COMMUNITY UPDATE™

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There are specific procedures that must be followed in order to evict or otherwise remove a disruptive tenant and the person or entity seeking such eviction or removal must have the legal authority to do so.

REMOVAL OR EVICTION OF TENANTS BY COMMUNITY ASSOCIATIONS

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THROW THE RASCALS OUT! This is often the first reaction by board members when tenants violate the governing documents of the association or otherwise make themselves unwelcome. However, Florida law does not permit this approach. There are specific procedures that must be followed in order to evict or otherwise remove a disruptive tenant and the person or entity seeking such eviction or removal must have the legal authority to do so.

Under Florida law, owners and tenants have different property rights. The Florida Statutes provide condominium and homeowners' association owners with an exclusive right to possess their property. In *Kittel-Glass v. Oceans Four Condominium Association*, 648 So.2d 827 (Fla. 5th DCA 1995), the Court held that an association could not permanently enjoin an owner from entering their unit. Conversely, the tenant is not afforded such right by the law. The tenant enjoys a limited interest in the property, and may be removed by the landlord or through action by the association.

The Florida Statutes also provide that each tenant of a condominium or homeowner association shall comply and be governed by the declaration and the documents of the association. Therefore, it is not a coincidence that most frequently associations desire to remove a tenant for being a nuisance or disruptive behavior in violation of the governing documents.

If the tenant is disruptive, it is important for the association to document the tenant's violations and send notice to the owner/landlord requesting that the tenant comply with the governing documents. Swift, aggressive action by the association will make the most dramatic impact on the owner and may deter the tenant from committing such violations.

If the tenant continues to commit violations that are not serious, proceeding with removal or eviction may not be worthwhile. If the tenant's lease or rental agreement is soon expiring, the association may simply disapprove a renewal. However, the association should be aware that pursuing this option may depend on the terms of the rental agreement and the right of the association to approve or screen tenants. Maintaining screening authority in the governing documents may become crucial at this time because, without it, associations may not disapprove renewals.

If the tenant is committing serious violations or the association does not maintain screening authority, the association may be required to take further action. Unlike other disputes, Florida law prohibits arbitrators for the Division of Florida Land Sales, Condominiums, and Mobile Homes from hearing cases regarding the eviction or other removal of a tenant. Consequently, the association is required to file an action in circuit court.

Chapter 83, Florida Statutes, Part II, provides the statutory authority of a landlord to evict a tenant from a residence. "Landlord" is defined by the statute as "the owner or lessor of a dwelling unit". "Tenant" is defined as "any person entitled to occupy a dwelling unit under a rental agreement". It is clear from these terms that an association is not entitled to evict a tenant since it is not a "landlord" as defined by the statute (provided that the association is not the owner of the rented property). In order for the association to exercise eviction rights,

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...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.

HOMEOWNERS' ASSOCIATION PRESUIT MEDIATION REQUIREMENTS

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New presuit mediation requirements for homeowners' associations were adopted during the 2007 Legislative Session. The new law 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 can 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. The highlights of this new law are as follows:

- 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 or more of the five certified mediators. If the responding party agrees to attend mediation with one or more 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 to mediate via certified and regular first class mail within 20 days of the date of the mailing; (2) fails to agree to one or more 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.
- 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. ■

...e-mail has become the standard and accepted mode of communication in the business environment. The same is true in the condominium and homeowners' association context...

USE OF ELECTRONIC MAIL

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The use of electronic mail, or "e-mail" as it is affectionately known, has skyrocketed in recent years in both residential and commercial settings. In fact, e-mail has become the standard and accepted mode of communication in the business environment. The same is true in the condominium and homeowners' association context.

Obviously, using e-mail in a commercial environment requires caution. How often, for example, have you been one of many recipients of an e-mail and responded to all the recipients instead of just the sender? At the very least, this can be embarrassing. At worst, it can constitute defamation and subject the sender to civil liability. The use and retention of e-mail correspondence has also become an interesting issue among associations and their respective Board Members. Very often, unit owners and homeowners contact the association through e-mail. Similarly, board members use e-mail to communicate with the association's attorney, other board members and owners, and as a means of providing notice of board meetings and membership meetings. A common question arises as to whether these "e-mails" become official records of the association that any owner may access.

