have been grandfathered in and the Association could not have required that it be taken out absent some

special considerations. The owners argued that they were grandfathered in to put tile in the dining room; the Association asserted that only the existing tile was grandfathered. Under the owners' theory, they would be allowed to continuously violate the amended Declaration into the future and replace the tile at will. However, the Arbitrator ruled that applying the new amendments to the new tile is not a retroactive application. The message of this case is that only existing violations are grandfathered in when a Declaration is amended. The owner does not have the right to create new violations or to violate the amended restrictions. Thus, grandfathering in a violation is a one-time exception and not a continuing license to disregard that part of the covenants and restrictions.

Please note that, if your Association is currently amending its documents, declaration or rules, there may be instances of violations which are allowed or were allowed prior to the amendment and which may be grandfathered in. However, the existence of a pre-existing violation that has been grandfathered in does not confer "grandfathered" status upon an owner. Such an owner has no right to commit the same kind of violation into the future.

Condominium and cooperative associations are unique entities formed and operated to advance the common interests of the unit owners residing in these communities. As such, these associations are the proper class representatives in the event of a lawsuit.

In the case of *Four Jay's Construction, Inc. v. The Marina At The Bluffs Condominium Association, Inc.*, 28 FLW D951 (Fla. 4th DCA, 2003), a contractor who installed balcony additions sued the condominium association as agent for, and as class representative of, all owners of record of all individual condominium parcels within the entire Marina at the Bluffs condominium community for breach of contract.

The trial court dismissed the complaint based on its conclusion that the individual unit

owners could not be joined as a class. The appellate court, however, determined that it was appropriate to sue the association as representative of individual unit owners as a class, pursuant to Rule of Civil Procedure 1.221. Rule 1.221 recognizes that a condominium association may sue and be sued on behalf of all unit owners concerning matters of common interest including matters pertaining to the common elements, the recreational facilities and protesting ad valorem taxes.

Since Four Jay's was seeking monetary damages against the association and not against the individual unit owners, presumably there would not be a conflict with the provisions of, Section 718.199 (2), Florida Statutes, which states that, "The owner of a unit may be personally liable for the acts or omissions of the association in relation to the use of the common elements, but

only to the extent of his or her pro rata share of that liability in the same percentage as his or her interest in the common elements, and then in no case shall that liability exceed the value of his or her unit."

The Fourth District Court of Appeal has certified the following question to the Florida Supreme Court for resolution of this matter:

WHETHER FLORIDA RULE OF CIVIL PROCEDURE 1.221 AUTHORIZES PLAINTIFFS TO SUE INDIVIDUAL OWNERS OF CONDOMINIUM UNITS (TO THE EXTENT OF THEIR INTEREST) AS A CLASS OF DEFENDANTS, BY SUING THE CONDOMINIUM ASSOCIATION AS CLASS REPRESENTATIVE, AS DISTINGUISHED FROM SIMPLY SUING THE CONDOMINIUM ASSOCIATION AS THE CONTRACTING PARTY, IN A CONTROVERSY CONCERNING MATTERS OF COMMON INTEREST.

Class REPRESENTATIVE



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Community Up-Date™

Vol.103 AUGUST 2003

CURRENT NEWS FOR COMMUNITY ASSOCIATIONS

Ante UP

By: Kevin L. Edwards, Esq.

The practice of gambling in the form of penny-ante poker games and bingo seems to be a common occurrence these days in many condominium associations. Social committees often engage in these practices as a means to raise money. Therefore, board members need to be cognizant of the many restrictions placed upon an association when it participates in penny-ante poker and bingo.

Section 849.08, Florida Statutes, provides that whoever plays or engages in any game of cards, keno, roulette, or other game of chance, at any place, by any device whatsoever, for money or other things of value, shall be guilty of a misdemeanor of the second degree and are subject to criminal prosecution. There are, however, two (2) exceptions that relate to card games. Specifically, it is not a crime for a person to participate

in a "penny-ante" game of poker, pinochle, bridge, rummy, canasta, hearts, dominoes or mahjong, provided that the winnings of any player in a single round, hand or game do not exceed \$10.00 in value and that the penny-ante game is conducted pursuant to the following restrictions in accordance with the above statute:

- (a) The game must be conducted in or upon the residential premises owned or rented by a participant in a penny-ante game and occupied by such participant. Alternatively, the game must be conducted upon the common elements or common areas of a condominium, cooperative, mobile home park or residential subdivision of which a participant in the penny-ante game is a unit owner.

cont. on page 2

TIDBITS Did You Know

Most condominium associations with older documents are unaware of the requirements of Section 718.112, Florida Statutes, with regard to the size of the board of directors:

- The Statute provides that the bylaws must provide for the size of the board and, if the bylaws do not so provide, the board will be fixed at five members. Many of the older condominium documents set a range for the board, for example, not less than three nor more than nine. Bylaws typically go on to provide that the exact number will be determined at the time of election.
- These older bylaws were typically drafted at a time when nominations could be made from the floor and the size of the board could actually be determined at the annual meeting, well before the current procedural election format was created.
- Section 718.112 requires a fixed number for the board of directors and, accordingly, the Division of Land Sales has ruled that provisions in bylaws that set the number of board members at a range, with the exact number to be determined at the time of election, do not adequately state the size of the board with enough specificity to meet

cont. on page 2

Ante UP cont.

- (b) A person may not receive any consideration or commission for allowing a penny-ante game to occur in his dwelling.
- (c) A person may not directly or indirectly charge admission or any other fee for participation in the penny-ante game.
- (d) A person may not solicit participants by means of advertising in any form, including the time and place of the game, or advertise that he/she will be a participant in the penny-ante game.
- (e) No one under the age of 18 may participate in a penny-ante game.

With regard to the conduct of bingo games to raise money for association purposes, Section 849.0931(4) specifically allows condominium associations to conduct bingo games. However, the statute sets forth guidelines by which the bingo games must be conducted. In order to "legally" conduct bingo games, the following criteria must be adhered to:

1. The net proceeds from the bingo games must be returned to the players in the form of prizes but the association can first deduct the actual business expenses for articles designed for and essential to the operation, conduct and playing of bingo. If there are any net proceeds still remaining after paying prizes and deducting expenses, the association has two options:
 - a) Donate the money to a charitable, nonprofit, or veterans' organization which is exempt from federal income tax under the provisions of Section 501(c) of the Internal Revenue Code; or
 - b) At the next scheduled day of play, conduct the bingo games without any charge to the players and continue to do so until the proceeds carried over from the previous days played have been exhausted.
 2. There shall be no more than 3 jackpots on any one day of play, and no jackpot can exceed the amount of \$250.00.
 3. Bingo cannot be played more than two days per week.
 4. Each person involved in the conduct of the bingo game must be a resident of the condominium and a member of the association and may not be compensated in any way for operation of any such bingo game. In other words, only owners can conduct the bingo games, not tenants or guests. A caller in a bingo game cannot be a participant in that bingo game.
 5. No one under eighteen years of age can play a bingo game or be involved in the conduct of a bingo game in any way.
 6. The bingo games must be held on the common elements or property owned by the association.
 7. Seats cannot be held or reserved by the association or anyone involved in conducting the bingo game for players not present, nor can any cards be set aside, held or reserved from one session to another for any player.
- A first violation of the statute is a first-degree misdemeanor. A second or subsequent violation of the statute constitutes a third degree felony.

TIDBITS cont.

the requirements of the Statute and, therefore, the Statute will apply to fix the size of the Board at five.

- All condominium associations with older documents are encouraged to look at their bylaws with regard to the size of the board to make sure that the bylaws comply with the requirements of the Statute. Since the size of the Board is also addressed, in most cases, in the articles of incorporation, those choosing to amend their documents should take care to make sure that the articles of incorporation and bylaws are both amended to maintain consistency between the documents. In the event of a conflict between the articles of incorporation and the bylaws, the articles will control.

ERRATA

In our May 2003, issue of the *Community Up-Date*, we erroneously identified a case note as *M.J. Gentry vs. Casa Del Sol Condominium Association, Inc.*, Case No. 02-5687 (Scheurerman/Summary Final Order/Feb. 6, 2003), under the heading of "Election Procedures Must Be Strictly Followed." The contents of this case note actually referred to the arbitration case of *Gosselin v. Sand Castle Condominium Association, Inc.*, Case No. 02-5465 (Coln/Amended Final Order/Feb. 19, 2003). We apologize for any inconvenience.



TRANSACTION In Homeowners' Associations CAN BE TAXING

By: E. Austin White, Esq.

Typically, the declaration of restrictive covenants governing a homeowners' association will contain a provision whereby the developer is obligated to convey the common areas of the community to the association on or before the time control of the association is turned over from the developer to the association's members ("transition"). In fact, Chapter 720, Florida Statutes, the Florida Homeowners' Association Act, provides that, for homeowners' associations which were created after 1995, the developer is required, at the developer's expense, to deliver all deeds to common property owned by the association within ninety (90) days after the time the members are entitled to elect at least a majority of the board of directors of the association.

However, it is important that, at the time of transition, each homeowners' association determine whether or not ad valorem taxes have been paid by the developer on the common areas to be conveyed to the association. In Florida, each county assesses real property for ad valorem taxes. In that regard, "ad valorem" is a Latin phrase meaning "according to value." Thus, an ad valorem tax is a tax imposed on real property based on the value of that property. More specifically, an ad valorem tax is a tax levied on real property in proportion to its value, as determined by assessment or appraisal.

The tax is calculated by multiplying the taxable value of the real property by the millage rate. The taxable value is determined by the County Property Appraiser's office based on various factors including, but not limited to, fair market value, geographic location, and the use of the property. This task is monitored by the Florida Department of Revenue, which establishes rules and regulations that must be adhered to by the various County Property Appraisers' offices. The millage rate is determined by dividing the approved taxing district budget for the tax year by the taxable value. The millage rate is translated as a rate per \$1,000.00 of taxable value.

For example, if the millage rate is 2.00 (.002 x \$1,000.00), a taxable value of \$10,000.00 of real property would require the payment of \$20.00 in ad valorem taxes. A mill is 1/10th of one percent (1%).

Ad valorem real property taxes are due for the calendar year beginning January 1st and ending December 31st. Taxes become payable on November 1st of that year, and are due on January 1st of the following year, and become delinquent on April 1st of the following year. Accordingly, the record owner of the property, the taxpayer, has five (5) months in which to pay the tax before it becomes delinquent.

Florida law prohibits the separate taxation of condominium common elements. The legal theory is that the value of the common amenities (for example, the clubhouse, swimming pool, tennis courts, roadways, etc.) are already included in the value of the individual units, and separate taxation of those items would constitute unlawful double taxation.

The law for homeowners associations is slightly different. Common areas in communities governed by homeowners' associations are not specifically exempt from ad valorem taxation by law in the same manner as condominium common elements. However, Florida's Attorney General has opined that common areas in homeowners' associations should not be separately taxed if the value of the use rights in the common areas is included in the value of the homes. Accordingly, in many homeowners' association-operated communities where development has been completed, the County Property Appraiser will assess the common areas owned by the association at an adjusted rate, or at zero valuation.

However, what happens if a developer, through inadvertence or otherwise, fails to convey the common areas in a homeowners' association-operated community to the association following transition? More than one association has been surprised to learn that its common areas were being sold at public auction for

unpaid taxes, when the association had never even received a tax bill for the property. This occurred because the ad valorem tax bill is sent to the owner of the property, the developer, who may no longer have any interest in paying taxes on the property, particularly if the development has been built out, and the developer is no longer involved in the development of the homeowners' association-operated community.

Further, if the common areas in a homeowners' association-operated community are still owned by the developer, the County Property Appraiser may assess the property at a higher taxable value than if it were owned by the association. The association could then be faced with a delinquent tax bill on property assessed at a higher value than it would have been, had it been owned by the association.

Once real estate taxes become delinquent, there is a legal process by which the property for which the taxes have not been paid is auctioned off in the form of the sale of tax certificates, in order to temporarily satisfy the tax obligation for the property. In that regard, the county will first advertise the delinquency to the public. Thereafter, investors will investigate the properties and bid on the tax certificates. The investor who bids the lowest interest percentage purchases the tax certificate, and the overdue tax begins to incur interest at that rate. In order to satisfy the tax lien, the property owner must pay the face value of the tax certificate and all accrued interest. If the tax certificate is not redeemed within two (2) years, the person who purchased the tax certificate at auction may "force" a sale of the property to collect on his or her investment in the tax certificate.

Furthermore, it is imperative that each association determine whether taxes have been paid by the developer on those common areas prior to deeding same to the association. At transition, the association must identify the common areas and insure that the developer has deeded or will deed all of the common areas to the association.

CASENOTES

To COMPENSATE Or Not To COMPENSATE

From time to time, a question arises about whether directors or officers of a community association can be compensated for their services. This issue was recently addressed in the case of *Basch v. Hopson, Taddeo and Garden-Aire Village Condominium Association, Inc.*, 27 Fla. L. Weekly D2555, (Fla 4th DCA), decided in November 2002.

An owner filed suit against his condominium association, the association president and vice president, contesting compensation which was being paid to the officers by the association.

The bylaws of the association described the duties of the President and the Vice President. The bylaws also required that any compensation to be paid to officers "shall be fixed by the members at their annual meeting."

Mr. Basch alleged that the owners had never voted to pay the officers, and that they should not have been paid, as the payment was not in accordance with procedural requirements in the bylaws. He asked that the amounts paid be reimbursed to the association, and that an

injunction be issued to prevent any further payments from being made.

The association and the president responded that the compensation was not for work performed in their capacity as an officer or director but, instead, was for services unrelated to their duties as officers or directors. They asked that the Court grant a motion for summary judgement, as there were no genuine issues of material fact, since the compensation was for services outside of the scope of the duties described in the bylaws for the offices which were held. The trial court issued a Final Summary Judgement in favor of the officers and the association. Mr. Basch appealed the result.

The Court of Appeal reversed the ruling for two reasons. In the trial court case, the first claim was that the additional compensation was not authorized by the unit's owners, as required by the bylaws. Although the association and the officers stated they were entitled to be paid, they did not provide any documentation of authority which would have allowed them to pay officers compensation beyond any which had been previously set by the membership. The association and the officers also claimed that

their services were above and beyond the scope of their duties as set forth in the bylaws, but the Appellate Court found that there was no description of any such services, so there was nothing in the Court Record which supported the defense. Accordingly, the trial court decision was reversed.

According to the state statutes, which apply to all community associations, payment of an officer or director can only be made if it is authorized by the bylaws and, then, only if the procedural requirements for approval of the compensation have been met. Some bylaws will allow compensation by vote of the board, and other bylaws may require approval by a percentage of the membership at a members' meeting. Most bylaws provide that no compensation is to be paid to officers or directors, and do not contain any procedures for approval of compensation. In those cases, officers and directors cannot be paid for services related to their elected positions. Individuals can be paid for business services, separate and apart from their duties as an officer or director, but any such arrangement should be thoroughly documented, and disclosed to the board and to the membership.

In the case of *Costa del Sol Condominium Association, Inc. v. Morrell*, Case No. 02-5011 (October 14, 2002), the Declaration of Condominium for Costa del Sol Condominium provided that "the Association shall have the right to have keys to all units and in the event that an owner installs a new or additional lock or locks on the front or entrance door to a unit, the owner shall furnish the Association with a key to all said locks within forty-eight (48) hours after the new lock or locks are installed."

