BECKER & POLIAKOFF COMMUNITY UP-DATE

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CURRENT NEWS FOR COMMUNITY ASSOCIATIONS

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TAX ALERT: BASIC TAX CHARACTERISTICS OF HOMEOWNERS ASSOCIATIONS

By: L. Ryan Pinder, Esq.

Introduction

Under section 528 of the Internal Revenue Code, homeowners associations are eligible for a limited exemption from income taxation. The policy behind the exemption is to place the collective efforts of homeowners acting in concert to maintain and improve their residences on a par with homeowners acting individually for similar purposes. (S. Rep. No. 938, 94th Cong., 2s Sess. 393 (1976).

Homeowners Association Defined

An organization can be classified, for tax purposes, as a homeowners association if it satisfies the following six conditions:

1. The organization must be a condominium management association, a residential real estate management association, or a timeshare association (as defined in the Internal Revenue Code).

2. The organization must be organized and operated to provide for the acquisition, construction, management, maintenance, and care of association property.

3. 60% or more of the organization's gross income for the taxable year must consist solely of amounts received as membership dues, fees, or assessments from owners of residential units, from owners of residences or residential lots, or from owners of timeshare rights to use, or timeshare ownership interests in, association property.

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TAX ALERT, *cont.*

4. 90% or more of the organization's expenditures for the taxable year must be for the acquisition, construction, management, maintenance, and care of association property.

5. No part of the organization's net earnings may benefit any private shareholder or individual, other than by acquiring, constructing or providing management, maintenance and care of association property, or by a rebate or excess membership dues, fees, or assessments.

6. The organization must elect for the taxable year to be subject to the tax regime of IRC section 528. (See IRC § 528(c)(1))

Homeowners Association Taxable Income

Under IRC section 528 homeowners associations are taxed at a rate of 30% on the homeowners association taxable income. Homeowners association taxable income consists of all of the organization's income except exempt function income.

Exempt Function Income

Exempt function income includes any amount received as membership dues, fees, or assessments from:

- Owners of condominium housing units of a condominium management association;
- Owners of real property of a residential real estate management association; or
- Owners of timeshare rights to use, or timeshare ownership interests in, real property of a timeshare association. (See IRC § 528(d)(3))

To constitute exempt function income, a receipt must be derived from the owners in their capacity as owner-members and not in some other capacity.

Tax

A flat tax of 30% (32% in the case of a timeshare association) is imposed on the "homeowners association taxable income" of a homeowners association (See IRC § 528(b)). Homeowners taxable income is equal to:

Gross income for the taxable year – deductions directly connected with the production of gross income

The calculation of homeowners taxable income is subject to the following modifications:

- A $100 specific deduction is allowed;
- The net operating loss deduction is disallowed; and
- No deduction is allowed for dividends received, dividends paid, organization expenditure amortization, and repurchased bond premium amortization. (See IRC § 528(d)(2)).

Results of Ineligibility or Non-election for Treatment as a Homeowners Association

Organizations that do not meet the six basic requirements of a homeowners association, or qualifying organizations that do not elect to be treated as a homeowners association are taxed as corporations. The election to be treated as a homeowners association is made on a yearly basis; in some taxable years it may be more advantageous to be taxed as a corporation rather than as a homeowners association. Examples of situations in which it might be more advantageous to not make the section 528 election are:

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• If 30% tax rate for homeowners associations would be higher than if the income for the year was taxed according to the graduated rates applicable to corporations.

• If the association has a net operating loss, treatment as a taxable corporation may be preferable as the net operating loss deduction is not allowed in computing the taxable income of a homeowners association.

Circular 230 Disclosure

To ensure compliance with requirements imposed by the IRS, unless we expressly state otherwise, we inform you that any U.S. federal tax advice contained in this communication (including any attachments) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction or matter addressed herein.

The discussion contained herein shall not constitute a legal opinion of any kind. The facts and circumstances will vary from one taxpayer to another, each taxpayer should seek advice on the taxpayer's particular circumstances from its own independent tax counsel or advisor as to all tax matters discussed herein.

For any questions or issues related to the taxation of homeowner or condominium associations please contact Ryan Pinder at: rpinder@becker-poliakoff.com.

REVERSE MORTGAGES

By: Mary R. Harvey, Esq.

tA Reverse Mortgage generally allows older homeowners (*age sixty-two (62) and older*) to use part of their equity in their homes and not have to sell their homes or take on additional monthly bills. The provisions of a Reverse Mortgage can be very attractive to owners when their income is limited but equity in their home is high. In a Reverse Mortgage the Lender is advancing the owner money and generally the owner does not have to pay it back as long as they live in the home.

The owner uses the equity in the home but does not increase the monthly debt as there is usually no repayment of the mortgage while the owner lives in the home. The owner may use the equity by converting it into cash (lump sum amount), use it as a line of credit, or even use it to generate a monthly income for themselves.

There are privately insured Reverse Mortgages and a federally insured program of Reverse Mortgages available to owners. To qualify for a federally insured Reverse Mortgage the current owner(s), in addition to meeting the age requirement, must live in the home as the principal residence. Further, the home must be a single family residence in a 1 to 4 unit dwelling, a condominium, or located in a PUD (planned unit development). Other types of residences, such as manufactured homes, are limited in eligibility. Generally mobile homes and cooperatives are not

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REVERSE MORTGAGES, *cont.*

eligible for the Reverse Mortgage.

Older owners who qualify for a Reverse Mortgage generally live on a fixed, lower income. A real advantage to the Reverse Mortgage versus a traditional bank loan is that under this program "income" is not a primary factor nor is it a factor at all in most programs of this type. Rather, "equity" is the main determination for the loan. Therefore, older owners can qualify for the loan if there is equity in the home.

The owner retains the title to the property and therefore, the unit owner remains responsible for all facets such as dues, assessments, taxes, insurance and upkeep. The mortgage is attached to the property and is usually not a personal debt.

The Reverse Mortgage allows for the added protection that the mortgage amount cannot exceed the value of the home at the time the loan is repaid. Generally, a Reverse Mortgage must only be paid back upon the occurrence of certain events such as death of the last eligible owner, sale of the property, or when the last eligible owner does not live at the property as the principal residence. Since there is no repayment on a Reverse Mortgage the lender of the Reverse Mortgage cannot foreclose on the property or force the owner to leave the home which is a great comfort to older homeowners, whereas, a bank loan may put the home at risk of foreclosure if there are monthly repayment schedules which the owner cannot pay due to lack of funds, for example, or illness.

There are different types of Reverse Mortgages which allow the owner to use the money for various uses and which may have various tax and estate planning advantages or disadvantages. The owner of a unit should refer any and all questions on a Reverse Mortgage to his lender, tax advisor or estate planner. Some associations have presented specific concerns as to how a Reverse Mortgage works in the community association environment.

A common question is whether the unit owner is still the owner of record or does the bank own the property when there is a Reverse Mortgage in place. It should be noted that the unit owner is still the owner of record on the property.

Another concern is whether unit owners with Reverse Mortgages have a right to vote? The answer is yes. The Reverse Mortgage does not change the ownership of the unit. The unit owner remains the owner of record and retains the title to the home. The bank does not own the property therefore the owner maintains all voting rights pursuant to the governing documents.

Do unit owners who have Reverse Mortgages forfeit any rights?

The answer is no. The unit owners still have all the use rights and other rights afforded under the governing documents.

Do unit owners remain responsible for assessments, special assessments, and following the governing documents, including rules and regulations of the association?

The answer is yes. The owner retains title to the home and as such is still responsible to follow the governing documents, the rules and regulations, to pay assessments, pay taxes, insurance, utilities and other expenses of the property. Further, the owner is still subject to all remedies the Association has should rules be broken or should the owner fail to pay assessments or special assessments as provided for in the governing documents and/or Florida Statutes. For example, an owner who failed to pay general or special assessments would still be subject to foreclosure from an Association pursuant to the governing documents and the law.

Another common question is whether the association has to be notified when owners have Reverse Mortgages. Usually, a provision requiring notice would be contained in the governing documents. For example, if the governing documents of your association provide that an owner may not mortgage the property or may only mortgage it through an

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REVERSE MORTGAGES, *cont.*

institutional mortgage or is obligated to request written permission from the Association, then the owner is obligated to follow the appropriate procedures.

Of concern is whether the Association's insurance carrier has to be notified that unit owners have Reverse Mortgages? Typically, if the governing documents and insurance policies provide that insurance coverage includes certain coverage for the unit owners and their mortgagees then it is advisable to notify the insurance carrier of any institutional mortgagee including a holder of the Reverse Mortgage.

It should be noted that usually a Reverse Mortgage will be the only Mortgage on the home as the programs generally require that any prior mortgages be paid off. Certain insurance coverage such as paint, wallpaper, interior walls, finishes, carpeting, or other insured items, that may be insured for the benefit of the owners and their mortgagees, may fall into this category. Also, the Reverse Mortgage lender may require an "endorsement" on the Association's insurance policy.

There are many websites that help educate consumers on Reverse Mortgages, including AARP at www.aarp.org, the U.S. Department of Housing and Urban Development (HUD) at www.hud.gov, and the Federal Trade Commission at www.ftc.gov/credit. This information is for your general understanding only and is not to be construed as legal advice, tax or estate planning advice on Reverse Mortgages.

FINANCIAL REPORTING TIDBITS

Did you know that: Condominium, Cooperative and Homeowner Associations must prepare financial reports each year.

Condominium Associations must prepare financial reports for the prior fiscal year no later than 90 days after the end of the fiscal year, or such other date as may be stated in the bylaws. Homeowner Associations must prepare annual financial reports within 60 days after the end of the fiscal year.

Condominium and Homeowner Associations must provide copies of the financial report, if requested, to its members at no charge.

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FINANCIAL REPORTING TIDBITS, *cont.*

Cooperative Associations must prepare **and** either mail or hand-deliver to its members a complete financial report of receipts and expenditures for the previous 12 months or alternatively, provide a complete set of financial statements for the previous 12 months, not later than 60 days after the end of the fiscal year, calendar year or such other time as may be stated in the bylaws. Cooperative associations with 50 or fewer units do not have to prepare financial reports.

Financial reports for condominium and homeowner associations, and for those cooperative associations who choose to prepare a complete set of financial statements, are prepared based upon the amount of the association's annual revenues. Specifically, associations with annual revenues of at least $100,000.00 but less than $200,000.00 must at a minimum, prepare compiled financial statements. Associations with annual revenues of at least $200,000.00 but less than $400,000.00 must at a minimum prepare reviewed financial statements. Associations with annual revenues in excess of $400,000.00 must prepare audited financial statements. Associations with annual revenues of less than $100,000.00 and all condominium associations with less than 50 units (regardless of its annual revenues) must prepare a report of cash receipts and expenditures.

Associations may reduce (but not eliminate) the level of financial reporting described above if a majority of the owners present at a properly noticed meeting vote to do so. For example, an association required to prepare audited financial statements in a given fiscal year may vote to reduce the level and prepare instead either reviewed or compiled financial statements or a report of cash receipts and expenditures. The reduction, if approved, is valid only for that particular fiscal year.

The bylaws may mandate a certain level of financial reporting each year (e.g. audited financial statements). If this is the case, the association must follow the bylaws regardless of the amount of its annual revenues and cannot vote to reduce this level without amending the bylaws.

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COMMUNITY UPDATE™

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"An innocent game of cards. A boisterous round of bingo. A friendly wager on a golf game. A 50/50 raffle to raise funds. Harmless, right?"

A SAFE BET: FLORIDA GAMING LAW AND THE COMMUNITY ASSOCIATION

By: Laurel R. Wiley, Esq.
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An innocent game of cards. A boisterous round of bingo. A friendly wager on a golf game. A 50/50 raffle to raise funds. Harmless, right? Not necessarily. Florida gaming law presents myriad pitfalls that can create problems for your community association. Florida law is broad in its prohibition against maintaining a location in which any person plays any game for money or any valuable thing. This prohibition is not limited to conducting a game. The law also prohibits participation in such games. It has long been recognized that regardless of the name used, if the elements of gambling are present, it is a violation of the law.

Florida law prohibits setting up, promoting, or playing any game of chance involving dice, cards, numbers, hazards, or any other gambling device, for any thing of value. Specifically prohibited are card games, keno, roulette, faro, or any other game of chance. It is also unlawful to wager for any thing of value on the result of any trial or contest of skill, speed, power, or endurance. Essentially, "gaming" involves any situation in which two or more persons risk money on a contest of chance of any kind, in which one must be the loser and the other the gainer.

Included in these prohibitions are lotteries. Florida law prohibits the set up, promotion, or conduct of a lottery for money or any thing of value, disposing of money or other property by means of a lottery, or conducting any lottery drawing for the distribution of a prize by lot or by chance, or to aid or assist in the set up, promotion, or conduct of a lottery. The Florida Supreme Court has indicated that a lottery has three elements: a prize, an award by chance, and a consideration. For example, if an association holds a "fifty-fifty raffle," a person pays for one or more tickets. A ticket is drawn at random, and the winner receives half of the money collected. The association retains the other half of the money. Such a raffle has all of the earmarks of a lottery, and is prohibited by Florida law.

THE NAME OF THE GAME

So, what's allowed? Exceptions are carved out for "penny-ante" games, sporting tournaments or similar skill contests, and bingo. These exceptions do not, however, grant carte blanche to conduct or play such games. Restrictions apply.

Penny-Ante Games

A penny-ante game is defined by the Florida Statutes as "*a game or series of games of poker, pinochle, bridge, rummy, canasta, hearts, dominoes, or mah-jongg, in which the winnings of any player in a single round, hand, or game do not exceed $10 in value*." These games are subject to many restrictions. First, the game must take place in either a participant's residence or on the common elements or common areas of the community association. The person or persons hosting the game cannot receive any payment in any form for hosting the game. There can be no fee of any kind for participation in the game, including an admission fee. There can be no advertising in any form regarding the game. Finally, no person under the age of 18 may participate in any penny-ante game. Florida law specifically addresses the playing of penny-ante games on community association property, and provides that the association will not be civilly liable for any losses sustained by players.

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Contests of Skill

Contests of skill that require entry fees are permissible under Florida law, as long as any prize awarded does not consist of money paid as entry fees. For instance, a sporting tournament in which each player pays an entrance fee is permissible, as long as the prize awarded to the winner was not paid for out of entrance fee money. In such situations, there is an opportunity to win a prize through a show of skill, but there is no stake, bet, or wager, and therefore, no violation of law.

Bingo

The traditional form of bingo hardly requires explanation: the cards, the numbers, the markers, and the final, triumphant, "***Bingo!***" Florida law specifically grants a right to community associations and to groups of residents in a mobile home park to conduct bingo games, with certain limitations. Such games must take place on property owned by the association, property owned by the residents of a mobile home park, or property that is a common area within the association.

The law also requires that any person involved in conducting the game must be a resident of the community and a bona fide member of the organization sponsoring the game. Further, any person serving as the caller in a bingo game cannot also be a participant in that game. Similar to penny-ante games, persons under the age of 18 are prohibited from conducting or participating in a bingo game.

Unlike penny-ante games, the law contemplates that a player will pay for the use of his or her bingo card(s). The association is permitted to deduct the actual business expenses for conducting the games, but any remaining proceeds must be returned to players in the form of prizes. The law defines "actual business expenses" as "articles designed for and essential to the operation, conduct, and playing of bingo." Actual business expenses do not include any payment to the person or persons conducting the game, and according to Florida law, a person conducting a bingo game is prohibited from receiving any compensation.

The association has two choices of how to distribute any proceeds remaining after the distribution of prizes to winning players. The association can either donate the remaining proceeds to a tax-exempt charitable, nonprofit, or veterans' organization, or it can distribute the proceeds as prizes at the next scheduled day of play. If the association chooses to distribute the proceeds as prizes at a subsequent game, it must be aware that it cannot charge any players for games in which leftover proceeds are being distributed.

The law provides further restrictions on the number of sessions that may be played in a day, the amount of money or value of prizes that may be distributed, and the number of days in any week that games may take place. Each session of bingo can have no more than three jackpots, which cannot exceed the value of $250 each. The association cannot hold bingo games more frequently than twice a week.

The law also imposes additional, technical rules on bingo games. Any object drawn or ejected to determine the next number to be called must be of equal size, shape, weight, and balance of all other numbered objects. A game must be canceled if an object becomes jammed and interferes with the accurate determination of the next number to be announced. An inspection of the objects, in the presence of a disinterested person, is required prior to the commencement of any bingo session, to ensure that there are no duplications or omissions of numbers. There can be no duplicate bingo cards and all drawn numbers must be visibly displayed after being drawn. If the caller begins to vocalize a number, any player who had a previous bingo must share the prize with any player who gained bingo on the last number called. Winning cards must be verified in the presence of another player. Upon determining a winner, the caller must ask if there are any other winners, and if there is no response, the game will be declared closed. Finally, no seat may be held or reserved by the person or group conducting the bingo. Although technical, these rules are important, and like every other provision in the statute, a violation is punishable by law.

THE WINDS OF CHANGE

HB 191 sponsored by Representative Charles Dean is currently in committee in both the Florida House of Representatives and the Florida Senate that would recognize "instant bingo" as a permissible form of bingo on community association property. Instant bingo is a form of bingo that is played using tickets that contain numbers that are concealed by a cover. The player removes the cover, and wins a prize if the set of numbers, letters, objects, or patterns on the ticket matches a pre-designated pattern. The pre-designated pattern appears on a "game flare," which is a board or placard that contains the game name, the manufacturer's name or logo, the form number, the ticket count, the prize structure, the cost per play, and the serial number of the game. Although many of the provisions governing instant bingo, if approved by the Florida legislature, would be identical to those governing traditional bingo, there would be a few key differences.

The proposed legislation would not restrict the number of instant bingo prizes that could be awarded in one day. The legislation contemplates that the limit on the number of prizes will be displayed on the ticket or game flare. Likewise, the amount of each prize would not be restricted by the legislation, but rather, by the prize amount indicated on the game flare. Finally, the number of days per week that instant bingo could be played would not be limited by this legislation. It is not known at this time whether HB 191 will become law.

Further restrictions unique to instant bingo games are contemplated. For instance, the price of an instant bingo ticket must be printed by the manufacturer on the face of the ticket,

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and the price cannot exceed $1.00. No discounts or free tickets are permitted. The game flare must be posted prior to the sale of any tickets, and the serial numbers of the tickets and the game flare must match.

CONCLUSION

Although Florida is a relatively strict state on the topic of gambling, a few exceptions exist. Aside from the specific provisions for penny-ante games and bingo, it should generally be presumed that any game of chance that offers a prize is prohibited by Florida law. If the elements of gambling are present, regardless of the name applied to the game, it is prohibited by Florida law.

The Condominium Act references Section 90.502 of the Florida Evidence Code, which sets out the statutory privilege for attorney-client communications when the client is a corporation.

ATTORNEY-CLIENT PRIVILEGE: WHEN DOES IT APPLY?

By: Marlene L. Kirtland, Esq.
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In an Association, the question arises on a daily basis whether the Association is obligated to include opinion letters from legal counsel within the official records of the Association, or whether the information can be omitted because it falls under the attorney-client privilege. In a corporation setting, it is generally held that the beneficiary of the attorney-client privilege typically lies with the Board of Directors, who may assert the privilege whenever a legal opinion or memorandum is prepared by an attorney with regards to potential or pending litigation.

This issue is specifically addressed in the Condominium Act, Chapter 718.111(12)(c), Paragraph 1 of the Florida Statutes, which provides in pertinent part:

Notwithstanding the fact that the records of the Association are open to inspection by any Association member or authorized representative, at all reasonable times, the following records shall not be accessible to unit owners:

Any record protected by the lawyer-client privilege as described in s. 90.502; and any record protected by the work-product privilege, including any record prepared by an association attorney or prepared at the attorney's express direction; which reflects a mental impression, conclusion, litigation strategy, or legal theory of the attorney or the association, and which was prepared exclusively for civil or criminal litigation or for adversarial administrative proceedings, or which was prepared in anticipation of imminent civil or criminal litigation or imminent adversarial administrative proceedings until the conclusion of the litigation or adversarial administrative proceedings.

The Condominium Act references Section 90.502 of the Florida Evidence Code, which sets out the statutory privilege for attorney-client communications when the client is a corporation. The Evidence Code provides:

(1) For purposes of this section:

(a) A "lawyer" is a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation.

(b) A "client" is any person, public officer, corporation, association, or other organization or entity, either public or private, who consults a lawyer with the purpose of obtaining legal services or who is rendered legal services by a lawyer.

(c) A communication between lawyer and client is "confidential" if it is not intended to be disclosed to third persons other than:

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In a corporation setting, it is generally held that the beneficiary of the attorney-client privilege typically lies with the Board of Directors...

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1. Those to whom disclosure is in furtherance of the rendition of legal services to the client.
2. Those reasonably necessary for the transmission of the communication.

(2) A client has a privilege to refuse to disclose, and to prevent any other person from disclosing, the contents of confidential communications when such other person learned of the communications because they were made in the rendition of legal services to the client.

(3) The privilege may be claimed by:

(a) The client.

(b) A guardian or conservator of the client.

(c) The personal representative of a deceased client.

(d) A successor, assignee, trustee in dissolution, or any similar representative of an organization, corporation, or association or other entity, either public or private, whether or not in existence.

(e) The lawyer, but only on behalf of the client. The lawyer's authority to claim the privilege is presumed in the absence of contrary evidence.

(4) There is no lawyer-client privilege under this section when:

a) The services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew was a crime or fraud.

(b) A communication is relevant to an issue between parties who claim through the same deceased client.

(c) A communication is relevant to an issue of breach of duty by the lawyer to the client or by the client to the lawyer, arising from the lawyer-client relationship.

(d) A communication is relevant to an issue concerning the intention or competence of a client executing an attested document to which the lawyer is an attesting witness, or concerning the execution or attestation of the document.

(e) A communication is relevant to a matter of common interest between two or more clients, or their successors in interest, if the communication was made by any of them to a lawyer retained or consulted in common when offered in a civil action between the clients or their successors in interest.

While an Association has the right to claim the privilege for information obtained from the Association's legal counsel, the privilege can be waived if the Association includes the legal correspondence as a part of its "Official Records." "Waived" or "waiver" means the document is made available to individuals outside of the benefit of the privilege (i.e., the Board of Directors), and therefore, the Association can no longer claim the information contained within the document is privileged.

For example, if an Association is involved in litigation with one of its unit owners, the Association would not want the unit owner to have access to confidential communications, opinions and memoranda from the Association's attorney, because the communication may disclose potential weaknesses in the case, settlement strategies, and/or litigation strategies. Therefore, to protect an Association's right to claim the privilege, confidential communications prepared by an Association's counsel should not be included within the Association's official records.

An example of an attorney-client privilege letter would be an opinion letter prepared by the Association's attorney regarding whether or not the Association must insure certain portions of a unit owner's condominium unit. Another example is counsel's opinion concerning whether or not the Association is required to retrofit for sprinklers and/or generators or alternative fuel sources, in the event of a natural disaster or emergency. Furthermore, a record that is protected under the attorney-client privilege would be an attorney's opinion pertaining to whether or not the

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Andres v. Indian Creek Phase III-B Homeowner's Association

By: Carlos Martin, Esq.
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George and Anna Andres erected a flagpole on their property located in the Indian Creek Phase III-B Homeowner's Association to fly an American flag. The HOA filed suit against Mr. & Mrs. Andres as this violated the Association's governing documents, and prevailed, forcing the removal of the flagpole. Thereafter, the Association sought to foreclose on the Andres' home to pay for the attorneys fees it incurred as a result of the lawsuit.