Both the Florida Condominium Act (Chapter 718, Florida Statutes) and the Homeowners' Association Act (Chapter 720, Florida Statutes) provide that owners have the right to access the association's official records. To do so, an owner must submit a written request to the Board (which request may be in the form of an e-mail). Upon receipt of the written request, the Board must provide the owner access to the records within five (5) business days. If the association fails to provide such access within ten (10) business days, there is a rebuttable presumption that the association willfully failed to provide access and the owner may then have a cause of action for monetary damages of up to $500.00.

There are, however, certain documents and records that an owner may not access. For example, any record protected by the lawyer-client privilege as described in Section 90.502, Florida Statutes and any record protected by the work-product privilege. These include, but are not limited to, 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 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. Thus, any e-mail protected under the attorney-client or work product privilege is not available to the owner for inspection.

What about e-mails between the Board and/or its Manager or Management Company? The Florida Statutes provide owners the right to inspect any records relating to the operation of the association that are not barred by the attorney-client privilege or work-product privilege while litigation is pending; information obtained by the association for approval of the transfer of units; and unit owner medical records. None of the exceptions are presumably applicable here with regard to e-mails by and between the association and its Manager. By analogy to other areas of law (relating to evidence and discovery) a Court or arbitrator would likely find that records maintained on a computer data-base, still constitute "official records".

While there does not appear to be any Florida case law or opinions relating to whether e-mails are official records of associations, a legal opinion released by the Division of Land Sales, Condominiums, and Mobile Homes ("Division") concluded that:

> Condominium owners have a right to inspect e-mail correspondences between the Board of Directors and the property manager as long as the correspondence is related to the operation of the Association and does not fall within one of the three statutorily protected exceptions. Letter through J. Sue Richards, Chief Assistant General Counsel, DBPR, to Robert Badger, Supervisor, Bureau of Customer Service (March 6, 2002).

Thus, it appears that as long as the nature of such e-mails deal with the "operation of the association", they will have to be produced as part of an owner's request to access the official records. ■

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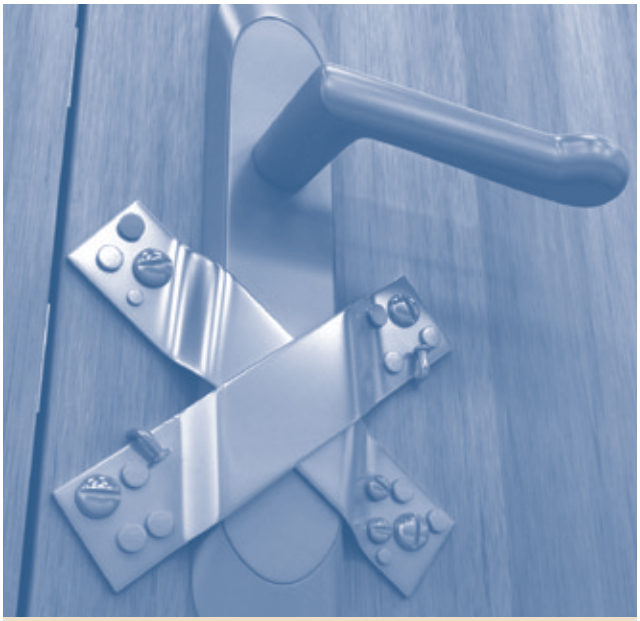
it must be given such authority by the governing documents to the extent that it "steps into the shoes of the landlord". If this authority is given to the association, it may act to evict tenants in accordance with the statutory authority given to landlords.

If the association is without the power to effect evictions under Chapter 83, the association may be required to file an action in circuit court against the landlord. This action is not an eviction, but is an action for injunctive relief requesting that the landlord comply with the governing documents and remove the tenant. If the court grants the association injunctive relief, the landlord will be required to evict the tenant under Chapter 83.

However, Chapter 83 may not provide community associations with a practical solution for removal of a disruptive tenant for several reasons. Section 83.56, Florida Statutes, requires that the tenant be given notice of any violation of the rental agreement, after which the tenant has a reasonable opportunity to cure his/her noncompliant conduct. Further, the right to bring an eviction action under Chapter 83 rests squarely with the landlord or his agent and only with the association if provided by the governing documents. Finally, even if these obstacles are overcome, the time period involved in getting an eviction action to the hearing stage may make it an impractical vehicle for removing an unruly or disruptive tenant from the property.

In cases where the tenant's conduct constitutes a criminal offense, such as public intoxication, harassment, or other conduct that amounts to a breach of the peace, the association should not hesitate to contact local law enforcement. While local law enforcement is not available to enforce the association's pet restrictions and other internal rules, it is available to handle breaches of the peace and, in all such situations, the appropriate authorities should be called.

In summary, there is no satisfactory one-size-fits-all solution to remove a disruptive tenant. Additionally, in some situations, there is no satisfactory solution at all. The association must be prepared to explore the various options available depending upon the factual context of each particular disruptive tenant. ■



In summary, there is no satisfactory one size fits all solution to remove a disruptive tenant.

2008 ANNUAL COMMUNITY ASSOCIATION LEADERSHIP CONFERENCES

Join Becker & Poliakoff Attorneys for a free half-day seminar regarding issues of concern to community association leaders, members and managers. The seminar is being held at various locations throughout the State of Florida. Learn about the 2007 legislation, legislative advocacy strategies, how to contract with vendors and contractors and new cases or arbitration decisions of interest. Information is available at www.becker-poliakoff.com or www.callbp.com and you can reserve your spot at the seminar closest to you online by registering.

Please visit our CALL (Community Association Leadership Lobby) website at http://www.callbp.com for all of the latest information impacting your community association. You must be a current client to access this site. Please contact CALL@becker-poliakoff.com if you do not know your community's password to log on to the site. ■

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Legal and Business Strategists

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Many times owners, managers and administrators believe that there is no option except to comply with these antiquated documents and deal with the problems that continue to exist. Not so.

AMENDMENTS TO GOVERNING DOCUMENTS WILL IMPROVE ASSOCIATION OPERATIONS

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Perhaps one of the most difficult aspects of dealing with Community Associations in our practice is working with communities that have antiquated documents. This is particularly so when the documents have never, or infrequently, been amended over the years. When this is the case, very often there is no remedy for a number of situations that commonly arise in community associations. Telling a client that, while it is true that there is a no leasing policy in the governing documents, it is impossible to prove that an owner's "cousin" who has been "visiting" for months at a time is not a "tenant", is very difficult. This is but one of numerous examples of cases where there may very well be a violation, but by virtue of a loophole that wasn't considered many years ago, or by virtue of a circumstance that no longer applies 20 years after the documents were originally drafted, it is nearly impossible to enforce. Other issues arise when perhaps that community used to be populated by mostly retired people who thought it would be a great idea for their annual meeting to take place every third Tuesday in April at 2:00 p.m., yet the current owners mostly work full time, making it impossible to meet their documents' requirements regarding the date and time of the annual meeting. So, what is an association to do? Many times owners, managers and administrators believe that there is no option except to comply with these antiquated documents and deal with the problems that continue to exist. Not so. There is another option: ***Amend, amend, amend.***

Understanding the Role of Each Governing Document

First, it is important to understand exactly what documents govern Condominium and Homeowners' Associations and what aspects of the community these actually govern. Mainly two things govern all Condominium and Homeowners' Associations: The Florida Statutes and the Governing Documents for the Condominium or Homeowners' Association. Governing Documents for Condominium and Homeowners' Associations include the following: Declaration of Condominium (usually called the Declaration of Covenants in Homeowners' Associations), bylaws, Articles of Incorporation and Rules and Regulations. Generally speaking, the Declaration is a deed restriction and constitutes a covenant running with the land. It is usually the most widely relied upon authority for the governance of the community, since it normally contains basic property rights, defines ownership, use restrictions, insurance requirements, maintenance and repair responsibility, and other integral questions of community living. The Articles of Incorporation are sometimes called the Charter. It is the document that was originally filed with the Florida Secretary of State to create the corporate entity that operates the condominium, in other words, the Association. It is usually sparse in detail, but may also have important information regarding the governance of the Association. The bylaws govern various aspects of operations of the Association. This normally includes the powers of the directors, the notice requirements for Board and Member meetings, the conduct of members' meetings, the election of directors, the conduct of board meetings, etc. Finally, the "Rules and Regulations" typically run the gamut of day-to-day restrictions and guidelines in the community. These typically include restrictions on use of the common elements

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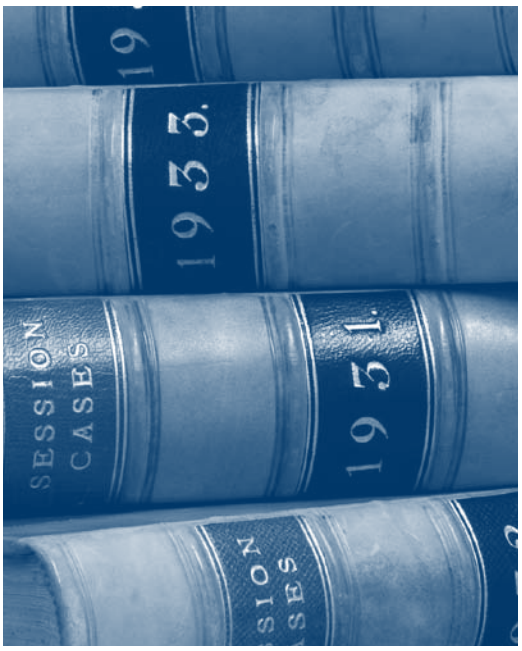
like pools, community rooms, service elevators, etc. Depending on the rule making authority of the Board as allowed by the other governing documents, the Rules and Regulations might also govern issues like frequency of written inquiries by owners, record inspections, etc.

Amendment Procedures

Normally, each governing document has in it the method by which it can be amended. Typically, a board of directors proposes an amendment and it will need to be approved by the vote of a certain percentage of the owners. In cases where a particular governing document does not explain a method by which it may be amended, the law will state the method. For example, Florida Statutes Section 718.110(1)(a) states: "If the declaration fails to provide a method of amendment, the declaration may be amended as to all matters except those listed in subsection (4) or subsection (8) if the amendment is approved by the owners of not less than two-thirds of the units..."



In any event, once you determine what percentage (if any) of owners need to approve your amendments, it is important to decide what amendments are possible. Most everything in the governing documents can be amended with the approval of the board and a particular level of owners. However, some documents have restrictions on amending certain portions of the documents. It is possible that the approval of the developer, institutional mortgagees or lenders, or the holder of a 99 year recreational lease is required for amending a particular provision or provisions. Fortunately, Section 718.110(11), Florida Statutes, was amended last year to address lender consent requirements.

Perhaps the best way for a community association interested in "revamping" its documents to proceed is to first ask the Association Attorney to review them and advise what restrictions, if any, exist to amendments. Once this is known, there are several possible courses of action:

"Spot" Amendments

The first is "spot" amendments. In other words, the Association's documents may not be so old as to require extensive amendments, but rather only to update certain portions of it, or to address a persistent issue. In this case, the Association can contact its attorney to draft the needed amendments and the meeting documents, to the extent necessary.

Integrated Documents

The next type of amendment project is usually a good idea when the Association's condominium documents have been amended several times throughout the years. What results is quite a disjointed set of documents inasmuch as the provisions that are amended are, obviously, not incorporated into the main text of the documents. It becomes cumbersome and difficult for persons to refer back to the governing provisions since so many other subsequent pages need to be checked to be sure there is no amendment that overrides the original text. Sometimes, there have been amendments to the same provisions over and over. In these cases, the Association attorney can prepare a "restated" set of condominium documents. This would be a retyped set of documents whereby all of the past amendments would be incorporated into one set of governing documents. Additional amendments could be prepared and proposed to the owners prior to such a project and, if they pass, can be included in the "restated" set. This would also allow the Association to have their documents in an electronic format, would resolve the problem with difficult to read documents, and would offer a cleaner, easier-to-review set of governing documents to all owners.

Substantial Revision and Restatement of Documents

Finally, another option is to have the Association attorney draft a whole new set of governing documents for the community. Instead of voting on individual amendments, the owners (as may be necessary) would vote on adopting the entirety of the new documents. These new documents could update the old documents, address new and past concerns of the Association, and ensure compliance with laws that may have changed over the years, among other things. This option would also offer the documents in an electronic format, would resolve the problem with difficult to read documents, and would offer a cleaner, easier-to-review set of governing documents to all owners. Additionally, it allows the Association to propose innumerable amendments all at once, without concern as to some being adopted while others are not. Since the documents would be approved or rejected as a whole, the Association would have certainty one way or another.

Issues to Address by Amendments

Of course, every community has its own separate and isolated set of issues that should be addressed as is fit for that community, and the following is by no means a one size fits all list. However, some popular areas of requested amendments (in either of the above referenced forms) include the following:

- