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BECKER & POLIAKOFF, P.A.
Community Up-Date™

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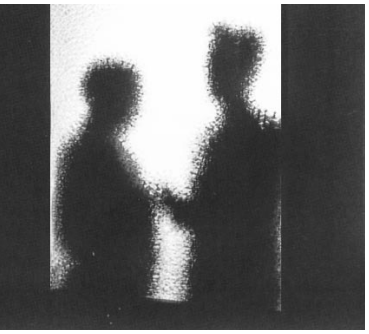
SEXUAL HARASSMENT:
Now It's Your Problem Too.

By: Marc J. Randazza, Esq.

Directors and managers of condominium and homeowner's associations should take note of a developing trend in the law - the application of the "hostile environment sexual harassment" theory to community associations. This legal theory is already entrenched in the workplace context, and legal forecasters suggest that community associations should take a page out of the workplace management book in preparation for what could be a costly legal storm.

Quid Pro Quo Harassment

The Fair Housing Act prohibits discrimination on the basis of gender, and harassing behavior can be actionable discrimination. While it may sound like legalese mumbo-jumbo, *quid pro quo* sexual harassment is the easiest for a layperson to understand, and makes the most logical sense.



In this kind of case, sex or sexual favors are demanded of a resident by those in control of the housing in return for housing or a housing benefit.

The case that heralded this trend in the law was *Shellhammer v. Lewellan*. In *Shellhammer*, the owner of an apartment building demanded that Ms. Shellhammer pose for nude photographs for him. When she refused, the landlord evicted her. Even though the landlord had a valid reason for eviction (Ms. Shellhammer was late paying her rent), the court held that Ms. Shellhammer had suffered quid pro quo sexual harassment, and her claim was actionable under the Fair Housing Act.

The fact that this case concerned rental housing, and not a common-ownership housing community, is of no legal effect, and whether the complainant is a seasonal tenant in your condominium, cooperative or timeshare community, or the owner of a single-family home in a homeowner's association, the law is the same. If someone has power over another's living situation and attempts to wield that power to receive sexual favors, then a valid claim for sexual harassment will attach. The complainant need not lose her (most cases are filed by women, but the law prohibits discrimination against men as well) home in order to prevail. All that needs to be established is that the complainant was subjected to an unwelcome demand, the unwelcome demand was based on the complainant's gender, and because of the way in which the complainant responded, she was denied housing or a "substantial benefit" of housing.

Additionally, community associations should be aware that claims such as these are frequently filed against the association as the "deep pocket." A community association may be held liable for the actions of its employees, directors, or even outside contractors, if the board is aware of the harassment (or should have been aware of it) and it failed to remedy the conduct. Therefore, if the lawn service company employee fails to service a unit owner's lawn because the unit owner won't "service" that employee, and the board becomes aware of it, the board must act swiftly and decisively to remedy the situation. Turning a blind eye will not relieve the association of responsibility, and a defendant can be held liable even in cases where the association had no actual knowledge, but should have been aware of the conduct. Therefore, associations should endeavor to implement adequate supervision and remedial procedures in order to minimize the association's legal risks.

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Sexual Harassment cont.

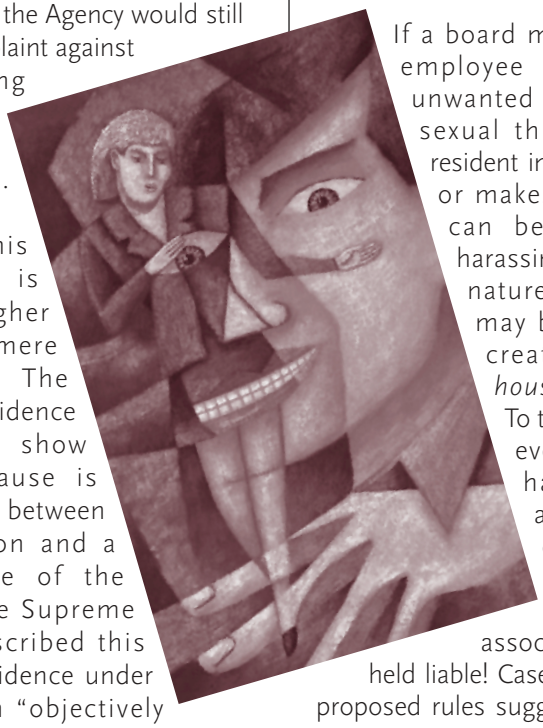
If you think that's bad....here come the Hostile Environment claims

Most reasonable people would agree that a resident shouldn't be penalized for rejecting unwanted sexual advances. It might even seem fair that an association would be held liable if they fail to fire or reprimand someone who engages in such obnoxious behavior. However, *quid pro quo's* less obvious cousin is the *hostile environment* lawsuit.

The Department of Housing and Urban Development ("HUD") is the governmental agency charged with the responsibility of implementing federal policies regarding housing discrimination. In this regard, HUD can be quite aggressive in promoting its agenda, and it has proposed rules codifying the application of sexual harassment standards (imported from the employment law context) to the fair housing laws.

Although these rules have not yet been codified by Congress, HUD officials have stated that the Agency would still likely file a complaint against a housing provider, if "reasonable cause" existed. Generally speaking, this standard is somewhat higher than "mere suspicion." The quantum of evidence needed to show reasonable cause is some measure between mere suspicion and a preponderance of the evidence. The Supreme Court has described this quantum of evidence under Title VII as an "objectively verifiable suspicion." Accordingly, although these rules are merely "proposed" at this time, it would be highly inadvisable to treat them as inapplicable. The proposed rules state, in pertinent part:

> A person creates a hostile environment when that person's unwelcome conduct is sufficiently severe or pervasive that it results in the creation of an environment that a reasonable person in the aggrieved person's position would find intimidating, hostile, offensive, or otherwise significantly less desirable. Generally, an individual asserting a hostile environment sexual harassment claim generally must establish that he or she was subjected to unwelcome verbal or physical conduct; the conduct was severe or pervasive; the conduct was based upon the individual's sex; and the conduct made the environment burdensome and significantly less desirable than if the conduct had not occurred.



If a board member, agent, or employee makes repeated unwanted sexual advances, sexual threats, touches a resident in an unwanted way, or makes comments that can be interpreted as harassing and of a sexual nature, the association may be held liable for creating a *hostile housing environment*. To take matters further, even if one resident harasses another, and no person connected to the association is responsible, the association may still be held liable! Case law and the HUD proposed rules suggest that a housing association could be responsible for acts of sexual harassment by third parties when the association knew (or should have known) of resident on resident harassing conduct and failed to take "immediate and appropriate corrective action."

The seminal case regarding this kind of claim is *Reeves v. Carrollsburg Condo. Owners Ass'n*, 1997 U.S. Dist. Lexis 21762 *23 (D.D.C. 1997). In this case, one condo resident repeatedly shouted sexist (and racist) epithets at another. The conduct was certainly offensive, as the perpetrator threatened to rape and to kill the complainant. The condo board sought to have the claim against the association dismissed on the grounds that the board had no involvement in the dispute. The Federal Court disagreed, and determined that, if an association has the responsibility to maintain the common areas and has the power to enforce regulations for the benefit of residents, then the association can be held liable for a failure to resolve incidents of sexual harassment. The Court said that the complainant's allegations "clearly satisfied the prima facie case for hostile housing environment due to racial and sexual harassment."

The Department of Housing and Urban Development looks at these cases through the "reasonable person standard." Whether conduct creates a hostile environment based on sex is evaluated from the perspective of a "reasonable person in the aggrieved person's position." Accordingly, if the complainant is hypersensitive, her perspective would not be the "reasonable person standard." Therefore, community associations should not adopt an atmosphere of paranoia regarding any conduct with sexually-charged undertones, but should be on their guard when conduct rises to that which may be offensive to a

Sexual Harassment cont.

reasonable person.

What Can You do to Protect your Association?

In many circumstances, sexual harassment claims against community associations will not be properly covered by the association's general liability or directors and officers liability insurance policies. Accordingly, in order to manage the association's risks, managers and directors should create mechanisms and procedures to adequately handle these kinds of issues before liability attaches.

With regard to employees and agents, an association should conduct an appropriate background check of all relevant parties. The association should check and verify references to reduce the possibility that someone with a predisposition to or history of sexually harassing behavior is unwittingly placed in a position to do so.

Associations should implement effective policy statements, making it clear that harassing behavior is not tolerated, whether it is in the form of director on resident, resident on resident, or employee on resident harassment. Should such an incident occur, there should be an unintimidating and effective procedure for filing a complaint with the association. If the alleged perpetrator is a board member or employee of the association, great care should be taken to avoid any conduct that may be perceived as retaliatory. Although complaints should be taken seriously, the association should always give the alleged harasser the right to rebut the accusation, and should be presumed innocent until proven otherwise. Any meetings regarding these matters should be held in private, and publicizing such events to third parties may be defamatory conduct and could result in yet another legal problem for the association.

PLEASE MAKE SURE YOU ARE LOGGING ON DAILY TO OUR COMMUNITY ASSOCIATION LEGISLATIVE LOBBY WEBSITE. GO TO: www.callbp.com!!

TIDBITS Did You Know

This year community associations will not receive the usual Annual Report form from the Florida Division of Corporations. Instead, Florida corporations will only receive a memo as a reminder to file.

- Failure to file the Annual Report on time (by May 1, 2004) may subject the corporations to a penalty.
- Florida corporations, including all associations, can file the Annual Report on-line.
- The on-line Annual Report is very similar to the Annual Report form what was previously mailed to each business entity, the information required for both is the same and the instructions for completing the forms are the same.
- Corporations which have any questions, or problems completing the Annual Report form, are encouraged to call Public Access at (850)245-6939 or the Corporate Information Line at (850)488-9000, but both are now toll calls.

CASENOTES

TENENTS WIN SUIT Over Roof Collapse

In the case of Smith v. Glen Cove Apartment Condominiums Master Association, Inc., 847 So.2d 1107 (Fla. 4th DCA 2003), low income tenants filed a class action complaint against the association and other defendants who were owners and lessors of the units. The class member tenants lived in units that were condemned by the city as a result of a roof collapse. The lawsuit alleged that the collapse was caused by the association's failure to maintain the roofs.

The District Court of Appeal held that the suit could be maintained as a class action by the tenants and noted that approximately 100 people were affected by the roof collapse. The court also noted that the residents of low income housing would probably be unable to bring separate actions. The court allowed the tenants to sue the association even though they did not own the units because the association breached a statutory duty when it failed to maintain the common elements.

The lesson to be learned from this case is that associations must maintain the common elements. Failure to maintain the common elements can lead to structural defects and/or class lawsuits by tenants that could cost the association (and the unit owners who pay maintenance) a large amount of money.

COURT UPHOLDS MRTA Extinguishment

In the case of Berger v. Riverwind Parking LLP, 842 So.2d 918 (Fla. 5th DCA 2003), the court was presented with several issues relating to the enforceability of restrictions that prohibited commercial use. First, the court addressed whether or not restrictions that a lot owner had actual knowledge of were valid even though, at the time of sale, the developer did not record the restrictions against the lot. Second, the court considered whether restrictions that a lot owner has actual knowledge of are extinguished if the restrictions are not re-recorded before the elapse of the 30 year period described in Chapter 712 of the Florida Statutes (MRTA). Third, the court addressed whether a document recorded by the developer (after the initial restrictions were recorded) could breathe new life into restrictions that would otherwise have been extinguished in accordance with MRTA.

With respect to the first issue, the court held that, if a person takes title to a lot and has actual knowledge of the restrictions, then the restrictions are valid even though they were not recorded against the lot at the time of purchase. Although the court made this general assertion, it held that there was not sufficient evidence to prove actual knowledge with respect to two out of the three lots at issue. The only lot owner that the court determined had actual knowledge of the restrictions was the lot owner who admitted that he was aware of the restrictions prior to purchase. Therefore, although actual knowledge is sufficient to subject a unit owner to restrictions that are not recorded against a property prior to purchase, it is difficult to prove that the lot owner had actual notice at the time of purchase.

Next, the court discussed whether restrictions that unit owners have actual knowledge of are extinguished by MRTA. The court held that actual knowledge of the restrictions does not save them from MRTA extinguishment.

Finally, the court examined whether or not a document that the developer recorded after the date the initial restrictions were recorded extended the time to re-record the restriction against the lots. The court noted that the document at issue did not specifically reference the recording information of the original governing documents or add any new restrictions (In fact, the recorded document lifted the restrictions on certain lots and reaffirmed that the restrictions still applied to other lots.). The court held this document was not sufficient to extend the MRTA period. As a result, the court wiped out the recorded restrictions in accordance with MRTA.

This case demonstrates the importance of re-recording the governing documents of a homeowner's associations. To insure compliance with MRTA, governing documents of a homeowner's association must be re-recorded prior to the elapse of thirty (30) years from the EARLIER of the date that the first lot was sold or the date the declaration was recorded. Otherwise, the association risks losing the power to enforce the deed restrictions.

The court indicated that, in the future, it might consider allowing a recorded amendment that explicitly references the original governing documents to extend the MRTA period. Associations should NOT rely on amendments extending the MRTA period but if, for some reason, the Association missed the 30 year MRTA period, a recorded amendment that explicitly references the original governing documents may extend the time to re-record them.

Finally, it is also of note that the court determines the validity of the restrictions on a lot by lot basis. MRTA is a very complicated statute and its intricacies are not addressed in this article. If the homeowner's association complies with the 30 year rule described above, the homeowner's association will not run into MRTA problems with any of the lots. However, if an association does not comply with the above rule, time is of the essence. It is important for the association to act fast because the restrictions may still be saved, at least with respect to some of the lots.

THE INFORMATION SET FORTH IN THIS BULLETIN IS GENERAL AND SUMMARY IN NATURE AND IS NOT INTENDED AS SPECIFIC LEGAL ADVICE APPLICABLE TO YOUR ASSOCIATION. IF YOU HAVE QUESTIONS REGARDING THE CONTENTS OF THIS RELEASE AS IT APPLIES TO YOUR SITUATION, PLEASE CONTACT THE ASSOCIATION ATTORNEY RESPONSIBLE FOR YOUR FILE. IN ADDITION, WE WISH TO REAFFIRM THE FACT THAT THE PRINCIPLES OF LAW CITED HEREIN ARE SUBJECT TO CHANGE FROM TIME TO TIME.

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CALL 2004 Florida Community Living Survey

Report of Final Result Based on 751 Responses • November 29, 2004

Donna D. Berger, Esq. *Editor*

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Introduction & Methodology

The CALL 2004 Florida Community Living Survey was conducted online in the state of Florida between October 21 and November 11, 2004 under the auspices of the Community Association Leadership Lobby (CALL).

The results contained in this report are based on the responses of 751 participants who own property in a community association in Florida. Not all respondents answered all questions. The margin of error for the total sample is +/- 4 percentage points at the 95% confidence level.

The survey was not random, with more than 2,000 previously identified owners of property in Florida community associations having been invited by CALL via e-mail to take the survey online. The initial invitees were also invited to forward the opt-in invitation to other owners of property in their community associations. Responses were received from 751 of the total universe of invitees who opted to take the survey online.

Further information about the survey is available to the media upon request.

Established in 2003 to work toward enhancing the quality of life and protecting property values for Florida's community association residents, CALL advocates on behalf of more than 4,000 member communities, including condominiums, homeowners' associations, mobile home communities and cooperatives throughout the state.

Property Usage Characteristics

Year-round residency is reported by most community association owners surveyed (65.8%), challenging the myth of snowbird occupancy. Since this is a principal residence, 91% do not make their property available as a rental at any time during the calendar year.

Working from home is popular among 52% of the respondents who work part-time. These part-time workers are relatively younger, with 66% in the 50-64 age range. A home office is also reported by over a third (34.3%) of full-time workers, who also tend to be in the 50-64 age range (65%). Retired respondents are just that - over 65 and not working from home. Geographically, almost half of the full-time (47.5%) and part-time (46.4%) workers live in Southeast Florida, while retirees tend to be clustered on the Gulf Coast in Southwest (28.6%) and Central West (25.5%) Florida.

Leading Factors in Purchase Decisions

Ease of maintenance and physical amenities clearly stand out as the most important factors in the decision to purchase in a particular community association. Physical security is rated as important by 2/3 of respondents, as well as protection for real estate investments.

Deciding where to purchase is determined by a personal visit to the area. While the recommendations of family and friends play a role in the purchase decision, owners rely on their first-hand impressions of the community and surrounding area when choosing where to buy.

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About the Community Associations

Condominiums are the most common form of ownership (60.4%) represented in the survey, followed by homeowners' associations (34.6%). Cooperative associations, mobile home communities and timeshare units represent a combined 5% of respondents.

Associations of all sizes are included in the survey. Over a quarter of respondents (26.3%) own in an association of 500 or more units, followed by 20.8% in the 50-99 unit range and 19% owing in an association with 100-199 units.

The entire state of Florida is geographically represented, with the heaviest concentration of participants representing the Southeast (34.4%), Southwest (27.6%) and Central West (21.6%).

The majority of community owners represented (56.4%) live in a professionally managed association, compared to 40% who live in an association managed by residents or an unlicensed property manager.

The vast majority of respondents (96%) own only one unit in their community association. Survey participants tend to be long-term owners, with 56.5% reporting ownership of 5 years or more. Most residents (87%) report no immediate relatives living in the same association.

Almost a third of respondents (30.7%) live in single family homes within their community association, followed by mid-rise (20.4%) and high-rise (20.1%) units.

Association Owner Concerns

Maintenance of the community property and its appearance emerges as the most important issue among community residents. Enforcement seems to be the other side of the coin when it comes to maintenance, since it ranks third as a common association concern. Owners will resort to litigation when needed to enforce association rules and regulations.

In today's post-Enron era, board member integrity ranks as the second most important community priority among owners surveyed. While many voice concern over the lack of qualified volunteers to serve on a board, others are worried about the need for term limits, board member conflicts and unfair representation if board members place their own well-being above that of other residents.

Crime and physical security is the # 1 quality of life issue determining property values, with 89% of respondents rating this as somewhat or extremely important. Quality of the environment is a close second consideration, followed by concerns about access to quality health care, overdevelopment and traffic congestion.

Legal and Regulatory Matters

Enforcement of the documents governing an association is definitely a hot topic among board members and owners. Almost all respondents (98.7%) feel that associations should strictly enforce community rules with no exception (36.1%) or with hardship exceptions as needed (62.6%).

Support for warning letters (92.8%), fines (86.1%), lawsuits (72.1%) and even liens or foreclosure (76.5%) underscore respondents' emphasis on the need to maintain association rules.

"The Association needs to strictly and fairly enforce all Association bylaws governing the complex," says one community owner. "In our (near)-retirement status it is more important than ever to have the peace of mind that the property we purchased increase in value. This is a major investment for most seniors. The bylaws governing what can and can not be done must remain intact and strictly enforced."

Perhaps in an effort to improve enforcement and management, over one quarter (27.9%) of respondents support an increase in the Division of Florida Land Sales' current $4.00/condominium assessment for dispute mediation and better oversight. Almost half of those surveyed (46.6%) opposed the measure, however, with 25.5% undecided.

Litigation is faced by many associations, with almost half of those surveyed (46.3%) reporting that their association has been involved in a lawsuit. The most common types of litigation revolve around covenant enforcement action (33.3%), foreclosure (24.7%), general contract disputes (21.8%) and negligence/premises liability/personal injury (20.7%).

Community associations weather the storms without a plan

Despite this year's record shattering hurricane season, almost half (48%) of participating board members reveal that their community association lacks a hurricane preparedness plan for catastrophic storms.

Developers take the lead in construction safety by incorporating a full range of safety materials. Traditional window shutters are used by the majority of unit owners (60%) to protect their home from storm damage. Impact glass or hurricane film is reported in use by almost 40% of respondents.

Enforcement endorsement, but not by the "Condo Commando"

Residents and board members alike underscore the need for owners to read, understand and abide by the governing association documents.

"It is important to remember that most people purchase in an association because they want restrictions to insure that the community will be able to retain its value as a desirable place in which to live," notes one survey respondent. "If the restrictions cannot be enforced there is no advantage to living in an association community."

When a violation occurs, a standard warning letter is viewed as acceptable by almost all (93%) of respondents. Aggressive steps such as fines, lawsuits, liens and even foreclosure are supported by 3 out of 4 respondents when voluntary compliance fails.

Insurance tops the list of financial concerns

Access to suitable insurance at affordable rates is the # 1 financial worry expressed by community owners surveyed. The relationship of individual homeowner's policy to the homeowner association master policy is a particular factor in community living that requires special attention.

Expense management is also on the minds of community owners, with the adequacy of reserve levels rated as somewhat or extremely important by 8 out of 10 respondents. Almost all owners surveyed (80%) worry about the board's ability to levy special assessments.

Cost concerns emerge again in the category of common area maintenance. The feature that community owners enjoy the most - ease of maintenance - comes with a monthly price tag. Balancing the cost of property management against the beauty of a well-maintained environment is a challenge faced by many community association boards.

Demographics

Half of the owners surveyed (51.2%) currently serve on their community association's board of directors, followed by 22.5% who previously served on their board. Almost a third of respondents (31.7%) have never served on a board, while 16.7% served on the board of another association.

The majority of respondents (51.4%) are 65 or older, followed by 42% in the 50-64 age range. A small number of respondents (5.8%) are 34-49.

While some respondents work full-time (22.6%) or part-time (8.9%), the vast majority (68.5%) are retired. Most survey respondents (79.8%) are married, 13.8% are single and 6.4% are divorced.

The average household income is $50-$99,999 for 43% of respondents, with 26.5% reporting income under $50,000 and almost a third (30.5%) enjoying an annual income greater than $100,000.

Survey Questions and Response Data

Listed below are the actual questions asked and responses collected in the CALL Community Living 2004 Survey. The number of responses to each question is indicated by R = #.

Indicate the type of community association in which you own:

Percent	Type of Community Association
60.4%	Condominiums
34.6%	Homeowners' Association
3.2%	Cooperative Association
1.5%	Mobile Home Community
.3%	Timeshare
(R=687)	

Please indicate the location of your unit/home:

Percent	Florida Territory
34.4%	Southeast Florida (Key West, Miami, Fort Lauderdale, West Palm Beach and Stuart)
27.6%	Southwest Florida (Bradenton/Sarasota, Fort Myers, Naples and Marco Island)
21.6%	Central West Florida (Crystal River, Clearwater and St. Pete/Tampa)
3.5%	Central East Florida (Port St. Lucie, Melbourne and Daytona Beach)
2.2%	Central Florida (Ocala, Orlando, Kissimmee/St. Cloud and Winter Haven)
1.9%	Northwest Florida (Pensacola to Panama City)
0.0%	North Central Florida (Tallahassee, Lake City, Gainesville, Cedar Key)
8.8%	Other

(R=684)

How many units/homes are in your association?

Percent	Number of Units
26.3%	500 or more
20.8%	50-99
19.0%	100-199
14.9%	200-499
12.6%	25-49
5.1%	5-24
1.2%	Don't Know
.1%	Under 5

(R = 684)

How is your community association managed?

Percent	Type of Management
56.4%	Managed by a licensed community association manager/management company
37.0%	Self-managed
3.4%	Managed by an unlicensed individual property manager/bookkeeper
3.2%	Don't know

(R=681)

Do you own more than one unit/home in the same community association? (R = 680)

- No (95.9%)
- Yes (4.1%)

Are any immediate relatives (mother, father, siblings, cousins, grandparents, in-laws) owners of units in your association? (R = 680)

- No (87.1%)
- Yes (12.9%)

How long have you owned your unit?

Percent	Length of Ownership
30.4%	5-9 years
26.1%	10 years or more
24.0%	2 years or less
19.5%	3-4 years

(R=682)

Which of the following describes your unit/home?

Percent	Type of Housing Unit
30.7%	Detached single family home
20.4%	Mid-rise unit (3-6 stories)
20.1%	High-rise unit (75 feet / 7 stories or higher)
18.8%	Low-rise unit (1-2 stories)
10.0%	Attached town home

(R=681)

Hurricane Preparedness

Does your community association board have a hurricane preparedness plan in place in the event of a catastrophic storm? (R = 684)

- Yes (44.3%)
- No (36.7%)
- Don't know (19%)

How is your unit/home protected from hurricanes?

Percent	Type of Hurricane Protection
25.8%	Impact glass
18.1%	Accordion shutters
13.9%	Hurricane film on windows
12.7%	Electric roll-down shutters
11.7%	Steel or aluminum storm panel shutters
10.7%	Plywood
5.8%	Awning shutters
1.4%	Bahama shutters

(R = 497)

Residency and Work Patterns

Each year, I reside in my condominium/home:

Percent	Occupancy Practices
65.8%	Year round resident
12.0%	4 - 6 months
10.7%	6 - 9 months
6.7%	1 - 3 months
4.7%	Less than 1 month

(R=682)

Do you work/conduct business from your unit/home via phone, fax or Internet? (R = 681)

- No (78.4%)
- Yes (21.6%)

Factors in Purchasing a Community Association

How important were the following association features in influencing your decision to purchase property in a condo/homeowners' association?

Feature	Extremely Unimportant	Somewhat Unimportant	Neutral	Somewhat Important	Extremely Important	Response Average
Ease of maintenance	9%	5%	8%	32%	46%	4.01
Physical amenities (clubhouse, pool)	11%	7%	9%	33%	41%	3.85
Physical security	9%	9%	15%	31%	36%	3.77
Protection for real estate investment	11%	7%	15%	32%	35%	3.73
Community and camaraderie	7%	10%	20%	31%	32%	3.70
Shared financial risk	10%	10%	32%	28%	21%	3.41

(R = 660)

How important were the following information sources in determining which condo/homeowners' association property you selected?