Pursuant to Section 718.111(5), Florida Statutes, a condominium association has the irrevocable right of access to each unit during reasonable hours, when necessary

for the maintenance, repair, or replacement of any common elements or of any portion of a unit to be maintained by the association pursuant to the declaration or as necessary to prevent damage to the common elements or to a unit or units.

Frances Morrell, a unit owner in Costa del Sol Condominium, refused to provide the Association with a key to his unit arguing, among other things, that he had a right to know how the keys are stored, under what conditions the keys will be used, and who will be allowed to have access to or use of the keys. However, the arbitrator held that the issue of whether or not the Association will access the unit in a manner that meets Mr. Morrell's requirements did not excuse

his failure to provide the Association access to his unit as required by the Condominium Act and the Declaration of Condominium. Mr. Morrell's defense of fear of damage to or loss of property and distrust of the Association were denied.

In conclusion, the association's right of access to the units is sufficient to support a requirement in the governing documents that unit owners must provide keys to their units to the association. A unit owner may not refuse to comply with this requirement on the basis that he or she does not trust the association or is not comfortable with the procedures of the association concerning the storage or use of such keys.

Surrender the KEYS


Community Up-Date

CURRENT NEWS FOR COMMUNITY ASSOCIATIONS

VOL.103 JULY 2003

The Truth About CATS AND DOGS

By Lisa A. Magill, Esq. and
Marc J. Randazza, Esq.

 It's typical, expected, and almost commonplace when community association boards of directors, managers, or residents "ignore" what is seen as harmless violations of the recorded restrictions or rules and regulations with regard to pets, only to be outraged later when a new owner or resident moves in with a 40 lb. bull terrier or a 4 foot snake. Sometimes the board's lack of action stems from its reluctance to spend money to enforce the pet restriction and/or sympathy for the long-term resident and his or her "cute little kitty" or "very quiet bird."

Then, something terrible happens. Fido moves in. Fido is observed urinating on the landscaping, shedding in the hallways and barking at all hours. Jake the snake escapes

from his cage and one of the residents almost has a heart attack out of fear of the large reptile. The community is up in arms, and the board hears things like, "Aren't pets prohibited by our documents – why don't you do something to remove Fido and Jake?"

No one even thinks about the quiet cat that lives with the long-term resident. Even if it occurs to someone, the thought is "That's okay – an 8 lb., ten year old cat is certainly different than a pit bull, right?"

Until recently, the argument that a board can't be prevented from enforcing a pet restriction against a dog owner solely because it has failed to take action to remove a cat or other animal stood a decent chance of winning in court or in the State's Arbitration Program. However, the Fourth District Court of Appeal has stated otherwise.

Anyone familiar with association operations is aware of the defense of "selective enforcement." The concept is based upon a case decided by the Supreme Court of Florida in 1979. Basically, an association cannot enforce the restrictions in the recorded documents, or those contained in the rules and regulations, in an inconsistent or arbitrary manner. This issue is addressed frequently by the arbitrators appointed by the State, and as explained in *Oceanside Plaza Condominium Association, Inc. v. Salussolia*, Case No. 96-0384 (September 23, 1996), the claim of "selective enforcement will succeed if the failure of the board to enforce documents in other instances bears sufficient similarity to the case at issue as to warrant the conclusion that to permit the enforcement in the instant case would be discriminatory, unfair, or unequal". However, the defense will not succeed if the other claimed violations are not "sufficiently similar" to the violation sought to be addressed.

Various arbitration decisions rendered by the Division of Florida Land Sales, Condominiums

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TIDBITS Did You Know

When and if your association finds itself in legal proceedings involving the enforcement of its governing documents, certain terms will commonly arise with which you will want to be familiar.

- **"ARBITRATION"** is a form of alternative dispute resolution in which the parties, rather than having a trial before a court, present their dispute to an "Arbitrator" at a final hearing. Under Florida law, claims brought by a condominium association, as "Petitioner," to enforce its governing documents against an owner or resident, as "Respondent," must nearly always be submitted to arbitration. Arbitration is commenced with the filing of an "Arbitration Petition," setting forth each of the petitioner's legal claims against the respondent.
- **"LITIGATION"** is the process of adjudicating a dispute in a court of law. A lawsuit is commenced by filing a "Complaint" which sets forth each of the "Plaintiff's" legal claims against the "Defendant."
- **"SERVICE OF PROCESS"** is the formal delivery of an arbitration petition upon the respondent or of a complaint upon the defendant. While service of the arbitration petition is performed by the arbitrator, service of the complaint is often made by a licensed process server or a sheriff.

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Cats and Dogs cont.

and Mobile Homes have held that it is appropriate to treat different types of pets differently for enforcement purposes. In *Palm Beach Hampton Condominium Association v. Masters*, Case No. 99-0942 (January 2000), the arbitrator concluded that:

"... the failure of the association to enforce its pet restriction against cats while seeking to enforce the restrictions against dogs does not constitute selective enforcement, due to the inherent differences between cats and dogs. A board may rationally decide to concentrate its enforcement resources that are larger, more nuisance-prone, generally louder, more dangerous and aggressive, with greater curbing needs, than cats."

The circuit court adopted this rationale at the trial court level in *Prisco v. Forest Villas Condominium Apartments, Inc.*, 28 FLW D1065a (Fla. 4th DCA 2003), but was overturned on appeal.

In this case, the Association created pet restrictions by amending its documents in 1979 to prohibit all pets, with the exception of fish and birds. Since there were dogs present on the property at the time of the amendment, the amendment included language that allowed the current dogs to remain, while prohibiting those owners from replacing the dogs and likewise prohibiting any new dogs

from being maintained or harbored on the condominium property.

In 1995, Loretta Prisco purchased a unit in the condominium and moved into the community with her dog. When the Association asked her to remove the dog from the property, she complained about the fact that the Association allowed several unit owners to have cats. She then refused to remove the dog, and the Association filed suit.

The trial court, following well-established tendencies in arbitration decisions, held that "cats are not the same as dogs, and the condominium allowing a cat on the premises [is] not equal to disallowing a dog" because "dogs clearly bark, cats do not, dogs need to be walked outside of their home, cats, do not." The court agreed with prior arbitration decisions in that cats and dogs are not similarly alike.

While the trial court agreed that the Association had a rational basis to enforce the pet restriction against an owner with a dog, but not against the cat owners, the appellate court did not and reversed the case.

The Fourth District Court of Appeal disagreed with the arbitrators and the lower court, stating, "the restriction was clear and unambiguous." The restriction provided that other than fish and birds, no pets whatsoever shall be allowed. "The fact that cats are different from dogs makes no difference. What does matter is that neither a cat nor a dog is a fish or a bird, so both should be prohibited." Thus, if the Board did not enforce the no-pet policy against the cat owners, it could not do so with respect to Ms. Prisco, a dog owner. The unit owner's defense of selective enforcement prevailed.

Accordingly, both boards and management must be extremely cognizant of what is occurring in the community before attempting to enforce restrictions and it is important to address these issues on an ongoing basis, keeping in mind the changed circumstances and opinions of the residents. In addition, restrictions and rules must either be republished in the appropriate fashion or amended to conform them to current practice. It is unclear to what extent this decision will impact future non-pet related enforcement actions, such as violations of architectural control provisions or exterior modification requirements. In this case, if the

TIDBITS cont.

- **"DISCOVERY"** is a formal procedure by which the parties to a lawsuit, and sometimes arbitration, obtain relevant information from one another through written questions, oral examinations, requests for production of documents and things, or requests for admissions.
- **"DEFAULT JUDGMENT"** may be entered by the arbitrator or by the court against a party who fails to respond to a properly served arbitration petition or complaint. When a default judgment is entered, the petitioner or plaintiff wins the case (since the initial petition or complaint remained uncontested) and only the determination of the amount of damages due and owing may be reserved for the final hearing or trial.
- **"SUMMARY JUDGMENT"** may be entered by the court, in favor of either party, as to some or all of the issues being litigated, when there are no disputes over the material factual allegations and only legal issues remain. However, if any factual issue remains, whatsoever, a motion for summary judgment will be denied.
- **"EXECUTION"** of a judgment is the process by which the prevailing party collects the amounts awarded to it in the judgment. This process can include a judgment recorded in the Public Records and attaching to real property or a Writ of Garnishment attaching to an income stream.

membership did not have an objection to allowing cats but still wanted to prohibit dogs or other animals, there was ample opportunity to amend the restrictions between 1979 (the date of the first amendment) and 1995, when Ms. Prisco became a resident. Under most circumstances, acting proactively is the best way to avoid problems, including rule violations or an inability to enforce rules based upon available defenses such as selective enforcement.



LIMITING DUAL USAGE of Your Common Facilities

By Kenneth S. Direktor, Esq.

Restrictions on dual usage address the use of the common facilities by both residents and non-residents; particularly owners who do not reside on the property whose units are leased. The common facilities of most communities include recreational facilities, like the pool or an exercise room, the available parking on the property, the clubhouse, meeting rooms, and other common areas. These facilities are typically designed to be sufficient for the anticipated number of residents in the community. Accordingly, restrictions prohibiting dual usage are important to prevent overburdening common facilities, accelerating wear and tear and pushing safety limits.



Restrictions on dual usage address the use of the common facilities by both residents and non-residents; particularly owners who do not reside on the property whose units are leased. The common facilities of most communities include recreational facilities, like the pool or an exercise room, the available parking on the property, the clubhouse, meeting rooms, and other common areas. These facilities are typically designed to be sufficient for the anticipated number of residents in the community. Accordingly, restrictions prohibiting dual usage are important to prevent overburdening common facilities, accelerating wear and tear and pushing safety limits.

In condominiums and cooperatives, dual usage is addressed in Sections 718.106(4) and 719.105(3), Florida Statutes, respectively. These sections allow an association to prohibit dual usage by providing that a tenant acquires the right to possess the unit and the appurtenant right to use the common elements and association property. These

sections further provide that the owner of the unit does not have the right to use the common facilities when his or her unit is leased, except as a guest, unless the tenant waives the right to use those facilities in writing.

There is no parallel statutory provision for homeowners' associations. Therefore, in homeowners' associations, dual usage can only be regulated by the governing documents. Since the same concerns would apply, namely, the risk that the common facilities will be overburdened if they are used by both resident tenants and non-resident owners, homeowners' associations should consider amending their documents to incorporate provisions similar to those set forth in the Condominium and Cooperative Acts regarding dual usage.

An association considering dual usage restrictions should base the restrictions on the capacity of the common facilities. For example, in a community with boat docks, a unit may be rented by an owner who owns a boat and wishes to continue to use the dock, while a tenant occupies the unit. Some communities might not find this objectionable, while others might find that the owner's continued access to the property creates additional demands, which may strain the available common facilities, such as parking spaces. Other communities which have golfing or tennis facilities may find the demands for available playing times unduly burdened if resident tenants and non-resident owners can both claim playing privileges.

The association's ability to enforce dual usage restrictions also faces certain practical limitations. Most non-resident owners leasing their units may not find it difficult to find a resident in the community willing to allow the absentee owner to use the facilities as a guest. The Condominium and Cooperative Acts do not specify that the owner must be a guest of another owner. This suggests that the owner could even be considered a guest of his or her own tenant.

Although the association can restrict guest usage to avoid or, at least, limit abuses, such rules must be narrowly drafted to accomplish and remain consistent with the statutory objectives of preventing dual usage. For example, in the case of *Massey v. Destin Gulfgate Owners Association, Inc.*, Arb. Case No. 97-0391, Final Order (May 27, 1997), the tenant issued a written waiver of the right to use a limited common element parking space appurtenant to the unit. Therefore, a rule prohibiting the owner from using the limited common element parking space did not withstand challenge. On the other hand, a rule that limits guest usage of common facilities which does not otherwise conflict with the Declaration and is based upon a realistic assessment of the demands on the common facilities would be an appropriate means of controlling dual usage by non-resident owners.

Restrictions prohibiting dual usage of the common facilities serve a legitimate interest in communities that allow leasing and have valid concerns about overcrowding and overburdening the common facilities.



When is a SIGN NOT A SIGN?

In the case of *Wilson v. Rex Quality Corporation*, 839 So. 2d 928 (Fla. 2nd DCA 2003), the court was presented with an issue of whether signs painted on small commercial vehicles violated the "no signs" provision contained in the subdivision's restrictive covenants.

One of the residential owners in the subdivision parked a Chevrolet Astro Van with the words "Enjoy Coca Cola" painted on its sides in his driveway, and another residential owner parked a Chevrolet S10 Pickup Truck with the words "Precision Termite and Pest Control" and "679-BUGS" painted on its sides in his driveway. The homeowners association (Rex Quality Corporation) advised these owners that the parking of their commercial trucks in the subdivision and the display of the signage on the parked trucks were prohibited by the restrictive covenants.

Paragraph 8 of the restrictive covenants provides, "No sign of any kind shall be

displayed to the public view on any lot, except one professional sign not more than one (1) square foot, one sign of not more than five (5) square feet advertising the property for sale or rent, or signs used by a builder to advertise the property during the construction and sale period." In addition, Paragraph 14 provides, "No noisy automobiles, trucks, motorcycles, dirt bikes or other similar type vehicles shall be permitted, and no commercial trucks (except small pickup trucks) shall be permitted."

The association filed a complaint alleging that the parking of a commercial truck at a residence within the subdivision was a violation of the provisions of Paragraph 14 of the restrictive covenants and that the display of signage on any vehicle within the subdivision was a violation of the provisions of Paragraph 8.

The appellate court held that the restrictive covenants did not prohibit the signage on the vehicles since the language prohibited the display of signs "on any lot." By giving the words their ordinary meaning, the court

concluded that the words referred only to signs posted on the lots and not to signs painted on vehicles parked in the residential driveways. The court further held that Paragraph 14 of the restrictive covenants did not prohibit all commercial vehicles since an exception was made for small pickup trucks, and that the owners' vehicles were not commercial vehicles as that term was used in the restrictive covenants.

It is a well-settled principle of law that restrictive covenants are to be strictly construed in favor of the free and unrestricted use of real property [See: *Moore v. Stevens*, 106 So. 901, 903 (Fla. 1925)]. The lesson presented by this case is that the courts will strictly construe restrictive covenants and give the words their ordinary meaning in order to carry out the supposed intent of the drafter. Prior to seeking enforcement of a particular restrictive covenant, the language should be examined by competent legal counsel to determine its meaning and enforceability.

INDISPENSABLE Parties

In the case of *Sheoah Highlands, Inc. vs. Daugherty*, et al, 837 So.2d 579 (5th DCA 2003), the Fifth District Court of Appeal held that a Court is without jurisdiction to issue an injunction which would interfere with the rights of those who are not parties to an action. Mr. Daugherty, a condominium owner brought an action against his association to enforce a provision of the condominium declaration, which prohibited unit owner alterations of the common elements.

The trial court found that certain screen enclosures were built on the common elements of the association. Under the terms of the declaration, the association

was responsible for the maintenance and operation of the condominium common elements and, hence, the trial court concluded that the association was responsible for removal of the two screen enclosures. However, the Fifth District Court of Appeal held that a Court is without jurisdiction to issue an injunction which would interfere with the rights of those who are not parties to the action. Therefore, the trial court could not order the association to remove the two screen enclosures since the association was not the owner of the screen enclosures. The Court held that Daugherty should have named the unit owners, who erected the screen enclosures, in his complaint for injunctive relief.

Another issue of contention for the Court was whether or not the statute of limitations to enforce the provision of the condominium declaration is a five-year limitation or a one-year limitation period for specific performance. The Court held that in an action to enforce a provision of the condominium declaration, a five-year limitation period exists for legal or equitable action on a contract, rather than a one-year limitation period for an action for specific performance of a contract. Therefore, in an action to enforce the declaration of condominium, the association and/or unit owner may bring an action as long as it is within the five-year timeframe in which the infraction to the declaration occurred.

Community Up-Date

CURRENT NEWS FOR COMMUNITY ASSOCIATIONS

VOL.103 JUNE 2003

AN OVERVIEW OF 2003 LEGISLATION Impacting Common Interest Ownership Housing Communities

By Joseph E. Adams, Esq.
Donna D. Berger, Esq. and
Carmen A. Sierra

As the 2003 Legislative Session wound down, numerous bills affecting common interest ownership housing communities fell by the wayside and several were adopted. This article will provide a brief overview of this legislation, which affects Florida's community associations.

CS/SB 260 – Chapter 2003-28, Laws of Florida – Effective Date: May 21, 2003

This legislation amends Section 718.113(4), Florida Statutes, which governs the display of the United States Flag in Condominiums. It provides that on Armed Forces Day, Memorial Day, Flag Day, Independence Day and Veterans' Day, unit owners may display official flags, no larger than 4 feet by 6 feet, that represent the United States Army, Navy, Air Force, Marine Corps and Coast Guard, regardless of any provisions in the declaration or rules and regulations to the contrary.

CS/SB 1721 – Chapter 2003-284, Laws of Florida; Effective Date: January 1, 2004

This bill amends Section 197.502 and .582, Florida Statutes, and provides for notice to contiguous property owners when application is made for a tax deed to acquire common elements of a subdivision. It provides that ad valorem and non-ad valorem assessments shall be assessed against the lots within a platted subdivision and not upon the subdivision property as a whole. Common elements of a subdivision are specifically excluded from ad valorem and non-ad valorem assessments, and the value of the lots include the interest in the common elements. "Common elements" of a

subdivision are defined in this legislation to include subdivision property not included within the lots, easements, and any part of the subdivision which has been designated on the plat or site plan as drainage or recreational facilities benefiting the subdivision.

CS/HB 861 – Chapter 2003-79, Laws of Florida; Effective Date: July 1, 2003

This is a homeowners' association bill which addresses homeowners associations' standing (right to sue) and amendments of vested rights, as well as amendments to the Marketable Record Title Act.

This legislation incorporates a "standing" clause into Section 720.303(1), which is similar to one found in Section 718.111(3). The intent of the amendment appears to confer standing on homeowners' associations for matters of "common interest" within the community. Curiously, this language is similar to provisions in the condominium statute which were declared unconstitutional by the Florida Supreme Court in *Avila South Condominium Association, Inc. v. Kappa Corp.*, 347 So.2d 599, 608 (Fla. 1977). Since Florida's courts have already held that a homeowners' association has standing regarding the common areas it owns, it is unclear what the new law adds to the mix. The apparent intent is to confer standing over the condition of individual homes.

The bill also includes a provision which requires that prior to initiating litigation involving amounts exceeding \$100,000, the homeowners association must obtain the affirmative approval of a majority of the voting interests at a meeting. This reference to "a majority vote at a meeting" is ambiguous as

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TIDBITS Did You Know

The following associations joined Becker & Poliakoff, P.A.'s lobbying effort on the Fire Safety bill and made the fire sprinkler opt-out possible for every high-rise condominium and cooperative association in the State of Florida. We salute you:

- 2100 Towers Condominium Association, Inc. – Cocoa Beach
- Admiralty House, Inc. – Marco Island
- Aquarius Condominium Association, Inc. - Hollywood
- Arlen House Condominium Association, Inc. – Sunny Isles Beach
- Arlen House West Condominium Association, Inc. – Sunny Isles Beach
- Atlantic Ocean Club Condominium Apts., Inc. – Fort Lauderdale
- Beachmoor Condominium Owners Association, Inc. – Naples
- Biltmore II Condominium Association, Inc. – Coral Gables
- Birch Crest Apts., Inc. – Fort Lauderdale
- Carlton Terrace Condominium Association, Inc. – Bal Harbour
- Carlyle Condominium Association, Inc. – Fort Lauderdale
- Chalfonte Condominium Apartments Association, Inc. – Boca Raton
- Clearwater Key Association – South Beach - 1460 Gulf Blvd., Inc. – Clearwater
- Clifton Condominium Association, Inc. – Hallandale Beach
- Club Redington Condominium Apartments Association, Inc. – Redington Shores

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Overview cont.

to whether the required standard is a majority of all voting interests voting at a meeting or the "majority of a quorum" standard. The Firm has adopted the majority of a quorum standard as its interpretation; however, it will be up to the courts to clarify this ambiguity.

Section 720.306(1)(c), F.S., was also amended to eliminate the "vested rights" provision in the statute, and incorporates the condominium concept of "appurtenances," although not by that name. The new language states that amendments which materially and adversely alter the proportionate voting interests appurtenant to a parcel, or which increase the proportion or percentage by which a parcel shares in the common expenses, are the types of amendments which require unanimous approval of the parcel owners.

One of the most significant changes within this legislation is an amendment to Section

712.05(1), the Marketable Record Title Act (MRTA), which has been the topic of numerous articles in the *Community Up-Date* since 1992, and to which we have dedicated a full article in this issue. (See page 6)

MRTA is an old law which eliminates claims against a property's title by extinguishing subdivision restrictions from a property owner's "root of title" after thirty years. Current law provides that, in order to preserve the covenants, a majority of the members must approve same at a membership meeting at which a quorum has been attained. Once, the vote is achieved, copies of the covenants and restrictions to be preserved must be recorded in the land records of the county where the community is located.

The new law provides that the covenants may be preserved by a two-thirds vote of the board of directors, provided notice is given to the owners. In addition, the new

law appears to eliminate the requirement for re-recording copies of covenants and restrictions and would permit the recording of a summary sheet, incorporating the covenants to be preserved.

CS/SB 1220 – Chapter 2003-48, Laws of Florida; Effective Date: July 1, 2003

This legislation amends Section 689.26, Florida Statutes, and is intended to increase a prospective purchaser's knowledge that he or she may be buying into a deed-restricted community. For several years, the Condominium Act has mandated substantial pre-sale disclosure obligations. This new legislation, which parallels its condominium counterpart, will require all agreements for the sale of property encumbered by covenants to contain a clause, in conspicuous type, indicating that if the disclosure summary

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TIDBITS cont.

- Coastal House Condominium Association, Inc. – Delray Beach
- The Commodore Condominium Apartments, Inc. – Fort Lauderdale
- Country Club Tower of Coral Springs Association, Inc. – Coral Springs
- The Fountainhead Association, Inc. – Lauderdale-by-the-Sea
- Galt Ocean Club Condominium Association, Inc. – Fort Lauderdale
- Galt Towers Condominium Association, Inc. – Fort Lauderdale
- Galt View Apartments, Inc. a/k/a Coral Ridge Towers South – Fort Lauderdale
- Grosvenor at Pelican Bay Condominium Association, Inc. – Naples
- Gulfside, Inc. – Naples
- Harbour Pointe Condominium Association, Inc. – Fort Myers Beach
- Hillcrest East No. 21, Inc. – Hollywood
- Hillcrest East No. 22, Inc. – Hollywood
- Hillcrest East No. 23, Inc. – Hollywood
- Hillcrest East No. 24, Inc. – Hollywood
- Hillcrest East No. 25, Inc. – Hollywood
- Jade Winds Association, Inc. – North Miami Beach
- Long Boat Harbor Towers Condominium Association, Inc. – Long Boat Key
- Marine Tower Condominium, Inc. – Fort Lauderdale
- Maya Marca Condominium Association, Inc. –

- Fort Lauderdale
- Nassau House Association, Inc. – Pompano Beach
- The Nautilus Management Corporation, Inc. – Flagler Beach
- Ocean Reef Towers, Inc. – Boca Raton
- Ocean Summit Association, Inc. – Fort Lauderdale
- Ocean View Towers Association, Inc. – Hallandale Beach
- Oceanside Plaza Condominium Association, Inc. – Miami Beach
- Olympus Association, Inc. – Hallandale Beach
- The Patrician of Palm Beach Condominium Apartments, Inc. – Palm Beach
- Plaza South Association, Inc. – Fort Lauderdale
- Point of the Americas II Condominium Apartments, Inc. – Fort Lauderdale
- Prince George Condominium Association, Inc. – Hallandale
- Quadomain Condominium Association, Inc. – Hollywood
- The 5838 Condominium, Inc. a/k/a Regency Tower – Miami Beach
- Royal Ambassador Condominium Association, Inc. – Fort Lauderdale
- Royal Embassy Condominium Association, Inc. – Miami Beach
- Sabal Ridge Apartment Association, Inc. – Boca Raton
- San Remo, Inc., A Condominium – Boca Raton
- Savoy Owners Association, Inc. – Naples
- Shore Drive Apts, Inc. a/k/a Coral Ridge Towers East – Fort Lauderdale
- Southpoint Condominium Association, Inc. – Fort Lauderdale
- The Stratford at Pelican Bay Condominium Association, Inc. – Naples

- Tradewinds Apts. of Marco Island, Inc. – Marco Island
- Victoria Park Tower Association, Inc. – Fort Lauderdale
- Winston Towers 200 Association, Inc. – Sunny Isles Beach
- Winston Towers 400 Association, Inc. – Sunny Isles Beach

Becker & Poliakoff, P.A. would also like to salute the following associations who have also made the commitment to join the Fire Lobby effort for next year:

- Allegro Condominium Association, Inc. - Naples
- Cloister Del Mar Association, Inc. – Boca Raton
- The Edgewater Arms, Inc. – Fort Lauderdale
- Embassy Club of Naples, Inc. - Naples
- Meridian Club Condominium Association, Inc. – Naples
- Pelican Point at Jacksonville Beach Condominium Association, Inc. - Jacksonville Beach
- The Prince Condominium Owners Association, Inc. – Marco Island
- Vanderbilt Landings Condominium Association, Inc. - Naples
- Whitehall South Condominium Association, Inc. – Boca Raton

If you are interested in joining our lobbying effort for next year, please contact Donna D. Berger, Esq. at 954-985-4163 or 1-800-432-7712 or e-mail her at dberger@becker-poliakoff.com.

Overview cont.

required by the law has not been provided to the prospective purchaser before executing the contract for sale, the contract is voidable by the buyer. To void the contract, the buyer must deliver notice of intent to cancel to the seller within 3 days of receiving the disclosure summary, or prior to closing, whichever occurs first.

CS/SB 1286 – Chapter 2003-49, Laws of Florida; Effective Date: May 27, 2003

This legislation applies to all residential construction (single family homes, condominiums, homeowners associations, etc.) and to both new construction and remodeling. It requires a property owner to give notice and an opportunity to repair prior to commencing a construction lawsuit. Contractors, which are defined to include developers, must be provided an opportunity to inspect the premises and to offer to fix the problem or pay money before an owner can bring suit. The owner is then given 15 days, or in the case of an association 45 days, in which to accept the "contractor's" offer or it is deemed **accepted**.

There are many unknown and problematic issues that will arise from this legislation, including what "remodeling" is, the status of warranties, if any, that exist for remedial work which is done, and the effect of non-compliance.

A separate article on this legislation can be found in this issue of the *Community Up-Date*. (See page 7)

CS/SB 592 – Chapter 2003-14, Laws of Florida; Effective Date: May 21, 2003

Although this bill became known as the "fire safety" bill, it encompasses many facets of community association law and is the primary legislation affecting community associations in 2003. A more detailed analysis of the fire safety portion of this bill appears in this issue.

Section 617.01401(6), F.S., was amended to include electronic transmission as a form of notice for not-for-profit corporations. Amendments to Section 617.0141(3) include electronic notice as a sufficient form of notice from a corporation to a member.

Section 718.111(11), F.S., which amends insurance provisions, applies to all policies written after January 1, 2004. The statute has been clarified to provide that in "**land condominiums**" (typically single family lots

with a house built on them), the declaration of condominium can require either the association or the unit owner to insure the home. Previous interpretations of the statute have suggested that only the association could provide casualty insurance for freestanding condominium homes, although many developers have drafted their governing documents to the contrary. The new statute also provides that, regardless of any requirement in a declaration of condominium for "replacement cost" insurance, the association's insurance policies may include reasonable **deductibles**, as determined by the board. The **scope of coverage** has been clarified to some degree, by this new legislation, to reflect the current intent of the statute, that the association insure the structure of the building (whether part of the unit or common elements) as originally constructed. For example, an item like a closet door is typically to be maintained by the unit owner, but is to be insured by the association. Exempted from the association's master policy items are unit owner upgrades and "excluded items," which are specifically listed in this statute. Based upon 1986 and 1992 amendments to the law, various "structural" items have been excluded from association insurance coverage to be covered under the unit owner's policy (usually called an HO6 policy). Floor coverings, wall coverings, ceiling coverings, built-in cabinetry, appliances, air conditioners, water heaters, and other items are the listed "excluded items." The new law expanded the list of "**excluded items**" to include water filters, countertops, window treatments, and air conditioning compressors that serve only an individual unit (whether or not located within the unit boundaries). In a move that will bring much clarity to adjusting claims, while possibly raising constitutional issues, the Legislature has abolished all distinctions regarding insurance coverage based upon the date of recording of the declaration of condominium. The new law will apply equally to all associations. Finally, the new law permits an association to amend the declaration of condominium without obtaining approval from mortgage lenders, which many declarations of condominium require for amending the insurance clause. This change should make that process much easier, although the board will still need to obtain a vote of the unit owners to

amend the insurance clause.

Section 718.111(12), F.S. was amended to include e-mail and facsimile addresses as part of the official records.

Section 718.111(12)(e), F.S. was amended to clarify that an association is not obligated to, but may, provide a prospective purchaser or lien holder the typical "mortgagee questionnaire." It also provides that an association may charge \$150 for preparation of the questionnaire, plus attorneys' fees incurred.

Section 718.112(2)(b), F.S., was amended to reinsert the proviso inadvertently eliminated in 2000 by a Reviser's Bill, providing that waiver of year-end financial reporting requirements require the use of a limited proxy.

Section 718.112(2)(c), F.S., was amended to permit electronic transmission of notice of board meetings and posting of notice of board meetings on community television channels, subject to procedures enacted by board rule ensuring that owners can access it.

Section 718.112(2)(d), F.S., was amended to permit giving unit owners notice of meetings by electronic transmission for direct notice and community television for posted notice. It requires the Department of Business and Professional Regulation (DBPR) to adopt rules establishing a procedure for giving notice by electronic transmission. Notice of recall meetings cannot be given by electronic transmission.

Miscellaneous other provisions of Chapter 718 and Chapter 719 that pertain to the giving of notice to members

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Overview cont.

(budget meetings, committee meetings, etc.) can all be done by electronic transmission. In addition, unit owners must consent to receiving electronic transmission. The law only applies to "one way transmission" (from the association to the owner) and does not deal with "electronic voting," or incoming electronic transmissions (e.g., faxes).

