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Community Up-Date™

Vol. 1, 2005

CURRENT NEWS FOR COMMUNITY ASSOCIATIONS

Donna D. Berger, Esq. *Editor*

Community Association Turnover

By Sanjay Kurian, Esq.

Transition of a "community association" is an important milestone in the life of any association. It marks the turnover of responsibility for the running of the association from the developer to the residents. This may be the first opportunity that the non-developer owners have to address issues related to the association, particularly construction-related issues. Transition of condominium and homeowners' associations occurs pursuant to statute, and the timing of turnover depends on the type of community.

For condominium associations the key milestones in transferring association control from the developer to non-developer unit owners are, as set forth in section 718.301, Florida Statutes as follows:

1. When non-developer unit owners own fifteen (15%) percent or more of the units in a condominium then the non-developer unit owners are entitled to elect no less than one-third of the members of the board.

2. Non-developer unit owners are entitled to elect at least half the board upon the first occurrence of the following:

(a) Three years after fifty (50%) percent of the units are conveyed to purchasers;

(b) Three months after ninety (90%) percent of the units have been conveyed to purchasers;

(c) When all the units have been completed, some of them have been conveyed to purchasers, and none of the others are being offered for sale by the developer in the ordinary course of business;

(d) When some of the units have been conveyed to purchasers and none of the others are being constructed or offered for sale by the developer in the ordinary course of business; or

(e) Seven years after recordation of the declaration of condominium in the case of an association operating a single condominium, or in the case of an association which may operate more than one condominium, seven years after recordation of the declaration for the first condominium; or, in the case of an association operating a phase condominium, seven years after recordation of the declaration creating the initial phase, whichever occurs first.

Elections for the board must be held within 75 days, and with at least 60 days notice, after the non-developer unit owners are entitled to elect at least one member or members of the board. At the time non-developer unit owners elect a majority of the members of the board, the developer is required to relinquish control of the association, and the unit owners must accept control.

Similarly, transition of a homeowners' association, as set forth in section 720.307, Florida Statutes, occurs when non-developer members are entitled to

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TIDBITS Did You Know

In 2003, the Community Association Leadership Lobby (CALL) drafted legislation to allow high-rise condominiums and cooperatives to opt out of certain provisions in the Life Safety Code which required a mandatory retrofit of older high-rises with automatic sprinklers inside the units and to opt out of an Engineered Life Safety System as well. In 2004, CALL revisited the issue by making the process to obtain the opt out vote easier.

- Section 718.112(2)(l) of the Condominium Act and Section 719.1055 of the Cooperative Act contain identical provisions regarding the process to opt out of a full sprinkler retrofit and /or an engineered life safety system.

- Sprinkler retrofit requirements currently only apply to high-rise buildings defined as buildings greater than 75 feet in height where the building height is measured from the lowest level of fire department access to the floor of the highest occupiable story.

- The association must mail, hand deliver or electronically transmit to each unit owner written notice at least fourteen (14) days prior to the membership meeting at which the vote to forego retrofitting of the required fire sprinkler system is to take place.

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TURNOVER *cont.*

elect a majority of the board which is either (a) three months after ninety (90%) percent of the parcels have been conveyed to members or (b) any other percentage of the parcels has been conveyed to members as is set forth in the governing documents in order to comply with the requirements of any governmentally chartered entity with regard to the mortgage financing of parcels, whichever occurs first.

For both condominium and homeowner associations, the developer is required to deliver the following documents to the board, within 90 days from the time the members are entitled to elect at least a majority of the board, including but not limited to the following:

(1) All deeds to common property owned by the association and the recorded declaration of condominium and all amendments thereto, or the original of the association's declarations of covenants and restrictions.

(2) Copies of the association's articles of incorporation, the bylaws, the minute books, the books and records of the association, and all rules, and regulations.

(3) Resignations of directors who are required to resign because the developer is required to relinquish control of the association.

(4) The financial records of the association from the date of incorporation through the date of turnover and all association funds and control thereof.

(5) All tangible property of the association.

(6) A copy of all contracts or leases to which the association is a party, and a list of the names and addresses and telephone numbers of all contractors, subcontractors, or others currently employed by the association.

(7) Any and all insurance policies in effect.

(8) Any permits issued to the association by governmental entities.

(9) Any and all warranties in effect.

(10) A roster of current homeowners and their addresses and telephone numbers and section and lot numbers.

For condominium associations, it is also necessary for the developer to provide: (1) A copy of the plans and specifications utilized in the construction (2) A list of the names and addresses of all contractors, subcontractors, and suppliers utilized in the construction and (3) copies of any certificates of occupancy which have been issued for the condominium property.

Once transition occurs, the owners have an opportunity to pursue claims for construction-related defects and deficiencies. However, the protections for owners of condominium units and for owners of homes in a homeowners' association are significantly different. Section 718.203, Florida Statutes, generally provides that the developer grants to the purchaser of each unit an implied warranty of fitness and merchantability. Additional warranties apply for personal property and other improvements, as well as for the structural components of the condominium buildings. Also, under section 718.203 the contractor, all subcontractors and suppliers, grant to the purchaser of each unit implied warranties of fitness as to the work performed or materials supplied by them. The Association has standing under Florida Rule of Civil Procedure 1.221 to represent the unit owners on all matters of common interest related to the common elements of a building.

For homeowners' associations, there are no statutory warranties, but as noted above, there may be warranties from individual contractors, subcontractors or suppliers which will have to be turned over to the association. These may provide avenues for residents to address their problems. Also, if there are any construction defects or deficiencies with a homeowner association, causes of action for breach of common law implied warranty or violation of building codes may exist. The Association in these cases would have standing under section 720.303, Florida Statutes for matters of common interest or for structural components of any building for which the Association has maintenance responsibility.

TIDBITS cont.

- The affirmative vote of at least two-thirds (2/3) of all voting interests in the affected condominium or cooperative must be obtained in order to opt out. A vote to forego retrofitting may be obtained by limited proxy or by ballot personally cast at a duly called membership meeting or by execution of a written consent. The vote becomes effective only after a certificate attesting to such vote is recorded in the public records of the county where the condominium or cooperative is located.
- Within thirty (30) days after the association's opt out vote, notice of the results of the vote shall be mailed, hand delivered or electronically transmitted to unit owners. An affidavit of mailing or hand or electronic delivery must be executed by the person providing then notice and this affidavit must be filed among the official records of the association.
- Associations who have opted out of the sprinkler requirements must report such information to the Division as part of the information collected annually from condominiums and cooperatives.
- A copy of the notice of the opt-out voting results must be provided by current unit owners to new owners prior to closing and must be provided by current unit owners to renters prior to signing a lease.

LET US INTRODUCE...
ATTORNEY GARY SCHAAF

By Robert Rubinstein, Esq.

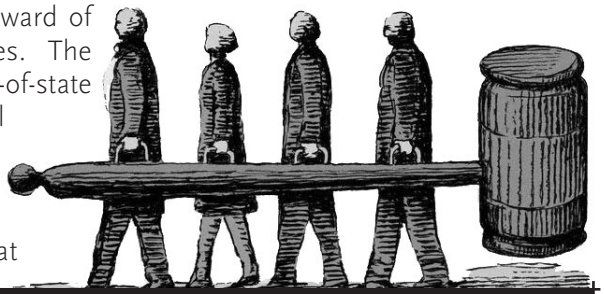
Many of you are quite familiar with the Association Attorney designed as the primary contact for your community and perhaps the collection/foreclosure paralegals working on your files. However, there are a number of other individuals at Becker & Poliakoff with whom you may not be familiar, but they can provide valuable services to Association clientele. Attorney Gary Schaaf is a litigator in Becker & Poliakoff P.A.'s Largo Office and while he is relatively new to the Firm (joining in 2002), he has twenty years' experience helping individuals and businesses resolve contract, land use, commercial and probate-related disputes. Gary has been able to accomplish tremendous successes on behalf of Associations throughout the Hillsborough, Sarasota and Pinellas County areas.

You may wonder what a Board can do when a tenant is unruly, abusive, regularly drunk or chemically altered and disorderly on the community association property? The Association members are likely to complain that they are in fear of the tenant. What if the tenant makes threats of physical violence? Of course you want to get rid of the tenant, but its not easy to do if the owner-landlord doesn't cooperate. In one such case, Gary filed a lawsuit on behalf of a condominium association and was able to obtain a temporary injunction that prohibited the tenant from being present or returning to the condominium property. The members breathed a sigh of relief and peace returned to this community after the Court action resulted in the injunction.

One of the primary functions of the Board is to enforce the use restrictions contained in the governing documents. When polled, most residents indicate that they choose a mandatory community association because they like the maintenance standards, the amenities and the general appearance of the property. Why is it then that some of those association members cry "harassment" when the Board attempts to do its job and enforce the documents? In one such situation the owners of a cooperative in Pinellas County sued the Association for harassment and abuse of process, because the Board took action against those owners for enlarging the footprint of their home, without the approval of the Association and in violation of the documents. Gary was able to convince the Court to dismiss the owners' case against the Association. The Court found that the owners' claims of selective enforcement did not mean the Board was harassing them, and the Board's Court action was certainly not an abuse of process, so their case was dismissed.

In another case, Gary was not only able to remove the tenant (who vacated immediately after the lawsuit was filed), but obtained an award of prevailing party attorney's fees. The case was filed against an out-of-state owner who failed to control the conduct of her tenant who had created a general nuisance in the community. Gary successfully argued that since the owner did not take action to control the tenant or force the tenant to relocate, the Association had to file the case. The owner claimed she shouldn't be responsible for any attorney's fees since the tenant left before the Court ordered the tenant to leave, but the Judge disagreed and awarded the Association over Eighteen Thousand ($18,000) Dollars in attorney's fees, in an effort to educate the owner that compliance with the association's documents remains with the owner even though the unit may be rented.

Many Associations throughout the State have similar issues. If your Association has experienced these types of problems or you foresee these or other disputes in the future, it is important to engage in a review of the documents to discover any impediments to enforceability and review Association practices to avoid common defenses of selective enforcement, waiver, estoppel, etc. These few examples show that if an Association (through its Board and its members) are willing to put in the time, effort and resources necessary to enforce the restrictive covenants, desirable results can be obtained. We have litigators throughout the State who stand ready to assist Associations in protecting the value of their communities through consistent enforcement of their documents.



CASENOTES

A Kept DOG

Riverside Park Condominiums Unit Owners Association, a North Dakota Nonprofit Corporation, Plaintiff, Appellee and Cross-Appellant v. A. William Lucas, Defendant, Appellant and Cross-Appellee, S. CT 2005 ND 26.

This case was appealed to the Supreme Court of North Dakota by a unit owner who wished to maintain a pet in the community, and in part by the Association which appealed a denial of its motion for attorneys fees.

In 1990 the Declaration of Covenants and Restrictions for this community was amended by two-thirds of the owners to prohibit owners from raising, breeding or keeping animals. William Lucas bought his unit in 1999. The Association sued Lucas alleging, among other things, that he was keeping and raising a dog in his unit and sought an injunction prohibiting him from keeping the dog. Lucas raised several defenses in his answer, including that the Association did not properly amend the Declaration (therefore rendering an unenforceable pet prohibition) and while he was not claiming the need for an "accommodation under the Fair Housing Act", he reserved his right to claim the need for an accommodation in the future if the Court held the amendment was invalid. Lucas raised a number of other substantive and procedural defenses, including that the Trial Court had no jurisdiction to make a determination under the Federal Fair Housing Act, that the pet restriction was unreasonable and arbitrary, and that he was not technically "keeping" the dog in his unit. The dog belonged to his former wife and he claimed the dog visited him at irregular times, approximately 24 days a year. Lucas presented 12 counterclaims against the Association, some of which were dismissed promptly by the Trial Court. The Trial Court also sanctioned Lucas $500.00 for failure to answer the Association's interrogatories and produce documents and $1,000.00 for the Association's attorneys fees in responding to a frivolous motion filed by Lucas. A judgment was entered by the Court against Lucas enjoining him from violating the pet restriction, granting the Association's motion for summary judgment declaring that Lucas did not have a valid claim for an accommodation under the Federal Fair Housing Act, or if he had a valid claim, the claim was voluntarily waived by his failure to make a request to the Association for an accommodation, imposed additional sanctions against Lucas, but denied the Association's motion for attorneys fees for defending against Lucas' counterclaims. Lucas appealed claiming the Trial Court erred in granting the Association's motion for summary judgment regarding the pet restriction, that the Trial Court erred in its decisions regarding the Federal Fair Housing Act, and other procedural issues.

Summary judgment is a procedural device for promptly disposing of a lawsuit without trial if there are "no genuine issues of material fact". In considering a motion for summary judgment, the Court must view the evidence "in the light most favorable to the party opposing the motion, and he must be given the benefit of all favorable inferences which can be reasonably drawn from the evidence". The Supreme Court carefully reviewed the procedure by which the Association amended its Declaration to prohibit pets and concluded that the Association appropriately amended its pet restriction. Lucas' allegation that the dog only "visits", and is not a "kept" dog was likewise dispensed with. Even if the Court viewed the evidence in the light most favorable to Lucas, the amount of time the dog stays with Lucas is clearly enough for any reasonable person to conclude that Lucas is violating the Association's pet restriction. The Court concluded that the word "kept" means "to reside with" and that no reasonable mind could dispute that the dog was being kept by Lucas.

With regard to the Federal Fair Housing Act, Lucas never made a request to the Association for an accommodation. The Trial Court attempted to have Lucas commit to a position with regard to a possible right under the Federal Fair Housing Act. If he did not intend to raise a claim under the Federal Fair Housing Act, the Court wanted to clarify that he had had his opportunity to raise the issue and chose not to and therefore would not be allowed to raise the issue in the future unless his disability status significantly changed. Lucas agreed he was not asserting any claim for relief under the Federal Fair Housing Act, but refused to stipulate that he would not in the future make a claim. The Court granted the Association's motion for partial summary judgment declaring Lucas was not entitled to a Federal Fair Housing Act accommodation since he conceded that he was not entitled to such an accommodation. The Court held that a party who brings a claim into Court without seeking complete relief or who presents some issues in one Court proceeding and reserves others to raise them in another Court, invites wasteful expense and delay. Thus, the Supreme Court agreed that under these circumstances the Trial Court did not abuse its discretion by granting declaratory relief. Various miscellaneous procedural issues were discussed in the lengthy ND Supreme Court opinion, including upholding the various monetary sanctions levied against Lucas and denying the Association's request for an award of costs and attorneys fees incurred when defending Lucas's counterclaims. The Trial Court did not abuse its discretion in denying the Association's motion for attorneys fees since the Trial Court did not act arbitrarily or unreasonably. The Supreme Court affirmed the holdings of the Trial Court.

Two interesting issues are raised which could result in a different holding had the facts been somewhat different. In this case, the pet owner never raised a claim for relief under the Federal Fair Housing Act. Since the claim was never raised, the Court did not have to analyze whether his claim to have high blood pressure would have been sufficient to support a request for an accommodation under the Federal Fair Housing Act. Secondly, an Association might provide better support for its claim that a Trial Court abused its discretion by denying a motion for attorneys fees in defending against frivolous counterclaims. The Association would have had to show that the Trial Court acted arbitrarily, unconscionably or unreasonably by not granting the attorneys fees. Lucas never articulated a legal basis for his counterclaims and an Association might use this to show that there was a complete absence of law or fact whereby a reasonable person could not have expected a Court to render judgment in that party's favor. If this criteria could have been established, the Association would have been entitled to recover its attorneys fees. In all, the result of this case was equitable to both sides since the Supreme Court did not find that the Trial Court had abused its discretion as to either party and, thus, upheld the lower Court's findings that Lucas had to get rid of the dog but that the Association was not entitled to an award of attorney's fees.

BECKER & POLIAKOFF COMMUNITY UP-DATE

Legal and Business Strategists

CURRENT NEWS FOR COMMUNITY ASSOCIATIONS

Volume XI-XII, 2005

Donna D. Berger, Esq. *Editor*

CALL 2005 Florida Community Living Survey

REPORT OF FINAL RESULTS BASED ON 1,299 RESPONSES — JANUARY 12, 2006

Introduction & Methodology

The CALL 2005 Florida Community Living Survey was conducted online in the state of Florida between October 1 and November 30, 2005 under the auspices of the Community Association Leadership Lobby (CALL).

The results contained in this report are based on the responses of 1,299 participants who own property in Florida common-ownership community associations -- including condominiums, homeowner associations, cooperatives, mobile homes, timeshare and condo hotels. The 2005 survey participation rate represents a 73% increase from 2004, when 751 community owners responded. Not all respondents answered all questions. The margin of error for the total sample is +/- 3% at the 95% confidence level. The survey was not random.

In an effort to build on the success of its inaugural 2004 Florida Community Living Survey, CALL made a concerted effort in 2005 to reach out beyond its own membership to community association residents statewide. As in 2004, the non-random survey methodology included CALL's e-mail invitation to more than 3,300 previously identified owners of property in Florida community associations, who were in turn invited to forward the opt-in invitation to other owners of property in their associations. In addition, CALL solicited participation in the survey from members and affiliates of non-CALL community association groups throughout the state, who were encouraged to invite fellow community association owners to respond to the survey. Furthermore, CALL also sought participation through direct advertising in condo and HOA newsletters, as well as newspapers and magazines that target community association readers.

Community association living is fast becoming the preferred form of residential living in the state of Florida, with owners of community association property an increasingly important segment of Florida's year-round and part-time population. Community associations are governed by unique legal covenants, guided by voluntary directors elected from among the membership and regulated by distinct government statutes and agencies. Nearly 27,600 condominium, co-operative, mobile home and timeshare associations currently exist in Florida, with a rising number of Florida homeowner associations generally estimated to be at 14,000 or more statewide. Condo-hotels are a relatively new phenomenon in Florida, with reports indicating their numbers are growing rapidly.

Just who are the millions of longtime residents and new arrivals to the state who increasingly prefer to call these shared-ownership community associations home? If one were to paint a picture of them as individuals or as a group, what would it look like? The pursuit of that picture, previously painted through anecdote and isolated reports, is what prompted CALL to launch the annual Florida Community Living Survey. The data contained in this report will speak to specifics of the demographics, attitudes and concerns, perceptions and motivations of community association property owners. Variations

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from one type of association to another and from region to region notwithstanding, one can see from the 2005 Survey an emerging common profile of a typical owner of Florida community association property.

Somewhat older than the general Florida population, the average property owners statewide in Florida's community associations are most probably age 50 or older, likely to be married, middle-income and have owned their unit or home for at least five years, if not 10 or more. Many are already retired, but fully a third are likely to still be working, a quarter of them full-time. They tend to live in their unit or home year-round or at least most of the year and the number who are now working from home at least a few hours each week has grown by nearly 10% since 2004.

Most tend to get their information about community association living issues from newspaper articles, their association newsletter or, increasingly, via e-mail – yes, they're Internet savvy! But, statewide, few say they bother to consult their association website, which in most cases is likely nonexistent or at the very least, of little perceived value. Generally active in their community, they try to attend a majority of monthly board and annual membership meetings. If not currently serving on their board of directors, they're just as likely to have never before served on any association board as to have previously served on their current community's board or on the board in another community in which they may have lived.

Having chosen to live in common-ownership housing communities, they share a strong concern for sound financial management of their associations, but not one that translates clearly into dissatisfaction with their board – on the contrary, irregardless of whether or not they have ever served on a board they give favorable ratings to their directors on the handling of community finances and responsiveness to the community. They feel strongly about the need for board member integrity and maintenance of the community.

Knowing that all members of the community have chosen voluntarily to live in a community association and agreed to abide by the covenants, restrictions and contracts that bind the association, they favor strict enforcement of rules and regulations and agree with the use of warning letters, fines and other strict measures to counter non-compliance by fellow property owners. Still, their enforcement concerns appear balanced by reason and compassion – the inclination to enforce compliance tends to diminish as enforcement measures move beyond lawsuits to liens and foreclosures and most do favor making exceptions for hardship cases.

Such quick snapshots like this of the average community association property owner are necessarily incomplete and certainly fleeting – as the population of community association residents statewide continues to grow by leaps and bounds, the elements that make up a typical condo and HOA dweller today will certainly have shifted and changed next year and the year after and the year after that. But, when taken in the context of the individual responses to each of the questions in this Survey, they serve to illuminate what is clearly the changing face of the state's growing community association population. For now, by providing the quantifiable data resulting from tabulation of these responses, the CALL 2005 Florida Community Living Survey provides the most complete description available today of Florida community associations and the individuals who choose to live therein.

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

About The COMMUNITY ASSOCIATION LEADERSHIP LOBBY (CALL)

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. Visit the CALL website at http://www.callbp.com.

About the ASSOCIATIONS

Condominiums are the most common form of community association ownership represented in the survey at 63.6%, followed by homeowners' associations (29.3%), while cooperative associations, mobile home communities, condo hotels and timeshare units together represent just 7% of respondents.

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The lion's share of the state's community association population as reflected in the Survey lives in multi-family condominiums comprised of high-rise buildings of 7 stories or higher (22%), low-rise units of 1-2 stories (20.7%), mid-rise units of 3-6 stories (18.7%) or attached town homes (10.8%). Nearly 28% of all respondents said they owned detached single family homes, clearly a correlation to the 29.3% who also said they lived in a homeowner association.

More than a third of associations correspond to large communities, with 23.4% corresponding to buildings or communities of 200-499 homes/units and an additional 14.3% having 500 or more homes or units. The trend appears to be influenced by a preponderance of larger homeowner associations, a full 52.4% of which were communities of 200 homes or more, while just 31.2% of condominium buildings represented in the survey had 200 units or more.

Nearly half (46.5%) of condo owners said their unit was in a building of 50-199 units, just 15.9% with 25 to 49 units and 5.6% with fewer than 24 units. One in five (20.1%) homeowners said their home is located in a HOA with 100-199 homes, 15.8% in HOAs of 50-99 units and only 10.9% with fewer than 50 units.

Of the 1,299 respondents to this year's Survey, 41.3% said their unit/home was located in an association in Southeast Florida (an area defined as from Key West, Miami, Fort Lauderdale, West Palm Beach to Stuart), followed by 26.2% in the Southwest (Bradenton/Sarasota, Fort Myers, Naples and Marco Island), 8.4% in Central West Florida (Crystal River, Clearwater, St. Pete/Tampa), 9.8% in Central East Florida (Port St. Lucie, Melbourne, Daytona Beach) and the remaining respondents throughout the state.

About the RESPONDENTS

Three quarters of all respondents said they live at least seven months of the year in their Florida home, with a full two-thirds claiming full-time residence of 10-12 months annually (See question 7). Full-time residency is much more likely among homeowner association owners (89%) than among condo unit owners (58.9%), with nearly a third of all condo owners residing in their unit 6 months or less each year.

Florida's "snow-bird" retiree phenomenon corresponded to only a quarter of the community association population statewide, with 14.4% of respondents saying they spend 4-6 months each year in their unit/home, 5.4% at 1-3 months annually and 4.7% living in their unit/home less than 30 days per year.

More than 70% of survey participants have owned their home or units for five years or more, with 33.9% of all respondents having owned for 5-9 years and 36.4% at 10 years or more. Long-term ownership is even more prevalent among condo owners, 74.6% of whom say they have owned their unit for five years or more, as compared to 61.3% of HOA respondents that say they've owned their home for five years or more. Less than a third of all respondents statewide say they've owned their unit/home for less than four years, with 18.0% at 3-4 years and 11.7% at two years or less. (See question 5.)

There appears to be a close correlation between age and the type of community association in which an owner holds property. The majority of condo owners (58.1%) are 65 or older, while only 35.5% of HOA property owners are in that age range. The largest percentage of HOA residents (45.4%) are 50 to 64 years old, with 17.3% in the 34 to 49 year age range.

Similarly, condo unit owners are much more likely to be retired (66.8%) versus homeowner association residents (50.7%). Almost 40% of HOA members surveyed work full-time, compared to 22.7% for condo respondents. Those working part-time are roughly equivalent in condos (10.5%) and homeowner associations (9.3%).

Some 41% of all Florida community association owners surveyed reported annual household income of $50,000-$99,000, with 26.7% reporting income under $49,999 and 32% reporting household income above $100,000. A breakout of HOA owners shows a tendency for slightly more of them (46.8%) to have annual incomes in the $50,000-$99,000 range, with relatively fewer under $49,000 per year (21.9%).

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At the higher-income level, 31.3% of homeowner association members report an annual household income of $100,000 or more compared to 33.3% for condo unit owners surveyed. The percentage among condo unit owners is further differentiated by an even higher percentage in the $100,000-plus income bracket pre-retirement, versus a lower percentage after retirement. More than half (51.4%) of full-time employed condo unit owners report annual household income in the $100,000-plus bracket. For retired condo unit owners, that percentage is cut in half, with just 26.8% of them reporting annual income of $100,000 or more.

Hurricane-Force Winds Fail to BUDGE many BUDGETS

Concern over hurricane- and insurance-related issues was in evidence in the 2004 CALL Survey and when asked this year how much they rely on their association to help them prepare for coming storms, community association members showed a general tendency toward self-reliance.

Statewide, 45.9% say they do not rely on their association to any significant degree for storm preparations. The tendency is sharply higher among HOA owners, however, more than 70% of whom say they rely little or not at all on their association in advance of a storm. Just 25% of condo unit owners show such marked self-reliance in storm preparedness.

Nearly a quarter (24%) of property owners did say they rely "almost exclusively" or "extensively" on their association to prepare them on what to do in the event of a catastrophic storm, that percentage climbing among condo unit owners (30.2%) but falling off sharply among HOA members (8.1%). Just 21.6% of HOA owners found themselves in the middle, relying "somewhat" on their association; more than a third of condo owners (34.4%) say they're only "somewhat" reliant on their association to prepare for an advancing storm. (See question 11.)

This year, less than a third (30.8%) of survey respondents reported any knowledge of increased investment by their association in storm protection as a result of the devastating 2004 hurricane season. A full 53.1% of respondents did not believe that the 2004 hurricane season resulted in any additional spending by their association to prepare for Florida's 2005 storm season, while 16.1% said they simply did not know if any additional storm-related spending occurred.

FOLLOW THE MONEY; Good Grades on FINANCES

The financial issues that have community association residents statewide "extremely concerned" (See Question 14) are maintenance of a balanced association operating budget, (75%), the perennial concern of "insurance affordability and availability" (69%), followed closely by "level of reserves" and "special assessments" (both at 64%).

The responses on financial issues do not appear to indicate alarm over the way finances are handled by association boards – as might seem to be indicated by the response of 79% of all community association property owners that they are "extremely concerned" about board member integrity. When asked directly about how they feel board members are handling association finances, an overriding three-quarters of all community association property owners give their boards a clear approval rating, with 44.8% saying their board's financial management is "excellent" and 30.1% saying the board's handling of finances is "good" (See question 16). Nearly two-thirds of HOA owners statewide say their board's handling of finances is either good or excellent, while four out of five (80.6%) of all condo unit owners say the same.

Similarly, more than three quarters of all community association property owners (77.2%) feel their board members "are responsive to the community" (See Question 20). The responsiveness approval rating is even higher among condo unit owners at 82.3%, while more than two-thirds (67.1%) of all HOA property owners also believe their board is responsive.

Board Member INTEGRITY in the SPOTLIGHT

The response over the issue of board member integrity can be interpreted as an affirmation by board and non-board members alike of the primacy of this quality in board members for the proper management of the association. Nearly four out of five (79%) of all community association property owners say board member integrity is "extremely important" (See question 10). Almost as many non-board members (77%) rated board member integrity extremely important as did

CALL *cont.*

the general survey population, but current board members themselves feel even more strongly about the issue, with 83% ranking it extremely important.

When a board member has proven "undesirable" – perhaps lacking in integrity or unresponsive to the community, for example -- community association members wishing to remove them from office have tended to rely on election mechanisms in place under Florida statute and/or the community's governing documents to do so. A quarter of property owners (24.2%) say they have simply waited until the association's annual election to vote an "undesirable" board member off the board, while 12.6% additionally have gone out of their way to recruit a special candidate from among association members to run against the Board member. (See question 21).

Only 8.6% of association members say they have ever had to resort to a special recall election to remove an undesirable board member from office. Just a handful of community association members say they have ever filed a formal complaint about a board member with Florida state authorities, whether it be with the Florida Condominium Ombudsman's office (2.7%) or the Florida Land Sales, Condominiums and Mobile Homes Division (4.5%).

The percentage of those currently serving on their association's board of directors fell this year to 48.2% of the total 1,299 responses, as compared to 51.2% of the total 751 responses last year. More than a quarter (25.6 %) say they have never served on any association board, also down from last year (31.7%), while there was also a decrease in the number who have served on any other association's board, at 10.4% this year as compared to 16.7% last year.

A full 73% of respondents said they attend at least most board and annual membership meetings, suggesting a vast majority of respondents – board members or not – are active in their communities and generally informed through public association meetings. (See question 19.)

Owners rely on NEWSPAPERS, NEWSLETTERS and E-MAIL for community news

Noteworthy in the 2005 Survey results was the response when asked to select all avenues through which they receive information about issues that affect community association living (See question 17).

More than two-thirds (68.5%) somewhat predictably said they received information about community association living through newspaper articles, but surprisingly more than half (51.3%) also said they received such information via e-mail and nearly half (46.7%) also said their association newsletter was a regular source of news. For community association property owners who have never served on any board, the number relying on newspaper articles for information about association living climbed to 58.3%, while their association newsletter was the second most important source of community news at 53.1%, with e-mail in third place at 47.6%.

Conversely to the reliance on e-mail for information and the fact that 39% of all respondents identified Internet websites as a source of information, a remarkable 68% of all respondents said they never consulted their own association's website. (See question 18). More than 10% of respondents said that was because the site was of "no value," but fully 57.6% reported that it was because their association has no website at all. Among those whose associations do have websites, HOA respondents tended to consult their association websites slightly more (35.4% said at least once a month) than do condo unit owners (30.2%, at least once a month).

Owners VALUE SAFETY offered by associations

With a clear tendency toward being informed and active in their communities, association members appear to keep a close eye on conditions that affect their property values and quality of life. Most property owners in condo buildings or homeowner associations feel that physical security and crime level are leading determinants in maintaining property values, with a majority (54%) rating these as extremely important. Quality of the natural environment follows closely, rated extremely important by 46% of respondents. (See question 13.)

CALL *cont.*

Community matters that include guest and/or occupancy issues, percentage of renters and the screening of new owners and tenants are important, but not primary issues of concern among community association members (See question 10). And when it comes to screening, a full two thirds (65.9%) of all association members are clearly against any mandated percentage of down payment as a requirement designed to ensure financial solvency of new association members (See question 15).
When asked to identify the features that were extremely important in their decision to purchase in their community, "ease of maintenance" was chosen by 46%, followed by "enforcement of standards," chosen as extremely important by 43% (See question 9). After board member integrity, community issues that continue to be seen as extremely important are overall maintenance of the community, chosen by nearly three quarters (73%) of association members, with more than half (57%) identifying enforcement of rules and regulations as extremely important.

Owners who feel RULES ARE MEANT TO BE BROKEN face majority desire for ENFORCEMENT

Clearly, buyers appear to purchase property in condominiums and homeowner associations based in large part upon issues related to maintenance of the community's appearance and enforcement of standards set by the association's rules and regulations. As owners, they expect the association property to be maintained and rules and regulations to be enforced.

In fact, strong enforcement of a community's rules, regulations and other government documents enjoys overwhelming support (96.2%) among community association property owners (See question 22). That percentage remains virtually the same for HOA members (91%) and climbs sharply among condo unit owners (98.3%). Even non-board members (93.6%) overwhelmingly responded that they are in favor of strong enforcement.

Of the 96.2% overall who support strong enforcement, a measure of compassion is demonstrated by the 51.8% of all community association property owners who also favor consideration for "hardship exceptions as needed." For owners who break the rules and ignore an association's governing documents, 93.7% preferred warning letters among enforcement techniques, up slightly from 92.8% in the 2004 Survey.

Nearly four out of five community association members (78.3%) also support fines to enforce compliance with governing documents. Support for stricter methods of forcing compliance begins to decline somewhat as those methods become stronger – though lawsuits (69.5%) and liens against property or foreclosure (67.2%) are still supported by at least two-thirds of all community association property owners (See question 23). Fines, lawsuits and liens/foreclosures also each fell slightly as a preferred means of enforcement when compared to 2004 responses.

Survey QUESTIONS and RESPONSE Data

Listed below are the actual questions asked and responses collected in the CALL Community Living 2005 Survey. Comparative data with 2004 survey responses are provided where applicable. The number of responses to each question is indicated by R = #.

1. **The first question asked if a respondent owned property in a Florida community association. Those who responded "no" to this question where not allowed to complete the survey.**

2. **Indicate the type of community association in which you own:**

2005	2004	Type of Community Association
63.6%	60.4%	Condominiums
29.3%	34.6%	Homeowners' Association
2.6%	3.2%	Cooperative Association
2.8%	1.5%	Mobile Home Community
0.6%	0.3%	Timeshare
1%	NA	Condo Hotel
R=1262	R=687	

CALL *cont.*

3. Please indicate the location of your unit/home:

2005	2004	Florida Territory
41.3%	34.4%	Southeast Florida (Key West, Miami, Fort Lauderdale, W Palm Beach, Stuart)
26.2%	27.6%	Southwest Florida (Bradenton/Sarasota, Fort Myers, Naples and Marco Island)
9.8%	3.5%	Central East Florida (Port St. Lucie, Melbourne and Daytona Beach)
8.4%	21.6%	Central West Florida (Crystal River, Clearwater and St. Pete/Tampa)
3.0%	2.2%	Central Florida (Ocala, Orlando, Kissimmee/St. Cloud and Winter Haven)
2.6%	1.9%	Northwest Florida (Pensacola to Panama City)
0.8%	0.0%	North East Florida (Jacksonville, St. Augustine)
0.5%	0.0%	North Central Florida (Tallahassee, Lake City, Gainesville, Cedar Key)
7.4%	8.8%	Other
R=1261	R=684	

4. How many units/homes are in your association?

2005	2004	Number of Units
14.3%	26.3%	500 or more
20.8%	20.8%	50-99
22.2%	19.0%	100-199
23.4%	14.9%	200-499
12.5%	12.6%	25-49
5.7%	5.1%	5-24
.9%	1.2%	Don't Know
.2%	.1%	Under 5
R=1262	R=684	

5. How long have you owned your unit?

2005	2004	Length of Ownership
36.4%	26.1%	10 years or more
33.9%	30.4%	5-9 years
18.0%	19.5%	3-4 years
11.7%	24.0%	2 years or less
R=1260	R=682	

6. Which of the following describes your unit/home?

2005	2004	Type of Housing Unit
27.7%	30.7%	Detached single family home
18.7%	20.4%	Mid-rise unit (3-6 stories)
22.0%	20.1%	High-rise unit (75 feet / 7 stories or higher)
20.7%	18.8%	Low-rise unit (1-2 stories)
10.8%	10.0%	Attached town home
R=1255	R=681	

CALL *cont.*

RESIDENCY and WORK PATTERNS

7. Each year, I reside in my condominium/home:

2005	2004	Occupancy Practices
66.1%	65.8%	Year round resident
14.4%	12.0%	4 – 6 months
9.4%	10.7%	7 – 9 months
5.4%	6.7%	1 – 3 months
4.7%	4.7%	Less than 1 month
R=1261	R=682	

8. Do you work/conduct business from your unit/home via phone, fax or Internet?

2005	2004	Response
18.1%	—	Yes, 1-10 hours/week
6.0%	—	Yes, 11-20 hours/week
3.5%	—	Yes, 21-35 hours/week
3.4%	—	Yes, full time
69%	78.4%	No, not at all
—	21.6%	Yes (with no qualifier)
R=1226	R=681	

FACTORS IN PURCHASING in a Community Association

9. 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	12%	6%	11%	25%	46%	3.88
Physical amenities (clubhouse, pool)	14%	9%	12%	32%	33%	3.59
Physical security	9%	9%	19%	31%	32%	3.69
Shared community values	8%	11%	24%	30%	27%	3.56
Enforcement of standards	8%	8%	13%	28%	43%	3.90

R = 1232

Community ISSUES

10. 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	11%	1%	2%	13%	73%	4.37
Board member integrity	11%	1%	2%	8%	79%	4.43
Enforcement of rules & regulations	9%	4%	6%	25%	57%	4.17
Guest and/or occupancy issues	8%	7%	14%	29%	43%	3.93
Percentage of renters	9%	6%	16%	25%	44%	3.89
Screening of new owners/tenants	11%	7%	15%	24%	43%	3.81

R = 1229

CALL *cont.*

11. How much do you rely on your community association to prepare you on what to do in the event of a catastrophic storm? (R=1231)

- Somewhat (30.2%)
- Not very much (23.6%)
- Not at all (22.3%)
- Extensively (16.5%)
- Almost exclusively (7.4%)

FINANCIAL CONCERNS among community owners

12. Did the 2004 hurricane season in Florida prompt your community association to spend more money on hurricane protection measures for the future? (R=1175)

- No (53.1%)
- Yes (30.8%)
- Don't know (16.1%)

13. How important are the following issues in influencing today's property values in your community association?

Feature	Extremely Unimportant	Somewhat Unimportant	Neutral	Somewhat Important	Extremely Important	Response Average
Crime levels & physical security	6%	5%	7%	28%	54%	4.19
Quality of natural environment	5%	4%	9%	36%	46%	4.13
Easy access to quality healthcare	6%	7%	22%	33%	31%	3.76
Nearby development	5%	10%	27%	33%	24%	3.61
Nearby transportation infrastructure	10%	16%	34%	24%	17%	3.24
Easy access to quality schools	37%	15%	26%	12%	10%	2.42

R = 1208

14. How concerned are you as an association member with the following financial issues?

Feature	Extremely Unimportant	Somewhat Unimportant	Neutral	Somewhat Important	Extremely Important	Response Average
Balanced operating budget	5%	1%	2%	16%	75%	4.54
Level of reserves	6%	2%	6%	22%	64%	4.36
Cost of common area maintenance	5%	2%	5%	27%	60%	4.36
Special assessments	5%	2%	8%	20%	64%	4.37
Expenditures to bring building up to code	8%	5%	17%	23%	47%	3.95
Insurance affordability & availability	5%	2%	5%	19%	69%	4.45

R = 1213

15. Should community associations be allowed to mandate the percentage of down payment required for purchase of a home or unit as a means of ensuring the financial solvency of new association members? (R=1203)

	All
• Yes	34.1%
• No	65.9%
• Total	100%

CALL *cont.*

16. How would you rate your board's performance in handling community finances?

All Respondents	Response
44.8%	Excellent
30.1%	Good
12.5%	Fair
12.6%	Poor

R=1211

Community RELATIONS

17. Where do you regularly get information about issues that affect community association living? (Select all that apply; responses > 100%) (R=1198)

- Articles in newspapers (68.5%)
- Through email (51.3%)
- Your association newsletter (46.7%)
- Columnists in newspapers (46%)
- Internet websites (39.1%)
- Magazines (19%)
- Other (24.9%)

18. Which of the following describes how often you use your association's website? (R=1199)

- Not at all / association does not have a website (57.6%)
- Once a month (12.2%)
- Not at all / website of no value (10.4%)
- More than once a week (7.3%)
- Twice or more a month (6.3%)
- Once a week (6.1%)

19. How many of your association's board meetings and annual membership meetings do you attend each year? (R=1199)

All Respondents	Response
50.4%	All board & membership meetings
22.6%	Most board & membership meetings
17.6%	A few board & membership meetings
9.4%	None

R=1199

20. Do you believe the board members of your association are responsive to the community?

All Respondents	Response
77.2%	Yes
22.8%	No

R=1188

CALL *cont.*

21. Which of the following actions have members of your community taken to remove an undesirable member of the board of directors? (Select all that apply; response totals > 100%) (R=1168)

- Successfully voted off board in annual election (24.2%)
- Put forward special candidate to contest them in annual election (12.6%)
- Special recall election (8.6%)
- Filed complaint with FL Land Sales, Condo & Mobile Homes (4.5%)
- Filed complaint with Condo Ombudsman's office (2.7%)
- None of the above (62.9%)

22. Should associations strongly enforce the rules, regulations and other governing documents of the community?

2005	2004	Response
44.4%	36.0%	Yes
51.8%	62.6%	Yes, with hardship exceptions as needed
3.8%	1.3%	No
R=1196	R=637	

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

2005	2004	Response
93.7%	92.8%	Warning letters
78.3%	86.1%	Fines
69.5%	72.1%	Lawsuit if continued non-compliance
67.2%	76.5%	Liens against property / foreclosure
R=1195	R = 638	

About the PARTICIPANTS

24. Age: (R = 1,175)

- 65+ (52%)
- 50-64 (37.8%)
- 34-49 (9.0%)
- 21-34 (1.2%)
- Under 20 (0%)

25. Gender: (R=1,171)

- Male 62.7%
- Female 37.3%

26. Work status: (R = 1,166)

- Retired (62.6%)
- Full time (27.0%)
- Part time (10.4%)

CALL *cont.*

27. Total annual household income: (R = 1,053)

- $50,000-$99,999 (41.3%)
- Under $49,999 (26.7%)
- $100,000-$149,999 (14.5%)
- $150,000 or more (17.5%)

28. Marital status: (R = 1.158)

- Married (73.7%)
- Single (7.4%)
- Divorced (7.3%)
- Widowed (7.4%)
- Domestic partnership (4.1%)

29. 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% in 2004)

2005	2004	Occupancy Practices
48.2%	51.2%	Currently serve on my community association's board of directors
25.6%	31.7%	Never served on a community association board of directors
15.8%	22.5%	Previously served on this board of directors
10.4%	16.7%	Previously served on board of directors for another association
R=1159	R=621	

BECKER & POLIAKOFF

Legal and Business Strategists

NOTE: If you have questions or comments about this survey, please contact Michael Tangeman at The Pen Group Communications, 305-529-1944 or michael@thepengroup.com.

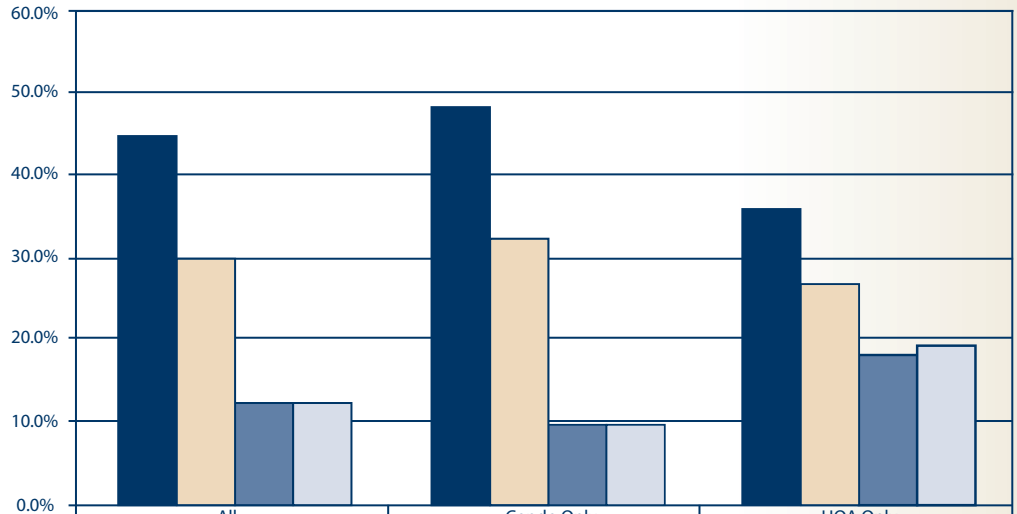
CALL *cont.*

Fast Facts from the CALL 2005 Survey

FACT # 1: Overall, board members enjoy high approval ratings

Boards rate well on financial performance, with 44.8% of respondents agreeing that the board does an "excellent" job of handling community finances. The chart below shows the breakdown between association types.

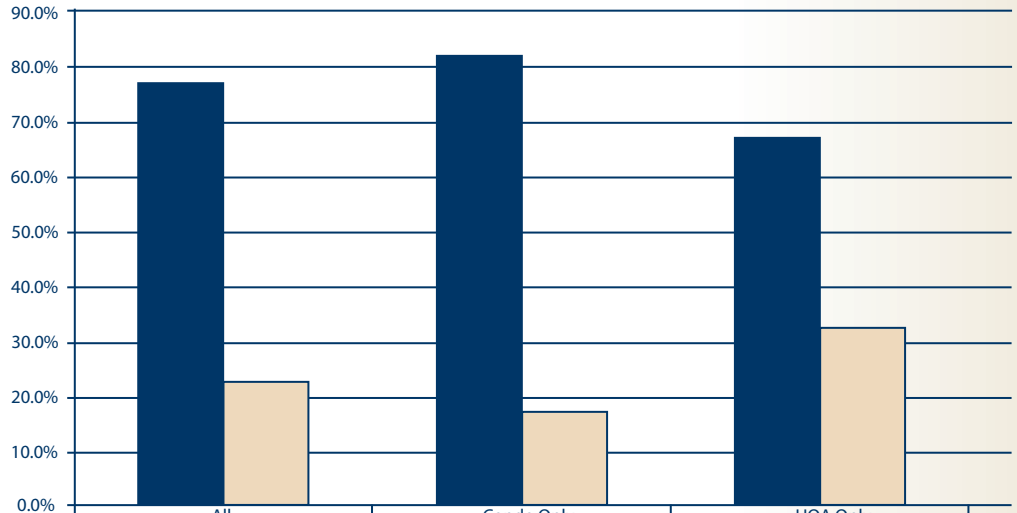
Board Performance in Handling Community Finances



	All	Condo Only	HOA Only
Excellent	44.8%	48.4%	35.9%
Good	30.1%	32.2%	26.8%
Fair	12.5%	9.7%	18.1%
Poor	12.6%	9.7%	19.2%

The vast majority of respondents (77.2%) rate board members as responsive to their community.

Are Board Members Responsive to the Community

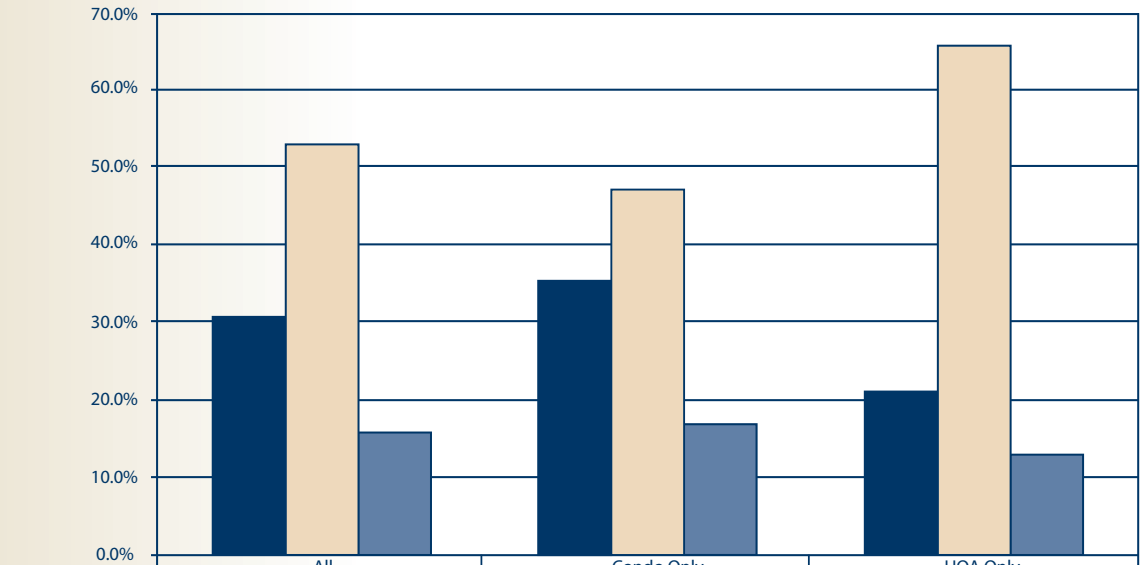


	All	Condo Only	HOA Only
Yes	77%	82%	67%
No	23%	18%	33%

CALL *cont.*

Fact # 2: Hurricane spending increased in almost a third (30.8%) of associations after 2004.

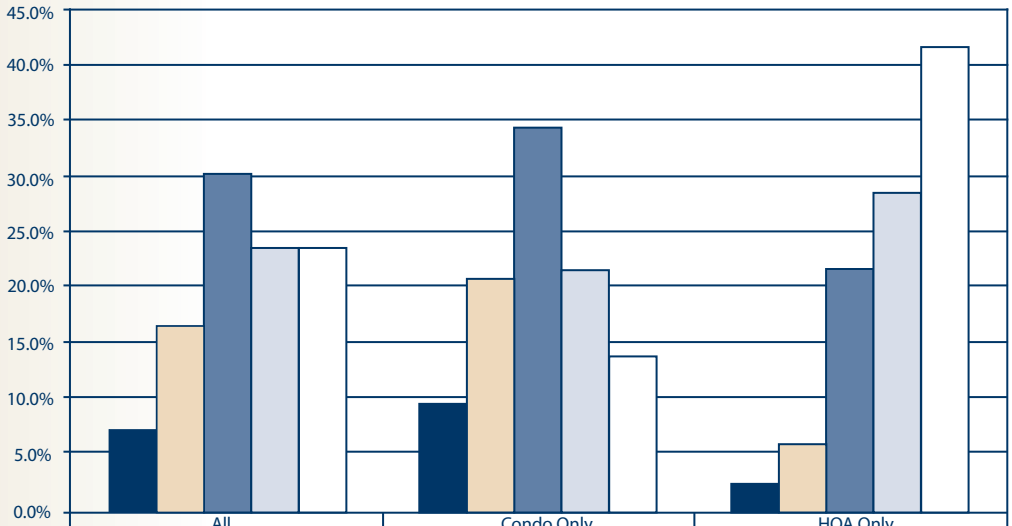
2004 Storms Prompted Spending



	All	Condo Only	HOA Only
Yes	30.8%	35.5%	21.2%
No	53.1%	47.4%	65.7%
Don't know	16.1%	17.0%	13.1%

While few owners rely on their associations for hurricane protection, levels vary by association type.

Reliance on association for Hurricane Preparations

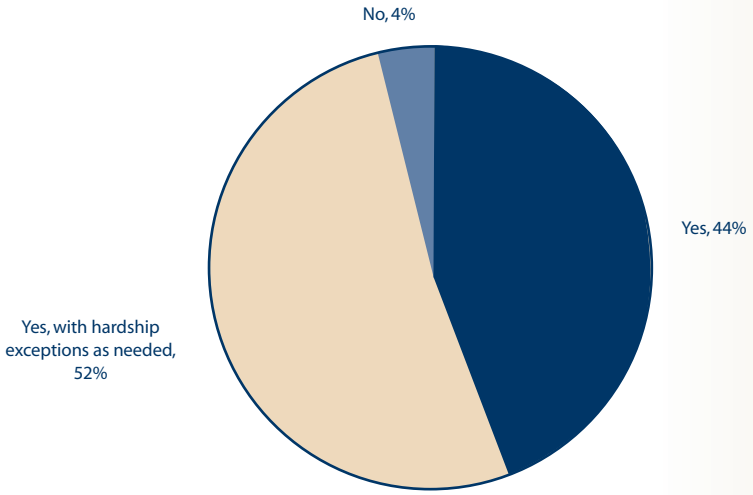


	All	Condo Only	HOA Only
Almost exclusively	7.4%	9.5%	2.2%
Exclusively	16.5%	20.7%	5.9%
Somewhat	30.2%	34.4%	21.6%
Not Very Much	23.6%	21.6%	28.6%
Not at all	22.3%	13.7%	41.7%

CALL *cont.*

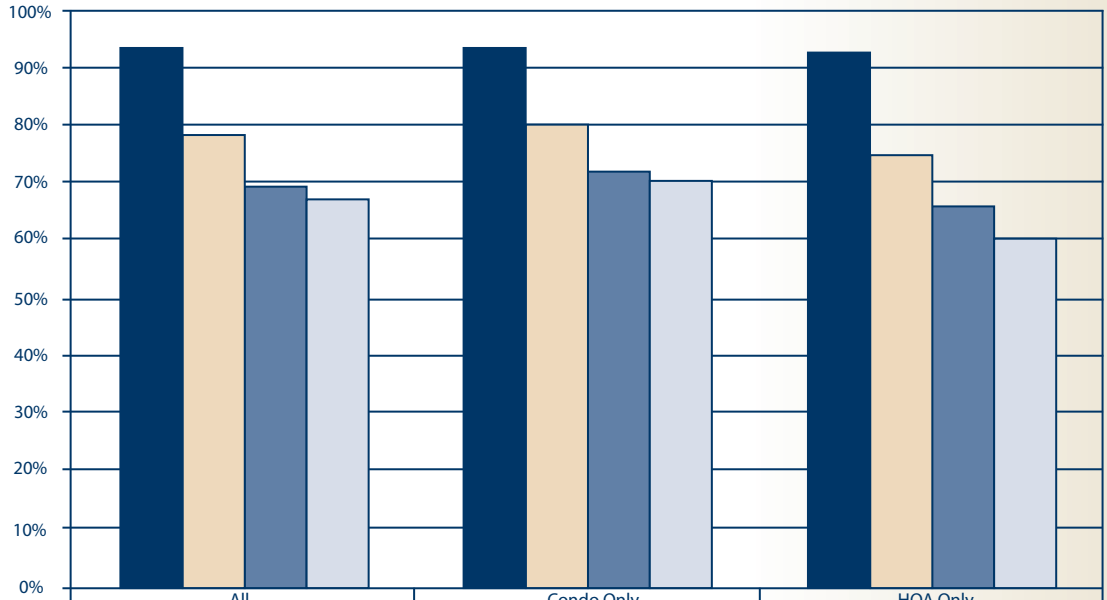
Fact # 3: Compliance with the governing documents is important and community members agree on strong enforcement actions.

Should Associations Strongly Enforce the Rules?



Respondents consistently favor a range of enforcement techniques to enforce community rules:

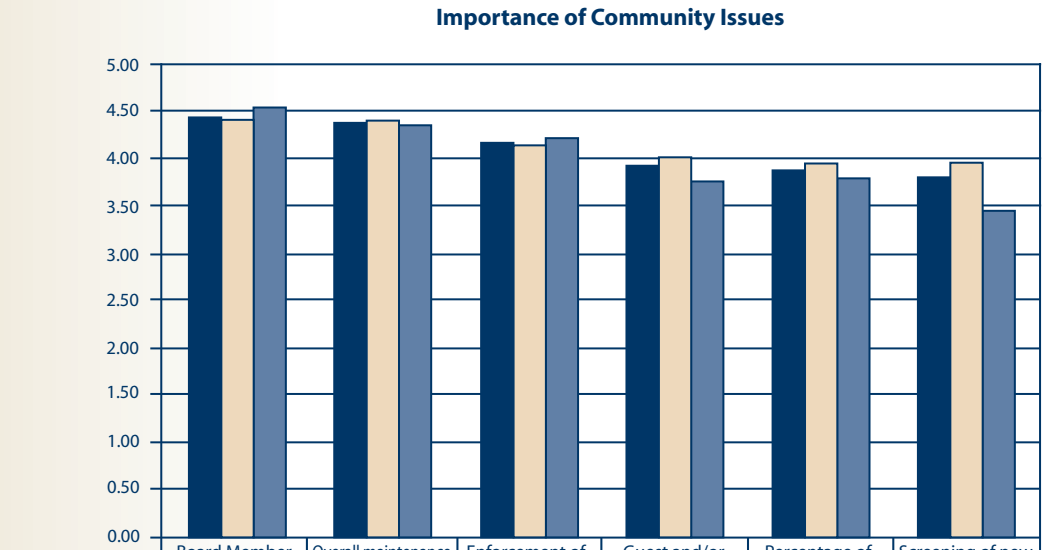
Favored Enforcement Techniques



	All	Condo Only	HOA Only
Warning letters	94%	94%	93%
Fines	78%	80%	75%
Lawsuits	70%	72%	66%
Liens/foreclosure	67%	71%	60%

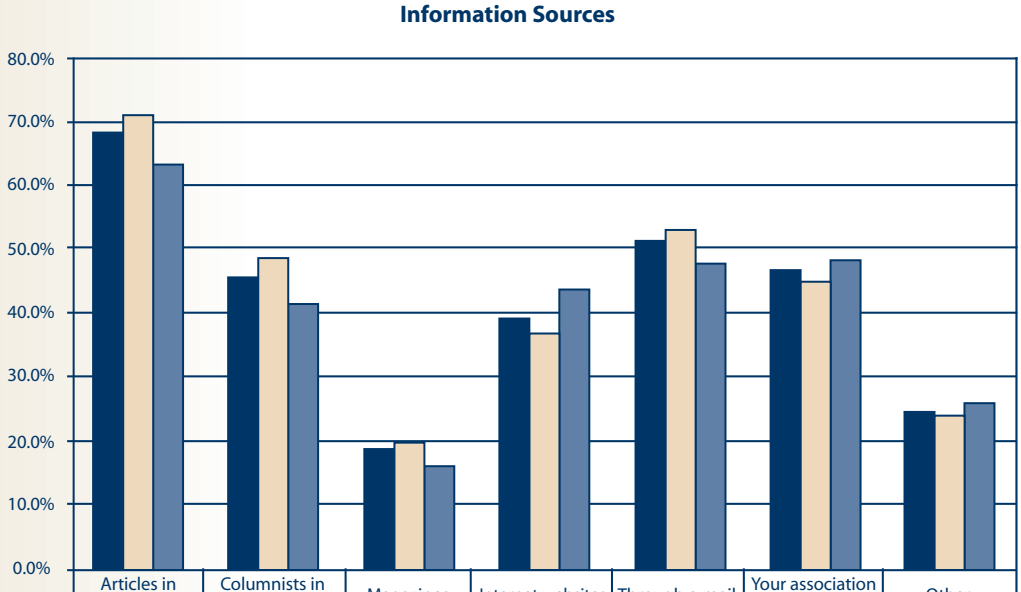
CALL *cont.*

Fact # 4: Board member integrity is a priority for all types of community association owners.
Responses on a scale of 1 (extremely unimportant) to 5 (extremely important).



	Board Member integrity	Overall maintenance of community	Enforcement of rules & regs	Guest and/or occupancy issues	Percentage of renters	Screening of new owners/tenants
All	4.43	4.37	4.17	3.93	3.89	3.81
Condo Only	4.41	4.39	4.15	4.00	3.95	3.96
HOA Only	4.53	4.36	4.20	3.75	3.80	3.46

Fact # 5. Newspapers are the leading source of information on community association living.



	Articles in newspapers	Columnists in newspapers	Magazines	Internet websites	Through e-mail	Your association newsletter	Other
All	68.5%	46.0%	19.0%	39.1%	51.3%	46.7%	24.9%
Condo Only	71.0%	48.9%	20.3%	37.1%	53.1%	45.2%	24.4%
HOA Only	63.5%	41.6%	16.4%	44.2%	47.9%	48.2%	26.1%

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Volume X, 2005

CURRENT NEWS FOR COMMUNITY ASSOCIATIONS

Donna D. Berger, Esq. *Editor*

part 2
Condominium CONSTRUCTION DEFECT Litigation

By: George Ketelhohn, Esq.

Claims for Breach of Common-Law Implied Warranties

Implied warranties of fitness and merchantability apply to the sale of new condominium units. Developers can disclaim or disavow common-law implied warranties with a clear disclaimer that such warranties don't apply. Common-law warranties only benefit owners who purchased directly from the developer, and not subsequent purchasers. However, as explained above, as long as even one unit owner is still in privity with the developer, that unit owner can arguably claim to have a right to recover all damages to remedy all defects in the common elements.

The majority of the case law holds that the common-law implied warranties extend further than mere habitability to impose the responsibility to construct improvements in a workmanlike manner in compliance with the applicable building codes and in compliance with the condominium's restrictive covenants. However, in the case of ***Putnam v. Roudebush***, 352 So.2d 908 (Fla. 2d DCA 1977), the Florida First District Court of Appeal held there was no action for breach of warranty for a noisy air conditioning system because the premises met normal standards reasonably to be expected of living quarters of comparable quality (in other words, because they met the habitability standard). The warranty of fitness or merchantability does not extend to a seawall. ***Conklin v. Hurley***, 428 So.2d 654 (Fla. 1983).

The defect must be related to an integral part of the unit. Also, the warranties do not apply to improvements to land other than residences and immediately supporting structures, commercial property, leased property, lots on which improvements were constructed, or unimproved lots. However, the courts are not in agreement on the scope of such warranties. See ***Drexel Properties, Inc. v. Bay Colony Club Condominium, Inc.***, 406 So.2d 515 (Fla. 4th DCA 1981) in which the Court affirmed an award based on a breach of implied warranty for failure to install a decorative aluminum fence with no utilitarian function.

There has been some judicial expansion of the developer's common-law implied warranty of fitness and merchantability towards purchasers of new condominium units to include a duty to construct the condominium in accordance with the plans and specifications.

cont. on page 2

Published periodically by the law offices of Becker & Poliakoff, P.A. with offices in Boca Raton, Fort Lauderdale, Fort Myers, Fort Walton Beach, Jacksonville, Largo, Melbourne, Miami, Naples, Orlando, Port Charlotte, Sarasota, Tallahassee, and West Palm Beach. The administrative office is located at 3111 Stirling Road, Fort Lauderdale, Florida 33312-6525. The objective of this newsletter is to keep officers and directors of Condominium, Cooperative and Homeowner Associations informed about matters affecting their communities' operations. This newsletter is prepared for and disseminated to clients of the Firm. Internet Address: http: // www.becker-poliakoff.com

LITIGATION *cont.*

However, one court held where unit owners were on notice of a change in the plans and the developer made a good faith attempt to comply with disclosure requirements of the Condominium Act, and without a showing of prejudice, the association did not have a claim for the deviation from the plans. ***Beach Place Joint Venture v. Beach Place Condominium Association, Inc.,*** 458 So.2d 439 (Fla. 2d DCA 1984). Another court held it was error for the trial court to fail to consider evidence that a change in the plans was necessary because of safety factors or impossibility of performance. ***Juno by the Sea Condominium Apartments, Inc. v. Juno by the Sea North Condominium Association (The Tower), Inc.,*** 418 So.2d 1190 (Fla. 4th DCA 1982). In ***Drexel Properties, Inc. v. Bay Colony Club Condominium, Inc.,*** 406 So.2d 515 (Fla. 4th DCA 1981), the court indicated an implied warranty existed in favor of original purchasers that the condominium was constructed in compliance with applicable building codes. The relevant question is whether the alleged failure to comply with building codes is material and results in any damage to the association. Generally only substantial compliance is needed. Also, it is important to determine the exact code that applied when the permit was issued.

The courts have been reluctant to enforce disclaimers for common-law implied warranties. Section 718.303(2), F.S., however, provides that "A provision of this chapter may not be waived if the waiver would adversely affect the rights of a unit owner or the purpose of the provision." But ***Belle Plaza Condominium Association v. B.C.E. Development, Inc.,*** 543 So.2d 239 (Fla. 3d DCA 1989), held that express or common-law implied warranties can be disclaimed by use of a bold and conspicuous disclaimer.

Claims for Breach of Statutory Warranties

Florida's Condominium Act imposes implied warranties extending from the developer to each purchaser of a condominium unit. Section 718.203(1), F.S., provides the warranty that the developer extends to each purchaser of a condominium unit is an implied warranty of fitness and merchantability for the purposes or uses intended. Unlike the common-law implied warranties, the statutory warranty benefits not only the original purchasers of condominium units, but also subsequent purchasers. § 718.203(5), F.S.

The statutory warranty extends to personal property transferred with or appurtenant to each unit, to the roof and structural components of a building or other improvements, and to mechanical, electrical and plumbing elements serving improvements or a building (except mechanical elements serving only one unit), and to other improvements for the use of the unit owners. The reference to other improvements covered by the warranty, in Section 718.203(1)(c), F.S., could be interpreted to include a seawall, tennis courts, or other portions of a condominium beyond the roof or structural, electrical, mechanical, and plumbing elements. Furthermore, the developer also impliedly promises that the condominium complies with the restrictive covenants for the condominium.

Section718.203(2), F.S. provides that contractors, subcontractors, and suppliers extend to each purchaser of a condominium unit an implied warranty of fitness as to the work performed or materials supplied. This warranty extends to the roof, structural components of the building or improvement, and mechanical and plumbing elements serving a building or an improvement, except mechanical elements serving only one unit. Design professionals, on the other hand, have no duty to the association based on the statutory implied warranty provisions of §718.203, F.S. They were removed from the statute in 1992.

Depending on which property the defect involves, a different statutory warranty period applies. The different statutory classifications are: units; personal property transferred with or appurtenant to each unit; all other improvements for the use of the unit owners; all other personal property for the use of the unit owners; roof and structural components and mechanical, electrical, and plumbing elements serving a building; and all other property conveyed with each unit. In some cases it is not clear which category applies.

Section718.203(4), F.S. conditions the statutory implied warranties under the Condominium Law on the performance of routine maintenance. The courts typically simply require the developer to assert failure to maintain as an affirmative defense. However, if the developer fails to perform maintenance for elements such as the roof, structural, mechanical, electrical and plumbing elements while it controls the association, especially if it retains control past the expiration of contractor and subcontractor warranties, the association may avoid this affirmative defense.

Claims for Negligence and Claims for Strict Product Liability

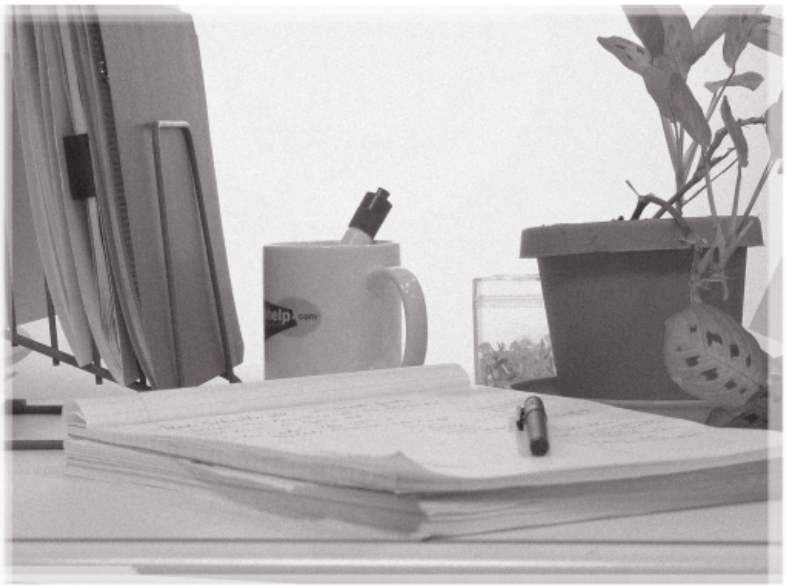
The economic loss rule is a judge-established rule in Florida which bars negligence or strict liability actions for economic losses in certain circumstances. The economic loss rule in Florida bars recovery of economic damages in negligence or strict liability actions for construction defects against parties that were in privity (in a direct contractual relationship) with the plaintiffs. Typically, the developer is in privity with a condominium association and with many or all of the unit owners who make up the class members in a class action by a condominium association. The economic loss rule also generally bars negligence actions against manufacturers or distributors of a product for damage only to the product itself, which caused no injury to persons or damage to other property (material suppliers or manufacturers of building components would fall into this category where the construction defects have caused only economic losses). The economic loss rule bars negligence actions by the association against pre- and post- turnover directors arising from defective design, construction, inspection, repair and wiring of a condominium.

LITIGATION *cont.*

The Greens of Town 'N Country Condominium Association, Inc. v. The Greens of Tampa, Inc., 653 So.2d 1136 (Fla. 2d DCA 1995).

Design firms and individual design professionals (architects and engineers) who participate in the design of the condominium are liable for their negligence to the aggrieved party regardless of lack of privity even for purely economic losses. The economic loss rule does not bar such claims. Such claims are not even barred when there is privity with the design professional.

The case of ***Sandarac Association, Inc. v. W.R. Frizzell Architects, Inc.,*** 609 So.2d 1349 (Fla. 2d DCA 1992) mentions an exception to the economic loss rule as to general contractors when the economic loss to the association is an expense to cure a latent building defect that creates an immediate and substantial risk of bodily injury or damage to property other than the building.



Florida Deceptive And Unfair Trade Practices Act (FDUTPA)

Chapter 501, Florida Statutes, can apply to condominiums and can authorize a cause of action arising out of a developer's failure to perform as represented in the offering prospectus or condominium declaration or to the extent the developer engaged in sale or advertising promotion which was deceptive or misleading. There is a statutory provision for recovering attorneys' fees. The economic loss doctrine does not bar a claim under this statute. However, Department of Legal Affairs Administrative Rule 2-16.04 which defined as an unfair and deceptive trade practice a developer's failure to perform as represented under the disclosure requirements or to engage in deceptive or misleading sales or advertising was repealed on July 25, 1995. Also, FDUTPA does not apply to claims for personal injury or death or claims for damage to property other than property that was the subject of the transaction, F.S. 501.212(3). FDUTPA does not apply to an act or practice involving the sale, lease, rental, or appraisal of real estate in violation of §475.42 or §475.626, F.S., by a person licensed, certified or registered under Ch. 475, F.S. FDUTPA does not apply to causes of action concerning failure to maintain real property if the Florida Statutes 1) require the owner to comply with applicable building, housing, and health codes, 2) require the owner to maintain buildings and improvements in common areas and 3) provide a cause of action for failure to maintain, including the award of attorney's fees. Damages and fees are not recoverable against a retailer who has in good faith disseminated claims of a manufacturer. §501.211, F.S.

Statute of Limitations

Actions for condominium construction defects have varying statutes of limitation. It is necessary to check Chapter 718 and Chapter 95, Florida Statutes. In an action against a developer for breach of statutory and common-law implied warranty, the statute of limitations is four years. In an action under §553.84, F.S., the statute of limitations is also four years. For latent defects, the action must be filed within four years of when there is an obvious manifestation of the defect, even if its exact nature is not known. ***Performing Arts Center Authority v. Clark Construction Group, Inc.,*** 789 So.2d 392 (Fla. 4th DCA 2001). But discovery of one actionable defect may not start the statute running as to unrelated defects. ***Wishnatzki v. Coffman Construction, Inc.,*** 884 So.2d 282 (Fla. 2d DCA 2004). And finding small cracks in a house was not notice of the house being built upon loose sand and muck to start the running of the statute of limitations. ***Snyder v. Wernecke,*** 813 So.2d 213 (Fla. 4th DCA 2002). Notice of a defect in the common elements as to the condominium association imputes notice of such a defect to the unit owners for purposes of the statute of limitations, because the association is the contractually and statutorily designated agent for the unit owners with respect to maintenance and repair of the common elements.

The statute of limitations will not begin to run for association actions against the developer until the developer relinquishes control of the association to the unit owners. The time periods specified in §718.203, F.S. establish the lifetime of statutory warranties, not the statute of limitations for suing on the warranties, which is set out in F.S. Chapter 95.

In any case, the outside limit on liability for construction defects is based on the statute of repose, which sets 15 years as the limit. The count of 15 years is triggered by the actual date of occupancy, issuance of certificate of occupancy and other events outlined in F.S. 95.11(3)(c). This outside limit on liability is absolute, and is not tolled by F.S. 718.124 or by the defects being of a latent nature.

LITIGATION *cont.*

Conversions

The Roth Act was enacted in 1980, and is incorporated as Part VI of the Condominium Act. It imposes disclosure requirements on a developer in a conversion of rental units to a condominium, including the condition of the roof, structure, fireproofing, fire protection systems, elevators, heating and cooling systems, plumbing and electrical systems, swimming pools, seawalls, pavement and parking areas, and drainage systems. §718.616(3)(a), F.S. The developer is also required to establish a reserve fund for capital expenditures and deferred maintenance or give warranties as provided in §718.618(6), F.S. or post a surety bond as provided in §718.618(7), F.S.

A conversion is not a new condominium unit, so the common law warranty of habitability or merchantability does not apply. However, a developer that fails to establish the reserve accounts, or post a surety bond per §718.618, F.S., is deemed to provide to the purchaser of each unit an implied warranty of fitness and merchantability for the purposes intended as to the roof, structural components, and mechanical, electrical, and plumbing elements except mechanical elements serving only one unit. §718.618(6), F.S.The warranty is for 3 years beginning with the notice of intended conversion or the recording of the declaration of condominium, or 1 year after owners other than the developer obtain control of the association, whichever occurs last, but for no more than 5 years.This warranty is conditioned on routine maintenance being performed unless maintenance is an obligation of the developer or a developer-controlled association. §718.618(6)(a), F.S. This requirement for warranties from the developer may be satisfied by means of an appropriate insurance policy obtained by the developer.

The developer of a conversion is required to disclose the date and type of construction, the prior use, any termite infestation, the condition of the roof, elevators, heating and cooling systems, plumbing, electrical systems, swimming pool, seawall, pavement and parking areas, and drainage systems, and must substantiate these with a certificate from an architect or engineer. Florida courts have not yet decided if incorrect information in these disclosures will create an action for breach of contract or breach of express warranty even if the contract for sale disclaims express warranties and states the property is sold "as is."

Under §718.506, F.S., any person who pays value towards purchase of a condominium unit has a cause of action against the developer if they reasonably relied on false or misleading information published under authority from the developer in advertising and promotional materials. Such person can rescind the contract prior to closing or collect damages from the developer before or after closing. Also, failure to disclose material facts known to the seller about the condominium can create a cause of action for fraudulent concealment, even if the seller does not intend to deceive the buyer. Fraud in the inducement is a tort independent of the contract between the individual unit purchasers and the developer and is therefore not barred by the economic loss rule. An action against the developer for negligent disclosure of the condominium's condition, however, would be barred by the economic loss rule. Actions for breach of contract, express warranty or common-law warranty are limited to original purchasers of units in a conversion condominium. However, the statutory implied warranty from a developer of a conversion inures to the benefit of owners and successor owners. §718.618(6)(b), F.S.

Damages Recoverable in a Lawsuits Regarding Construction Defects

Generally the measure of damages is the cost to repair or replace the defective building components, not the diminution in value of the condominium units. However, an association's damages may be prorated to account for increased life expectancy of the new component. Where the cost of correction would result in unreasonable economic waste or the cost of correction exceeds the value of the property, the measure of damages is instead the diminution in the value of the property.

Homeowners Association Claims

Some limitations apply to construction defect claims by homeowners' associations. Like a condominium association, a homeowners' association has standing to bring a class action on behalf of all its members concerning matters of common interest to the members, including, but not limited to, the common areas, roof or structural components of a building or other improvements for which the association is responsible, and representations of the developer pertaining to any existing or proposed commonly used facility. §720.303(1), F.S. However, before commencing litigation involving an amount in excess of $100,000, the association must obtain the approval of a majority of the voting interests at a meeting of the membership where a quorum has been attained. §720.303(1), F.S. The statute mentioned above, statute §718.124, F.S., which tolls the statute of limitations so that it does not begin running until the unit owners have elected a majority of the board, applies only to condominium associations or to cooperative associations, not to homeowners' associations. Also, unlike a condominium association, which is granted statutory implied warranties under §718.203, F.S., a homeowners' association has no such protection, though common-law implied warranties can still apply if they have not been expressly disclaimed by the developer.