Feature	Extremely Unimportant	Somewhat Unimportant	Neutral	Somewhat Important	Extremely Important	Response Average
Personal visit to the area	7%	2%	3%	15%	73%	4.45
Friends & family recommendations	21%	10%	33%	21%	16%	3.01
Working with a realtor	28%	11%	28%	21%	13%	2.80
Magazine/newspaper articles	28%	16%	40%	13%	2%	2.45
Information found on the Internet	34%	14%	38%	12%	3%	2.37
Developer's advertising	37%	14%	31%	14%	5%	2.36
Tourism/development agency info	43%	11%	37%	7%	1%	2.12

(R = 661)

Financial Concerns Among Community Owners

How important are the following FINANCIAL issues to you as an association member?

Feature	Extremely Unimportant	Somewhat Unimportant	Neutral	Somewhat Important	Extremely Important	Response Average
Insurance availability & affordability	5%	3%	6%	23%	64%	4.39
Level of reserves	5%	2%	10%	27%	56%	4.27
Cost of common area maintenance	4%	3%	6%	39%	49%	4.26
Bd ability to levy special assessments	3%	3%	13%	34%	46%	4.15
Retrofitting to meet building codes	6%	5%	29%	28%	32%	3.75

(R = 648)

Community Issues

How important are the following COMMUNITY issues to you as an association member?

Feature	Extremely Unimportant	Somewhat Unimportant	Neutral	Somewhat Important	Extremely Important	Response Average
Overall maintenance of community	5%	1%	1%	8%	85%	4.67
Board member integrity	5%	1%	1%	11%	82%	4.63
Enforcement of rules & regulations	5%	2%	3%	32%	57%	4.35
Guest and/or occupancy issues	4%	5%	14%	34%	43%	4.08
Percentage of renters	5%	6%	16%	26%	47%	4.05
Screening of new owners/tenants	7%	7%	20%	30%	36%	3.82

(R = 648)

How important are the following quality of life issues in influencing property values in your community association?

Feature	Extremely Unimportant	Somewhat Unimportant	Neutral	Somewhat Important	Extremely Important	Response Average
Crime & physical security	4%	2%	5%	20%	69%	4.47
Qualify of environment	4%	2%	4%	22%	68%	4.46
Access to quality healthcare	5%	6%	11%	29%	48%	4.10
Overdevelopment	6%	6%	12%	26%	50%	4.07
Traffic congestion	5%	8%	12%	39%	37%	3.96
Quality of education	16%	12%	37%	22%	14%	3.07

(R = 649)

Should associations strongly enforce the governing documents for the community? (R = 637)

- Yes (36%)
- Yes, with hardship exceptions as needed (62.6%)
- No (1.3%)

What enforcement techniques should be available to enforce the governing documents for the community? (Check all that apply; responses > 100%) (R = 638)

- Warning letters (92.8%)
- Fines (86.1%)
- Lawsuit if continued non-compliance (72.1%)
- Liens against property / foreclosure (76.5%)

The Division of Florida Land Sales currently collects $4.00 per condominium unit in the State of Florida to fund its programs and services. Would you support an increase in this annual fee to expand government oversight of community associations and mediate disputes between boards and members? (R = 638)

- Yes (27.9%)
- No (46.6%)
- Don't know (25.5%)

Has your association ever been involved in litigation? (R = 635)

- Yes (46.3%)
- No (26.8%)
- Don't know (26.9%)

If yes to the above question, what type of litigation? (Check all that apply; responses > 100%)

Percent	Litigation Type
33.3%	Covenant enforcement action
27.0%	Construction defect
24.7%	Foreclosure
21.8%	General contract dispute
21.3%	Don't know
20.7%	Negligence / premises liability / personal injury
9.5%	Employment dispute

(R=348)

Please tell us about any experience you have had as a member of the board of directors for a community association. (Check all that apply; responses > 100%)

Percent	Occupancy Practices
51.2%	Currently serve on my community association's board of directors
31.7%	Never served on a community association board of directors
22.5%	Previously served on this board of directors
16.7%	Previously served on board of directors for another association

(R=621)

About the Participants

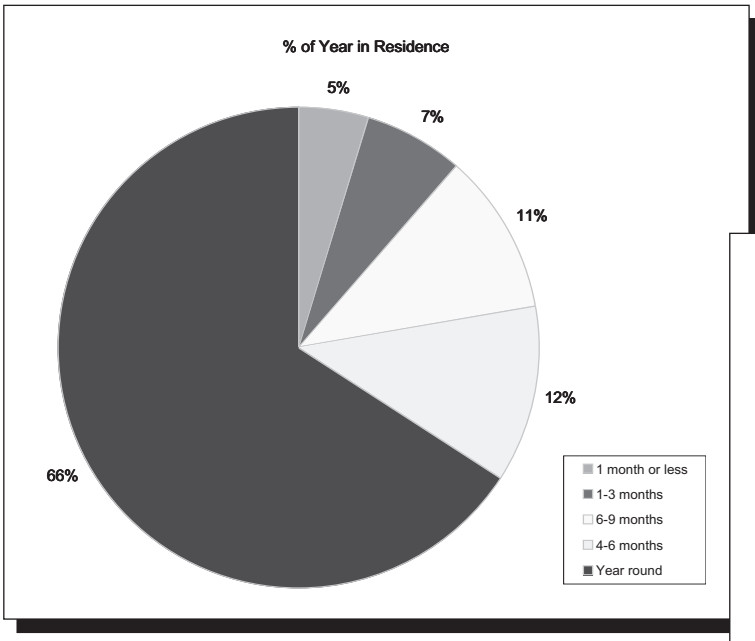
Age: (R = 634)
- 65+ (51.4%)
- 50-64 (42.3%)
- 34-49 (5.8%)
- 21-34 (.5%)
- Under 20 (0%)

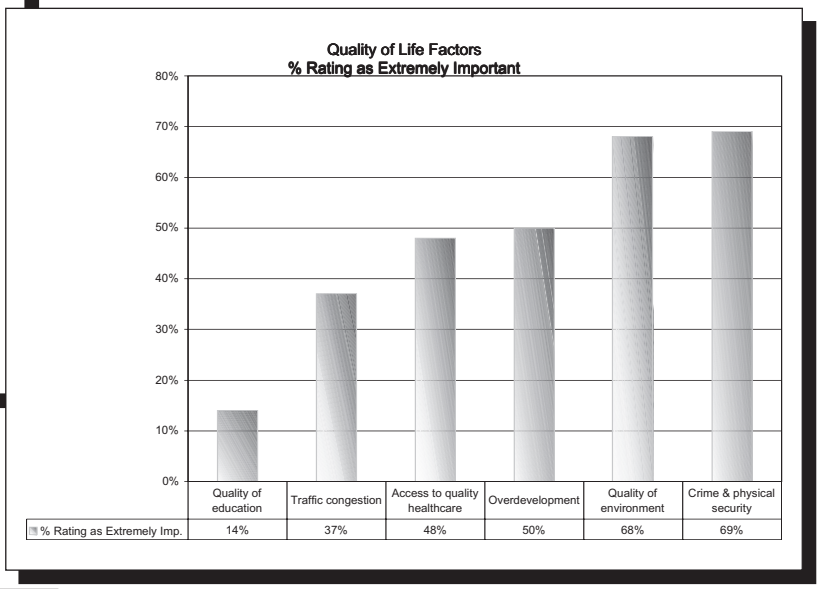
Work status: (R = 629)
- Retired (68.5%)
- Full time (22.6%)
- Part time (8.9%)

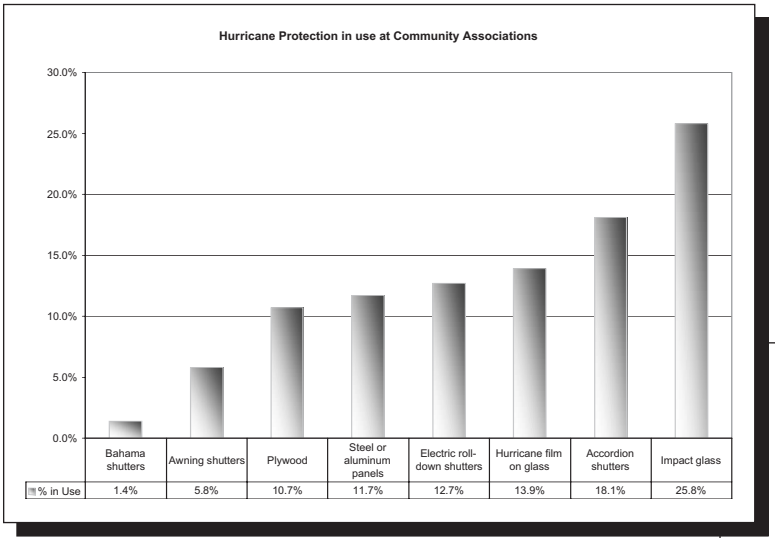
Total annual household income: (R = 551)
- $50,000-$99,999 (43%)
- Under $49,999 (26.5%)
- $100,000-$149,999 (16%)
- $150,000 or more (14.5%)

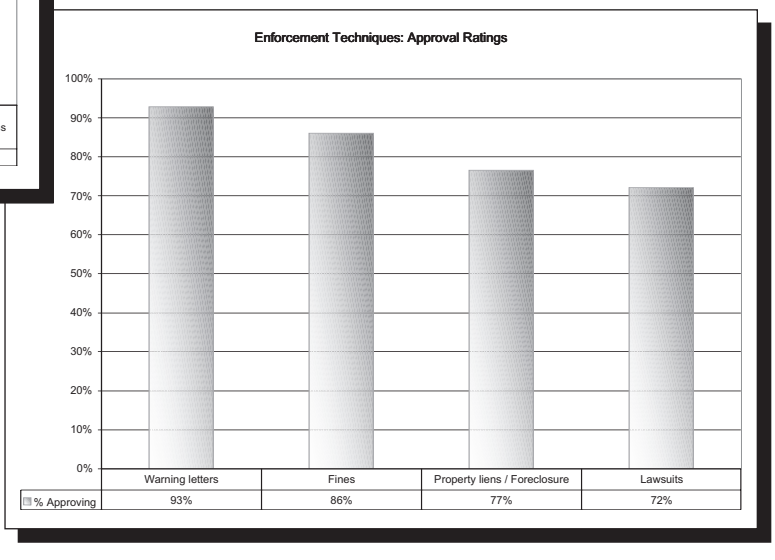
Marital status: (R = 625)
- Married (79.8%)
- Single (13.8%)
- Divorced (6.4%)

NOTE: If you have questions or comments about this survey, please contact Alan Penchansky at The Pen Group, 305-529-1944 or alan@thepengroup.com.


% of Year in Residence
5%
7%
11%
12%
66%
1 month or less
1-3 months
6-9 months
4-6 months
Year round

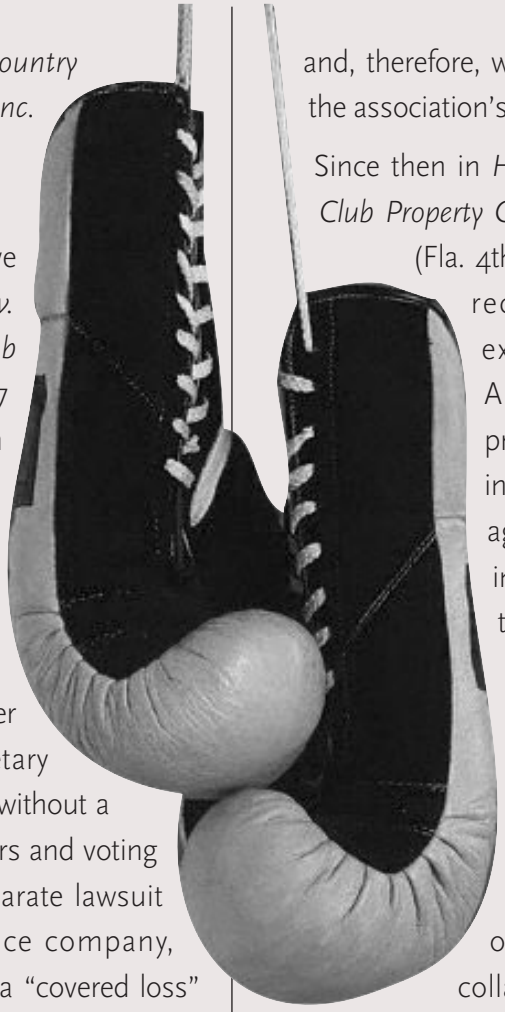

Quality of Life Factors
% Rating as Extremely Important
80%
70%
60%
50%
40%
30%
20%
10%
0%
Quality of education
Traffic congestion
Access to quality healthcare
Overdevelopment
Quality of environment
Crime & physical security
% Rating as Extremely Imp.
14%
37%
48%
50%
68%
69%


Hurricane Protection in use at Community Associations
30.0%
25.0%
20.0%
15.0%
10.0%
5.0%
0.0%
Bahama shutters
Awning shutters
Plywood
Steel or aluminum panels
Electric roll-down shutters
Hurricane film on glass
Accordion shutters
Impact glass
% in Use
1.4%
5.8%
10.7%
11.7%
12.7%
13.9%
18.1%
25.8%


Enforcement Techniques: Approval Ratings
100%
90%
80%
70%
60%
50%
40%
30%
20%
10%
0%
Warning letters
Fines
Property liens / Foreclosure
Lawsuits
% Approving
93%
86%
77%
72%

CASENOTES

Litigating Disputes
LONG AFTER YOU HAVE ALREADY LOST



Tom Hill v. Palm Beach Polo and Country Club Property Owner's Association, Inc. 717 So.2nd 1080 (Fla. 4th DCA 1998).

In a previous community update, we advised you of the case of *Tom Hill v. Palm Beach Polo and Country Club Property Owners' Association, Inc.*, 717 So.2nd 1080 (Fla. 4th DCA 1998). In that case, Tom Hill, a property owner, filed a lawsuit against the Property Owners' Association and the developer, seeking various types of equitable and legal relief claiming the developer exceeded his authority under the by-laws by amending the monetary assessment provisions in the by-laws without a two-thirds vote of the board of directors and voting members. Mr. Hill then filed a separate lawsuit against the Association's insurance company, claiming his litigation expenses were a "covered loss" that should be paid under the insurance policy. As we advised you in our previous Community Update, the Court determined the Property Owner had acted in his individual capacity and not as a member of the Association's Board of Directors when he filed a lawsuit and, therefore, was not entitled to coverage under the association's insurance policy.

Since then in *Hill v. Palm Beach Polo & Country Club Property Owners Ass'n, Inc.*, 885 So.2nd 879 (Fla. 4th DCA 2004), , Mr. Hill sought to recover those same litigation expenses pursuant to the Association's by-laws which provided that the Association must indemnify every director and officer against all expenses and liabilities, including attorney's fees. However, the Court held it would be illogical and inconsistent to now decide Mr. Hill was acting in his capacity as a member of the Board of Directors, when the Lower Court previously decided he acted in his individual capacity as a property owner. This doctrine, known as collateral estoppel, prevents a party from re-litigating an issue he or she previously had the full opportunity to litigate. Therefore, the Court held Mr. Hill was not entitled to indemnity from the Association for his attorney's fees pursuant to the provisions in the Association's by-laws.

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Community Up-Date™

Vol. X, 2004

CURRENT NEWS FOR COMMUNITY ASSOCIATIONS

Waving the Flag

By C. John Christensen, Esq.

The Boards of Directors of community associations are occasionally faced with a lot owner, in a homeowners association, or a unit owner, in a condominium association, requesting to display a flag whose size, or whose flagpole mount, are in apparent violation of the community documents. Alternatively, Boards may be faced with a lot owner or unit owner who unilaterally displays an apparently violating flag, or installs a flagpole mount, without requesting permission from the Board of Directors or Architectural Control Committee of the association. At that point, the Board of Directors will typically conduct research to determine whether the lot owner or unit owner has the authority to display the flag in question, or install the questionable mount, in order to determine Association response. Hence, the following discussion will address the various statutes and policy considerations to guide a Board of Directors in this scenario. Let us begin with homeowners associations.

Section 720.304(2), Florida Statutes, of the Homeowners Association Act, currently provides the following regarding display of flags: "(2) Any homeowner may display one portable, removable United States flag or official flag of the State of Florida **in a respectful manner**, and on Armed Forces Day, Memorial Day, Flag Day, Independence Day, and Veterans Day may display in a respectful manner portable, removable official flags, not larger than 4-1/2 feet by 6 feet, which represents the United States Army, Navy, Air Force, Marine Corps, or Coast Guard, **regardless of any Declaration rules or requirements dealing with flags or decorations**."

As you can see, this Statute provides no guidance as to either the size of the flag, or the flagpole mount such as a limitation on flagpole height. (Although Section 720.3075(3), Florida Statutes, does provide that the U. S. flag "must be displayed in a respectful manner, consistent with Title 36 U.S.C. Chapter 10", the Federal statute referenced does not address flag or flagpole size.) In this regard, it is somewhat clear from the legislative history of this statutory provision that the Legislature intended to state that specific standards for size, placement, and safety of flags contained in a homeowner association's documents were no longer valid.

For example, prior to the statute quoted above becoming part of the Homeowner's Association Act last year, the Act had contained a fairly extensive protocol for the display of the flag, specifically authorizing a Homeowners Association to establish flag size, placement and safety standards, which was replaced by the broader

cont. on page 2

By the year 2011, 20% of the population, more than 77 million people, will be "seniors" 65 or older. Research shows that more seniors are choosing to stay in their homes rather than in assisted care living facility. What kinds of things can you do to handle issues related to aging populations in your community association?

- Get emergency contact and family information from new residents, and update it periodically for current residents.
- Keep records regarding medical conditions and medication to assist medical emergency personnel.
- Review governing documents to ensure a right of access to homes for emergencies.
- Update governing documents to reflect changes in lifestyle and needs of older persons, to accommodate caregivers, to provide handicap accessibility, and so on.

cont. on page 2

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WAVING THE FLAG *cont.*

and unfortunately more vague language quoted above. Additionally, during the 2002 Legislative session, State Representative Harper attempted to amend the above-quoted Statute to limit flagpole height to fifteen feet (15'). However, Representative Harper's amendment failed, and the broader and more vague statutory provision then passed the Florida House of Representatives by a vote of 108 to 4, with even Representative Harper supporting the proposed Statute (without his amendment). Therefore, although it may seem nonsensical to assume that the current Homeowners' Association Act might permit a 100-foot high flagpole, and a flag the size of one that you may see on the lots of car dealerships; until the Courts address the situation, this matter is somewhat of a "no-man's land".

Hence, when faced with the display of a United States (or other authorized) flag, or installation of a flagpole mount, in apparent violation of the Homeowner Association's documents, the Board will need to make a business decision as to how aggressive it wishes to be and whether it wishes to run the risk of being a "test case". It seems clear that the Legislature took a hands-off approach regarding individual community flag restrictions and preferred the above-quoted statute to specifically supersede these restrictions. The bottom line is that if a potentially violative flag or flagpole is being proposed to be installed on lot property, which flag or flagpole can be characterized as an "industry norm", and such flag and/or flagpole can be installed without undue safety concerns, most Boards would be well advised to simply permit such installation, unless there is some overriding reason not to do so. (That is, while a 20-foot flagpole might be considered an "industry norm", and therefore acceptable notwithstanding documentary restrictions to the contrary, a 100-foot flagpole would seem excessive, and more likely of toppling and causing damage to the community, to thereby justify Board disapproval of same).

Finally, as the above-quoted statute provides, a recent amendment to this statute will not only allow the flag of Florida to be displayed in the same manner as the United States flag (e.g. on any day of the year, and even including oversized flags upon large flagpoles), but the identified flags of the United States Military may be displayed on the identified National holidays (however, in regard to the flags of the Military, the flag size is limited to 4-1/2 feet by 6 feet).

As to a condominium association, the analysis above would apply equally, since **Section 718.113(4), Florida Statutes, contains language essentially identical to the language quoted above from the Homeowners' Association Act**. (The only difference between these statutes is that the Condominium Act does not address the display of the flag of the State of Florida.) The "twist" in regard to condominium associations is that a unit owner often desires to display a flag, or install a flag mount, upon the **common elements** of the condominium (unlike a homeowners' association, in which the lot owners are typically installing flags and flag mounts upon lot property.) In this regard, the common elements (including the limited common elements) are legally "owned" by **all** of the unit owners in common, and prohibitions often exist against unit owner alteration of the common elements unless some sort of membership approval is obtained. Nevertheless, given the patriotic overtones involved in the display of the flag, unless the installation is completely inappropriate due to size or location, most Boards of Directors would be advised to allow unit owner display of statutorily authorized flags, and installation of flag mounts, upon the common elements, pursuant to the authority of 718.113(4), Florida Statutes, which could be cited to supersede any documentary limitations.

In fact, even the Division of Florida Land Sales, Condominiums and Mobile Homes is reticent to become involved in this potentially controversial issue, as evidenced by the Hurlingham Condominium Association, Inc. Petition for Declaratory Statement, DS 96369. In this Declaratory Statement, the Division declines to answer a Petition asking whether a unit owner has the right, under 718.113(4), Florida Statutes, to "permanently erect a flagpole in a concrete base, which flagpole is approximately 18 to 20 feet high", apparently upon the common elements. The Division, citing a rarely invoked principle that Division Declaratory Statements are only meant to apply when the Petitioner is asking a question unique to his particular circumstances, declines to wade into the politically-charged issue of flag display and flag mounting. Hence, if the Division is unwilling to address this potentially controversial topic, and unwilling to establish limits upon an owner's right to display a flag or install a flagpole mount, perhaps Boards of Directors of condominium associations should likewise avoid disapproving a flag display or a flagpole mount which arguably satisfies 718.113(4), of the Florida Statutes.❖

TIDBITS cont.

- Become familiar with local service agencies, and other support services, for residents who might need the information on short notice.
- Create and publish an emergency response plan to deal with resident problems, and for weather, fire, etc.

For Further Information on this topic see: *Boomer Shock: Preparing Communities for the Retirement Generation*, by Ellen Hirsch de Haan, Esq.,* published by Community Associations Press. It can be purchased from Community Associations Institute, by calling 703-5•8-8600, on the CAI website, *www.caionline.org/bookstore.cfm (CAI Item #5788)* or on Amazon.com.❖

** Ellen Hirsch de Haan, Esq. is a shareholder of Becker & Poliakoff, P.A.*

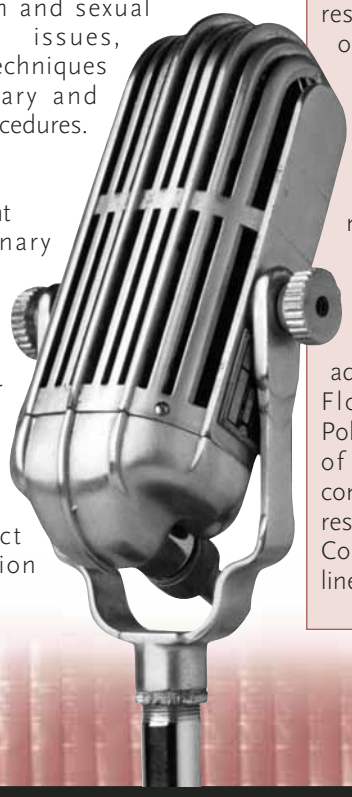
LET US INTRODUCE... ATTORNEY DANIELLE BREWER

Many of you are quite familiar with the Association Attorney designated as the primary contact for your community and perhaps the collection/foreclosure paralegals. However, there are a number of other individuals at Becker & Poliakoff with whom you may not be familiar, but they can provide valuable services to Association clientele. The Community Update will spotlight various attorneys from time to time to help Association Boards of Directors get to know our other attorneys who provide valuable services that may greatly improve their community operations and protect them against liability. The first in our series is Danielle Brewer.

"She practices extensively in the Federal Courts"

Danielle Brewer is a litigator in Becker & Poliakoff, P.A.'s West Palm Beach office. She practices extensively in the Federal Courts handing employment, discrimination, fair housing and commercial matters in addition to Association disputes and enforcement matters. Danielle is Chair of the Labor and Employment Section, and former Chair of the Individual Employee Rights Committee of the Federal Bar Association, a very prestigious organization. Employment related claims can significantly impact a community association, especially since many types of claims are not covered by standard insurance policies. Many Associations don't even have written employee policies, job descriptions or employee manuals or procedures for properly handling problems, making claims much more difficult to defend in court.

Danielle recently completed a full-scale Employment Law Training Program for a Country Club Community Association in Palm Beach County which taught the employer (the community association board) and employees how to identify employment law problems and implement procedures to protect the Association against adverse claims. The training included advice regarding the Fair Labor Standards Act (primarily wage and hour claims which can affect Associations with only one employee such as a manager, janitor, maintenance supervisor, valet, etc.); Americans With Disabilities Act (ADA) compliance; COBRA requirements, employment discrimination and sexual harassment issues, interviewing techniques and disciplinary and termination procedures. If you believe that training, the development of disciplinary procedures, creation of a employment manual, or a review of your existing practices is needed in your Association, please contact your Association Attorney. ❖



Upcoming CALL SURVEY RESULTS

Having endured the worst hurricane season in a century, Floridians living in condominiums and homeowners' associations say concerns over insurance cost and availability trump all other financial issues – even the perennially thorny condo issues of common area maintenance, financial reserve levels and unexpected special assessments.

Respondents to the **CALL 2004 Community Living Survey** also say that quality-of-life concerns that include the environment and overdevelopment equal more traditional concerns, such as access to quality healthcare and education, as major issues influencing property values and their financial well-being.

What's more, survey responses from community association residents challenge some commonly-held beliefs about Florida's "snowbird" seasonal resident phenomenon, with barely 11% of respondents saying they live three months or less per year in Florida and two-thirds saying they live year-round.