Section 718.112(2)(l), F.S., regarding "fire safety," was amended to permit condominiums, which are more than 75 feet tall, to "opt-out" of requirements for "retrofitting" fire sprinklers by 2014. The vote must be by two-thirds (2/3rds) of the voting interests in the affected condominium. Associations may not vote to forego "common area" retrofitting (enclosed hallways, corridors, lobbies, stairwells, or entryways). The "common area compromise" was controversial, and it is unclear how the law will be applied under the Florida Fire Prevention Code. Curiously, limited proxies may not be used to take the "opt-out" vote, however, the votes must be "personally cast at a duly called membership meeting, or by execution of a written consent by the member." Associations are required to provide notice to members (in 16-point type) of the "opt-out," and unit owners are required to provide the information in re-sales and leases. A more detailed analysis of this legislation appears on page 5 of this issue.

Section 719.1055(5), F.S., is the cooperative equivalent of the above-noted "fire safety issue."

Section 718.116(8), F.S., was amended to permit associations to charge a "reasonable fee" for estoppel letters.

Section F.S. 719.104(2), F.S., as well as other clauses of the statute, contain the same provisions for "electronic notice" in cooperatives as for condominiums.

Section 719.104(13)(d), F.S., contains the same "mortgagee questionnaire" proviso for cooperatives as those for condominiums.

Section 719.106(b)(2), F.S., is the cooperative equivalent of the "audit waiver" limited proxy vote requirement that was made to the Condominium Act.

Section 720.302(5), F.S., was amended to provide that Chapter 617 applies to homeowners' associations which are also governed by Chapter 720, Florida Statutes.

Section 720.303(2), F.S., was amended to include condominium-like procedures for

publication of board notice by closed circuit cable television.

Section 720.303(4), F.S., was amended to provide for homeowners' associations the condominium equivalent that the e-mails and fax numbers of members are official records.

Section 702.09, F.S., was amended to provide that liens for homeowners' associations are "mortgages" for purposes of the foreclosure statute. This is intended to provide for expedient service of process in homeowners associations.

Section 718.303(1), F.S., was amended to provide that actions arising to enforce condominium documents are not actions for "specific performance," and thus do not carry a one year statute of limitations, consistent with recent case law suggesting that a 5 year statute of limitations applies to condo enforcement actions. There is a parallel amendment to Section 719.303(1) of the Cooperative Act.

HB 1719 – Chapter 2003-77, Laws of Florida; Effective Date: Varies

This legislation relates to consumer protection in the construction lien law and amends various portions of Chapter 713, Florida Statutes.

This legislation requires an additional warning statement to the owner as part of residential construction contract (s. 713.015, F.S.), on the Notice to Owner form (s. 713.06, F.S.), on the Claim of Lien form (s. 713.08, F.S.), and on the notice provided by the lender prior to making any loan disbursement (s. 713.3471, F.S.). This portion of the bill will become effective on October 1, 2003.

In addition, s. 713.06, F.S., was amended to provide a form for the Contractor's Final Affidavit, which will become effective on January 1, 2004.

Furthermore, s. 713.135, F.S., requires the DBPR to furnish a statement containing an explanation of owner's rights, and mail such statement to the owner, as of January 1, 2004.

Sections 713.31 and 713.35, F.S., requires the state attorney to forward indictments or information filed pursuant to this Act to the DBPR and requires the DBPR to open an investigation upon receipt of an indictment or information from the state attorney or statewide prosecutor. This will become effective on January 1, 2004.

Section 713.345, F.S., was amended to provide permissive inferences that a person knowingly and intentionally misapplied construction funds, and clarifies the time period for payment of a lien by the contractor as being 45 days from receipt of the funds. This section becomes effective on October 1, 2003.

HB 63-A – Chapter 2003-398, Laws of Florida; Effective Date: July 1, 2003

HB 63-A, also known as the Florida Clean Indoor Air Act, was adopted by the Florida Legislature to protect people from the health hazards associated with second-hand tobacco smoke in accordance with the amendment passed to Section 20 of Article X of the Florida Constitution.

While most people believe that the Clean Indoor Air Act applies only to "workplaces" in the traditional sense, this legislation does now extend to condominium and cooperative buildings as well as any other common areas that are at least 50% covered from above by some type of barrier. That would include a screened lanai, clubhouse, parking garage, etc.

The act defines the concept of "work" so liberally as to encompass any association that has a board of directors. Since those directors are serving the association, they are "working" under the definition of the Florida Clean Indoor Air Act and thus, must be provided with a smoke free environment. Thus, smoking is now prohibited in all common areas except for the private residences.

As you can see, much of the legislation adopted in 2003 was very beneficial to community associations; however, some of the legislation adopted was somewhat detrimental and some was downright bad. Next year, we will be launching another lobbying effort to improve the fire safety legislation and, hopefully, reverse some of provisions amended onto the construction warranty law.

A grass roots effort by Florida's community associations is a voice to be reckoned with, so Becker & Poliakoff, P.A. needs your help to get organized for the 2004 Legislative Session. Please take the time to fill out the questionnaire on page 8, and return it to Carmen Sierra at the Fort Lauderdale Office, so we can get you involved when we need assistance from a Legislator in your district.

Fire Safety Lobby IGNITES TALLAHASSEE

SB 592 was an omnibus bill dealing with many issues affecting condominium and cooperative communities, although it is most well known as the bill which provided opt-out rights to condominium and cooperative high-rise owners throughout the State who were facing a total sprinkler retrofit of their community. This bill was sponsored by Senator Steve Geller (D-31) and Representative Faye Culp (R-57). The push to provide condominium and cooperative owners with the right to opt out of the fire sprinkler requirements set forth in the NFPA-1 National Fire Prevention Code was aided by the concerted efforts of Representative Connie Mack (R-91), Senator Evelyn Lynn (R-7) and Representative Dudley Goodlette (R-76).

Currently, any high-rise building (defined as any building 75 feet or higher) must be retrofitted with an automatic sprinkler system inside each unit and in the common areas by 2014, pursuant to the requirements of the NFPA-1 National Fire Prevention Code. There are two exemptions to this requirement:

- (1) If every unit opens onto an open-air walkway with access to two remote stairwells; or
- (2) If a building chooses to install an engineered life safety system in lieu of the total retrofit. The engineered life safety system is not clearly defined by the Code but it typically consists of a partial sprinkler system (with only one sprinkler head just inside the unit) together with various components, including a sophisticated alarm system, fire-rated corridor doors, self-closing mechanisms on the unit doors, etc. If the life safety system is chosen in lieu of a total retrofit, the local authority having jurisdiction can set a deadline much shorter than the 2014 deadline for a total retrofit.

SB 592 amends s.718.112(2)(1) and s.719.1055(5) of the Condominium and Cooperative Acts, respectively. This amendment will allow two-thirds (2/3rds) of an association's total membership to vote to opt out of both the full sprinkler retrofit **AND** the life safety system. This vote must be cast in person at a duly called association meeting or

through the use of written consents; proxies cannot be used for this vote. If an association does opt out of the sprinkler requirements, a certificate attesting to that fact must be recorded in the Public Records of the county where the condominium or cooperative is located. Moreover, the association must provide each owner written notice in 16-point bold print, of the vote to forego retrofitting, **via certified mail** sent to each owner within twenty (20) days following the opt-out vote. Lastly, a certificate must be sent to the Division as part of the information collected annually from condominiums and cooperatives, and this certificate must report the membership vote on the opt-out.

Currently, the opt-out vote is a one-time vote, and there is no deadline by which it must be taken. Most associations will likely wait to vote on this issue until the fall or winter when most of their members are present.

Associations **MAY NOT** opt out of retrofitting the common areas with sprinklers. This was part of the political compromise that resulted in opt-out rights being granted during this legislative session. SB 592 defines common areas as "any enclosed hallway, corridor, lobby, stairwell or entryway." Thus the definition of what constitutes a common area under SB 592 is much narrower than the traditional definition of common areas found in Chapters 718 and 719 of the Florida Statutes. An additional bonus of this amendment is that the local authority having jurisdiction may not require sprinkler retrofitting of the common areas prior to 2014.

Much was accomplished this legislative session with regard to the sprinkler retrofit. Associations now have the option of whether or not to spend millions of dollars to retrofit their units with sprinklers. They also have the option to not choose the path of a life safety system, which would require a much shorter deadline than 2014. Undoubtedly, these hard-won opt-out rights will be challenged next session by all of the traditional opponents we saw this year: local

fire marshals, the sprinkler association, pipe fitters' union, etc. The members of our Fire Lobby were instrumental in achieving rights that every high-rise condominium and cooperative community can now enjoy; namely, the ability to opt out of costly and overreaching Code requirements. Please look at the Tidbits section of this issue, saluting these members.

There is also more work to do. Our first goal for the Fire Lobby next session will be to defend the opt-out rights we achieved this session. Our next goal will be to remove the prohibition against the use of proxies when conducting this vote. A limited proxy reflects a unit owner's intent and should be allowed when voting to opt out of the sprinkler requirements. Another goal would be to remove the requirement that a notice be sent out via certified mail after the vote has been taken. In larger communities, this can prove to be quite burdensome and costly.

Lastly, if we can garner sufficient support for our lobbying efforts next year by signing up new members, we may have the resources to push for elimination of common area sprinklers. Substituting an "intelligent" fire alarm detection system in its stead could prove to be the most efficient, cost-effective and sensible approach to safeguarding condominium and cooperative unit owners, residents and guests. These new fire alarm systems can pinpoint the exact location of the unit experiencing fire trouble as opposed to conventional fire alarm systems that only identified units in general zones.

If you are interested in joining the ongoing Fire Lobby effort to defend both the opt-out rights achieved this session, as well as achieve the goals listed above, please contact Donna Berger at 1-800-432-7712 or e-mail her at dberger@becker-poliakoff.com.

MRTA: Use It Or Lose

As the concept of common interest housing matures in Florida, several community associations have been dismayed to learn that the covenants and restrictions applicable to their communities have been extinguished by Florida's Marketable Record Title Act ("MRTA").

MRTA, found at Chapter 712 of the Florida Statutes, is primarily intended to facilitate real estate transactions by eliminating stale claims against real property. Florida's courts have held that covenants and restrictions are subject to MRTA extinguishment.

It is important to understand that the duration of covenants is different than MRTA extinguishment. Many covenants will run for a period of twenty-five or thirty years, and then automatically extend for ten year intervals unless amended or terminated. However, covenants and restrictions can be extinguished by MRTA, even though they have not yet expired on their own terms.

Obviously, the effects of MRTA can be harsh. Among the more notable consequences are the inability to enforce use restrictions, and the loss of the right to collect assessments. MRTA applies most typically to non-condominium communities, such as platted and unplatted subdivisions, non-condominium townhouse communities, "zero-lot line" homes, and the like.

MRTA extinguishes covenants and restrictions after thirty years from the "root of title," by identifying the Official Records Book and Page of the Public Records of the County where they are recorded, which most often is the initial deed from the Developer to a purchaser. If deeds used in the chain of title specifically reference covenants and restrictions, then the covenants are preserved for 30 years from that "root of title." However, in most counties throughout Florida, conveyance is typically by reference to a plat or other legal description, which does not prevent MRTA extinguishment of covenants and restrictions. Likewise, generic conveyances referencing "covenants and restrictions of record" do not prevent MRTA extinguishment.

Florida's courts have not specifically addressed whether amendments of covenants

and restrictions, the restatement of covenants and restrictions, or "republishing," serve as "title transactions" and thus start a new thirty-year "clock." The case of *Cunningham v. Haley*, 501 So.2d 649 (Fla. 5th DCA 1986) suggests that the amendment, restatement, or republication of covenants are not "title transactions" so as to prevent MRTA extinguishment. However, a very vague reference in *Berger v. Riverwind Parking*, 842 So.2d 918 (Fla. 5th DCA 2003), a case in the same District, suggests otherwise. When given the choice, associations should not rely on amended, restated, or republished restrictions for MRTA preservation purposes. The most prudent yardstick for assessing potential MRTA expiration is 30 years from the recordation date for the original covenants and restrictions. For example, if the declaration of covenants was recorded in the public records on June 1, 1975, the covenants and restrictions would be subject to MRTA extinguishment beginning on May 31, 2005.

Prior to 1997, there was no clear method for a community association to preserve covenants and restrictions against MRTA extinguishment. The 1997 amendment to MRTA permitted "homeowners associations" to take a majority vote of the property owners, record certain documentation in the public records, and extend the covenants and restrictions for another thirty years.

In the 2003 Legislative Session, MRTA was again amended to permit the extension of covenants and restrictions against MRTA extinguishment solely by a vote of two-thirds of the board of directors, thus eliminating the need for property owner approval. This new law became effective on July 1, 2003. There are various technical procedures affiliated with the MRTA preservation vote, even if conducted by the Board (including notice requirements, recording formalities, and the like), and an association should not attempt a MRTA preservation vote without the assistance of legal counsel.

To determine whether or not MRTA has extinguished a community's covenants, one must either look at the original covenants and restrictions, or order a certified title search to identify same. Under current law, if a community's covenants and restrictions have been extinguished by MRTA, there appears to



be nothing that can be done to "revive" them. As noted above, whether amended, restated, or republished covenants and restrictions will survive a MRTA attack remains debatable.

It is the Firm's intention to work with other affected parties to seek further relief from the Legislature. Specifically, it is our hope that legislation will be enacted which clearly states that amended, restated, or republished covenants and restrictions are adequate for MRTA preservation purposes. Further, and certainly a more Herculean task, we hope to see legislation that would provide relief to communities whose covenants and restrictions have been unwittingly extinguished by MRTA, enabling the association to reinstate them.

Until the law is changed, it exists as stated above, notwithstanding the harshness of its application in some circumstances. Review the issues raised in this article and determine the status of your covenants and restrictions in relation to MRTA and take such action as may be appropriate. For example, if a community's covenants and restrictions were recorded in 1977, they will face potential MRTA expiration in 2007. Don't wait until that time to take the appropriate steps to preserve against MRTA extinguishment; the board of directors has a fiduciary duty to its members to ensure that the restrictive covenants are preserved.

As noted above, the primary impact of MRTA applies to non-condominium community associations. In condominiums, deeds of conveyance should specifically reference the declaration of condominium, which serves as an ongoing "root of title," and thus minimizes MRTA issues. However, condominium associations can be affected by MRTA, too. Typical examples include: "master association" covenants and restrictions, deed restrictions negotiated with individual unit owners, and agreements with other property owners restricting the use of another piece of property.

MRTA does not extinguish interests of parties in possession and, therefore, does not affect easements in use, long-term leases, and similar possessory interests.

Legislature Notices CONSTRUCTION DEFECTS

On May 27, 2003, Governor Bush signed into law a recent enactment of §558.001, Florida Statutes. This new law now requires an aggrieved homeowner to promptly notify and provide builders or other responsible parties with an opportunity to resolve claims or correct construction defects prior to initiating a lawsuit for damages. This new law applies to damage claims arising from defects associated with residential construction, and excludes claims for personal injury. The scope of the law includes any claims brought by condominium, cooperative and homeowners' associations (hereinafter collectively referred to as "association") as well as any owner of a dwelling which could include a single family homeowner, a condominium unit owner or even an owner of a mobile home. For the most part, the statutory provisions apply in the same fashion to all homeowners except relative to rejection of an offer.

Under the new law, an association claiming damages due to a construction defect must provide the contractor, design professional or other responsible party with written notification of the alleged defect at least sixty (60) days before filing a lawsuit, setting forth the alleged construction defects in reasonable detail. It should be noted that the contractor has been defined to include anyone engaged in the business of selling a dwelling and would therefore include a developer. Within five (5) business days after service of the claim, the contractor or other responsible party has the right to inspect the premises and perform "destructive testing;" however, destructive testing can only be performed by mutual agreement between the parties. Ten (10) days after receiving notice of the claim, the contractor or other responsible party must forward a copy of the notice of the claim to each person (i.e., subcontractor) which he believes may also be responsible for the defects identified in the notice that it received from the client. Those recipients may then also inspect the dwelling within five (5) business days after receipt of the notice. The inspection must take place during normal working hours.

Following this opportunity to inspect and not later than twenty-five (25) days after receiving the notice of a claim, the contractor must serve a written response to the claimant. The contractor's written response must either (a) include a written offer to repair the alleged defect at no cost to the claimant; (b) include a written offer to compromise the claim by monetary payment within thirty (30) days; or (c) dispute the claim. The association is then given forty-five (45) days to accept or reject the offer. If a single family or other homeowner files a claim, they are provided with fifteen (15) days to reject an offer. It is only after this process is exhausted that an association can initiate legal action against the contractor or other responsible party. If an association files an action without first complying with the statutory requirements, the statute requires the trial court to "abate" or stop the action, without prejudice. If this occurs, the lawsuit may not proceed until the claimant has complied with the requirements of this law.

If the association fails to timely reject the contractor's offer to compromise within forty-five (45) days of receipt of the offer, the association will be deemed to have accepted the offer and, therefore, could be barred from commencing a lawsuit against responsible parties. As to a single family homeowner, the time to reject an offer is fifteen (15) days.

It is also noteworthy that the statute encompasses not only original construction but also "remodeling," which could mean repair work to association buildings and improvements such as concrete restoration, re-roofing, painting, etc. There are no dollar thresholds on what work falls within the scope of the statute and, therefore, we must assume that **any** construction work performed at the project would be subject to the requirements of the statute.

Now, in order to comply with this legislation, every contract between an association and a developer, contractor,

design professional, supplier and subcontractor must contain the following disclosure statement:

FLORIDA LAW CONTAINS IMPORTANT REQUIREMENTS YOU MUST FOLLOW BEFORE YOU MAY FILE A LAWSUIT FOR DEFECTIVE CONSTRUCTION AGAINST A CONTRACTOR, SUBCONTRACTOR, SUPPLIER, OR DESIGN PROFESSIONAL FOR AN ALLEGED CONSTRUCTION DEFECT IN YOUR HOME. SIXTY DAYS BEFORE YOU FILE YOUR LAWSUIT, YOU MUST DELIVER TO THE CONTRACTOR, SUBCONTRACTOR, SUPPLIER, OR DESIGN PROFESSIONAL A WRITTEN NOTICE OF ANY CONSTRUCTION CONDITIONS YOU ALLEGE ARE DEFECTIVE AND PROVIDE YOUR CONTRACTOR AND ANY SUBCONTRACTORS, SUPPLIERS, OR DESIGN PROFESSIONALS THE OPPORTUNITY TO INSPECT THE ALLEGED CONSTRUCTION DEFECTS AND MAKE AN OFFER TO REPAIR OR PAY FOR THE ALLEGED CONSTRUCTION DEFECTS.

cont. on page 8

Legislature cont.

YOU ARE NOT OBLIGATED TO ACCEPT ANY OFFER MADE BY THE CONTRACTOR OR ANY SUBCONTRACTORS, SUPPLIERS, OR DESIGN PROFESSIONALS. THERE ARE STRICT DEADLINES AND PROCEDURES UNDER FLORIDA LAW.

There are a variety of other significant issues. The claim letter must provide a description of the defect "in reasonable detail" and provide an assessment of the damages, if known, to the association. It is our view that as much detail as available should be provided in order to place the proper parties on notice of a claim. Also, simply serving notice of a claim upon the responsible party will toll the applicable statute of limitations for the later of sixty (60) days from receipt of the notice or thirty (30) days from the end of the repair period stated in the offer.

With respect to any repairs offered, the response from the responsible party must indicate a description of the repair being offered, how it will be repaired and a specified time period for completing the repair. To the extent that the offer is rejected, the association must mark the word "rejected" on the written offer itself in order to comply with the statutory requirements. Once an offer is rejected, then the association may proceed to file a lawsuit. To the extent that either party to this process fails to follow these procedures, then the failure to follow the procedures set forth in the statute may be admissible in litigation.

The association must be mindful of the time deadlines associated with the statute. Once a claim letter is served, the association must be prepared to arrange for access to enable the recipients of the claim letter to inspect the dwelling. Efforts should be undertaken to resist requests to perform destructive testing unless parameters for testing have been established such as arrangements to repair the areas, posting security to guard against theft and damage during the testing process and requiring the testing party to carry necessary insurance. These issues must be agreed upon between the parties prior to testing.

Based upon the statutory time deadlines, it is likely that the recipients of the claim letter will be unable to conduct an inspection in five (5)

business days. Consequently, in many instances, the inspection may not take place. However, there may be a response to the offer and care should be undertaken by the association to accept or reject it within the specified timeframe. Accordingly, boards of directors should be prepared to meet on an immediate basis to timely decide on what action will be taken with respect to an offer. This is especially true during the summer months. Mail must be checked frequently and any doubt as to the ability of the association representative

to receive mail should be overcome by specifying in the claim letter those association representatives designated to receive responses to the claim letter. It is suggested that the association specify board members, managers and legal counsel to receive all responses to the claim letter in order to avoid missing the deadlines set forth in the statute.

This is a complex and convoluted law, and this article serves to simply highlight some of its significant provisions.

Help Us Help You!

This year, the Firm was successful in their lobbying efforts because of YOU. Our Association clients launched telephone and letter campaigns to those legislators who sat on critical committees when we needed their assistance in either passing good legislation or killing bad legislation. We are putting together a database which will help us target specific legislators by having the Associations in their constituency contact them regarding legislation affecting common ownership housing communities. ***Please help us in our efforts by providing the following information (This information can be found on the voter's registration card of any resident in your community):***

ASSOCIATION NAME _____

U.S. CONGRESSIONAL DISTRICT NO. _____

STATE SENATE DISTRICT NO. _____

STATE HOUSE DISTRICT NO. _____

COUNTY COMMISSION DISTRICT NO. _____

COUNTY: _____

SCHOOL BOARD DISTRICT NO. _____

Please clip this and send it to:

**Carmen A. Sierra
Becker & Poliakoff, P.A.
3111 Stirling Road
Fort Lauderdale, FL 33312-6525**



LAW OFFICES

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Community Up-Date™

Vol.103 MAY 2003

CURRENT NEWS FOR COMMUNITY ASSOCIATIONS

DO THE DISHES! Satellite Receivers & Community Associations

By: Marc J. Randazza, Esquire

A few years ago, private satellite dishes were a rarity. Today, with costs coming down and service improving, these dishes are becoming commonplace. As common as they are, many community members consider their presence to be a source of aesthetic irritation, and quite a few have attempted to ban them or regulate their use. Associations that do attempt to regulate these devices must be aware of the federal guidelines protecting satellite dishes.

The right of community associations to regulate the placement of dishes is directly addressed by the Federal Communications Commission ("FCC") regulations.

In 1996, the FCC adopted the Over The Air Reception Devices Rule ("the OTARD rule") [See 47 C.F.R. §1.4000]. The OTARD rule prohibits restrictions that impair the installation, maintenance or use of antennas used to receive video programming. The rule applies to video antennas, including satellite dishes that are less than one meter (39 inches) in diameter, television antennas, and wireless cable antennas. The rule prohibits most restrictions that:

1. unreasonably delay or prevent installation, maintenance or use; or

2. unreasonably increase the cost of installation, maintenance or use; or
3. preclude reception of an acceptable quality signal [47 C.F.R. §1.400(a)].

Accordingly, with certain exceptions as described below, associations may not enforce rules and restrictions that cause any one of these three impairments.

The OTARD rule applies to viewers who place video antennas on property that they own (or have a leasehold interest in), and that is within their exclusive use or control; this would include condominium owners who have an area where they have exclusive use, such as a balcony or patio. Therefore, the rule would apply to the installation of an individual antenna by a resident on the lanai of his or her condominium unit or on the outside of a home in a community governed by a homeowners association.

The association has the right to list preferred locations within the unit for the installation of individual antennas in its rules, or it may require that the color of the dish conform to the aesthetic standards of the community. However, the burden of proof for the enforceability of any rule or restriction affecting the installation, maintenance, or use of an antenna will be on the association. Thus, any rule concerning the installation of individual antennas will be subject to strict scrutiny. The only exceptions to the Rule are restrictions that are necessitated by safety or

TIDBITS

Did You Know ???

A lis pendens is a document that is recorded against property to put people on notice that there is an action pending on the property. For example, a lien foreclosure complaint is accompanied by a lis pendens to insure that the real property cannot be sold or encumbered without the lis pendens being noticed and perhaps resolved.

- ✓ No action operates as a lis pendens on any property unless a notice of commencement of the action is recorded in the office of the clerk of the circuit court of the county where the property is located.
- ✓ The lis pendens must contain the names of the parties, time of institution of the action, name of the court in which the action is pending, a description of the property involved or to be affected, and a statement of the relief sought as to the property. Failure to include all of the requisite information could invalidate the lis pendens.

continued on page 2

continued on page 2



DISHES...*continued from page 1*

historic preservation concerns, and even then, the restrictions must be as narrowly tailored as possible, impose as little burden as possible, and applied in a nondiscriminatory manner throughout the regulated area. [47 C.F.R. §1.4000(b)].

It is important to note that the Rule does not apply to the common elements of a community. Therefore, an association may prohibit individual antenna installations in the common elements that are not within the exclusive use or control of the owner. However, if the association desires to permit individual antenna installations on the common elements, it may do so, and its rules and regulations controlling that installation do not have to comply with the OTARD rule.

Some associations have sought to reduce "dish clutter" by installing a centrally-located dish for the reception of programming. Generally speaking, a good compromise can be reached when an association offers a central dish in exchange for the removal of individual dishes, and this is generally considered to be permissible under the OTARD rule. However, in order to compel a homeowner to remove their individual antenna, there must be no "impairment of services." Thus, the centrally-located antenna must provide the same quality and diversity of programming as the individual antenna at the same cost. If any unit-owners wish to receive programming not available over the central dish, then those unit owners must be permitted to maintain their individual antennas, if they so desire.

As of the date of this article, there are no FCC advisory opinions or FCC rulings governing the removal of individual dishes in favor of centrally-located receivers. The sole document giving guidance is an FCC Order on Reconsideration issued in 1998. These FCC orders are not given the same precedential weight as appellate court decisions, but they do provide persuasive instruction.

Paragraph 89 of this Order on Reconsideration clearly states that a community association may not impair a resident from installing a satellite dish in **anticipation** of the arrival of a central dish. Once the central dish is

operational, the association may require the removal of the individual dishes as long as the association reimburses the homeowner for the value of the " antenna" in question. This general rule begs the question as to whether hardware inside the unit (specifically internal receivers which can be connected with the main satellite) are also included in this reimbursement amount. Again, there is no FCC statement or ruling directly on point addressing equipment inside the unit. However, all indications are that the "impairment" analysis would control this situation, and "antenna" would arguably include the dish, cables, **and** the internal receiver.

Each situation must be reviewed on a case-by-case basis to determine if an "impairment" exists. Any rule or regulation, or any other action by the association which could be considered an "impairment" of a consumer's right to receive television signals violates the OTARD rule. It is important to know that "impairment" refers to both physical and economic impairment. Under the (as of yet) poorly articulated "economic impairment" analysis, any kind of economic impairment must be paid for by the impairing authority. Therefore, if the centrally located dish will give residents the identical picture quality and programming diversity as their individually owned dishes, then its use may be compelled. However, if this winds up costing the individual owner one dollar extra per year, then the association must pay that dollar.

At the other end of the spectrum, many subscriber-based services provide free equipment to the consumer in exchange for a contract of one year or more, but an early cancellation fee may apply. If the association requires a homeowner to remove his or her dish, thereby causing an early cancellation fee, the association must be prepared to pay this fee. Similarly, if the receiver inside the house (or any other piece of equipment in the technology chain) is no longer of any use to the consumer because of an association-promulgated rule, then the association must reimburse the individual homeowner for the value of that equipment. The board of directors will need to determine if the aesthetic value of removing individual satellite dishes outweighs the multiple reimbursement of early cancellation fees and equipment

**TIDBITS****Did You Know ???***continued from page 1*

- ✓ Except as to persons in actual possession of the property or easements of use, the lis pendens constitutes a bar to the enforcement of any instruments that remain unrecorded at the time of the filing of lis pendens, unless the holder of that unrecorded instrument intervenes within 20 days.
- ✓ Unless it is based on a recorded instrument or lien, a lis pendens lasts only one year from the commencement of the initial action, except when extended by the court for good cause. Since assessment liens are recorded, lis pendens based on these liens are not subject to this one year limitation.
- ✓ For those actions not founded on a recorded instrument, the court may require the posting of a bond, or cost deposit. The court may control and discharge a lis pendens not founded on a recorded instrument in the same manner as the court may grant and dissolve an injunction.

purchase costs, which will be triggered by this mass removal.

The only way to definitively determine if a particular satellite rule or restriction is permissible under the OTARD rule is to petition the FCC for a declaratory ruling. However, this is often inadvisable because the ruling may take over a year, and whatever rule the association wishes to promulgate will be under suspension until the ruling is issued. Given the risks involved, the FCC advises that any association rules requiring the removal of individual satellite dishes be applied only prospectively to homeowners who have not yet purchased an individual satellite dish.

Just the F.A.Q.s

Frequently Asked Questions

Question:

I recently moved to Florida and was elected to my condominium association's board of directors. I have never served on a condominium board before and am in need of any information, suggestions or advice you can give me in this endeavor.

Answer:

The following is a list of the most common mistakes made by condominium associations and potential headaches inherited by new board members:

- **Knowledge is power.** Become very well acquainted with your association's declaration, bylaws, articles of incorporation and rules and regulations, as well as Chapter 718, Florida Statutes (the Condominium Act), and the administrative rules pertaining thereto. You owe it to yourself and the members of the community who elected you to represent their interests to fully appreciate and understand your duties and responsibilities as a member of the Board of Directors.
- **Hurricane shutter specifications:** The condominium statute requires every board of directors to adopt specifications for the installation of hurricane shutters. Unit owners are entitled to install shutters in accordance with the board's specifications. Many associations (perhaps a majority) have never adopted the required specifications.
- **Notice posting location:** The law requires the board to adopt a rule specifying where official association notices are posted. Although most associations have a set place where notices are posted, most boards have never adopted a formal rule specifying posting location, as required by the law. Recent code changes probably require updates for those associations which have adopted specifications.
- **Q&A Sheet:** The law requires every condominium association to prepare a "Question and Answer Sheet," commonly referred to as the "Q&A Sheet." It is essentially a disclosure document. The Q&A Sheet must be updated annually. Many associations do not have a Q&A Sheet, and more yet fail to update it annually.
- **Fidelity bonding:** The statute requires an association to have fidelity bonding (or similar insurance, sometimes known as employee dishonesty or crime coverage) in place, for the maximum amount of association funds exposed to theft. In many cases, associations are grossly underinsured with their fidelity coverage, and it can come back to haunt an association after an employee or agent dishonesty incident.
- **Rules and regulations:** Assuming the association is granted rulemaking authority in the governing documents, the condominium statute requires any rule regarding use of the units (apartments) to be publicly noticed fourteen days in advance of the meeting at which it is adopted. This notice must be posted and mailed out to every unit owner. There is no similar requirement for common element rules; the regular forty-eight hour posting typically suffices. Many associations adopt rules regarding unit use without the required public notice, which only becomes an issue when the association attempts to enforce the rule in court or arbitration, or when attempting to collect a fine.
- **Board voting:** Many associations continue to cling to the erroneous assumption that, under *Robert's Rules of Order*, the president of the board is not entitled to vote on matters before the board, except to break a tie. If the president is a director (and he or she almost always is), then not only is he or she entitled to vote, he or she is obligated to vote, except in the event of a conflict of interest. The statute also requires the vote of each director, by name, to be recorded in the minutes for each vote that is taken.
- **Agendas:** The condominium statute requires that any item of business that is to be taken up at a board meeting must be specifically included on the posted agenda for the meeting. Generic designations such as "new business" are not sufficient. Many boards routinely violate this law. There is a somewhat complicated procedure for emergency situations.
- **Sunshine requirements:** The condominium statute requires that every board meeting be publicly noticed and open to unit owner observation and participation, except when meeting with the association's legal counsel. Many boards engage in "executive sessions" for potentially sensitive matters such as personnel, board political problems, etc. Although usually well intentioned, any gathering of a quorum of the board for conducting association business, whether or not a vote is taken, is contrary to the law unless proper notice and participation rights have been given.
- **Fining procedures:** The condominium statute provides that no fine may be levied until an opportunity for a hearing, before a committee of unit owners other than board members, has been provided. Many associations conduct their fining procedures outside the bounds of the law, usually involving notice violations or the failure to provide the opportunity for the required hearing.
- **Special assessment procedures:** Assuming that the board is given special assessment authority in the governing documents (and some documents require a membership vote), the public notice requirement is similar to rule-making, discussed above, requiring fourteen days posted and mailed notice. The notice must contain a statement of the purposes of the proposed assessment. Once the assessment is levied, a second notice must be sent out, which again indicates the purpose for which the assessment was levied.



CASENOTES

KEEPING GOOD FAITH

In the case of *Doyle v. Maruszczak*, 834 So.2d 307 (Fla. 5th DCA 2003), the Fifth District Court of Appeal analyzed the duty a real estate agent owes to its client. Richard Doyle was a licensed real estate sales agent, employed by Hernando Beach Realty. The Maruszczaks hired Doyle to find them property in the Hernando Beach area. In connection with that representation, the parties signed a transaction broker agreement which stated that Hernando Beach Realty was providing representation that included the duty to deal honestly and fairly with the Maruszczaks.

The Maruszczaks were shown a number of lots for possible purchase. One such lot, Lot 11, was of interest to the Maruszczaks and they instructed Doyle to negotiate for the purchase of that lot at the best price and terms he could obtain. After the listing on Lot 11 expired, Marchant, the owner of the lot, offered Lot 11 to Doyle at a reduced price, and Doyle purchased the property for himself. The Maruszczaks claimed Doyle breached his fiduciary duty when he purchased Lot 11 without notice to them, since they had previously informed him that they were interested in acquiring this property and even instructed Doyle to negotiate its purchase on their behalf. The Maruszczaks thereafter sued Doyle seeking injunctive relief and the imposition of a constructive trust over Lot 11.

The appellate court stated that the pivotal issue in the case is whether Doyle possessed a fiduciary relationship with the Maruszczaks. The uncontroverted evidence established that the Maruszczaks hired Doyle as their agent, and Hernando Beach Realty agreed to deal with them honestly and fairly. When the relationship of principal and agent exists, the ultimate good faith is required in all of the transactions of the agent towards his principal, and the agent cannot put himself in a position adverse to that of his principal. Where the agent, employed to purchase for the principal, purchases for himself, all of the profits and advantages gained in the

transaction are presumed to be held in trust for the principal by the agent.

The District Court of Appeal held that the lower court's entry of a summary judgment was improper since there were issues of material fact with respect to whether or not the owner of Lot 11 would have ever sold the property to the Maruszczaks. However, the District Court of Appeal did affirm the trial court's conclusion that Doyle undertook a fiduciary duty to the Maruszczaks.

ELECTION PROCEDURES MUST BE STRICTLY FOLLOWED

In the case of *M.J. Gentry vs. Casa Del Sol [Winter Haven] Condominium Association, Inc.*, Case No.02-5465 (Coln/Amended Final Order/February 19, 2003), a unit owner filed a Petition for Arbitration regarding the Association's failure to abide by its By-Laws which specified that the Association's annual meeting was to be held at 3:00 p.m. on the third Friday in February of each year. The Association, in its nearly 30 years of operation, had held the annual meeting on the specified date only once, in 1974. The remaining annual meetings were held in October, November or December, in order to accommodate the unit owners. However, no amendment was ever enacted to actually change the date required by the By-Laws.

The Arbitrator found that the Association had in fact violated the provisions of its By-Laws regarding the holding of its annual meetings. Although the Association was allegedly holding the annual meeting on a date it believed was convenient to the unit owners, it was not authorized to change the meeting date without a validly enacted amendment to the Association's By-Laws reflecting the change. Accordingly, the Arbitrator ordered the Association to comply with the By-Laws and hold the meeting on the date specified therein. Alternatively, the Association was required to validly amend its By-Laws to reflect the desired changes to its annual meeting dates.

CASENOTES



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Vol. 103 APRIL 2003 CURRENT NEWS FOR COMMUNITY ASSOCIATIONS

IS YOUR DIRECTORS & OFFICERS LIABILITY COVERAGE ADEQUATE?

By Donna D. Berger, Esq.

If you've ever served on a community association board of directors, you've probably asked yourself, just before the election results were returned, what kind of liability you could be exposed to as a result of your director status. Lawsuits, in general, are on the rise across the nation so it is a pertinent question.

Community association board members have been sued for a variety of actions including discriminatory hiring practices, tortious interference with a sales contract, and prohibiting the installation of a satellite dish on a front lawn. The person suing could be a unit owner, an association employee or a contractor who is working on the common elements. These suits can expose both the individual board members and the association to financial disaster if a proper directors and officers (D & O) liability policy is not in place.

Industry analysts warn that most D & O policies are inadequate; providing only a fraction of the coverage many associations need. These policies are often not scrutinized as closely as they should be because many directors believe they will be covered in the event of a lawsuit by the language found in most declarations requiring the association to indemnify their board members. An indemnity agreement basically says that if an officer or director is sued, the association will pay him or her back for any costs and fees incurred.

However, indemnification may provide a false sense of security if the association

does not have enough money budgeted to pay those costs. Moreover, most indemnification clauses require the association to repay costs only after they have accrued, so a board member who has been sued may spend months paying large legal bills before being reimbursed by the association. The prudent course of conduct is to ensure that a thorough D & O policy is in place which contains the proper provisions to meet the common legal challenges that face associations and board members today. The benefits of having such a policy in place extends beyond covering just the board members and their personal assets, to covering their spouses, committee members, volunteers, the association and its employees against most types of lawsuits.

In order to ensure that the D & O policy you buy is actually the type of coverage you need, you should review the policy carefully (and be sure to check with your attorney and other informed professional advisers prior to buying) to determine that the following areas are covered:

1. Make sure there is sufficient coverage. The coverage limit on your policy should be sufficient to pay both the cost of defending the suit as well as any eventual settlement or judgment. The cost of protracted litigation can quickly erode your policy limits well before a settlement or verdict is reached so the limit must be high enough to cover the worst-case scenario.

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TIDBITS

Did You Know ???

Pursuant to Section 718.3025, Florida Statutes, no written contract to provide maintenance or management services for a condominium association shall be valid or enforceable unless the contract:

- ✓ Specifies the services, obligations and responsibilities of the party contracting to provide maintenance or management services to the unit owners.
- ✓ Specifies those costs incurred in the performance of those services, obligations or responsibilities which are to be reimbursed by the association to the party contracting to provide maintenance and management services.
- ✓ Provides an indication of how often the service obligation or responsibility is to be performed whether stated for each service obligation or responsibility or in categories thereof.

continued on page 2

COVERAGE...*continued from page 1*

2. Make sure that the policy covers past, present and future board members. This should alleviate any concerns potential board candidates may have about their predecessors' actions. You should also insure the board members' spouses since particularly disgruntled unit owners will occasionally name them as defendants as well. An example of the type of language being suggested would be:

"Insured Persons" means any persons who were, now are, or shall become: 1. duly elected or appointed directors, trustees, or officers of the Insured Organization, and spouses thereof.

3. Make sure committee members and other volunteers are covered by the D & O policy. The work of volunteers and committee members is essential to many community associations but remember that their actions can lead to a lawsuit even though they do not serve on the board. They need to be insured as well. An example of the type of language being suggested would be:

"Insured Persons" means...2. members of duly constituted committees or other volunteers of the Insured Organization, and spouses thereof.

4. Make sure all association employees are properly covered. Your D & O coverage should include all past, present and future association employees and should include full-time, part-time, seasonal and leased employees as well. A strict reading of the policy is especially important since terms such as "employee" can be defined to exclude seasonal workers or leased employees. An example of the type of language being suggested would be:

"Insured Persons" means...3. employees of the Insured Organization, including all employees, whether they be full-time, part-time, seasonal or leased.

5. Make sure your D & O policy **does not** exclude non-monetary claims unless you specifically request that exclusion. An example of a non-monetary claim would be one in which

an association member was requesting the right to do something that the board attempted to prohibit. For example, a board denies an owner's request to install a satellite dish and the owner sues to force the board to approve the request. If the court rules in the owner's favor, it would probably just enter an order requiring the board to grant the installation request but probably not require the board to pay damages. In that event, a D & O policy that excluded non-monetary claims would not pay for the board members' legal fees and costs no matter how substantial they may have been in defending their course of conduct in denying the installation.

Including non-monetary claims in your coverage will certainly increase the cost of your premium, but as the number of lawsuits for non-monetary damages rises, it may prove to be a prudent investment.

6. Insured vs. insured coverage is another area that merits closer consideration. Perhaps one member of your board might sue another member. This could become a real threat in the event one board member takes unilateral action that puts the entire board at risk. You could also face the proposition of current board members suing prior board members. You should know ahead of time if your D & O policy covers these types of insured vs. insured claims since most do not.

7. Discrimination lawsuits have been gathering steam over the last twenty years. Make sure your D & O policy will protect your board members in the event they are sued over a housing discrimination claim or an employment discrimination matter. These are particularly vulnerable areas for associations, and board members may be wholly unprepared to deal with requests for handicapped accommodations in a sensitive manner. These are also the types of cases that carry the potential for disastrous damage awards, so specifically review your policy beforehand to assure coverage is warranted.

8. You should ensure that your D & O policy contains coverage for "full employment practices" or EPL. Since so many associations today do have employees, this coverage is particularly important. This coverage should protect the directors, officers, property

TIDBITS**Did You Know ???***continued from page 1*

- ✓ Specifies a minimum number of personnel to be employed by the party contracted to provide maintenance or management services for the purpose of providing service to the association.
- ✓ Discloses any financial or ownership interest which the developer, if a developer is still in control of the association, holds with regard to the party contracting to provide maintenance or management services.

This statute applies only to maintenance or management services for which the association pays compensation and does not apply to contracts for services or property made available for the convenience of unit owners such as coin operated laundry, food, soft drink or telephone vendors, cable operators, retail store operators, businesses, restaurants or similar vendors.

manager and employees from lawsuits involving employment discrimination, handicapped discrimination, racial discrimination, etc. If your D & O policy does not offer this type of coverage, you may want to consider purchasing a separate EPL policy.

9. Do not accept a reimbursement policy which requires your board members to lay out costs and attorneys' fees ahead of time only to receive reimbursement from the policy post-settlement.

By thinking about your board members' needs and the unique functioning of your association, in advance, you should be able to procure D & O coverage that will thoroughly protect your members, employees, and volunteers and allow them to serve your community in as positive an environment as possible.

REFLECTIONS; PRELUDE TO THE HOUSING FOR OLDER PERSON'S ACT

By Gary A. Poliakoff, J.D.

Recently, while preparing for a presentation at a legal forum, I had the occasion to re-read the Florida Supreme Court decision, *Franklin v. White Egret Condominium, Inc.*, 358 So.2d 1084 (Fla. 4th DCA 1977), which, 25 years ago, affirmed the right to maintain "adult" communities. The issues debated then seem as relevant today, so I have chosen to share some of the poignant quotes from the decision, and those of the Fourth District Court of Appeal. Quoting Judge Letts of Florida's Fourth District Court of Appeal:



"The majority opinion believes that age restrictions run afoul of fundamental rights such as marriage and procreation. These are 'motherhood and the flag' proclamations and the cases cited in support simply do not relate these unassailable fundamentals to an age restriction. Certainly, this particular age restriction does not deny the right of any adult owner to take a bride and continue to live in his condominium apartment. Nor does it deny him the right to procreate; he simply has to move when the child is born. This is comparable in principle, to a couple with three kids having to move to a bigger house upon the

arrival of the fourth, because the existing living quarters are bursting at the seams and the zoning will not permit the addition of another room."

Judge Letts, went on to note:

"There are countless examples of apparently valid and enforced age restrictions which run the gamut from the required 3 years of age for Kentucky Derby entrants, all the way to the necessary 35 years that any aspirant to the presidency must attain under the Constitution itself. (Article II §1, U.S. Constitution.) Judge Kovachevich finds it difficult to comprehend the ...change that occurs on a child's twelfth birthday which suddenly renders him fit to live in a condominium. Maybe so, but from whence the magic of a 35th birthday which suddenly renders a person fit to live in the White House, even though one can serve as a U.S. Senator for 5 years before that? (and why 30 years of age for the Senate?) The answer is that, between night and day, childhood and maturity, or any other extremes . . . a line has to be drawn [somewhere]."

In reversing Florida's Fourth District Court of Appeal, which had ruled against the enforcement of age restrictions, Florida's Supreme Court, for the most part, adopted Judge Lett's rationale. The Court noted:

"The urbanization of this country requiring substantial portions of our population to live closer together coupled with the desire for varying types of family units and recreational activities have brought about new concepts in living accommodations. These are residential units designed specifically for young adults, for families with young children, and

for senior citizens. The desires and demands of each category are different. Young adult units are predominantly one bedroom units with extensive recreational facilities designed for the young, including tennis and racquet ball courts, weight rooms, saunas, and even disco rooms. The units designed principally for families are two- to four-bedroom units with recreational facilities geared for children, including playgrounds and small children's swimming pools. Senior citizen units are limited to one- and two-bedroom units designed to provide the quiet atmosphere that most of our senior citizens desire. These units may provide extra wide doors throughout the complex to allow sufficient clearance for wheelchairs and walkers and recreational facilities such as card rooms and shuffleboard courts.... We cannot ignore the fact that some housing complexes are specifically designed for certain age groups. In our view, age restrictions are a reasonable means to identify and categorize the varying desires of our population."

In 1995 Congress adopted the Housing for Older Persons Act which formally made provision for senior retirement communities, free from families with small children. Congress recognized that the desire to live in a community geared towards a specific age group was not inherently discriminatory so long as the proper documentary restriction accompanies that desire.





CASENOTES

STICKS AND STONES

Directors, Officers, and managers (and sometimes simply unit or lot owners) occasionally want to investigate the possibility of obtaining a restraining order or injunction to stamp out harassing or combative behavior. Section 784.046, Florida Statutes, establishes a procedure by which any victim can immediately obtain a "protective injunction" upon "two incidents of violence or stalking," by submitting a sworn petition to a court alleging the two incidents of violence. This statute defines "violence" to mean any "assault ... battery ... or stalking."

In *Gianni v. Kerrigan*, 836 So.2d 1106 (2nd DCA 2003), Mr. Gianni had sought a protective injunction based upon the following two acts of alleged violence: 1) several telephone calls from Mr. Kerrigan verbally threatening violence on April 29, 2001; and 2) on May 3, 2001, Mr. Kerrigan's physical attack on Mr. Gianni. The court held that the telephone calls did not rise to the level of "violence" as defined in the above-referenced statute, and therefore, the necessary requirement for at least two acts of violence to support the issuance of a "protective injunction" was not satisfied.

Words, including words transmitted by telephone, can validly constitute an assault; therefore, given that the telephone calls threatening violence were actually followed up several days later by the accomplishment of such violence, the Court's holding might seem puzzling. The explanation of the Court's holding can be found in Mr. Gianni's testimony that the telephone calls did **not** place him in fear. That is, one necessary element of assault, a "well-founded fear that violence is **imminent**," was not created in Mr. Gianni's mind by Mr. Kerrigan's telephone calls. The moral of this story is that a verbal attack, threatening violence, will only be characterized as an assault for purposes of law if the party being attacked is legitimately put in imminent fear by the words being spoken.

SET IT BACK

In *Payne v. Cudjoe Gardens Property Owners Association, Inc.*, 28 FLW D1 (Fla. 3rd DCA 2002), the homeowners association brought suit against

defendant homeowners for injunctive relief, asserting that the defendants violated deed restriction set-back requirements in the construction of their home.

Summary judgment was initially granted in favor of the defendants, the court finding that the Association had waived the right to enforce the set-back requirements as a result of numerous variances granted to prior property owners. However, the judgment was vacated based upon allegations of defense counsel misconduct. The Association, thereafter, filed its own motion for summary judgment, asserting that the defendants, having failed to submit building plans for Association approval prior to construction, were barred from raising any affirmative defenses.

The court granted summary judgment in favor of the Association, refusing to consider the defendants' evidence of over sixty prior violations of the deed restrictions, and holding that the defendants lacked standing to challenge the deed restrictions due to their failure to submit the building plans for approval prior to construction.

On appeal, the Third District Court found that summary judgment in favor of the Association had been entered in error because the defendants had not yet received responses to their discovery requests. The discovery responses may have revealed other owners who, also having failed to timely submit building plans, were nonetheless granted waivers or variances by the Association.

The court further noted that the record clearly evidenced some 68 other violations of the set-back requirements. While some of the 68 non-conforming owners had received variances, it was unclear, absent responses to the outstanding discovery requests, how many had received their variances prior to commencing construction or thereafter. It could not be determined whether the defendants were precluded from raising any affirmative defenses against the Association's claims or whether the Association was enforcing the restrictive covenant arbitrarily and unreasonably. The court held that where discovery is not complete and the facts are therefore not sufficiently developed to enable the trial court to determine whether issues of material fact exist, entry of summary judgment is premature and constitutes reversible error. Thus, the summary judgment in favor of the Association was reversed.

CASENOTES



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Vol. 103 MARCH 2003 CURRENT NEWS FOR COMMUNITY ASSOCIATIONS

LEGAL RIGHTS OF CONDOMINIUM OWNERS IN FLORIDA

By Gary A. Poliakoff, J.D.

1. A purchaser from the developer has a right to receive from the developer a complete set of condominium documents as well as disclosure documents, and to rescind the contract to purchase at any time within 15 days from receipt of all required documents.
2. Right of a re-sale purchaser to receive a complete set of the condominium documents, rules and regulations, the most recent year-end financial report, as well as the right to rescind the contract within 3 days of receipt of said documents.
3. A new condominium unit comes with an implied warranty of fitness and merchantability, as well as a common law implied warranty that the unit will be constructed in accordance with the approved building plans, code specifications and with sound workmanship.
4. A unit owner is entitled to the exclusive possession of his/her unit.
5. A unit owner and his/her invited guests are entitled to use the common elements, common areas and recreational facilities serving the condominium in accordance with the purposes for which they are intended, but no use may hinder or encroach upon the lawful rights of other unit owners.
6. Unit owners have the right to invite candidates for public office to appear and speak on the common elements, common areas and recreational facilities, subject to reasonable rules adopted by the association.
7. Unit owners have the right to peaceably assemble on the common elements, common areas and recreational facilities.
8. Unit owners have a right of access to any available franchised or licensed cable television service and, pursuant to the



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TIDBITS

Did You Know ???

The Florida Administrative Code requires condominium associations to maintain a Frequently Asked Question and Answer (Q&A) sheet as part of its official records.

- ✓ The Q&A sheet must be updated once every 12 months
- ✓ It must provide information to the unit owners regarding:
 - Voting rights;
 - Restrictions affecting the use of a unit;
 - Leasing restrictions;
 - Amount and due date of assessments;
 - Any mandatory memberships in other associations and assessments related thereto (such as a master association or country club);
 - The existence of a recreational facility or long-term land lease and, if so, the amount each unit owner is required to pay per year; and

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LEGAL RIGHTS...

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- Telecommunications Act of 1996, to install a satellite dish on property exclusively owned or controlled by the unit owner.
9. Unit owners are entitled to have certain delineated disputes, such as an attempt by the board to require the unit owner to take any action regarding his or her unit, or altering the common elements, submitted to arbitration before the Division of Florida Land Sales, Condominiums and Mobile Homes.
 10. Unit owners have a right to receive 30 days notice of an alleged delinquency before the board initiates a foreclosure on a lien securing the obligation owed to the association.
 11. The Association is prohibited from changing a unit owner's share of the common elements, voting rights or unit appurtenances, without the unit owner's written consent.
 12. A unit owner has the right of peaceful possession of the unit, free from unwarranted nuisances.
 13. Unit owners have the right to notice, with a posted agenda, of board and membership meetings and the right to speak to the agenda.
 14. Unit owners have the right to audio and video tape meetings of the board and membership meetings
 15. Unit owners have the right to notice and attendance at meetings of committees, which take final action on behalf of the board and/or make recommendations to the board regarding the association budget issues, and all other committee meetings unless excluded by an amendment to the condominium documents.
 16. Unit owners have the right to inspect a copy of each insurance policy in effect.
 17. Unit owners have the right to inspect the official records of the association, and make or obtain copies of the records. The right of record inspection is subject to reasonable rules of the association regarding the frequency, time, location, nature and manner of record inspections and copying.
 18. Unit owners have the right to receive a complete financial report of actual receipts and expenditures for the previous 12 months, within 60 days following the end of the fiscal or calendar year, or annually.
 19. Unit owners have the right to maintain a warranty action.
 20. Unit owners have the right to make one written inquiry every 30 days, by certified mail, to the board, which must be responded to within 10 days.
 21. Unit owners have the right to vote by limited proxy on the waiver or reduction of statutory reserves, on amendment of the condominium documents and to waive the Division accounting requirements.
 22. Unit owners have the right to receive personal notice of any board meeting where the board will consider non-emergency assessments or rules regarding unit use.
 23. Unit owners have the right to elect and recall the board, at any time, with or without cause.
 24. In situations where the condominium documents grant the board fining authority, unit owners have the right to notice of the alleged violation of the covenants and/or the rules and regulations, an opportunity to cure it and a hearing, before a fine can be levied.
 25. Unit owners have a right to qualify for the board. And, pursuant thereto, the right to have a single sided 8 1/2" x 11 1/2" information sheet, prepared by the candidate, mailed with the ballots to all unit owners.
 26. Unit owners have the right to display one portable United States Flag in a respectful way.
 27. Unit owners have the right to install hurricane shutters.
 28. Hearing impaired or sight impaired unit owners living alone can opt out of any obligation for compulsory cable television.
 29. A tenant residing in a building being converted from rental to condominium is afforded the right-of-first refusal and disclosure of the building condition.
 30. Unit owners are entitled to notice of any special assessment, including the specific purpose or purposes for same.
 31. Unit owners have the right to recover legal fees in any action between the unit owner and the association, when the unit owner prevails in the action.
 32. Unit owners collectively have the right to cancel contracts for maintenance, operation or management, which were entered into by developer-controlled boards.
 33. Unit owners have an entitlement, that any grant, reservation or contract entered into by a developer-controlled board, prior to assumption of control by the unit owners, be fair and reasonable.

TIDBITS

Did You Know ???

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- Any litigation the association is involved in where it may face liability in excess of \$100,000.
- ✓ Information may be summary in nature and must refer to identified portions of the condominium governing documents.
- ✓ The "Question and Answer" sheet must be printed on a single piece of paper; however, the association may use both sides of one sheet of paper.
- ✓ The Q&A sheet is no longer required to be included as part of the package of documents which must be delivered by an association in connection with unit re-sales.

COLLECTING NEW ASSESSMENTS AFTER BANKRUPTCY

By C. John Christensen, Esq.

Can an association collect regular and special assessments after an owner liable for assessments has filed for bankruptcy? The answer is a qualified "yes," but watch out how you go about doing it.

In a typical suit to enforce a lien for payment of assessments by the owner of a unit or lot, or for a judgment against the owner, the association sues the owner both personally for the money he or she owes, and also sues to foreclose its claim of lien against the property. The first count is based upon the theory that the owner, when he or she purchased the property, entered into a contract to personally pay to the association the assessments described in the declaration or bylaws; in this regard, the documents are characterized as a type of contract.

The second count is based on the fact that the documents give the association a lien against the property in order to secure or collateralize the assessments; this lien attaches directly to the real property (e.g., the unit or lot) and improvements, irrespective of the documentary "contract" with the property owner.

In more legalistic terms, the first count is called *in personam*, meaning "against the person" because it is a claim against the person, the owner; the second count is called *in rem*, meaning "against the thing" because it is a claim to foreclose a lien against a thing, the real property itself. While the bankruptcy may, as discussed below, affect the owner's *in personam* (contractual) obligations, it will not eliminate the association's right to bring an *in rem* (lien foreclosure) action against the property.

In this regard, there have been two opposing schools of thought on what happens to a property owner's *in personam* duty to pay assessments

following the filing of a bankruptcy. Many Courts have previously ruled that a unit owner's *in personam* obligation to pay future assessments was extinguished by the bankruptcy. These courts held that the bankruptcy could erase the owner's personal duty to pay the assessments, which were created by the documents. Many other Courts took a completely different interpretation, and ruled that the unit owner's personal duty to pay assessments after filing for bankruptcy was non-dischargeable as a "covenant running with the land," meaning that the duty to pay was an **integral** part of owning the real property itself (like an easement) and therefore the duty could not be extinguished by the bankruptcy. These two different theories led to considerable confusion, so Congress tried to clear the matter up by changing the Bankruptcy Code in 1994 to state that an owner's personal contractual obligation to pay assessments, coming due after a bankruptcy is filed, is not erased **if** the person actually occupied the unit or lot, or rented it for profit after filing for bankruptcy protection.

The bottom line is that there are cases which state that the owner's personal contractual duty to pay assessments after filing bankruptcy is extinguished, and there are cases which state that an owner's personal duty to pay assessments after bankruptcy is not extinguished, and finally, there is a federal law that provides that an owner's personal contractual duty to pay assessments is not extinguished after bankruptcy **if** the owner lives in his unit or lot, or rents it out for profit.

Given this complicated scenario, how can an association make sure its assessments are paid after an owner's bankruptcy? One relatively straightforward way to

proceed is to forgo pursuing a count against the owner personally and focus instead on a count to foreclose the association's **lien** against the property itself.

The two different theories in the case law, along with the bankruptcy code change, leave many questions. Because of these questions, any *in personam* lawsuit for unpaid assessments after bankruptcy could be complex, expensive and could go either way. It could also violate the bankruptcy discharge (which is why it is so important that qualified counsel prepare any demand letter for new assessments following a bankruptcy). It is for this reason that associations may desire to only pursue an *in rem* action against the property to foreclose its claim of lien against the property. In this way, the association could potentially take title to the property, or at least force the owner to start paying assessments to avoid losing the property in a foreclosure sale; in effect, achieving the same result without the risk of running afoul of the bankruptcy laws.

To reiterate, when it comes to assessments which come due after bankruptcy has been filed, an owner's bankruptcy does not affect the *in rem* (lien foreclosure) action. Thus, the association can accomplish what it needs to without facing the risks and uncertainties of proceeding against the owner *in personam* under the personal contract theory.

The association can usually achieve its end by only pursuing foreclosure of the lien against the property. Of course, each case must be weighed on its individual merits and circumstances with counsel's advice.





CASENOTES

AD HOC COMMITTEE STILL STANDING

In the case of *Westwood Community Two Association, Inc. v. Barbee*, 293 F.3d 1332 (11th Cir. 2002), the United States Court of Appeal for the Eleventh Circuit held that an unofficial committee of homeowners had standing to appeal an order requiring each homeowner in the Westwood Two Community to pay a \$7,250.00 special assessment or risk having their homes liened. The Westwood Community Two Association, Inc. (the "Association") had previously filed for bankruptcy protection in the United States District Court for the Southern District of Florida as a result of successful litigation brought against the homeowners' association alleging violations of both the Federal and Florida Fair Housing Acts. After conducting a trial on the adversarial claims, the bankruptcy court allowed the discrimination claims to stand, which resulted in the Association facing liability in excess of one million dollars, including sums for compensatory and punitive damages.

The court-appointed trustee of the bankruptcy estate sought reconsideration of the bankruptcy court's decision to allow the claims. When the bankruptcy court denied the motion for reconsideration, the trustee elected not to file an appeal to the district court, and instead took the position that, pursuant to the Association's governing documents, the trustee had authority to specially assess each homeowner their pro rata share of the Association's liability (\$7,250.00 per home) in order to satisfy the judgments.

After the trustee sought collection of the special assessment, a group of homeowners calling themselves the "Unofficial Ad-Hoc Committee for Westwood Community Two" filed an action in the bankruptcy court challenging the special assessment by claiming its members did not engage in any of the wrongful conduct that led to the claims. The bankruptcy court ruled in favor of the trustee, finding that the trustee had the power to impose the special assessment, and authorize its collection. The Unofficial Committee appealed the bankruptcy court's rulings to the federal district court, but their appeal was denied under that court's determination that the committee lacked standing to challenge the

bankruptcy court's ruling. The Committee then appealed to the Eleventh Circuit Court of Appeal in Atlanta, Georgia.