There are a myriad of construction-related issues that can crop up in a community association. For guidance on your particular situation or for more information on any construction-related concerns you may have, be sure to contact your association counsel.

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Community Up-Date™

Volume IX, 2005

CURRENT NEWS FOR COMMUNITY ASSOCIATIONS

Donna D. Berger, Esq. *Editor*

Part One of a Two-Part Series
Condominium CONSTRUCTION DEFECT Litigation

By: George Ketelhohn, Esq.

Construction defects are an issue that sooner or later concern all property owners, including condominium associations and homeowner associations. There may have been defects involved with the original construction of the condominium or development. Or there may be defects involved with subsequent construction undertaken at the direction of the association, such as hurricane repairs or replacement of elements in need of maintenance. The applicable law regarding legal claims that can be brought for construction defects depends on whether the claim is by a homeowner association (governed by Chapter 720, Florida Statutes), a condominium which was developed and sold as new construction by a developer (governed by Chapter 718, Florida Statutes), or a conversion of existing improvements, such as apartment buildings, to a condominium (governed by Part VI of Chapter 718, Florida Statutes). Under some circumstances, individual condominium unit owners can also bring a construction defect claim on their own behalf or can bring a class action on behalf of all unit owners.

A condominium association, whether for a newly constructed condominium or for a conversion, can bring a claim on its own behalf for construction defects in the common elements. A condominium association can also assert a class action on behalf of its unit owners for matters involving the common elements or other matters of common interest which affect all or most of the unit owners. Fla.R.Civ.P. 1.221; §718.111, F.S. Class certification has been upheld when the issues were common to many of the unit owners. ***El Conquistador Condominium, Inc. v. Day***, 338 So.2d 237 (Fla. 3rd DCA 1976). However, an association may not assert an action in its own name for alleged fraud on its individual members, because of the individual questions involved in fraud claims. Thus, an association cannot bring a class action to claim that the developer defrauded individual unit owners regarding the condition of the construction. In addition, an umbrella association cannot maintain a class action on behalf of its various member condominium associations. ***Condominium Owners Organization of Century Village East, Inc. v. Century Village East, Inc.,*** 428 So.2d 384 (Fla. 4th DCA 1983).

cont. on page 2

SBA

The U.S. Small Business Administration (SBA) offers low interest hurricane/disaster relief loans to businesses and not for profit corporations, associations, unit owners, homeowners, mobile home owners, and to renters (among others).

see back cover for additional information

Published periodically by the law offices of Becker & Poliakoff, P.A. with offices in Boca Raton, Fort Lauderdale, Fort Myers, Fort Walton Beach, Jacksonville, Largo, Melbourne, Miami, Naples, Orlando, Port Charlotte, Sarasota, Tallahassee, and West Palm Beach. The administrative office is located at 3111 Stirling Road, Fort Lauderdale, Florida 33312-6525. The objective of this newsletter is to keep officers and directors of Condominium, Cooperative and Homeowner Associations informed about matters affecting their communities' operations. This newsletter is prepared for and disseminated to clients of the Firm. Internet Address: http: // www.becker-poliakoff.com

LITIGATION *cont.*

A unit owner may maintain an action on his or her own behalf against a developer or general contractor for breaches of duty with respect to the non-common elements owned by that individual. An individual can also pursue an action for fraud if the individual can show that the developer or contractor made a false statement to the individual concerning a specific material fact, that the developer or contractor knew that the representation was false, and intended that the individual rely on the representation, and that the individual suffered harm as a consequence of acting in reliance on the representation. An individual unit owner can also maintain an action against a developer or general contractor for breaches of duty with respect to common elements, though the interests of the other unit owners must be represented unless the duty breached was owed only to a particular unit owner. ***Rogers & Ford Construction Corp. v. Carlandia Corp.,*** 626 So.2d 1350 (Fla. 1993). In the ***Rogers*** case, the Supreme Court of Florida further approved the right of an individual unit owner to pursue a class action on behalf of all unit owners of the condominium against the developer, for construction defects in the common elements which breached the developer's duties towards all unit owners. ***Id***. The court noted that if the developer had breached a duty or promise owed only to only a particular unit owner, even with respect to the common elements, that unit owner would be allowed to proceed without further involvement of other unit owners. ***Id***.

Pre-suit Notice and Procedure for Construction Defect Claims

Chapter 558, Florida Statutes is a relatively recent law first passed in 2003 which establishes pre-suit procedures which must be followed before a claimant can file suit alleging a construction defect. The statute defines a construction defect to mean a deficiency in design, specifications, surveying, planning, supervision, observation of construction, or construction, repair, alteration, or remodeling of a dwelling, appurtenance or the real property on which a dwelling is affixed. This includes defective materials, Code violations, improper design, or substandard construction.

In order to comply with Chapter 558, F.S., the claimant must first serve written notice of the claim on the contractor, subcontractor, supplier, or design professional that is alleged to be responsible for the construction defect. For actions involving single family homes or associations representing 20 or fewer residential parcels, notice must be served at least 60 days before filing suit. For actions involving associations representing more than 20 residential parcels, notice must be served at least 120 days before suit is filed. Service must be by certified mail, return receipt requested, to the last known address of the addressee.

For actions involving single family homes or associations representing 20 or fewer residential parcels, the recipient of the notice of claim is entitled to conduct an inspection to assess the alleged defect within 30 days of receipt of the notice. For actions involving associations representing more than 20 residential parcels, the period to inspect is 50 days.

The owner must grant reasonable access for the inspection. Destructive testing is permitted under certain conditions. If the claimant refuses to agree to destructive testing, the claimant has no claim for damages which could have been avoided or mitigated if destructive testing had been permitted when requested.

Within 10 days after receipt of the notice of claim involving a single family home or association representing 20 or fewer residential parcels, the recipient of the notice of claim may forward a copy of the notice to each contractor, subcontractor, supplier, or design professional whom it reasonably believes is responsible for each defect in the claim. Such parties also have a right to inspect the alleged defect. The period to forward the claim to others is 30 days for claims involving associations representing more than 20 residential parcels.

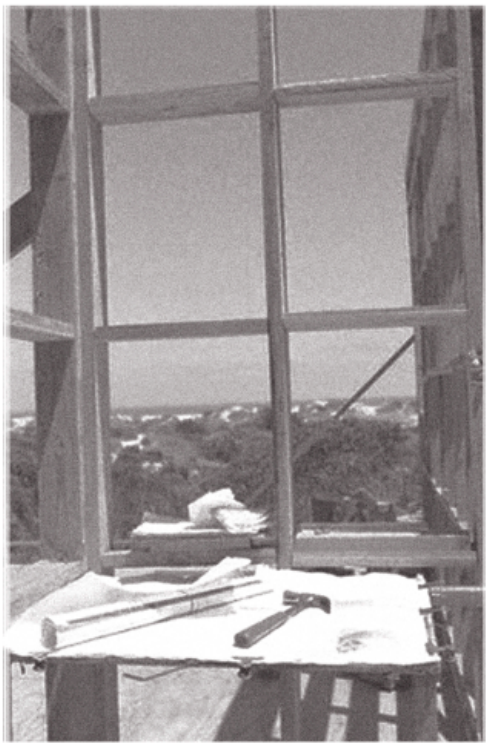
Within 15 days after receiving a copy of a claim involving a single family home or association representing 20 or fewer residential parcels, the recipient of the forwarded notice of claim must serve a written response. The period to serve a response is 30 days for claims involving associations representing more than 20 residential parcels. This response must include a report of the scope and results of the inspection (if any) and a statement as to whether the recipient of the notice is willing to make repairs, including a time table for completion, and whether the claim is disputed.

Within 45 days after receipt of the notice of a claim involving a single-family home or association representing 20 or fewer residential parcels, the recipient of the original notice of claim must serve a written response with an offer to remedy the defect at no cost to the claimaint, including a description of the proposed repairs and a time table, or a written offer to compromise and settle the claim by monetary payment, or an offer of a combination of repairs and payment, or a statement that the person disputes the claim, or a statement that a monetary payment will be determined within 30 days after notification to the person's insurer.

If the recipient of the notice of claim disputes the claim, the claimant may proceed to file suit. A claimant who receives a timely settlement offer must accept or reject the offer in writing served by certified mail, return receipt requested.

If a claimant files suit without first complying with the requirements of Chapter 558, F.S., the court will suspend the lawsuit until the claimant complies with the requirements. Serving the initial notice of claim (stops the running of (tolls) the

LITIGATION *cont.*

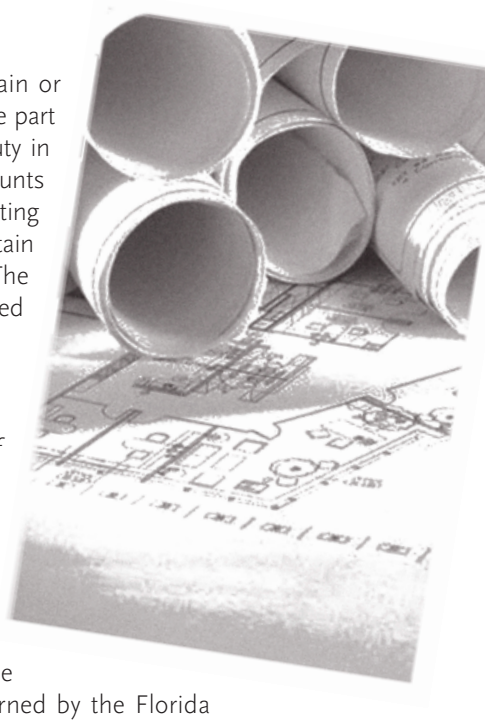


statute of limitations for bringing the claim against such person and any bond surety by 90 or 120 days, as applicable, or 30 days after the end of the repair period or payment period stated in the settlement offer (if the offer was accepted), whichever is later. Chapter 558, F.S. does not prohibit or limit the claimant from making any emergency repairs to the dwelling as are required to protect the health, safety and welfare of the claimaint.

Who Can be Sued for Construction Defects

Depending on the nature of the claim, possible defendants include the developer, the general contractor hired by the developer to perform the construction, subcontractors in turn hired by the general contractor to perform portions of the work, and design professionals who performed design or supervision with regard to the construction. The developer is the person who creates a condominium or who offers condominium parcels for sale or lease in the ordinary course of business. § 718.103(16), F.S. Developers may attempt to shield themselves by forming corporate shells for each development project or by dissolving a corporation and transferring the assets to a new one. If there is a showing of improper conduct, developers can sometimes be reached by piercing the corporate veil or by rescission of a fraudulent transfer through supplementary proceedings. § 56.29, F.S.; ***Rashdan v. Sheikh***, 706 So.2d 357 (Fla. 4th DCA 1998).

Absent actual wrongdoing in the form of fraud, self-dealing, or unjust enrichment, directors, officers, and stockholders are not liable for corporate acts simply by reason of their official relationship to the corporation. Chapter 607 and 617, Florida Statutes, shield condominium association directors from individual liability for negligent management. Principals of the corporate developer-builder who serve as directors of the condominium association pursuant to designation by the developer are not personally liable in the latter capacity to the association for the existence of, or failure to correct, construction defects created by the developer.



However, developer-appointed directors may be liable if they use their position for personal gain or otherwise breach their fiduciary duty pursuant to F.S. 718.111(1). There is a quasi-fiduciary duty on the part of the officers and directors of the pre-turnover association. There may be a breach of fiduciary duty in failure to collect assessments on unsold units owned by the developer, failure to fund reserve accounts for deferred maintenance, or overestimation of the useful life of building components when calculating reserves. §718.303(1), F.S. There is since 1998 a statutory presumption that failure to obtain and maintain adequate insurance during developer control is a breach of fiduciary duty. §718.111(11)(a), F.S. The Condominium Law does not, however, provide a different standard for liability of a developer-appointed director as compared to the liability of any other director of the association.

Claims for Violation of the Florida Building Code

Section 553.84, F.S. creates a statutory claim for any person damaged as a result of a violation of the Florida Building Code. This is in addition to any other available remedies. There is no requirement that the claimant have a contract directly with the party to be sued under §553.84, F.S. Also, §553.84, F.S., authorizes civil actions against parties who violate the Florida Building Code, however, only against the party that actually committed the violation, not developers that hire a contractor and do not themselves engage in construction or supervision activity. Section 553.72(1), F.S. refers to the Florida Building Code as applying to the "design, construction, erection, alteration, modification, repair, or demolition" of buildings, etc. Developers may argue they do not directly engage in these specified activities. Also, material suppliers are not governed by the Florida Building Code and are not covered by §553.84, F.S.

A claim under Section 553.84, F.S., can potentially be made against engineers (pursuant to §471.001-045 F.S.), architects, interior designers, and landscape architects (pursuant to § 481.201-329 ***F.S.***), and contractors (pursuant to § 489.101-558 Fla. ***Stat***).

LITIGATION *cont.*

Section 553.84, F.S. was revised on June 8, 2001, so that under the revised statute, if the appropriate permit is obtained and the project passes all required inspections under the code, and there is no injury to person or damage to property other than the subject construction, then the association must prove that the party that committed the Code violation knew or should have known that the violation existed.

Design professionals can be liable to the association based on §553.84, F.S. if the association can prove that the design professional knew or should have known that its design violated the Florida Building Code. But a design professional that acquires approval of a design from the chief building inspector and chief code enforcement officer for the appropriate building department before construction, has complied with the standard of care, although this can be challenged if it can be demonstrated the approval was clearly erroneous. ***Edward J. Seibert, A.I.A., Architect & Planner, P.A. v. Bayport Beach & Tennis Club Association, Inc.,*** 573 So.2d 889 (Fla. 2d DCA 1991).

Claims for Breach of Express Warranties

Developers may be liable to unit owners for faulty construction based on express warranties (warranties made expressly by the developer). The developer may have made an express warranty in the prospectus, in the purchase and sale contract, in offering brochures, or in other developer publications. If false or misleading information is contained in the documents, § 718.506 creates a cause of action against the developer which includes a prevailing party attorney's fee provision. The statute of limitations is one year from 1) the closing of the transaction (purchase of the condominium unit), or 2) from the issuance of a certificate of occupancy or other evidence of completion sufficient to allow lawful occupancy, or 3) from the completion of the common elements or recreational facilities the developer is obligated to provide under the written agreement, or if there is no written agreement, completion of the common elements or recreational facilities the developer is obligated to provide under the law. §718.506(1), F.S. However, there is also a statute of repose under which no such action survives beyond five years after the closing of the transaction. §718.506(1), F.S. Express warranties benefit the original purchasers of condominium units from the developer, but do not benefit subsequent purchasers. However, as long as even one unit owner is still in privity with the developer, that unit owner can arguably claim to have a right to recover all damages to remedy all defects in the common elements. ***Drexel Properties, Inc. v. Bay Colony Club Condominium, Inc.,*** 406 So.2d 515 (Fla. 4th DCA 1981).

SBA *cont.*

The U.S. Small Business Administration (SBA) offers low interest hurricane/disaster relief loans to businesses and not for profit corporations, associations, unit owners, homeowners, mobile home owners, and to renters (among others). The loans are available for physical disaster damage for certain persons and businesses and may be available for economic injury damage for certain businesses.

The web site for the SBA is www.sba.gov and go to Disaster Relief. This web site is filled with most of the information you will need to apply for a disaster relief loan. The web site includes most criteria for eligibility and also includes the forms you will need to download and send to the SBA. The web site details additional documents you will need to send to the SBA so that it can evaluate your request for an SBA loan.

Also, the customer service number for the SBA is 800-659-2955. The customer service line can assist you with questions and walk you through the process and also walk you through the web site.

Hurrican Wilma is SBA Declaration #10222/10223. IMPORTANT: the current filing deadlines are:

1. Application for physical disaster loans for homeowners, renters, landlords, businesses and non-profit organizations is December 23, 2005; and

2. Application for economic injury is July 24, 2006 (which is not typically applicable to community associations).

The counties currently declared eligible are: Brevard, Broward, Collier, Glades, Hendry, Indian River, Lee, Martin, Miami-Dade, Monroe, Okeechobee, Palm Beach and St. Lucie and contiguous counties of Charlotte, DeSoto, Highland, Orange, Osceola, Polk, Seminole and Volusia counties.

Please check the SBA web site or call customer service for the amounts of the loans available and the current interest rates. Generally, homeowners can apply for $200,000 physical real estate loss, homeowners and renters can apply for up to $40,000 for personal property loss, businesses and not-for-profit corporations (community associations) can apply for up to $1.5 million dollars (which may include physical loss and economic injury loss). Generally, the SBA will require some type of collateral for loans in excess of $10,000.

If you have any questions on this process or require assistance in applying for a SBA loan, please contact attorney Mary Harvey at 800-800-432-7712 or by email at mharvey@becker-poliakoff.com.

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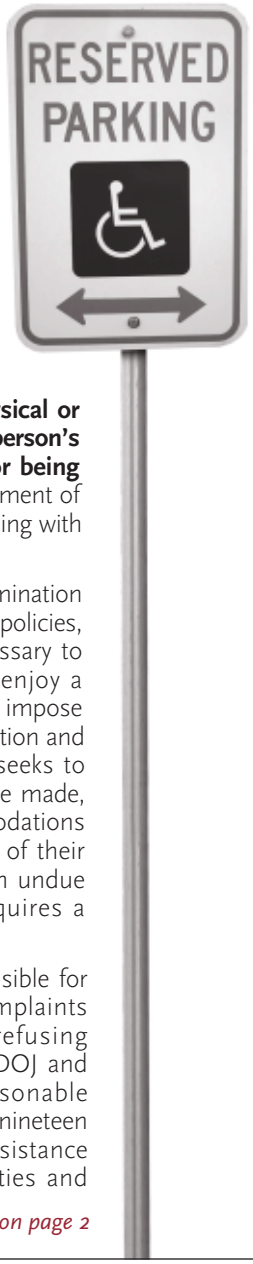
Volume VIII, 2005

CURRENT NEWS FOR COMMUNITY ASSOCIATIONS

Donna D. Berger, Esq. *Editor*

How to Determine If A HANDICAP ACCOMMODATION is Reasonable Under the FHA

By: Yeline Goin, Esq.



As has been reported in numerous issues of the Community Up-Date, condominium and homeowners' associations are considered "housing providers" for purposes of the Fair Housing Act ("FHA" or "the Act") and must make reasonable accommodations to its rules, practices, and policies, if necessary, to provide a handicapped person an equal opportunity to use and enjoy a dwelling (i.e., a unit or parcel).

The Fair Housing Act makes it unlawful to discriminate against any person in connection with the rental or sale of a dwelling because of a handicap. The Fair Housing Act is codified at 42 U.S.C. §§3601-3619. A handicap is defined in the FHA as a **"physical or mental impairment which substantially limits one or more of [a] person's major life activities, a record of having such an impairment, or being regarded as having such an impairment."** In addition, the Department of Housing and Urban Development ("HUD") has adopted rules dealing with claims of discrimination found at 24 C.F.R. §100.200, et seq.

Both under the Federal statutes and HUD rules, handicap discrimination includes a "refusal to make reasonable accommodation in rules, policies, practices or services, when such accommodations may be necessary to afford a handicapped person equal opportunity to use and enjoy a dwelling." A "reasonable accommodation" is one which would not impose undue hardship or burden upon the entity making the accommodation and would not undermine the basic purpose the accommodation seeks to achieve. Stated another way, reasonable accommodations must be made, but unreasonable accommodations are not required. Accommodations that permit handicapped persons to experience the full benefit of their dwelling must be made unless the accommodation imposes an undue financial or administrative burden on an Association or requires a fundamental alteration in the nature of its program.

The Department of Justice ("DOJ") and HUD are jointly responsible for enforcing the FHA. HUD and DOJ frequently respond to complaints alleging that housing providers have violated the Act by refusing reasonable accommodations to persons with disabilities. The DOJ and HUD recently published a "Joint Statement" regarding reasonable accommodations under the FHA. The Joint Statement consists of nineteen (19) Questions and Answers intended to provide technical assistance regarding the rights and obligations of persons with disabilities and

cont. on page 2

TIDBITS Did You Know

FLOOD INSURANCE

- Flood Insurance is required to secure financing, from a federally regulated or federally insured lender, to buy, build, or improve structures in Special Flood Hazard Areas (SFHA's).
- The National Flood Insurance Program (NFIP) was created by Congress in 1968. The Federal Emergency Management Agency (FEMA) manages the NFIP, and oversees the floodplain management and mapping.
- If your property is higher than the Base Flood Elevation, then you may request a Letter of Map Amendment (LOMA) or a Letter of Map Revision (LOM-R) by submitting an elevation certificate to FEMA. If the redesignation is granted, your lender may choose not to require Flood Insurance.
- If you were required to get insurance by a lender and then your property is redesignated by FEMA, you may request a refund of the premium paid for flood insurance coverage.
- Lenders do not have to waive flood insurance requirements and may decide that flood insurance coverage is still required as a condition of the mortgage or other financing.
- The decision whether or not to carry Flood Insurance for an Association should only be made after a careful review and analysis of the governing documents and then consultation with your attorney and insurance advisors.

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HANDICAP *cont.*

housing providers under the FHA relating to reasonable accommodations. The full Joint Statement can be found at www.hud.gov/offices/fheo/library/huddojstatement.pdf. The following is a summary of some of the questions and answers found in the Joint Statement.

(1) **What types of discrimination does the Act prohibit?** The Act prohibits discrimination against persons because of their disability or the disability of anyone associated with them (including buyers and renters without disabilities who live or are associated with individuals with disabilities.) Thus, the Act also prohibits denials of housing opportunities to persons because they have children, parents, friends, spouses, roommates, subtenants or other associates who have disabilities.

(2) **Who must comply with the FHA's reasonable accommodation requirements?** The Joint Statement explains that the term "housing provider" includes homeowners' and condominium associations.

(3) **Who qualifies as a person with a disability under the Act?** A person with a disability includes (1) individuals with a physical or mental impairment that substantially limits one or more major life activities; (2) individuals who are regarded as having such an impairment; and (3) individuals with a record of such an impairment. The term "physical or mental impairment" includes, but is not limited to, diseases and conditions such as orthopedic, visual, speech and hearing impairments, cerebral palsy, autism, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, HIV, mental retardation, emotional illness, drug addiction (other than addiction caused by current, illegal use of a controlled substance) and alcoholism. The term "substantially limits" means a limitation that is "significant" or "to a large degree." The term "major life activity" means those activities that are of central importance to daily life such as seeing, hearing, walking, breathing, performing manual tasks, caring for one's self, learning, and speaking. However, the Act does not protect juvenile offenders, by virtue of that status, sex offenders, persons who illegally use controlled substances, and persons with disabilities who pose a "direct threat" to others, unless the threat can be eliminated or significantly reduced by the reasonable accommodation. To determine whether a direct threat exists, the following must be considered: (1) the nature, duration, and severity of the risk of injury; (2) the probability that injury will actually occur; and (3) whether there are any reasonable accommodations that will eliminate the direct threat. In addition, a determination that someone poses a direct threat cannot be based upon fear, speculation or stereotype about a particular disability or persons with disabilities in general. Rather, there must be reliable, objective evidence (e.g., current conduct, or a recent history of overt acts) of the direct threat.

(4) **What is a reasonable accommodation?** A reasonable accommodation is a change, exception, or adjustment to a rule, policy, practice or service that may be necessary for a person with a disability to have an equal opportunity to use and enjoy a dwelling, including public and common use spaces. To show that a requested accommodation is necessary, there must be an identifiable relationship, or nexus, between the requested accommodation and the individual's disability. The following examples are provided in the Joint Statement to explain "reasonable accommodation": (1) A provider must make an exception to its policy of not providing assigned parking spaces to accommodate a resident with a mobility impairment who is substantially limited in her ability to walk; (2) A provider must make an exception to its policy that all tenants must come to the rental office in person to pay their rent for a tenant who has a mental disability that makes her afraid to leave her unit; (3) A provider must make an exception to its "no pets" policy for a person who is deaf and whose dog will alert him to several sounds, including knocks at the door, sounding of the smoke detector, the telephone ringing, and cars coming into the driveway.

(5) **When can a provider deny a request for a reasonable accommodation?** The request can be denied if the request was not made by or on behalf of a person with a disability or if there is no disability-related need for the accommodation. In addition, the request can be denied if the accommodation would impose an undue financial and administrative burden on the provider or it would fundamentally alter the nature of the provider's operations. In considering whether there is an "undue burden," the provider can consider the cost of the requested accommodation, the financial resources of the provider, the benefits that the accommodation would provide to the requester, and the availability of alternative accommodations that would effectively meet the requester's disability-related needs. The Joint Statement includes the following example to illustrate "undue burden": As a result of a disability, a tenant is unable to open the dumpster placed in the parking lot by his housing provider for trash collection. The provider does not have to grant a request that a maintenance staff person be sent to a unit on a daily basis to collect a disabled person's trash and take it to the dumpster, particularly where the housing development is a small operation with limited financial resources and maintenance staff is on site only a couple of days a week. However, the provider should discuss with the tenant whether reasonable accommodations could be provided to meet the disabled tenant's needs, such as placing an open trash collection can in

TIDBITS *cont.*

The individual owners may be required, by their mortgages, to purchase flood insurance in the event an Association drops its coverage (even after the property has been redesignated).

- Association leaders are cautioned against executing any documents or entering into any contractual relationships regarding flood insurance, without first seeking the advice of counsel and consulting with their insurance professionals.

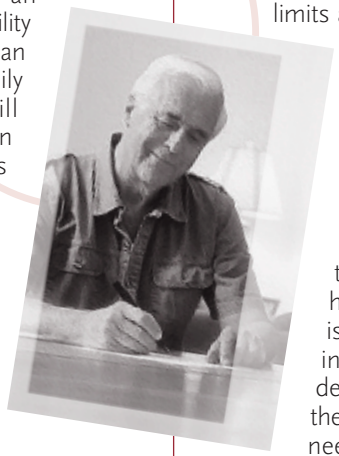
HANDICAP *cont.*

a location that is readily accessible to the tenant so the tenant can dispose of his own trash and the provider's maintenance staff person can then transfer the trash to the dumpster when they are on site.

(6) **What happens if providing a requested accommodation involves some costs on the part of the housing provider?** The Act may require a housing provider to pay for the costs of the reasonable accommodation as long as it does not impose an undue financial or administrative burden. The financial resources of the provider, the cost of the reasonable accommodation, the benefits to the requester, and the availability of other, less expensive alternative accommodations that would effectively meet the applicant or resident's disability-related needs must be considered.

(7) **Can the housing provider charge an extra fee or require a deposit as a condition of granting a reasonable accommodation?** No. For example, if a provider makes an exception to its "no motorized scooter" policy for an owner who is substantially limited in his ability to walk, the provider cannot condition the owner's use of the scooter on payment of a fee or deposit, or on a requirement that the owner obtain liability insurance relating to the use of the scooter. Likewise, a provider could not condition granting permission for an assistance animal on the applicant paying a fee or a security deposit. However, the provider can require the owner to pay for any damage caused by the scooter or animal.

(8) **When and how should an individual request an accommodation?** The Fair Housing Act does not require that a request be made in a particular manner or at a particular time. Although it can be made orally, it should be made in writing to prevent misunderstandings regarding what is being requested, or whether the request was made. However, providers must consider reasonable accommodation requests even if the requester makes it orally or does not use the preferred forms or procedures. For example, if an owner has a physical disability that limits her ability to reach and bend and makes an oral request for an assigned mailbox in a location that can be easily accessed and reached, the provider must still consider the reasonable accommodation even though the owner would not use the provider's designated form.



(9) **Must the housing provider adopt formal procedures for processing requests for a reasonable accommodation?** Formal procedures are not required, but are helpful to prevent future misunderstandings. However, the provider should be careful not to require information that is not necessary to evaluate the reasonable accommodation.

(10) **What kinds of information, if any, can a provider request when someone who has an obvious or known disability is requesting a reasonable accommodation?** If a person's disability is obvious, or otherwise known to the provider, then the provider may not request any additional information about the requester's disability but can request information on the disability-related need for the accommodation. For example, someone who uses a wheelchair advises that he wishes to keep an assistance dog even though there is a "no pets" policy. Although the disability is apparent, the need for an assistance animal is not obvious, and therefore, the housing provider may ask for additional information about the disability-related need for the dog.

(11) **If the disability is not obvious, what kinds of information can be requested from the person with a disability in support of the requested accommodation?** A housing provider may request reliable disability-related information that (1) is necessary to verify that the person meets the Act's definition of disability (i.e., has a physical or mental impairment that substantially limits one or more major life activities); (2) describes the needed accommodation, and (3) shows the relationship between the person's disability and the need for the requested accommodation. Such information can be provided by the individual himself or herself or by a doctor or other medical professional, a peer support group, a non-medical service agency, or a reliable third party who is in a position to know about the individual's disability. In most cases, an individual's medical records should not be necessary to evaluate the disability. Such information must be kept confidential and not shared with others unless they need the information to make or assess a decision to grant or deny a reasonable accommodation request or unless disclosure is required by law. (Author's note: The Condominium Act and Homeowners' Association Act provide that medical records of unit owners are exempt from "official records inspection" and do not have to be disclosed to anyone, including unit or parcel owners.)

Although the Joint Statement is a good reference tool for an association that receives a reasonable accommodation request, the Joint Statement still leaves many questions unanswered. For instance, the Joint Statement does not give any examples to help explain whether a physical or mental impairment substantially limits a major life activity. Individuals will sometimes claim to be disabled because they suffer a physical or mental impairment, but a dispute will arise as to whether the impairment substantially limits a major life activity. In addition, although the Joint Statement does indicate that an individual must show the relationship between the person's disability and the need for the requested accommodation, it leaves some questions unanswered. For example, the Joint Statement indicates that an exception would have to be made to a "no pet" policy for a person who is deaf and whose dog will alert him to several sounds, including knocks at the door, sounding of the smoke detector, the telephone ringing, and cars coming into the driveway. This example suggests that the pet would need to have some discernable skills. However, the main area in contention in current law, and where differing opinions and case authorities exist, is whether "emotional support animals" must have discernable skills. Unfortunately, the Joint Statement did not provide guidance on that issue. Perhaps as this area of the law evolves, there will be additional Joint Statements issued.

CASENOTES

Rain, Rain GO AWAY

Florida Windstorm Underwriting Association (FWUA) v. Anil Gajwani 30 FLW D1213 (FL 3rd DCA, 2005)

This decision upheld FWUA's wind-driven rain exclusion.

Facts: Two houses located next to each other suffered "wind-driven rain" damage when Hurricane Irene struck South Florida. The evidence indicated that the rain entered the homes through window and sliding glass door openings, and by seeping through second floor patio tiles and cracks in the stucco. The homeowners could not offer evidence of entry through openings in the roof or walls. The Association's policy required that an opening in a roof or wall must cause the rain damage. Thus, the Association's insurance denied coverage, as did the FWUA, based on the wind-driven rain exclusion. The homeowners, the insureds, had the burden to prove an exception to the exclusion contained in the insurance policy. The homeowners could not meet this burden of proof.

This case first examined the cross-appeal. The court confirmed that a cross-appeal is appropriate if it seeks to review an order or judgment that is merged into or is an inherent part of the order or judgment properly under review by the main appeal. However, a cross-appeal is not appropriate if it seeks to review an order or judgment that is separate and distinct from the order or judgment under review by the main appeal. Based on this reasoning, the court found that the judgment against the Association insurance and the judgment against FWUA were two separate and distinct judgments, even though they were combined into one document. Thus, the court dismissed the cross appeal involving the Association's insurance for lack of jurisdiction, and only dealt with the judgment against FWUA.

In examining the lower courts judgment, the appellate court examined Florida Statute § 627.351(2) (2004), the section that created the Florida Windstorm Underwriting Association (FWUA). The court reasoned that nothing in the statutory language of Florida Statute § 627.351(2) (2004) suggests that the legislature intended or mandated Florida Windstorm Underwriting Association to include wind-driven rain coverage in policies it issues. The statutory language of Florida Statute § 627.351(2) (2004) also does not indicate that Florida, as a matter of public policy, requires seamless windstorm coverage for all types of windstorm caused losses. The court construed public policy as a narrow basis upon which to strike down an otherwise valid contract. Thus, the court stated that in the absence of a clear public policy directive in the statute, it is not the court's function to extend coverage for wind-driven rain damages to insurance policies excluding such coverage.

Therefore, the court held that FWUA's wind-driven rain exclusion is not void as against public policy. In so holding, the court also indicated that § 627.4025(2)(a) Florida Statutes (2004) seems to contemplate a wind-driven rain exclusion.

LAW OFFICES
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Community Up-Date™

Volume VII, 2005

CURRENT NEWS FOR COMMUNITY ASSOCIATIONS

Donna D. Berger, Esq. *Editor*

What You Need To Know About ASSOCIATION INSURANCE COVERAGE

By: Peter C. Mollengarden, Esq.

As result of the unprecedented four hurricanes that struck Florida in 2004, the Florida legislature amended the laws governing insurance in an attempt to ensure the availability of hurricane/wind storm insurance in the state of Florida.

Citizens Property Insurance Corporation ("Citizens") is the state owned and operated insurer of last resort. If hurricane/windstorm insurance is unavailable in the voluntary market, one may obtain such insurance from Citizens. The legislation has established a Board of Governors for Citizens consisting of eight members. The Governor, Chief Financial Officer, President of the Senate and the Speaker of the House will each appoint two members to the Board. The Board, in turn, must create a Market Accountability Advisory Committee to assist Citizens in developing awareness of its rates and service levels in relation to the voluntary market with similar coverage. The committee will report on insurance market issues such as rates, rate competition with the voluntary market and service, including policy issuance, claim processing and responsiveness.

The Florida legislature concluded that many who filed claims related to the 2004 storms were inadequately insured due to the difficulty in understanding the complex nature of insurance policies. The intent of the amended law is for property / casualty insurers to offer standard residential property insurance policies and standard checklists of policy contents.

The stated goal is for policies to be written in simple format with easily readable language for coverage, exclusions, limitations, deductibles, co-insurance and additional coverage through riders or endorsements. The Chief Financial Officer of the State of Florida is to appoint a committee to develop language for policies and checklists. However, no insurer is required to offer the standard policy unless required by further act of the Florida Legislature.

Pursuant to Section 627.4133, Florida Statutes, in the event of a declaration of emergency under Section 252.36, Florida Statutes, and the order of the Commission of Insurance Regulation, an insurer may not cancel or non-renew a personal or commercial residential property insurance policy for property damaged by a hurricane or wind loss subject to the declaration of emergency for 90 days after the dwelling or structure has been repaired. The structure or dwelling is considered repaired when substantially completed and restored to the extent insurable by another authorized insurer. The insurance company may cancel, however, for (I) non-payment of premium after 10 day notice, (II) material misrepresentation after 45 days notice, (III) insured having unnecessarily delayed the repairs or (IV) insurer has paid the policy limit.

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TIDBITS Did You Know

ENSURING A Reliable Electric Supply To Power FLORIDA'S FUTURE

All of us depend on a reliable electric supply to power our lives. Lights, air conditioning, refrigeration, computers – electricity powers nearly everything we depend on for health, safety, comfort, commerce and communication.

One of the most important factors in ensuring a reliable supply of electricity is maintaining a diverse and flexible mix of fuels to produce that electricity. That way, if there is an interruption or reduction in supply in one fuel source, and/or a price spike, it is possible to shift to other fuel sources to maintain a steady power supply at a fairly level cost.

A well-balanced mix of fuel sources has provided Florida consumers with lower than national average electric bills for many years. According to a March 2005 report by the Florida Public Service Commission, the mix is approximately 33 percent coal, 26 percent natural gas, 13 percent nuclear, 13 percent oil, 11 percent interchange/other and 4 percent non-utility generation.

Most new power plants built in Florida in recent years, however, have relied increasingly on natural gas as the primary fuel course. Hurricane Katrina provided an unfortunate example of the threat to Florida's electric supply when the production and delivery of natural gas from the Gulf of Mexico was significantly reduced. The Florida Reliability Coordinating Council

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COVERAGE *cont.*

Section 627.4143, Florida Statutes, as amended, requires that a basic homeowner, mobile homeowner, dwelling or condominium owner policy may not be issued without a comprehensive checklist of coverage on a form approved by the Insurance Commission, and an acceptable outline of coverage has been delivered to the insured prior to the issuance of the policy, or accompanies the policy when issued.

A. Limits of liability shall be listed for each item on the checklist. The checklist must include, but is not limited to, the following:

1. Property coverage for the principal premises shown in the declarations.
2. Property coverage for other structures on the residential premises.
3. Whether the principal premises and other structures are insured against the following perils:
    a. Fire
    b. Lightning
    c. Explosion
    d. Hurricane loss
    e. Non-hurricane wind loss
    f. Collapse
    g. Mold
    h. Sinkhole loss
    i. Vandalism
4. Personal property coverage
5. Whether personal property is insured against the following perils:
    a. Fire
    b. Lightning
    c. Hurricane loss
    d. Non-hurricane wind loss
    e. Collapse
    f. Mold
    g. Sinkhole loss
    h. Theft
6. The following additional coverages:
    a. Debris removal
    b. Loss assessment
    c. Additional living expenses
7. Personal liability coverage
8. Medical payments coverage
9. Discounts applied to the premiums
10. Deductible for loss due to hurricane and loss of other perils
11. Building ordinance or loss coverage
12. Replacement cost coverage
13. Actual cash value coverage

The forms shall allow the insurance company to place other coverages on the checklists which may or may not be included in the company's policies.

The outline of coverage must contain the following:

1. A brief description of the main benefits and coverage provided in the policy, broken down by each class or type of coverage provided under the policy for which a premium is charged, and the itemization of the applicable premium.
2. A summary of the principal exclusions and limitations or reductions contained in the policy by class or type, including, but not limited to, deductibles, co-insurance, and any other limitations or reductions.
3. A summary of any renewal or cancellation provisions
4. A description of the credit or surcharge plan being applied. The description may be numbered or alphabetical codes on the declarations page or premium notice to enable the insured to determine the reason or reasons why the policy is being surcharged or is receiving a credit.
5. Summary of any additional coverage provided through any rider or endorsement accompanying the policy.

TIDBITS *cont.*

issued an alert on behalf of the state's utilities asking customers to temporarily reduce their use of electricity. Reduced deliveries of natural gas were also experienced last year in the wake of Hurricane Ivan.

In addition, natural gas prices have more than doubled in the past five years and are forecast to continue to climb at a very steep rate. These costs are passed on to consumers and, as a result, we are all paying more and more for our electricity.

One important way to help mitigate the increased cost of natural gas and the potential threat of an interruption or reduction in supply is by increasing our fuel supply options. Conservation programs and the use of renewable energy sources are important parts of these measures, but they won't be enough to meet Florida's burgeoning growth and increasing demand for electricity. And, recognizing that we can't risk "putting all our eggs in one basket," several utilities are planning to add advanced technology coal fired power plants to the mix.

These new plants, coupled with advanced pollution control technologies to meet today's stringent environmental protection requirements, can provide a reliable source of low cost power while still being protective of the clean air quality that Floridians enjoy.

COVERAGE *cont.*

The statute requires that the checklist must contain a list of the standard provisions and elements typically included in the insurer's policies, whether or not included in the subject policy, in a format that allows the insurer to put a checkmark next to the provision or element such that the insured can see what is and is not included. The checklist may use text rather than checkmarks.

Neither the statute, the checklist or the outline of coverage alters or modifies the terms of the policy or creates a cause of action, and is not admissible.

Many areas in Florida were struck by two (2) hurricanes in 2004, particularly Hurricanes Frances and Jeanne which unbelievably struck at almost the exact place a scant three (3) weeks apart. This created the additional burden of homeowners and community associations having their insurance company apply two windstorm deductibles to the damage suffered to their property, one for each occurrence or storm. After the hurricanes, the Florida legislation attempted to address the situation by passing emergency legislation providing for a measure of state funded reimbursement for qualifying parties who were charged double hurricane deductibles. In a further attempt to address the multiple occurrence, multiple deductible issue, Section 627.701, Florida Statutes, has been amended regarding the disclosure of the amount of alternative windstorm deductibles and the applicability of separate deductibles to each storm or hurricane.

For personal lines residential policies issued on or after January 1, 2006 the insurer must offer alternative deductibles for hurricane loss of $500 and 2%, 5% and 10% of the policy limits unless the percentage equals less than $500. The insurer must also provide notice of the availability of the deductibles. A personal lines residential policy for a risk of $100,000 or more may include a hurricane deductible of up to 10% unless subject to a higher deductible on August 24, 1992. There is no maximum deductible for risk value above $500,000 for these policies, and if the risk value is $250,000 or more, the insurer is not required to offer the $500 deductible.

Commencing October 1, 2005 personal lines residential insurance policies with a separate hurricane deductible must disclose prominently the dollar value of the deductible on the declarations page at the issuance and on the renewal of the policy. For policies with an inflation guard rider the insurer must compute and display the dollar value of the deductible and notify the policy holder of the possibility that the hurricane deductible may be higher than indicated when a loss occurs due to the application of the inflation guard rider.

With respect to commercial lines residential coverage, including condominium and cooperative association policies, the insurer must offer a deductible not exceeding 10% of the insured value, if at the time of offer and renewal the insurer also offers a 3% deductible. For such policies issued or renewed on or after January 1, 2006 the insurer must offer alternative deductibles. The policy holder must also be offered a choice regarding the application of the hurricane deductible for policies issued or renewed on or after January 1, 2006. The commercial policy holder will be offered a choice of a deductible that applies on an annual basis or a deductible that applies to each hurricane. Presumably, there may be a significant difference in the cost of insurance coverage depending on which type of deductible is selected.

Another significant issue or problem facing many insureds after the storms of 2004 was that many property owners discovered that their insurance policies did not cover the repair/reconstruction costs related to complying with current building codes. This resulted in many homeowners and community associations bearing thousands and thousands of dollars of uninsured repair and reconstruction costs. In order for such costs to be covered, one must have building code or law and ordinance insurance coverage, which will cover the cost of repairs/reconstruction required in order to comply with current building codes and ordinances. Since such codes change frequently and typically require more stringent and expensive building materials and/or techniques or methods, such coverage may prove vital, if available. Under Section 627.7011, as amended, a homeowners insurance policy issued or renewed on or after October 1, 2005 must contain a bold face type of statement about law and ordinance coverage and flood insurance. The law now also provides that, in the event of a loss for which a dwelling or personal property is insured on the basis of replacement cost, the insurer shall pay the replacement cost without reservation or hold back of any depreciation in value, whether or not the insured replaces or repairs the dwelling or property.

Pursuant to Section 627.711, the insurer must notify each insured on a form prescribed by the Office of Insurance Regulation of the availability and range of each premium discount or credit for fixtures or construction techniques to reduce loss in the event of a windstorm. The form must describe actions which may be taken to reduce the windstorm premium. Thus, if an insurer offers a premium discount if hurricane shutters are installed, or for other fixtures or construction techniques, this must be disclosed.

In response to complaints about insurers' lack of response to claims made after the 2004 hurricanes, the law now requires an insurer to provide a substantive written acknowledgment within fourteen (14) days of receiving a communication about a claim. Furthermore, unless otherwise provided by the policy or by law, the insurer must begin investigating a claim within 10 days of receipt of a proof of loss.

Finally, in light of the finding by the legislature that the availability of hurricane insurance coverage is essential to the economic survival of the state, a Task Force on Long Term Solutions to Hurricane Insurance has been established. Among the Task Force's tasks is to ensure that Citizens operates as an insurer of last resort and does not compete with the insurers in the voluntary market but charges rates that are not excessive or unfairly discriminatory. The Task Force must issue a report by April 1, 2006. The result of that report, and the findings of the reports of the other committees and commissions, will likely be further statutory changes to address the problems in providing hurricane insurance coverage to the homeowners and consumers of Florida.

CASENOTES

It Depends On Your DEFINITION of THEREON

Shields v. Andros Property Owners Association, Inc., (872 So. 2d 1003 (FLA 4th DCA 2004)

The specific meanings of words are very important in the interpretation of documents. In the case of *Shields v. Andros Property Owners Association, Inc.,* (872 So. 2d 1003 (FLA 4th DCA 2004), the Court's ruling was partially predicated on the meaning of the word "thereon".

The owner purchased a home in the Andros Isles subdivision. Dissatisfied with the builder, she displayed a sign in her front yard advertising the sale of her house and criticizing the builder. She placed other signs complaining about her home and its builder in the windows of her automobile. The association demanded that she remove all signs because they violated the Declaration. When the Owner refused, the association filed a complaint against the homeowner for temporary and permanent injunctive relief. The trial court entered an order granting a temporary injunction that enjoined the owner from posting signs on her lot, but denied relief with respect to the signs posted in her automobile windows.

Section 8 of the Declaration of Covenants states "[n]o signs of any kind shall be displayed to public view on any Lot except one sign of not more than two (2) square feet advertising such Lot for sale or rent." Section 11 of the Declaration state that "[n]o vehicles, except four wheeled passenger automobiles ... with no lettering or signage thereon, shall be placed, parked or stored upon any Lot.

The Court quoted with approval the following principles of law: "Restrictions found within a Declaration are afforded a strong presumption of validity, and a reasonable unambiguous restriction will be enforced according to the intent of the parties as expressed by the clear and ordinary meaning of its terms...." "Due regard must be had for the purpose contemplated by the parties to the covenant, and words used must be given their ordinary, obvious meaning as commonly understood at the time the instrument containing the covenants was executed...." "Any doubt as to the meaning of the words used must be resolved against those seeking enforcement."

The Court than examined the meanings of the relevant words as an aid to the interpretation of the document language. In making its interpretation, the Court stated, "Thereon" is defined as "[o]n or upon this, that, or it." "Therein" is defined as "[i]n that place or context." The Court further stated, "The clear and ordinary meaning of the term "thereon" suggests that the signs located within the interior of the homeowner's car do not violate section 11 of the Declaration. The language employed in section 11 as a whole does not suggest an intent to prohibit interior vehicle signs displayed to criticize the builder's workmanship. Section 11 is aimed at prohibiting four wheeled vehicles of a recreational or commercial nature from parking on any lot in plain view, not from prohibiting residents from hanging signs in their car windows.". The Court then concluded that signs or lettering "on" a vehicle parked on a lot were prohibited by the Covenants, but that a sign "in" a vehicle parked on a lot was not prohibited by the Covenants and rendered judgment on this issue for the owner.

This case points out the importance of precise wording in documents. Governing documents of associations should be regularly reviewed to be sure the words properly express the intent and desires of the members.

Are you a DEVELOPER?

Riedlinger v. Rousset, 2005 Fla. App.Lexis 12795, (Fla. Dist. Ct. App. 2005)

This case points out how important it is to know if one classifies as a developer, as developers are subject to strict disclosure requirements which allows a buyer to void the contract if such disclosure is not made. Thus, this case provides valuable guidance as to what characterizes a seller as a "developer" pursuant to Florida Statute, Section 718.503.

Seller sued buyer for breach of contract for tendering bad checks for the deposit on a condominium sale contract. Buyer defended by claiming that the seller was a "developer" triggering strict disclosure requirements, which were not met. The failure to make these disclosures gave buyer the option to void the contract. On the basis of this rescission defense, the trial court entered judgment against the seller.

The appeals court reversed, holding that the Seller was not a developer. According to the appeals court, the seller was not a developer, because seller did not personally sell or lease condominiums in the ordinary course of business, despite seller's status as president of the development company.

To reach this conclusion, the appeals court interpreted the definition of developer pursuant to Section 718.503 of Florida Statutes, as a person who creates a condominium or offers condominium parcels for sale or lease in the ordinary course of business. The appeals court relied on Florida Administrative Code Section 61B-15.007(2)(a) which explains that selling or leasing in the ordinary course of business means offering within one year more than seven units in a seventy-unit condominium or more than five units in a condominium of less than seventy units. The appeals court also relied on Florida Administrative Code 61B-15.007(2)(b) which provides that a person may sell or lease in the ordinary course of business by participating in a common promotional plan offering more than seven units in one year.

The appeals court interpreted these sections of Florida Administrative Code to mean that seller was not a developer, as he did not sell or lease condominiums in the ordinary course of business. This seller only personally sold four units of an eight-unit condominium development. As a result, the developer disclosure requirements did not apply and the contract was not voidable, as the seller met the nondeveloper disclosure requirements.

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Volume VI, 2005

CURRENT NEWS FOR COMMUNITY ASSOCIATIONS

Donna D. Berger, Esq. *Editor*

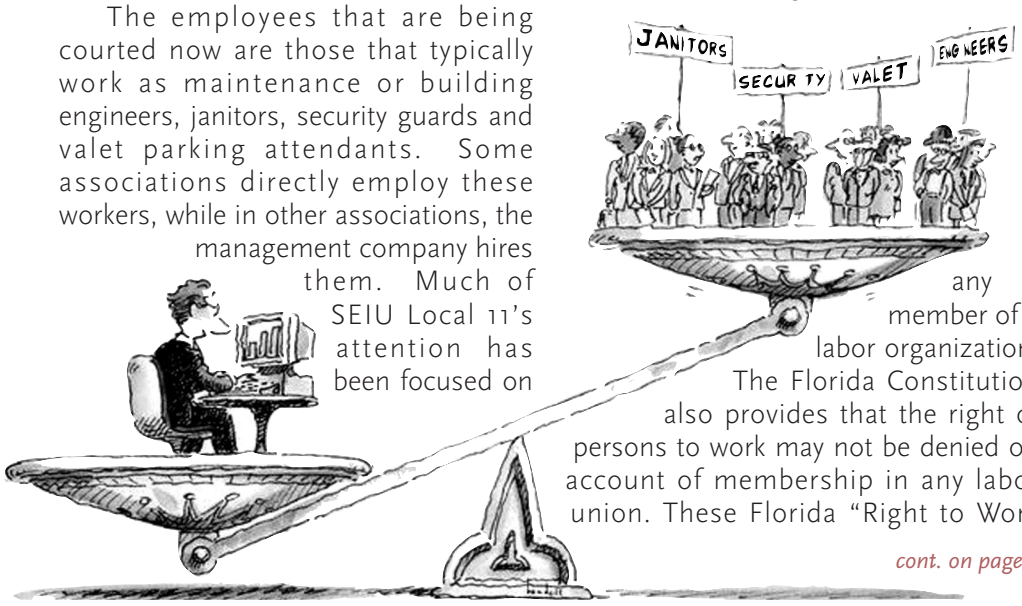
UNION or Disunion

By: Rosa de la Camara, Esq.

South Florida has recently been targeted by a union which has launched a campaign to organize workers at condominiums. The Service Employees International Union ("SEIU") has begun one of its largest organizing drives with the ultimate goal of negotiating a master contract with condominium associations and management companies covering the entire region. Similar campaigns have organized thousands of maintenance employees over other areas in the country by coordinating recruiting efforts among workers in order to build a support base. SEIU Local 11 seeks to represent an entire industry in South Florida instead of trying to organize a few buildings individually.

The employees that are being courted now are those that typically work as maintenance or building engineers, janitors, security guards and valet parking attendants. Some associations directly employ these workers, while in other associations, the management company hires them. Much of SEIU Local 11's attention has been focused on management companies, and in particular, Hollywood-based Continental Group, Inc., which has over 3,000 employees. SEIU has accused Continental Group and various condominium associations of engaging in anti-union tactics, all of which have been vehemently denied. Knowing that these efforts are ongoing, associations must be particularly careful not to violate Federal or Florida laws which protect the rights of employees.

Florida Statutes provide that employees have the right to self-organization, to join labor unions and to bargain collectively through representatives of their own choosing and it is unlawful for any person to interfere with the right of franchise of any member of a labor organization. The Florida Constitution also provides that the right of persons to work may not be denied on account of membership in any labor union. These Florida "Right to Work



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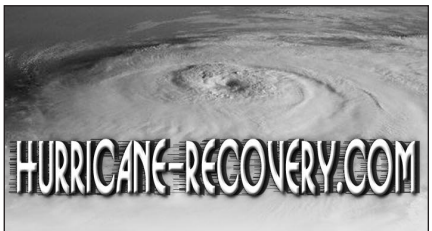


Becker & Poliakoff is committed to helping our clients prepare themselves before a hurricane and assist with post hurricane recovery. We have a dedicated website www.hurricane-recovery.com which contains numerous articles, videos and suggestions regarding pre- and post-hurricane efforts.

Additionally, Becker & Poliakoff is planning a series of seminars in impacted regions to help clients deal more effectively with insurance companies and reconstruction efforts. Topics will include: Getting the Most from Insurance Companies after a Casualty; Dealing with Mold & Insurance Claims by Getting Around Mold Exclusions In Insurance Policies; Helping to Maximize Your Insurance Claims and Avoiding Common Pitfalls During the Claim Process.

More details to follow in future editions of the Community Update.

Published periodically by the law offices of Becker & Poliakoff, P.A. with offices in Boca Raton, Fort Lauderdale, Fort Myers, Fort Walton Beach, Jacksonville, Largo, Melbourne, Miami, Naples, Orlando, Port Charlotte, Sarasota, Tallahassee, and West Palm Beach. The administrative office is located at 3111 Stirling Road, Fort Lauderdale, Florida 33312-6525. The objective of this newsletter is to keep officers and directors of Condominium, Cooperative and Homeowner Associations informed about matters affecting their communities' operations. This newsletter is prepared for and disseminated to clients of the Firm. Internet Address: http: // www.becker-poliakoff.com

Union *cont.*

Laws" subject employers to prosecution in Florida Courts if violated. If the employer is deemed to have acted willfully and with malice, punitive damages could be assessed against the employer.

There are also protections established by Federal law. The Federal National Labor Relations Act ("NLRA") provides that employees have the right to engage in union activity and to bargain collectively with their employer, or alternatively, to refrain from doing so. Unlawful conduct under the NLRA is referred to as an "unfair labor practice". Unfair labor practice include actions such as threatening, warning or ordering the employee to refrain from certain protected activities. An employee's complaint of unfair labor practice is filed with the National Labor Relations Board ("NLRB") which investigates the case and decides to either dismiss the charges or set the case for a hearing and further prosecution.

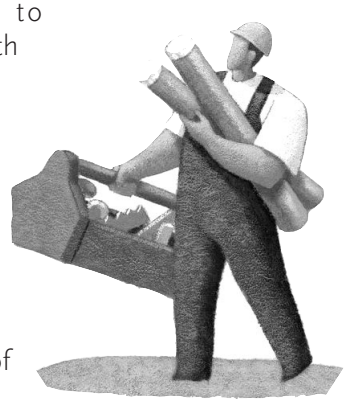
Florida Statutes provide that employees have the right to self-organization, to join labor unions and to bargain collectively through representatives of their own choosing and it is unlawful for any person to interfere with the right of franchise of any member of a labor organization.

Some examples of employer conduct which violate the NLRA are:

- Threatening employees with loss of jobs or benefits if they join or vote for a union or engage in protected concerted activity;
- Promising benefits to employees to discourage their union support;
- Attending any union meeting, parking across the street from the hall, or engaging in any undercover activity which would indicate that the employees are being kept under surveillance to determine who is and who is not participating in the union program;
- Telling the employees that the Association will fire or punish them if they engage in union activity;
- Laying off, discharging, or disciplining any employee for union activity;
- Granting employees wage increases, special concessions, or benefits in order to keep the union out;
- Barring employee union representatives from soliciting employees' membership on or off company property during non-work hours;
- Asking employees about union matters, meetings; etc. (It is not an unfair labor practice to listen, but to ask questions to obtain additional information is illegal.);
- Asking employees what they think about the union or the union representative;
- Asking the employees how they intend to vote;
- Announcing the Employer will not deal with the union;
- Asking employees whether or not they belong to the union or have signed up for union representation;
- Asking an employee, during a hiring interview, about his or her affiliation with a labor organization or how he or she feels about unions;
- Making anti-union statements, or acting in any way that might show preference for a non-union person;
- Making distinctions between the union and non-union employees when assigning overtime or other desirable work;
- Purposely teaming up non-union workers and keeping them apart from those supporting the union;
- Transferring workers on the basis of union supporting activities;
- Choosing employees to be laid off in order to weaken the union's strength or discouraging membership in the union;
- Discriminating against union workers when disciplining employees;
- By the nature of work assignments, creating conditions intended to get rid of an employee because of their union activity;
- Failing to grant a scheduled benefit or wage increase because of union activity;
- Deviating from Association policy for the purpose of getting rid of a union supporter;
- Taking action that adversely affects an employee's job or pay rate because of union activity;
- Threatening workers or coercing them in an attempt to influence their vote;
- Threatening a union member through a third party;
- Promising employees a reward or future benefits if they decide to vote against unionization;
- Saying that unionization will do away with vacations or other benefits and privileges presently in effect;
- Saying that unionization will force the company to lay off employees;
- Promising employees promotions, raises, or other benefits if they get out of the union or refrain from joining the union;

- Starting a petition or circular against the union or encouraging or taking part in its circulation if started by employees;
- Urging employees to try and induce others to oppose the union or keep out of it;
- Visiting homes of employees and encouraging them to reject the union.

Clearly, associations must be very careful when handling union activity in the community, even if it is merely a suspicion of union activity. Employees are entitled to a government election on union representation. The unions cannot force employees to participate. Employer associations need to be aware of this campaign which has been launched by SEIU Local 11 and some of the aggressive tactics that are being employed. SEIU has admitted to dedicating significant resources to the South Florida unionization effort. SEIU has been perceived as strong-arming unionization in various buildings. Florida is a "Right to Work" state, thus union membership cannot be required as part of a job. The counter-union argument is that Florida's healthy economy makes organized labor unnecessary since wages are up, job growth is up and employers are taking better care of their employees.



Associations, (or any employer for that matter), should consider the following preparation tasks in order to avoid employer violations:

- Review and update for compliance your policy and practice on solicitation and distribution on premises.
- Review and update for compliance other employee policies such as on off-duty access, and confidentiality.
- Review the policies and practices of contractors or service providers that do business on your premises (such as landscaping companies, pool service, and valet).
- Identify your supervisors, agents, and "confidential employees" and train them on lawful conduct during union organizing.
- Have a preparedness plan to protect guests, employees and property from trespass, property damage, and disruption of business and customers.
- Evaluate your community ties, and whether your organization is a good neighbor and citizen.
- Identify areas for possible improvement as an employer. Have you had lost ground in pay or benefits? Do you have a supervisor that is a source of employee complaint? Have you had discrimination or harassment charges filed? Tend to those things.
- Educate your organization so you can provide truthful, useful information to employees as well as others who might inquire.
- Make a commitment to protect your employees and help them if they are receiving unwanted attention at home or at work. Let them know you will not tolerate intimidation, harassment or threats at your place of business, or outside, from anyone.
- Think about your position as an organization and how you would respond if targeted by a union - before it happens.

The NLRB lacks jurisdiction over condominiums with less than $500,000 in gross income annually. While the Federal employee protection would not apply to these associations, unfair labor practices could still be prosecuted against the employer under Florida laws. Even if the revenues exceed $500,000 annually, the NLRB has discretion to reject jurisdiction in cases.

Most Associations do not know their choices and legal alternatives regarding union membership. Yes, employees have the right to join unions, however, employees also have the right to refrain from supporting a union. Refraining from support includes deciding against joining the union, the ability to resign from the union and the right to stop paying dues and the right to refuse to sign a membership card. Unions derive revenue from their ability to organize employees and collect dues. If an employer suspects that union authorization cards are being solicited by the employees, the Association should contact its legal counsel. At that point, the employer association can determine whether it wants to counter-attack the union's organization effort through its own campaign, However, it is always best to alleviate these potential issues by following the preparation tasks listed above before there is a unionization campaign in your own backyard.

CASENOTES

One Heartbeat Too Many

Milsap v. Cornerstone Residential Management, Inc., 18 Fla. L. Weekly Fed. D287 (So. Dist. Fla. 2005)

In Milsap, the Court addressed the question of restrictions placed on the number of children living in a rental unit. The defendant apartment community, Sanctuary Cove, placed a restriction that would allow a couple and no more than "1 heart beat" in each additional bedroom. The plaintiffs in this case were two single mothers, each of whom sought housing at Sanctuary Cove.

The restrictions in place at Sanctuary Cove provided for the following occupancy limits:

One bedroom: Maximum of two (2) people (2 adults)
Two bedroom: Maximum of three (3) people (couple and one heart beat per room)
Three bedroom: Maximum of four (4) people (couple and one heart beat per room)

The first plaintiff, Milsap, is the single mother of two children, who had a Section 8 voucher for a two bedroom apartment. Milsap applied for a two bedroom apartment with Sanctuary Cove but was told she would have to rent a three bedroom apartment so that each child would have his own room. The property manager recommended that Milsap could try another apartment community managed by the same company that did not have the same restriction.

The second plaintiff, Weissinger, is the single mother of three children. Weissinger applied for a three bedroom apartment with Sanctuary Cove, but was told that she would have to rent a four bedroom unit so that each child would have his own room. Sanctuary Cove denied Weissinger occupancy because Sanctuary Cove did not have any four bedroom units, and suggested another apartment complex she might try.

Milsap and Weissinger brought a claim in Federal Court, alleging housing discrimination based on familial status. The District Court held that the restrictions in place at Sanctuary Cove constituted discrimination based on familial status, as it would prohibit a family with children from occupying a unit, where the same number of adults would be permitted. For instance, under the restrictions, a one bedroom unit could house two adults, but not one adult and one child. Likewise, a two bedroom unit could house three adults, or two adults and one child, but not one adult and two children. Similarly, a three bedroom unit could house four adults, three adults and one child, or two adults and two children, but not one adult and three children.
The District Court found that Milsap and Weissinger showed direct evidence of discrimination, as the policy of Sanctuary Cove discriminated against families on its face. Finding no rational basis for the distinctions in Sanctuary Cove's regulations, the Court restrained Sanctuary Cove from denying occupancy to families with children where the same limitations would not be placed on the same number of adults.

A Private Matter

Shumrak v. Broken Sound et al, 30 FLW D694A,

In the case of Shumrak v. Broken Sound et al, 30 FLW D694A, a homeowner filed suit against a Country Club and individual members of its Board as a result of a membership suspension. Mr. Shumrak initially purchased a home in the community at a time when residents were not required to be members of the Country Club. He was, however, a voluntary member. A later amendment to the governing documents of the subdivision required all new owners to become members of the Country Club.

The dispute arose after Mr. Shumrak learned that the Board was undertaking an evaluation of the Country Club manager. He telephoned a Board member to ask whether comment was invited and the Board member indicated that he could file written comments which would remain confidential. Mr. Shumrak then e-mailed comments making certain accusations against the general manager which the Board member forwarded to all other directors, members, and the general manager. As a result of the e-mail the Board and general manager filed grievances against Mr. Shumrak pursuant to the By-Laws which provided that conduct of a member which is deemed by the Board to be improper may result in reprimand, fine or suspension from the club. The By-Laws provided that the Board shall be the sole judge of what constitutes improper conduct or conduct likely to endanger the welfare, safety, harmony or good of reputation of the club.

The Board suspended Mr. Shumrak from the club for three months and, in turn, he filed a lawsuit alleging breach of contract, breach of fiduciary duty and intentional infliction of emotion distress. The trial court found that the Country Club is a social club, a status that prevents review of its disciplinary actions. The appellate court agreed that it should leave to private social clubs and their Boards the right to determine whether an action would interfere with the pleasant, friendly and congenial social relationship between members.

Mr. Shumrak contended however that the Country Club is not a social club but rather it is no different from a homeowners' association since membership was mandatory. The enforcement of rules and regulations by a homeowners' association are subject to judicial review since they affect property rights. Mr. Shumrak therefore argued that he would potentially be deprived of property rights by expulsion from the club. However, since the By-Laws made no provision for expulsion there was no potential for deprivation of property rights and therefore the Country Club was found to be a private club whose disciplinary actions were not subject to judicial review.

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Volume V, 2005

CURRENT NEWS FOR COMMUNITY ASSOCIATIONS

Donna D. Berger, Esq. *Editor*

2005 Legislative Update

By: David G. Muller, Esq.

Each year Florida's Legislature sits in regular session for 60 days. The regular session of the 2005 Legislature ended Friday, May 6. A few bills were passed during the regular session that will have an impact on community associations. Notwithstanding, many other bills died that would have had a lasting, negative affect on community associations. Below is a brief summary of the bills that passed and those that died during the Legislature's 2005 regular session.

Bills That PASSED

House Bill 291 added subsections (6) and (7) to Section 718.301. The new subsections require developers to be responsible for actions taken by condominium association directors appointed by the developer. Also, the new subsections require a licensed professional examine a warranty claim made against a developer for construction defects.

House Bill 565 revised the Florida Mobile Home Act. HB 565 clarifies the required information regarding "comparable parks" to be exchanged at the time of an increase in park rents. The bill also specifies that the information obtained regarding "comparable parks" is only intended to be used in settlement discussions and not in civil or administrative enforcement actions. Additionally, the bill states that a mobile homeowner is not entitled to compensation from the Relocation Trust fund if there is an eviction action pending against the homeowner.

Senate Bill 2600, the budget bill, includes three provisions that affect condominiums and community associations. First, the Department of Business

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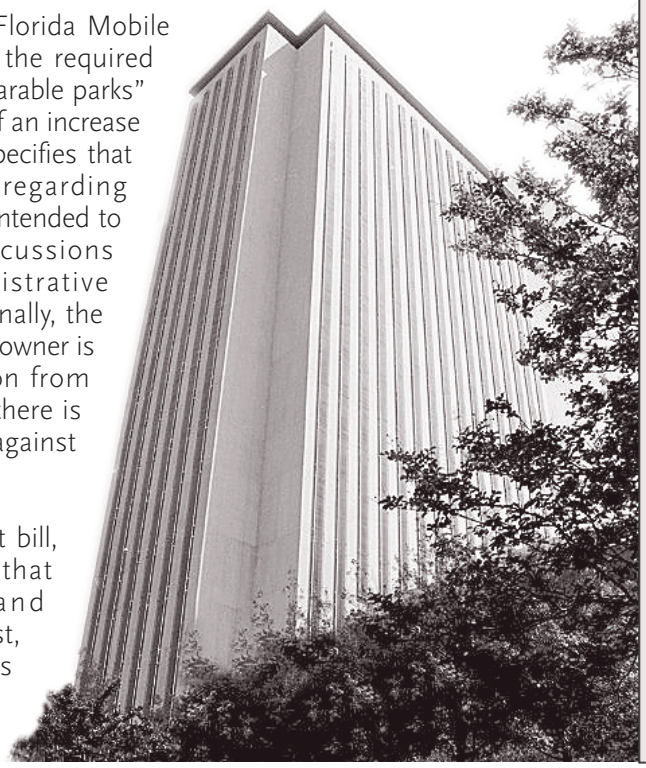

TIDBITS
Did You Know

On April 20, 2005, President Bush signed into law the Bankruptcy Reform Act Bill, S 256. That law had one major change as it relates to and affects community associations.

The amendment expands the exception to a discharge for a debtor in bankruptcy under Section 523(a)(16) of the Bankruptcy Code for fees and assessments that become due and payable after the order for relief is entered, by eliminating the current requirement that the debtor dwell and reside on the property.

This section now only requires that the debtor have an ownership interest in the property in order to exempt from discharge all fees and assessments that became due and payable after the order for relief was entered.

This section also expands the exception to discharge to fees and assessments owing to homeowners' associations which had been previously available only to condominium associations and cooperative housing corporations under the prior version of the law.

Notwithstanding these changes, the law continues to make it clear that this exception to discharge is not applicable to fees and assessments due before the entry of an order for relief in bankruptcy, which is generally when the petition is filed.

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Update *cont.*

and Professional Regulation is now required to make quarterly reports concerning its duties under the Condominium Act to the Governor, the Legislative funding committee chairs and the Office of Program Policy Analysis and Government Accountability (OPPAGA). The report must provide for the number of education and training programs provided for unit owners, the number of investigations and the time needed to resolve them, the caseloads of complaints and investigations, the non-jurisdictional complaints received, and any recommended legislation deemed appropriate. Second, the bill requires the condominium Ombudsman to make quarterly expenditure reports to the Governor and the presiding officers of each House of Legislature. Finally, the bill made funds available for support of the Center for Timeshare Excellence at the Rosen College of Hospitality Management at the University of Central Florida.

Bills That DIED

House Bill 1229, sponsored by Representative Robaina, was the focus of much attention during the regular session. HB 1229, at various stages of its life, would have required mandatory education for condominium board members, would have prohibited the waiver of reserves and would have required mandatory audits for condominium associations at least every two years. Additionally, HB 1229 contained a provision that would do away with previous legislation limiting inquiries or complaints to the association by owners to once a month. Furthermore, HB 1229 would have prohibited husbands and wives from simultaneous board service. HB 1229 also attempted to bring homeowners' associations within the oversight of the DBPR. HB 1229 ultimately was hung up in committees and died. This bill was ultimately defeated as a result of CALL (The Community Association Leadership Lobby) and a hue and cry from community association residents around the State who took the time to get proactive and educate themselves as to the details of HB 1229. The defeat of this bill is a significant victory for all community associations and a clear message that over- regulation and micromanagement of private residential communities is not the answer to common association problems.

Senate Bill 1520 made several changes to the state's consumer protection laws. Subsection (7)(c) of Section 501.059 was created which prohibits the facsimile of documents by means of a telephone network for unsolicited advertising materials for the sale of real estate, goods or other services. Also, the bill created a new definition of "travel clubs" and preempts the regulation of "travel clubs" from the Timeshare Act where a person receives no legal or equitable time to any real property. This provision would have been detrimental inasmuch as the law could have been applied to seek the invalidation of single family use restrictions found in the governing documents for most condominium associations and homeowners' associations.

The death of **House Bill 1593/Senate Bill 2062** was a definite blow for community associations. The bill addressed emergency powers of association boards after catastrophic events, such as hurricanes. Additionally, HB 1593/SB 2062 would have addressed problems in homeowners' association mediation, reinstatement of expired covenants in voluntary homeowners' associations and the extension of the current deadline for retrofitting fire sprinklers in high-rise condominium buildings. An amendment to the bill introduced midway through the session, which would have allowed homeowners' associations to again place liens for unpaid fines (the ability to do so was removed during the 2004 legislative session), became very controversial and may have had some role in the bill's demise.

Senate Bill 2632, sponsored by Senator Siplin, would have severely limited an association's right to collect delinquent assessments through lien foreclosure proceedings. This was the same bill introduced by the California Legislature last year and ultimately vetoed by Governor Schwarzenegger. The death of SB 2632 was a true victory for community associations.

Overall, most measures that were proposed during the 2005 regular session affecting community associations got bogged down in Tallahassee's gridlock and ultimately died. The bills that passed will only have a minor impact on community associations. Notwithstanding, several controversial bills that would have had a tremendous, negative impact on community associations were defeated. We attribute these critical bill defeats to CALL and our many clients who took the time to educate themselves on the impact these bills would have on their communities and voiced their opinions to their elected officials.

OPPAGA'S Report on the Division of Florida Land Sales Condominiums and Mobile Homes

By Joseph E. Adams, Esq.

The last several Sessions of the Florida Legislature have seen pitched battles regarding community association laws. Although the specific proposals for change have varied widely, the basic theme has been the same, the role which government should play in controlling affairs within a neighborhood.

One of the most significant differences between condominium associations and homeowners associations in Florida is government regulation. Condominiums have been heavily regulated by the State for some forty years. Conversely, there is no state agency which regulates HOAs, except for administration of a pre-suit mediation program.

In 2004, Governor Jeb Bush appointed a Task Force on Homeowners' Associations, which specifically considered whether homeowners' associations should be regulated by a government agency in the same manner as condominiums. The Task Force overwhelmingly voted against such regulation.

During the same time-frame, the effectiveness of existing condominium regulation was also debated. Some unit owners who were apparently having problems with their association, prevailed upon the Legislature to commission its Office of Program Policy Analysis & Government Accountability (OPPAGA) to review the effectiveness of the Division of Florida Land Sales, Condominiums, and Mobile Homes.

OPPAGA issued its report a year later, releasing it in early May of 2005. OPPAGA Report No. 05-24 can be viewed on the Internet at www.oppaga.state.fl.us/.

Unfortunately for those who cry that the sky is falling on condominiums, there is no smoking gun to be found anywhere in the eleven page Report. In fact, the Report uncovers some noteworthy information about the "condominium crisis" in Florida. Among the more revealing items were the following:

- **Volume of Problems:** Although some claim that every association is "one board away from dictatorship", the statistics show a surprisingly low level of unit owner complaints against associations. During the fiscal year 2003-2004 (the time frame subject to the study), 1,822 unit owner complaints were filed against associations. According to Division statistics, there is a population of "repeat complainants", comprised of 54 people who have filed 833 cases against their association. Therefore, discounting the "frequent fliers", something in the neighborhood of 1,500 unit owner complaints are filed against a condominium associations each year. According to the most recent Division statistics, there are 1.2 million condominium units in this State. Therefore, conservatively, there are at least 1.5 million unit owners in the State of Florida. Stated otherwise, only .001 percent of owners have been unhappy enough with the governance of their condominium to file formal complaints against their board.
- **Public Interest:** Although various "reform" groups loudly and persistently solicited people to make complaints to OPPAGA about the Division's effectiveness, only 90 comments were received by OPPAGA, including many from so-called "stakeholder" groups.
- **Effectiveness of Arbitration:** In 1992, the Legislature found that condominium disputes were clogging the courts, and required most document violation cases to be referred to mandatory, non-binding arbitration, before the case could head to court. According to the OPPAGA Report, 610 arbitration disputes were processed by the Division in the 2003-2004 fiscal year. Since 137 of those cases were attorney fee disputes arising from prior cases, the actual number of disputes subject to arbitration is about 500 per year. In a state of some seventeen million people, with well over a million condominium owners, one has to question frequent suggestions of rampant litigation in condominium associations. Remarkably, some two-thirds of filed arbitration cases were closed within a four-month period, demonstrating that the program does provide a more speedy (and presumably cost-effective) alternative to circuit court litigation, which can often drag on for years.
- **Do Punishments Fit the Crimes?:** According to OPPAGA, only five percent of complaints filed against associations resulted in formal enforcement action, which resulted in 46 separate cases involving the levy of fines totaling $230,176.00. As part of the fining guidelines adopted by the Division in 1998, fines are to be levied against unit owner-controlled associations only as a last resort. According to the Division's response to the OPPAGA Report, the Division issued 727 warning letters during the two-year period preceding the Report, with only 23 associations having been cited for repeat violations. Proponents of the status quo can certainly argue that a recidivism rate of .03 percent shows that the current system works.

Every condominium unit owner pays a four dollar yearly fee for the services provided by the Division. This includes a 49 member Bureau of Compliance, including 28 staff investigators. Clearly, no state in the nation places such resources at the disposal of an individual who has a beef with their association, and all for four bucks.

Perhaps the looming threat of fines keeps rogue boards in check.

Perhaps the tail has been allowed to wag the dog.

Check out the OPPAGA Report on the CALL website at www.callbp.com for yourself and reach your own conclusions.

CASENOTES

An Uneasy Easement

One Harbor Financial Limited Company v. Hynes Properties, LLC. 884 So.2d 1039 (Fifth District Court of Appeal, 10/15/04)

In the case of One Harbor Financial Limited Company v. Hynes Properties, LLC, 884 So.2d 1039 (Fifth District Court of Appeal, 10/15/04), the District Court held that the granting of certain purported easements are not meant to be quite so "easy". In 1986, Hoffenberg owned two adjoining parcels of real property. Although his ownership rights were identical (e.g., he was the only owner in fee simple of both of these parcels), Hoffenberg had acquired each of these parcels in separate transactions with different prior owners. Subsequently, in the context of selling one of these parcels for commercial development to One Harbor Financial but prior to actual transfer of the parcel at closing, Hoffenberg, for the benefit of One Harbor Financial, prepared a written easement over the parcel which Hoffenberg was not selling, consisting of 13 parking spaces and a roadway. This easement purportedly allowed One Harbor Financial to use the 13 parking spaces located on Hoffenberg's remaining parcel.

Subsequently, Hoffenberg sold his remaining parcel. The parking spaces and roadway thereon were then used for 15 years by One Harbor Financial, without objection by a succession of owners who accepted that their property was "burdened" by an easement for the 13 parking spaces and roadway, up until the parcel was conveyed to Hynes. Hynes purchased the property, on the advice of his attorney that the easement was invalid and unenforceable, based on the legal principle that a single property owner who happens to own adjoining parcels of real property in fee simple cannot create an easement over one of the parcels in favor of the other. Hynes then filed a lawsuit to extinguish the purported easement under this principle. The Fifth District Court of Appeal agreed with Hynes, holding that Hoffenberg, when he was the fee simple owner of both parcels, did not possess any legal right to grant an easement over one parcel that he owned benefiting the other parcel that he owned.

Although the Court was "uneasy" with its own holding, conceiving it to be unfair to One Harbor Financial who had utilized its apparent easement for more than 15 years without controversy, it felt compelled by prior case decisions establishing that an easement is a grant of a right to use real property owned by someone other than oneself.

Standing to Sue

Biscayne Investment Group, Ltd v. Guarantee Management Services, Inc. 2005 WL 766977 (Fla.App. 3 Dist.)

Plaintiff, the developer of Knightsbridge Condominium Units filed a Complaint against Guarantee Management Services, Inc., the management company hired to manage Knightsbridge. The Complaint alleged breach of contract, fraud in the inducement, equitable subrogation and negligence. The trial court dismissed with prejudice all counts because the Plaintiff was not a party to the management contract, nor was the Plaintiff an intended third party beneficiary of the contract. The court held that unless a person is a party to a contract, that person may not sue for breach of that contract where the non party has received only an incidental or consequential benefit of the contract.

The Plaintiffs contended that they were intended third party beneficiaries and therefore were able to bring suit on the underlying contract. The court disagreed and found that a contract brought by a third party beneficiary must allege: 1) the existence of a contract; 2) the clear or manifest intent of the contracting parties that the contract primarily and directly benefits the third party; 3) breach of the contract by a contracting party; and 4) damages to the third party resulting from the breach. A non party, such as the developer/Plaintiff in this case, could be a specifically intended beneficiary only if the contract clearly expresses an intent to primarily and directly benefit the third party or a class of persons to which that party belongs.

In conclusion, the Appellate Court affirmed the trial court's dismissal of the case. Typically, an Association that enters into a management contract is the party who can sue under the contract. There are only very limited circumstances in which a third party can file a lawsuit with regards to an association's management contract.

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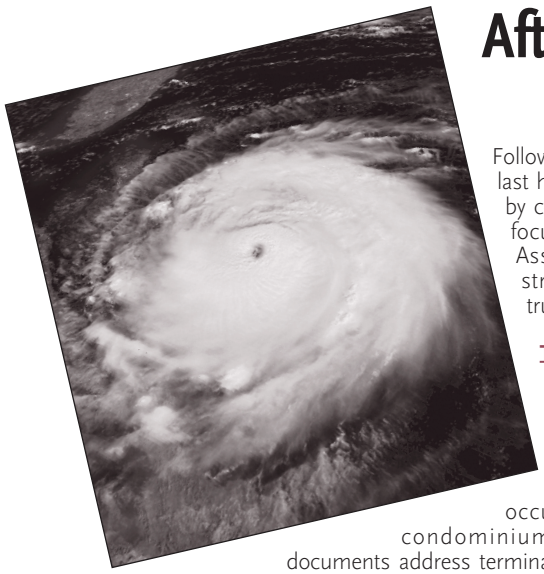
Community Up-Date™
Vol. IV, 2005
CURRENT NEWS FOR COMMUNITY ASSOCIATIONS
Donna D. Berger, Esq. *Editor*



After The HURRICANE

By David H. Rogel, Esq.

Following the four hurricanes that hit our state in the last hurricane season, a number of issues were faced by communities which suffered damage. This article focuses on two issues which your Condominium Association may wish to address before disaster strikes. They are termination and the insurance trustee.

TERMINATION

Widespread damage to many communities in this state resulted in many communities facing for the first time the consequences of language in their condominium documents regarding termination. Termination is the process which occurs when a property is withdrawn from the condominium form of ownership. Most condominium documents address termination as do the provisions of the Condominium Act. While termination of the condominium form of ownership can be voluntary, many condominium documents are written in a manner which may **require** termination of your condominium following a casualty loss, like a hurricane.

The typical set of condominium documents may contain one or more provisions regarding how the condominium form of ownership will be terminated. Most documents contain termination provisions which allow for the voluntary termination of a condominium with the approval of either all or a large percentage of the unit owners and mortgage holders. However, typical documents also address termination when the units in the condominium have suffered damage. In many cases, termination as a result of a casualty loss resulting in damage to units or common elements is triggered when a sufficient number of units have suffered damage. The amount of damage units must suffer are typically described as damage which renders the units untenantable or uninhabitable. A typical provision might read:

> If Fifty Percent (50%) or more of all apartments have been rendered untenantable, the condominium property shall not be reconstructed unless two-thirds (2/3) of all unit owners shall vote to reconstruct the property within sixty (60) after the casualty loss or damage occurs.

The first problem a Condominium Association may face following damage which triggers a position like this is what is meant by words like untenantable. As it relates to a dwelling unit, the typical understanding of what the word untenantable means is that the unit is not habitable or capable of being occupied. However, just because a unit may be rendered uninhabitable or untenantable may not be in the best method by which to determine whether the membership must face a decision as to whether the condominium form of ownership should be terminated. For instance, while a roof may be destroyed or damaged to the extent that the units underneath it cannot be occupied for a period of time, repairing or replacing a roof is not an insurmountable task. Certainly, this kind of damage may not be an appropriate basis for ending the existence of the entire condominium.

A better way to define what may occasion the requirement for owners to vote whether to rebuild or not may be based on the total dollar amount of damage suffered or the availability of insurance proceeds to repair the damage. Another important factor may be whether or not it is possible to rebuild the condominium property as it existed prior to the casualty loss. For instance, if damage exceeds more than half of the value of the buildings and improvements, then rebuilding may not be the prudent course of action. The same may be true to the extent that there are not sufficient proceeds from insurance to avoid burdensome assessments to owners based upon a percentage of the value of those buildings and improvements.

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TIDBITS Did You Know

FPL's Post-Storm Efforts Throughout the State of Florida

- Did you know that the Florida Power & Light Company spent nearly $1 billion restoring power after last year's four not-so-friendly visitors: Charley, Frances, Ivan and Jeanne, roared through the State of Florida; the first time in 100 years that any single state has been hit by multiple hurricanes in one season.
- As a result of last year's storm season of biblical proportions, FPL faced challenges no other electric company had heretofore faced. FPL responded with an unprecedented effort of national teamwork and cooperation not seen since the 9-11 tragedy. Workers from 39 states and Canada toiled 16 hours a day to restore 5.4 million power outages as quickly as possible. With as many as 17,000 people working to restore power, more than 75% of FPL's customers had their power back on by the third day after each storm; by the fifth day that number was upwards of 90%.
- FPL is now working to make sure it does even better next time and has identified a number of improvement opportunities. Among them are providing customers with more information about when their power will be restored, working closely with emergency operations centers to review priorities for restoring power to "critical" facilities, and promoting the planting of the "right tree in the right place" to help keep power lines clear as well as identifying other pre-storm planning procedures to safeguard life and property.

FPL®

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HURRICANE *cont.*

Equally important, especially in communities located on the water, is the legal challenges which may be faced because a building cannot be constructed as it existed prior to the casualty loss. Buildings constructed ahead of current coastal construction setbacks may not be allowed to rebuild beyond those setbacks. Current building codes and other legal restraints may also impact upon the ability to rebuild what existed previously in terms of density. In these circumstances, the members should determine whether continuation of the condominium form of ownership is appropriate.

Whatever the condominium documents may describe as the basis for making a decision as to whether or not to terminate the condominium form of ownership, the most important factor may be what vote is required. As is the case with the language shown above, many condominium documents contain provisions that require termination of the condominium to the extent sufficient damage is suffered and a vote of the owners is not achieved to approve rebuilding. Termination of the condominium is a rather drastic result, so that a presumption in favor of termination absent a vote is very disadvantageous. Among other things, it may be very difficult to obtain a vote after the condominium property suffers a disaster. To the extent hurricanes occurred during a season when many condominium owners in Florida reside elsewhere may further compliance the vote. Even in condominiums where year-round residency is the norm, a disaster creating sufficient damage to trigger the termination provisions in condominium documents logically may have resulted in a displacement of owners from their condominium residences.

These types of factors may preclude or delay a vote to the point where obtaining the necessary vote before termination is mandated simply cannot be achieved. This is especially so if the vote is required within a short of period of time following the casualty. Lack of information which can be obtained in a short period of time can also significantly affect any decision which owners are required to make.

Because of this, it is more advantageous for any vote which may be required to be one which need not be taken within an artificially short period. Moreover, the vote required should be one which, if not taken, would not mean the termination of the condominium.

Instead, any requirement for a vote should be one which can be extended for reasonable periods through a defined procedure. Of even more importance is that language regarding termination should require a vote to terminate, rather than having termination be automatic unless a vote to rebuild is obtained. Your condominium documents should be reviewed to make sure that termination of your condominium will not occur where the circumstances do not justify termination. Properly defining when a termination vote should be required and allowing sufficient time to take a vote so as to provide the membership with enough information to make such an important decision is warranted. Certainly, no condominium should be terminated unless the membership votes to do so, instead of a situation where termination occurs because a vote could not be achieved.

THE INSURANCE TRUSTEE

Most insurance trustee agreements contain provisions which require the insurance trustee to receive monies from insurance claims and pay them out according to the instructions from the Association. These agreements typically state that the insurance trustee will not be required to review provisions of the condominium documents, provisions of construction contracts or plans and specifications in order to determine whether the money which they are holding is being properly disbursed. Instead, these documents typically release the insurance trustee from all manner of liability for disbursing monies in accordance with the Board's instructions unless such liability arises from their gross negligence or intentional misconduct. To the extent the insurance trustee is not obligated to be involved in the reconstruction process, it is impossible to hold them liable if disbursements are not being properly made as long as the Association follows the procedure to instruct the trustee to make disbursements.

If reliance on instructions from the Board of Directors is the only method by which an insurance trustee is to act, having an insurance trustee is relatively meaningless. One alternative is to make sure that any agreement with an insurance trustee is negotiated before a disaster and contains protection so that the membership can reasonably rely on the insurance trustee's decision to disburse funds because that decision is independent of instructions from the Board. Because most insurance trustees are unwilling to take on such liability, another alternative is to amend your documents to remove language which requires depositing insurance policies or insurance proceeds with an insurance trustee. Instead, the documents may require that all insurance proceeds be deposited into a separate account and that any money for rebuilding comes only from that account. To the extent that special assessment monies are needed because insurance proceeds are insufficient to pay for rebuilding, all special assessment monies should also be deposited into this separate account. Of course, this does not eliminate the possibility that board members who are in charge of the rebuilding process might do something wrong with the money. However, to the extent that the typical relationship with an insurance trustee does little to avoid this problem either suggests that doing without an insurance trustee, and the fees associated with that relationship, may be better in the long-run.

TIDBITS *cont.*

- Restoring power to get customers quickly back on their feet doesn't come without a cost. FPL does not receive hurricane relief funds from the federal government and private insurance is either unavailable or exorbitantly expensive (something we can all relate to). This is why the Florida Public Service Commission-which regulates FPL and other utilities on behalf of consumers-has approved a cost-effective way to pay for hurricane restoration through a storm "savings account".
- After growing to more than $350 million over the years, this account was depleted by last season's hurricanes. FPL spent an additional $536 million to fix its electric system and to restore power. Upcoming Tidbits on FPL will discuss various methods to replenish this fund as well as electrical issues germane to community association residents including classification of association accounts as commercial or residential users, separate metering in some communities, storm preparation tips and future grid expansion. Individuals living inside community associations are the fastest-growing segment of FPL's customer base. It is essential that the needs and wishes of owners in common interest ownership communities be understood and fulfilled by essential service providers.
- If you're interested in learning how FPL is preparing for this year's storm season-or looking for information on other electricity-related topics of interest to you and your neighbors-FPL representatives are available to speak at your community association meeting.

Suppose now that your condominium has suffered damage and insurance proceeds are available for rebuilding. Many condominium documents require that an insurance trustee be appointed in order to receive funds which are paid for rebuilding. In theory, this sounds like an appropriate safeguard for money designated to rebuild a condominium. In practice, it is little more than an additional burden and expense at a time when unnecessary burdens and expenses can be even more harmful.

The typical condominium documents will require that any insurance proceeds be payable

cont. on page 3

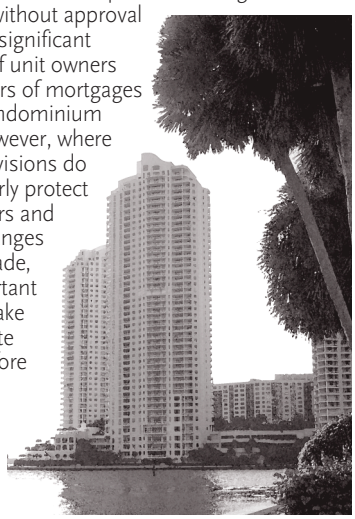
HURRICANE *cont.*

to an insurance trustee, and may define the type of institution which can act as an insurance trustee. The documents may also require that all insurance policies which the Association is required to obtain must be deposited with the insurance trustee. This means that the Association must have an insurance trustee at all times, not just after suffering a loss which results in an insurance claim. Of course, while there are many institutions willing to act as an insurance trustee, they do so on a fee for service basis. This means that a portion of the money which might otherwise go to rebuild the condominium building will go to the insurance trustee instead. If this means that improper expenditure of insurance proceeds will be avoided, the fee might be money well spent. Unfortunately, the typical agreement establishing the relationship with an insurance trustee does not safeguard money received by an Association as a result of a casualty loss.

CONCLUSION

It is important that your condominium documents be reviewed to determine whether the language regarding termination is sufficient to avoid the improper termination of the condominium following a casualty loss where it is not appropriate. You should also address whether the documents require an insurance trustee and whether the Association can find an institution willing to provide real protection for the Association following a casualty loss. If not, then the membership should consider amending the provisions of the condominium documents addressing these issues.

Most of the language dealing with termination following a casualty loss and the requirements for an insurance trustee are found in the insurance and reconstruction sections of the Declaration. Care must be taken to review these sections and the provisions of the Declaration regarding amendments in order to make sure that the proper procedure is followed to amend these sections. Many condominium documents severely limit or even preclude changes to these sections without approval of all or a significant number of unit owners and holders of mortgages on the condominium units. However, where these provisions do not properly protect the owners and where changes can be made, it is important that you take appropriate action before the next disaster strikes.



The Office of the CONDOMINIUM OMBUDSMAN

By Jason Mikes, Esq.

As many of you may be aware, the Florida Legislature established the Office of the Condominium Ombudsman during the 2004 Legislative Session. The Office has only been up and running since January of this year, but has already become a hot topic of discussion around the state amongst common ownership housing residents and community association industry professionals. Despite all the discussion, media coverage, and now the proposed legislation to expand the scope and duties of the Office, some of you may still be asking yourselves... ombudswhat?

In general, an ombudsman is an official appointed to receive, investigate, and report on private citizens' complaints about the government. It can also be a similar appointee in a nongovernmental organization (such as a university). However, the Office of the Condominium Ombudsman was created by Florida Statute, which grants specific powers and duties and limits the reach of the Office.

Specifically, the Condominium Ombudsman is to serve as a bureau chief within the Division of Florida Land Sales, Condominiums and Mobile Homes ("the Division") and the Office's reach does not extend beyond condominiums. Accordingly, the powers and duties of the Office are not to be exercised in the homeowners association, cooperative, or timeshare contexts.

In the condominium context, the Ombudsman is charged with the duties of a consultant, a liaison, a monitor, an educator and a mediator. The Florida Statutes provide that the Ombudsman is:

- To make recommendations on Division procedures, policies and rules to various parties, including the Governor, the Florida Legislature, the Division and the Advisory Council on Condominiums;
- To act as a liaison between the Division, managers, unit owners and association boards;
- To develop policies and procedures to assist all of those parties in understanding the rights and responsibilities set forth within the Condominium Act and the condominium documents for their association;
- To assist the Division in the preparation and adoption of educational and reference materials for parties interested in condominium law in the State of Florida;
- To monitor disputes concerning elections and association meetings and recommend that the Division pursue enforcement action if there is reasonable cause to do so;
- To make recommendations to the Division regarding the rules and procedures governing complaints filed by unit owners, associations and managers;
- To encourage and facilitate voluntary meetings between unit owners and boards before a party submits a dispute for formal or administrative proceedings;

In addition to the foregoing, if fifteen percent (15%) of all members of an association, or six members, whichever is greater, petition the Ombudsman to do so, the Ombudsman may appoint an election monitor to attend an annual members' meeting and conduct an election.

The specific powers listed above are the current limit of the Ombudsman's powers. Contrary to some general impressions, the Ombudsman is to act as a neutral resource for the rights and responsibilities of unit owners, associations and board members. The Legislature's intent in this regard is set forth right in the statute.

The Ombudsman may not unilaterally create Division policies or create rules, which unit owners, boards or associations must follow. The Ombudsman is not to act as an advocate for one party or another in a dispute, whether prior to or during formal or administrative proceedings. Furthermore, the Ombudsman is not empowered to conduct investigations of association affairs and prosecute perceived offenses by unit owners, board members or an association in general.

However, while the Legislature is in session, everything is subject to change. In that regard, a bill has been proposed in the House, which would expand the previously-mentioned powers and scope of the Office of the Condominium Ombudsman. The proposed legislation, if adopted, would increase the powers of the Ombudsman by giving the Office subpoena powers and the ability to monitor and review procedures and disputes concerning ALL types of community associations. If you desire additional information regarding this proposed legislation and the expansion of the Office's power and scope, it is available on-line at www.callbp.com

CASENOTES

Exempt From FORECLOSURE

Andres v. Indian Creek Phase III-B Homeowner's Association, Inc., 2005 Fla. App. LEXIS 3891 (Fla. 4th DCA 2005)

The issue before the District Court in *Andres* was whether the governing documents for Indian Creek gave the homeowners' association the authority to foreclose on the Andres' home to collect court costs and prevailing party attorney's fees incurred during a covenant enforcement matter.

The dispute initiated when the homeowners association filed suit and prevailed against the Andreses, who were found to have violated Indian Creek's covenants restricting flag poles. (The covenant enforcement action was initiated prior to the enactment of Section 720.304(2), Florida Statutes, which now permits property owners to display a United States Flag regardless of any restrictions to the contrary within the governing documents.) The governing documents provided that the prevailing party to a covenant enforcement dispute would be entitled to receive its court costs and attorney's fees from the other party. Therefore, following the covenant enforcement dispute, the homeowners association filed suit to recover its court costs and attorney's fees from the Andreses, which resulted in a foreclosure action.

The homeowners association prevailed on the foreclosure action in Circuit Court, but the Andreses appealed the decision asserting that the Florida Constitution's exemption of homestead property from forced sale should have preempted the foreclosure. The homeowners association countered with the argument that the governing documents created a lien for court costs and attorney's fees against the Andres' property, which pre-dated the homestead status. Since the governing documents were recorded in the public records prior to when the Andreses filed for homestead, the lien for court costs and attorney's fees was superior to the Andres' homestead protection.

In making its decision in the matter, the District Court considered Article X, Section 4 of the Florida Constitution, which provides, in relevant part, that a homestead shall be exempt from forced sale (except in very limited circumstances). However, the District Court also considered the opinion of the Florida Supreme Court in *Bessemer v. Gersten, 381 So. 2d 1344, 1348 (Fla. 1980)*, which ruled that a properly recorded covenant, which runs with the land, may create a lien that dates back to the filing of the covenants. If a lien set forth in covenants affecting property is recorded before the property acquires homestead status, the homestead status will not prevent foreclosure to collect on the previously recorded lien.

If the Indian Creek governing documents had properly provided that a continuing lien for court costs and attorney's fees was to exist upon the property, the homeowners association may have prevailed and been permitted to foreclose upon the Andres' property. However, after reviewing the applicable provisions of the Indian Creek governing documents, the District Court determined that the covenants only provided a continuing lien for regular and special assessments. Since the governing documents did not define "assessments" to include court costs and attorney's fees that may be incurred in a covenant enforcement dispute, there was no continuing lien for court costs and prevailing party attorney's fees that pre-dated the Andres' homestead status. Therefore, the District Court reversed the the Circuit Court on the basis that the Andres' homestead protection pre-dated the homeowners association's award ruling of for court costs and prevailing party attorney's fees and prevented the homeowners' association from foreclosing on the property. Ultimately, the homeowners' association was limited to collection remedies other than foreclosure.

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Vol. III, 2005

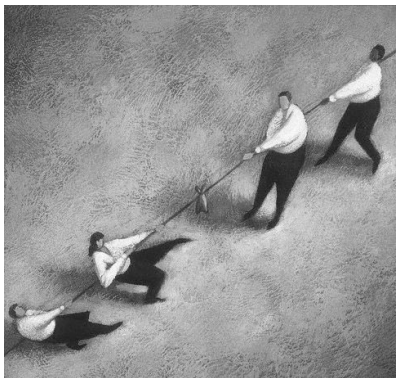
CURRENT NEWS FOR COMMUNITY ASSOCIATIONS

Donna D. Berger, Esq. *Editor*

Substantive vs. Procedural: THE CLASH OF THE TITANS

By C. John Christensen and Alex C. Costopoulos

Article I, Section 10, of the Florida Constitution prohibits the Legislature from passing a law "impairing the obligation of contracts". This means that new laws passed by the Florida Legislature cannot substantially change pre-existing contract rights. Declarations of community associations are considered, in law, to be a specialized type of contract. Hence, a general rule derived from these two simple concepts is that the Florida Legislature cannot enact laws affecting the substance of existing community association Declarations. However, like all general rules in the law, there are exceptions; the two major exceptions to that general rule are as follows.



The first exception is applicable whenever the Declaration itself provides that the Legislature can enact laws which will make substantive changes to the Declaration. This is accomplished most frequently through the use of "Kaufman" language, from a case decision of the same name. This is typically established in a Declaration by a statement that the Declaration is subject to the pertinent governing law "as it may be amended from time to time". For example, "ABC condominium is hereby governed by the Condominium Act [or the Time-Share Act, etc.] as it may be amended from time to time". Hence, the inclusion of "Kaufman" language will automatically incorporate into a Declaration any changes to the pertinent governing law that the Legislature may adopt, even if such legislative changes significantly revise provisions in the Declaration and take effect many years after the Declaration has been recorded and the condominium has come into existence.

The second exception arises when a Declaration does not contain "Kaufman" language, and the Legislature creates new laws which will result in changes to a Declaration which are not considered '*substantive*', but are considered to be merely '*procedural*.' The general prohibition against the Legislature making laws impairing existing contracts has been interpreted, by the courts, to only prohibit the application of legislation to a pre-existing "substantive" contract right. These decisions have established that a distinction needs to be made between legislation which affects substance and that which affects procedure. Substantive laws address rights and responsibilities, while

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TIDBITS Did You Know

HOW A BILL BECOMES LAW

- During session, Legislators work on making new laws or changing old laws. Each Legislator also serves on several committees where the effects of laws on the people in our state are studied. Any member of either house can make suggestions for new laws.
- There are 10 House Councils and 42 House Committees. (Three are Select Committees meaning they have been created for a certain, specific purpose and are not Standing Committees. Two of those are Joint Committees meaning they also have Senate Members. There are also two other standing Joint Committees which are administrative in nature.)
- Presiding Officers can create additional Select Committees and the Rules can be amended to create new Standing Committees.
- There are 24 Standing Senate Committees, the same Joint Committees with the House and two Joint Select Committees. There is also a Senate Select Committee on Medicaid Reform.
- There is no limit as to how many bills can be filed although House Rules limit each House Member to 6 bill slots not counting Local Bills.

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Substantive *cont.*

procedural laws describe the manner in which those rights and responsibilities are exercised and enforced. **If a party has a substantive right in a contract, a legislative change after the date of the contract cannot retroactively take that right away; on the other hand, legislative changes that are only procedural do apply 'retroactively' to existing contracts, including community association Declarations**. A good example of this distinction can be found in the 1992 legislative change to the Condominium Act regarding the election of directors. Prior to this legislative change, many condominium documents allowed directors to be elected by proxy; after the legislative change, the election of director ballot and double envelope procedure superseded the documentary provisions. In this example, the substantive right of unit owners to elect directors, set forth in an existing Declaration of Condominium, could not have been taken away by the Legislature; however, the procedure by which votes were cast for director candidates could be changed legislatively.

Nevertheless, *clashes* in the community association context can arise as to whether a legislative change to the law is substantive (meaning the change will not apply retroactively to an existing Declaration that does not have "Kaufman" language), or is procedural (meaning the change will apply to all Declarations with or without "Kaufman" language).

In the 1980's and early 1990's, condominium law was unsettled as to the method by which a condominium association could alter the common elements. Hence, in 1992, the Florida Legislature amended Section 718.113 of the Condominium Act to state that if a Declaration of Condominium was silent on the issue of material alterations to the common elements, such alterations could be accomplished upon the approval of 75% of all association members.

Unfortunately, the Declarations of Condominium for many *time-share* condominiums were silent about altering the time-share condominium's common elements. It subsequently dawned on the Legislature that it would be impossible for these resorts to obtain the 75% vote necessary to alter the common elements, given the sheer number of unit week owners in a time-share condominium, their location throughout the United States and the rest of the world, and their natural inclination to treat the time-share resort as the location of vacation rather than as a form of residential real property necessitating participation in membership meetings, etc. Hence, in 2000, the Florida Legislature added Section 721.13 (8) to the Time-Share Act, which allowed for material alterations to a time-share condominium's common elements (and all time-share resorts for that matter) to be accomplished unilaterally by a majority vote of the Board of Directors, apparently superseding the 75% membership vote of the Condominium Act.

In this context, a *titanic* case recently arose in which a majority of the Board of Directors of a time-share condominium, whose Declaration was silent upon the issue of material alterations to the common elements and did not contain Kaufman language, decided to add a clubhouse to the resort, pursuant to the Legislature's 2000 amendment to the Time-Share Act. Space is a precious commodity in most time-share resorts and resorts often need to expand their facilities and amenities to remain modern and competitive. This time-share condominium happened to be one of those that desperately needed to expand. Its Declaration was recorded after the 1992 legislative change to the Condominium Act had taken effect, creating the 75% membership approval requirement for common element alterations in a condominium whose Declaration was silent on the issue. However, the Declaration was recorded before the 2000 legislative change allowing a time-share resort to alter the common elements by Board decision alone.

For whatever reason, the developer of the time-share condominium, which still owned a significant number of unit weeks in the resort, did not want the association to construct the new clubhouse. Therefore, the developer claimed that the 2000 legislative change to the Time-Share Act was a substantive change in the law and could not be applied retroactively to the existing substantive "contract" provisions of the time-share's Declaration of Condominium. The Developer asserted that the Declaration was governed by the 1992 provisions of the Condominium Act requiring 75% membership approval. In response, the Association argued the 2000 legislative change was procedural rather than substantive, to thereby claim exception to the general rule (that no legislative change can impair substantive provisions of existing contracts). The dispute, Westgate Blue Tree Orlando, Ltd. v. Blue Tree Resort at Lake Buena Vista Condominium Association, Inc., Case No. 2004-03-9446, went to Arbitration before the Division of Florida Land Sales, Condominiums and Mobile Homes; the Association, acting through its Board of Directors, was represented by Becker & Poliakoff's time-share practice group.

TIDBITS *cont.*

- Bills, are studied in committee; the committees can change the bill, accept the bill or reject the bill. After the bill is changed or accepted by the final committee it visits, it is then sent to the full house which in turn votes to accept the bill as it is, change the bill or reject the bill.
- Passage of a bill occurs when the bill is accepted by a majority of the Legislators of one house. The passed bill goes to the other house of the Florida Legislature for its review; that means, a bill passed in the Senate goes to the House for its review. The bill goes through the same process in the second house as it did in the first house.
- When a bill is passed by both houses it is sent to the Governor for action. The Governor may sign the bill, allow it to become a law without his signature, or veto it.

Sun and Sand... NOT ALWAYS FUN!

By Herbert O. Brock, Esq.

Most people come to Florida for the beautiful climate and the sun and sand. The climate is indeed great for tourists, snow- birds and year-round residents, but the wind, salt water and sun can be very rough on buildings. Over the course of time, even the most beautiful buildings will begin to show the effects of age and wear and tear. This occurs even despite routine maintenance and care. Given the large number of condominiums here in Florida, the problem of renovating, restoring and preserving condominium buildings is one that all condominium associations are facing or will eventually face.

These projects may include elevators, lobbies, clubhouses, parking lots, balconies, or anything else needed to beautify, repair or restore the buildings. In undertaking these projects, condominium associations have many things to consider, including determining the scope of the work, how best to do the work, and of course, how to pay for the work. Typically, identifying areas in need of repair or renovation is done by Boards in response to the observations of unit owners or the observations of Board members themselves. As buildings get older, it may be beneficial to schedule periodic inspections by an engineer or building consultant to identify areas needing renovation that the average unit owner would not be able to identify.

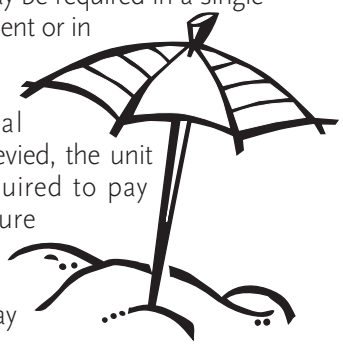
In undertaking any work, it is necessary for the condominium association to have a good idea of what exactly it is that needs to be done. Some problems are invisible to the untrained eye, and require someone with expertise in the area being investigated. Typically, an Association would be well served in obtaining an engineer or other building consultant with knowledge and expertise in the specific area they are seeking to renovate. The benefit of obtaining an independent consultant is two-fold. They can provide an independent analysis of the situation, and also be used to protect the Association in its dealings with contractors to ensure that the proper work (work addressing the problem) is contracted for and being performed. Although some associations may believe that consultant costs are unnecessary, having an independent consultant prepare the specifications and scope of work, as well as reviewing the work as it progresses will prevent many problems.

Another area where Associations may try and save money is the contract itself. Many contractors use a brief two-sided proposal to do all the work, however, these forms are rarely protective of the association's interests. These contracts may not address key items needed for the Association to protect itself and were more than likely drawn up by the contractor's lawyer for protection of the contractor. A truly protective contract will address questions related to dispute resolution, bonding, timely completion, liquidated damages, insurance undertakings, indemnity and hold harmless obligations, clean-up obligations, compliance with Florida's lien laws, warranties, prevailing party attorney's fees and jurisdiction should litigation arise. Sometimes clients may believe that such provisions are overkill, and although contracts may be completed with no problem, the case law is full of contracts gone awry.

Another area which should be carefully examined is compliance with local, state and federal laws relating to the renovation. It is possible that depending on the type and amount of work done that new building codes will have to be met. This is particularly true the older your building is, as the building codes have changed substantially over the course of time. Similarly, compliance with the Americans with Disabilities Act (ADA) may be required. The ADA mandates accommodations for disabled persons in places of public accommodation, possibly even requiring retrofitting of buildings. If there is some type of facility at the condominium that is open to the general public, the area may fall under the ADA as a place of public accommodation.

For unit owners and boards, sometimes the most important part of any renovation project is the decision on how to pay for the project. Typically, most condominium associations have three choices in paying for such projects: 1. Special Assessments, 2. Use of reserves, and, 3. Bank loans or lines of credit.

Probably the most common method of funding renovations projects is through special assessments. Before enacting a special assessment it is important to review the Declaration of Condominium, Articles of Incorporation and By-Laws as the Condominium Act provides that special assessments must be levied as provided in these documents. The condominium documents will set forth whether membership approval is needed. In addition, the Condominium Act requires that written notice of any meeting at which a non-emergency special assessment will be considered shall be mailed, delivered, or electronically transmitted to the unit owners and posted conspicuously on the condominium property not less than 14 days prior to the meeting. Special assessments may be required in a single lump-sum payment or in multiple payments. Once a special assessment is levied, the unit owners are required to pay them. The failure to pay a duly levied special assessment, may



Substantive *cont.*

The Association's specific argument was that the Association's substantive right to alter the common elements had *not*, in fact, *changed* upon the Legislature's 2000 change to the Time-Share Act. Only the 'procedure' by which the Association decided whether to make such alterations had changed; that is, instead of a membership vote being required, a Board vote was instead required. After written and oral arguments, the Arbitrator accepted the Association's position that the Legislature's 2000 change to the Time-Share Act was indeed procedural, not substantive, to thereby authorize this Board, and other Boards of Directors in time-share associations, to unilaterally alter the common elements (assuming their Declarations do not prohibit otherwise). This decision also makes practical sense, given the near impossibility of time-share associations obtaining super-majority membership votes to make necessary changes and beneficial improvements to the common elements. Although the Arbitrator's decision has not been tested in State Court, the decision is a great step forward in ensuring that the Boards of time-share associations will have the ability and flexibility to deal with changing times and changing needs to make sure their resorts remain vibrant. This welcomed decision removes the handcuffs that have prevented certain condominium time-share resorts from being able to make needed changes to improve and modernize their resorts.

Finally, the Arbitrator also ruled that the 1992 legislative changes to the Condominium Act, requiring the approval of 75% of a condominium association's membership in order to alter the common elements (unless otherwise specifically provided in the Declaration of Condominium), was likewise a procedural, and not a substantive, change to the Condominium Act. This ruling supported the Arbitrator's discrediting of a troublesome whole-unit condominium case decision, known as Wellington Property Management v. Parc Corniche Condominium Association, Inc., 755 So. 2d 824 (Fla. App. 5 Dist. 2000). In Parc Corniche, a District Court had questioned whether the 1992 legislative change to the Condominium Act, authorizing alterations upon 75% membership approval, applied to pre-existing condominiums. The Court had reasoned that these 1992 legislative changes were substantive, and therefore could not apply to a Declaration of Condominium (without Kaufman language) which had been recorded prior to 1992; this reasoning supported the conclusion of the Court that unanimous owner approval was required to alter the common elements of the Parc Corniche. In support of the Arbitrator's conclusion that Parc Corniche was no longer binding, the Arbitrator noted the Woodside Village Condominium v. Jahren case, a decision of the Florida Supreme Court. From statements made by the Florida Supreme Court in Woodside, that Condominium Declarations are contracts primarily created by the Condominium Act, the Arbitrator inferred that legislative changes to the Condominium Act will generally be expected to be procedural, rather than substantive, and will therefore apply retroactively to existing Condominium Declarations, unless stated otherwise in the legislative change itself or unless the expectation can somehow be overcome.

(If you are interested in Timeshare issues, you may wish to review the Firm's "Timeshare Update" newsletters available at www.becker-poliakoff.com , or contact the Firm's Timeshare Practice Group, focussing on the needs of owner-controlled timeshare resorts, at 800 / 232-5379 or by e-mail at Timeshare@Becker-Poliakoff.com.)

Sun and Sand *cont.*

result in the unit owner being charged late fees or interest, as provided in the governing documents. The Association may also secure payment by recording a Claim of Lien against the unit, which secures future assessments, as well as costs and attorney's fees related with the collection effort.

Condominium associations may also use "reserve" funds to pay for some or all of the work. This requires the Board to examine how its reserves are structured to determine if the reserves can be used. Reserves cannot be used for non-scheduled purposes without a unit owner vote. Money in a "general" or "contingency" reserve fund, can be applied to the restoration/ preservation project. However, money in a "statutory" reserve account, (such as for painting, paving, roof and any other item for which the deferred maintenance and replacement costs exceeds $10,000.00) cannot be used without a unit owner vote.

Finally, condominium associations are increasingly using lines of credit or bank loans to address major renovation projects. A loan or line of credit is useful even where the association may have levied sufficient special assessments to cover the cost of the work. This is primarily because unit owners often cannot afford to pay the assessment in one lump sum, and the line of credit provides interim financing to meet the contractor's draw schedule. The association must be careful in structuring these transactions. For example, absent a unit owner vote, it is not lawful for a condominium association to pledge statutory reserves as security for a loan. Also, because lending institutions typically require collateral, and condominium associations rarely own property, a mortgage is not feasible. Typically, assignment of assessment rights, or a specific special assessment, is the most frequent means of securing association loans.

No matter what your renovation, restoration or preservation project, there are numerous pitfalls for the unwary. The time to obtain professional help is before the contract is signed and the work is done, so your project will proceed more smoothly to a successful outcome.

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Community Up-Date™

Vol. II, 2005

CURRENT NEWS FOR COMMUNITY ASSOCIATIONS

Donna D. Berger, Esq. *Editor*

The "Vocal Minority"
Greasing the Squeaky Wheels

By Gary A. Poliakoff, J.D.

When we speak of the "ins" and "outs" of condominiums, we are referring to the fact that, while there is one group in power, there is always another group trying to oust it from power.

Successful community association operation is dependent upon the board's ability to maintain harmony among the co-owners. The difficulty of this task is often exacerbated by a few vocal owners who loudly take issue with every board action and/or fight with other co-owners. When analyzing causes of friction within the common interest ownership housing community, we find a link between overt hostilities and fundamental human behavioral problems caused by individuals who are out of sync with the mainstream of the community. Most squeaking is caused by:

1. The square peg in the round hole.
2. The outsider.
3. The misled and uninformed.
4. The broken components.
5. The board moving against the grain.

The board's ability to recognize squeaky wheels can provide it with an opportunity to apply the grease necessary for a smooth operation.

The Square Peg in a Round Hole:

Common interest ownership is not for everyone. The socialite who feels compelled to entertain twenty guests around the swimming pool every Sunday, the entertainer who wishes to practice at all hours of the day or night, and the individual not wishing to subject himself to community-imposed standards should each seek housing other than condominiums. Perhaps, the Florida Fourth District Court of Appeal said it best, when it noted:

> Every man may justly consider his home his castle and himself as the king thereof; nevertheless his sovereign fiat to use his property as he pleases must yield, at least in degree, where ownership is in common or cooperation with others. The benefits of condominium living and ownership demand no less. The individual ought not be permitted to disrupt the integrity of the common scheme through his desire for change, however laudable that change might be.

See, Sterling Village Condominium, Inc. v. Breitenbach, 251 So 2d 685 (Fla. 4th DCA 1971).

Even at the risk of losing a sale, sellers should inform prospective buyers not only of the benefits of common interest ownership, but of the limitations, as well. Proper selection of the appropriate housing alternative at the outset will alleviate a significant part of the problem.

The Outsider

There is a common misconception about common interest ownership housing communities, which is perpetuated by newspaper references during political campaigns to the "condominium vote." The impression given is that common interest ownership housing communities are a homogeneous grouping of individuals from similar sociological, economical, political and religious backgrounds, which act in unison in all matters. Nothing could be further from the truth. Co-owners represent every segment of society. They are black and white, Protestant and Jewish, northerners and southerners, liberal and conservative, heterosexual and homosexual. Communities no longer cater solely to retirees. There are retirement communities. But there are also golf and tennis communities, and even a nudist condominium in Land-O-Lakes, Florida.

A key, therefore, to avoiding friction is selecting the community, which best fits one's needs. No one should purchase, as did one young couple, in an "Housing for Older Persons Community," with the idea that the residents will change their minds concerning the enforcement of the age restrictions, after they see little Timothy.

Published periodically by the law offices of Becker & Poliakoff, P.A. with offices in Boca Raton, Fort Lauderdale, Fort Myers, Fort Walton Beach, Jacksonville, Largo, Melbourne, Miami, Naples, Orlando, Port Charlotte, Sarasota, Tallahassee, and West Palm Beach. The administrative office is located at 3111 Stirling Road, Fort Lauderdale, Florida 33312-6525. The objective of this newsletter is to keep officers and directors of Condominium, Cooperative and Homeowner Associations informed about matters affecting their communities' operations. This newsletter is prepared for and disseminated to clients of the Firm. Internet Address: http: // www.becker-poliakoff.com

The Misled and Misinformed

Misunderstandings may develop as a result of insufficient information and/or liabilities associated with common interest ownership. Purchasers attracted to "carefree," "maintenance free" lifestyle promotions are surprised to learn that, while common interest ownership affords many advantages, carefree and maintenance free living is not among them.

The common interest ownership concept only works if the owners are fully informed about their rights and responsibilities. Co-owners must come to grips with the fact that:

1. They are owners and not tenants. It is they, and not someone else, who must concern themselves with the operation of their property.
2. They, not just the board, are responsible for the success or failure of their community.
3. They must share in the common expenses, regardless of how high those expenses may be, and must budget sufficient funds to provide for repair and replacement of all building components.
4. They must abide by the covenants and restrictions and reasonable rules and regulations for the common good of the community.
5. They must give up rights, which they might otherwise enjoy in single-family detached housing.

Boards must be sensitive to the co-owners' need to know the basis for board decisions. Board members are often their own worst enemies! They contribute to the friction by:

a) Showing a lack of sensitivity to psychological and sociological factors that often influence the manner in which an owner will respond to a particular set of circumstances.

b) Failing to communicate effectively with the membership concerning the rationale for board decisions. If you treat adults like children ("Don't ask me, just do what I say,") don't be surprised when they react like children.

c) Failing to involve owners in the decision-making process through effective use of committees and open board meetings.

d) Losing sight of the fact that the board serves at the pleasure of the members to whom the board owes a fiduciary duty, and not vice versa.

Co-owners, on the other hand, **must** appreciate the fact that the common interest ownership concept is dependent upon volunteers willing to give their time and energy to serve on the board. Board members must be treated as co-owners, not as hired help, catering to an individual owner's personal needs.

The Broken Components

We cannot lose sight of the fact that we are dealing with people — fellow human beings. All of us are susceptible to certain basic human emotions, responses and needs. The manner in which we perceive and respond to a given set of circumstances may be directly dependent upon our emotional or physical condition, and/or other factors beyond our control.

Every day occurrences, such as marriage, divorce, death, retirement, relocation, financial considerations and stress will affect our demeanor and our attitudes. Our state of health, including factors such as strokes, Alzheimer's disease, mental or emotional illness, physical handicaps, drugs and alcohol, affect our responses.

In evaluating why the wheels squeak, we may find it is not as the result of our actions or failure to act, rather, it may be a problem with the wheel itself. The solution may be beyond the scope of the board's authority or ability to act, and outside professional help may be necessary. In those cases, involving things such as hoarding, extraordinary relief, such as the Baker Act, must be used.

Moving Against the Grain

Sometimes, the cause of friction is actually the failure of the board to respond to community desires. Too often, we lose sight of the fact that the fabric of America is made of threads woven from the voices of dissidents. Differences of opinion and debate are healthy signs of democracy in action. The board should not stifle contrary opinions. As long as an owner speaks out in an orderly fashion, is respectful of the rights of others, and uses legitimate means to communicate his or her ideas in the proper forum, he or she should be encouraged - not feared.

Constructive criticism is positive input. We can learn and grow only by listening attentively to diverse ideas and positions. In fact, one of the most effective means of quieting dissidents is to bring them into the decision-making process. Invite co-owners who are dissatisfied with certain aspects of community living to serve on committees addressing such problems. Encourage all owners to serve on the board so they can acquire first-hand experience, which will lead to a better appreciation of the problems facing the board.

Unfortunately, there will be occasions when the only solution to a particular problem will be through court-imposed restraints. These occasions should not be viewed as a failure on the board's part. Rather, such dispute resolution is a normal and acceptable alternative in a civilized society and is useful to promote the safety, health and welfare of the residents as a whole.

When all else fails, keep in mind this fable, with apologies to Aesop:

The Farmer, The Son and the Donkey

A farmer and his son were driving their donkey to market, where they were going to sell him. They had not gone far when a group of bystanders shouted, "Aren't you foolish to be trudging along on foot when one of you might be riding the donkey?"

When the farmer heard this, he told his son to get up on the donkey. And, they went happily along their way until they encountered another group of bystanders.

"My, my!" said one of the men. "Just look at that young fellow riding in comfort while his poor father has to walk." "Get off that donkey, you lazy boy," shouted another, "and let your father ride!"

Right away, the son got off the donkey, his father taking his place.

Before long, they encountered yet another group of bystanders. "How can you ride when your poor tired child can hardly keep up with you?"

So, the farmer reached down, pulling his son up behind him onto the donkey's back. Further down the road, there was another group of bystanders - probably from the Society for the Prevention of Cruelty to Animals.

"Aren't you ashamed," they asked, "to place such a load upon that donkey? The two of you should be carrying him."

"You are right!" agreed the farmer. And, he and his son got down from the donkey's back. Then they tied the donkey's feet together, sliding a pole between its legs enabling them to carry the donkey on their shoulders.

Upon reaching the town, a whole crowd of people had gathered. They shouted and laughed at the sight of this farmer and his son carrying the donkey.

Now, outside the town, there was a bridge crossing a stream of water. The donkey, upon hearing all the commotion, kicked free of the ropes, tumbling into the water, where he soon drowned.

The moral of the story, and one which is useful when dealing with co-ownership situations, is:

You cannot please all the people all the time. And, if you try, you will lose your ass in the process.

HEAD OF THE CLASS

Amber Glades, Inc. v. Leisure Associates Limited Partnership and P & S Florida Leisure Corporation, 30 FLW D379 (Fla. 2nd DCA, 2005).

This case was an action by a mobile homeowners' association against mobile home park owners "on behalf of all mobile homeowners in the park" alleging that owners unreasonably increased lot rental amounts and improperly amended or failed to enforce park rules. The trial court entered an order requiring the association to give notice of the lawsuit to all mobile homeowners pursuant to Florida Rule of Civil Procedure 1.222. The mobile homeowners' association appealed that order.

In October 2003, Amber Glades, Inc. the homeowners' association field an action against the park owner on the following theories:

1. A recent lot rental increase which affected all mobile homeowners was unreasonable and should be unenforceable;

2. The park owner had improperly amended park rules and/or was not enforcing "55 and over" park rules; and

3. The park owner was not enforcing rules restricting pets within the park.

The homeowners' association sought monetary damages for the mobile homeowners as well as attorney's fees and costs. The complaint was filed in reliance upon Florida Rule of Civil Procedure 1.2222 which states in its entirety:

"A mobile homeowners' association may institute, maintain, settle, or appeal actions or hearings in its name on behalf of all homeowners concerning matters of common interest, including but not limited to:

- the common property
- structural components of a building or other improvements
- mechanical, electrical, and plumbing elements serving the park property; and
- protests of ad valorem taxes on commonly used facilities.

If the association has the authority to maintain a class action under this rule, the association may be joined in an action as representative of that class with reference to litigation and disputes involved the matters for which the association could bring a class action under this rule. Nothing herein limits any statutory or common-law right of any individual homeowner or class of homeowners to bring any action which may otherwise be available. An action under this rule shall not be subject to the requirements of rule 1.220."

Rule 1.222 was created by the Florida Supreme Court in 1988 when the Court declared most of Section 723.079 (1) of the Florida Statutes unconstitutional and since 1988 there has been little caselaw addressing this rule. The defendant mobile home park owner wanted the trial court to determine a class, make the homeowners' association the class representative and require that notices of the class action be sent to all members of the class. Normally the defendant in a class action would oppose the creation of a class but the positions are reversed in this case. The explanation centers on the risk of an adverse judgment awarding attorney's fees and costs in an action under Chapter 723. The risk of losing a lawsuit under this chapter could easily cause mobile homeowners to choose to forego litigation. The homeowners' association wanted to maintain this lawsuit in its own name whereby the mobile homeowners were not parties and thus, would have no risk of personal judgments entered against them if they lose. The tactics of the parties in this case clearly demonstrate two distinctly different interpretations of Rule 1.222 as they jockey for the most favorable litigation stance. The Appellate Court confirmed the trial court's order that the homeowners' association notify all affected mobile homeowners of the pending action so they could take the affirmative step of opting out of the litigation if they wanted to and thereby avoid being named individually in a judgment awarding attorney's fees to the opposing party.

COME JOIN US ON WEDNESDAY, MARCH 30, 2005 FOR CALL'S COMMUNITY ASSOCIATION DAY IN TALLAHASSEE!

DO YOU WANT YOUR VOICES TO BE HEARD AS THE FOLLOWING PROPOSALS ARE DEBATED AND VOTED UPON THIS YEAR?

- Severe limitations on or an outright ban on the ability of associations (condominiums and HOA's) to lien and foreclose for delinquent assessments
- Mandatory audits every 2 years (whether your association needs them or not)
- Mandatory full reserves every year (no more waiving or partially funding)
- 1 year terms for ALL Board members
- Expanding Division and Ombudsman control to HOA's and collecting a per-home fee to pay for it
- A uniform set of documents for associations regardless of the size or type of community you live in.
- Subpoena powers for the Ombudsman

To make sure the voices of the "Silent Majority" are heard on these and other important community association issues, please plan on joining us up in Tallahassee this March 30th.

(Please note that this Agenda is tentative and is subject to change due to the Legislature's Calendar.)

9:30 - 10:00 a.m.	Convene in Capitol
10:00 - 10:30 a.m.	Orientation/Introductions and Welcome
	SpeechesBagels & Coffee served
10:30 a.m. -12:00 p.m.	Walk the Halls and Meet Your Legislators
12:00 - 1:30 p.m.	Lunch with invited Legislators -
	Catered by Andrew's
1:30 - 3:00 p.m.	Keynote Speakers
3:00 - 3:30 p.m.	Visit House and Senate Chambers
3:30 - 4:30 p.m.	Walk the Halls and Meet Your Legislators
4:30 - 4:45 p.m.	Farewell
5:00 p.m.	Depart

FOR MORE INFORMATION ON TRAVEL AND LODGING, PLEASE GO TO THE CALL LOG IN PAGE AT WWW.CALLBP.COM.