These key findings are among the many results of the first-ever survey of Floridians living in condominium and homeowner associations, conducted by Florida's Community Association Leadership Lobby (CALL), an advocacy group established in 2003 by Florida-based law firm Becker & Poliakoff to advance the shared interests of the state's common-ownership community associations. The full survey results will be published in an upcoming Community Update or can be seen on line at www.callbp.com.❖

CASENOTES

A Duty Not Delegated... Is A duty Retained

Denise Robert-Blier v. Statewide Enterprises Inc. 2005 Fla. App. Lexis 16 (Fla. 4th DCA 2005)

Increasingly, Community Associations are employing security companies to meet all or a portion of its security needs. In so doing it is critical for the Association to indicate with specificity what security functions are being provided by the independent contractor and hat obligations, if any, are being retained by the Association.

Recently, in the case of *Denise Robert-Blier v. Statewide Enterprises Inc. 2005 Fla. App. Lexis 16* (Fla. 4th DCA 2005), the Fourth District Court of Appeals affirmed the proposition that an independent contractor is only responsible for those security functions that it has assumed as conditioned by the contractual arrangement between the parties. In *Blier*, a third party invitee sued the security company after being forced into her car, driven off premises, and raped. The plaintiff sued the contractor for failing to provide more security than the association hired it to provide. Plaintiffs also sued the Association, but that matter was settled before trial.
In affirming a trial verdict for the defendant, the appellate court reasoned that the contractor was engaged to provide only very limited services, which were tantamount to merely providing an appearance of security. Pursuant to the terms of the oral agreement, the security company agreed to provide one unarmed guard to patrol a community of several buildings and adjoining parking areas, to escort residents to their homes upon request, and to observe and report suspicious incidents. No other services were expected or intended by this agreement.

The court opined that the defendant owned no duty to the defendant guest because no such duty was undertaken. The Fourth District Court of Appeals relying upon a 2003 Florida Supreme Court decision in *Clay Electric Cooperative, Inc. v. Johnson* 873 So.2d 1182, 1185 (Fla. 2003) determined that a duty may arise from the general facts of a case when one undertakes to provide a service to others and "thereby assumes a duty to act carefully and not to put others at an undue risk of harm." In *Blier*, there was no evidence that the contractor ever undertook by any affirmative act to assume the association's duty to protect its residents or its guests. The court held that the security company's "mere act of providing a security guard" did not impose any duty to protect the guests of the Association from criminal assault.❖

Water, Water, Everywhere!

Sherry vs. Regency Insurance Company 29 Fla. L. Weekly D 1707 (July 23,2004) (Fla. 2nd DCA 2004)

In the case of *Sherry vs. Regency Insurance Company* 29 Fla. L. Weekly D 1707 (July 23, 2004) (Fla. 2nd DCA 2004), a unit owner challenged summary judgment findings that a court had entered against her for damages caused when a washing machine hose in her condominium burst, flooding her unit and the condominium unit located below her. At the time of the flooding, both Sherry and her downstairs neighbors, the Reginos, were on extended trips out of town. Sherry admitted that she did not turn the water off in her unit before she left town. The Reginos' insurance company did pay the policy limits on the Reginos' claim. However, the Reginos filed the action against Sherry to recover those damages that exceeded their insurance coverage. The Reginos argued that Sherry was liable for the damage to their unit under one or more of four different legal theories: strict liability, negligence for leaving the water on while away from home, negligence for failing to properly maintain the washing machine hose and trespass by permitting water to enter the Reginos' condominium. The trial court found Sherry was liable for the damages because, between the two parties, she should have to bear the risk of damage, not the Reginos. Sherry appealed the trial court's decision.

The appellate court found that the trial court should not have decided the case as if there were no disputed facts, because some did exist. For example, issues of fact existed as to whether Sherry was negligent for failing to turn the water off before her trip or for failing to properly maintain the washing machine hose. The appellate court sent the case back to the trial court to determine these issues. **However, the appellate court clarified that strict liability (liability that exists regardless of whether any negligence existed) did not apply to damages resulting from water in household pipes.** Also, absent strict liability, intention or negligence, Sherry could not be liable for trespass as a result of the bursting water hose. Depending on the facts, however, she potentially could be liable for negligence. This case was remanded for further proceedings.❖

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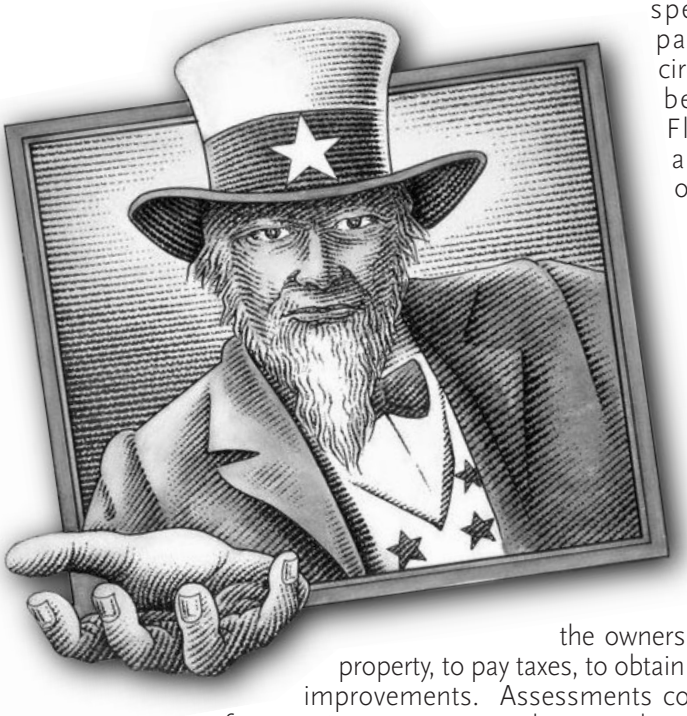
Vol. IX, 2004

CURRENT NEWS FOR COMMUNITY ASSOCIATIONS

The Income Tax Implications of Insurance Settlement Proceeds to Condominium Associations and Unit Owners

By Kevin Miller, Esq. and Marc J. Soss, Esq.

Many Floridians are still recovering today from the damage and destruction caused this past year during our historic hurricane season. As repairs to homes and communities continue, so does the work with insurers and the association members who deal with the losses and repairs. It is anticipated that the financial impact from our four not-so-friendly visitors: Charley, Frances Jeanne and Ivan will be felt for years to come. In order to offset the devastating financial impact, the Internal Revenue Service (IRS) has issued a recent private letter ruling (that is specifically limited to the particular case facts and circumstances) that could be beneficial guidance for Florida's condominium associations and unit owners.



In the case on which the private letter ruling was obtained, the management and operation of the condominium associations were similar to those organized and operating pursuant to Florida's Condominium Act. The associations were empowered to make general and special assessments against the owners for the maintenance of the property, to pay taxes, to obtain insurance, and make capital improvements. Assessments collected by the associations from unit owners were deposited into either an operating account or reserve account. Pursuant to the association governing documents, the associations were required to maintain liability and hazard insurance. Any insurance proceeds

cont. on page 2

TIDBITS Did You Know

The Condominium Act and the Corporations Not-for-Profit Act permit a condominium board of directors to act in the event of an emergency without having to follow the usual procedural and notice requirements in the law.

- An emergency exists in those instances where an unanticipated set of circumstances, which, if not acted upon immediately, is likely to cause imminent and significant financial harm to the Association, the Unit Owners, the Condominium Property, or Association Property.
- In the event of an emergency, the Board may hold meetings without having to post the required 48 hours notice.
- Emergency special assessments can be adopted by the Board without the required 14 days notice by mail to the owners.
- If an emergency exists, an Association is not required to obtain competitive bids for contracts for materials, equipment or services. For example, if in the aftermath of a

cont. on page 2

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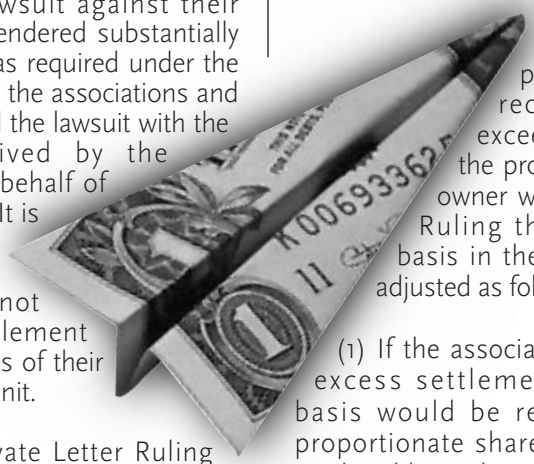
TAX IMPLICATIONS *cont.*

received by any of the associations were required to be held by them as trustee for the benefit of the unit owners, and could only be used to repair the property, if the destruction was partial in nature, and the proceeds were sufficient to pay the costs of repair.

Pursuant to the condominium documents, the Association acquired a master insurance policy that included earthquake coverage. Subsequently, an earthquake occurred and caused severe damage to the associations' property. The associations were then forced to commence a lawsuit against their insurer when it tendered substantially less than what was required under the policy. Thereafter, the associations and the insurer settled the lawsuit with the proceeds received by the associations on behalf of the unit owners. It is important to note that each unit owner did not recover any settlement proceeds in excess of their tax basis in their unit.



The IRS Private Letter Ruling was then obtained to determine whether the settlement proceeds constituted taxable income to each unit owner. In the ruling, the IRS cited to Section 61 of the Internal Revenue Code (Code) which provides that gross income is defined as income from whatever source derived, and Section 1016(a)(1) which provides that proper adjustments shall be made to the basis of property for expenditures, receipts, losses, or other items properly chargeable to capital account. As a result, since the associations were membership organizations that were operated primarily to furnish goods or services to their members, they were not exempt from taxation.

In reaching its conclusion, the IRS held that a condominium association's receipt of settlement litigation proceeds from an insurance company, resulting from claims arising as a result of earthquake damage, did not constitute taxable income to either the condominium association or the unit owners. This conclusion was predicated upon the following finding: (1) the settlement proceeds would not be included in the associations' gross income; (2) the settlement proceeds represented amounts necessary to repair or restore the property; (3) the associations received no benefit in their own right; and (4) the associations had a duty to act as the agents for the unit owners. The ruling further provided that the settlement funds did not constitute income to the unit owners, but rather represented a return of capital to them to the extent their portion of the recovery did not exceed their basis in the property. "Each unit owner was advised in the Ruling that their capital basis in their unit would be adjusted as follows:

(1) If the association released any excess settlement funds, their basis would be reduced by their proportionate share of the recovery attributable to the common area and their unit; and
(2) If the association held any excess settlement funds in reserve, their basis would be increased by their proportionate share of the amount retained."

In addition, the ruling held that any excess settlement funds retained in reserves by the associations, for future capital improvements, was not taxable income to the associations but rather a capital assessment of each unit owner.

Although this ruling is not specifically binding on hurricane related claims it is useful when considering the tax treatment one can expect from the IRS in similar type matters. It is important to note that an IRS Private Letter Ruling is case specific and does not constitute precedent on any particular tax issue.

TIDBITS *cont.*

hurricane, it is necessary for an Association to make emergency repairs in order to mitigate further damage and to protect the residents, the Association will be exempted from compliance with the statutory bidding requirements.

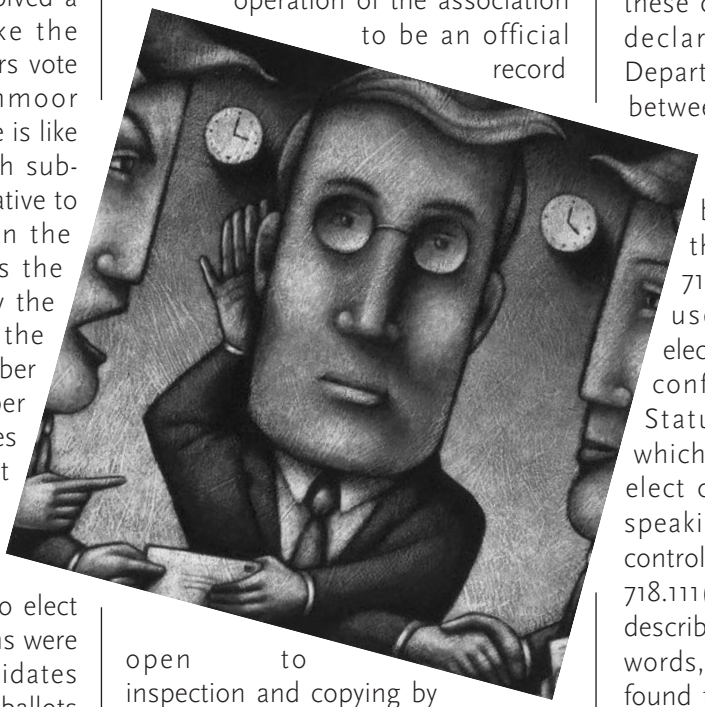
- Unless the articles of incorporation provide otherwise, the board of directors of a corporation may adopt emergency bylaws to be effective only if a quorum of the directors cannot be readily assembled because of some catastrophic event. The emergency bylaws may make all provisions necessary for managing the corporation during an emergency, including procedures for calling a meeting of the board of directors; quorum requirements for the meeting; and designation of additional or substitute directors.

- If a quorum of the corporation's directors cannot readily be assembled because of some catastrophic event, the board of directors may modify lines of succession to accommodate the incapacity of any director, officer, employee, or agent and relocate the principal office or designate alternative principal offices or regional offices or authorize the officers to do so. In addition, notice of a meeting of the board of directors need be given only to those directors to whom it is practical to reach and may be given in any practical manner, including by publication and radio. Likewise, one or more officers of the corporation present at a meeting of the board of directors may be deemed to be directors for the meeting, as necessary, to achieve a quorum. The director or directors in attendance at a meeting, or any greater number affixed by the emergency bylaws, constitute a quorum.

IS IT REALLY POSSIBLE TO KEEP A SECRET IN A CONDOMINIUM?

By Robert Rubinstein, Esq.

In a recent landmark decision, the Department of Business and Professional Regulation exercised sound logic and rendered a Declaratory Statement worthy of being cited. IN RE PETITION FOR DECLARATORY STATEMENT, JACK MENDELSON, DS 2004-010 (Docket No. 2004011033, 8/10/04) involved a unit owner who did not like the outcome of a Board of Directors vote electing officers. The Wynmoor Community Council in this case is like a master association and each sub-association elects its representative to the Board. Each director on the Board has as many votes as the number of units governed by the sub-association from which the director was elected. The number of units, and hence the number of votes for each director, varies and many are unique, so that it can be very easy to identify how a particular director voted simply by viewing the tally sheet. When the Board met to elect its officers, three of the positions were contested. One of the candidates requested an inspection of the ballots and tally sheets so he could verify the count, but the Board refused the request on the basis that voting for officers was secret. In this case, the Bylaws required secret ballots for the election of officers. The unit owner asserted that the right to challenge the count is superior to the right of secrecy.



As a general rule, Florida Statutes, Section 718.111(12), requires virtually any document relating to the operation of the association to be an official record open to inspection and copying by unit owners. Under this general rule, the ballots and tally sheets used by the Board to elect its officers would normally be an official record open to inspection and copying. This statute only recognizes three exceptions to the inspection and copying requirements: attorney-client privileged communications, unit transfer information and unit owner medical records, so the ballots and tally sheets used by the Board to elect its officers did not fall into any of these categories. Overriding a prior declaratory statement, the Department recognized the conflict between Florida Statutes, Sections 718.111(12) (which opens all official records to inspection by unit owner if not within the three listed exceptions) and 718.111(1)(b) (which permits the use of secret ballots for the election of officers). It settled this conflict by holding that Florida Statutes, Section 718.111(1)(b), which authorizes secret ballots to elect officers, is a specific statute speaking directly to this issue and controls over Florida Statutes, Section 718.111(12), which is a general statute describing inspection rights. In other words, the secret ballot statute was found to be another exception to the record inspection statute. Based on this holding, the Department stated that the ballots and tally sheets used by the Board to elect its officers were not open to inspection.

CASENOTES

The $0.78 LIEN!

McKenna v. Camino Real Village Association, Inc. (877 So.2d 900 (Fla. 4th DCA 2004)

On July 21, 2004, the Fourth District Court of Appeal issued its opinion on *McKenna v. Camino Real Village Association, Inc.* The holding of this case is important to community associations for several reasons. First, it underscores the importance of an association following its governing documents in assessing and accelerating assessments. Second, it underscores the importance of following the Rules of Civil Procedure when litigating a collections and foreclosure matter. Third, it underscores the importance of reviewing an account carefully prior to filing a lien.

Camino Real Village Association, Inc. (the "Association") filed a Complaint for foreclosure based upon a Claim of Lien filed against McKenna's condominium for unpaid assessments. McKenna denied owing the amounts alleged and asserted several Affirmative Defenses, including the Association's failure to comply with its regulations regarding Notice of Delinquency in payment of assessments and acceleration of future assessments. The Association filed a Motion for Summary Judgment, which was granted by the Trial Court. The Appellate Court reversed and remanded the action back to the Trial Court for further proceedings.

There are two relevant provisions in the Association's Declaration. One requires seven (7) days written notice to a unit owner in the event that a unit owner is more than thirty (30) days delinquent in the payment of any assessments. The other provision requires no less than fifteen (15) days notice of acceleration. McKenna argued that she did not owe the amounts due under the Claim of Lien, and the Association failed to comply with the procedural requirements set forth in the Declaration and By-Laws.

Procedurally, the Appellate Court found that the Association failed to address McKenna's allegations that she did not receive proper notice of the acceleration and that the Association did not follow its outline procedures regarding delinquency. Because the Association failed to address those allegations in Court, the Appellate Court reversed the Trial Court and remanded the case back to the Trial Court for further consideration of those issues. Once a unit owner raises defenses of failing to comply with the procedural requirements set forth in the governing documents, the Association must address those defenses in order to successfully obtain a judgment of foreclosure without the necessity of trial.

If the Trial Court ultimately finds that the Association did not comply with the Declaration provisions, it could find in favor of McKenna. Thus, it is very important for an Association to comply with its governing documents regarding assessments if it ultimately expects to collect those assessments.

Finally, the Court noted that when the Claim of Lien was filed, the only assessment that was more than thirty (30) days delinquent was seventy eight cents due in July. The Court found that the August assessments were not yet more than thirty (30) days delinquent, and therefore should not have been included in the Claim of Lien. More significantly, as the August assessments were not more than thirty (30) days delinquent, the Association only had the right to file the lien for the seventy eight cents that was due, and will thus find itself in the difficult position of arguing to the Court why it filed a lien, and incurred costs and attorney's fees in doing so, all for seventy eight cents. No doubt, the Trial Court will not appreciate spending time dealing with such a de minimus amount in controversy.

In conclusion, whether dealing with assessments, acceleration of assessments, or special assessments, an Association must ensure that it follows its own governing documents to the letter if it expects to be able to enforce its governing documents to collect those assessments.

Buyer BEWARE!

Robert Wayne Cloud v. Joseph T. and Toni Schenck, 869 So.2d 709 (Fla. 1st DCA 2004)

In *Cloud v. Schenck*, Florida's First District Court of Appeal reversed a summary judgment, entered by the trial court in favor of the Schencks, as proposed sellers of real property, which allowed the Schencks, upon default by the buyer, Cloud, to retain a $10,000 security deposit paid into trust by Cloud, pursuant to an addendum to the Contract for Sale and Purchase executed by the parties. The appellate court held that the $10,000 which the sellers sought to recover from the trust account, upon the buyer's breach, was intended by the parties to constitute liquidated damages, but was, in fact, an invalid penalty, as the sellers had reserved to themselves the option to pursue their legal rights under the contract.

The sellers brought suit against the buyer, asserting breach of the contract for failure to close by the extended closing date provided in the contract addendum and seeking to recover the $10,000 additional deposit, held in trust, and petitioned the court for entry of a summary judgment. The trial court granted the motion, finding that the $10,000 was not intended to comprise liquidated damages, but served only as consideration for the extension of the closing date.

On appeal, the First District Court of Appeal held that the trial court's findings were in error, and that, pursuant to the clear and unambiguous language of the contract, the parties clearly intended that the $10,000 deposit would be treated as liquidated damages. In so holding, the court relied upon the language of the contract which provided that the $10,000 was "in addition to the original $5,000 Buyers have already given to Sellers" and that the $10,000 would be forfeited, as would the $5,000, in the event of the buyer's breach. The court held that, while the $10,000 did serve as consideration for the extension of the closing date, it was to be treated in the same manner as the prior $5,000 deposit, and was, therefore, subject to the liquidated damages provisions of the contract.

As such, the court held, pursuant to the Florida Supreme Court's decision in *Lefemine v. Baron*, 573 So.2d 326 (Fla. 1991), that such provisions were invalid, as they provided the seller with "the option to either retain the deposit as liquidated damages or to bring an action for actual damages." *Id.* at 328-329. *Lefemine* had held that such an option, in a sales contract, constituted a penalty, as a matter of law. *Id.* at 330.

Because the liquidated damages provision in *Cloud* was found to be virtually identical to the invalidated provision in *Lefemine*, the First District declared the provision invalid, and reversed the summary judgment entered in favor of the sellers.

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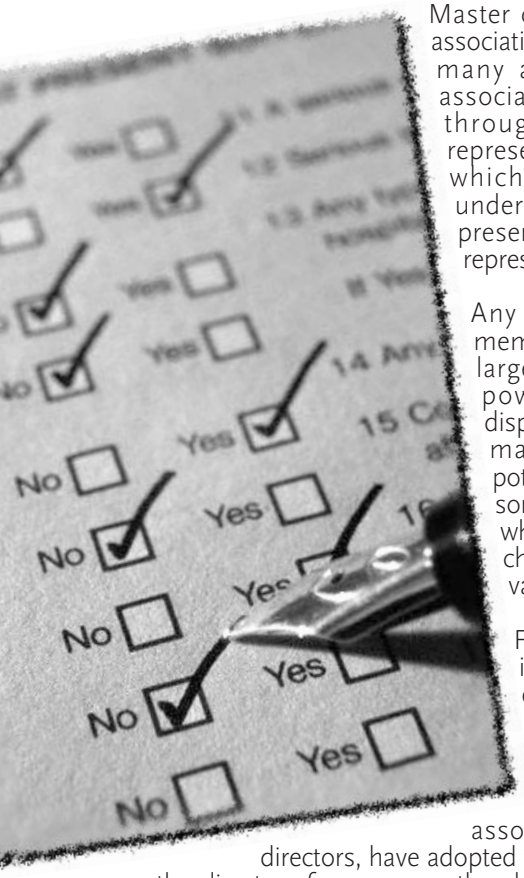
Vol.104 – AUGUST 2004 CURRENT NEWS FOR COMMUNITY ASSOCIATIONS

Get Out the VOTE!

MASTER CONDOMINIUM ASSOCIATION BOARDS MUST BE ELECTED, NOT APPOINTED

By Gary M. Schaaf, Esq.

A recent decision of the State of Florida Department of Business and Professional Regulation, Division of Florida Land Sales, Condominiums and Mobile Homes, holds, in accordance with Chapter 718, Florida Statutes, that the Board of Directors of a Master Condominium Association must be elected, not appointed. This decision is applicable only to condominium associations. It does not apply to homeowners associations.



Master condominium associations are "umbrella" associations, which preside over as few as two and as many as fifty or more related condominium associations. A master association is obligated, through its board of directors, to provide representation for each of the "sub-associations" which comprise the master. Sometimes the underlying sub-associations vary greatly in size, presenting a challenge for maintaining balanced representation on the master association board.

Any time one sub-association has far more members than another, there is a fear that the larger sub-association, with its greater voting power, will ultimately elect all or a disproportionate number of the members to the master association board. To avoid such a potentially prejudicial result, master associations sometimes opt to replace formal elections with what they consider to be just mechanisms for choosing their board members from among the various sub-associations.

For example, many master associations impose conditions on the election of their directors to ensure that the number of directors elected from each of the sub-associations will bear a similar ratio to that of the sub-association populations to the total master population. Other master associations, instead of formally electing their directors, have adopted the alternative procedure of simply appointing the directors from among the elected officers or directors of the various sub-

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TIDBITS Did You Know

The Fair Housing Act, Section 760.29, Florida Statutes, provides that a community claiming to be Housing For Older Persons shall register with the Florida Commission on Human Relations and submit a letter to the Commission stating that the community complies with the requirements of the Act.

- In order to qualify as Housing for Older Persons, and thus be exempt from familial status discrimination, a community must either be: 1) operated under a state or federal program designed to assist elderly persons, 2) intended solely for occupants 62 years of age or older, or 3) intended and operated for occupancy by persons 55 years of age or older, that meet the following requirements: a) At least 80 percent of the units are occupied by at least one person 55 years of age or older, b) the community publishes and adheres to policies and procedures that demonstrate the intent to comply with the Act, including taking a community census every 2 years, c) the community complies with the rules made by the United States Department of Housing and Urban Development.

- The letter to be filed with the Commission on Human Relations shall be submitted on the letterhead of the community and shall be signed by the president.

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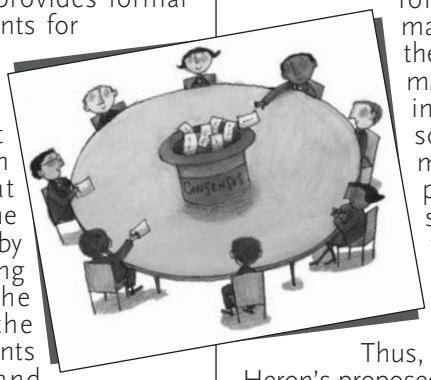
VOTE *cont.*

associations, which constitute the master.

One such association, known as the Heron Master Association, which was composed of two sub-associations, one of which had three times as many members as the other, sought a determination from the Division of Florida Land Sales, Condominiums and Mobile Homes, that it was legally permitted to amend its bylaws to provide that the members of the master association board would thereafter be automatically appointed from among the officers of the sub-associations.

It should be noted that Section 718.112(2)(d)(3), F.S., provides formal procedural requirements for electing directors to the board of directors of any condominium association. That statute provides, in pertinent part, that "[t]he members of the board *shall be elected* by written ballot or voting machine." While the statute sets forth the procedural requirements for nomination and election of such board members, it further provides in Subsection (8) that "an association may, by the affirmative vote of a majority of the total voting interests, provide for different voting and election procedures in its bylaws, which vote may be by a proxy specifically delineating the different voting and election procedures."



Despite the fact that the bylaws of the Heron Master Association provided for the formal election of the master board, since 1977, the association had taken to appointing its members to avoid the possibility of disproportionate representation of the larger sub-association. When that procedure was challenged in 2003, an election was held, at which the same candidates were ultimately elected as would have been appointed. In light of that outcome, the master association then drafted proposed amendments to its bylaws, which provided that its three-member board of directors would be automatically composed of the president and treasurer of the larger sub-association, and the president of the smaller sub-association; these amendments were approved by a membership vote of 49 to 2.

The Division, in *In re Petition for Declaratory Statement, The Heron Master Association, Inc.*, Case No. 2003092101 (DS-2003-039, April 9, 2004), found that, pursuant to the decision of the Florida Supreme Court in *Woodside Village Condominium Association, Inc. v. Jahren*, 806 So.2d 452 (Fla. 2002), where the bylaws of a master association differ from the provisions of Chapter 718, Florida Statutes, the statute will control. The Division also noted that, while Chapter 718.112(2)(d)(8), Florida Statutes, set forth above, allows a master association, with the affirmative vote of a majority of its total voting interests, to opt out of some of the statutorily mandated election procedures, such statute did not allow the association to opt out of holding elections altogether.

Thus, the Division held that Heron's proposed amendments violated Chapter 718.112(2)(d)(3), Florida Statutes.

The Division did not, however, rule out the possibility that a master association could amend its bylaws "to adopt a representational form of governance in which the bylaws require proportional representation for *elected* directors." By way of example, in a *Heron* type situation, in which the master association is composed of two disproportionately sized sub-associations, the master elections could be structured such that specified numbers of board members would be elected from the respective sub-associations. So long as the board members were *elected*, and not simply appointed, the procedures would not run afoul of the statute.

The Division further found that nothing in the law prohibits the sub-associations and the master association from holding concurrent elections, or prohibits the same individuals from being elected to the boards of both the sub-association and the master association. Such matters may be addressed by proper amendment to the master association bylaws.

Master condominium associations should review the election procedures set forth in their bylaws or, if different, those established by course of conduct, to ensure compliance with Chapter 718.112, Florida Statutes, in accordance with the *Heron* decision. If such procedures do not provide for election of master association directors, as required by statute, the procedures must be modified to ensure compliance with the statutory requirements.

TIDBITS *cont.*

- The registration and documentation shall be renewed every two years from the date of the original filing.
- The information in the registry shall be made available to the public and the Commission shall include this information on an Internet web site.
- The Commission may establish a reasonable registration fee not to exceed Twenty ($20.00) Dollars that shall be deposited into the Commission's trust fund to defray the administrative cost associated with maintaining the registry.
- The Commission may impose an administrative fine not to exceed Five Hundred ($500.00) Dollars on a community that knowingly submits false information in this documentation.
- The registration and documentation shall not substitute for proof of compliance with the requirements of the Act and failure to register shall not disqualify a facility or community that otherwise qualifies for the exemption.
- By publishing the registration letter, however, a second public record is created, in addition to the recorded covenants, that advises the general public that your community operates as housing for older persons and therefore constitutes another basis to show your intent to be a 55 and older community.

EMAIL USERS BEWARE!

By Alex C. Costopoulos, Esq.

Technology is supposed to simplify our lives, isn't it? Unfortunately, sometimes, new technology brings with it new bureaucracy and rules and regulations that do anything but simplify our lives.

We all know how hard it is to schedule a board meeting at a time when everybody can come; most times we are just lucky to get a quorum. Even setting up a telephone conference for five or seven people is nearly impossible. Enter the amazing e-mail! With a few key strokes and the click of a mouse, the president can ask the rest of the board members how they feel about resurfacing the tennis courts; the rest of the board members get the message whenever they check their e-mail and can respond to just the president or to "all." Voila, done in a matter of minutes instead of hours, days, or even weeks. All the board members agree it is a good idea, so the president sends an e-mail to the manager (with a copy to the rest of the board), instructing him to accept the bid from Joe's Resurfacing and then shoots another e-mail to the association's attorney to review the contract. Piece of cake, right? Wrong! That board has just violated Florida Law.

Sometimes, new technology brings with it new bureaucracy and rules and regulations that do anything but simplify our lives.

The allure of using e-mail as a means of communication and decision-making between board members is seductive in its convenience and simplicity. This is particularly true when some directors are "snow birds" and are scattered across the country during various times of the year, or when directors are full-time workers with families. Contrary to popular belief, however, the creation of the Internet did not extinguish the long-standing laws regarding board meetings and board decisions. *Board meetings still must be noticed, must be open to the owners, and minutes must be taken* (and retained as official records of the association).

This is not to say that board members cannot communicate with each other via e-mail. Board members may certainly speak with each other either in person, over the telephone or by mail. E-mail falls into the same categories. The problem arises when e-mail is used to conduct board business instead of holding a properly noticed board meeting, or to decide the issues in private prior to an official board meeting. This is no different than holding an illegal "executive session," either in person or by telephone conference, before the noticed meeting. You simply cannot do it.

As for e-mails between the board and the manager, or the board and its attorney, more questions are raised. While it is certainly proper for the president to instruct the manager via e-mail, the question is whether that e-mail now constitutes an official record of the association and must be preserved as such and provided to owners upon demand? The Department of Business and Professional Regulation provided an opinion (specifically regarding condominiums) on this subject in March 2002, when they stated that, "Condominium owners do have the right to inspect e-mail correspondences between the board of directors and the property manager as long as the correspondence is related to the operation of the association and does not fall within one of the three statutorily protected exceptions." The three exceptions are (1) records which are attorney/client or work-product privileged (while litigation is pending); (2) information obtained by the association for approval of the transfer of a unit; and (3) unit owner medical records. So, according to the Department, those lighthearted e-mails to the manager to "hammer that bum" are now official records! So are those e-mails to and from your lawyer. While litigation is pending, you may not have to provide them, if they are privileged, but after the litigation is over, they must be provided upon demand. Better be careful what you tell your lawyer about that deadbeat who has not paid his assessments for the last two years. He could be reading that e-mail right after he gets caught up.

The Department's legal opinion goes on to state that, while there are no regulations expressly requiring such e-mails to be archived, "if the e-mail correspondence relates to the operation of the association property, *it is required to be maintained by the association, whether on paper or electronically*, under Chapter 718, Florida Statutes." So what if you fail to save all these e-mails or print them out? You could be in a little trouble with the Division or a whole lot of trouble with a State Court Judge who determines that you destroyed records that should have been kept and gives the other side a presumption that those e-mails must have said whatever the other side wishes they said.

Treat e-mails just like any other official records and retain them for *at least* twelve months before deleting any of them. You probably will not be able to save seven years worth of e-mails on your desktop, so printing out hard copies and storing them is a good option. Another choice is to save the e-mails for a year and then simply download them to a disk, thus saving space.

Tedious? Certainly. More trouble than it is worth? Probably, but bear in mind that everything you write may become an official record and may be used against you someday—*even if you delete it*.

CASENOTES

A Hidden DANGER

Summer is upon us once again, and with the Florida heat, everyone is trying to keep cool - especially the children. One of the best methods for cooling off is to jump into the water and go for a swim. But what happens when a child is injured, or worse, drowns, in an association's lake or pond? Unfortunately, the courts have had to address this situation on more than one occasion.

Most recently, in the case of *Longmore v. Saga Bay POA, Inc.*, 868 So. 2d 1268 (Fla. 3d DCA 2004), the Third District Court of Appeal affirmed the general proposition of law that an association is not liable for a child's drowning in a body of water located on the association's property, whether artificial or natural, unless there is some unusual danger that does not generally exist in similar bodies of water or the water contains a dangerous condition constituting a trap.

The *Longmore* case involved the drowning of a 16 year-old child in a man-made lake on the association's property. The child's parents sued numerous defendants, including the association, alleging that the association knew its lake had a precipitous drop-off and negligently failed to warn or provide lifeguards to protect the children from this danger. It is important to note that the lake had a designated swimming area with properly posted warning signs. However, the 16 year-old child was not swimming in that area, but instead, was swimming at the lakeshore abutting a privately owned home when he drowned.

Relying on a previous court decision involving the very same association and similar facts, the Third District dismissed the parents' complaint, explaining that a sudden drop off in a lake or pond does not constitute a dangerous condition or trap. The lake's sharp change in depth is characteristic of lakes and does not constitute a concealed dangerous condition imposing liability upon the association in the event a child drowns.

The Court further distinguished this case from the Florida Supreme Court's decision in *Allen v. William P. McDonald Corp.*, 42 So. 2d 706 (Fla. 1949), wherein the Court found sufficient grounds to proceed against the defendant based upon the attractive nuisance doctrine. Specifically, the Court found that the "spoil bank of white sand adjacent to the lake amounted to an unusual element of danger, rendering it more attractive than the ordinary pond." As the Supreme Court explained, children, especially those of tender age, are drawn to sand, thereby allowing the claim to proceed under the attractive nuisance doctrine.

Accordingly, the general rule is that an association will not be liable for the wrongful death of a drowning victim in its lakes or ponds, unless there is some unusual element of danger that is atypical of ponds or lakes, generally, or that poses some type of trap.

To Tell OR Not to Tell?

In the case of *Sink and Cross v. Florida Community Service Corporation Of Walton County et al.*, 29 FLW D1667 (Fla. 1st DCA, 2004), a ground floor condominium unit was flooded with raw sewage due to a back up in the building's sewage system. The issue in this case was whether or not the seller had knowledge of a defect in the plumbing system at the time the unit was sold.

The seller denied having knowledge of the defect, but the buyers produced evidence to the contrary. The buyers were able to show that the seller had been notified previously of the ground floor sewage problems and that she had personally attended an association meeting where the flooding was discussed. The trial court entered a Summary Judgment in favor of the seller. The Appellate Court reversed the trial court's judgment on a technical basis.

In reviewing a summary judgment, the appellate court reviews the facts in the light most favorable to the losing party. Here, it was clear that there was a genuine issue of material fact as to whether or not the seller was aware of the defect at the time the property was sold. In Florida, case law provides that *if the seller has such knowledge, and the defect materially affected the value of the property, the seller has a duty to disclose it to the buyers [Johnson v. Davis,* 480 So. 2d 625 (Fla. 1985).] The technical basis for the reversal is not as important as the underlying premise, which establishes that the seller of real property has a duty to disclose defects to the buyer, if those defects materially affect the value of the property.

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Vol.104 – JULY 2004

CURRENT NEWS FOR COMMUNITY ASSOCIATIONS

Words COUNT

By Marc J. Randazza, Esq.

Attorneys are frequently called upon to handle matters for community association clients regarding disputes between the association and rule-breaking unit owners. The majority of these offenses are not the result of a "bad seed" in the community, but rather the result of the "evil twins" of confusion and miscommunication taking root in the community. By using effective communication tools, community associations can minimize the number of conflicts between the association and its membership. If conflict is inevitable, well-crafted pre-conflict communication can place the association in a markedly stronger legal position. This article will address communication tools that can achieve these goals.

Notice of Meetings

The Condominium, Cooperative and Homeowners' Association Acts both require that meetings of the membership and the board be preceded by adequate notice to the membership. Any item of business that is not duly noticed may only be addressed on an "emergency basis." However, failing to notice an agenda item is not an "emergency" and this exception should be reserved for true "emergencies" such as natural disasters.

A problem can arise when these notices are posted, but the specific items to be discussed are not clearly noted. For example, boards of directors sometimes issue notices of meetings including agendas, which simply state "new business," as an agenda item – but fail to report what that business will be. Boards should be forewarned that taking short cuts around the meeting notice requirements will add ammunition to a dissenting unit owner's position, if that unit owner wishes to challenge board or membership action at an improperly noticed meeting.

cont. on page 2

TIDBITS Did You Know

A Water Management District has broad powers that could affect your association long after developer turnover to the association.

- Developer turnover occurs when the developer relinquishes control of the association in favor of its owners.
- Typically, during the pre-construction stage, a developer submits a surface water management plan to the District. At that stage, the District refers to the Developer as the "permitee" and the association as the "operating entity." The District requires the permitee to transfer the surface water management plan to the operating entity.
- A time requirement for the transfer of the surface water management system from the permitee (the developer) to the operating entity (the association) does not exist. For example, if your association was created in 1980 and the District just discovered the transfer was not complete, it will look to the association to complete the transfer. Typically, the District discovers the deficiency during an audit of its files. Upon the District's discovery, it sends the association a "Notice of Noncompliance" letter.
- The Florida Administrative Code requires that before the transfer of the surface water management system can become effective, the system must be certified by a licensed Florida engineer. The certification must establish that the system is substantially in accordance with the approved plans and specifications, and

cont. on page 2

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WORDS *cont.*

Accordingly, if the association intends to take specific action, it should notice that item on the meeting agenda with sufficient specificity that any member who might be interested in the subject could be considered to have had adequate notice that the item was being discussed.

Meeting Minutes

Often, volunteer boards do not understand the purpose or function of meeting minutes. Good minutes can make or break a future legal case, as these records may one day need to be read in court. On the lighter side of things, well-drafted minutes can be relied upon by unit owners to recognize the actions of the board, so that all members are on notice of official actions and rule changes.

Good minutes can make or break a future legal case, as these records may one day need to be read in court.

Robert's Rules of Order states that meeting minutes exist to record what is "done" by the board or the membership, and not to memorialize all of what is said at a meeting. Meeting minutes should reflect the type of meeting that occurred (Board, Committee or Membership); the date, time, and place of the meeting; which of the officers or board members of the association were present at the meeting; whether the minutes of the previous meeting were approved; all main motions (but not those that are withdrawn); all points of order and appeals; and the hours of the meeting and adjournment. Generally, the name of the member who makes a motion is recorded and, while not necessary, it is often a good idea to record the name of the member who seconded the motion.

As a matter of great importance – the wording of a motion should be clear at the time the secretary records the motion. When a motion is presented, often it encounters a number of amendments before its final passage. Failure to accurately record all amendments to a motion can result in the minutes inaccurately reflecting the final motion. Often, minutes do not surface in a dispute until years after their recordation, and at that point, it is possible that nobody will remember what precisely happened.

Despite the importance of taking good minutes, associations should understand that meeting minutes are not intended to be a transcript or a word-for-word rendering of everything discussed at a board or unit owner meeting. In fact, this is not desirable. All members should feel free to discuss the issues being debated without fear of their remarks being taken out of context or quoted. All readers know the "Miranda" warnings from television police shows. Any transcript of a meeting could have one sentence taken out of context, and then anything said may be used against the association in a later dispute.

The Condominium, Cooperative and Homeowners' Association Acts provide that any owner may tape-record or videotape meetings of the board and meetings of the membership. Accordingly, boards may not prohibit taping of meetings, but that does not mean that boards must tape them. In fact, if your board of directors does tape meetings for the purpose of assisting the manager or secretary in writing the minutes, this is an acceptable practice. However, it is advisable to erase these tapes after the official minutes have been written and approved.

Newsletters

Community newsletters are a valuable source of information for residents.

cont. on page 2

TIDBITS cont.

any deviations will not prevent the system from functioning in compliance with the developer-submitted plans.

- Also, the District requires that specific language be included in the association's documents as to the maintenance and operation of the surface water management plan. To the extent that the necessary language is absent, the documents must be amended. The document amendments are much easier to accomplish while the association is under the control of the developer.
- The District's enforcement powers include the levy of large fines, though it will often work with an association to ensure compliance once the deficiency is discovered.
- The failure to transfer the District's permit from the permitee (the developer) to the operating entity (the association) is often missed because it does not show up in the public records.
- Also, the failure to complete the transfer does not prevent a certificate of occupancy from being issued.
- The best way to verify compliance is to request that your attorney request a written opinion from your water management district as to the status of the surface water management system.
- Ideally, an ethical developer will ensure that it completes the transfer of the surface water management plan to the association. Often times, this does not occur, and the association, especially when the developer is no longer in business, is left holding the bag.
- If you are an association that is in the process of developer turnover, you should ask your lawyer to verify the status of the surface water management plan to review the permit, determine whether it has been transferred to the association and, also, to recommend whether outside engineering assistance is required with regard to the surface water management plan.

WORDS *cont.*

Many associations use them for announcements and to simply foster a greater level of camaraderie between residents. As a tool to keep your community running smoothly, the association's newsletter can be a valuable tool for the dissemination of board policies and procedures. On the other hand, the association should take care to avoid communications that create problems for enforcement efforts.

In many community association enforcement matters, the unit owner attempts to defend his or her actions by claiming a lack of awareness of a certain policy, procedure, or rule. As most board members are aware, board meetings are frequently poorly attended, especially during the summer months. When the board of directors passes a new rule, simply stating this in the meeting minutes may not be an adequate method of communicating with the membership at large.

Often, errant owners are good people, whom would have followed the rules, had they been aware of them. Accordingly, if your board of directors passes a rule limiting pet ownership, most owners would choose to follow it. However, if owners are unaware of the rule and they purchase a pet, enforcement efforts can be much more difficult once the family has gotten attached to the animal. Keeping your members informed can be the first step in avoiding conflict, and can usually dispel any claims that the violator was not aware of the restriction.

On the other hand, associations must take care not to create a defense for violators. Communications in an association newsletter can create the defense of estoppel. Estoppel is an affirmative defense, the essence of which is that the board should not be permitted to assert one position prior to enforcement, upon which the unit owner relies, and then rely on an opposite position once enforcement begins. [See: *Enegren v. Marathon Country Club Condo. West Assn., Inc.*, 525 So. 2d 488 (Fla. 3d DCA 1988); *Southeast Grove Management v. McKines*, 578 So. 2d 883 (Fla. 1st DCA 1991).]

Often, errant owners are good people, whom would have followed the rules, had they been aware of them.

For example, if your association has a rule prohibiting animals from running freely, but the association's newsletter publishes an article about dog owners being permitted to let their animals run freely in a select area, owners could later claim that this is evidence that the board did not intend to enforce this rule. A statement in a newsletter should not be relied upon as a modification of written rules, but it is always best to avoid creating a built-in defense.

Any discussion of community newsletters would be incomplete without a warning about potential libel issues. Libel is a written or broadcasted defamation, (as opposed to slander, which is a spoken defamation). The four essential elements of a defamation claim are set forth in *Valencia v. Citibank, Int'l.*, 728 So. 2d 330 (Fla. 3d DCA 1999). These are as follows: "(1) the defendant published a false statement (2) about the plaintiff (3) to a third party and (4) the falsity caused injury to the plaintiff." If the plaintiff can prove all four of these elements, then the plaintiff may prevail in a libel action.

What may seem to the author as an attempt at humor could be a grave insult to the subject of the joke. Even when humor gone awry is not at issue, the publisher of the newsletter should be careful to remember that checking facts, especially in matters that may be contentious, is an important responsibility. Failing to do so could land the association in trouble (if the newsletter is sanctioned by the association).

If there is any question of whether an article in a newsletter is potentially libelous, the association should consult legal counsel for pre-publication review. As they say, "an ounce of prevention is worth a pound of cure."

The BUCK STOPS HERE!

In the case of *Madness, L.P. v. DiTocco Konstruction, Inc.,* 29 Fla.L.Weekly D1005 (Fla. 4th DCA), the Florida Fourth District Court of Appeal recently held that a property owner was not liable for treble damages for stopping payment on a check, when there was no intent to defraud. Pursuant to §68.065, Florida Statutes, under certain circumstances, a check payee may have the right to collect triple the amount of a check which is refused by the drawee bank. Section 68.065, in pertinent part, states:

> In any civil action brought for the purposes of collecting a check, draft, or order of payment, the payment of which was refused by the drawee because of the lack of funds, credit, or an account, or where the maker or drawer stops payment on the check, draft, or order of payment with intent to defraud, and where the maker or drawer fails to pay the amount owing, in cash, to the payee within thirty days following a written demand therefor...the maker or drawer shall be liable to the payee, in addition to the amount owing upon such check, draft, or order, for damages of triple the amount so owing.

In *Madness,* the court found that where a property owner stops payment prior to a contractor performing any actual work, and where the contractor was notified not to proceed on the same day as the check was stopped, there was no intent to defraud. Thus, the owner was found not liable for treble damages. It should be noted, however, that there was also evidence presented at the trial level that the parties disputed whether they had agreed on final contract terms. Further, the owner was still liable for consequential damages actually incurred by the contractor. In a situation similar to the one presented by the case, it would be advisable for an association to secure a legal opinion prior to stopping payment on a check to the contractor.

Practicing Law WITHOUT A LICENSE

Providing even the minimum of legal assistance without a license can be considered the unlicensed practice of law. In *The Florida Bar v. We The People Forms and Service Center of Sarasota, Inc.,* 29 Fla. L. Weekly S 187 (Fla. 2004), the Florida Supreme Court dealt with a claim involving the unlicensed practice of law by a company and its principal who provided legal assistance in various forms.

The Supreme Court found that numerous instances of the unlicensed practice of law occurred when We The People and Danielle Kingsley offered legal assistance to third parties. The Court found various violations of the prohibition on the unlicensed practice of law where the company and its principal: (1) provided customers with legal assistance in the selection, preparation, and completion of legal forms; (2) corrected customers' errors and omissions with respect to those legal forms; (3) prepared or assisted in the preparation of pleadings and other legal documents for customers; (4) corresponded with attorneys who represented opposing parties; (5) hired a licensed, Florida attorney to provide legal advice to customers; (6) held out the attorney as the supervisor of the company performing these services; and (7) advertised services in such a way as to lead the public to believe that the business was capable of providing legal services.

Among other activities, the Court found that We The People had offered legal services directly to their customers by employing a licensed attorney to give legal advice. However, much of the advice and assistance was provided by the company and Ms. Kingsley. The legal assistance related to a range of activities including dissolutions of marriage, bankruptcy and wills and trusts.

The Court reviewed a number of previous cases, which provided an analysis on what constitutes the unlicensed practice of law. The unlicensed practice of law includes a non-lawyer who has direct contact with individuals in the nature of consultation, explanation, recommendations, advice, and assistance in the provision, selection and completion of legal forms. While a non-lawyer may sell certain legal forms and type up instruments completed by clients, a non-lawyer cannot engage in personal legal assistance in conjunction with business activities, including the correction of errors and omissions. The Court will enjoin a non-lawyer from doing so and from advertising in any fashion that may lead a reasonable lay person to believe that the non-lawyer may offer to the public legal services, legal advice or personal legal assistance.

The many activities, which the Court enjoined as a result of this case, included completing forms or assisting in the completion of forms that were not simplified forms approved by the Court. The Court also prohibited the use of the title "Paralegal" or "Legal Assistant" by Ms. Kingsley, unless she was working for or under the supervision of a member of The Florida Bar and performing specifically delegated substantive legal work for which the Bar member is responsible. The Court specifically found that giving legal advice to another person concerning the application, preparation, advisability, or quality of any legal instrument or document or forms in connection with any legal proceedings or procedures would not be allowed.

In this case, the Court found that the rules regulating the Florida Bar allowed the imposition of a civil penalty not to exceed $1,000.00 per incident. The Court noted that a Nine Thousand Dollar ($9,000.00) penalty, which was imposed jointly and severally on We The People and Kingsley, was appropriate, given the number of incidents in which they were involved. The Court also awarded over Four Thousand Four Hundred Dollars ($4,400.00) in costs incurred in connection with the proceedings, which led to the opinion. Not only is the unlicensed practice of law unlawful and unethical, but it can ultimately be costly to those who hold themselves out as being able to perform services that only a lawyer licensed to practice law can perform.

THE INFORMATION SET FORTH IN THIS BULLETIN IS GENERAL AND SUMMARY IN NATURE AND IS NOT INTENDED AS SPECIFIC LEGAL ADVICE APPLICABLE TO YOUR ASSOCIATION. IF YOU HAVE QUESTIONS REGARDING THE CONTENTS OF THIS RELEASE AS IT APPLIES TO YOUR SITUATION, PLEASE CONTACT THE ASSOCIATION ATTORNEY RESPONSIBLE FOR YOUR FILE. IN ADDITION, WE WISH TO REAFFIRM THE FACT THAT THE PRINCIPLES OF LAW CITED HEREIN ARE SUBJECT TO CHANGE FROM TIME TO TIME.

LAW OFFICES
BECKER & POLIAKOFF, P.A.
Community Up-Date™

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2004 LEGISLATIVE Session Summary

By Donna D. Berger, Esq.

The 2004 Legislative Session was extremely eventful, and thanks to the efforts of the Community Associations participating in Becker & Poliakoff, P.A.'s Community Association Legislative Lobby's (CALL) initiatives, some detrimental legislation was killed and some beneficial legislation was adopted. This article will provide an overview of the legislation adopted in 2004 that affects Florida's community associations.

CONDOMINIUM LEGISLATION

SB 1184 and SB 2984 – Chapters 2004-345 and 2004-353, Laws of Florida, respectively; Effective Dates: SB 1184- October 1, 2004; SB 2984 – Upon becoming law, except as otherwise provided.

These Bills affect both condominium associations and homeowners' associations. A separate article on the provisions of this legislation affecting homeowner's associations can be found in this issue of the *Community Up-Date*. (See page 4).

SB 1184 contains several provisions that SB 2984 does not contain but the bills are otherwise identical. SB 1184's impact upon condominium associations is outlined below by section:

1. Amends s. 718.111(12), F.S., to provide immunity from liability to an association for information provided to a prospective purchaser or lienholder via a lender's information request form, provided the association or its authorized agent providing the information include a written statement advising that "The responses herein are made in good faith and to the best of my ability as to their accuracy."

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TIDBITS Did You Know

*There were two bills that could have had a profoundly negative impact upon condominium associations that were **soundly defeated** as a result of our CALL initiative.*

- **HB 1223 and SB 2498** resulted from the creation of the Select Committee on Condominium Governance.
- These bills (sponsored respectively by Rep. Julio Robaina -Miami and Sen. Rudy Garcia - Hialeah) proposed a drastic overhaul of Chapter 718, Florida Statutes.
- These Bills imposed two-year term limits on board members, mandatory criminal background checks for all potential board candidates, further dwindling of the pool of eligible board members by excluding immediate family members (broadly defined to include half-siblings, half-cousins, etc.), removing voting rights as an appurtenance to unit ownership, requiring governance by majority consensus, etc.
- **These bills both died in messages as a result of public outcry from community association members throughout the State.**

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Summary cont.

2. Amends s. 718.1325 (3) and (4), F.S., to provide immunity from liability when a condominium, cooperative, timeshare, mobile home or homeowners' association provides an automated external defibrillator device for its members and guests, provided the device is properly maintained and an employee or agent of the association is properly trained in the device's use. This section is further amended to provide that an insurer may not require an association to purchase medical malpractice insurance for maintaining the cardiac defibrillator.

3. Amends s. 718.112 (1) and (2), F.S., by clarifying the expenses to be listed in the annual budget, as well as revising the procedure by which the vote to opt out of sprinkler systems is taken. The vote may now be obtained through the use of a limited proxy and the notice to be sent out within thirty (30) days after the vote is taken is no longer required to be sent via certified mail.

4. Creates s. 718.5015, F.S., to re-establish the Advisory Council on Condominiums. The Council's functions shall include receiving input from the public regarding issues of concern and recommendations for changes in the law, reviewing, evaluating and advising the Division regarding needed changes and recommending improvements to the Division's educational programs. The Council shall consist of seven (7) members appointed as follows:

   2 members shall be appointed by the President of the Senate;

   2 members shall be appointed by the Speaker of the House; and

   3 members shall be appointed by the Governor.

   At least 1 member appointed by the Governor shall represent timeshare condominiums. All members shall be appointed to 2-year terms (except at least one member from each of the categories above shall have an initial 1-year term). THIS LANGUAGE IS NOT FOUND IN SB 2984.

5. Creates s. 718.5011, F.S., to establish the office of the Condominium Ombudsman. The Ombudsman must be an attorney admitted to practice before the Florida Supreme Court and must be appointed by the Governor. The Ombudsman's powers shall include reviewing and using all files of the Division, employing professional and clerical staff as needed, preparing and issuing reports and recommendations to the Governor, the Division, the Advisory Council, the Senate President or House Speaker, acting as a liaison between the Division and unit owners, boards, managers and other affected parties, monitoring and reviewing procedures and disputes concerning condominium elections or meetings, making recommendations to the Division for changes in rules and procedures for the filing of complaints, providing resources to board members to assist them in carrying out their powers and duties and providing a neutral resource for all affected parties to meet and voluntarily resolve disputes.

   This bill also amends s. 718.5012, F.S., to provide for new election monitoring procedures under the Office of a Condominium Ombudsman. Fifteen (15%) percent of the total voting interests in a condominium association, or six (6) owners, whichever is greater, may petition the Ombudsman to appoint an election monitor to attend the annual meeting of the unit owners and to conduct the election of directors.

TIDBITS cont.

- Thank you to every board member and community association resident who took the time to get involved, send an e-mail, write a letter or make a phone call and make a difference! Your involvement made a real difference in the type of legislation that was ultimately adopted.

6. Amends s. 718.503 (2), F.S., to reinstate the requirement for a condominium unit owner to transmit the Frequently Asked Question and Answer Sheet at the time his or her unit is sold.

7. **Creates subsection (13) of s. 718.110, F.S., to provide that any amendments restricting a unit owner's rental rights shall apply only to owners who take title after the effective date of the amendment and to current owners who consented to the amendment.**

ALL OF THE PROVISIONS OUTLINED ABOVE SHALL TAKE EFFECT OCTOBER 1, 2004.

SB 1728 – Chapter 2004-80, Laws of Florida; Effective Date: July 1, 2004.

This legislation was sponsored by Senator Fasano and will allow high-rise buildings that qualify as "Housing for Older Persons" communities to opt out of guardrails and handrails and contains language identical to the sprinkler opt-out.

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Summary cont.

HB 129 – Chapter 2004-12, Laws of Florida; Effective Date: April 6, 2004. This legislation requires elevators in certain newly constructed or substantially renovated buildings to be keyed alike within each of the state emergency response regions.

HB 1899 – Chapter 2004-342, Laws of Florida; Effective Date: July 1, 2004.

In 2003, the Florida Legislature created Chapter 558, F.S., Florida's Construction Defects Law, which requires pre-litigation notice and an opportunity to cure before a residential property owner can bring a lawsuit for construction defects against a contractor. House Bill 1899 makes several changes to Chapter 558, F.S., which are discussed in detail in a separate article in this issue of the *Community Up-Date.* (See Page 10)

COOPERATIVE LEGISLATION

The only portions of SB 1184 and SB 2984 that will affect cooperative associations are the sections that amend s. 719.1055, F.S. to allow the use of a limited proxy when taking the vote to opt out of high-rise sprinkler systems and the section that amends s. 768.1325 (3) and (4) to provide immunity for the use of a cardiac defibrillator on the common areas.

Cooperative associations are also impacted by the construction defect bill (HB 1899).

TIMESHARE LEGISLATION

SB 1208 – Chapter 2004-279, Laws of Florida; Effective Date: June 10, 2004.

This legislation adds provisions to the Florida Timeshare Act to permit the timesharing of personal property including ships, vessels, houseboats and recreational vehicles.

Timeshare communities are also impacted by the construction defect bill (HB 1899).

MOBILE HOME LEGISLATION

HB 325 – Chapter 2004-13, Laws of Florida; Effective Date: April 6, 2004.

This legislation was sponsored by Rep. Fiorentino and makes a technical change to clarify that payments by the park owner, when the use of the mobile home park is changed, are to be made to the Mobile Home Relocation Corporation.

Mobile home communities are also impacted by the construction defect bill (HB 1899).

The 2004 Legislative Session was extremely active. A great deal of community association legislation was proposed, adopted and defeated. Thanks to the efforts of our client associations, CALL was very successful in its first year. Your participation through letters, e-mails and phone calls to your legislators made the difference in keeping this session from having a negative impact on all the community associations throughout the state.

URGENT ALERT!!!

IF YOUR COMMUNITY IS CONSIDERING AMENDMENTS REGARDING UNIT RENTALS, YOU SHOULD ATTEMPT TO ADOPT THOSE AMENDMENTS BEFORE OCTOBER 1, 2004. AFTER OCTOBER 1, 2004, ANY NEW AMENDMENTS REGARDING RENTAL RIGHTS ONLY APPLY TO PURCHASERS WHO TAKE TITLE AFTER THE EFFECTIVE DATE OF THE AMENDMENT OR TO THOSE EXISTING UNIT OWNERS WHO CONSENTED TO THE AMENDMENT

FOR MORE INFORMATION LOG ON TO: www.callbp.com

2004 AMENDMENTS
Affecting Homeowners' Associations

By Joseph E. Adams, Esq.

In 2003, Governor Bush asked the Department of Business and Professional Regulation Secretary, Dianne Carr, to appoint a task force with the following mission statement:

> The Homeowners' Association Task Force, a cross-section of representatives involved with homeowners' associations, was created at the Governor's request to harmonize and improve relations between homeowners, homeowners' associations and other related entities. The members will provide input and make recommendations for legislative change consistent with his vision for government and regulation.

Secretary Carr appointed a 15 member task force which held six meetings throughout the State of Florida in the latter part of 2003 through January of 2004.

Only some of the Task Force's recommendations were ultimately implemented, while others were rejected. The myriad of changes to Chapter 720 that were adopted during the 2004 Legislative Session were contained in two community association bills – SB 1184 and SB 2984 [Chapters 2004-345 and 2004-353, Laws of Florida, respectively.]. The following amendments to Chapter 720 can be found in both of these bills.

Petition Rights, F.S. 720.301(2)(b), F.S. 720.301(d): This reform in the law is intended to provide members of homeowners' associations (HOA) with the right to be heard on issues of concern. The law provides that if twenty percent of the total voting interests (there is usually one voting interest per lot or parcel) petition the board to address an item of business, the board must take the item up at a meeting of the board. The board is not obligated to act favorably on the item, only consider it. For example, if twenty percent of the members want the board to consider hiring a management company, a decision typically within the prerogative of the board's discretion, the board would be obligated to call a meeting to at least debate the topic. The board is obligated to consider properly presented petitions either at its next regular board meeting, or at a special board meeting, but no later than sixty days after receipt of the petition. The law further requires the board to give all parcel owners notice of the meeting, by mail or delivery, fourteen days in advance. The notice must also be posted in the manner prescribed by law. Each member of the association is granted the right to speak for at least three minutes on any matter placed on the agenda by this petition process. As noted above, the Task Force recommended that parcel owners be permitted to speak to any agenda item (whether placed on the agenda by petition or not), but the law as adopted limits a parcel owner's right to address the board to items brought to the board by the petition process. This is in contrast to the condominium law, where unit owners are entitled to speak at any board meeting with respect to any designated agenda item. The new HOA law also provides that the board may require those desiring to speak to sign a sign-up sheet prior to the meeting.

Notice of Board Intention to Adopt Special Assessments or Enact Rules Regarding Parcel Use, F.S. 720.303(2)(c)2: The new law requires fourteen days notice be given to all parcel owners before the board considers the adoption of a special assessment, or rules regarding parcel use (parcels are the individually-owned property, such as lots). Of course, the authority for these actions must be granted in the governing documents, and the new law is procedural in nature. This procedure does not apply to the adoption of rules regarding use of common areas. The notice which must be given to each parcel owner is a fourteen day, mailed, delivered, or electronically transmitted notice to members, which must also be posted conspicuously on the property by posting or closed circuit cable television fourteen days in advance. The right to use electronic transmission of notice to members and closed-circuit cable television in connection with association notices is based upon 2003 amendments to the Florida laws, which should also be reviewed in connection with use of those procedures.

Official Records, F.S. 720.303(4) and (5): Under prior law, "official records" in homeowners' associations were limited to those records specifically mentioned in the statute. Similar to the condominium law, the HOA statute now states that all written records of the association not specifically exempted are part of the official records. Therefore, items such as correspondence from a parcel owner to the board, not considered an "official record" under prior law, would now be considered an official record. The law exempts certain potentially sensitive documents from the definition of "official records," including: attorney-client and work-product privileged documents; information obtained by the association in connection with the approval of unit leases or transfers; disciplinary, health, insurance, and personnel records of association employees; and medical records of parcel owners or community residents. The law also requires that the association make photocopies for members who inspect the records if the association has a photocopy

cont. on page 5

Amendments cont.

machine available, and if the member's request is less than twenty-five pages. The association may charge up to fifty cents per page. For more voluminous requests, the association is entitled to send the project out for copying, and the owner is required to reimburse actual copying costs. The law permits the board to adopt reasonable written rules governing records inspection, provided that an association cannot limit a parcel owner's rights to inspect records to less than one eight hour business day per month.

Year-End Financial Reporting Requirements, F.S. 720.303(7): The changes to the HOA law are very similar to the existing requirements for condominium associations. Homeowners associations will now be required to provide year-end financial reports in accordance with generally accepted accounting principles. The level of report is based upon the association's annual receipts. Associations with revenues of less than $100,000.00 may prepare a cash report of receipts and expenditures. Associations with annual revenues between $100,000.00 and $200,000.00 shall prepare compiled statements. Those with revenues between $200,000.00 and $400,000.00 require a review. Associations with annual revenues in excess of $400,000.00 must prepare an annual audit.

Associations of fewer than fifty parcels, regardless of the annual level of revenue, may prepare an annual report of cash receipts and expenditures in lieu of the more thorough financial statements, unless the governing documents provide otherwise.

As with condominiums, if approved by a majority of the voting interests present at a properly called meeting of the association, the association may waive the financial reporting requirements required by the law to any lower level of report, provided that a report of cash receipts and expenditures is required under any circumstances.

On the flip side, twenty percent of the parcel owners may petition the board to obtain a level of financial reporting higher than that required by the law. If the higher level report is approved by a majority of the total voting interests, the association has ninety days to prepare the expanded report. The board is also authorized to amend the budget or adopt a special assessment to pay for the costs affiliated with the more expansive financial report.

Limitation on Expenditures During Developer Control, F.S. 720.303(8)(c): The law has been changed to state that association funds may not be used by a developer to defend legal proceedings filed against the developer, or directors appointed to the board by the developer, even when the subject of action or proceedings concerns the operation of a developer-controlled association.

Recall, F.S. 720.303(10): The new regulations for recall (removal) of directors in homeowners' associations largely mirrors the provisions found in the Condominium Act. The law clarifies that HOA directors may be removed, with or without cause, by a majority of the entire voting interests. Unlike the condominium counterpart, which provides equal deference to both procedures, the HOA law seems to favor recalls by written agreement over the petition/meeting process. However, the HOA law does permit the use of petition by ten percent of the members for the call of a recall meeting, however, authority for this procedure must be contained in the governing documents. Recall by written agreement is permitted regardless of enabling authority in the governing documents. Like the condominium law, there is a requirement that when more than one director is being subject to recall, separate votes be taken for each. There is also a procedure for service of recall agreement on the board by certified mail or formal service of process. As in condominiums, the board has five full business days after receipt of recall papers to call a board meeting to certify or de-certify the recall. Recall contests are handled through arbitration proceedings. Unlike the condominium statute (although now subject of a proposed rule for condos), written recall agreements or ballots used in one recall effort may be re-used in a second recall effort, if the first recall effort is stricken for any reason. However, in no event is a written agreement or ballot for recall valid for more than 120 days after it has been signed by the member. Consistent with condominium regulations, rescission or revocation of a written recall ballot or agreement must be in writing and must be delivered to the association before the association is served with recall papers. When more than a majority of the board is being subjected to recall, the recall agreement or ballot must list at least as many possible replacement candidates as there are directors subject to recall. If less than a majority of the board is recalled, the remaining directors can fill vacancies created by the recall.

Flags, F.S. 720.104(2): The right to fly the American flag in HOA-operated communities has been expanded to mirror the condominium statute which permits the flying of various armed services flags on certain enumerated holidays. The new HOA law also permits a homeowner to display one portable, removable official flag of the State of Florida, a right not conferred by the condominium law.

Securing HOA Fines by Liens, F.S. 720.305(2): The statute has been changed to specifically state that a fine may not become a lien against a parcel, which is the law for condominiums, but which has not been the law for HOAs (where appellate court cases have recognized the right to secure fines by liens if authorized by the governing documents). It is debatable whether the new statute can be

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Amendments cont.

retroactively applied to existing associations whose governing documents permit the securing of fines by liens, based upon constitutional considerations. The new law also provides that in any action to recover a fine, the prevailing party is entitled to collect its reasonable attorney's fees and costs from the non-prevailing party, as determined by the court.

Competitive Bidding, F.S. 720.305(5): This change is also very similar to the law for condominiums. However, the threshold where competitive bidding is triggered is ten percent of the association's total annual budget (including reserves), as compared to the five percent threshold in condominiums. The bidding requirements apply to any contract that cannot be performed within one year for the purchase, lease, or renting of materials or equipment to be used by an association and all contracts for services. These contracts must also be in writing. Like condominiums, the association is not required to accept the lowest bid. Further, contracts with employees of the association, attorneys, accountants, architects, community association managers, engineers, and landscape architects are not subject to competitive bidding. Certain existing contracts are also exempt from bidding, as are contracts procured on an emergency basis or from a sole supplier of the goods or services involved.

Notice of Membership Meetings, F.S. 720.306(5): The bylaws of the homeowners' association shall provide, and if they do not so provide, are deemed to provide certain requirements regarding notice of membership meetings. An association must give all parcel owners actual notice of all membership meetings, which shall be mailed, delivered, or electronically transmitted to members not less than fourteen days prior to the meeting. This notice must also be posted or broadcast on closed circuit cable television fourteen days in advance. When electronic transmission is used as an alternative for mail or delivery of notice, or where broadcast television is used as an alternative for physical posting, the authority for these alternatives should be contained in the bylaws. The new law applies not only to annual meetings of the homeowner's association, but special meetings as well. Proof of compliance is required to be given through affidavit.

Right of Members to Speak at HOA Meetings, F.S. 720.306(6): As distinguished from meetings of the homeowner's association board, where the right to speak is limited to "petition" meetings, parcel owners are given an unfettered right to speak at all membership meetings with reference to all items "open for discussion or included on the agenda." The reference to items "open for discussion" appears to be a bit broad, and it is not clear whether a parcel owner has an individual right to "open an item for discussion." The board may adopt rules regulating member statements, provided that each parcel owner has the right to speak for at least three minutes "on any item." However, the member must submit a written request to speak prior to the meeting, and the association may adopt additional rules regulating owner statements at membership meetings.

Mandatory Binding Arbitration of Election Recall Disputes, F.S. 720.306(9): The Division of Florida Land Sales, Condominiums, and Mobile Homes ("Division") has been empowered to intervene in certain controversies within homeowners' associations, including election and recall disputes. The new law requires all disputes involving election challenges or recalls to be submitted to binding arbitration with the Division.

"SLAPP" Suits, F.S. 720.304(4): This change to the law, which is likely to have little effect on the operation of homeowners' associations in the real-world, prohibits so-called "SLAPP" suits, which is an acronym for Strategic Loss Against Public Participation. The new law would prohibit a homeowner's association from suing a parcel owner solely because the parcel owner sought redress of his grievances before a governmental agency. The law provides various penalties, including triple damages.

Alternative Dispute Resolution, F.S. 720.311(1): Typical disputes between homeowners' associations and parcel owners must now be submitted to mediation prior to the dispute being filed in court. Included within the definition of controversies requiring pre-suit mediation are:

- Disputes between an association and a parcel owner regarding use or changes to the parcel or common areas;
- Disputes regarding amendments to association documents;
- Disputes regarding meetings of the board and committees appointed by the board;
- Disputes regarding membership meetings, not including election meetings; and
- Disputes regarding access to official records.

The law also requires "other covenant enforcement disputes" to be submitted to pre-suit mediation, which would presumably address typical controversies in associations such as pets, vehicle parking, and similar matters. Some have speculated whether the reference to "covenant enforcement" is so broad as to encompass assessment collection disputes, although this was not the focus of any Task Force debate, and presumably not the intent of the Legislature. The cost of mediation is to be shared equally by the parties. Mediators may either be employed by the Division or be private mediators. Mediation conferences attended by a quorum of the board are not "meetings" of the board and are not subject to the "sunshine" requirements of the law. If mediation is not successful in resolving all the disputes, the parties are free to file suit in a court of competent jurisdiction or avail themselves of either binding or non-binding arbitration with the Division. Unless the parties mutually agree to Division arbitration, unsuccessful mediations must be resolved in court. The Division is obligated to develop a certification and training program for private mediators and private

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Amendments cont.

arbitrators. The Division may only certify those mediators previously certified by the Florida Supreme Court. Pre-suit mediation is also available for non-mandatory associations with the right to enforce restrictive covenants, although mediation for non-mandatory associations is optional.

Remedies for False and Misleading Information by a Developer, F.S. 720.602: The law now provides remedies to purchasers in HOA communities similar to those granted to condominium purchasers who are the victims of false or misleading statements or information published by, or under the authority of, a developer. If false or misleading information is published in promotional materials, including but not limited to contracts, governing documents, brochures or newspaper advertising, a purchaser may rescind his contract or collect damages prior to closing. After closing, the purchaser has the right to collect damages for a period of one year after the later of several triggering events, the most common of which will be the closing date. Like its condominium counterpart, this law entitles the prevailing party to recover his attorney's fees from the non-prevailing party.

Jurisdiction of County Courts, F.S. 34.01(1)(d): Although not an amendment to Chapter 720, this change addresses the jurisdiction of the county and circuit courts. The new law provides a county court with jurisdiction in homeowners' disputes, which is concurrent with the jurisdiction of the circuit court. This would permit a plaintiff in the typical HOA dispute to choose county court as the desired forum for resolution, even when only injunctive relief is being sought.

Finally, several amendments to Chapter 720 were the product of efforts of parties other than the Task Force. These amendments include the following:

Definition of "Member" in Homeowners' Associations, F.S. 720.301(10): The new law adds any person or entity obligated to pay an assessment or amenity fee as a "member" of a homeowners' association. It is reported that the intention of the change is to confer membership status in homeowners' associations on people (or associations) who are obligated by covenant to pay a homeowners' association for services, but are not members of the association due to charter restrictions or the jurisdictional boundaries of the homeowner's association.

Limitations on Enforcement of Amendments to Governing Documents for Associations of Fifteen or Fewer Units, F.S. 720.103(1): This clause provides that an association of fifteen or fewer parcel owners may enforce only the requirements of the original "deed restrictions" established prior to the purchase of each parcel. The intent of the law appears to limit an HOA consisting of 15 or fewer parcels from enforcing amendments to a declaration of covenants as to those who purchased prior to the amendment. Setting aside the absence of demonstrable public policy for this change, the law also appears to suffer significant constitutional infirmities as both a retroactive impairment of contract rights (for associations whose governing documents permit enforcement of future amendments) as well as the creation of a legislative rule of standing in contravention of the authority of the Florida Supreme Court.

Ramps for the Disabled, F.S. 720.304(5)(a): The statute applicable to homeowners' associations now provides that any parcel owner may construct an "access ramp" if a resident or occupant of the parcel has a medical necessity or disability that requires a ramp for ingress and egress. The law does not state whether the right to construct the ramp is limited to the parcel, or extends to common areas, certainly a drafting flaw. The law requires that the ramp be "unobtrusive as possible" and that it also "blend in aesthetically as practicable." It must also be "reasonably sized to fit the intended use." While the law appears to confer an absolute right to build a ramp, there is a procedure requiring submission of plans to the association before construction. Although the association apparently cannot deny approval, it can make "reasonable requests to modify the design to achieve architectural consistency with surrounding structures." It is unclear how this law will interact with state and federal fair housing laws which generally permit reasonable modifications of premises for the benefit of disabled individuals. Prior to construction of a ramp, the owner must submit a physician's affidavit.

Security Signs, F.S. 720.304(6): Any parcel owner may now display a sign of "reasonable size" provided by a contractor for security services, within ten feet of any entrance to the home.

Pre-sale Disclosure, F.S. 720.601: This change in the law basically removes the existing pre-sale disclosure law from Section 689.26, Florida Statutes, and places it in Chapter 720, implying that the disclosure law does not apply in non-mandatory association settings, even if deed restrictions apply. The remaining changes to current law are largely grammatical. There is a new provision which states that if the required disclosure summary is not provided to a prospective purchaser "before" the purchaser executes a contract, there is a right of rescission for up to three days after receiving the disclosure summary. As a practical matter, if the prospective purchaser signs the disclosure summary minutes or even seconds before signing the purchase contract, there will be no right of rescission.

Marketable Record Title Act, Revival of Covenants, F.S. 720.401-405: Although presented as an amendment to Chapter 720, this change deals with revival of restrictive covenants extinguished by the Marketable Records Title Act (MRTA). (For more on MRTA, see Page 8)

This article is summary in nature, constitutes the author's interpretation on certain points, and should not be substituted for thorough review and familiarization with the new laws.

MRTA – A Good Idea Run Afoul – REINSTATING EXTINGUISHED COVENANTS

By: Gary A. Poliakoff, J.D.

The Marketable Record Title Act (MRTA) seemed like a good idea when it was enacted by the Florida Legislature in 1963. The intent was to simplify title searches by extinguishing ancient defects and stale claims against title to real property. No longer would a title examination have to search title back to the Spanish land grants. Any person having legal capacity to own land in the State, who, alone, or together with his predecessor in title has been vested with any estate in land of record for 30 years or more, shall have a marketable record title to such estate and land, which shall be free and clear of all claims except the matters setting forth its marketability in s. 712.03, Florida Statutes.

Therein is the rub. Among those items which were extinguished of record, as a matter of law [no doubt an unintentional consequence of MRTA], were the covenants, conditions and restrictions [CC&R's] of many planned developments where CC&R's were recorded over 30 years ago and the deeds conveying the individual lots did not expressly reference the CC&R's. Suddenly, large planned developments, such as the Woodlands in Tamarac, Florida, found themselves without the legal authority to enforce their covenants, hire managers, provide lawn maintenance, security, etc. and/or levy assessments to maintain, operate or insure the common areas.

Once the problem was exposed, steps were taken through legislative initiatives in 2002 and 2003 to provide mechanisms to allow planned developments to extend the term of expiring CC&R's, prior to their being extinguished. This was a relatively simple process which requires filing, for the record, a notice of intent to extend the CC&R's for an additional 30 year period after first obtaining approval of not less than two-thirds (2/3rds) of the board.