The Eleventh Circuit held that the Unofficial Committee did have standing to appeal the bankruptcy court's order as its members were "personally aggrieved" under the bankruptcy court's order. The court noted that "generally, only the bankruptcy trustee may appeal an order from the bankruptcy court." However, the court recognized an exception to this rule for purposes of appeal where a person's interests are "directly and adversely affected pecuniarily by the [bankruptcy court's] order." The court indicated that standing may be conferred in bankruptcy matters where the appellant has a financial stake that the challenged order diminishes, increases, burdens, or impairs rights. Based on that holding, the Eleventh Circuit remanded the matter to the district court for consideration of the Unofficial Committee's claims that they should not be specially assessed their pro rata share of the claim amount since the members alleged they did not participate in any of the wrongdoing which resulted in the claim.

WATCH YOUR STEP

In the case of *Tresize v. Holiday Apartments Condominium Association, Inc.* (Case No. 02-4660), the Division of Florida Land Sales, Condominiums and Mobile Homes analyzed the issue of whether an association was required to install a sidewalk as an accommodation to an owner's disability. The unit owner alleged that he had difficulty walking on certain stepping stones located outside of his unit.

The Arbitrator conducted a hearing, and found that the stepping stones were not flawed, but that the particular unit owner had difficulty walking on them. Further, since the stones were not defective in any way, the Association was not required to take any curative action. On the other hand, the Arbitrator ruled that if the unit owner desired to install a new sidewalk at his own expense, the Association would be required to permit the installation as an accommodation to the owner's handicap. This decision was based upon federal regulations promulgated under the Fair Housing Act, which permit a handicapped person to make reasonable modification of existing premises at that person's expense.

CASENOTES



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Community Up-Date™

Vol. 103 FEBRUARY 2003

CURRENT NEWS FOR COMMUNITY ASSOCIATIONS

RESERVE RULES CHANGE

By David H. Rogel, Esq.

The most important issue affecting the operation of condominiums and cooperatives typically involves money. One of the most important financial issues which impacts condominium and cooperative associations is reserves, which are required under Florida law. While most important changes affecting the operation of these associations come through the legislature, probably one of the most important changes in recent times, one which affects funding of reserves, has come from a change of rules promulgated by the Department of Business and Professional Regulation.



As almost everyone involved with a condominium and cooperative knows, an association is obligated to maintain reserve accounts for capital expenditures and deferred maintenance. Required accounts include roof replacement, building painting, and pavement resurfacing. Accounts are also required for any other item whose deferred maintenance expense or replacement cost exceeds \$10,000.00. Mechanical equipment like elevators and chiller towers, structures like pools and seawalls and

interior replacement of carpeting and furniture are all things found in many reserve accounts established in accordance with the law. Until now, an association had really only one way in which to calculate how to fund reserve accounts, requiring large amounts of money to be collected each year, and leading many communities to waive the reserve funding requirement.

Until now, the only way to determine the amount of reserves to be collected required that an amount be collected for each reserve item based upon the replacement cost, the amount in the reserves at the beginning of the year and the remaining useful life of each reserve item. The total calculated for each of the reserve categories, added together, was the amount which was required to be collected, notwithstanding the actual need for money during any particular year. This method of calculating reserves is sometimes known as the straight-line method. Effective December 23, 2002, condominium and cooperative associations can now utilize a second, new, method by which to calculate reserves which may mean a substantial reduction in the yearly contribution for reserves, while still resulting in sufficient funds to be available for replacement of components when those funds are needed. This cash-flow method of funding allows an association to look at a group of assets, instead of looking at each asset individually.

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TIDBITS

Did You Know ???

The Division of Florida Land Sales, Condominiums and Mobile Homes is responsible for six (6) regulatory programs: The Condominium Act (Chapter 718), The Cooperative Act (Chapter 719), The Florida Vacation Plan and Timesharing Act (Chapter 721), The Florida Mobile Home Act (Chapter 723), The Florida Uniform Land Sales Practices Act (Chapter 498) and The Florida Yacht and Ship Brokers Act (Chapter 368).

- ✓ The Division's responsibilities, as outlined by these various laws, include: licensing functions, review of public disclosure materials, education, arbitration of disputes, mediation of complaints and enforcement of the laws subject to Division jurisdiction.
- ✓ The Division is now organized into three distinct units in order to fulfill all of these duties and responsibilities.
- ✓ The Bureau of Customer Service is the Division's liaison with the general public. It is

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RESERVE...*continued from page 1*

The collection of reserves in a condominium is required by Section 718.112(3)(f), Florida Statutes, while the same requirement for cooperative associations is found in Section 719.106(1)(j), Florida Statutes. These mandatory provisions are further regulated by the provisions of Rule 61B-22.005, Florida Administrative Code, which contains the rules regulating reserves. As now revised, the rules allow a calculation using a formula that will provide funds equal to the total estimated deferred maintenance expense or total replacement cost for an *asset or group of assets over the remaining useful life of the asset or group of assets* (amended language in italics). The new version of the rule goes on to state that:

If the association maintains a pooled account of two or more of the required reserve assets, the amount of the contribution to the pooled reserve account as disclosed on the proposed budget shall be not less than that required to ensure that the balance on hand at the beginning of the period for which the budget will go into effect plus the projected annual cash inflows over the remaining estimated useful lives of all of the assets that make up the reserve pool are equal to or greater than the projected annual cash outflows over the remaining estimated useful lives of all of the assets that make up the reserve pool, based on the current reserve analysis. The projected annual cash inflows may include estimated earnings from investment of principal. The reserve funding formula shall not include any type of balloon payments.

The amended language of the rule now allows an association to pool two or more of the required reserve assets into one pooled account. An association is only obligated to contribute sufficient funds to the pooled reserve account to ensure that a sufficient amount of money exists during each year to fund the deferred maintenance or replacements which will be undertaken during that year.

Because the original method by which reserve funding was calculated required a contribution, regardless of whether reserve components were being replaced in any particular year, the net effect of the new cash-flow method is a reduction in annual contributions while still allowing an association to maintain adequate monies to address major replacements.

The starting point for the calculation of reserve contributions remains the same, no matter which method of calculation is utilized. In order to know how much to fund, a condominium or cooperative association must identify the components for which reserves are required, estimate the remaining useful life of the component and determine the amount it will cost for the replacement of each component. There are companies, which will come into a community and perform this work for a fee. A condominium association can also obtain information from contractors and other professionals as to each component for which it collects funds. Either way, the information obtained must be put into a schedule so that the projection of how much money is necessary can be determined. The straight-line method for calculating reserves only required you to look at the year for which the calculation was being made, based upon the total of the calculations for each component in the reserve schedule. The cash-flow method depends upon a schedule which looks at the requirements for all components over an extended period. In fact, the more years included in the cash-flow schedule, the more accurate an association can be in calculating contributions over the years.

Two example tables are shown in order to assist in understanding how the two funding methods differ. For simplicity, the examples show four items for which reserves are being collected: roof replacement, building painting, pavement resurfacing and pool re-marciting. Both examples assume no negative balance in each account, but also assume that no money has been collected so that the beginning balance for each account for the first year is

*continued on page 3***TIDBITS****Did You Know ???***continued from page 1*

responsible for educating the public on the laws subject to Division jurisdiction and the administrative rules promulgated by the division. The Bureau of Customer Service also responds to telephone inquiries and written inquiries as well as distributing booklets and brochures.

- ✓ The Bureau of Standards and Registration is the Division's liaison with land developers. It reviews and approves all public disclosure reports prepared by developers of condominiums, cooperatives, timeshares, mobile home parks and subdivided lands.
- ✓ The Bureau of Compliance is the Division's liaison with association boards. It ensures compliance with statutory and administrative rule requirements. This review process is begun with the receipt of a complaint filed against a particular association. Upon receipt of a written complaint, this Bureau will first determine whether the alleged activity outlined in the complaint is, in fact, subject to the jurisdiction of the Division and whether sufficient documentation has been submitted to warrant the opening of a file and the commencement of an investigation.
- ✓ The Division uses many tools to resolve complaints. These include education efforts, settlement agreements and formal administrative actions, which may include imposing fines. The Division has compliance offices in Tallahassee, Tampa, Orlando and Margate to carry out these enforcement functions.

zero. The first example shows the amount of contribution necessary in order to fund reserves in accordance with the straight-line method of reserve funding. Even though no component replacement is required in this first year, the total amount of the contribution necessary to fund reserves would be \$9,000.00. In the second example, showing the cash-flow funding method, ten years of contributions and expenditures are shown. By allowing the four categories to be pooled, so that all money collected is available for any expenditure, the contribution for each year of the ten years shown is only \$5,000.00.

STRAIGHT-LINE METHOD

Reserve Category	Total Estimated Life (Yrs)	Remaining Life (Yrs)	Cost	Contribution
Roof Replacement	20	10	20,000	2,000
Building Painting	5	2	6,000	3,000
Pavement Resurfacing	20	4	8,000	2,000
Pool Re-Marciting	10	5	10,000	2,000
Annual Reserve Contribution				9,000

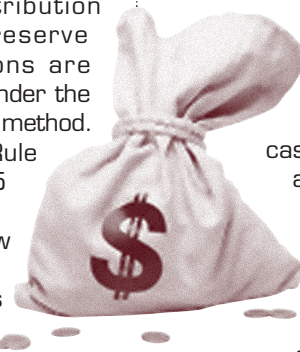
the required reserve contributions, especially in larger communities where significant amounts of monies are set aside for reserves and invested until they are utilized.

The cash-flow method of calculating reserve contributions is not new. Many communities have been utilizing this method for years, although the problem has been that the statutes and administrative rules did not recognize this option. Because of that, communities which utilized cash-flow funding were required to take a vote each year in order to partially waive full funding of reserves under the only previously recognized method, the straight-line method.

This was because the cash-flow method always results in a lower contribution than if reserve contributions are calculated under the straight-line method. Now that Rule 61B-22.005 recognizes the cash-flow method, annual votes

which have been collected up until now are specifically allocated to the reserve categories required. Because the cash-flow method anticipates the pooling of reserve items, and funds for those items, all funds must be transferred to one unallocated pool for the purpose of future expenditures. This requires the same vote necessary to use reserve funds for purposes other than that for which they were collected. This means calling a meeting for that purpose and obtaining approval by a majority of the members at that meeting, assuming that a quorum has been attained. Presumably, a community which has always waived reserves and has no funds collected in any reserve accounts would not need to take a vote, as there are no votes to transfer from specific reserve categories to one unallocated pool.

The main impact of the cash-flow method is to allow a community to collect reserves with less of a burden on the members. While many communities routinely waive reserves, such a decision by the members may be shortsighted. Communities which have reserve funds will more likely avoid special assessments when major components need to be replaced. A unit in a community which collects reserves is likely more valuable in the marketplace than a similar unit in a community which does not collect reserves, for the very reason that a purchaser can be assured that funds have been collected for future anticipated expenditures. Of course, each community and its membership must still make a decision on whether to fund reserves or not. However, the cash-flow method now makes it easier to make that decision and more economical for those communities who wish to fund for future major replacements.



CASH FLOW METHOD

Reserve Category	Total Estimated Life (Yrs)	Remaining Life (Yrs)	Cost	Year 1	Year 2	Year 3	Year 4	Year 5	Year 6	Year 7	Year 8	Year 9	Year 10
Roof Replacement	20	10	20,000	0	0	0	0	0	0	0	0	0	20,000
Building Painting	5	2	6,000	0	6,000	0	0	0	0	6,000	0	0	0
Pavement Resurfacing	20	4	8,000	0	0	0	8,000	0	0	0	0	0	0
Pool Re-Marciting	10	5	10,000	0	0	0	0	10,000	0	0	0	0	0
Beginning Cash Balance				0	5,000	4,000	9,000	6,000	1,000	6,000	5,000	10,000	15,000
Annual Reserve Contribution				5,000	5,000	5,000	5,000	5,000	5,000	5,000	5,000	5,000	5,000
Expenditure				0	6,000	0	8,000	10,000	0	6,000	0	0	20,000
Ending Cash Balance				5,000	4,000	9,000	6,000	1,000	6,000	5,000	10,000	15,000	0

While not shown in the examples, another benefit of the cash flow funding method involves interest or dividend returns on the investment of reserve funds. The cash-flow method allows not only the pooling of reserve categories and the funds contributed, but also allows the pool to include the return on investment of reserve funds. Adding investment returns to the amounts being set aside would further reduce

will no longer be necessary. However, in order to begin collecting reserves under the cash-flow method, some action by the membership may be necessary.

Communities which have been collecting reserves under the straight-line method must take a vote to initiate the cash-flow funding method. They must do so because all funds



CASENOTES

THE CASE OF THE DISAPPEARING PARKING SPACE

In the case of *Weiss v. Garnet Condominium Association, Inc.*, Case No. 02-4901 (Scheuerman/Summary Final Order/October 23, 2002), Joel Weiss filed an action in circuit court alleging that his condominium association reassigned his designated parking space while he was out of town and moved it to a more remote location. The circuit court action was stayed pending arbitration.

The Association argued that it was required to reassign Mr. Weiss' parking space due to an order issued by the City of Lauderdale Lakes Fire Chief. Pursuant to the South Florida Building Code, the Fire Chief demanded that two parking spaces in the condominium be converted into marked fire lanes in order to provide access for fire fighting and rescue vehicles. Since the Weiss parking space was near the main entrance to the building, his was one of the spaces designated for removal.

Mr. Weiss, however, argued:

1. The Board failed to provide advance notice of the parking space change;
2. The Fire Department's letter was a suggestion and not an order;
3. A neighboring condominium had not modified its parking configuration;
4. His contractual and Constitutional rights to procedural due process were abridged; and
5. He cannot now provide clear title to his property since his designated parking space has been changed.

Since the arbitrator ruled that the parking space was a limited common element and the Association had no power to reassign a limited common

element's use, it dismissed the Association as a party and dismissed the petition for arbitration. The arbitrator held that the Association simply performed a ministerial act by notifying the condominium owner of the City's decision and the City's action; therefore, a final summary judgment was entered in favor of the Association.

SPEAKING TONGUES

In the arbitration case of *Jade Winds Association, Inc. v. Kolker*, Case No. 02-5242 (Gioia/Summary Final Order/Oct. 30, 2002), the Association filed an action against Mr. and Mrs. Naum Kolker as a result of a satellite dish installed by the Kolkers that protruded onto the common elements of the condominium.

The Kolkers responded to the petition for arbitration by claiming that their satellite dish installation was protected by FCC rules and that the Association was selectively enforcing its rules and regulations. While the Telecommunications Act of 1996 does allow the installation of a satellite dish on those areas of the condominium which are within the exclusive use of the unit owners, it does not allow the installation of such device on the common elements.

With regard to the claim of selective enforcement, Mr. and Mrs. Kolker stated that they speak Russian and can only watch Russian language TV through the use of a satellite dish. They also assert that Spanish language programming is readily available to the rest of the condominium residents through cable services. However unfortunate the situation, the arbitrator ruled that this scenario does not constitute selective enforcement since the provision of Spanish language programming did not occur as a result of a rule violation; it is simply offered as part of the cable system, while comparable Russian programming is not. Mr. and Mrs. Kolker were ordered to remove the satellite dish from the common elements and to repair any damage incurred as a result of the installation.

CASENOTES