At the appeal, the Association argued that their documents imposed a lien for attorneys fees on the Andres' property when the governing documents were first recorded. They argued that because of this the lien existed before the property acquired homestead status, thus the Andres were not protected by the unit's homestead status. However, the court found that the provision in the governing documents that provided for attorneys fees did not authorize the Association to lien and foreclose to collect them.

The governing documents only gave the Association the authority to lien and foreclose upon a unit for failure to pay assessments. The appeals court found that pursuant to the Association's governing documents the attorneys fees expended by the Association were neither annual assessments nor special assessments. As a result the court held that the Association could not lien and foreclose on a unit to collect attorneys fees spent in enforcing the provisions of its governing documents.

It is important to note that this decision is very fact-specific, and does not alter current applicable laws that allow owners in a homeowner's association to display a flag. Sections 720.304(2), Florida Statutes provides that any unit may display one (1) portable, removable United States Flag in a respectful way regardless of any provisions in the declaration or requirements dealing with flags or decorations. Furthermore, despite the negative outcome for the association in this case, the ruling affirms that if the governing documents specifically provide it, homeowners associations may lien and foreclose on a unit to collect attorneys fees spent in enforcing the association's governing documents.

Continued from page 4.

Association should sue a unit owner for violating the provisions of the governing documents. All of the above mentioned information would be protected by the attorney-client privilege, if not disclosed to those outside of the benefit of the privilege.

In the event that a privileged record is disclosed to a unit owner, under the law the privilege is deemed waived, and any potentially damaging information may be used against the Association. Associations are therefore advised to err on the side of caution and not provide records to unit owners concerning potential, pending or possible litigation, that is prepared by the Association's legal counsel without first consulting with your legal counsel.

NEW INSURANCE ALTERNATIVES

Many of you may already have heard about the insurance reforms in HB 1A which passed during the Special Session of the Legislature. The statutes permitting community associations to enter into self insurance funds and/or to form coalitions for the purpose of pooling assets to purchase insurance were revised to make them potentially more accessible to a greater number of communities. As a result, there are new insurance products and fund models being created and marketed specifically towards community associations some of which you may already have seen.

These models and funds can vary greatly in terms of their structure; some have a private insurance layer while others have varying abilities to tap into Florida's Catastrophe Fund depending if they are admitted carriers with the State of Florida and licensed and certified by the Office of Insurance Regulation. Most of these funds require some level of similarity amongst the participating properties but all of these models and funds have one thing in common: a certain amount of risk. Some of these pools can become targets for surplus lines companies offering huge discounts but without the necessary ability to tap into the State's CAT fund and to provide necessary consumer solvency protections.

It is therefore absolutely essential for boards to evaluate the risks of participating in a pooled or self-insurance fund with the assistance of legal counsel to determine if such participation is available for their particular community and to assess their community's comfort level with the risks involved.

Community Update Gets a New Look and Goes Electronic

We hope you are enjoying the new "look" of the Community Update. As editors, we wanted to provide an attractive, easy-to-read newsletter while maintaining the same high quality of information that you have relied upon for many years. Let us know what you think. Also, Becker & Poliakoff will begin sending your Community Update newsletter via e-mail in the next few months. Please take a moment to send the requested information below via e-mail to ***caforms@becker-poliakoff.com*** or you can go online to ***becker-poliakoff.com/forms/ca.html*** to complete this form.
Thank you, *Donna and David, Editors.*

Name: _____

E-mail address: _____

Name of Association: _____

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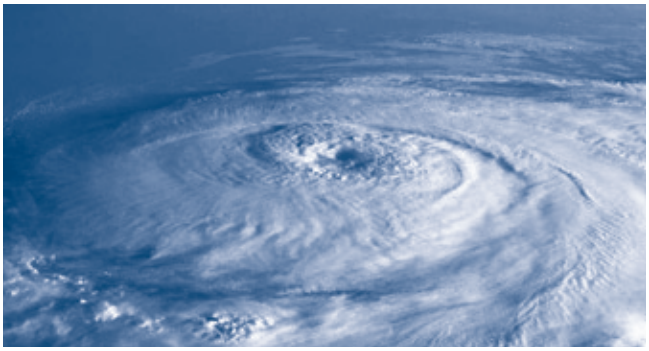
COMMUNITY UPDATE™

VOLUME III, 2007 | Serving Florida's Communities Since 1980 | Lisa Magill, Esq., Editor



Political firestorms surround the issue of post-casualty cost allocation. This is the first in a case study of the effects of a hurricane or other substantial casualty.

HURRICANE CHRISTI – A CASE STUDY

By: Joseph E. Adams, Esq.
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For the past few years, hurricanes and their resulting catastrophic damage have been big news in Florida, and indeed around the world. In the condominium context, one of the biggest challenges for associations in dealing with the aftermath of the 2004-2005 storms was the question of how to allocate repair costs not covered by insurance.

For example, many high rise condominiums sustained noteworthy damage from Hurricane Wilma in October of 2005. Typically windstorm insurance policies include deductibles ranging from two percent to five percent of the building's insured value. If a condominium building is insured for 20 million dollars, and carries a five percent hurricane deductible, one million dollars of damage must be sustained before the first penny of insurance money is paid.

Particularly in the post-Wilma environment, but also for "lucky" communities visited by Hurricanes Katrina or Charley, Jeanne and Frances the year before, total damage did not reach the deductible. Nonetheless, the damages needed to be fixed, and someone has to pay. There are only two choices. First, the association can assess all unit owners (in which case assessments are passed on pursuant to the formula set forth in the declaration of condominium, most often equally, but sometimes based on apartment square footage). The second alternative is that some pay, and some don't.

Political firestorms surround the issue of post-casualty cost allocation. This is the first in a case study of the effects of a hurricane or other substantial casualty.

When the damaged element is a common element that benefits all, the answer is easy. For example, few would argue against the proposition that the expenses of repairing roof damage, not covered by the deductible, should be passed on to all unit owners, pursuant to the formula by which all other expenses are shared.

However, the equation becomes substantially more murky, perhaps clear as mud, when the damaged element is something which the individual unit owner is generally obligated to maintain, repair, and replace outside of the casualty damage context.

Let's look at a case study over the next few issues, and you will see how things get confusing.

Green Flash Condominium is a single condominium building situated directly on the beach. Green Flash was built in 1974. The building is ten stories high, and has four apartments (units) on each floor for a total of 40 units. Common expenses at Green Flash are shared on a 1/40 basis.

Green Flash is insured for hurricane damage with Citizens, at a rebuilding cost of 20 million dollars. The deductible for named storms is four percent of the insured value, or $800,000.00.

Suddenly, Green Flash is struck by Hurricane Christi, a Category 3 storm that makes landfall south, in the Everglades. However, Christi does bring sustained winds of 100 miles per hour to the beach area, for about an hour. The rain from the storm is constant for nearly two days. Fortunately, there are no flood waters or tidal surge affiliated with the storm.

The apartments at Green Flash are traditional 70's-era high rise construction, with 900 square foot apartments, accented by ten foot by twenty foot screened-in balconies overlooking the water.

The Declaration of Condominium for Green Flash describes the balconies as part of the unit, and includes the original screen installation (framing and screening) within the boundaries of the unit. The sliding glass door leading out to the balcony is also

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part of the unit, and is described in the Declaration as a unit owner maintenance, repair, and replacement responsibility.

To say the least, Green Flash is a hodge-podge. About half the units have installed hurricane shutters, which the association requires be mounted flush to the sliding glass doors. Many of those shutters were installed more than a decade ago, and do not meet current code. Some shutters have been installed more recently, and meet current code.

The association has also permitted (or at least has not objected to) unit owners enclosing their balconies with a standard glass enclosure, which the residents call "window-walls." The window-walls are basically three panel sliding glass doors, which can be opened to let in air, or can be closed to keep the area protected. One or two of the owners recently installed state-of-the-art impact glass for their window-walls, but most are older versions which are not rated for hurricane protection.

Each unit also has two bedroom windows and one kitchen window. None of the windows at Green Flash have hurricane shutters installed over them.

Christi blew in from the west, and most of the damage was to the west side of the building. Part of the roof lifted up, and was saturated by wind-driven rain. Christi's winds blew out about ten window-walls; the two new impact glass window-walls held up wonderfully. No water entered through sliding glass doors where hurricane shutters were in place, nor where the window-walls held up, although every balcony with exposed screen had the screens blown out. About six sliding glass doors that were not protected by hurricane shutters or window-walls (or where window-walls failed) blew in. Two of the bedroom windows failed. Water leaked around some windows which did not fail. It was a mess.

Green Flash Condominium Association was fortunate to have an experienced manager in Godfrey Goodfellow, who had extensive training in disaster preparedness and response.

Following the mantra he had learned to "shore-up", "dry-in" and "dry-out", Goodfellow first made sure that there were no safety hazards on the property, such as broken glass, jagged metal, or exposed electrical lines.

Having completed the shore-up stage, which fortunately required little work (clearing some landscaping debris), Goodfellow proceeded to the dry-in stage. Being a prepared sort, Goodfellow had the Association's roof registered with a local roofing company, Randy's Roofing, which inspected the Green Flash roof at least once per year, recommended required maintenance, and assisted in planning for the roof's ultimate replacement. Being an existing client of Randy's, Green Flash got first-priority treatment from the roofing contractor. As soon as the torrential rains had stopped, the contractor placed temporary patches on all of the areas where the roof had lifted.

Randy also referred the association to another contractor, Storm Chasers, who were quickly able to temporarily board up the areas where the windows and sliders had blown out, preventing further water intrusion.

Having shored up and dried in, it was time for Goodfellow to arrange for the dry-out of the building. Fortunately, Goodfellow had a key to each of the apartments (which was a requirement contained in the original Green Flash condominium documents) and he was able to inspect each apartment after the storm had passed. Goodfellow determined that 22 of the 40 units had some form of water intrusion, some severe, some minor. Because of the volume of rain that came with Christi, a few apartments that had no direct water entry showed signs of water intrusion as well.

Although it would be a week before power was restored, Goodfellow also had a pre-existing relationship with a dry-out contractor, Walt's Water Extraction. Walt brought generators, fans, de-humidifiers, and a large crew of workers to dry-out Green Flash. The dry-out contractor ran the fans and de-humidifiers for five days, and declared the building to be moisture-free.

Green Flash, at Goodfellow's insistence, also had a pre-existing arrangement with an independent consultant, Tom Techno, a professional engineer. Techno agreed after the five day period that it was okay to remove the water extraction equipment, and opined that there was a low probability of significant mold infestation.

Continued on page 3.

ERRATA: Volume XII, 2006, Funding Reserves

This is a clarification of comments in the referenced article regarding the developer's rights in connection with the waiver or reduced funding of reserves for a condominium association during its first two years of operation. The developer may exercise its voting rights in the Association to waive or reduce reserves, but the vote on reserves must occur at a properly noticed meeting of the members of the association. After two years, reserves may be waived or reduced only with consent of a majority of the non-developer unit owners present and voting at a properly noticed meeting.

Effective disaster preparation, such as establishing relationships with local contractors and service providers, as well as engaging in a proactive maintenance program, is crucial to secure priority service in the aftermath of a storm.

To this point, the association has spent $200,000.00 in post-hurricane remediation. Walt, the dry-out contractor, charged $100,000.00. The cost to Randy's Roofing amounted to about $50,000.00, but just for the immediate, temporary patch-work. The contractor who cleaned up the property and boarded the windows, Storm Chasers, charged $25,000.00. The engineering consultant fees for Tom Techno, along with miscellaneous other expenses, ran another $25,000.00. Remember, Green Flash has an $800,000.00 deductible.

So far, so good. But, now, it is time to put things back together again. Questions abound about who is authorized (or obligated) to contract for the necessary repair work, and who is going to have to pay for it.

Of course, the association also immediately contacted its insurance agent, Risk, Reward and Associates, who filed a claim and got a file number from Citizens. There was a promise to send an adjuster out to assess the situation, but the association is warned that the more significantly damaged areas to the south would get first attention.

Always wanting to do things the right way, Green Flash also calls its attorney, John Justice, a local lawyer well respected in the community association law field. The association's first question to Justice is whose insurance is supposed to cover what.

Justice looks at the Declaration of Condominium for Green Flash, and notes, with some chagrin, that the association has not amended its documents since 1974. Apparently, while Green Flash was well-prepared on many fronts, good legal documentation was not one of them. Justice notes that Article 14 of the Declaration of Condominium provides: "The association shall obtain one hundred percent replacement cost coverage for all insurable improvements within the condominium."

Don Dooright, the Green Flash President, asks Justice whether the association's insurance policy will cover the damage which has occurred. Damaged items include the carpeting (some is completely ruined), dry-wall and kitchen cabinets. Of course, the various windows, window-walls and sliding glass doors will also have to be addressed, which will be discussed in future volumes of the COMMUNITY UPDATE.

Participation in Meetings by a Power of Attorney or by a Trustee or Beneficiary of a Trust

By: Yeline Goin, Esq.
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The condominium law is clear that unit owners have a right to attend meetings of the Board of Directors and meetings of the owners, and such right to attend includes the right to speak at such meetings. In addition, it is clear that owners may vote in person or by proxy at unit owner meetings. But what about the right of someone holding a power of attorney from a unit owner or a beneficiary or trustee of a living trust? What rights do these individuals have to attend, participate, and vote, on behalf of the unit owner?

Powers of Attorney

- Where the condominium documents are silent regarding the use of a power of attorney, a board must allow a person holding a power of attorney from the unit owner to attend, speak at, and participate in the association's board of administration meetings.
- A person holding a power of attorney may not vote in the election of directors because the Condominium Act specifically prohibits any person other than the unit owner to vote his or her ballot.
- An association may limit the attendance of a holder of a power of attorney, by amending its bylaws to prohibit third persons (for example, a power of attorney) from attending meetings.
- If the unit is owned by a corporation, the association could not prohibit a power of attorney to attend on behalf of a corporation, because a corporation is an entity that cannot act except through a designated individual.

Units Owned in Trust

If the unit is owned in trust, it must be determined who is considered the "unit owner" entitled to participate in meetings and vote on behalf of the owner (i.e., the trust).

- The statute governing corporations not-for-profit states that a grantor of a trust or a beneficiary of a trust which owns a unit shall be considered a member of the association and eligible to serve as a director of the condominium association. The terms "grantor" and "beneficiary" are defined in the statute. In order for the beneficiary to be considered a member, the beneficiary must occupy the unit. Therefore, if the unit is owned by a trust, a grantor or a beneficiary who occupies a unit may attend meetings and participate and speak at meetings.
- In most cases, the "trustee" will also be either a grantor or a beneficiary. Even if the trustee is not a grantor or a beneficiary, there are arbitration decisions holding that a trustee may vote on behalf of a unit owned in trust, and therefore, the trustee should also be permitted to attend and speak at meetings.
- The governing documents may impose a requirement that a unit owned in trust designate a "voting member" through the use of a voting certificate. If that is the case, the person designated in the voting certificate is the person entitled to vote on behalf of the unit owner.

Can an Association sue an owner who fails to prevent a family member or guest from violating the governing documents?

The Meadows Community Association, Inc. v. Russell-Tutty

By: Michael C. Gongora, Esq.
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In the case of The Meadows Community Association, Inc. v. Russell-Tutty, 928 So.2d 1276 (Fla. 2d DCA 2006), the Court considered whether the trial court erred in granting a motion to dismiss a complaint, with prejudice, that had been filed against a unit owner. In Meadows, a homeowners' association had brought action against a unit owner for declaratory and injunctive relief arising out of alleged violations of the association's traffic regulations by the owner's adult son who was residing with her. The owner filed a motion to dismiss for failure to state a cause of action arguing that:

a. the enforcement of traffic laws is within the sole province of law enforcement;
b. courts cannot enjoin criminal behavior;
c. the amended complaint fails to allege a factual nexus between the defendant and her son; and
d. the defendant cannot be ordered to control the actions of another individual.

The Appellate Court found that the trial court erred in dismissing the complaint with prejudice. The Court found that dismissal of the case by the trial court was inappropriate because on a motion to dismiss for failure to state a cause of action the court should not speculate on whether the allegations in the complaint are true or whether the pleader has the ability to prove them. The question for the court to decide is simply whether or not, assuming all the allegations in the complaint are true, the plaintiff would be entitled to the relief requested.

It is important to note that the Court stated that the trial court focused on the merits of the association's case rather than on the sufficiency of the allegations found within the four corners of the complaint. The Court noted that the complaint may be subject to a motion for summary judgment or other arguments that may ultimately moot the complaint. "The availability of a remedy, however, is reached after, not before, the determination of a plaintiff's rights." The case was reversed and remanded for further proceedings.

CALL LEADERSHIP

Hopefully all of you know that David Muller and Yeline Goin have assumed responsibility for all day-to-day operations of the Community Association Leadership Lobby (CALL), which advocates on behalf of more than 4,000 member communities statewide and is the leading organization working to enhance the quality of life and protect property values for Florida's community association residents.

Mr. Muller is based in our Sarasota office and represents community associations located in Sarasota, Manatee, Charlotte, Lee, Polk, DeSoto, Brevard and Highlands counties.

Based in Tallahassee, Ms. Goin represents condominiums and homeowner associations in efforts to comply with various aspects of the Florida Condominium Act and Florida Homeowners Association Act.

"I'm honored to be given the opportunity as CALL co-director to help drive the expansion of CALL's successful grassroots lobby efforts to include more condo, homeowner and other community association involvement from different regions around the state." — David Muller

"I'm very pleased with the opportunity to provide a permanent presence for CALL in Tallahassee, where so many decisions are made that impact on the quality of life of community association residents across the state." — Yeline Goin

A WORD OF THANKS...

Our sincere appreciation is expressed to all the clients, community leaders, managers and colleagues that have complimented the Firm regarding the new look and content of the Community Update and the improvements to the Community Association Leadership Lobby (CALL) website.

Thank you,
Lisa Magill, Editor.

Community Update Gets a New Look and Goes Electronic

We hope you are enjoying the new "look" of the Community Update. As editors, we wanted to provide an attractive, easy-to-read newsletter while maintaining the same high quality of information that you have relied upon for many years. Let us know what you think. Also, Becker & Poliakoff will begin sending your Community Update newsletter via e-mail in the next few months. Please take a moment to send the requested information below via e-mail to ***caforms@becker-poliakoff.com*** or you can go online to ***becker-poliakoff.com/forms/ca.html*** to complete this form.

Name: _____

E-mail address: _____

Name of Association: _____

Board Position or Manager (if so, include your company name): _____

Street Address: _____

City: _____ State: _____ Zip: _____

Phone Number: _____ Fax Number: _____

E-mail delivery of Community Update will ensure your community continues to receive this valuable information in the most timely manner possible.

COMMUNITY UPDATE™

VOLUME IV, 2007 | **Serving Florida's Communities Since 1980** | Lisa Magill, Esq., Editor

"Generally, a board member is permitted to make a mistake and will be immune from a personal lawsuit, even if the mistake is unreasonable."

DIRECTORS DO YOUR DUTY, DON'T BE LED DOWN THE BRIDLE PATH

By: C. John Christensen, Esq.
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Berg v. Wagner, Brodsky, Lloyd, Shipman & Bridle Path Homeowners Association, Inc., 935 So.2d 100 (Fla. 4th DCA 2006)

In Berg v. Wagner, Brodsky, Lloyd, Shipman & Bridle Path Homeowners Association, Inc., 935 So.2d 100 (Fla. 4th DCA 2006), Bridle Path Homeowners Association filed a foreclosure action against an owner (Berg) due to the owner's failure to pay assessments. The owner countersued the Association and, more critically, the board members personally and individually, claiming breach of fiduciary duty by the Board, and individual directors, in the establishment of the assessments, in violation of 617.303, Florida Statutes (now 720.303). The board members argued that the owner's claims against them personally and individually were invalid for two reasons: (1) the "statute of limitations" period (the time-frame in which a legal claim must be brought against another party) had expired; and (2) any claims against the board members in their individual capacities were prevented by the Not-for-Profit Corporation Act which, affords board members immunity under most circumstances (for example, for mistakes by directors).

In response, the owner argued that the statutory immunity for board members was not applicable, asserting that the board members deliberately ignored proper procedure when assessments were levied, and that the board members intentionally holding illegal and improper board meetings to adopt assessments, all in bad faith and with a malicious purpose. The board members then asked the Trial Court to dismiss the owner's countersuit by way of a legal procedure known as a "Motion for Summary Judgment"; if a "Motion for Summary Judgment" is granted against a party, it means the Court does not believe the party can come up with any legal argument whatsoever to win the case. The Trial Court agreed with the board members and granted their Motion for Summary Judgment and dismissed the owner's countersuit. The owner appealed.

The Appellate Court held the Trial Court's granting of the Summary Judgment could not be justified by reliance on the immunity provided board members by the Not-for-Profit Corporation Act; the Not-for-Profit Corporation Act protections do not extend to immunity for actions taken by board members in bad faith, which the owner had claimed. Apparently, the Trial Court had not fully examined the issue as to whether the board members had indeed acted in bad faith. The Appellate Court then noted that Summary Judgment is proper only when there are no genuine issues of material fact shown from the record of the trial; if there is the slightest doubt about or conflict in the evidence, then Summary Judgment should not be granted. Nevertheless, the running of the statute of limitations period did prevent the Appellate Court from completely reversing the Trial Court's decision. The Appellate Court only reversed the Trial Court's decision with regard to those actions assertedly committed by board members before the statute of limitations had expired; the Trial Court was required to reconsider the issue of the owner's claim of bad faith on the part of the board members before the statute of limitations had expired.

The bottom line is that, while board members are typically afforded immunity under the Not-for-Profit Corporation Act, if a board member acts in bad faith and with a malicious purpose, the board member may not be entitled to rely on these immunity provisions. Generally, a board member is permitted to make a mistake and will be immune from a personal lawsuit, even if the mistake is unreasonable. However, if it can be demonstrated that the board member acted maliciously and in bad faith, the board member may be subject to personal liability.

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HURRICANE CHRISTI – THE SAGA CONTINUES

By: Joseph E. Adams, Esq.
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To continue our case study of hypothetical Hurricane Christi, we start by trying to sort out how condominium associations allocate post-hurricane costs. The following are excerpts of Attorney John Justice's opinion letter to Green Flash Condominium Association:

Dear Mr. Dooright:

You have inquired about the allocation of insuring responsibilities between individual unit owners and the association. Your question is governed by two sources, Chapter 718 of the Florida Statutes (the Florida Condominium Act) and your Declaration of Condominium.

The second source which must be reviewed is your Declaration of Condominium. Relevant to this inquiry, Article 14 of the Declaration provides:

"The association shall insure the insurable improvements of the condominium property, at one hundred percent full insurable value, excluding excavation and foundation costs."