Unfortunately, the right to extend expiring, but yet unexpired, CC&R's could not save those CC&R's which had already been extinguished by operation of MRTA. That is, until the CALL (Community Association Legislative Lobby) initiative enlisted the aid of Senator Skip Campbell to introduce an amendment during the 2004 Legislative Session, which eventually became law. The Campbell Amendment [Section 720.401, Florida Statutes, Preservation of Residential Communities; revival of declaration of covenants], which was placed in Senate Bills 1184 and 2984 (Chapters 2004-345 and 2004-353, Laws of Florida, respectively; Effective Date: October 1, 2004), establishes the parameters and procedures for revising extinguished CC&R's. The preservation of extinguished CC&R's is a two-part process. First, it requires the approval of the parcel owners of the planned development whose covenants were extinguished. Second, it requires the approval of the State of Florida Department of Community Affairs.

In order for a residential community to be eligible to revive extinguished covenants, all of the following requirements must be met:

1. **All** parcels to be governed by the revived declaration must have once been governed by a previous declaration that has ceased to govern some or all of the parcels in the community.

2. The revived declaration must be approved, in writing, by a majority of the affected parcel owners, at a meeting of the affected parcel owners, conducted in accordance with the provisions of the Homeowners Association Act.

3. The revived declaration **may not** contain covenants that are more restrictive on the parcel owners than the covenants contained in

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MRTA cont.

the previous declaration, with the following exceptions:

(a) The declaration may have an effective term of longer duration than the term of the previous declaration.

(b) The declaration may omit restrictions contained in the previous declaration.

(c) The declaration may govern fewer than all of the parcels governed by the previous declaration.

(d) The declaration may provide for amendments to the declaration and other governing documents.

(e) The declaration may contain other provisions as may be required by law.

The process for reviving extinguished covenants begins with an "Organizing Committee" consisting of not less than three (3) parcel owners from the affected community. The names, addresses and telephone numbers of the members of the Organizing Committee must be contained in all notices. The Organizing Committee prepares, or causes to be prepared, the **complete text** of the proposed, revived declaration of covenants. The proposed, revived documents must **identify** each parcel that is to be subject to the governing documents by its legal description, and the names of the parcel owners, as same appear on the tax assessment roll. In addition, the Organizing Committee must prepare the full text of the proposed articles and bylaws of the revived homeowners' association. In the alternative, the Organizing Committee can elect to utilize an existing homeowners' association, in which event, the existing articles and bylaws shall be produced.

4. The voting interest of each parcel **shall be the same** as the voting interest under the previous governing documents.

5. The proportional assessment obligations of each parcel shall be the same as the proportional assessment obligation under the previous governing documents.

6. The amendment provisions for the revived declaration shall be the same as the previous governing documents, unless the previous documents did not contain an amendment provision. In which case, the revived documents must provide for an amendment provision that requires the approval of not less than two-thirds 2/3rds of the affected parcel owners.

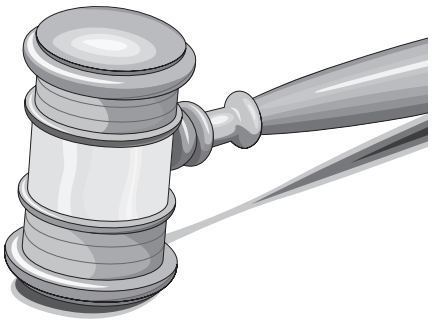
7. The covenants within the revived declaration **cannot** be more restrictive on the affected parcel owners than the original covenants, other than as permitted by law.

A copy of the complete text of the proposed, revived declaration of covenants, along with the proposed new or existing articles and bylaws of the homeowners' association, and a graphic depiction of the property to be governed by the revived declaration, shall be presented to all of the affected parcel owners by mail or hand delivery not less than fourteen (14) days prior to the meeting at which the members will vote to approve the revived declaration, articles and bylaws. As previously advised, the vote to approve the revived declaration is a majority of the affected parcel owners.

No later than sixty (60) days after the parcel owners approve reinstatement of the CC&R's, the Organizing Committee, or its designee, **must** submit the proposed, revived governing documents and supporting materials to the Department of Community Affairs (DCA) for review and determination of whether to approve or disapprove the proposal to preserve the residential community. From date of receipt of the documents, the DCA then has sixty (60) days to decide whether to approve or disapprove the submission.

No later than thirty (30) days after DCA approval, the approved, revived declaration shall be recorded in the county where the planned development is located. Immediately after recording the documents, a complete copy of all of the approved, recorded documents must be mailed or hand delivered to the owner of each affected parcel. The revived documents shall become effective upon recordation of same in the public records.

For those planned developments whose covenants were extinguished by MRTA, a debt of gratitude is owed to Senator Skip Campbell for his efforts in this matter. Please contact your association attorney should you have any questions regarding the extension of existing covenants approaching the thirty (30) year point of extinction, or for reviving previously extinguished covenants.



MORE CHAOS IN THE COURTS: Recent Amendments to Florida's Construction Defect Statute

By: Steven B. Lesser, Esq.

The Florida Construction Defect Statute, Section 558.001 et seq., Florida Statutes, enacted in May 2003, requires owners of single family homes, multi-family and other residential buildings to provide notice and an opportunity for contractors and others to offer money, fix the defect or dispute the claim before allowing litigation to proceed.

Statutory amendments contained in HB 1899 (Chapter 2004-342, Laws of Florida) were adopted and will become effective July 1, 2004. These amendments rectified many shortcomings associated with the original statute but some new provisions will likely generate controversy. These provisions require parties to exchange expert reports and other discoverable evidence, allow a contractor to inspect all affected units in multi-family buildings and permit destructive testing. Failure to comply with these pre-suit requirements may limit a homeowner's damages or result in court imposed sanctions in the event of subsequent litigation. Additionally, the statutory time period for filing litigation, conducting inspections, offering to perform work, pay money or dispute the claim have been extended. The applicable timeframes for compliance differ depending upon whether the residential building exceeds 20 units. For purposes of brevity, this article will discuss the new controversial amendments, focusing exclusively on an association representing in excess of 20 residential parcels. At the outset, an overview of the amended statutory procedure will be discussed.

Overview Of The New Statute and Amendments

The aggrieved homeowner must provide the contractor and other responsible parties with 120-day advance, written notification of the alleged defects, describing them in "reasonable detail." Within 50 days after being served with notice of a claim, the contractor has the right to inspect the dwelling and all affected units. Within 30 days of receiving notice of the claim, the contractor must forward a copy of it to any other person whom the contractor believes is responsible for the defect. These secondary recipients (such as, subcontractors, material suppliers, manufacturers) may also inspect the dwelling within the same time period provided to the contractor.

Within 75 days of receiving the notice, the contractor must give a written response to the homeowner. This response must provide either: (a) a written offer to repair the alleged defect at no cost to the claimant; (b) a written offer to compromise the claim by monetary payment, or (c) a written statement that the contractor disputes the claim. The response may include a combination of the alternatives set forth above when multiple defects have been alleged to exist.

If the contractor offers to pay for or repair the defect, the homeowner has 45 days to accept or reject the offer. If the homeowner accepts the offer, and repair or payment is made, he or she is thereafter barred from pursuing relief through litigation. Regardless if the homeowner accepts or rejects the offer, it must be done by written notice. To the extent homeowners fail to comply with these specific requirements, they are barred from litigating the dispute, until they have successfully complied with the statute's pre-suit dispute resolution procedures.

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Chaos cont.

Previously, a homeowner's failure to reject an offer and serve it upon the contractor within 45 days of receipt resulted in an **automatic acceptance** of the offer. This new procedure, requiring a written acceptance or rejection, represents a significant improvement over the prior statute dealing with acceptance of an offer.

New Requirements For The Mutual Exchange of Discoverable Evidence

The initial requirement that homeowners identify the alleged defects in "reasonable detail" still remains a Pandora's box that inevitably will lead to controversy.

This portion of the statute essentially remains unchanged from the prior version with the exception of a more burdensome requirement placed upon the homeowner and contractor. Now, the homeowner must also provide to the contractor, upon request, all discoverable evidence it may have, including expert reports. Discoverable evidence is generally defined as material that is not privileged and would exclude attorney-client communication and material prepared in anticipation of litigation.

These new requirements will prompt homeowners to hire legal counsel to assemble those materials to be provided to the requesting party. This evaluation is critical since the failure to turn over these materials could result in a court sanctioning the homeowner in subsequent litigation. In light of these disclosure requirements, counsel will likely hire experts directly, in order to control the content of expert reports and protect these materials from disclosure based upon the work product privilege. Although this provision appears to be heavily stacked against the homeowner, contractors also have the same duty to provide discoverable materials or be subject to court imposed sanctions.

Consequently, upon serving a notice of claim, the homeowner may request a contractor to furnish expert reports, plans, shop drawings, contracts, photographs, videotapes and correspondence generated during the original construction of the project. Never before could these documents be acquired except by subpoena issued after filing a lawsuit. This documentation could prove invaluable to engineers initially retained by a homeowner to identify problematic areas that are not readily observed without destructive testing.

Because most documentation generated during the design and construction of a construction project is not privileged, the contractor could be required to produce voluminous documentation even before a lawsuit is filed. Complying with this request could be expensive, burdensome and fraught with confusion as to enforcement of this requirement. This is particularly the case since the statute fails to specify when these documents must be produced or who is responsible to pay for the cost of reproduction.

The Right To Inspect And Perform Destructive Testing

A contractor receiving a notice of claim may inspect the dwelling and "reasonably coordinate the timing and manner of all inspections with the claimant to minimize the number of inspections." In a community association setting, coordination becomes significant because the statute now permits a contractor to gain access to **each unit** to inspect the defective condition. Hardship in providing access to unit interiors throughout a multi-family residential building may be difficult and the consequences ultimately fatal to an association's claim. To the extent the matter proceeds to trial, a court may bar the association's right to recover damages for defects found in units that were not subject to inspection. As a precautionary measure, an association should initiate early steps to advise unit owners that these inspections are necessary to prosecute a claim for defective construction. Toward this end, an inspection schedule should be generated to demonstrate efforts to reasonably coordinate with the contractor to avoid later arguments that these units were not available for inspection. Experts retained by the association should photograph and videotape defects located in interior units so, ultimately, alternative proof can be offered for a court to consider in the event that unit owner access is not available.

Destructive testing is still by "mutual agreement" but an amendment now requires that the person performing the test offer "financial responsibility" to cover the cost of repairing the tested areas. Moreover, the person selected to perform the destructive testing must be identified in advance with an opportunity for the homeowner to object. Under these circumstances, the party requesting the testing must then offer a list of three additional candidates to perform the testing. The homeowner or its representative may be present during the testing which must be conducted at a mutually convenient time.

Overall, this provision has a greater impact upon the homeowner because there is no assurance that the testing will be properly performed to minimize damages. The requirement of "financial responsibility" is vague, ambiguous and fails to specify what type of information or security must be provided. For this reason alone, homeowners should refuse destructive testing unless the contractor agrees to restore the tested

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Chaos cont.

areas to their original condition, post a bond, and maintain liability insurance to guard against theft or damage during the testing process. Moreover, the homeowner should request that its property be kept free and clear of any liens or encumbrances should the testing party not be paid by the contractor that ordered it.

Most importantly, the amended statute fails to provide any meaningful remedy to a homeowner damaged by the destructive testing other than to initiate legal action to recover damages against the responsible parties. To make matters worse, the only requirement to guard the homeowner from potential damage is a provision which states that "…. destructive testing shall not render the dwelling uninhabitable." This ludicrous provision means that a contractor can leave a large gaping hole in the living room ceiling and, as long as the homeowner can live in the dwelling, the destructive testing is deemed appropriate. Should the defect become worse after the request for destructive testing is denied, the statute provides that the claimant shall have no claim for damages "which could have been avoided or mitigated had destructive testing been allowed when requested and had a feasible remedy been promptly implemented." As with other portions of the statute, this provision is equally ambiguous and likely to generate litigation over its meaning. How would a party ascertain if a condition became progressively worse, if testing is not conducted and a benchmark has not been established? From a homeowner's standpoint, if destructive testing is requested, it may be advisable for a homeowner to acquire input from its own technical representative as to whether destructive testing is needed in light of the alleged defect. Alternatively, the homeowner may elect to perform its own testing to accurately assess the defective condition and gain assurance that the testing will be properly performed. This information could later be used during litigation to justify why the homeowner objected to destructive testing proposed by a contractor and to avoid a court placing limitations on a claim at trial. Contractors will likely request an opportunity to perform destructive testing in every instance to preserve a potential defense in subsequent litigation, if a homeowner objects to it.

Notice Issues

All design, construction and remedial work contracts entered into on or after July 1, 2004 must contain a conspicuous notice outlining the statutory procedure. Once the notice is served, the parties, by written mutual agreement, may waive or alter the statutory procedure. Notwithstanding these notice procedures, any action **commenced** after July 1, 2004, regardless of the date the cause of action accrued, requires compliance with the newly amended statute. This is the case even if the conspicuous notice language was omitted from the contract that gave rise to the claim for defective construction.

Remaining Problematic Issues

The statute remains dangerously silent at the juncture where the contractor's offer is accepted by the homeowner and the contractor later decides not to honor the deal. Unbelievably, the statute does not create a private right of action for these violations, nor penalize the contractor, in any meaningful way, for walking away from such a commitment. The statute further fails to prescribe any outside time limitations for completing the offered repairs. This loophole permits the contractor to specify ***any*** time period to complete the repair, conceivably forever, without any recourse to the homeowner except for rejection.

As for a monetary offer by the contractor, there are no requirements that the offer be reasonable or tied to any "real world" cost estimates for repair. With respect to repairs performed by the contractor, the amendments fail to provide any warranty for remedial work performed. In the event the repairs do not last, the homeowner is out of luck and could be barred from pursuing relief for lousy remedial work performed.

Ironically, these recent amendments enacted to rectify shortcomings with the original statute will most likely generate a flood of disputes over the new terms and conditions. The ultimate result will be more chaos in the courts, as the judiciary will inevitably be tasked to sort it all out for the second year in a row. Construction defect legislation is one of the many areas the Community Association Legislative Lobby (CALL) will be seeking to revisit next year. As the 2004 Legislative Session ended, there was already talk of a new "glitch bill" to be proposed next year. Hopefully, they will get it right in 2005.

THE INFORMATION SET FORTH IN THIS BULLETIN IS GENERAL AND SUMMARY IN NATURE AND IS NOT INTENDED AS SPECIFIC LEGAL ADVICE APPLICABLE TO YOUR ASSOCIATION. IF YOU HAVE QUESTIONS REGARDING THE CONTENTS OF THIS RELEASE AS IT APPLIES TO YOUR SITUATION, PLEASE CONTACT THE ASSOCIATION ATTORNEY RESPONSIBLE FOR YOUR FILE. IN ADDITION, WE WISH TO REAFFIRM THE FACT THAT THE PRINCIPLES OF LAW CITED HEREIN ARE SUBJECT TO CHANGE FROM TIME TO TIME.

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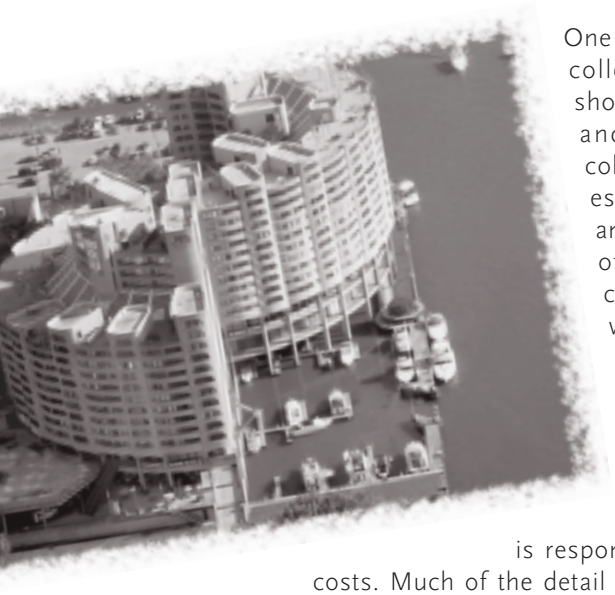
Vol.104 MAY 2004 CURRENT NEWS FOR COMMUNITY ASSOCIATIONS

Show Me The MONEY!

By Raymond F. Newman, Esq.

Assessments are the "lifeblood" of every association. Assessments provide the funds for the operation of the association and its amenities. It is not enough to develop and approve an annual budget funded by assessments, which provide for all the needs of the association. The assessments levied must be consistently collected when due. Otherwise, the association will suffer cash flow problems with the attendant inability to pay its bills in a timely manner.



One of the most important elements of collecting assessments when due, or shortly thereafter, is the establishment and strict adherence to a written collection policy. This policy must be established by the board of directors and copies furnished to each member of the association. The policy should contain the due date for payments, what happens if the payments are late, how late payments are to be applied, kinds and timing of notices to owners and timing of referral of delinquent accounts to association legal counsel for further action. It should also state that the delinquent owner is responsible for payment of the collection costs. Much of the detail of this information will vary among associations in accordance with the dictates of the respective governing documents.

It is important to maintain a list of the correct names and current addresses for all owners. Effective collection cannot occur unless the notices are going to the correct person at the correct address. Having the correct name and address becomes even more important if lien recordation and foreclosure later become necessary. All owners are responsible for payment of assessments. Consequently, each must be named in a claim of lien and in any subsequent foreclosure action.

A sample plan of action for the collection of assessments based upon a written collection policy is set forth below. In this example, assessments are due on the first day of the month and delinquent after the tenth day of the month, if unpaid.

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TIDBITS
Did You Know

The official records of condominium and cooperative associations are subject to numerous regulations mandated by Sections 718.111(12) and 719.104(2), Florida Statutes, respectively.

- Official records must be maintained within the State.
- Official Records must be made available to a unit owner within 5 working days after receipt of a written request.
- Official records are open to inspection by any association member or the authorized representative of such member at all reasonable times.
- The right to inspect the records includes the right to make or obtain copies at a reasonable cost.
- Associations may adopt reasonable rules regarding the frequency, time, location, notice and manner of record inspections and copying.
- If an association fails to provide the records within 10 working days after receiving a written request for same, it

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Money cont.

Procedure for Assessment Collection

- *Mail notice of monthly installment not less than 10 days before the due date.*
- *Mail second notice of monthly installment with gentle reminder on the 11th day after the due date; add late fees, if any, to the assessment installment.*
- *Mail third notice of monthly installment on the 21st day after due date with notice that the account will be referred to the association attorney after the last day of the current month for further handling, including the recording of a Claim of Lien.*
- *On the 35th day after the due date, forward the delinquent account to the association attorney for preparation and recordation of a Claim of Lien.*
- *Record attorney-prepared Claim of Lien.*
- *Attorney letter to delinquent owner with copy of recorded Claim of Lien notifying that foreclosure of the lien will be instituted in not less than 30 days. This letter must contain the statements and warnings required by law. This letter must also set out the total amount due for assessments (and the respective due dates), late charges, interest, attorney's fees and expenses.*
- *Initiate lien foreclosure proceedings after the appropriate lapse of time.*

The above plan is for example only. There are circumstances which may slow or alter the process. For example, if the delinquent owner disputes the amount of the debt, written verification of the amount owed must be furnished to this owner before the process may proceed. Before adapting a plan for its association, the board must consult legal counsel to determine that any proposed collection policy not only conforms to existing law, but also conforms to the governing documents of the association.

A criticism of this plan may be that the serious collection efforts begin too soon (35 days) after the due date. The answer to this is that all owners know in advance the amount of the periodic assessments and the due date of each. There are no surprises. Consequently, owners should be prepared to pay the periodic amounts due on their respective due dates.

In order to obtain and maintain the desired results from a collection policy, the contents of the policy must be widely disseminated. Do not assume that all owners are familiar with it. It is obvious that each new owner should be furnished with a copy, but other owners need to be kept aware also. A copy of the collection policy may be included with the copy of the annual budget that is furnished to the owners or it may be published in the association's newsletter on an annual basis. Keeping the owners informed of what is expected of them in this area will cause most of them to pay in a timely manner.

TIDBITS cont.

creates a rebuttable presumption that it willfully failed to comply with this Statute.

- A unit owner who is denied access to the official records is entitled to the actual damages or minimum damages.
- Minimum damages for failure to provide the official records is $50 per calendar day up to 10 days, the calculation to begin on the eleventh day after the written request.
- Any person denied access who subsequently prevailed in an enforcement action is entitled to recover attorney's fees from the person controlling the records.
- The association shall maintain a sufficient number of copies of the declaration, or proprietary lease in the case of a cooperative, articles of incorporation, bylaws and rules, and all amendments thereto, as well as the question and answer sheet and year-end financial information on the association property to ensure their availability to unit owners and prospective purchasers and may charge its actual costs for preparing and furnishing these documents to anyone requesting them.

Finally, be consistent in application. Once adopted by the board, the collection policy is a directive to the association manager to carry out its provisions. The board should get regular reports of unpaid assessments and the status of collection efforts for each. It should insist upon close adherence to the requirements of the established collection policy. Effective collection of assessments will keep the "lifeblood" flowing.

ONE BIG HAPPY FAMILY:
The Woes and Realities of Merging Condominiums

By Carolyn Myers-Simmonds, Esq.

Very large communities often consist of several separate condominiums operated by multiple associations. This occurs because the developer created a separate association to operate each condominium, as it was completed. After operating in this fashion for several years, the unit owners and the associations realize that operating as separate entities creates an administrative nightmare with regard to preparing multiple budgets, maintaining separate records and incurring duplicate costs.

The community then makes a decision to merge the two associations, in order to enjoy savings in insurance and maintenance costs, and to encourage consistency in enforcing the rules and regulations. The question becomes: how do they go about merging and becoming "one big happy family?"

There are two ways to "merge" the condominiums. The first is called a "property merger;" the second is called a "corporate merger." In other words, the condominium properties may be merged, or in the case of multiple associations, the corporate entities may be merged.

In a "property merger," the two condominiums would be "merged" into a single condominium. In essence, merging the properties means terminating one or more condominiums, while simultaneously creating or enlarging another condominium. To accomplish this, Section 718.110(7), Florida Statutes, provides:

The declarations, bylaws, and common elements of two or more independent condominiums of a single complex may be merged to form a single condominium upon the approval of such voting interest of each condominium as is required by the declaration for modifying the appurtenances to the units or changing the proportion or percentages by which the owners of the parcel share the common expenses and own the common surplus; upon the approval of all record owners of liens, and upon the recording of new or amended articles of incorporation, declarations, and bylaws.

Based on Section 718.110(7), Florida Statutes, most property mergers require the approval of one hundred percent of all unit owners and all lien holders of record. However, obtaining the unanimous consent that is necessary is virtually impossible because, in most instances, at least one owner or lien holder may not agree. In some rare instances, property mergers are addressed in the declaration and require less than one hundred percent consent from the unit owners.

Another issue is that a property merger usually involves substantial or complete revision of the condominium documents. Further, a title insurance underwriter should also be contacted to determine whether a new survey would be necessary for a new legal description. It is also a good idea to have an abstract or title company prepare and certify a list of unit owners and lien holders as of the date the property merger documents are recorded. The list should be recorded as part of the merger as proof in the event the merger is challenged.

The second type of merger is called a "corporate merger." In this scenario, two or more separate corporations merge their identity into a single organization. The corporate merger results in a "multi-condominium association." Corporate mergers are governed by Section 617, Florida Statutes, (except when an association is a for-profit corporation, in which case Section 607, Florida Statutes, would control) and do not require unanimous consent of unit owners nor consent of mortgagees. The merger would become effective upon filing the

articles of merger with the Department of State and would require an affirmative vote of a majority of the unit owners (unless the governing documents provide differently).

The issues presented in a corporate merger are fewer than those in a "property merger," however, they can prove to be significant, if not handled carefully. For example, even if you have merged the multiple associations, if you have not also merged the underlying condominiums, then separate budgets and reserves would be required for each condominium. Further, a corporate merger may involve real property transactions if one or more of the merging associations own any interest in real property (This does not include the common elements, as the common elements are owned proportionately by the unit owners.). Other formalities, such as the legal documentation, are also involved. This includes a Plan of Merger, amendments to the governing documents, filing Articles of Merger with the Secretary of State, and filing certain certifications in the Public Records of the County where the condominium is located.

It may take a substantial investment of time and patience to merge your condominiums and/or your associations into a single condominium governed by a single association, but the resulting streamlined procedures may very well make it worthwhile for your community.

CASENOTES

The UNLICENSED PRACTICE of CONSTRUCTION

So your community association is having a nightmare with the contractor over some renovations, whether it be for balcony restoration work, re-roofing, or re-surfacing the pool deck. The work is behind schedule, there are numerous cost overruns, and the contractor has filed a lien on the property. The unit owners are on the warpath, and they want someone's head on a silver platter; they don't care whether it's the contractor's head or one of the board members' heads. One such association found themselves in such a predicament and was able to make lemonade out of lemons.

In R.A.M. of South Florida, Inc. v. WCI Communities, Inc., 29 Fla. L. Weekly D761 (Fla. 2d DCA, March 26, 2004), the community association had entered into a contract with the contractor for concrete and masonry work at the clubhouse facility. During the course of construction, a dispute arose regarding the quality and timeliness of the work. The association refused to pay certain sums and, in response, the contractor recorded a claim of lien and commenced a foreclosure action.

Some two years into the litigation, the association first became aware that the contractor was not licensed for the particular construction work at the time the work was performed, although the contractor had later become licensed for the work.

The association filed a motion with the court to determine the enforceability of the contract pursuant to Section 489.128, Florida Statutes, which reads:

> As a matter of public policy, contracts entered into on or after October 1, 1990, and performed in full or in part by any contractor who fails to obtain or maintain a license in accordance with this part [i.e., Part I, Chapter 489, F.S.] shall be unenforce-able in law or in equity.