Although your Declaration of Condominium requires insurance of "improvements," it appears that the intent of the Florida Legislature was to exempt certain "improvements" from coverage under the association's master policy. Among the "excluded items" are carpeting, other coverings, cabinetry, and various fixtures/appliances, as quoted above. In my experience, virtually all condominium associations follow this law (which has existed in some form since the 1970's, and has been amended numerous times, most recently in 2003), notwithstanding the fact that there may be constitutional arguments that the Legislature cannot change the insuring requirements in your Declaration of Condominium, as it is a contract.

You will also note that your current insurance policy does not comply with your Declaration, since your Declaration requires coverage for "full insurable value," while your policy with Citizens contains an $800,000.00 (four percent) deductible. However, as you can see, the law specifically states that insuring any requirement for "full insurable value" would permit a reasonable deductible, and accordingly it is my opinion that the association has complied with applicable legal requirements.

As you will also note, the law requires (and this change was added effective January 1, 2004) that unit owners shall insure the various internal fixtures (floor coverings, cabinetry, etc.), not covered under the master policy. I understand that the Green Flash Association does not know whether all owners have placed this insurance.

Based upon my experience in representing condominium associations after Florida's 2004 and 2005 hurricanes, it appears that this "new law" has created as much confusion as it was intended to cure, and is certainly not applied consistently.

One of the largest sources of dispute is the responsibility for insuring drywall inside of the apartments, which is also sometimes referred to as "sheet-rock" or "gypsum-board." Although certain drywall installations may actually be within the unit owner's general ownership and maintenance spheres (for example, interior non-load bearing partitions almost always fall in this category), these walls are nonetheless part of the "condominium property" as originally constructed. Likewise, the drywall constitutes part of the "improvements" required to be insured by your declaration. Further, drywall is not found on the "excluded list" of items in the Condominium Act.

Therefore, the association is responsible for insuring all drywall in the building, including drywall contained solely within the unit. The association must also insure other original installations such as all exterior and interior doors (including hardware), windows, sliding glass doors, and screening, so long as these installations were originally installed by the developer, or are replacements of like kind and quality. The Association's insuring responsibility is without regard to the ownership of these items (whether they are part of the unit or common element), nor whether the Declaration of Condominium delegates their day-to-day responsibility for maintenance, repair, and replacement to the association, or to the individual unit owner.

Conversely, any damage to kitchen or bathroom cabinetry, appliances, carpeting, paint, lights, ceiling fans, and similar items (as detailed in the portion of the statute I quoted earlier in this letter) are to be insured by the individual unit owner. That is the case even if such items (for example, the air conditioner compressors) are located outside of the building, and are designated a common element. The Association is precluded by law from providing insurance coverage for these items, and the law mandates their insurance be carried by the individual unit owners.

It is my understanding that you have been in contact with your insurance agent, who has gotten a claim number open with Citizens. I would recommend that you take a pro-active approach in ensuring that an adjuster is appointed for your claim, that a prompt initial inspection by the adjuster takes place, and that you establish personal contact information with the adjuster.

I also recommend that you save detailed invoices for any work which has been done to this date, along with any information which would justify why the work was necessary to be performed on an emergency basis. In general, emergency mitigation work does not require prior approval of the insurer, so long as the work was reasonably necessary to mitigate damage and preserve the property, and the expenses were reasonable. However, in moving forward, I would recommend that you have the adjuster sign off on any significant charges the association intends to incur, at least if you are going to submit them as part of your insurance claim.

I would also recommend that you submit the complete dry-out invoice from Walt's Water Extraction, which I understand was one hundred thousand dollars, to the insurer. Based upon my previous experience, it may well be that the association's insurer will only agree to cover a fraction of that expense, and we will need to address, at the appropriate time, whether those shortfalls are shared by all unit owners, or just those whose apartments were dried out.

Very truly yours,

John Justice, Attorney at Law

In the next issue of Community Update, we will fast forward our case study a few months, with a look at some contract challenges frequently faced by associations in post-disaster remediation, and working toward determining who will have to pay the piper.

Becker & Poliakoff's Hurricane Preparedness Checklist

1. **Create a Disaster Plan** and establish off-site contact information and meeting points.
2. **Establish Evacuation Routes** and conduct building or community evacuation drills in the weeks leading up to hurricane season.
3. **Verify Emergency Generators & Supplies** operate and that fuel, flashlights, batteries, water and other necessities are available.
4. **Backup Computer Files** and store information offsite, in case computers crash or systems fail.
5. **Secure the Premises** – Make preparations for routine lockdown of the building or other facilities as a storm approaches, so the building is secure during the storm and safe from vandalism or looting if a hurricane strikes.
6. **List of Owners & Employees** – Have on hand a current, hard-copy reference list complete with the names of all property owners, emergency contact numbers and details of second residence addresses, as well as a list of all association employees, with full contact details.
7. **Photograph or Video Premises** – Keep a visual record through video or photographs of premises, facilities and buildings to facilitate damage assessment and speed damage claims in a storm aftermath.
8. **Building and Facilities Plans** – Make sure a complete set of building or community plans are readily available for consultation by first-responders, utilities workers and insurance adjusters following a storm.
9. **Insurance Policies & Agent Details** – Be sure all insurance policies are current and coverage is adequate for community property, facilities and common areas and compliant with State Law; full contact details for insurance companies and agents should be readily available in the event of a storm.
10. **Bank Account Details & Signatories** – Keep handy a list of all bank account numbers, branch locations and authorized association signatories, and make contingency plans for back-up signatories in case evacuation or relocation becomes necessary.
11. **Mitigation of Damages** – In the immediate aftermath of a storm, take the necessary steps to mitigate damages – this includes "Drying-In," which is the placement of tarps on openings in the roof and plywood over blown out doors and windows, and "Drying-Out," which is the removal of wet carpet and drywall to prevent the growth of mold.
12. **Debris Removal** – Have a plan for speedy removal of debris by maintenance staff, outside contractors or civic public works employees, should a hurricane topple trees and leave debris in its wake.

Delinquency Protection – Assessment Escrows Upheld by Division

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Condominiums, cooperatives and homeowner associations can help protect themselves from an owner's failure to pay assessments.

An amendment to the governing documents can be adopted requiring new purchasers to deposit with the association a certain amount of assessment installments the association holds in escrow. This assessment escrow can serve as a source of funds to apply whenever an owner becomes delinquent in the payment of assessments.

In a couple of recent decisions, the Department of Business and Professional Regulation (DBPR) reviewed complaints about assessment escrow deposits for condominiums. In those complaints, it was alleged the assessment escrow deposit was an illegal acceleration of assessments or an illegal transfer fee. For condominiums and cooperatives, the statutes permit the balance of assessments for a fiscal year to be accelerated, so they are immediately due and payable, if the governing documents provide for this after an owner becomes delinquent. There is no statutory counterpart for homeowner associations, but they can still accelerate the balance of assessments for a fiscal year, if the governing documents so provide. For condominiums and cooperatives, only a fee of $100 can be charged when the unit is being transferred, if the governing documents allow for such an approval fee. There is no such statutory restriction for homeowner associations, so homeowner associations can charge any reasonable transfer fee, if the governing documents authorize the fee.

After reviewing these complaints the DBPR determined that no condominium statutory violation occurred by reason of having and enforcing an assessment escrow deposit. The DBPR did not give any reason or basis for why it found no violation, but it can be assumed the DBPR responded to the arguments made by the condominium associations. Those arguments were that the assessment escrow was a deposit, not a fee and not an acceleration of assessments. Because the money was returned to the owner after a certain period of time, it was argued that it could not be a fee, which, by definition, is earned and kept, not returned. Since the money was not commingled with the association's operating account and not used by the association except in the event of a default in the payment of assessments, it was argued that it could not be an acceleration of assessments. The argument was further supported by case law showing that, at the time the money is given to the association, there is a right to demand the return of that money, so it could not be deemed an advance payment for services.

For condominiums and cooperatives, the DBPR has decided that assessment escrow deposits are not a violation of Chapter 718, Florida Statutes. Therefore, condominiums and cooperatives can safely protect themselves from delinquent owners by amending their governing documents to require an assessment escrow deposit from all new purchasers. For homeowner associations, there are no statutes that restrict transfer fees or acceleration of assessments, so homeowner associations can also amend their governing documents to safely protect themselves against delinquent owners by requiring an assessment escrow deposit. However, to insure this type of amendment fits within those approved by the DBPR, all community associations should have the amendment prepared by their legal counsel.

Greg Marler and other Becker & Poliakoff attorneys have presented several educational programs for the Community Association Officers Forum in Southwest Florida. The Forum which is coordinated by Edison College, is a series of informational sessions for community association leaders in areas such as reserves, management, pooling reserves, collection of assessments and compliance with various legal and regulatory requirements. Greg and other industry professionals from the banking and financial industries that work with community association board members presented several sessions of "must know" information for the College. Greg is a regular speaker at the Forum and also presents seminars providing CAM credits for property managers in the Southwest Florida area.

COMMUNITY UPDATE™

VOLUME V, 2007 | **Serving Florida's Communities Since 1980** | Lisa Magill, Esq., Editor

". . . Every man may justly consider his home his castle and himself as the king thereof; nonetheless 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."

YOUR HOME IS YOUR CASTLE:

HOWEVER, IN A CONDOMINIUM YOUR REIGN IS NOT ABSOLUTE — PART 1 OF A 2-PART SERIES

By: Mark D. Friedman, Esq.
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"A man's home is his castle."

This proverbial expression which illustrates the principle of individual privacy existed long before there were condominiums, cooperatives and homeowners associations in Florida. How true is that expression in such modern settings? In 1971, in denying a condominium unit owner's right to install glass jalousies where a screened enclosure had once stood, the Circuit Court revisited the proverb and held:

"…Every man may justly consider his home his castle and himself as the king thereof; nonetheless, 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."

Stirling Village Condominium Association v. Breitenbach, 251 So.2d 685 (Fla. 4th DCA 1971).

Condominium ownership is not without its rights. In fact such ownership comes with a long list of rights mandated by Chapter 718, Florida Statutes. Those rights, which are too numerous to list in this article, include, but are not limited to, the right to receive a complete set of documents and the most recent year-end financial reports before purchasing the unit; exclusive possession of the unit; the right to peaceably assemble on the common elements; the right to invite candidates for public office to appear and speak on the common elements; the right to receive notice of meetings and notice of any special assessments. These rights are provided by Florida law and may not be taken away by a condominium's governing documents or rules and regulations. Aspects of condominium living not covered by these statutory provisions are usually covered by the association's governing documents. However, the average condominium unit purchaser does not review the Florida Statutes before making a purchase and many do not take advantage of their right to thoroughly review the governing documents before closing on the sale of a unit. That is where the problems often begin. This article explores some common misconceptions prospective owners and current unit owners have and how judges and arbitrators have resolved such disputes.

"The realtor (or sales agent) said I could have a dog. I was told that the association never enforces its rules so I should be permitted to keep my pet."

Who said the association's rules were not going to be enforced and how binding is that promise on the association? Case law, arbitration decisions and the Florida Statutes hold that oral representations made by the sales agents of developers are not binding. One case even held this to be true when the sales agent occupied a position on the association's board of directors. The basic principle is that neither a third party nor an individual board member may waive the association's enforcement rights. Courts hold that it is not reasonable for a prospective unit owner to rely on representations of the sales agent. It is only when the association itself, through a vote of the Board of Directors at a properly noticed meeting, makes representations that a restriction will not be enforced that a unit owner may rely upon such statements. Additionally, even if the unit owner is unaware of the restrictions because they failed to read the documents presented to them prior to the sale, under Florida's Recording Act, recordation of an instrument, such as the governing documents of the association, is considered constructive notice to subsequent purchasers of its content.

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BECKER & POLIAKOFF
Legal and Business Strategists

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**"This is my unit.
You cannot enter without my permission.
I won't give you a key."**

This is a contentious issue. Unit owners do not want to have strangers in their home, especially when they are away. So what happens when a pipe bursts in unit 203 while the unit owner is at work and it suddenly seems to be raining in unit 103 below? It may be left to representatives of the association to take immediate action to handle this situation. They will have to gain entry to unit 203 to stop the source of the leak and may have to enter unit 103 to determine the extent of the damage. This is part of the association's obligation to maintain and protect the condominium building. Therefore, in condominiums as well as cooperatives, the right of entry into a unit is provided by Statute. Section 718.111(5), Florida Statutes, provides the condominium association with:

"…the irrevocable right of access to each unit during reasonable hours, when necessary for the maintenance, repair, or replacement of any common elements or of any portion of a unit to be maintained by the association pursuant to the declaration or as necessary to prevent damage to the common elements or to a unit or units."

A similar provision is found in Section 719.104, Florida Statutes, for cooperatives. Unit owners are not permitted to prevent such access to units. Additionally, if the rules and regulations or governing documents of the association require that a key be provided to the association, a unit owner must provide one. The right of access is provided to the association so that it may protect the property and a key may be required for such access because, in the event of an emergency, precious minutes could be lost if the association had to find an owner, resort to a locksmith or break the door down. Even the claim that the owner keeps national defense secrets unsecured in his unit was rejected by an arbitrator as an excuse for not providing a key. Additionally, a unit owner may not condition access and repairs on requiring proof of insurance and a valid building permit.

In a condominium setting a man's or woman's home is still his or her castle, but the keys to the castle, and the ability to live without conflict, are found in the governing documents. Part 2 of this series (appearing in our next publication) explores the issue of condominium living in further depth and considers alterations to units, the obligation to pay assessments, and using a condominium unit in a manner which disturbs other residents. ■

HURRICANE CHRISTI – REPAIRS ALMOST COMPLETE BUT THE CONFUSION LINGERS ON…

By: Joseph E. Adams, Esq.
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"Whether just those who benefit should pay, or whether everyone should pay, often depends on which side of the ledge you fall on."

This is the conclusion of our case study of hypothetical Hurricane Christi and the Green Flash Condominium Association.

As reported earlier, Green Flash Association spent about two hundred thousand dollars in the immediate aftermath of the hurricane, including temporary patches to the roof, water extraction, and various miscellaneous expenses.

Fortunately, Green Flash had set up a reserve fund called "Hurricane Deductible Expenses," which covered about half the initial costs. The board levied a special assessment for the other one hundred thousand dollars. Many owners were pleased to learn that their individual insurance policy contained a feature called "loss assessment coverage," which reimbursed them for the special assessment levied by the association, although many of the policies capped loss assessment reimbursement at one thousand dollars.

After the initial emergency repairs, Green Flash took prompt action to rebuild the condominium. A contract with Randy's Roofing was entered into, after review of the contract by Attorney Justice and preparation of the new roof's specifications by Engineer Tom Techno. The association also hired Techno to administer the contract, and make sure work was progressing as draw requests were made by Randy's.

Justice also helped the association with filing a "Notice of Commencement" in the Public Records, and advised Green Flash to make sure that lien waivers were secured from subcontractors and material suppliers who had filed Notices To Owner, before draw payments were made to Randy's Roofing. The contract also protected the association by requiring the issuance of a new manufacturer's warranty for the roof before Randy could receive final payment.

The total cost for the re-roof came to two hundred thousand dollars. Fortunately, Green Flash was only expecting a few more years of service life out of the old roof, and had accumulated $150,000.00 in the roof reserve, leaving a shortfall of only fifty thousand dollars for the roof replacement cost.

Because Randy's wanted to get the roof work done during the dry season, and to avoid another immediate assessment against the beleaguered owners, the association took out a line of credit with Carl's Community Bank, to provide cash flow for the roof work as it was progressing. Carl's was one of many local

banks willing to loan money to condominium associations, after verifying that the condominium documents would not preclude the board of directors from taking out a loan. While the Green Flash condominium documents are antiquated, they do not specifically require unit owner approval to borrow money, and confer all corporate powers on the association, to be exercised by the board. On that basis, Attorney Justice was comfortable in opining that the board could borrow the money without a vote from the members.

The association also hired Storm Chasers, the contractor who did the initial emergency repairs, to act as the general contractor for the remaining aspects of the rebuilding. Unfortunately, things with Storm Chasers did not get off to such a smooth start. Because many owners were starting to question how long the process was taking, and how much things were costing, Manager Goodfellow and Association President Dooright made the uncharacteristic and soon to be regretted decision to sign with Storm Chasers without legal review of the contract, nor assistance from Techno in generating the specifications for the repair work. Storm Chasers' foreman was apparently able to convince Dooright and Goodfellow that Storm Chasers' three-page form was "industry standard," was "used all over the country," and was not full of "legal gobbledygook."

It did not take long for the lid to start coming off at Green Flash. Those owners whose units were not damaged insisted that it was because they had the foresight to install hurricane shutters, and they should not be assessed for their neighbor's penny-pinching decisions. Some of the owners with damaged sliding glass doors insisted that the association replace them with state-of-the-art hurricane impact glass doors, at the expense of the association. Others questioned why Storm Chasers was being hired to do interior drywall work, since several of the owners had other contractors they would rather hire. No one knew how much the contract with Storm Chasers was going to cost, or who was going to have to pay.

Fortunately the association's improvident decision to enter into a poorly written contract with Storm Chasers worked out for the best (although that is often not the case in the real world) and that all of the liens Storm Chasers' material suppliers had recorded against the building were ultimately taken care of.

We can also assume, for the sake of illustrating our points, that the entire cost for all post-hurricane repairs at Green Flash Condominium came very close to, but did not quite reach, the association's $800,000.00 named-storm deductible. The association has decided to pay off its bank loans and now needs to assess its forty unit owners for the repair costs, roughly $20,000.00 each. Ouch!

Some owners claim that certain expenses should only be paid by those who suffered the damage. The Declaration of Condominium for Green Flash provides: "If there are insufficient insurance proceeds to cover damage to the condominium property, assessments shall be made against all owners for damage to the common elements and against the owners of the affected units for damage to the units."

Allocating some of the repair costs is a no-brainer. For example, the replacement of landscaping and the roof repair work clearly involve common elements, and are to be shared on a 1/40 basis.

The windows present a more difficult question. For our purposes the windows are considered "limited common elements," because they are located outside of the unit's boundaries, but are required by the Green Flash documents to be maintained, repaired, and replaced by the individual unit owner. However, given the language found in the Green Flash declaration, the window replacement cost should be assessed on a 1/40 basis, because the windows are common elements.

Another dynamic that is always present in this situation involves whether the association can get by with simply replacing broken glass with new panes, or whether state-of-the-art hurricane impact glass must be installed. Obviously, if the association is paying for the work, the unit owner prefers the latter. Most associations take the position, however, that if broken glass can be legally replaced with like-kind (old code) windows, the association's obligations end there, and that any upgrade of the windows would be at the expense of the individual owner.

If the window issue is not hazy enough, what about the sliding glass doors? Remember from our hypothetical that these are described in the Green Flash documents as part of the "unit" (not common elements), and are the maintenance responsibility of the individual unit owner. We have also learned that state law requires the sliders to be insured by the association. According to the Green Flash Declaration, since the sliding glass doors are part of the "unit," any shortfalls attributable to their replacement are assessed only against the door owners, and not the association as a whole. However, the state agency which regulates condominiums is telling associations that the 2004 change to the insurance law now makes these an association obligation, at everyone's expense. Confused yet?

The window-walls present another twist. Remember, these are after-market installations. Are they part of the "condominium property" that the association is required to insure? While most insurers and attorneys I have spoken with interpret the law to say that "upgrades" are the insurance and replacement

Continued on page 4.

responsibility of the individual owner, others interpret the law differently.

If the Green Flash Board is not ready to tear out its hair yet, wait until it tries to figure out how to pass on the dry-out costs. In many hurricanes, the insurer will conclude that only a fraction (often less than half) of the dry-out costs were attributable to preserving association-insured assets (drywall, etc.) and that the remaining costs were for the benefit of individual owners, preserving their carpeting, furniture, and interior fixtures and installations. Whether just those who benefit should pay, or whether everyone should pay, often depends on which side of the ledge you fall on. Solomon himself would be baffled in deciding what is fair and just.

Hopefully, our fiction will assist in understanding a reality that defies easy explanation. A couple of things are clear. Updated condominium documents will save a lot of hassle. The association can change its documents. The law also needs to be clarified in several key areas. The association also has control over changes to the law by, among other things, becoming involved with Firm's Community Association Legislative Lobby and contacting your local legislators to discuss these issues and how they impact association operations. ■

"Unless otherwise provided in the bylaws" the officers and members of the board shall serve without compensation.

AUTHORITY FOR APPROVAL OF BOARD COMPENSATION

By: Lance Clouse, Esq.
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In re Petition for Declaratory Statement, Inverness Village Condominium Association, Inc.

Docket no. 2006056782 (January 10, 2007)

The Division of Florida Land Sales, Condominiums and Mobile Homes (the "Division") in In re Petition for Declaratory Statement, Inverness Village Condominium Association, Inc., Docket no. 2006056782 (January 10, 2007), issued a statement regarding whether directors and officers who directly participated in hurricane cleanup and code compliance may be compensated for their work under Section 718.112(2)(a)1, Florida Statutes, and if so, whether the directors to be compensated may vote or abstain from voting on the question under Section 718.111(1)(b), Florida Statutes.

In construing Section 718.112(2)(a)1, the Division observed that the provision explicitly states that "unless otherwise provided in the bylaws" the officers and members of the board shall serve without compensation. In this case, the bylaws for Inverness Village did not allow the board to approve their own compensation, but did provide that the officers and board members could receive compensation upon the affirmative vote of 75% of the unit owners approving such compensation. Therefore, the Division concluded that Section 718.112(2)(a)1 does not prohibit paying the directors and officers, but, in accordance with its bylaws, such approval must come from the unit owners and not the board. In addition, since the bylaws precluded the board from voting on their own compensation, Section 718.111(1)(b), regarding abstaining from voting at a board meeting due to an asserted conflict of interest, did not apply to the issues presented.

Regarding the issue whether the directors could vote as members at a member meeting called to determine whether the directors are to be compensated, the Division stated that board members are also unit owners and that pursuant to Section 718.106(2)(d), Florida Statutes, membership in the association, including full voting rights, is an appurtenance to unit ownership. Moreover, the Division noted the Inverness Village bylaws indicated that each unit owner is entitled to one vote at any meeting of the members, and observed that the declaration provided that each unit owner is entitled to one vote for each unit owned. Based on its interpretation of the statutes and governing documents, the Division concluded that the directors to be compensated may vote as unit owners at a member meeting on whether they will receive compensation. ■

COMMUNITY UPDATE™

VOLUME VI, 2007 | **Serving Florida's Communities Since 1980** | Lisa Magill, Esq., Editor

"I am not paying my assessments because the association did not do the maintenance it was required to perform."

YOUR HOME IS YOUR CASTLE:

HOWEVER, IN A CONDOMINIUM YOUR REIGN IS NOT ABSOLUTE — PART 2 OF A 2-PART SERIES

By: Mark D. Friedman, Esq.
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Part 1 of this article (appearing in our last issue) addressed whether a "man's home is still his castle," and discussed how a unit owner's control over his or her unit must give way in a condominium setting. As the District Court explained:

"It appears to us that inherent in the condominium concept is the principle that to promote the health, happiness, and peace of mind of the majority of the unit owners. Since they are living in such close proximity and using facilities in common, each unit owner must give up a certain degree of freedom of choice which he might otherwise enjoy in separate, privately owned property. Condominium unit owners comprise a little democratic sub-society of necessity more restrictive as it pertains to use of condominium property than may be existent outside the condominium organization."

Hidden Harbour Estates, Inc. v. Norman, 309 So.2d 180 (Fla. 4th DCA 1975)

Unit owners have enforceable rights. However, the good of the community as a whole, as outlined by the provisions of the governing documents, outweighs the personal tastes, wishes and expressions of individuality unit owners often wish to pursue.

"It is my door (or balcony) and I want to paint (or enclose it)."

Another major issue that community associations deal with is unit owners wishing to express their individuality by altering the exterior appearance of their unit. The unit owner often has the mistaken belief that if they own it they can alter it. They enclose a balcony with windows, change the style of their front door or paint the exterior of their unit a different color than all of the other units in the building. Such individual expression does not go over well in the condominium setting when it alters the exterior appearance of the unit and these issues often end up in arbitration.

The District Court defined material alteration as one which "palpably or perceptively varies or changes the form, shape, elements or specifications of a building from its original design or plan, or existing condition, in such a manner as to appreciably affect or influence its function, use or appearance." Courts and arbitrators rely on this definition as a starting point in determining whether a material alteration has taken place which violates the condominium documents. The Court, in this case ordered a unit owner to remove the glass jalousies and restore the screen enclosures in keeping with the comprehensive plans and specifications of the condominium or to obtain the requisite approval. Section 718.113(2)(a), Florida Statutes, requires the approval as prescribed in the declaration and if the declaration is silent, the approval of seventy-five percent of the membership before a material alteration to the common elements (those portions of the condominium outside of the unit boundaries) may be approved. Without the requisite approval the association may obtain injunctive relief against the offending unit owner to have the property restored at the unit owner's expense. While there are currently no comparable statutory requirements for homeowners Associations, if there are architectural guidelines in the declaration of covenants and restrictions and a common scheme or plan in the community (i.e., all roofs are identical), then the association will likely be able to enforce architectural guidelines regarding the appearance of the exterior portions of homes in the community.

"I am not paying my assessments because the association did not do the maintenance it was required to perform."

There is no quid pro quo when it comes to paying assessments.

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BECKER & POLIAKOFF
Legal and Business Strategists

Your Home Is Your Castle: However In A Condominium Your Reign Is Not Absolute - Part 2 Page 1

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Assessments are not considered payment for services rendered. A Circuit Court ruled on this matter almost 20 years ago when an owner attempted to withhold assessment payments on the basis that the association had failed to maintain the common elements. This affirmative defense to the association's action to collect the assessments was held to be inadequate as a matter of law. The Court held that the homeowner's obligation to pay assessments was based solely on the acquisition of title. If regular or special assessments are not paid when due, the association may place a lien on the property which may ultimately be foreclosed. Many unit owners also make the mistaken assumption after a hurricane or other disaster that if the building is not habitable during reconstruction that they are not required to pay assessments. In fact, the opposite is true. The payment of assessments is required even if the building is damaged or destroyed by a hurricane and uninhabitable unless the condominium is terminated pursuant to the provisions of the declaration.

"We own our unit, so we can party as loud as we want. Turn up the volume!!"

Sound carries in most, if not all, condominium buildings. Therefore, ownership does not provide an unbridled right to be as loud and noisy as possible. The basic premise of a nuisance in a condominium setting is that the actions of one resident unreasonably interfere with another resident's use and enjoyment of his or her unit. Many condominium documents have specific prohibitions against creating a nuisance which disturbs other residents. Additionally, even without such language, there are common law nuisance actions which may also be brought depending on the circumstances. While often difficult to prove, an arbitration decision required noisy unit owners to cease and desist from creating excessive noise, yelling, and other annoyances particularly between the hours of 11:00 p.m. and 9:00 a.m. The unit owners were also required to prohibit their guests from doing so. Nuisances may not only result from loud music. Improperly installed tile or hardwood floor coverings on upper floors of a building may also constitute a nuisance. As such, their installation may be regulated by the association's governing documents to prevent a nuisance from being created which disturbs the residents in the units below.

"Rules, Regulations and Governing Documents"

Prospective and current unit owners should know that they take their unit subject to the provisions of the Articles of Incorporation, declaration of condominium, bylaws and the rules and regulations. These documents are required to be provided to a unit owner before purchase. In fact, the Florida Statutes allow a prospective purchaser to rescind a sales contract within fifteen days from receipt of the documents when purchasing from a developer and within three days of receipt of the documents when purchasing a unit which is being resold. Because of these statutory protections, courts and arbitrators do not look favorably on the unit owner who states that they did not know that there was a prohibition against some activity they wish to pursue on the property. Additionally, the rules and regulations are enforceable, as long as such rules are reasonable, were properly adopted according to the requirements found within the governing documents, and do not contravene either an express provision of the declaration of condominium or any right reasonable inferable therefrom. It is therefore important for prospective unit owners and tenants, especially those coming from privately owned homes, to carefully review all of the governing documents before deciding if a particular community is well-suited for them. ■

Circuit Court Holds that Section 718.302, Florida Statutes, Applies to Bulk Cable Contracts.

With limited exceptions, Section 718.302, Florida Statutes, allows unit owners, after transition, to cancel contracts made by the association prior to transition of control from the developer, if the contracts are for the operation, maintenance or management of a condominium association or the property serving the unit owners. If the contract or reservation in the declaration or lease requires the association to purchase condominium property or to lease condominium property to another party it must be cancelled with eighteen (18) months from transition – otherwise the contract is deemed ratified. Recently a Broward Circuit Court ruled that this statute applies to bulk cable television contracts entered into by the Developer prior to transition in a case in which Comcast sought about $370,000.00 in damages as a result of the Association's cancellation. Becker & Poliakoff, P.A. is monitoring the case and will report if an adverse ruling occurs at the appellate level. ■

PRELIMINARY LEGISLATIVE UPDATE

The 2007 Legislative Session came to an end on Friday, May 4, 2007. This is a preliminary summary of the bills affecting community associations that passed and did not pass. A full legislative update will appear in the Community Update as soon as the bills become law and the effective dates are known.

BILLS THAT PASSED:

SB 1844 regarding liens and foreclosures for homeowners associations provides that a parcel owner is liable for all assessments on a parcel and is jointly and severally liable with the previous parcel owner for all unpaid assessments that came due up to the time of transfer of title. It also provides for the payment of interest and late fees on unpaid assessments and prioritizes the application of any payment received. Restrictive endorsements on checks are prohibited. This bill allows the owner 45 days to pay any outstanding balances and prohibits foreclosure until such notice is provided. The bill also requires the Association to wait 60 days before taking further action on a foreclosure, if the owner offers to pay the outstanding balance.

SB 902 contains language hopefully making it easier to amend condominium documents that are currently burdened with lender consent requirements. It allows voluntary associations to reinstate covenants that have expired due to MRTA. This bill revamps the mediation dispute resolution procedures for Homeowners Associations and allows a majority of owners in a homeowners association to petition the board to fund reserves. Architectural control rights of Homeowners' Associations are limited.

SB 314 provides a method of terminating condominiums in the event of economic waste, disrepair of the property and when continued operation of the condominium is made impossible by law or regulation. There are special provisions in this bill for the termination of timeshare units. Other provisions in the bill allow for termination without 100% mortgagee consent, so long as all mortgages would be satisfied in the plan of dissolution.

HB 7031 is a bill partially dedicated to problems in conversion condominiums. Both reserves and insurance issues are addressed. This bill contains requirements for additional disclosures in sale/lease contracts. This bill expands the definition of common expenses in a condominium to include the costs of certain insurance or self-insurance. The bill defines the notice required for special assessments for self-insurance purposes. This bill contains incremental insurance fixes that attempt to make commercial self-insurance funds more attainable.

HB 2498 which will have a positive impact on community associations by freezing the rates charged by Citizens Property Insurance Corporation until 2009.

BILLS THAT DID NOT PASS:

HB 1373 / SB 2816. These bills were the subject of numerous CALL Alerts because they contained numerous problematic provisions including:

a. limitations on the ability to regulate hurricane shutters in a homeowners association community;

b. allowing any unit owner or renter of a condominium unit to have a companion animal if the resident had two (2) healthcare professionals agree it would be beneficial;

c. requirements that notices be sent by certified mail, including notice of proposed amendments;

d. requirements to provide 24 hours advance written notice of the intent to access unit (increasing the costs and burden on association volunteers);

e. requirements to keep all records in the county of the condominium (burdening smaller associations without offices and whose members may not reside in Florida during the entire year);

f. requirements for all board members to be unit owners (prohibiting a spouse of a unit owner who is not on title from serving on the board);

g. requirements to obtain detailed estimates of the costs necessary to repair and replace damaged property no later than 60 days after a casualty;

h. requirements that all insurance shortfalls be a common expense, even if the damage is to only one unit;

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i. requirements for notices of any meeting in which a regular or special assessment is to be considered contain a specific breakdown of the proposed assessment(s);

j. requirements for membership vote approving a loan or line of credit in any amount exceeding 10 percent of the association's annual budget, except under very limited circumstances.

SB 714, which would have prohibited associations from recording a Claim of Lien, foreclosing and/or pursuing a monetary judgment against owners for amounts less than $2,500 and would have precluded the association from reimbursement of attorney's fees and costs. This bill would have greatly impacted an association's ability to timely and efficiently collect assessments and maintenance payments necessary to ensure the continuation of essential community services.

SB 348, which would have prohibited associations from inquiring into the financial status of any prospective purchaser or lessee. It would have likewise prohibited monetary deposits to the association (assessment escrows) if the prospective buyer was approved for a mortgage.

HB 1365 which contained emergency powers language to assist boards when dealing with the preparations pre-storm as well as post-storm reconstruction issues. ■

"Parents should be careful to safeguard their children, and if they fail to do so, they may not recover damages from the owner of the body of water, even if the child is severely injured or drowns."

LIABILITY FOR BODIES OF WATER, A CASE NOTE

By: Stuart Zoberg, Esq.
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Kenley v. Inwood Property Investments, Inc., 931 So2d 1053 (Fla. 4th DCA 2006).

A. FACTS: The father of a child who fell from a dock into an open body of water with sharp rocks brought a negligence action against the corporation owning and controlling the body of water, "Inwood Property." The father argued that because Inwood Property did not erect safety barriers or warnings regarding the dangerous condition, and the victim was a young child, Inwood Property should be held liable.

B. ISSUE: Whether an owner may be held liable due to its failure to erect safety barriers or warnings around a dangerous body of water if a child is injured?

C. HOLDING: No.

D. RATIONALE: An owner or anyone in control of a dangerous body of water (including an Association) has no duty to protect against such an injury. It is fundamental that Florida is full of natural and artificial bodies of water. Additionally, such bodies of water often possess obvious and/or unknown dangers. Parents should be careful to safeguard their children, and if they fail to do so, they may not recover damages from the owner of the body of water, even if the child is severely injured or drowns. It is important to note that this immunity from negligence suits may not be applied if the owner of a body of water violates a law or regulation, such as if a swimming pool is not fenced when required by law, or lakes and retention areas that are not maintained in accordance with code requirements. It is also important to note that the court does not address situations where the owner (despite a lack of duty to do so), nevertheless attempts to safeguard individuals from injury, but does so negligently. However, in the absence of an explicit violation of a statute or regulation, the court appears to conclude that there is "no way around" the body of water cases that hold that negligence claims may not be brought against the owners of unprotected bodies of water, regardless of how dangerous the body of water may be. Nonetheless, it is still important for Associations to be cognizant of the potential causes of action and take steps to minimize accidents or potential injuries. ■

COMMUNITY UPDATE™

VOLUME VII, 2007 | **Serving Florida's Communities Since 1980** | Lisa Magill, Esq., Editor

"It almost goes without saying that the most difficult issue to overcome for small associations stems from the fact that there are simply less members to pay the costs of operating the community."

IT'S NOT EASY BEING LITTLE:
ISSUES AFFECTING SMALL ASSOCIATIONS

By: Greg W. Marler, Esq.
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Members of large associations with 300 or more members might sometimes wish they lived in smaller, simpler communities where the budgets are not enormous, the volunteer board members do not find themselves performing the equivalent of a part-time job, or more, and the members do not sometimes feel as though their association is out of touch with their needs. But small associations of 50 members or less must deal with unique issues and difficulties that are equally challenging, often much more acute, and not at all easy to overcome.

Three challenges facing small associations can be generally categorized as administration issues, financial issues and social issues. The administration issues arise from the fact that there is a smaller pool of members to draw from to serve on the board and there are fewer management professionals willing to work with small associations. The financial issues are created due to the obvious fact that fewer members must bear the burden of association expenses, including some fixed expenses that are not always reduced just because the association is small. And the social issues concern the reality that interaction between all of the members in small associations tends to be much more frequent, personal, and therefore critical to the smooth administration and success of the community. To add to these challenges for small associations, these issues, and their solutions, are often interrelated.

Administration Issues

A condominium or deed restricted community is operated, most often, by a not-for-profit corporation: the association. The association is administered by an elected board of directors. It is not unusual in many communities, large and small, to find that there are not enough members willing to serve on the board. But the fact is that every association realistically needs at least five directors to serve on the board. This is because a board meeting occurs anytime a quorum of the board, most often defined as a majority, meets in person or over the telephone and discusses association business. While boards should always conduct important business in open meetings, as a practical matter, it is necessary for board members to communicate and interact outside of duly noticed board meetings. An odd number of directors is preferable in order to avoid deadlock, and while three directors can certainly, legally administer an association, important provisions of the Florida Condominium Act and the Florida Homeowners' Associations Act require most board meetings to be open to members. Therefore, anytime two members of a three member board meet and discuss association business, a board meeting is taking place which must be noticed and open to members. This is cumbersome and impractical. On a five-member board, two board members can meet outside of open board meetings and conduct necessary association business, as two board members do not constitute a quorum of such a board.

Because a five-member board is critical to the effective administration of any association, in small associations of 50 units or less, this requires at least 10% of the members to be willing to serve on the board. In an association of 20 or fewer members, at least 25% of the members must be willing to serve on the board. Such levels of interest in board service are rare, and it can be difficult for small associations to get a sufficient number of volunteers.

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One obvious solution to the reluctance of members to serve on a board is to hire a licensed community association manager to assist with the administration of the association. Delegating many of the board responsibilities to a good manager can greatly reduce the required time commitment of board members. But community association management contracts are typically priced based on the number of units in a community. It is not unusual to find that some community association managers are not interested in managing small associations because many of the duties of a manager, such as attending meetings, obtaining bids on service contracts, and preparing budgets and financial statements, are equally demanding and time consuming whether being performed for a small or large association. One solution to this problem for small associations may be to entice managers to manage the association by paying them a premium over and above the typical rate structure. But the increased cost may unreasonably increase the financial burden of the members.

Chapter 468, Florida Statutes, governs community association management, and requires certain managers to be licensed. The definition of "community association management" in the statute excludes management of an association of 50 units or less, so long as the association's annual budget does not exceed $100,000. Therefore, certain small associations are permitted to hire an unlicensed person who is willing to provide management services, presumably at a reduced cost to market rates for licensed management services. However, as you can imagine, an association that hires an unlicensed manager must proceed very cautiously. Most likely, the only acceptable, unlicensed managers would be persons with significant business and financial experience and a proven track record of integrity. In most every case, it would not be wise to invest an unlicensed manager with all of the powers and responsibilities that an association would typically delegate to a licensed manager.

In summary, one solution to the administration issues facing small associations is to hire a manager, but that solution necessarily adversely affects the financial burden for the association.

Financial Issues

It almost goes without saying that the most difficult issue to overcome for small associations stems from the fact that there are simply less members to pay the costs of operating the community. Fortunately, the amenities that are operated by a small association are usually small as well, if they exist at all. In many cases, the small association may be part of a larger community which owns and operates substantial facilities such as a clubhouse, pool, tennis courts and golf course. But there are some fixed costs and financial requirements that can create an unusually heavy burden on small associations.

One such cost is unanticipated damages or repair costs. In certain circumstances, especially involving condominiums, damage from a hurricane or other casualty event, or unexpected repair costs, can be a common expense of the association charged to all members for which insurance proceeds are not payable. In many of these situations, often involving water leaks, the damaged property is in a localized area of the community affecting only a few members. In large associations, the common expense of such an event can be spread over hundreds of members, and is not likely to be a burden, but in a small association, each member's pro rata share of the common expense is usually significant and must be addressed with a special assessment over and above the regular, annual assessment.

Another critical financial issue for small associations arises when a member or two fails to pay assessments in a timely manner. Mathematically, it is easy to see that two non-paying members in a 20 member community represent the loss of 10% of the community's revenue. In a community of 300 members, even 10 non-paying members barely registers and can be easily absorbed by the association, at least in the short term. The problem for small associations is compounded because legal action is often necessary to collect the unpaid assessments. While the costs and reasonable attorneys' fees spent by the association in collecting the assessments are generally recoverable from the non-paying member, the association must fund the collection effort initially, and that can create immediate cash flow problems for many small associations. Both this issue of non-payment, and the possibility of significant unanticipated expenses, highlight the need for small associations to maintain adequate surplus or reserve funds, and of course those funds come from the members.

In addition, certain insurance costs are essentially fixed costs that do not fluctuate precisely in accordance with the size of the association. Likewise, total legal and accounting costs are similar for large and small associations, or at the very least are not reduced for small associations in exact proportion to the size of the association. In the event litigation is necessary

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Remember – Any Member of the Association May Serve on the Board

By: Lisa A. Magill, Esq.
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Section 718.112(2)(d), Florida Statutes requires any unit owner desiring to become a member of the Board of Directors to furnish the association with written notice of such intent at least forty (40) days prior to the election. While the Statute prohibits any person who has been convicted of a felony by any court of record in the United States and who has not had his or her right to vote restored from serving, the prevailing view is that no other eligibility requirements are permitted. For Homeowners Association communities, Section 720.306(9), Florida Statutes specifically provides that all members of the association are eligible to serve on the Board and that any member may nominate themselves to become a candidate.

The Division of Florida Land Sales, Condominiums and Mobile Homes (the agency governing condominium and cooperative communities, but not homeowners associations) consistently rejects eligibility requirements. For example:

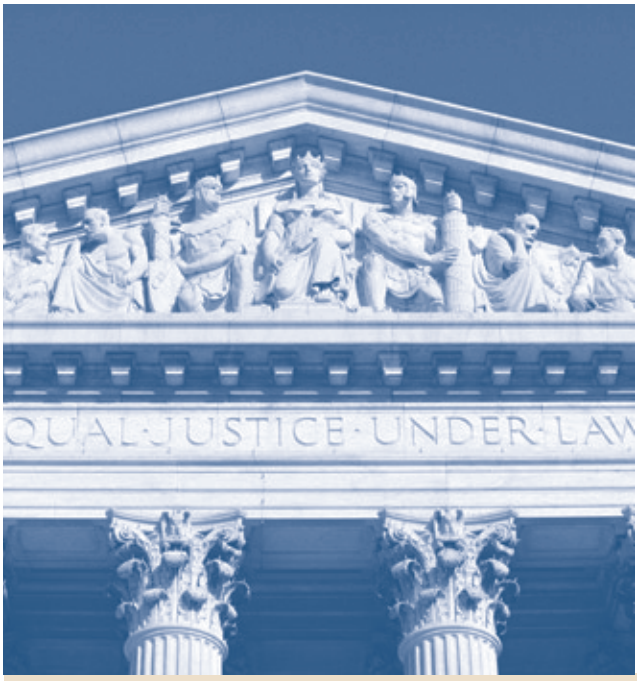
Residency requirements were rejected in the Hollywood Golf and Tennis Club Condominium Assn., Inc. (Case No. 96L-0189) Declaratory Statement. Thus, an association cannot prohibit a non-resident owner from serving on the board, even if that condition is imposed by the governing documents.

Good standing requirements were rejected in the Schultz v. LaCosta Beach Club Resort Condominium Assn., Inc. (Case No. 2003-08-3347) arbitration matter. Thus, the failure to pay assessments or maintenance fees does not preclude board service.

Co-owners of units may serve on the board. The Declaratory Statement issued William A. Grubbs, Sandpiper Village Condominium Assn., Inc. (BPR 2005-02777) rejected a bylaw provision prohibiting multiple owners of a single unit from serving simultaneously. Recently (June, 2007) a County Court Judge in Broward County, Florida ruled that any attempt by a condominium association to prohibit unit owners from serving on the board (so long as they meet the criteria in Section 718.112(2)(d), Florida Statutes) constitutes a violation of the law and refused to grant injunctive relief to the Association in the Lakewood Village Condominium Association, Inc. v. Beracha, (Case No. COWE 07-006293) litigation. The Judge in that case has reportedly requested the Fourth District to review the ruling; and

Term limits were rejected by the Division in the Declaratory Statement recently issued in Case No. DS 2007-03 involving the Cloister Beach Towers Association, Inc.

While the issue has not been fully explored in the Homeowners Association context, the analysis is similar. However, there is a distinction between ownership and membership in a homeowners association context. Section 720.301(10), Florida Statutes defines the term "member" as including, but not limited to, a parcel owner or an association representing parcel owners and includes any person or entity obligated by the governing documents to pay assessments or an amenity fee, requiring analysis of the governing documents to determine whether all parcel owners are considered members and therefore eligible to serve on the Board of Directors. ■



"Florida Statutes specifically provides that all members of the association are eligible to serve on the Board and that any member may nominate themselves to become a candidate."

"Many people think that, for all projects, big or small, three (3) bids are required. This is not true."

COMPETITIVE BIDDING REQUIREMENTS

By: Anne M. Hathorn, Esq.
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If your Association has to replace the roof, or paint the buildings, or enter into a contract for some type of work, the Board/Manager is probably going to obtain several bids. How many bids are "enough"? The exact number of bids will depend on the work to be done, the area in which you live, the number of people/companies who do the needed work, etc.

Many people think that, for all projects, big or small, three (3) bids are required. This is not true.

For condominium and cooperative associations, Chapters 718 and 719, Florida Statutes, require that, if a contract for products and services requires payment in an amount which, in total, exceeds five percent (5%) of the Association's budget, including reserves, the Association must obtain "competitive bids for the materials, equipment, or services." (Section 718.3026(1), Section 719.3026(1), Florida Statutes) (emphasis supplied)

Homeowners' associations are required to obtain competitive bids if the contract requires payment that exceeds ten percent (10%) of the Association's annual budget, including reserves. (Section 720.3055(1), Florida Statutes)

The Statutes require "competitive" bids, which means more than one, but not necessarily three. The number of bids obtained for each contract will depend upon many factors, as described above.

None of these statutory provisions require the Association to accept the lowest bid. And, in most situations, the "Business Judgment Rule" will protect the Board's decision regarding selection of a contractor.

The requirement to obtain competitive bids is waived in emergency situations; in situations where the Association's selected contractor is the only source of supply within the county serving the association; for contracts executed prior to January 1, 1992 and renewals thereof (for homeowners associations, contracts executed before October 1, 2004); and for contracts with Association employees, attorneys, accountants, architects, community association managers, timeshare management firms, engineers, and landscape architects.

It is also important to note that some Associations have competitive bidding requirements in their Governing Documents. These Associations may, but are not required to, operate under the provisions in their documents, as long as those provisions are not less stringent than the statutory provisions.

When your Association is preparing to do a project, don't forget about the competitive bidding requirements. ■

"Another critical financial issue for small associations arises when a member or two fails to pay assessments in a timely manner."

Issues Affecting Small Associations - Continued from page 2.

to enforce the covenants against a member or to address some defect in the property, the litigation process and costs incurred are the same regardless of the size of the association. Similarly, the cost of maintaining ledgers, financial statements and preparing audits are not reduced in direct correlation to the size of an association. In part to address the accounting and financial reporting burden that small associations must bear, both the Condominium Act and the Homeowners' Associations Act do permit associations with less than 50 units or parcels to prepare only a report of cash receipts and expenditures, without regard to the association's annual revenues, in lieu of more comprehensive, otherwise required reports.

To be sure, persons who purchase homes in small associations must be aware, hopefully in advance of purchasing their home, that their pro rata share of the financial requirements of the association is almost always going to exceed the burden on members in similar homes in larger communities.

Social Issues

Another critical fact that members of a small association must recognize is that the ability to get along and function well with other members, and the need to fulfill their responsibilities, are absolute requirements to maintain a well-run association.

To address the administration issues, members must be willing to serve the association. It is much easier for substantial numbers of members in a large association to "lie low" and not affect the association's operation. Member apathy in a small association can be devastating, either because of the absence of volunteers to diligently administer the association or because only one or two members may dominate the board, which, in some cases, can be to the detriment of the association.

Moreover, because of the financial effects of a member failing to pay assessments in a timely manner, or failing to follow the covenants and restrictions which leads to enforcement action and litigation, members of small associations must value and respect their association, their neighbors, and must meet their responsibilities to the community to a greater degree than members of a large association.

Conclusion

Small community associations may appear to be less complex and more manageable than large associations, but small associations have their own unique issues that are no less difficult to overcome. In the end, the best solution to meet the challenges of any community association, large or small, is for members to recognize their indispensable roles in serving the community, meeting their obligations and respecting the structure and objectives of the community that they chose to make their home. ■

Did you know?

The Firm has a website where you can check the status of all pending matters in collections or foreclosure. If you haven't visited www.bpcollections.com please contact your community association attorney or the collection/foreclosure paralegal(s) handling the cases to obtain your password for the site.

The Firm's website includes a collection of articles written by the Firm's attorneys. Past issues of Community Updates are also included (from January 2001 to the present). Click on "Publications" on the right upper hand corner of the main page of www.becker-poliakoff.com.

Web Casts are a new feature on the Firm's website, click on "Events & Video" to the left of "Publications" and choose "Web Casts" from the menu on the left hand side to see a collection of short videos pertaining to Community Association issues. These will be updated or replaced from time to time so please log on in the future to view different videos and features. ■

Self Help Not Helpful – Parton v. Palomino Lakes Property Owners Association, Inc.

By: Lisa A. Magill, Esq.
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While the legal process may seem slow and to involve a significant amount of paperwork, this case shows what can happen if owners and directors decide to take enforcement matters into their own hands.

The Partons owned a lot within the Palomino Lakes Community, subject to the governance by the Palomino Lakes Property Owners Association, Inc. The governing documents prohibited mobile homes. The Partons decided to install a modular home and attempted to have it delivered to the homesite. Four (4) owners, (three [3] of which were members of the board of directors of the association) blocked the delivery by blockading the entrance to the subdivision. This happened on three (3) separate occasions.

As a result, the Partons filed suit against these owners and the Association and immediately obtained injunctive relief, as the Court apparently agreed that the modular home to be permanently attached to a concrete slab, was not a mobile home. The Partons amended their complaint to add counts for damages based upon tortuous interference with contract and civil conspiracy. A jury awarded the Partons $5,000.00 in compensatory damages and further awarded punitive damages against Larry Vinson in the amount of $60,000.00, Ila Vinson in the amount of $40,000.00 and against Linda Drielbelbis in the amount of $50,000.00! The Court also awarded the Partons prevailing party attorney's fees and costs.

The Partons actually appealed from the Final Order, primarily on two grounds claiming:

1. The compensatory damage award should not be divided as an award of $1,250 against each individual defendant. Instead, the individual defendants should be jointly and severally liable for the compensatory damages; and
2. The award of attorney's fees didn't explain how the Court calculated the fees and why they were reduced for the work associated with the tort claims. Moreover, the Partons claimed that all the individual defendants should be jointly and severally liable for the fee award.

The Court agreed with both contentions and instructed the trial court to revise the judgment to reflect that all four (4) individual defendants were responsible (jointly and severally) for both the compensatory damage award of $5,000.00 and the attorney fee award for that portion of the work was likewise the responsibility of all of them, jointly and severally.

Having those portions of the judgment reflect joint and several liability enables the Partons to collect the entire sum from one or less than all defendants, leaving those payors responsible for seeking contribution from the other defendants.

The extreme personal liability in this case could have easily been avoided by consultation with legal counsel when the problem first arose. Proper interpretation of the deed restrictions, as well as counseling regarding the procedures by which to enforce the deed restrictions is crucial to successful association operations. The reported decision doesn't explain how the board members were held personally liable, but resorting to self-help under these circumstances was clearly wrong, resulting in an undesirable outcome. ■

COMMUNITY UPDATE™

VOLUME VIII, 2007 | Serving Florida's Communities Since 1980 | Lisa Magill, Esq., Editor

SPECIAL LEGISLATIVE ISSUE

SUMMARY OF THE 2007 LEGISLATIVE SESSION

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The 2007 Legislative Session was very eventful as there were a number of bills filed significantly affecting community associations. Thanks in large part to the efforts of the community associations participating in Becker & Poliakoff, P.A.'s Community Association Leadership Lobby (CALL), some beneficial legislation was adopted. In addition, legislation that would have had detrimental effects on community associations did not pass. CALL was also successful in modifying some legislation to remove objectionable language included in earlier versions of the legislation. This article will provide an overview of the major legislation adopted in 2007 that affects Florida's community associations.

SB 902: COMMUNITY ASSOCIATIONS

SB 902 affects condominium associations, cooperative associations, and homeowners' associations. The effective date is July 1, 2007.

CONDOMINIUM ASSOCIATION IMPACTS:

Beach Access: Amends §718.106, F.S., to state that a local government may not adopt an ordinance or regulation that prohibits unit owners or their guests from pedestrian access to a public beach contiguous to a condominium property, except where necessary to protect public health, safety, or natural resources.

Lender Consent of Amendments: Amends §718.110(11), F.S., to address lender consent of amendments when required by the condominium documents. Several of the noteworthy provisions are as follows:

- As to any mortgage recorded on or after October 1, 2007, any provision in the declaration, articles of incorporation, or bylaws that requires the consent or joinder of some or all mortgagees is enforceable only as to certain matters, including, but not limited to, amendments that adversely affect the priority of the mortgagee's lien or the mortgagee's rights to foreclose its lien or that otherwise materially affect the rights or interests of the mortgagees;
- As to any mortgage recorded before October 1, 2007, any existing provisions in the condominium documents requiring mortgagee consents shall be enforceable;
- Includes a method for identifying the holders of outstanding mortgages and providing them with notice of the proposed amendment;
- After the notice is sent to the mortgagees as required under the statute, any mortgagee who fails to respond within sixty (60) days after the date of mailing shall be deemed to have consented to the amendment;
- For amendments requiring mortgage consent on or after October 1, 2007, any amendment adopted without the required consent of a mortgagee is voidable only by a mortgagee who was entitled to notice and an opportunity to consent;
- Sets a statute of limitations for actions to void an amendment.

These lender consent provisions will be most beneficial to condominium associations whose documents require mortgagee approval for amendments. Previously, an association would have to spend substantial time and money to obtain the required mortgagee consents. One of the most beneficial provisions in this new law is that if the procedural steps for providing notice are followed and the mortgagee does not respond, it will be deemed an approval. This should make it easier for associations to reach the level of consent required by the governing documents.

Power to Acquire Leaseholds, Memberships or Other Possessory or Use Interests: Amends §718.114, F.S., to provide that subsequent to the recording of the declaration, agreements

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acquiring leaseholds, memberships or other possessory or use interests not entered into within twelve (12) months following the recording of the declaration must be approved in the same manner as material alterations or substantial additions to real property that is association property.

Mixed-Use Condominiums: Amends §718.404(1) and (2), F.S., dealing with mixed use condominiums. §718.404(1) prohibits the condominium documents from permitting the owner of any commercial unit to have the authority to veto amendments to the declaration, articles of incorporation, bylaws, or rules and regulations of the association. §718.404(2) provides that where the number of residential units in the condominium equals or exceeds fifty percent of the total units operated by the association, owners of the residential units shall be entitled to vote for a majority of the seats on the board of administration. The new law will make these provisions retroactive as a remedial measure.

COOPERATIVE ASSOCIATION IMPACTS:

Equities Facilities Clubs: Amends §719.103(18), F.S., to provide a definition for an "equities facilities club." It provides that an "equity facilities club" means a club comprised of recreational facilities in which proprietary membership interests are sold to individuals, which membership interests entitle the individuals to use certain physical facilities owned by the equity club. Such physical facilities do not include a residential unit or accommodation.

HOMEOWNERS' ASSOCIATION IMPACTS:

Presuit Mediation Procedures: Amends the petition for mediation provisions contained within §720.311, F.S., which requires mandatory mediation for certain disputes (e.g. covenant enforcement, use or changes to common areas, etc.) between a homeowners' association and a member before the dispute could be filed in court. The effective date of this new law is July 1, 2007. The new law eliminates much of the burdensome requirements of the petition for mediation process. Specifically, the aggrieved party no longer has to file a petition for mediation with the Division of Land Sales, Condominiums and Mobile Homes. Instead, an aggrieved party must now serve upon the responding party a written offer to participate in presuit mediation. The form of the written offer must be strictly adhered to. A sample written offer is contained within the new statute. The written offer, which must be sent via certified and regular first class mail, informs the responding party of the dispute and offers presuit mediation as an avenue to resolve the dispute. The aggrieved party suggests the use of one of five certified mediators to mediate the dispute. The responding party is given the option of selecting one of the five certified mediators. If the responding party agrees to attend mediation with one of the five suggested mediators, the mediation must be scheduled within 90 days, unless extended by mutual written agreement. Both parties are likewise required to prepay one-half of the mediator's estimated fees. The aggrieved party is authorized to immediately proceed with the filing of a lawsuit against the responding party if the responding party: (1) fails to respond to the written offer via certified and regular first class mail within 20 days of the date of the mailing; (2) fails to agree to one of the five suggested certified mediators; or (3) fails to prepay one-half of the mediator's estimated fees.

The new law also states that persons who refuse to participate in the entire mediation process may not recover attorney's fees and costs in subsequent litigation relating to the dispute. In addition, the new law allows the prevailing party in any subsequent arbitration or litigation proceeding to recover costs and attorney's fees incurred in the presuit mediation process.

Overall, the changes made to §720.311, F.S., will prove very beneficial to homeowners' associations. The new law will dramatically accelerate the presuit mediation process. Additionally, the new law will provide homeowners' associations a quicker and less expensive path to the courts by providing a smaller procedural hurdle to jump over. If you have any questions concerning the new requirements mandated by §720.311, F.S., you should contact your legal counsel to guide you through the process.

Official Records: Creates §720.303(5)(d), F.S., to provide that the association is not required to provide a prospective purchaser or lienholder with information about the subdivision or the association other than information required to be disclosed by Chapter 720. If the association chooses to provide information, the association may charge a reasonable fee for providing good faith responses to requests for information if the fee does not exceed $150 plus the reasonable costs for photocopying and attorney's fees.

Reserves: Amends §720.303(6), F.S., as follows:

- Provides that if the association does not provide for reserve accounts, each financial report must state in conspicuous type that the budget does not provide for reserves. (The exact language required is in §720.303(6)(c), F.S.).
- Provides that an association shall be deemed to have provided for reserve accounts when reserve accounts have been initially established by the developer or when the membership of the association affirmatively elects to provide for reserves.
- Provides that if reserve accounts are not initially provided for by the developer, the membership may elect to establish reserve accounts upon the affirmative approval of not less than a majority of the total voting interests of the association.
- If reserve accounts are established, they shall be funded or maintained unless the reserves have been waived or reduced by the membership upon a majority vote at a meeting at which a quorum is present.
- Provides funding formulas for reserves.
- Describes the funding of pooled reserve accounts.
- Provides that reserve funds and any interest thereon must remain in the reserve account and be used only for authorized reserve expenditures unless their use for other purposes is approved in advance by a majority vote at a meeting at which a quorum is present.

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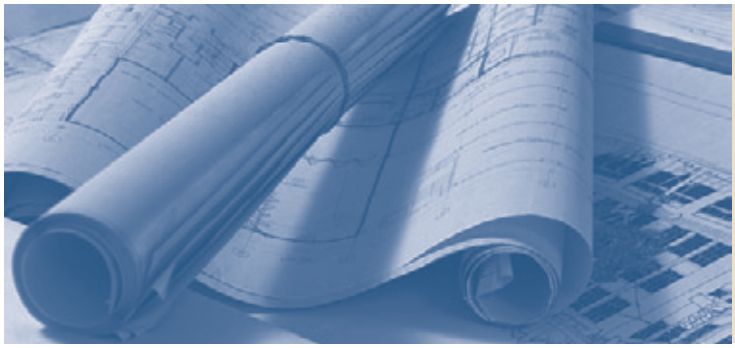

Because architectural control is one of the most important functions of a homeowners' association, it is particularly important at this time that all homeowners' associations review their declaration of covenants and other published guidelines and standards providing for architectural control.

Financial Reports: Amends §720.303(7), F.S., as follows:

- Deletes the requirement that the association prepare a financial report within 60 days after the close of the fiscal year and replaces it with a requirement that within 90 days after the end of the fiscal year, or on the date provided in the bylaws, the association must prepare and complete, or contract with a third party for the preparation and completion of, a financial report for the preceding fiscal year.
- Requires that within 21 days after completion of the financial report, but not later than 120 days after the end of the fiscal year or other date as provided in the bylaws, the association must provide each member with a copy of the financial report or a written notice that a copy of the financial report is available upon request.

Architectural Control Covenants: Creates §720.3035, F.S. The noteworthy provisions are as follows:

- Provides that the authority of an association or an architectural committee (or other similar committee) to review and approve plans and specifications for the location, size, type or appearance of any structure or other improvement on a parcel, or to enforce standards for the external appearance of any structure or improvement located on a parcel, shall be permitted only to the extent that the authority is specifically stated or reasonably inferred as to such location, size, type or appearance in the declaration of covenants or other published guidelines and standards authorized by the declaration of covenants.
- Provides that if the declaration, or other published guidelines and standards authorized by the declaration, provides options for the use of materials, the size of the structure or improvement, the design of the structure for improvement, or the location of the structure or improvement on the parcel, neither the association nor any committee shall restrict the right of a parcel owner to select from the options provided in the declaration or other published guidelines and standards authorized by the declaration.
- Provides that unless otherwise specifically stated in the declaration or other published guidelines or standards authorized by the declaration, each parcel shall be deemed to have only one front for purposes of determining the required front setback. When the specific setback limitations are not provided, the applicable county or municipal setback limitations shall apply.
- Provides that if a homeowners' association or any committee should unreasonably, knowingly, and willingly infringe upon or impair the rights and privileges set forth in the declaration or other published guidelines and standards authorized by the declaration, the adversely affected parcel owner is entitled to recover damages caused by such infringement or impairment, including any costs or reasonable attorney's fees incurred in preserving or restoring the rights and privileges of the parcel owner.
- States that neither the Association nor any architectural control committee shall enforce any policy or restriction inconsistent with the rights and privileges of a parcel owner set forth in the declaration or other published guidelines and standards authorized by the declaration, whether uniformly applied or not.

Because architectural control is one of the most important functions of a homeowners' association, it is particularly important at this time that all homeowners' associations review their declaration of covenants and other published guidelines and standards providing for architectural control. A homeowners' association, or an architectural committee (or other similar committee) should not rely on undefined, unwritten, or unpublished architectural control guidelines. Rather, guidelines and standards should be published in the declaration of cove-nants or in a separate document if authorized by the declaration of covenants.

The new law's apparent goal of requiring published guidelines and standards for architectural control should assist associations and architectural review boards when considering requests to approve plans and specifications and when enforcing architectural control requirements. This should eventually result in a fewer number of disputes between the association and parcel owners with respect to architectural control.

Attorney's Fees: Amends §720.305(1)(d), F.S., to provide that a member prevailing in an action against the association under §720.305(1) is entitled to recover reasonable attorney's fees and additional amounts as determined by the court to be necessary to reimburse the member for his share of assessments levied by the association to fund its expenses of the litigation.

Developer Requirements:

- Creates §720.307(3)(t), F.S., to provide that for associations incorporated after December 31, 2007, the developer must pay to have a turnover audit prepared of the association's financial records.
- Creates §720.308(2), F.S., to address guarantee of common expenses by the developer.

HB 7031: COMMUNITY ASSOCIATIONS

This bill, dealing with insurance, developer disclosures, and condominium conversions, became effective on May 24, 2007

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when it was approved by the Governor. It impacts condominium associations, homeowners' associations, and cooperative associations.

Insurance: During the 2007-A Special Session, the Florida Legislature adopted legislation permitting community associations operating at least fifty residential parcels or units to "self insure," for the purpose of pooling and spreading the liabilities of its group members relating to property or casualty risks or surety insurance. Specifically, the law permitted windstorm insurance coverage for a group of no fewer than three communities created and operated under Chapter 718 (Condominiums), Chapter 719 (Cooperatives), Chapter 720 (Homeowners' Associations), or Chapter 721 (Timeshare Associations) to be obtained and maintained for the communities if the insurance coverage is sufficient to cover an amount equal to the probable maximum loss for the communities for a 250-year windstorm event.

HB 7031 fixed what was perceived to be certain "glitches" in the law adopted during the Special Session, including:

- Amends §718.115 and §719.107 to provide that the common expenses of an association include the cost of insurance acquired by the association, including costs and contingent expenses required to participate in a self-insurance fund.
- Amends §720.308, F.S. to provide that assessments may be levied by the board to secure the obligation of the association for insurance acquired from a self-insurance fund.

Another "glitch" to be corrected was that the original legislation did not amend Chapters 719 and 720 to specifically authorize cooperative associations and homeowners' associations to self-insure. This law fixes that glitch and implements for cooperatives and homeowners' associations the self-insurance provisions in the law adopted during the 2007-A Special Session.

Developer Disclosures: Amends §§718.503 and 718.504, F.S. and §§719.503 and 719.504, F.S., relating to developer disclosures prior to sale. These provisions apply to both condominium and cooperative associations. The following are some of the changes:

- Provides that the figures contained in any budget delivered to a buyer are estimates only, that the actual cost of such items may exceed the estimated cost, and that any such changes in cost do not constitute material adverse changes in the offering.
- Requires that the budget prepared by a developer be prepared in good faith and must reflect accurate estimated amounts.
- Preserves the developer assessment guarantees in the prospectus and provides that subsequent increases that are beyond the control of the developer shall not be considered an amendment that would rise to rescission rights.
- Provides that if the closing on the contract occurs more than twelve months after the filing of the offering circular with the Division of Florida Land Sales, Condominiums, and Mobile Homes, the developer must provide a copy of the current operating budget to the buyer at closing.

Cooperative Special Assessments: Amends § 719.108, F.S. to clarify (similar to the Condominium Act) that if a special assessment is levied, excess funds may, at the discretion of the board, either be returned to the unit owners or applied as a credit toward future assessments.

Condominium Conversions: Amends Chapter 718, Part VI, to change the information that must be disclosed by the developer of a residential condominium created by a conversion. Some of the changes include:

- Clarifies the law by adding the terms "converter" and "as provided in this section" to modify "reserve accounts" in order to better differentiate between converter reserve accounts and regular reserve accounts;
- Requires the age of any component or structure for which the developer is required to fund reserve accounts be measured in years, rounded to the nearest whole year. The amount of converter reserves to be funded must be based on the age of the structure as disclosed in the inspection report, which must be determined by an architect or engineer;
- Requires a developer who sells a condominium parcel in a condominium conversion project to disclose in conspicuous type in the contract whether the developer has established converter reserve accounts, provided a warranty of fitness and merchantability, or posted a surety bond for purposes of complying with the law.

S.B. 314: CONDOMINIUM TERMINATION

SB 314 had the strong support of the Real Property Section of the Florida Bar. A very similar bill passed the Legislature last session (unanimously), but was vetoed by Gov. Bush because

Continued on page 5.

DID YOU KNOW?

The Florida Environmental and Land Use Dispute Resolution Act created a new dispute resolution procedure (a special master/mediation process) for handling private property rights disputes between government entities and private citizens. Section 70.51(3), Florida Statutes specifically provides that:

> Any owner who believes that a development order, either separately or in conjunction with other development orders, or an enforcement action of a governmental entity, is unreasonable or unfairly burdens the use of the owner's real property, may apply within 30 days after receipt of the order or notice of the governmental action for relief under this section.

It is necessary to request the relief from either the elected or appointed head of the governmental entity that issued the developmental order or initiated the enforcement action. There is no filing or administrative fee involved in the process.

This procedure may be utilized in connection with code enforcement actions under certain circumstances, but is not available once the thirty (30) day period has expired. Thus, if you believe that your property is unfairly burdened by a development order or enforcement action (or either are unreasonable), please notify your community association attorney immediately. ■

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he felt the threshold to terminate could be too easily attained. Hearings were held around the state to strike a balance between the property rights of condominium owners as a whole against the rights of a lone holdout who opposes the termination plan. The bill was modified to address those concerns.

SB 314 amends §718.117, F.S., to provide a method of terminating condominiums in the event of economic waste, disrepair of the property and when continued operation of the condominium is made impossible by law or regulation. In the event of economic waste, the percentage needed to terminate is the lesser of the lowest percentage of voting interests needed to amend the declaration or as provided in the Declaration for termination of condominiums. There are special provisions in this bill for the termination of timeshare units. Optional termination can be effectuated by 80 percent of the unit owners if not more than 10 percent of the total voting interests of the condominium have rejected the plan of termination by negative vote or by providing written objections thereto. Mortgagee consent is not required unless the plan of termination will result in less than full satisfaction of the mortgage lien. The effective date of this new law is July 1, 2007.

SB 1844: NEW COLLECTION AND FORECLOSURE REGULATIONS FOR HOMEOWNERS' ASSOCIATIONS

SB 1844 deals with liens and foreclosures for homeowners' associations. The effective date of this new law is July 1, 2007 and it will have a dramatic impact on the collection and foreclosure process for homeowners' associations. SB 1844 creates §720.3085, F.S., and several of the noteworthy provisions of the bill are documented below:

- The bill mandates that a parcel owner is liable for all assessments on a parcel and is jointly and severally liable with the previous parcel owner for all unpaid assessments that came due up to the time of transfer of title.
- Provides for the payment of interest and late fees on unpaid assessments.
- Prioritizes the application of any payment received.
- Prohibits the placement of a restrictive endorsement on the payment.
- Requires written notice before a lien is filed against a parcel.
- Provides the owner with 45 days to make payment for all amounts due.
- Provides for the foreclosure of the lien, but not until 45 days after the parcel owner has been provided notice of the associations intent to foreclose.
- Permits the owner to make a qualifying offer one time during the pendency of a foreclosure action, in which case the foreclosure action is stayed for a period not to exceed 60 days.

HB 405: TIMESHARE AND VACATION PLANS

The new makes a number of changes to Chapter 721 dealing with timeshares and vacation plans. The effective date is July 1, 2007. Some of the significant changes include the following:

- Permits a seller to offer timeshare interests in a real estate property timeshare plan located outside of the state without filing a public offering statement provided certain criteria are satisfied.
- Creates definitions for "lead dealer" and "resale service provider" and creates new record-keeping requirements for lead dealers and resale service providers.
- Provides that the failure of the managing entity to obtain and maintain insurance coverage during any period of developer controls constitutes a breach of the managing entity's fiduciary duty.
- States that a managing entity that is an owners' association may waive or reduce reserves by a majority vote of those voting interests present, in person or by proxy, at a duly called meeting of the owners' association.
- States that the managing entity is authorized to manage the reservation and use of accommodations using those processes, analyses, procedures and methods that are in the best interest of the owners as a whole and to encourage the maximum use and enjoyment of the accommodations and other benefits.
- States that any determination by a timeshare association of whether assessments exceed 115 percent of assessments for the prior fiscal year shall exclude anticipated expenses for insurance coverage required by law or by the timeshare instrument.
- States that the managing entity shall use due diligence to obtain adequate casualty insurance in such covered amounts and subject to reasonable exclusions and reasonable deductibles.
- Provides certain factors to be taken into account when determining whether the insurance obtained by managing entity is "adequate."
- Provides that the managing entity is authorized to apply any existing reserves toward payment of insurance deductibles or the repair or replacement of the timeshare property after a casualty without regard to the purpose for which such reserves were originally established.

SB 259: MOBILE HOME RELOCATION

SB 259 changes the eviction notice requirements found in §723.062, F.S., by requiring the following language be added, "You may be entitled to compensation from the Florida Mobile Home Relocation Trust Fund, Administered by the Florida Mobile Home Relocation Corporation (FMHRC). FMHRC contact information is available from the Florida Department of Business and Professional Regulation." The bill also provides for late fees if a mobile park owner does not make payments to the Florida Mobile Home Relocation Corporation within the required time period. Additionally, the bill provides for a time period within which an application for funding for relocation expenses must be submitted to the Florida Mobile Home Relocation Corporation. SB 259 became law on May 22, 2007, the day the Governor signed the bill.

HB 7057: MY SAFE FLORIDA HOME PROGRAM, FLORIDA BUILDING CODE, AND CITIZENS PROPERTY INSURANCE CORPORATION AND OPENINGS PROTECTION

HB 7057 has a number of sections dealing with the My Safe Florida Home Program, the Florida Building Code, and eligibility for coverage by Citizens Property Insurance Corporation. The part that has received the most attention is the section creating §627.351(6)(a)8., F.S., which provides that effective

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January 1, 2009, a personal lines residential structure located in a wind-borne debris region that has an insured value on the structure of $750,000 or more is not eligible for coverage by Citizens unless the structure has openings protections. A residential structure will comply with the requirements if it has shutters or openings protections on all openings and if such openings protections complied with the Florida Building Code at the time they were installed.

Note that condominium buildings are not considered "personal lines residential structure." Rather, condominium buildings are insured as a "commercial lines residential" structure. Therefore, it appears that the new law will apply to single family homes (with an insured valued of $750,000 or more in the wind-borne debris region and insured by Citizens), but not to condominium buildings.

SB 2498: INSURANCE REFORM

Some of the highlights include:

- Freezes rates charged by Citizens Property Insurance Corporation until 2009.
- Amends §627.70131, F.S., to require insurance companies to pay or deny a claim or a portion of the claim within 90 days of receiving notice of a claim.
- Amends §627.70131, F.S., to apply the 90-day payment requirement to residential property claims, commercial property claims for structural or contents coverage if the insured structure is 10,000 square feet or less, and commercial property claims for contents coverage under a commercial property insurance policy if the insured structure is 10,000 square feet or less.
- Amends §627.70131, F.S., to require the insurer to pay interest on any payment or a portion of a claim paid 90 days after the insurer receives notice of the claim, or more than 15 days after there are no longer factors beyond the control of the insurer which reasonably prevented such payment, whichever is later.

SB 500: INSTANT BINGO

SB 500 deals with gambling regulations and amends §849.0931, F.S. The effective date of the new law is July 1, 2007 and recognizes "instant bingo" as a permissible form of bingo on community association property. Instant bingo is a form of bingo that is played using tickets that contain numbers that are concealed by a cover. The player removes the cover and wins a prize if the set of numbers, letters, objects, or patterns on the ticket match a pre-designated pattern. The pre-designated pattern appears on a "game flare," which is a board or placard that contains the game name, the manufacturer's name or logo, the form number, the ticket count, the prize structure, the cost per play, and the serial number of the game. Although many of the new provisions governing instant bingo are identical to those governing traditional bingo, there are a few key differences.

The new law does not restrict the number of instant bingo prizes that may be awarded in one day. Likewise, the amount of each prize is not restricted. Instead, the prize amount is simply indicated on the game flare. Additionally, the number of days per week that instant bingo can be played is not limited by this legislation. The price of an instant bingo ticket must be printed by the manufacturer on the face of the ticket, and the price cannot exceed $1.00. No discounts or free tickets are permitted. The game flare must be posted prior to the sale of any tickets, and the serial numbers of the tickets and the game flare must match.

SB 2234: REGULATION OF BUILDING INSPECTION PROFESSIONALS

This legislation will require that building inspectors, mold assessors, and mold remediators be licensed by the Department of Business and Professional Regulation by July 1, 2010.

SB 1824: MORTGAGE FRAUD

This legislation provides greater consumer protections related to the mortgage loan application process and makes mortgage fraud a third-degree felony. The effective date of the law is October 1, 2007.

All of the legislation is available on the CALL website found at www.callbp.com – if you have any trouble logging on the site, please email call@becker-poliakoff.com for assistance. ■

Governor's Office
www.flgov.com

Senate
www.floridasenate.gov

House of Representatives
www.myfloridahouse.gov

COMMUNITY UPDATE™

VOLUME IX, 2007 | **Serving Florida's Communities Since 1980** | Lisa Magill, Esq., Editor

DOES ADA (AMERICANS WITH DISABILITIES ACT) AFFECT YOUR RESIDENTIAL COMMUNITY?

By: Michael J. Oliver, Esq.
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A topic which has become an increasing concern for community associations is whether the association is obligated to comply with ADA requirements.

The Equal Opportunity for Individuals with Disabilities Act, publicly referred to as the Americans with Disabilities Act ("ADA") is set forth in Title 42, United States Code, Sections 12101-12213. Subchapter III of the ADA regulates private entities which fall within the definition of a "public accommodation". Residential condominiums, cooperatives, and subdivisions are not classified as public accommodations under the ADA. However, a "residential" community may lose its classification as a residential facility and may be classified as a "place of lodging" which would be subject to the ADA. One way the community may lose its classification as a residential facility is through unit or parcel rentals.

While many associations do not specifically permit transient rentals, they also do not restrict them. When an association's documents do not restrict the duration of rentals, theoretically any unit owner would be legally entitled to rent their unit, even on an overnight basis. Accordingly, many associations passively permit unit owners to lease their units to "transient" individuals. Transient rentals are, in part, regulated as Public Lodging Establishments.

In Florida, Public Lodging Establishments are classified in Section 509.242(1) of the Florida Statutes, as a hotel, motel, resort condominium, non-transient apartment, transient's apartment, rooming house, bed and breakfast inn, or resort dwelling. "Resort condominium" is defined in Section 509.242(1)(c), Florida Statutes, as follows:

> *A resort condominium is any unit or group of units in a condominium, cooperative, or timeshare plan which is rented more than three times in a calendar year for periods less than 30 days or one calendar month, whichever is less, or which is advertised or held out to the public as a place regularly rented for a period of less than 30 days or one calendar month, whichever is less.*

As you can see, resort condominiums are classified as Public Lodging Establishments in the State of Florida. As long as the condominium association does not manage or otherwise coordinate the rental of units in the association, the association would not be required to obtain a license (required for operators of Public Lodging Establishments). However, the association is only excused from obtaining a license. Accordingly, the remainder of the statutory requirements governing Public Lodging Establishments may still apply. The statute does, however, contain some exceptions.

Section 509.013(4)(b), Florida Statutes, (which specifically excludes certain leasing accommodations from classification as a "Public Lodging Establishment") excludes any place

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renting four rental units or less, unless the rental units are advertised or held out to the public as places that are regularly rented to transients. Further, any unit or group of units in a condominium, cooperative, or timeshare plan that is rented for periods of at least 30 days or one calendar month, whichever is less, and that is not advertised or held out to the public as a place regularly rented for periods of less than one calendar month, so long as no more than four rental units within a single complex of buildings are available for rent, are also excluded from Public Lodging Establishment classification.

"... a 'residential' community may lose its classification as a residential facility and may be classified as a "place of lodging" which would be subject to the ADA."

As a result, many associations, in an effort to avoid potential application of the ADA as well as Chapter 509 of the Florida Statutes, have initiated amendments to the governing documents which would prohibit unit owners from renting their units in a manner that would potentially classify the community as a "Public Lodging Establishment".

In the condominium context, amendments which restrict rentals are impaired by Florida Statutes Section 718.110(13), which provides that amendments restricting unit owners' rental rights apply only to unit owners who consent to the amendment and unit owners who purchased their units after the effective date of the amendment. An amendment increasing the minimum term of permissible rentals would likely be subject to this law.

To further complicate this issue, the Florida courts have yet to issue any binding decisions regarding whether or not a resort condominium is or may, at least in part, be classified as nonresidential, potentially subjecting the resort condominium to the ADA, which regulates "places of public accommodation".

Subchapter III of the ADA defines a "place of public accommodation" as:

> *An inn, hotel, motel, or other place of lodging, except for an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of such establishment as the residence of such proprietor…*

Accordingly, if a condominium is classified as a "resort condominium" under Florida law, it is a "Public Lodging Establishment". As such, a Public Lodging Establishment may qualify as a "place of lodging" under the ADA, particularly if the resort condominium in question is classified as non-residential.

Only one court (a federal court) has addressed this issue in non-binding "dictum" (discussion unnecessary to the disposition of the case) contained within the court's opinion. (See Thompson v. Sand Cliffs Owners Association, Inc., 1998 WL 35177067 (N.D.Fla.)). This case did not, however, account for the duration and number of leases or whether or not the units in question were held out or advertised as places regularly rented to transient guests. Accordingly, there is very little "one size fits all" guidance offered on this topic, and each case must be analyzed on an individual basis in order to determine the likelihood that the Public Lodging Establishment classification and/or the ADA may be applicable.

One thing is, however, relatively clear. Traditional residential condominium associations are not subject to the ADA. However, they are subject to the Fair Housing Amendments Act of 1988 (FHAA). (See, 42 USC § 3602, 1998). The FHAA prohibits condominium associations from discriminating against people on the basis of handicap, and requires condominium associations to permit disabled persons to make reasonable modifications to the condominium property, so as to enable the unit owner's enjoyment of the premises. However, unlike the ADA, the FHAA provides that if modifications are to take place, the modifications are at the expense of the requesting owner. Further, the association can establish reasonable conditions regarding the modification. Unlike an association's ability to "amend out" of the definition of a Public Lodging Establishment (discussed above) and consequent application of the ADA, associations cannot "amend out" of the FHAA.

"... many associations... have initiated amendments... which would prohibit unit owners from renting their units in a manner that would potentially classify the community as a 'Public Lodging Establishment'."

Even a community which prohibits rentals altogether is subject to the FHAA. However, the association is not obligated to grant every request made by a disabled unit owner. Every request for a "reasonable modification" depends upon the specific facts involved and must be addressed on a case by case basis. Accordingly, if your condominium association is faced with a request by a unit owner to make a "reasonable modification" you should consult with your association's attorney to assess whether or not the association must accommodate the requesting owner.

Given the complexities of the application of the ADA, FHAA, and rules governing Public Lodging Establishments, the Board should consult with the association's attorney to ensure the association is taking all of the necessary measures to avoid allegations of discrimination, as the cost of defending such allegations are considerable. ■

MOLD ASSESSMENT SPECIALISTS AND MOLD REMEDIATORS REQUIRED TO BE LICENSED IN 2010

By: Bennett M. Miller, Esq.

Community Associations are often faced with hiring mold assessors and mold remediators in the aftermath of a hurricane or other casualty event that causes water intrusion, such as a pipe bursting or a fire sprinkler false alarm. As the Association scrambles to find a professional to respond to these urgent problems, they often fail to ask about the qualifications of the persons providing mold removal services. Many community association managers are surprised to learn that Florida law does not currently require a mold assessor or mold remediator to be licensed. However, a new law in Florida will require mold assessors and mold remediators to be licensed beginning July 1, 2010. The new law will also require new applicants for a mold assessor license or mold remediator license to be of good moral character.

The new law defines "mold assessment" as the process performed by a mold assessor that includes the physical sampling and detailed evaluation of data obtained from a building history and inspection to formulate an initial hypothesis about the origin, identity, location and extent of amplification of mold growth of greater than ten square feet. The new law also provides that "mold remediation" means the removal, cleaning, sanitizing, demolition or other treatment including preventative activities of mold or mold contaminated matter of greater than ten square feet that was not purposely grown at that location. After July 1, 2010, these activities may not be performed without a license. Persons who perform these activities without a license after the effective date of this law may be subject to criminal penalties under certain circumstances.

Between now and the effective date of the new law, it appears that private trade associations will continue to be permitted to provide educational guidelines and educational programming necessary to be "certified" as a mold assessor or mold remediator. These trade groups do not issue licenses today, nor will trade associations issue licenses under the new law after the effective date of the law. These courses and certifications include certified indoor environmentalist, certified microbial remediator, certified microbial investigator, certified residential mold inspector, as well as other specialized certifications. However, these certifications are not approved by the State of Florida.

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As a result, community associations and their managers should continue to be wary of the qualifications and experience of mold assessors and mold remediators until licenses are issued by the State of Florida. "Buyer beware" definitely applies to this situation, where persons acting as mold inspectors may not have any training or experience. Many mold removal service companies are reputable, however it is possible that these mold assessors and remediators may not have been screened by their employer for a criminal background.

The new law creates a new Part XVI of Chapter 468, Florida Statutes. However, not all persons who assess or remediate mold problems are covered under the new law. There are several important exemptions to the new law, such as residential property owners who perform mold assessment and remediation on their own property. Under those circumstances, the owners do not need a license. In addition, a person who performs mold assessment or remediation on property owned or leased by that person, the person's employer, or an affiliate of the employer, does not need a license as long as the persons are not engaging in the business of performing mold assessment for the public.

Thus, it would appear that a community association maintenance supervisor or maintenance employee performing routine maintenance of the structure and facilities of the community would not otherwise need a mold assessment or mold remediation license to inspect for the presence of mold. However, for reasons relating to insurance coverage and potential liability for damages to persons exposed by mold, community associations may find it inappropriate for maintenance workers to perform this task. In addition, certain types of professionals are not regulated by the new law, including Division I and Division II contractors, engineers, architects and interior designers, and pest control professionals.

Florida law does not currently require mold assessors and remediators to meet minimum educational standards. Under the new law, licensed mold assessors will be required to possess at least a two-year degree in microbiology, engineering, architecture, industrial hygiene, occupational safety, or related field of science from an accredited institution. There are also additional field experience requirements for licensure.

For persons interested in hiring a mold removal professional, the new law requires in 2010 that all contracts to perform mold assessment or mold remediation services must be in writing or some other type of electronic record. Perhaps most importantly, the new law creates Section 468.8421, Florida Statutes, which requires licensed mold assessors and remediators to maintain general liability, and errors and omissions insurance coverage in an amount not less than one million dollars beginning in 2010. Also beginning in 2010, mold assessment and mold removal agreements must be signed by the parties or otherwise authenticated by the parties who are entering into the contract. Community associations and managers should be aware of the requirement for a written agreement beginning in 2010, because unlicensed individuals may attempt to offer or perform these services without a written contract.

The overall effect of this new law is to provide community associations with additional protections against unscrupulous vendors. However, the effective date of this law is still several years away. In the meantime, state regulators will attempt to establish guidelines for enforcement of this new law. Because of the inherent difficulties in establishing what constitutes "mold," the exact nature of the regulations and the effect of this law is unknown at this time. As new information becomes available, *Community Update* will keep you posted on changes to this new law. ■

Editor's note: The Firm congratulates and wishes Bennett success in his new position as Deputy Director of the Division of Regulation for the Department of Business and Professional Regulation. Please contact your community association attorney if you have questions regarding licensing of mold assessment specialists and mold remediation companies.

HOW TO GET INVOLVED WITH LOCAL GOVERNMENT

By: Michael C. Gongora, Esq.
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Many residents want to get involved with local government but don't know the best way to do so. This article will provide six simple ways to directly get involved and make a difference in your neighborhood.

1. Vote. Many people like to complain about local elected officials however they don't bother to take the time to learn who the candidates are and/or make the trip to their voting center on election day. Early voting and absentee voting have made it much easier to get out and vote so there's really no excuse for not letting your voice be heard. Find out where your local government has early voting centers set up and vote at your own convenience. Or, better yet, register for an absentee ballot so that you may vote by mail. Timely requesting an absentee ballot will allow you to vote from the comfort of your own home and you may even leisurely browse the internet and read up on the candidates. An informed decision is usually the best decision. In most local elections less than 30% of registered voters turn out to vote so a relatively small group of voters are able to have a big impact. Many municipalities, including the City of Miami Beach, have businesses participate in programs that give discounts to voters. Whether it's an elected official or an issue that may affect you, the only way to have a say is to vote.

2. Attend public meetings. Whether it's a public hearing or a community meeting, get involved. Attending public meetings is one of the best ways to meet people in the community with similar interests and to let your voice be heard in mass. Local government is required to publicly advertise public hearings to specifically allow for the public to attend and give their opinions regarding proposed issues. When projects request zoning variances, local government is required to allow for commentary by the neighbors as to the requested variances. Many cities also have citizens' academies or neighborhood leadership academies so that residents can learn how to get involved with local government.

3. Be pro-active. You may have great ideas for your local government but if you don't effectively communicate those ideas to your local elected officials they will have no way of knowing. Phone calls are a good start. Better yet, write your ideas down and either mail or e-mail your local officials. E-mail has made it easier and more efficient to submit a written idea to all of your elected officials simultaneously and without any cost to you. Written communication is generally more effective than verbal communication when dealing with government officials and gives you a record of what you have stated. Also, local officials are generally more inclined to respond to written inquires than to verbal inquiries. Most local elected officials have staff – get to know them. Sometimes knowing a chief of staff, office aide or administrative assistant can help ensure your issue does not get neglected.

4. Serve on a board or committee. Almost all local governments have advisory boards and committees made up of residents to deal with particular issues or problems. In most cities, some of these boards wield great power and authority in determining issues. In particular, land use boards such as the zoning board, planning board and design review board are granted broad authority in determining the types of real estate projects that may be built in a community. Service on local government boards and committees demonstrates that you are committed to the quality of life in your area and gives you greater clout with your local officials as well as building relationships with people to help get things done.

5. Join volunteer efforts. Most local governments have groups such as the chambers of commerce that work with local government in joint ventures such as neighborhood clean-ups and other projects affecting the community. These volunteer efforts are generally well-attended by local officials and provide a good opportunity to speak one on one. For example, if your concern is safety then see if your local government has a program that allows residents to ride with police officers and see the issues being dealt with firsthand. If your local government doesn't have this type of program, then start one.

6. Run for office. The old saying goes that if you can't beat them, join them. If you are unable to effect change through communication with local officials sometimes it is better to run for office yourself and effect your own ideas as a local official. Many local governments have councilpersons and/or commissioners that consist of ordinary working people that want to make a difference. You may get involved with your local government through one or more of the recommended channels and ultimately decide that you can make more of a difference in your community through public service yourself. ■

Editor's note: Michael Gongora is a City Commissioner in Miami Beach, FL.

REVIEW LOSS ASSESSMENT COVERAGE CAREFULLY

You may think your homeowners' insurance or insurance policy for your condominium unit provides coverage for assessments levied by your association for costs sustained as a result of damages due to a casualty. Many policies provide excellent protection, some as much as $10,000! However, it is very important to review the exact language of the policy and discuss this issue with your insurance agent or have an attorney analyze it before deciding to purchase one policy over another. An owner of an Aventura condominium unit learned the hard way that his policy did not provide coverage for any assessments levied by the Association to repair damages from Hurricane Wilma.

The Admiral's Port Condominium levied an assessment in amount in excess of eight hundred thousand ($800,000.00) dollars. When an owner applied for reimbursement for his portion of the assessment he learned that his Allstate Floridian policy would not pay for any portion of the assessment attributable to the master policy deductible. In fact, the owner was not entitled to any reimbursement because his percentage of the amount Allstate agreed to pay was less than his $250 deductible. The case entitled Grife v. Allstate Floridian Insurance Company, 20 Fla.L.Weekly Fed. D899a, decided June 27, 2007 again demonstrates how important it is to review policy terms and conditions (both individual and the master policy) in detail before committing to the carrier. ■

ELECTRONIC DELIVERY OF COMMUNITY UPDATE

As technology changes and more and more people use the internet as well as electronic mail over other methods of communication, so will Becker & Poliakoff, P.A. We encourage you to receive delivery of Community Update by electronic mail to ensure you are among the first to become aware of important changes in the law and issues that affect community association operations. Please be sure to send the following information to caforms@becker-poliakoff.com at your earliest convenience:

Name: _____

Community: _____

If Manager, specify Company: _____

E-Mail Address: _____

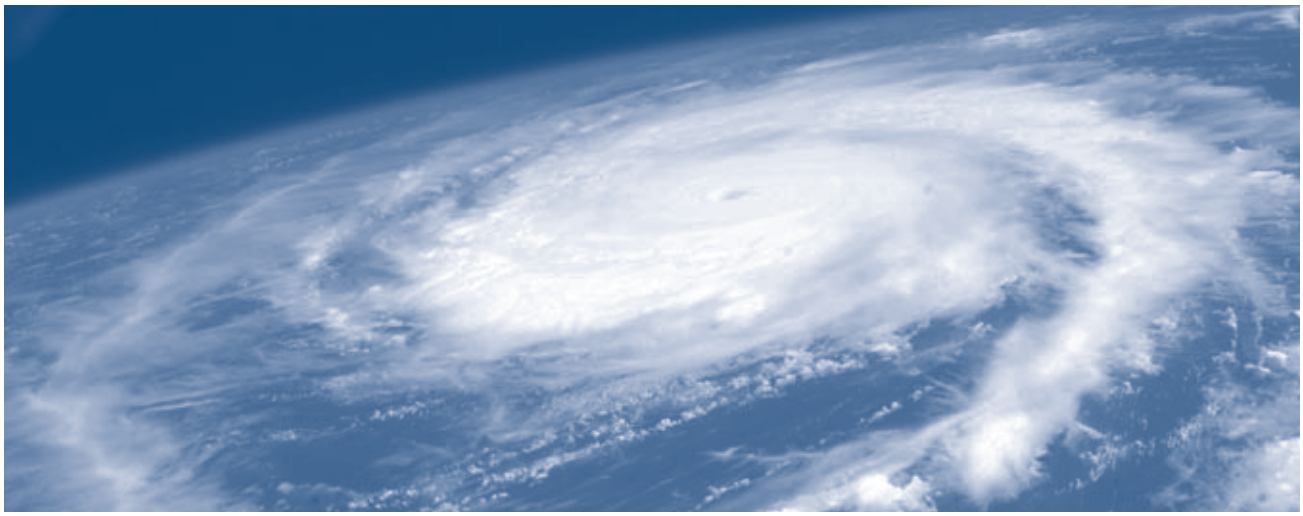
Physical Address: _____

_____

We look forward to providing you Community Update in the most expedient way possible. Please feel free to send suggestions for articles or topics you would like to see covered in future issues. ■

COMMUNITY UPDATE™

VOLUME X, 2007 | Serving Florida's Communities Since 1980 | Lisa Magill, Esq., Editor



FEDERAL COURT JURY AWARDS ASSOCIATION 8.1 MILLION DOLLARS IN HURRICANE WILMA INSURANCE CLAIM

It's been close to two (2) years since Hurricane Wilma tore through Palm Beach County. Two (2) long years of inspections, engineering evaluations, bidding, selecting contractors, working with permit officials, construction debris, noise, dust and inconvenience. Two (2) long years of paying large assessments, incurring debt and questioning whether any of the reconstruction expenses would be reimbursed by the insurance company providing coverage to the association. For the 378 owners of the Chalfonte condominium in Boca Raton, Florida, a Federal Court Jury answered that question in the positive by returning a verdict for approximately $8.1 million for damages. The Association is represented by Becker & Poliakoff's team of experienced litigation attorneys in the dispute, led by Dan Rosenbaum, the Managing Shareholder of the Firm's West Palm Beach office.

Chalfonte is a luxury condominium situated on the Ocean, consisting of two 21-story residential buildings, recreational facilities and improvements. The property was insured by QBE Insurance Corporation, an Australian Company, for close to $70 million dollars for property damage, with an additional $6.5 million in law and ordinance coverage. Since the eyewall of the storm passed directly over the condominium, damage to the common elements and interiors, including the roofs, interior drywall/walls, generator, garage doors, sliding glass doors, elevators, windows, the satellite system and personal property of the Association (furniture and furnishings) was substantial. The damages were reported to the insurance company immediately after the storm which occurred in October, 2005.

The insurance company failed to adjust the claim in a timely manner. In fact, the Association didn't receive a formal adjustment (estimate) of the damages from QBE until after it filed suit in Federal Court. QBE claimed that Chalfonte exaggerated its damage by Hurricane Wilma and that many of the damaged items were excluded from coverage under the policy due to wear and tear, corrosion and other matters. Although Chalfonte spent approximately $12 million on hurricane related repairs, QBE determined the actual damage to be only about $460,000, well under the $1.6 million policy deductible.

Damage to windows and sliding glass doors was responsible for the bulk of the costs sustained by the Association. An analysis performed by a Certified General Contractor determined that more than seventy-five percent (75%) of the sliding glass windows and doors were severely damaged, either blown out

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entirely or damaged beyond repair – those components had to be replaced. However, the local ordinances require building permits to be approved by a Community Appearance Board which partially decides to approve or reject permit applications based upon whether the completed work would maintain the city's high quality image. The local ordinances specifically required multiple building communities to have a unity of character and design, with the goal of creating a harmonious appearance. Replacing the vast majority of the windows and sliding glass doors, while leaving the original, non-damaged doors and windows in their previous condition, would be obviously noticeable and create an inconsistent appearance. Thus, the Association, based upon the advice of the experts consulted and the codes in place, proceeded to replace all the exterior windows and sliding glass doors, not only those beyond repair.

QBE disputed the Association's contention that all the windows and sliding glass doors had to be replaced. The insurance company maintained the position that only some of these items were actually broken as a result of the hurricane and that the majority of the glass needed to be replaced anyway since the buildings were almost thirty (30) years old and thus worn out due to wear and tear. The Association was able to present testimony from reliable experts, not only the Certified General Contractor and licensed Structural Engineer that examined the buildings after the storm, but from professionals that had consulted with the Association in the past, attesting to the fact that the windows/sliding glass doors could not be repaired. The history of maintenance records was extremely helpful in the analysis of the damages, but QBE's representatives still did not agree that all windows would have to be replaced, did not agree that all of the damages were from the storm and would not include these expenses in its adjustment of the claim.

Consequently, the Association filed suit in Federal Court and went to trial on three (3) separate counts. The first count asked the Court to issue a Declaratory Judgment upholding the validity of the contract and entitlement to coverage for the damages sustained from the storm. The second count was for Breach of Contract as a result of the failure to provide coverage. The last count was likewise a count for Breach of Contract based upon a claim of breach of the implied warranty of good faith and fair dealing.

The insurance company attempted to strike or dismiss the third count several times, claiming that Florida law does not provide a separate cause of action for a breach of contract claim based upon a violation of the implied warranty of good faith and fair dealing. The Association's attorneys successfully defended the Association's right to maintain such a claim, defeating both a Motion for Summary Judgment and a Motion in Limine. QBE argued to the Court that Count III of the Complaint constituted an action for "bad faith", a cause of action available at common law and by Section 624.155, Florida Statutes. The Becker & Poliakoff team convinced the Court that the covenant of good faith and fair dealing is implied in every contract, in order to protect the parties' reasonable contractual expectations. The Court agreed that the Association was entitled to a good faith handling of its claim and the discretion afforded to QBE in the insurance contract could not be exercised in such a way as to thwart the insured's reasonable expectations.

Moreover, Chalfonte's attorneys noticed that the form of the insurance contract, even though it had been approved by the Department of Insurance, failed to conform to Section 627.701, Florida Statutes, which requires any policy containing a separate hurricane deductible to include certain statements in boldface type in a certain font size.

On Wednesday, August 29, 2007 after a trial that lasted two weeks, a Federal Court jury returned a verdict finding that QBE Insurance Corporation breached its insurance contract and ordered the company to pay the Chalfonte Condominium Apartments Association, Inc. approximately $8.1 million dollars in damages. The federal jury determined that QBE breached its contract, breached the implied warranty of good faith and fair dealing and determined that QBE's form policy, as it relates to the hurricane deductibles, did not comply with the disclosure requirements of Section 627, Florida Statutes. QBE will be responsible to pay approximately $1,000,000 in pre-judgment interest and prevailing party attorney fees and costs to Chalfonte.

The federal jury's findings will allow Chalfonte to pursue another lawsuit against QBE for bad faith claims handling practices, pursuant to Section 624.155, Florida Statutes.

"This is a huge development for the Associations, perhaps hundreds of them out there in Florida, that have not received an equitable adjustment of their losses from the last two active hurricane seasons," said Dan Rosenbaum. "This is the second case involving QBE in which the Court ruled the insurer has an implied warranty of good faith and fair dealing. I think the message to QBE is that they cannot treat the insured that way. They can't beat them down and break them down."

The Chalfonte verdict is a reminder to all community associations of the critical importance of the association conducting a complete and thorough post-casualty inspection and inventory of the entire property, instead of relying on the individual owners to inspect their own units and document their own damages; and the importance of contacting the right professionals to get advice about handling and documenting the claim and addressing the insurance issues. Documenting all of the damages caused by the casualty with photographs, video and detailed records is imperative to protecting the association's interests as is a careful review of the insurance contract itself. If you believe your claim has not been adjusted fairly, it's not too late. Supplemental claims are still being processed by the major insurers, especially as a result of all the damages that only became known after the initial analysis was done and the claim paid. ■

TACKLING BANKRUPTCY ISSUES

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

Whether an association's judgement is subject to being avoided as a judicial lien on debtor's homestead?

Generally, Florida's constitution protects its residents' homestead (the home in which they reside) from being impaired by judicial liens (liens obtained by judgment).

If an association obtained a judgment against a unit owner/homeowner, could that judgment be avoided by the debtor as a judicially lien impairing the individual's homestead? The answer is no.

In one case, the Court held that a judgment requiring Chapter 7 debtors to remove a pool and concrete deck that they had built in violation of restrictive covenants governing the appearance of homes in a community was in the nature of a personal mandate, and did not give rise to a "judicial lien," of the kind which debtors could avoid as allegedly impairing their homestead exemption rights. Similarly, in another case, a homeowners' association obtained a pre-petition (before bankruptcy) judgment against a Chapter 7 debtor-homeowner for unpaid monthly assessments, late fees, interest, and attorney fees and costs. The debtor subsequently moved to avoid the lien on the ground that it impaired her homestead exemption. The Court held that the nature of the lien was a security interest, despite being in the form of a final judgment, and thus, it was not an avoidable "judicial lien." Although the judgment in favor of the creditor-homeowners' association for unpaid assessments appeared at first blush to be a "lien obtained by judgment" within the Bankruptcy Code's definition of a judicial lien, substantively, the lien stemmed from a security interest through the parties' declaration of covenants and, thus, was in the nature of a security interest.

Are post-petition homeowners' association assessments discharged?

The primary reason people file for bankruptcy is to obtain a discharge (or wipe out) of their pre-bankruptcy debts. Normally however, that discharge does not apply to debts incurred after the filing of the bankruptcy. However, homeowners' associations face a unique dilemma that other creditors don't face, and this has led to a split amongst the Courts. This problem arises because on the one hand the debtor will be living in his home after the bankruptcy filing and continuing to accrue monthly maintenance and other expenses due to the association, but on the other hand the association's declarations which give rise to the ability to assert this debt in the first place was incurred pre-petition and it has been argued should be discharged.

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

In that case, the Judge notes that there are actually three different lines of case authority on the dischargeability of post-petition assessments to community associations. Florida cases have been split on the issue. One line of authority has held that post-petition assessments are non-dischargeable because the obligation to pay assessments arises from a covenant running with the land. A second line of authority has held that post-petition assessments are dischargeable because they arose from a pre-petition contract. A third line has taken a compromise position that post-petition assessments are dischargeable unless the debtor resided in or leased the unit.

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

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

> (16) for a fee or assessment that becomes due and payable after the order for relief to a membership association with respect to the debtor's interest in a dwelling unit that has **condominium ownership or in a share of a cooperative housing corporation**, but only if such fee or assessment is payable for a period during which–
>
> (A) the debtor physically occupied a dwelling unit in the **condominium or cooperative project**; or
>
> (B) the debtor rented the dwelling unit to a tenant and received payments from the tenant for such period, but nothing in this paragraph shall except from discharge the debt of a debtor for a membership association fee or assessment for a period arising before entry of the order for relief in a pending or subsequent bankruptcy case. (Emphasis added.)

While this amendment may have solved the problem for condominium and cooperative associations, unfortunately, direct reference to homeowners' associations is missing from the 1994 version of the statute, although the legislative history seems to imply coverage for homeowners' associations.

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See 140 Cong. Rec. H10770 (daily ed. October 4, 1994) ("this Section amends Section 523(a) of the Bankruptcy Code to except from discharge those fees that become due to condominiums, cooperatives, or similar membership associations after the filing of a petition..."). On the other hand, however, another Court has since extensively reviewed the legislative history of Section 523(a)(16), including Senate floor comments and concluded that Section 523(a)(16) did not extend to homeowners' associations.

Fortunately this issue was resolved by the Bankruptcy Reform Act of 2005 which amended Section 523(a)(16) to read:

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

> (16) for a fee or assessment that becomes due and payable after the order for relief to a membership association with respect to the debtor's interest in a unit that has condominium ownership, or a share of a cooperative corporation, or a lot in a homeowners association, for as long as the debtor or the trustee has a legal, equitable or possessory ownership interest in such unit, such corporation, or such lot, but nothing in this paragraph shall except from discharge the debt of a debtor for a membership association fee or assessment for a period arising before entry of the order for relief in a pending or subsequent bankruptcy case;
>
> Thus resolving the issue for homeowners' association communities and eliminating factual questions as to whether the debtor still resides in the property or received rental income during the relevant period of time.

Are post-petition association assessments entitled to an administrative priority claim in bankruptcy?

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

Whether an association can record or perfect post-petition its lien for past due assessments without seeking relief from the automatic stay to do so?

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

The Court found that on one hand, under the Bankruptcy Code, the post-petition recordation of a mechanic's lien for work performed pre-petition relates back to time pre-petition, under Florida law, and the lien defeats or has priority over the rights of a trustee or a debtor holding status of a hypothetical lien creditor under the Bankruptcy Code, so that the filing of a lien would be permissible post-petition for the purpose of perfecting a mechanic's lien. However, also under the Bankruptcy Code, Court found that the post-recordation filing of liens, which, in contrast to mechanic's liens, are effective only upon recordation under Florida law (as it was written at that time), did not relate back to any time pre-petition, and therefore violates the automatic stay.

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

Now, after the 1990 amendments creating §718.116(5), condominium associations do not need to seek stay relief to record and perfect their pre-petition lien rights, and are treated as other statutory lien holders, such as materialmen and mechanics' lien holders, in their ability to pursue this remedy unimpeded by the automatic stay. However, since homeowners' associations are not covered by a similarly applicable statute, homeowners' associations would be covered under the old case law holding that such liens did not relate back to any time pre-petition, and therefore an attempt to prefect them post-petition violates the automatic stay.

Conclusion

The interplay between bankruptcy and association law creates other interesting and complex issues for associations in enforcing their rights. If you have any issues that arise as a result of one of your association's members or vendors having filed bankruptcy, please contact your Becker & Poliakoff association lawyer, and ask them to speak with me so that we can together address the issue and develop a strategy to best protect your association's rights in bankruptcy. ■

MAINTENANCE V. ALTERATION

By: Anne M. Hathorn, Esq.
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You may know that making a "material alteration" to the Common Elements requires a vote of the members of the Association. A material alteration is defined as a change in use, form or function. Chapters 718 and 719, Florida Statutes, state that if the Association Governing Documents do not specify a procedure for approving material alterations, "75 percent of the total voting interests of the association must approve the alteration..."

You may also know that the Board of Directors has a duty to operate and maintain the Common Elements of the Association. This duty to maintain is not discretionary, and no owner vote is required.

There are some activities that are clearly "material alterations," such as putting in a swimming pool on the Common Elements. This would obviously require unit owner approval. There are other activities that clearly fall into the "maintenance" category, like replacing a deteriorating roof. This activity would be undertaken at the direction of the Board of Directors, and no owner approval would be required.

What about activities that are not so clearly defined? For example, is it a material alteration to replace carpet with tile? Replacing the old carpet with new carpet would certainly be considered "maintenance." Replacing carpet with tile could arguably be considered a change in "form," and thus, a material alteration; but what if the Board decided that tile would last longer, and require less ongoing maintenance, than carpet? Could the replacement of carpet with tile then be considered maintenance, and therefore not require a vote of the owners?

Since the inception of the arbitration requirements in the Condominium Act, there have been a number of significant decisions in the Florida Arbitration Cases regarding what constitutes a material alteration which would require the approval of the membership, and what falls within the scope of the Board's authority. These decisions are helpful to us in this analysis, and include:

1. Kreitman v. The Decoplage Condominium Association, Inc., Case No. 98-3495 (September 14, 1999) – In this case, the Board replaced the common elements acoustical ceiling tiles with drywall and the ceramic floor tiles with marble. The Arbitrator found that this replacement fell within the scope of the Board's maintenance authority, and did not require unit owner approval. In this case, the Arbitrator found that the drywall was a more durable, cost-effective ceiling material, and determined that the existing ceramic floor tiles could not be cleaned. The Association in that case was not required to replace a material that had performed poorly, when there was an alternative that was comparable in function.

2. Midman v. Sun Valley East Condominium Association, Inc., Case No. 99-0537 (August 26, 1999) – In this case, a deteriorated river rock deck around the pool was replaced with paver bricks, and the Arbitrator found that it was a necessary repair, not a material alteration, and within the scope of the Board's authority, since the paver bricks required less maintenance and lasted longer than the river rock decking.

3. A.N. Inc. v. Seaplace Association, Inc., Case No. 98-4251 (November 19, 1998) – The Association undertook substantial window replacement. The Arbitrator found that, even if the replacement of the windows changed the exterior building appearance and was a material alteration to the common elements, the alteration would not require a vote of the owners since the replacement of the windows was reasonably necessary to maintain and protect the common elements, despite the fact that the new windows were a substantial upgrade to the existing windows.

4. In another case involving the replacement of a river rock pool deck with paver bricks, Bronstein v. Hills of Inverrary Condominium, Inc., Case No. 94-0147 (March 24, 1995), the installation of the paver bricks was held not to be an improvement because it did not change the size of the decking, but merely the type of surface. In that particular case, the Board had determined that the river rock decking needed repair or replacement, and the Arbitrator held that it fell within the scope of the Board's authority to maintain, repair and replace the common elements, and no vote of the unit owners was necessary.

The rationale in all of these decisions seems to focus on the necessity of replacing the element at issue. On the other hand, in George v. Beach Club Villas Condominium Association, Inc., 833 So.2d 813 (Fla. 3d DCA 2002), replacement of cedar shingled roof mansards with terra cotta tiles was held to be a material alteration, requiring a vote of the unit owners, even though the replacement of the shingles was necessary to maintain the roof, and the terra cotta tiles cost about half as much as the cedar shingles; the Court stated that the change constituted a "substantial and material alteration in appearance." Id., at 819 and therefore could not be approved by Board vote alone. ■

INFRINGEMENT OF EASEMENT – A CASE NOTE

By: Stuart Zoberg, Esq.
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Sand Lake Residence LLC v. Ogilvie, 2007 WL776605 (Fla. 5th DCA 2007).

FACTS: Landowners who held easement providing for ingress and egress across permanent access road on adjoining property (Sand Lake) sued to remove the speed bumps installed by Sand Lake, and require that Sand Lake leave an electronic gate that Sand Lake installed but that was not described in the easement agreement open. The easement agreement provided a non-exclusive perpetual easement in favor of the adjoining landowners over Sand Lake's access road. The agreement contemplated the installation of one electronic gate but Sand Lake installed a second electronic gate and placed speed bumps across the permanent access road. Sand Lake provided the adjoining owners several means to pass through the front gate, which was not contemplated in the agreement. The landowners could open the gate by using a single button remote, by entering a personal access code in the gate's keypad, by calling Sand Lake's office during business hours, by calling their own cell phone numbers from the gate and buzzing themselves in. If the owners wished to admit a guest or a delivery person, they were permitted to either provide that person with their personal access code, or utilize any of the other options for entry. The Trial Court held that both the speed bumps and the gate unreasonably interfered with the adjoining landowners' easement rights. Sand Lake did not appeal the ruling with regard to the speed bumps, but did appeal the ruling with regard to the gate.

ISSUE: Does an electronic gate with all the options mentioned above unreasonably interfere with the easement rights of the owners?

HOLDING: No.

RATIONALE: If the document granting the easement does not address the issue, whether or not a gate may be erected depends on whether the gate would unreasonably interfere with the easement holders' rights. The Appellate Court distinguished one prior community association case precluding the erection of a gate by holding that the gate here was much more easy to access because it could be opened from a distance by anyone in all of the above described ways. It is unclear how many of these access options are necessary to obtain the same result in light of the prior cases which have held that other gates without all of these access options do unreasonably interfere with easement rights. ■

COMMUNITY UPDATE™

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"Despite the immunity afforded by this section of the Florida Statutes, recent decisions by Florida courts suggest that members of the board should not ignore the potential liability for their actions."

TRENDS IN BOARD MEMBER LIABILITY

By: Carlos F. Martin, Esq.
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Community Association board members need to consider the developing law concerning individual liability with regard to the operation and management of the association. Recent case law on this issue should give directors some pause when considering what actions should be taken on behalf of the association.

As you should all be aware, board members owe a fiduciary duty to the members of the association and the corporate entity itself.

This fiduciary duty is explicitly defined in the general standards for directors of not-for-profit corporations (which include condominiums and homeowners associations) located in Section 617.0830, Florida Statutes, which states:

> General standards for directors:
>
> (1) A director shall discharge his or her duties as a director, including his or her duties as a member of a committee:
>
> (a) In good faith;
>
> (b) With the care an ordinarily prudent person in a like position would exercise under similar circumstances; and
>
> (c) In a manner he or she reasonably believes to be in the best interests of the corporation.

Complying with the requirements listed above is a challenging task, made more challenging by the interpretation of these and other statutes by the judiciary. The law, however, clearly states that board members owe a fiduciary duty to the unit owners. A fiduciary duty exists when there is a special relationship between two parties, one who is bound to act in good faith and due regard for the interests of the other. It is well established that community association officers and directors owe a duty to the members of the association, and that the members of the board can be held liable for breaching that duty.

Directors are protected, to some extent, by a grant of immunity in the not-for-profit corporation statutes. Section 617.0834, Florida Statutes, provides immunity from civil liability to board members in certain instances. Specifically, this section provides:

> (1) An officer or director of a nonprofit organization . . . is not personally liable for monetary damages to any person for any statement, vote, decision, or failure to take an action, regarding organizational management or policy by an officer or director, unless:
>
> (a) The officer or director breached or failed to perform his or her duties as an officer or director; and
>
> (b) The officer's or director's breach of, or failure to perform, his or her duties constitutes:
>
> 1. A violation of the criminal law . . .;
> 2. A transaction from which the officer or director derived an improper personal benefit, either directly or indirectly; or
> 3. Recklessness or an act or omission which was committed in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property.

Despite the immunity afforded by this section of the Florida Statutes, recent decisions by Florida courts suggest that members of the board should not ignore the potential liability for their actions. The seminal case governing individual director liability is *Perlow v. Goldberg*, 700 So2d 148 (Fla. 3d DCA 1997). In *Perlow* unit owners brought an action for breach of fiduciary duty against directors in their individual capacities alleging what amounted to mere negligence in administrating insurance funds. The *Perlow* court upheld the rule that directors will not

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Legal and Business Strategists

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"A fiduciary duty exists when there is special relationship between two parties one who is bound to act in good faith and due regard for the interests of the other."

be held personally liable for their actions, including negligent actions, absent allegations of criminal activity, fraud, willful misconduct or self-dealing. The recent cases seem to indicate a trend towards director liability that chips away at the *Perlow* standard.

A very recent appeals case allowed a trial to go forward against directors in their individual capacities. In this case, the unit owner claimed that the directors deliberately abdicated their responsibilities with respect to the annual budget, the levying of assessments, and the holding of board meetings and that such actions were taken in bad faith with a malicious purpose. The court found that these allegations were sufficient to deny the director's motion for summary judgment based upon Section 617.0834 immunity. *Berg v. Wagner*, 935 So. 2d 100 (Fla. 4th DCA August 9, 2006).

In the *Aza* case, the court of appeals reinstated a matter, after it had been dismissed by the trial court, against a corporate officer in her individual capacity for fraud and negligent misrepresentation, for acts within the course and scope of her employment as president of the corporation. In this case, the corporate officer simply signed loan documentation in her capacity as president. The court reinstated the case, finding that if a director or officer commits, or participates in the commission of a tort she is liable to third persons injured thereby. *Home Loan Corporation v. Aza*, 930 So. 2d 814 (Fla. 3rd DCA May 31, 2006).

Another case allowed discovery to be taken that would potentially establish that a condominium association's refusal to repair a leaky roof for several years constituted a breach of the board members' fiduciary duty. In this case, the unit owner made several complaints to the board members over several years, and ultimately his unit was so badly damaged by the leaks that it was condemned by the local governing authority. Although the court did not legally determine whether these actions by the members of the board constituted a breach of fiduciary duty, the court did allow the unit owner to take discovery from the association's insurance carrier to establish that fact. *Allstate Insurance Co. v. Cambron*, 31 Florida Law Weekly D2326 (Fla. 5th DCA September 8, 2006).

These recent decisions suggest a trend toward director liability for merely negligent acts, but none of the cases above have abrogated *Perlow*, and *Perlow* remains the seminal case on this issue. It is important to note that the courts will protect the association and its directors as long as they operate reasonably and in good faith. It is only when the members of the board overstep these boundaries, that they should fear legal action. Allegations of board member misconduct generally arise due to poor communication, and general confusion as to what the law provides in this area. Ultimately, the directors must direct their actions for the benefit of the unit owners.

In furtherance of that goal, there are certain steps the board of directors can take to minimize their exposure:

1. Board members should stay informed of all issues facing the association. Before making a decision, directors should consult with legal counsel, management, and experts. The advice provided by these professionals should be considered before making a decision.
2. The directors should keep accurate minutes of all meetings and votes. Specific attention should be paid to documenting not only the decisions made by

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Editor's note: Insurance reform legislation resulting from the Special Session of the Legislature (HB 1A) and modifications to the Condominium, Cooperative and Homeowners' Associations Acts created by HB 7031 provide mechanisms for community associations to self-insure. As few as three (3) associations can join together, but the coverage must be sufficient to fund the probable losses from a 250-year windstorm event. The self-insurance fund must comply with regulations set forth in the Commercial Self Insurance Fund Act. The following is an Advisory (reprinted in full) from the Office of the Florida Insurance Consumer Advocate.

ADVISORY FROM THE OFFICE OF THE FLORIDA INSURANCE CONSUMER ADVOCATE

Robert F. Bob Milligan, Insurance Consumer Advocate

In 2007, the Florida Legislature enacted a number of changes to property insurance laws.

Condominium, homeowner, and other residential associations may now participate in a Commercial Self Insurance Fund (SIF) to insure common property such as a condominium building. If your association is considering participation in a self-insurance fund, please take time to carefully consider the differences between insurance provided through a self-insurance fund and insurance provided by an insurance company.

Self-insurance funds do not operate like insurance companies.

The policy (contract) issued to an association member of a self-insurance fund must contain the following statement:

> "This is a fully assessable policy. In the event the fund is unable to pay its obligations, policyholders will be required to contribute on a pro rate earned premium basis the money necessary to meet any unfilled obligations."

- Once an insurance policy premium is paid to an insurance company, the company cannot come back later and ask for more money because the company paid more claims than they expected.
    - **This is not true for self-insurance funds. In a self-insurance fund, unit owners can ultimately be responsible for the shortfall of the self-insurance fund**.
- Insurance policies issued by insurance companies that are authorized to do business in Florida are protected by the Florida Insurance Guaranty Association (FIGA) in the event that the authorized insurance company goes bankrupt.
    - **Participants in a self-insurance fund are not protected by FIGA**. If a self-insurance fund becomes bankrupt, associations participating must pay the unpaid claims – this could result in assessments being levied by the association against individual property owners who are members of the association.

If your association is considering membership in a self-insurance fund, please be aware of all the contract clauses – and be sure you understand at what dollar amounts your association would have to assess your individual homeowners or unit owners to pay damages for your buildings or for the damages to another member's buildings after a windstorm or hurricane event. ■

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"Board members should stay informed of all issues facing the association. Before making a decision, directors should consult with legal counsel, management, and experts."

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the directors but the basis and reasoning for such decisions. By properly documenting these decisions, and the reasoning behind them, the board creates a record that can be used in defense of an action against the directors in their individual capacity.

3. The members of the board should know what their governing documents require of them, and should make every effort to comply.
4. The directors should consult with legal counsel whenever making a decision that they believe may result in litigation. Specific attention should be paid to how the directors' actions in these instances may be perceived by the unit owners and third parties.
5. The directors should ensure that all procedural requirements provided for in the Condominium Act, Homeowners Association Act, and governing documents are fulfilled. For example, failing to notice meetings properly would invalidate all actions taken at a board meeting.
6. Members of the board should make every effort to avoid self-dealing, conflicts of interest, and acts in bad faith.
7. Members should be responsive to requests for information, complaints, and concerns of the unit owners. Serious issues brought up by unit owners should not be ignored, should be discussed at duly called meetings of the board, and reflected in the minutes.
8. The directors should assure that the provisions of the governing documents are enforced consistently and equally amongst the unit owners so as to prevent claims of discrimination and bad faith application.

Although this is not an all-inclusive list, members of the association's governing bodies should keep these points in mind when acting. If the directors communicate as they should with the unit owners, and follow the requirements of Florida Statutes and the governing documents, they would arguably be protected from individual liability. ■

CALL

Legislative Proposals are already being discussed — Please be sure to log on to our Community Association Leadership Lobby Website www.callbp.com

DIRECTORS NEEDED, ONLY THOSE WITH THICK SKINS NEED APPLY - TEMPORARY INJUNCTIONS AGAINST VIOLENCE LIMITED

By: Lisa A. Magill, Esq.
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Violent acts occur with increasing frequency throughout the State for different reasons. The Florida legislature has recognized the need to provide a mechanism for the residents to protect themselves and thus the law provides for three (3) different types of orders of protection against violence (generally referred to as restraining orders) called injunctions. The Court is authorized to enter Protective Injunctions against repeat violence, sexual violence and dating violence – all of which include the term "violence" in the title.

The term "violence" is specifically defined by the statute as:

> "any assault, aggravated assault, battery, aggravated battery, sexual assault, sexual battery, stalking, aggravated stalking, kidnapping or false imprisonment, or any criminal offense resulting in physical injury or death, by a person against another person."

The Florida Supreme Court has promulgated forms to pursue an injunction against violence. All courts use the Supreme Court's temporary injunction and final judgment forms to promote predictability and recognition by the various law enforcement departments throughout the state. The forms, including petitions, various motions and orders are available at the courthouses and online for viewing, printing, and/or downloading at www.flcourts.org.

Unfortunately, violent acts sometimes occur as a result of association disputes. While many pro-active boards, believing that one or more of their members may become violent or engage in undesirable behavior, hire security or off-duty law enforcement personnel to attend association meetings or patrol the community, a board cannot often predict whether a resident (or guest) will attempt to harm another resident, board member, management or an employee simply as a result of enforcing the association's regulations. Under some circumstances, obtaining a temporary injunction against repeat violence is an appropriate step to take while either the Association (depending upon the nature of the actions) or the individual pursue other civil action to prevent further incidents in the future. However, the injunction (restraining order) most typically sought in the association setting is an injunction against repeat violence, which is only available if two (2) incidents of violence or stalking have been committed, one of which is within six (6) months of filing the petition. The incidents of violence must be committed against the person seeking the injunction or their immediate family member.

A recent case arising out of a dispute over easement rights (access to a lake through a residential property) demonstrates how simple matters can get out of hand, but the specifics of the statute control whether an injunction should be issued. In *Clement v. Ziemer*, 32 Fla.L.Weekly D901, (Fla. 5th DCA 2007), there were various allegations made about incidents or examples of behavior that did not rise to the level of repeat violence. Peter Clement has an easement over a ten (10) foot wide piece of property owned by Lanelle Ziemer for access to a lake. Ziemer claimed that Clement said "she would be sorry" if she did not permit Clement unfettered access, drove like a madman through the property, screamed obscene names, "terrorized" the neighborhood, argued with the sheriffs that responded to complaints and the like. While the trial court initially granted injunctive relief, the appellate court reversed and remanded the case with instructions to vacate (lift) the injunction indicating that threats that "Zeimer would be sorry may have placed her in fear, but, without more, are not qualifying acts of violence". The Court relied upon a previous case which stated:

> "Mere shouting and obscene hand gestures, without an overt act that places the victim in fear, does not constitute the type of violence required for an injunction …. Even a representation that the offender owns a gun and is not afraid to use it is insufficient to support an injunction absent an overt act indicating an ability to carry out the threat or justifying a belief that violence is imminent."

Santiago v. Towle, 917 So.2d 909 (Fla. 5th DCA 2005).

Community leaders must develop conflict resolution skills, learn to withstand criticism and also learn techniques to prevent casual disputes from leading to incidents of violence. At the same time, community leaders must also recognize trends or behaviors that may lead to injuries to themselves, employees or other residents. With good management, good communication, strong education of members and a diverse group of community volunteers, dispute resolution practices should occur at every level – hopefully preventing verbal altercations from escalating into something else. ■

ELECTRONIC DELIVERY OF COMMUNITY UPDATE

Please make sure that the Firm has current electronic mail addresses for the members of the Board of Directors or send the preferred email address for delivery of this publication to caforms@becker-poliakoff.com.

PALM BEACH COMMUNITY COLLEGE, ALONG WITH PRIVATE SECTOR INDUSTRY SPONSORS, WILL PRESENT AN EDUCATIONAL PROGRAM SERIES FOR BOARD MEMBERS OF COMMUNITY ASSOCIATIONS IN PALM BEACH COUNTY. PLEASE JOIN BECKER & POLIAKOFF ATTORNEYS FOR THE FIVE SESSIONS BEGINNING IN DECEMBER, 2007 TO LEARN ABOUT AND DISCUSS THE FOLLOWING TOPICS:

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Learn about the New Year's hot topics in the areas of legislation, insurance rates and coverage, property management, bank lending policies, financial reporting, and money management.

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Get insight into Florida's insurance crisis, including ways to minimize rate increases and coverage limitations on your community.

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What are your responsibilities as a board member? Attend this session to learn about legal obligations, fiduciary liability, risk management, financial reporting, asset protection and more.

Disaster Planning: Is Your Association Ready?

Attendees will learn about pre-disaster planning for a recovery, mandatory evacuation policies, premises access after a storm, filing insurance claims, coordinating repairs, securing financing, and building code compliance.

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COMMUNITY UPDATE™

VOLUME XII, 2007 | **Serving Florida's Communities Since 1980** | Lisa Magill, Esq., Editor

Generally a litigant may only recover attorney's fees from an adversary upon: (1) statutory grounds; (2) contract grounds; and (3) by use of procedural rules.

FORCING YOUR OPPONENT TO PAY YOUR BILLS: A PRIMER ON AN ASSOCIATION'S ABILITY TO RECOVER ITS ATTORNEY'S FEES

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The recovery of attorney's fees can be a significant factor in determining how an Association approaches its problems, both real and potential. Whether it be an unruly tenant who breaches the Association's governing documents, a devious director who helps himself to Association funds, or an unscrupulous contractor who pads bills with numerous "unforeseen" markups, the ability to recover attorney's fees can help to assess the risks and rewards of the gamut of sticky situations that confront Associations on almost a daily basis.

There are three general methods of recovering attorney's fees: (i) on statutory grounds, such as Florida's "sanctions statute" for frivolous or dilatory conduct during litigation; (ii) pursuant to an "attorney's fees" provision in a contract; and (iii) pursuant to the procedural rules that parties must follow when conducting litigation. Each provides an independent means of recovering attorney's fees under certain circumstances.

I. Statutory Grounds: Sanctions, Stolen Money, and More

As you probably know, the Florida Statutes are the repository of many—perhaps thousands—of the state's laws. (You can find the Florida Statutes online at http://www.flsenate.gov/Statutes/). Sprinkled in amongst these laws are several statutes that allow an Association to recover some or all of its attorney's fees from the opposition, but only under certain circumstances.

Perhaps the most important of these statutes is Florida Statutes Section 57.105, commonly known to attorneys throughout the state as the "sanctions statute" or simply "57.105". Section 57.l05 provides the court with broad authority to impose sanctions on a party to a lawsuit for engaging in frivolous conduct or meritless delay tactics. Frivolous conduct is that which "was not supported by the material facts necessary to establish [a] claim or defense" or "[w]ould not be supported by the application of then-existing law to those material facts". Fla. Stat. Sec. 57.105(1)(a) and (b). An example would be a tenant who defends against an Association's lawsuit to foreclose a lien for a valid and unpaid assessment by claiming that the Association has no authority to impose assessments. Notably, sanctions for frivolous conduct can be imposed against the opposition's attorney when he or she knew or should have known that the conduct was frivolous; however, such a claim can be defeated by the opposing attorney if, in asserting the claim or defense, he or she relied in good faith on the client's representations. Fla. Stat. 57.105(1). Section 57.105 also allows for a party to recover its attorney's fees where the opposition engages in action "primarily for the purpose of unreasonable delay". Fla. Stat. Sec. 57.105(3). Dilatory tactics logically include conduct such as the repeated filing of motions that the court has already resolved.

The procedure for obtaining sanctions requires the service of a motion for sanctions upon the opposition, who is then afforded 21 days—often referred to as the "safe harbor" period—to withdraw or appropriately correct the offending conduct. See

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Fla. Stat. Sec. 57.105(4). Upon the expiration of the safe harbor period, the moving party may file the motion with the court and have a hearing to determine the outcome. If successful, the court may award the moving party a "reasonable attorney's fee". Importantly, what is a "reasonable" fee to the court may only be a fraction of the attorney's fees actually spent in defending against the frivolous/dilatory conduct or obtaining sanctions.

Other statutes exist that allow a party to recover its attorney's fees. One example pertinent to Associations exists in Fla. Stat. Sec. 718.125, which provides that if a condominium Association or unit owner is the prevailing party in any litigation arising from a contract or lease which provides that the developer will receive attorney's fees, then the Association or unit owner may also be awarded reasonable attorney's fees. In essence, Sec. 718.125 transforms one-sided attorney's fees provisions—i.e., where only one party, usually the developer, is awarded attorney's fees in the event the contract is breached—into reciprocal ones where any party to the contract may seek its attorney's fees.

Attorney's fees are also recoverable in the event of "civil theft", which occurs when a person or entity interferes with another's right to possess property, including money. Fla. Stat. Sec. 772.11. Accordingly, any time money is stolen from an Association, a claim for civil theft should be considered in addition to any other applicable theories of relief. Perhaps the money was not stolen but was instead tendered falsely through a "bad check"—i.e., where the maker has insufficient funds to cover the amount of the check or dishonors the check prior to the time the Association cashes it. Under Florida Statutes Sec. 68.065, a party who receives a bad check may recover his or her attorney's fees (and triple damages!). A note of caution, however, to parties seeking to bring claims for civil theft or bad checks: Secs. 772.11 and 68.065 have procedural requirements that must occur before a claim is brought, including the issuance of a demand letter with particular wording. Thus, it is best to consult your attorney to ensure you have met these requirements.

II. Contractual Grounds: The "Attorney's Fees" Clause

A second means of recovering attorney's fees is by contractual agreement. Here, there need not be a governing statute that allows for attorney's fees to be recovered. All that is necessary is a valid and enforceable contract containing an attorney's fees provision. Attorney's fees provisions come in many different forms. These provisions are often found in an Association's governing documents, such as its Declaration, Bylaws, and Rules and Regulations.

As a caveat, an Association must be careful while enforcing its governing documents. The Third District Court of Appeals in *Seagull Townhomes Cd'm. Ass'n, Inc. v. Edlund*, 941 So. 2d 457 (Fla. 3d DCA 2006), held that the Association was not entitled to recover attorney's fees in its action to nullify a conveyance of a unit on the grounds that the Association's prior consent was not obtained and that the seller failed to provide the Association with the right of first refusal, as provided by the governing documents. In this case, although the Association was the prevailing party as the court recognized the Association's right of first refusal, because the Association failed to respond to an owner's written inquiry during the conveyance dispute, the court held that the Association was not entitled to recover its attorney's fees. Id. As you may know, an Association must respond to a unit owner's written inquiry within thirty (30) days of receipt of the same. See Fla. Stat. Sec. 718.112(2)(a)(2). Thus, it is paramount that when enforcing the governing documents, the Association complies with the other requirements pursuant to Florida Statute Chapter 718.

III. Procedural Rules: Leave It to the Lawyers

The third means of recovering attorney's fees exists in the procedural rules that parties and attorneys must follow when engaging in civil litigation in Florida. Fully understanding these rules, which are known as the Florida Rules of Civil Procedure, often requires legal training and is a task best left to your attorney. Nevertheless, it is important to know that the Rules of Civil Procedure provide a basis for recovering attorney's fees in Rule 1.380, which governs the court's ability to sanction improper conduct, particularly during "discovery". (Discovery is the process by which a party gains information on the merits of the opposition's case. It can include requests for documents, requests to admit facts, written questions that the opposition must answer, and depositions.) In general (and at the risk of oversimplification), Rule 1.380 is triggered when a party must involve the court to compel the opposition to comply with a legitimate discovery request. Perhaps because discovery abuses often arise during the course of litigation, courts are generally reluctant to award sanctions pursuant to Rule 1.380 without affording the offending party multiple opportunities to rectify the improper conduct. ■

As you probably know, the Florida Statutes are the repository of many—perhaps thousands—of the state's laws.

If there is significant equity in the property but the bank foreclosure is not moving along quickly, it is often in the Association's best interest to begin or to resume its own collection efforts to collect past due assessments.

TOUGH CHOICES: IMPACT OF FORECLOSURES ON ASSOCIATIONS

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The U.S. foreclosure rate has climbed to the highest it has been in over fifty years. Many Florida cities rank among the top 25 cities with the nation's highest foreclosure rates. Some economists speculate that Florida will not get any relief from the surge in new foreclosure filings, caused in part by the slump that hit the once-hot Florida housing market in 2005, for several years.

Community Association Boards of Directors are becoming far too familiar with the foreclosure process, as Associations are more frequently being involved in bank foreclosure suits filed against their members. When a unit owner's first mortgage holder files a bank foreclosure suit, the Association is usually joined as a defendant in the case. This forces the Association to make decisions regarding how it will respond to the bank foreclosure. An Association may choose to monitor the bank foreclosure, temporarily discontinue its own efforts to collect delinquent assessments from a unit owner or do nothing at all.

The frequency with which Associations are filing their own foreclosure actions against homeowners for delinquent assessments has also increased substantially in the last few years. In Florida, an Association has a statutory right to record a claim of lien against a unit for an owner's failure to pay assessments. The Association ultimately has the right to foreclose on the claim of lien. The choice of whether to file its own foreclosure action is sometimes viewed as a Hobson's choice by an Association. On one hand, if there is little or no equity in the property, the Association may have to bear the cost of ousting a non-paying owner without recovering any money. On the other hand, taking no action at all could allow the non-paying owner to remain in the unit indefinitely, especially if the owner pays the mortgage.

It is also common these days for both a bank foreclosure suit and Association foreclosure suit to be simultaneously pending against the same property. Many times temporarily discontinuing its efforts to collect past due assessments while a bank foreclosure is pending can save an Association from duplicating foreclosure efforts and incurring additional attorney's fees. The bank is often able to obtain a foreclosure judgment and, once a foreclosure sale is completed, the Association will most likely be no better off by pursuing its own foreclosure if the bank moves expeditiously. In the last year, the bank itself has more often become the new owner of the property because of the inability to attract third-party bidders to the foreclosure sale due to very little equity in the property or no equity at all. In such cases, depending on the type of Association, an Association's claims could be "wiped out" if there are no surplus funds to cover the amounts due to it.

In cases where there is little or no equity in the property, an Association may be faced with the inability to collect the entire amount of past due assessments owed to it by a unit owner. The decrease in the number of homeowners who resolve the foreclosure by refinancing or settling the suit and the lack of interested third-party bidders at the foreclosure sales also creates a problem for Associations in their own foreclosure suits, as it is becoming more common for Associations to be the successful bidders at foreclosure sales. As a result, an Association could end up the owner of a property that has little value because it is subject to the superior lien-holder's right to foreclose.

If there is significant equity in the property but the bank foreclosure is not moving along quickly, it is often in the Association's best interest to begin or to resume its own collection efforts to collect past due assessments. In such a scenario, it is likely that the Association will obtain a foreclosure judgment and recover the past due assessments, attorney's fees incurred, late fees and interest.

With the proverbial light at the end of the tunnel perhaps years away, Community Associations should definitely become better informed and more aware of the most efficient and effective ways of responding to bank foreclosure actions filed against its members and handling its own foreclosure suits because the days of 100% collection have come to a close. ■

Editor's note: For those readers in the Southeast Florida area, please be advised that Ms. Mitchell will participate in a legal panel regarding Association collection and foreclosure practices and trends on January 26, 2007. More information about the event is available on www.callbp.com

REQUIREMENTS FOR CONTRACTS WITH PUBLIC ADJUSTERS

In the last few years, several public insurance adjusters have helped Community Associations that suffered significant hurricane damages to recover significantly more money from the insurance company than what the insurance company initially offered. However, a few public adjusters also took advantage of some Community Associations by providing little if any services to the Association in exchange for a large percentage of the Association's insurance proceeds. To better protect its interests, a Community Association should know what provisions need to be included in a contract with a public adjuster, to better avoid confusion (at best) and litigation (at worst) in the future.

Rule 69B-220.051, of the Florida Administrative Code, provides for certain terms that must be included in a public adjuster's service contract, and a Community Association should ensure that these terms are present before signing anything presented by a public adjuster. First, all contracts for public adjuster services must be in writing, and must be signed by the public adjuster who solicited the contract. In addition, the contract must provide for the following terms:

(a) legibly states the full name of the public adjuster signing the contract as specified in the records of the Department of Financial Services;

(b) the public adjuster's permanent business address, phone number, and Florida Department of Financial Services license number;

(c) the Association's full name and street address, as the insured;

(d) the address of the loss;

(e) a brief description of the loss;

(f) the Association's insurance company's name and policy number, if available;

(g) the date the contract with the public adjuster was actually signed by the Association as the insured or claimant; and

(h) the full compensation to the public adjuster.

If the compensation is based on a share of the insurance settlement, the exact percentage must be specified in the contract. Furthermore, if the public adjuster is to be reimbursed for any costs out of the insurance proceeds, Rule 69B-220.051(6)(e)3., F.A.C., requires that the costs be specified in an addendum to the contract. Consult your Association attorney to determine whether the public adjuster proposal submitted adequately comports with Florida law and whether other provisions should be included based on the circumstances involved. ■

FACTS ABOUT FLORIDA INSURANCE GUARANTEE ASSOCIATION (FIGA)

The Florida legislature established the Florida Insurance Guarantee Association in 1970 through the enactment of Florida Statute section 631.50 et seq. The FIGA, as it is known, essentially services and pays pending insurance claims made by Florida policy holders of member insurance companies that have become insolvent and ordered liquidated. In order to receive relief from FIGA, the policy holder must have a "covered claim" which means an unpaid claim that arises out of and is within the coverage (and not in excess) of the applicable limits of an insurance policy from an insurer that has been declared insolvent. The maximum amount that FIGA will cover in the cases of condominium and homeowners Associations claims will be $100,000.00 multiplied by the number of units in the Association. All claims are subject to a $100.00 deductible, above and beyond any deductible identified in the policy holder's policy. If your Association's insurer is insolvent and in liquidation or bankrupt, you should contact FIGA immediately to determine whether coverage is available in your circumstance. You may contact FIGA at 1-800-988-1450, P.O. Box 10366, Jacksonville, FL 32247-0366 or visit its website at www.FIGAfacts.com, where you can review frequently asked questions about FIGA, a list of active insolvencies being handled by FIGA and other very helpful information. ■