Based upon the statute, the court dismissed the contractor's foreclosure action and declared the contract illegal. The contractor tried to argue that an earlier version of the statute permitted the opportunity to cure the unlicensed practice of construction by having the license reinstated or otherwise obtaining the valid license for the work performed. The court refused to apply the older statute, leaving the contractor without any remedy.

The statute is very harsh against contractors and strips them of nearly all ability to collect on a construction contract if the contractor was unlicensed at the time construction work commenced. Not clear, however, is whether an association can enter into a construction contract *knowing* that the contractor is unlicensed, and then upon completion, refuse to pay the bill. Also unclear in the statute is whether a subcontractor can maintain its claim of lien performed on the project if the general contractor is unlicensed? For additional clarification on contractor licensing requirements, please visit www.myflorida.com.

There is NO SUBSTITUTE

In *Torres v. Arnco Construction, Inc.*, 29 Fla.L.Weekly D579 (Fla. 5th DCA March 5, 2004), a contractor sued two defendant property owners, a mother and son, alleging breach of an agreement for the construction of a home in Florida. The mother was a resident of the State of Florida and the son a resident of the State of New York. The mother was served personally at her Florida residence. The contractor attempted to serve its summons and complaint upon the son at his residence in New York; however, after several unsuccessful attempts, the plaintiff sought to effectuate "substituted service," by serving the mother at her residence in Florida, on behalf of the son.

When the son failed to appear and defend the claim, the contractor sought and received a default judgment against him for the sum of $59,000. Upon learning that a default judgment had been entered against him, the son retained counsel and filed a motion to vacate the default judgment based on invalid service of process. The trial court denied the motion to vacate and the son appealed. The Fifth District Court of Appeal reversed the trial court, holding that plaintiffs attempted "substituted service" upon the son by serving the mother was invalid. The court stated:

> "The purpose of service of process is to advise the defendant that an action has been commenced and to warn the defendant that he or she must appear in a timely fashion to state such defenses as are available. Jurisdiction is perfected by the proper service of process. Indeed, a judgment entered without due service of process is void."

The court reasoned that rules authorizing substituted service of process are the exception to the general rule that requires individual defendants to be personally served. In order to effectuate "substituted service" under Florida law, a defendant must be served at their "usual place of abode" by leaving a copy of the pleading at the residence with an individual residing there who is age 15 years or older. Substituted service of process at a location other than the place where a defendant is living (even if a relative lives there), is not proper service. Because the record demonstrated that the son was a resident of the State of New York when plaintiff attempted to substitute serve its complaint upon the mother at the mother's residence, service was invalid and the default judgment vacated.

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Community Up-Date™

Vol.104 APRIL 2004 CURRENT NEWS FOR COMMUNITY ASSOCIATIONS

TO BORROW OR NOT TO BORROW? That is The Question

By Peter C. Mollengarden, Esq.

As buildings, facilities and amenities age, community associations are having to face large and very expensive repair, replacement or renovation projects more frequently. Such projects range from concrete balcony and/or catwalk restoration to redecorating thirty year old outdated lobbies and hallways. All too often an association will have little or no reserves to pay for such projects, leaving the board of directors to wrestle with the issue of how to raise the necessary funds to pay for them.

An association typically has three choices or alternatives to fund a project for which the budget or reserves are inadequate: (1) levy a special assessment, (2) amend the budget or (3) borrow the money. Each of these options needs to be analyzed by the board to determine which method best meets the needs, interests or requirements of the association.

There is a common misperception that the board of directors of a condominium, homeowners or cooperative association has the statutory right or authority to impose or levy special assessments. The truth is that the Florida Condominium and Cooperative Acts (Chapters 718 and 719, Florida Statutes, respectively) set forth the procedure a board must adhere to in adopting special assessments, but such Acts do not authorize or enable the board to levy special assessments. Chapter 720, Florida Statutes, governing homeowners' associations, does not address special assessments at all, other than providing that an assessment may not be levied at a board meeting unless the notice of the meeting includes a statement that assessments will be considered and the nature of the assessments. The governing documents for the association (declaration, articles of incorporation and/or bylaws for condominiums and homeowners' associations, and bylaws, articles of incorporation and/or proprietary lease or occupancy agreement for cooperatives) will typically address the authority to impose special assessments. If the documents provide the board with the authority to impose additional or special assessments to meet expenses not met by the budgeted annual assessments, then the board may do so. In condominiums and cooperatives, notice of a board meeting, at which adoption of any non-emergency special assessment will be considered, must be mailed, delivered or electronically transmitted to the unit owners and posted conspicuously on the property not less than fourteen (14) days prior to the meeting (unless the documents require a longer notice period). Evidence of compliance with this fourteen (14) day notice shall be made by affidavit executed by the person providing notice and filed among the official records of the association.

Relatively frequently, the governing documents for an association will require unit owner approval for special assessments, and the documents for some associations require prior owner approval even for emergencies. Although requiring owner approval for emergency assessment provisions may handcuff the board from being able to operate and administer the association, and even seem to be illogical, the fact remains that such provisions are presumably enforceable, as no appellate court has yet addressed this issue. Of course, an association may amend its governing documents, following the procedure provided in same, to resolve this situation by either deleting the provision or setting a spending limit for the board, which if exceeded

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TIDBITS Did You Know

A condominium association shall adopt a proposed annual budget of common expenses and shall show the amounts budgeted by accounts and expense classification. Although waivable, the budget shall also include reserve accounts for capital expenditures and deferred maintenance.

- Pursuant to s. 718.112(2)(f)2, Florida Statutes, these reserve accounts shall include roof replacement, building painting, and pavement resurfacing regardless of the amount of deferred maintenance expense or replacement costs of these items.
- Additionally, reserve amounts must also be budgeted for any item for which deferred maintenance expense exceeds $10,000.00. The amount to be reserved shall be computed by using a formula which is based on estimated remaining useful life and estimated replacement costs or deferred maintenance expense for each deferred maintenance item.
- As stated above, a condominium association may vote to partially fund these reserves or to not fund them at all, if it is so voted by a majority of all eligible voting members at a duly called meeting of the association. Notwithstanding, the membership must first be presented with the proposed budget including full reserves for such items.

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Borrow cont.

would require unit owner approval. However, the process by which the governing documents are amended can be time-consuming, and there is no guarantee that the unit owners would approve such an amendment. Therefore, if an association has documents requiring unit owner approval for a special assessment and needs to raise money very quickly, or if the members of the association fail to approve a special assessment, the board must explore other ways to obtain the necessary funds.

As noted above, an alternative to levying special assessments is amending the association's budget to increase the annual assessments. The governing documents must be examined to determine if there is any limitation or restriction on the amount the budget may be increased without unit owner approval. It is important to remember that for condominium and cooperative associations, if the budget is increased by more than 115% above the preceding fiscal year (excluding reasonable reserves, anticipated expenses which the board does not expect to be incurred on a regular or annual basis, or assessments for betterments), the unit owners may request a special meeting to consider the adoption of a substitute budget. This request must be in writing, signed by at least ten (10%) percent of the owners and must be received by the board within twenty one (21) days after adoption of the budget. With respect to homeowners associations, Chapter 720, Florida Statutes, does not address increasing the budget and these associations must follow the budgetary provisions set forth in their governing documents.

Amending the budget may not be a viable alternative if the governing documents restrict or limit the amount the budget may be increased, or if the association needs money quickly, since unlike a special assessment, which typically is payable in the manner determined by the board, amending the budget simply increases the amount of the annual assessments which may not provide the association the funds it needs quickly enough.

This leads to the third alternative, borrowing money from a bank or other lender. Chapter 617, the Florida Corporations Not-for-Profit Act, provides that Florida not-for-profit corporations have the authority to borrow money at such rates of interest as the corporation may determine. The Condominium Act provides that a condominium association may mortgage association property for the use and benefit of its members but may not mortgage association real property except in the manner provided in the declaration. If the declaration does not contain such procedure, approval of 75% of the total voting interests is required. It is important to note that condominium association real property is property owned by the association, as opposed to common elements of a condominium, which are not owned by the association but by all of the owners.

When addressing the issue of borrowing money, one must first check the association's governing documents to determine if they expressly provide that unit owner approval is required for such action. If so, then, obviously, the approval of the requisite percentage of owners must be properly obtained in order to enter into the loan.

Rather than mortgaging real property, the collateral for community association loans is almost always the pledging or granting of an assignment of the association's lien rights with respect to the assessments owed to the association by the unit owners. The lender will usually require the association to execute a note, pledge and assignment agreement, certain corporate resolutions and other loan documents. In the event of default by the association in repaying the loan, the lender will have the right to enforce, on its own behalf, the association's lien against any unit in default of paying its share of assessments to the association. The lender may also sue the association, seeking payment of the loan (enforcement of the note) plus the recovery of the attorney's fees incurred by the lender (most loan documents provide for the lender's right to recover attorney's fees in suits to enforce the loan documents).

Loan documents are complex legal instruments, and entering into a loan has potentially very serious consequences for an association. Among the issues to be concerned about are: (1) making sure the association does not pledge or assign any funds or assessments designated as, or for, reserves (particularly for condominiums and cooperatives since statutorily their reserves may not be used for other than designated purposes without prior owner approval); (2) ensuring that there is no prepayment penalty; (3) verifying that the association does not grant the lender the authority to operate the association in the event of default; and (4) identifying that the business terms of the loan (interest rate, term for payment, etc.) comply with the loan commitment letter from the lender. Of course, there are a myriad of other issues, and an association should always seek advice of counsel prior to entering into a loan, including review of the proposed loan documents.

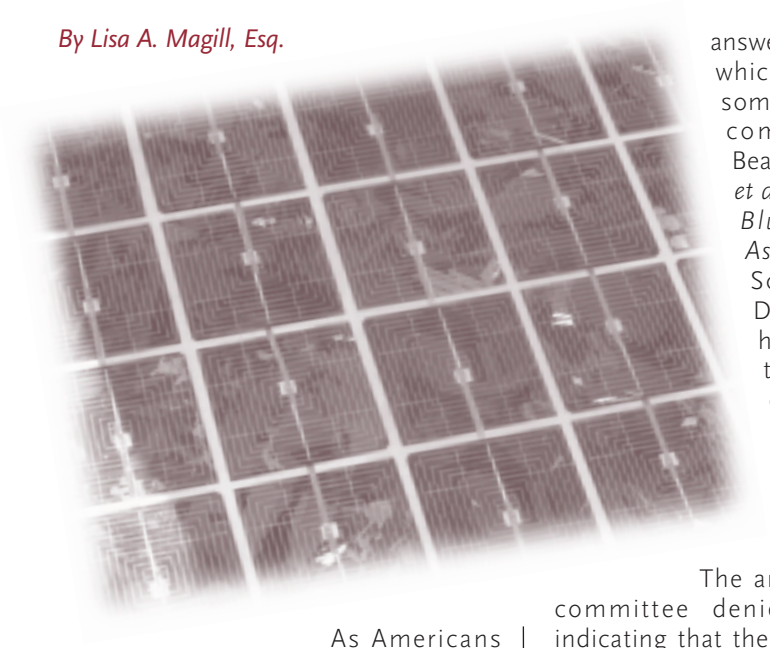
Ultimately, the decision of how to obtain necessary unbudgeted funds will depend upon how quickly the funds are needed, how much is needed (a loan may be desired in order to have smaller payments spread over a period of time rather than a large special assessment due and payable immediately), and the provisions of the governing documents.

TIDBITS cont.

- Prior to turnover of control of an association by a developer to unit owners other than the developer, the developer alone may vote to waive the reserves or reduce the funding of reserves for the first two fiscal years of the association's operation, beginning with the fiscal year in which the declaration is recorded.
- If a meeting of the unit owners has been called to determine whether to waive or reduce the funding of reserves, and no such result is achieved or a quorum is not attained, the reserves, as included in the budget, shall go into effect.
- Reserve funds and any interest accruing thereon shall remain in the reserve account or accounts, and shall be used only for authorized reserve expenditures unless their use for other purposes is approved in advance by a majority vote at a duly called meeting of the association.

Going SOLAR?

By Lisa A. Magill, Esq.



As Americans are becoming increasingly cognizant of higher energy costs, and social conscience dictates a need to make environmentally friendly choices, smart developers and homebuilders have seized this opportunity by offering energy and cost saving mechanisms for home purchasers. The desire to go "green" or otherwise make improvements to existing homes for the purpose of conserving energy from non-renewable sources is also becoming increasingly popular among Floridians. This ecologically driven desire has the added benefit of lowering utility and other bills. However, improvements desired to be made by individual homeowners generally involve changing the exterior appearance of the home, which may not be considered desirable or aesthetically pleasing to neighboring homeowners or the members of the board of the association that has been charged with the responsibility of enforcing the covenants and preserving the uniform appearance and aesthetic appeal of the community in general.

Can an association prohibit a homeowner from installing solar collectors or other energy devices based on renewable resources? Well, until a change in the law some years ago, the answer was not very clear which led to trouble for some homeowners in a community in Palm Beach County. In *Taylor et al. v. The Ridges at the Bluffs Homeowner's Association, Inc.*, 579 So.2d 895 (Fla. 4th DCA 1991), several homeowners applied to the architectural control committee for permission to install solar panels on their individual roofs to heat their swimming pools. The architectural control committee denied the requests, indicating that the solar panels would detract from the attractiveness of the community and claimed that the installation would adversely affect the structural integrity of the roofing system. Presumably relying upon the former version of Section 163.04, Florida Statutes (1987), the homeowners went ahead anyway, forcing the association to file a lawsuit for declaratory and injunctive relief. The court concluded that the association had the power to regulate the use, maintenance and external appearance of each lot and found that the prohibition in Section 163.04, Florida Statutes, was inapplicable to a private homeowner's association.

The Legislature reacted by amending the statute, which now reads, in relevant part, as follows:

(2) No deed restrictions, covenants, or similar binding agreements running with the land shall prohibit or have the effect of prohibiting solar collectors, clotheslines, or other energy devices based upon renewable resources from being installed on buildings erected on the lots or parcels covered by the deed restrictions, covenants, or binding agreements. A property owner may not be denied permission to install solar collectors or other energy devices **with respect to residential dwellings not exceeding three stories in height.** For purposes of this subsection, [the association] may determine the specific location where solar collectors may be installed on the roof within an orientation to the south or within 45 degrees east or west of due south provided that such determination does not impair the effective operation of the solar collectors.

The legislative intent of this provision is to protect the public health, safety and welfare by encouraging development and use of renewable resources by, in part, preventing regulations that increase the costs and expenses associated with the installation and operation of these types of devices. The Statute also grants the prevailing party reasonable attorney's fees and costs in associated litigation.

While the Statute does not apply to patio or balcony railings in condominiums, cooperatives or apartment buildings, all association leaders must be aware of this law and it is advisable to obtain a legal opinion from association counsel prior to denying an application for this type of improvement, regardless of the type of community.

A clear example of the move to become environmentally conscious is found in the Governor's Front Porch Sunshine Program, which was enacted in 1999 and has a goal of revitalizing low-income neighborhoods. State Agencies are hard at work assisting communities to grow economically while preserving the environment. Already several households in Ocala, Florida received solar water heaters, and other installations are planned throughout the State. Community leaders may want to consider solar options for electricity for common areas, pool heaters, hot water heaters and the like, so long as the installations are approved by the members, if necessary, to reduce future energy costs and go "green."

CASENOTES

RULE GOVERNING Service Animals Deemed Reasonable

In the case of *In Re: Kenna Homes Cooperative Corporation,* 210 W. Va. 380 (W. Va. App., 2001), Kenna Homes Cooperative Corporation sought a Declaratory Judgment as to whether its "No-Pet" rule violated the Federal Fair Housing Act ("FFHA") or the West Virginia Fair Housing Act. The rule in question provided that animals were not permitted in the cooperative. However, the rule provided an exception for disabled residents to keep service animals "provided the animal is properly trained and certified for the particular disability, licensed and provided further that the...resident has a certificate or authorization request from a licensed physician specializing in the field of subject disability."

The FFHA makes it "unlawful to discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap of...that person." Discrimination includes "a refusal to make reasonable accommodations in rules...when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling." Handicap means "a physical or mental impairment which substantially limits one or more of such person's major life activities."

The FFHA requires an accommodation for persons with handicaps if the accommodation is *reasonable* and *necessary* to afford handicapped persons equal opportunity to use and enjoy housing. Permitting a service animal trained to provide services to the blind, deaf, autistic, epileptic, or mobility-impaired in a pet-restricted community is a prime example of such an accommodation.

The "reasonable accommodation" requirement does not entail an obligation to do everything possible to accommodate a disabled person. Cost to the community association and benefit to the disabled person is often considered when determining the reasonableness of an accommodation. Some accommodations, even a service animal *in very rare circumstances,* may be unreasonable.

The "necessity" requirement requires a direct link between the accommodation requested and how it will provide an equal opportunity for the handicapped person to enjoy the dwelling. The best expert to decide the "necessity" of an accommodation is a licensed physician who specializes in the disability of the handicapped person.

The most significant issue addressed by the Court in *In Re: Kenna,* was whether the Cooperative's rule provided a reasonable accommodation to a disabled person or whether the rule's requirement that the pet be properly trained, certified for a particular disability, and licensed was too restrictive.

In sum, the Court held that the rule did not violate the FFHA or the State's virtually identical version thereof. It interpreted the FFHA as requiring that "a service animal be individually trained and work for the benefit of a disabled person in order to be considered a reasonable accommodation of that person's disability." Specifically, the Court held that a community association may require a disabled resident who asserts the need to keep an alleged service animal (1) to show that the animal is properly trained; (2) to produce in writing the formal assertion of the trainer that the animal has been so trained; and (3) to present a statement from a licensed physician specializing in the field of subject disability which certifies that the alleged service animal is necessary to ameliorate the effects of the resident's disability.

It's Not Over 'Til It's Over

In the case of *Winner, FL, LLC, Etc. v.APAC-FLORIDA, Inc.*, 29 FLW D753 (Fla. 5th DCA, 2004), a hotel contracted with a paving contractor to resurface the hotel's parking lot and build a parking island. The contractor claimed the work was completed, except a portion of the work, which the contractor had been excused from performing. The hotel claimed the contractor was not excused from performing any portion of the work, the work was defective and the contractor caused damage to other property. Both parties asked the court to grant a summary judgment (an expedited ruling used when there are no material facts in dispute). The trial court granted a summary judgment in favor of the contractor and, of course, the hotel appealed. The appellate court vacated the summary judgment saying that material issues of fact still existed.

The contract did require the contractor to build an island, but the contractor said the hotel failed to provide engineering plans. In addition, there was no price listed in the contract for the island. The appellate court stated that, since the contract was silent on whether engineering plans were required or which party had the obligation to obtain the engineering drawings, this issue of fact remained to be determined. Also, simply because there was no price for the island in the contract did not mean the cost of the island could not have been included in the total contract price, thus raising another issue of fact to be determined.

The contract required the work to be performed "over a two day period and during Monday – Thursday." The hotel claimed this was to prevent work during the weekend when it received most of its guest revenues. The hotel claimed that, because the work was done over the weekend, it lost revenue. The contractor claimed this language was merely for pricing the job. The appellate court stated the different interpretations show the existence of a material issue of fact yet to be determined.

The hotel claimed the paving work altered the drainage for the parking areas and caused flooding, none of which existed before the work was done. The contractor used a provision in the contract saying that 100% positive drainage could not be assured. The appellate court found that a significant difference existed between the hotel's claim that flooding and poor drainage occurred as a result of the work and the contractor's assertion that perfect or 100% drainage could not be assured, so this material fact was still in issue.

Finally, during the work, two water lines to the hotel were damaged. The hotel claimed it lost the water supply to the buildings and suffered damages because of the lost water. The contractor claimed the water lines were immediately repaired, the break was an inevitable result of the work and that the water lines were really only irrigation lines. Again, the appellate court held these were issues of fact that remained to be determined, all of which worked in the hotel's favor to avoid an appellate affirmation of the lower court's summary judgment.

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Vol.104 MARCH 2004 CURRENT NEWS FOR COMMUNITY ASSOCIATIONS

ASK NOT What Your Manager CAN DO FOR YOU

By Robert Rubinstein, Esq.

In these troubling economic times, community associations are looking for their managers to perform as many functions as possible, and with managers being better educated and more experienced, they are more willing to use their knowledge and perform those additional functions. Nevertheless, a manager is restricted to performing those tasks permitted by law for a licensed community association manager.

There are two primary controlling regulations for managers: Sections 468.431 – 468.438, Florida Statutes, and F.A.C. 61-20. Section 468.431(2), Florida Statutes, provides as follows:

> "Community association management" means any of the following practices requiring substantial specialized knowledge, judgment, and managerial skill when done for remuneration and when the association or associations served contain more than 50 units or have an annual budget or budgets in excess of $100,000: controlling or disbursing funds of a community association, preparing budgets or other financial documents for a community association, assisting in the noticing or conduct of community association meetings, and coordinating maintenance for the residential development and other day-to-day services involved with the operation of a community association. A person who performs clerical or ministerial functions under the direct supervision and control of a licensed manager or who is charged only with performing the maintenance of a community association and who does not assist in any of the management services described in this subsection is not required to be licensed under this part.

As you can see, this statute provides some general guidelines concerning what a manager is authorized to do. The statute says a manager can:

A. Control or disburse association money.

B. Prepare a budget or other financial documents, but obviously nothing that requires a licensed CPA to prepare.

C. Assist in noticing and conducting meetings.

D. Coordinate the maintenance of the entire community and other day-to-day services for the entire community.

The Division Rules also provide some general guidelines for what managers can and cannot do. The primary Rule applicable here is F.A.C. 61-20.503, "Standards of Professional Conduct," the relevant portions of which state:

> All licensees and registrants shall adhere to the following provisions and standards of professional conduct, and such provisions and standards shall be deemed automatically incorporated, as duties of all licensees and registrants, into any written or oral agreement for the rendition of community association management services, the violation of which shall

cont. on page 2

TIDBITS Did You Know

The Association has a lien on each condominium parcel to secure the payment of assessments.

- The lien is effective from and shall relate back to the recording of the original declaration of condominium.
- A unit owner of a condominium, regardless of how his or her title has been acquired, including by purchase at a foreclosure sale or by deed in lieu of foreclosure, is liable for all assessments, which become due while he or she is the unit owner.
- Additionally, a unit owner is jointly and severally liable with the previous owner for all unpaid assessments that came due up to the time of transfer of title.
- The liability of a first mortgagee, or its successor or assignees, who acquired title to a condominium unit by foreclosure, or by deed in lieu of foreclosure, for unpaid assessments that became due prior to the mortgagor's acquisition of title, is limited to the unit's unpaid assessments and regular periodic assessments which accrued or came due during the six months

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Manager cont.

constitute gross misconduct or gross negligence:

(2) Honesty. During the performance of management services, a licensee or registrant shall not knowingly make an untrue statement of a material fact or knowingly fail to state a material fact.

(3) Professional Competence. A licensee or registrant shall undertake to perform only those community association management services which he or it can reasonably expect to complete with professional competence.

(4) Due Professional Care.

(a) A licensee or registrant shall exercise due professional care in the performance of community association management services.

(b) A licensee or registrant shall not knowingly fail to comply with the requirements of the documents by which the association is created or operated so long as such documents comply with the requirements of law.

(5) Control of Others. A licensee or registrant shall not permit others under his or its control to commit on his or its behalf, acts or omissions which, if made by the licensee or registrant, would place him or it in violation of Chapter 468, Part VIII, Florida Statutes, or Chapter 61-20, F.A.C. A licensee or registrant shall be deemed responsible by the department for the actions of all persons who perform community association management related functions under his or its supervision or control.

(6) Records.

(a) A licensee or registrant shall not withhold possession of any original books, records, accounts, funds, or other property of a community association when requested by the community association to deliver the same to the association upon reasonable notice. Reasonable notice shall extend no later than 20 business days after receipt of a written request from the association. The provisions of this rule apply regardless of any contractual or other dispute between the licensee and the community association, or between the registrant and the community association. It shall be considered gross misconduct, as provided by Section 468.436(2), Florida Statutes, for a licensee or registrant to violate the provisions of this subsection.

(b) A licensee or registrant shall not deny access to association records, for the purpose of inspecting or photocopying the same, to a person entitled to such by law, to the extent and under the procedures set forth in the applicable law.

(c) A licensee or registrant shall not create false records or alter records of a community association or of the licensee or registrant except in such cases where an alteration is permitted by law (e.g., the correction of minutes per direction given at a meeting at which the minutes are submitted for approval).

(d) A licensee or registrant shall not, to the extent charged with the responsibility of maintaining records, fail to maintain his or its records, and the records of any applicable community association, in accordance with the laws and documents requiring or governing the records.

(7) Financial Matters. A licensee or registrant shall use funds received by him or it on the account of any community association or its members only for the specific purpose or purposes for which the funds were remitted.

(8) Other Licenses.

(b) A licensee or registrant shall not perform, agree to perform or hold himself or itself out as being qualified to perform any services which, under the laws of the State of Florida or of the United States, are to be performed only by a person or entity holding the requisite license or registration for same, unless the licensee or registrant also holds such license or registration; provided, however, that no violation hereof shall be deemed to have occurred unless and until the authority administering the license

cont. on page 2

TIDBITS cont.

immediately preceding the acquisition of title or one (1%) percent of the original mortgage debt, whichever is less.

- Liability for assessments may not be avoided by waiver of the use or enjoyment of any common elements or by abandonment of the units for which the assessments are made.
- Assessments and installments on them, which are not paid when due, bear interest at the rate provided in the declaration from the due date until paid. This rate may not exceed eighteen (18%) percent per year.
- If the declaration or bylaws so provide, the association may charge an administrative late fee, in addition to such interest, in an amount not to exceed the greater of twenty-five ($25.00) dollars or five (5%) percent of each installment of the assessment for each delinquent installment that the payment is late.
- Any payment received by an association shall first be applied to any interest accrued by the association then to an administrative late fee, then to any costs and reasonable attorney's fees incurred in collection, and then to the delinquent assessments.

Manager cont.

or registration in question makes a final determination that the licensee or registrant has failed to obtain a license or registration in violation of the law requiring same.

(c) A licensee or registrant shall reveal all other licenses or registrations held by him or it under the laws of the State of Florida or the United States, if, as a result of such license or registration, a licensee or registrant receives any payment for services or goods from the community association or its board.

As important as the statutes and administrative rules may be, they do not give us any guidance concerning the limitations or restrictions imposed on managers. They merely define what minimum duties require a person to be licensed as a community association manager or the minimum standard of conduct below which will expose a manager to disciplinary proceedings. Instead, we must focus on what the Florida Courts say a manager can and cannot do.

Let's start with a few things managers can do:

1. A manager can send notices of delinquent assessments and violations of the governing documents to owners.

2. A manager can determine the timing, method and forms for giving notices of meetings.

3. A manager can supervise elections, including the preparation of ballots, mailing of ballots and counting of ballots.

4. A manager can advise a board what votes are needed to take certain actions when those actions and the voting for those actions are specified in the governing documents or statutes.

5. A manager can supply a form to the Board and can fill out blanks in the form, provided the Board gives the manager, in writing, the information to put into the blanks.

Obviously, a manager can do other things not mentioned above, and this list is meant to be illustrative, not all inclusive.

Here are a few things that managers cannot do:

1. A manager cannot complete and record claims of lien or satisfactions of lien, even if the forms are prepared by an attorney. As stated above, a manager can give the form to the board for the board to fill in and record, or the manager can fill in the blanks with information the board provides to the manager in writing.

2. A manager cannot give advice on the procedures used in elections, or whether or not a ballot, proxy, or other document is valid.

3. A manager cannot prepare amendments to the governing documents. A manager cannot draft documents from scratch or prepare amendments from a concept discussed by the board. However, a manager can act as a scrivener and type an amendment prepared by the board.

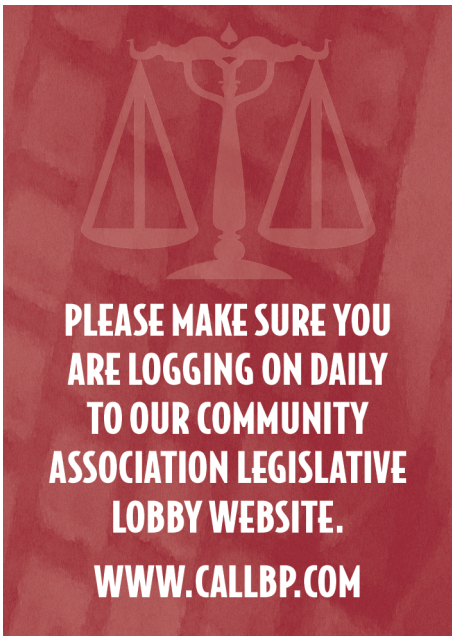
4. A manager cannot complete waivers of the association's right of first refusal or approvals of purchasers and tenants, even if the forms are prepared by an attorney. Again, the manager can provide the forms to the board for the board to fill out, or the manager can fill in the blanks with information supplied by the board in writing.

5. A manager cannot advise a board that a particular statute, regulation, or document provision applies to a particular situation. However, a manager can provide a copy of the statutes, regulations, or documents in general to the board and let the board come to its own conclusions.

6. A manager cannot advise the association, a board, individual director, or individual officer that a specific action may not be authorized. Here, too, the manager can provide a copy of the statutes, regulations, or documents which address the action and let the association, board, director, or officer come to their own conclusion.

Again, this list is meant to be illustrative and not all inclusive.

Managers provide an important and vital service for community associations. They can relieve the Board of the many day-to-day functions required to operate the association and can provide guidance on many important aspects of community operations. Nevertheless, community associations must recognize that managers are limited and restricted in the services they can perform and that community associations must look to other professionals for advice and guidance on matters falling outside the scope of a manager's authority. Good managers know when the service requested by the Board exceeds the manager's authority and will refer the matter to the appropriate professional. A good manager will also refer a matter to the appropriate professional when the manager is unsure whether the matter exceeds his or her authority. The board must also understand that it cannot hire anyone to perform community association management unless the person has a valid license. It constitutes a breach of the association's and directors' fiduciary duty to retain someone to perform those services who is not properly licensed.



CASENOTES

TAXING The Common Elements

In *Attorney General Advisory Legal Opinion Number AGO 2003-63,* December 15, 2003, the Florida Attorney General responded to several inquiries from the St. Johns County Property Appraiser related to the new Section 193.0235, Florida Statutes (the "Statute"). The Attorney General's responses are summarized below.

The Legislature enacted the Statute to protect common element property from being sold due to unpaid taxes. The situation had arisen a number of times where the ad valorem taxes or non-ad valorem assessments went unpaid on a common element lake or property, the lake or property would be sold at a tax sale to a third party, who would then sell the property back to the association at an inflated price. The Statute now states that ad valorem taxes and non-ad valorem assessments may not be imposed separately against common elements. Rather, the property appraiser shall prorate the value of the common elements and include it in the assessments of all the lots within the subdivision that are intended to be or have been conveyed into private ownership. As a result, all the lots slightly increase in value, and each lot pays a portion of the taxes due for the common elements. In this manner, the taxes or non-ad valorem assessments will not go unpaid. Each owner would pay a portion of the taxes or non-ad valorem assessments for the common elements.

The Statute defines "common elements" as subdivision property not included in the inventory of lots intended to be sold or that have been sold to private owners, easements that have been dedicated to the public or retained for the benefit of the subdivision and any other part of the subdivision designated on the plat or the site plan as the drainage pond, or detention or retention pond, or common elements for the exclusive use of the subdivision.

The Statute prohibits the separate assessment of ad valorem taxes or non-ad valorem assessments against common elements "regardless of ownership." Rather than looking to ownership of the property, the intended use of the property, as set forth in the site plan or subdivision plat, will control whether assessments against the property will be prorated among subdivision lot owners. This means that, even if the developer still owns the common elements, the lot owners will be responsible for their real property taxes and other non-ad valorem assessments. Developers, however, are required by the Florida Department of Revenue to show an indication of intent that parcels that they continue to own are common elements or will be common elements. In these cases, the property appraiser must be able to determine that the property will actually be used exclusively for the benefit of lot owners within the subdivision.

The effective date of the Statute is January 1, 2004. In order to give effect to the Legislature's intent (to protect the common elements from inadvertent forfeiture), the Statute should be read to apply to common elements in all subdivisions after the effective date, whether or not they were plotted or planned before January 1, 2004.

The Statute only applies to common elements that are designated as such on a subdivision plan or plat. If the common elements were sold to a private party for use other than as common elements, that property would no longer be prorated to lot owners in the subdivision. Once the Property Appraiser determines that the parcel is no longer a common element, it will be returned to the tax rolls as any other lot or parcel. Additionally, the previously benefited lots in the subdivision would have their valuations adjusted to reflect the lower value without the benefit of the common element.

Non-payment of taxes or non-ad valorem assessments imposed on any individual lot will expose that parcel to the issuance of a tax certificate and tax sale. However, this would not affect the common elements. The purchaser of the tax certificate on an individual lot would receive the same benefit from the common elements as would be claimed by the previous lot owner.

Finally, the Attorney General opined that the lot owners would be unlikely to ever take title to the common elements via "adverse possession." Adverse possession is a legal theory whereby someone claims title to property not previously his by being in "actual continuous occupation" of the real property for seven years, under a claim of title "exclusive of any other right" but not founded on a written judgment or instrument. Also, a person claiming adverse possession of the property must have "made a return of the property by proper legal description to the property appraiser of the county where it is located within one year after entering into possession" and must have paid all taxes, liens, etc. on the property thereafter. The property at issue must have been protected by a substantial enclosure and have been "usually cultivated" or improved. In order to claim adverse possession over a property, the specific statutory terms set forth must have been met.

Any claim for adverse possession over the common elements would be very unlikely for a number of reasons. First, the assessments for the common elements would be prorated among several lot owners, not just one. Second, the Statutes regarding adverse possession require "exclusive" possession of the property, which would be nearly impossible in the case of common elements. Finally, possession of the property would not be "adverse," because use of the common elements by the lot owners has been designated in the declaration, site plan or other document. As a result, even if the Developer retained title to the common elements for the full statutorily prescribed period of seven years, the Attorney General deemed it very unlikely that the homeowners who would be paying the taxes for the common property over the years would be able to claim title over the common elements via adverse possession.

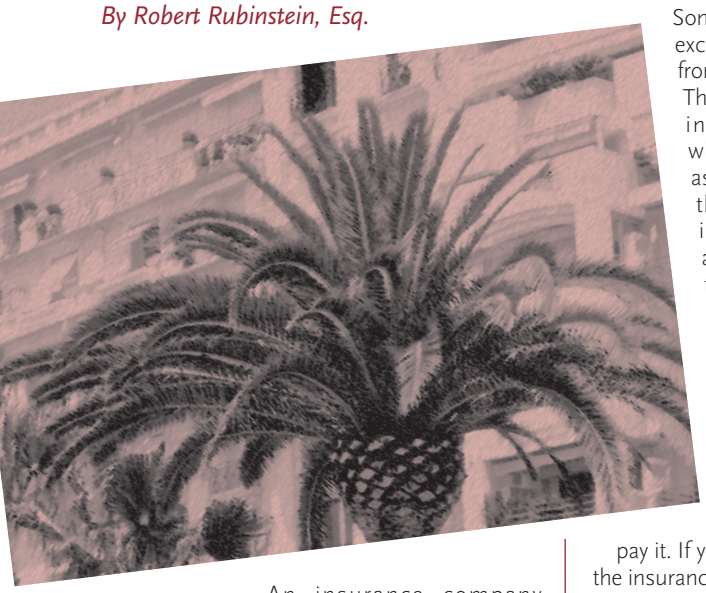
THE INFORMATION SET FORTH IN THIS BULLETIN IS GENERAL AND SUMMARY IN NATURE AND IS NOT INTENDED AS SPECIFIC LEGAL ADVICE APPLICABLE TO YOUR ASSOCIATION. IF YOU HAVE QUESTIONS REGARDING THE CONTENTS OF THIS RELEASE AS IT APPLIES TO YOUR SITUATION, PLEASE CONTACT THE ASSOCIATION ATTORNEY RESPONSIBLE FOR YOUR FILE. IN ADDITION, WE WISH TO REAFFIRM THE FACT THAT THE PRINCIPLES OF LAW CITED HEREIN ARE SUBJECT TO CHANGE FROM TIME TO TIME.

LAW OFFICES
BECKER & POLIAKOFF, P.A.
Community Up-Date™

Vol.104 FEBRUARY 2004 CURRENT NEWS FOR COMMUNITY ASSOCIATIONS

AVOID PAYING UNNECESSARY Worker's Compensation Insurance Premiums

By Robert Rubinstein, Esq.



An insurance company "fined" the Association $4,000 because the tree trimming company the condominium association hired did not have worker's compensation insurance. More accurately stated, the insurance company charged the condominium association an additional insurance premium for worker's compensation insurance based upon the contract price for the tree trimming contract. What does the condominium association do?

The insurance company may be acting improperly (although not intentionally so) while following standard insurance practice. If the tree trimming company is an independent contractor, then the condominium association is not responsible to pay for worker's compensation insurance for that company, even if that company does not have its own worker's compensation insurance. Insurance companies operate on the assumption that the condominium association is a contractor and, therefore, must have worker's compensation insurance, if their contractors or subcontractors do not have such insurance. Some do not understand that the law excludes condominium associations from the worker's compensation laws. Therefore, at the end of each year, the insurance company determines whether or not the condominium association hired contractors and if they had worker's compensation insurance. If the condominium association hired contractors and if those contractors did not have worker's compensation insurance, the insurance company will charge the condominium association a premium for worker's compensation insurance based on the contract price. Most condominium associations just pay this premium because they don't know they don't have to pay it. If you don't pay it, there's a battle with the insurance company.

In the case of *Woods v. Carpet Restorations, Inc.*, 611 So.2d 1303 (Fla. 4th DCA 1992), the Court held:

> "...that a condominium association which, in performing its statutory duty to manage and maintain the condominium property, enters into a contract with a professional company to perform certain of those duties, is not a statutory employer under Section 440.10(1)(b), Florida Statutes (1991), such as to confer upon the condominium association immunity from suit by an injured employee of the contractor."

In *Woods*, the condominium association hired a property management company. One of the property management company's employees was injured on the condominium property while performing his duties and sued the condominium association for his injuries. The condominium association

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TIDBITS Did You Know

Can you terminate an employee who had a worker's compensation claim and is now able to perform limited work, but you do not have a position that would accommodate his limited work ability? This is becoming a frequently asked question, since more community associations are hiring their own employees.

- If the employee can no longer perform the essential functions of the job, with or without reasonable accommodation, then it is not discriminatory to fire him.
- If a reasonable accommodation can be fashioned to allow the employee to continue performing the essential job functions, then it should be provided.
- If the disability is so severe that the employee cannot perform the essential, core job functions, even with an accommodation, then termination is permissible.
- Reasonable accommodation means to find a method or device that will enable the employee to perform the essential job functions with his or her disability, provided the method or device is not unduly burdensome.
- Reasonable accommodation does not require the employer to purchase

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Compensation cont.

defended on the ground the injured property management employee was also the condominium association's employee under the worker's compensation laws and, therefore, was immune from the employee's lawsuit. The Court soundly rejected this argument and stated:

> "Without discussing all of the reasons why we find this argument untenable, we reject it first and foremost because we do not perceive statutorily created condominium associations as being a part of the property management industry, however that term might be otherwise defined. It boggles the mind to think of the ramifications of a condominium association becoming the statutory employer of every employee of the various organizations with which it might contract... for operation, maintenance or management of the condominium."

Simply stated, the worker's compensation laws do not apply to any person or entity merely fulfilling a statutory duty. It requires a person or entity to have a contractual duty and to subcontract all or a portion of the contractual duty to another. A condominium association is a statutorily created entity that is statutorily required to maintain the common elements. For purposes of the worker's compensation laws, a condominium association does not have a contractual duty with the unit owners to perform maintenance on the common elements because it has primarily a statutory duty to perform that maintenance. Therefore, a condominium association cannot subcontract its maintenance duties. It can only contract with someone to perform those maintenance duties. In other words, it can only do on behalf of the owners what the owners cannot do for themselves. Because there is no contract from which to subcontract, the condominium association cannot be a statutory employer of any of the employees of independent contractors hired to perform maintenance on the common elements.

Being a statutory employer is the critical element for application of the worker's compensation laws. Only those laws require a statutory employer to obtain worker's compensation insurance. Because the condominium association is not a statutory employer of its independent contractor's employees, the condominium association has no obligation to obtain worker's compensation insurance for those employees. Since there is no obligation to obtain such insurance, there is no basis upon which the condominium association's insurance company can charge premiums for or require the condominium association to obtain worker's compensation insurance to cover the employees of independent contractors.

Worker's compensation insurance only covers the contractor's employees and the subcontractor's employees. It does not cover the condominium association. Under Florida law, the condominium association is deemed the owner of the condominium property and not a contractor, so the condominium association is not required to have and is not covered by worker's compensation insurance when it contracts with the contractor. Whether or not the contractor has worker's compensation insurance has no effect whatsoever on the condominium association's liability, if one of the contractor's employees gets injured on the condominium property. In either event, the employee has the right to sue the condominium association for the injury. However, if there is worker's compensation insurance available and if the injured employee receives benefits therefrom, such benefits act as a set-off against the damages otherwise suffered by the injured employee, so it is in the condominium association's best interest to make sure the contractor has worker's compensation insurance.

The law stated above is specific to condominiums because the Condominium Act expressly requires the condominium association to maintain the common elements. Neither the Cooperative Act nor the Homeowners' Association Act contain express provisions requiring either the cooperative association or the homeowners association to maintain the common elements or common areas. For this reason, a cooperative association and a homeowners association cannot rely upon anything stated above and will have to consult with their attorney for an answer to this situation.

TIDBITS cont.

equipment or hire other employees to perform the job function in the place of the disabled employee, which protocols relieve the employee from performing his essential job function.

- However, if the employee cannot lift heavy packages and there is a device that would allow the employee to lift those packages without injury, the association would have to purchase that device, as long as the cost was not unduly burdensome.
- An example of an unduly burdensome expense would be the purchase of a forklift to lift heavy packages.
- Whether something is unduly burdensome depends upon the type of business, expenses and income of the employer.
- Finding a reasonable accommodation requires an interactive dialogue between the employer and the employee.
- It is critical for the association to interview the employee and ask him whether he can think of reasonable accommodations that would allow him to perform these essential job functions.
- If the employee and the association cannot think of any reasonable accommodations, then the association has no choice but to terminate his or her employment.
- If, however, there are accommodations, but they are unreasonable because they are unduly expensive, the association still has no choice but to terminate the employee.
- If there are reasonable accommodations that can be implemented, the association would have no choice but to implement them and retain the employee. Failure to do so in this instance would expose the association to a claim for employment discrimination.
- For assistance in determining reasonable accommodations, you can call some of the non-profit organizations that aid disabled persons. This will also help prove your intent not to discriminate.

LOAN QUESTIONNAIRES

By Donna D. Berger, Esq.

Some lenders have begun submitting lengthy "review forms," "questionnaires" and even "association certification forms" in the hopes that community associations will perform quasi-risk assessment functions for them as these lenders weigh the risks of issuing a loan for a particular condominium, cooperative or single family home located within a mandatory association setting.

Under Section 718.116(8) of the Condominium Act and Section 719.108(6) of the Cooperative Act, an association is required to provide estoppel information to potential purchasers and to lenders. This usually takes the form of an association providing a form letter with certain blanks filled in to indicate the type and amount of maintenance payments (i.e., monthly, quarterly, based on square footage or unit type), a statement advising if there are any delinquent assessments owed on the unit in question and whether there are any pending special assessments and the nature, amount and due date for those special assessments.

However, under the "new" forms referenced above, lenders are now asking detailed, complex questions that would require a real time investment as well as legal expertise on the part of the association to research the answers. These lengthy forms are also raising real concerns about the possibility of association liability, should a lender detrimentally rely on the information provided. Some of the information now being requested by lenders in connection with loan transactions includes:

- Date of transition of control from developer to unit owners;
- Are the units owned in fee simple or leasehold;
- Are there any adverse environmental factors affecting the project as a whole or as individual units;
- Total number of units sold to primary residents, total number sold to second home owners, total number sold to investors;
- How many units are currently financed by FHA mortgages;
- If a unit is taken over in foreclosure or deed-in-lieu, is the mortgagee responsible for delinquent association dues;
- Do the project legal documents include any restrictions on sale which would limit the free transferability of title;
- Does the project contain multi-dwelling units where any one owner may hold title to more than one unit with ownership of all of his/her owned units evidenced by a single deed/mortgage; and
- How many units are over 30 days delinquent?

Not surprisingly, most volunteer board members find these questions and others like them daunting. Oddly enough, loan officers would have the answers to these extraneous questions if they read the governing documents, reviewed the association insurance policies and reviewed the plat. Those are typical components of a proper risk analysis report made during the course of a lending transaction. There is also an element of coercion at work, as some unit owners/sellers advise the association that their "deal will fall through if the association does not provide this information to the purchaser's bank or lending company."

It is important for boards to remember that they are not obligated to act as quasi-risk assessment officers for banks and lending companies. That being said, if an association is inclined to dutifully fill out these extra forms, it can do so in an easier fashion if two bills currently pending up in Tallahassee are passed. SB 1184 (sponsored by Senator Skip Campbell) and HB 411 (sponsored by Representative Don Sullivan) would both amend Section 718.111 of the Florida Statutes to protect associations from any liability incurred as a result of lender reliance on the information provided. Currently, associations may charge a reasonable fee (defined as $150.00 or less) to a prospective purchaser, lienholder or current owner, for providing good faith responses to requests for information by or on behalf of a prospective purchaser, lienholder or unit owner. An association may also charge for any attorney's fees incurred as a result of complying with the additional information request.

SB 1184 and HB 411 would add the following language to 718.111

> "An association and its authorized agent are not liable for providing such information in good faith pursuant to a written request if the person providing the information includes a written statement in substantially the following form: "the responses are made in good faith and to the best of my ability as to their accuracy."

There is currently no such language in s. 718.111, Florida Statutes, exempting associations from liability, should they fill out these lender request forms inaccurately. If these bills pass, that level of protection will exist but associations must be sure to include the disclaimer language stated above. On a practical level, associations must also weigh the time and expertise required when deciding whether or not to comply with these lengthy and often complex lender request forms.

PLEASE MAKE SURE YOU ARE LOGGING ON DAILY TO OUR COMMUNITY ASSOCIATION LEGISLATIVE LOBBY WEBSITE. WWW.CALLBP.COM

CASENOTES

SERVICE ANIMALS Must Have Special Skills

In the case of *Prindable v. Association of Apartment Owners of 2987 Kalakaua,* 2003 U. S. Dist., Lexis 23744 (2003), the District Court considered a case where Plaintiffs filed suit under the Fair Housing Act (FHA), alleging the Defendant condominium association had discriminated against them by failing to accommodate a dog, when the Association had a no pets policy. The Plaintiffs were residents of one of the condominium units, and they sought permission from the Association to acquire and maintain a dog on the premises for reasons related to a disability. The Association allowed the Plaintiffs to keep the dog temporarily until a final decision could be made by the Association as to the disability and also the requirements of allowing the particular dog, a bulldog.

Prior to the Association's final decision, the Plaintiffs filed suit in District Court against various Defendants, including the Association, asserting violations of the Fair Housing Act. The Fair Housing Act prohibits discrimination against any person concerning the provision of services or facilities in connection with a dwelling, due to a handicap, or of any person associated with that person. Once an accommodation is requested, a determination must be made whether the accommodation is necessary to afford the person an equal opportunity to use and enjoy the dwelling. The District Court, on a Motion for Summary Judgment, found that there was no evidence that would lead a jury to conclude that the dog in question was an "individually trained service animal" and, therefore, nothing to show that an accommodation was necessary to afford the allegedly disabled Plaintiffs an equal opportunity to use and enjoy the dwelling.

In *Prindable,* the Court found that, although service animals were often a reasonable accommodation, even when a no pet policy was in place, some animals did not constitute service animals requiring an accommodation. Noting that the FHA did not define the term service animal, the Court stated that most animals were not equipped to do work or perform tasks for the benefit of an individual with disabilities and that there must be some "evidence of individual training" setting the particular animal apart from an ordinary pet. The disability claimed of in *Prindable* was mental and emotional rather than physical, and the Court found that a service animal should be "peculiarly suited to ameliorate the unique problems of the mentally disabled."

The Court found that the bulldog was not individually trained, and the mere fact that it was a dog and the Plaintiffs felt better after being with the bulldog, did not create a requirement to accommodate that particular dog. The Court stated that unsupported statements from the Plaintiffs as to the evidence of service by the dog was insufficient to establish that the dog was trained for a particular purpose. Consequently, the Court found that the Association did not violate the Fair Housing Act for failing to make a reasonable accommodation.

OUT-OF-STATE – OUT OF LUCK

In *Florida Bar Staff Opinion 24894,* September 3, 2003, the Florida Bar responded to an inquiry by a Florida attorney regarding the practice of law by out-of-state attorneys. The Florida attorney petitioner handled real estate and condominium matters and continually encountered situations where individuals adverse to his client only lived in Florida for part of the year. Those individuals had attorneys in other states, who would send demand letters or other correspondence to the Florida attorney and his clients, attempting to interpret Florida real estate documents, Florida condominium documents and Florida law, in general, to the Florida attorney's clients.

The Florida attorney would routinely respond to these inquiries, advising the out-of-state attorneys that the out-of-state attorney should cease and desist from further communication with the Florida attorney's client, until the adverse individual obtained an attorney admitted to the Florida Bar. Essentially, the Florida attorney was concerned that the out-of-state attorneys were engaging in the unlicensed practice of law in the State of Florida. The Florida Rules of Professional Conduct for attorneys prohibit assisting a person who is not a member of the Florida Bar in the performance of activity that constitutes the unlicensed practice of law. The Rules also prohibit a Florida attorney from practicing law in a jurisdiction where doing so would violate the regulation of the legal profession in that jurisdiction.

The Florida Bar agreed with the manner in which the Florida attorney handled the out-of-state attorneys' correspondence and demand letters to his clients. The Florida Bar affirmed that the out-of-state attorneys would be engaging in the unlicensed practice of law by attempting to interpret Florida laws. The Florida attorney was correct in alerting the out-of-state practitioners to Florida Rules regarding the unlicensed practice of law and by refusing to engage in negotiations and communications with those of out-of-state attorneys.

THE INFORMATION SET FORTH IN THIS BULLETIN IS GENERAL AND SUMMARY IN NATURE AND IS NOT INTENDED AS SPECIFIC LEGAL ADVICE APPLICABLE TO YOUR ASSOCIATION. IF YOU HAVE QUESTIONS REGARDING THE CONTENTS OF THIS RELEASE AS IT APPLIES TO YOUR SITUATION, PLEASE CONTACT THE ASSOCIATION ATTORNEY RESPONSIBLE FOR YOUR FILE. IN ADDITION, WE WISH TO REAFFIRM THE FACT THAT THE PRINCIPLES OF LAW CITED HEREIN ARE SUBJECT TO CHANGE FROM TIME TO TIME.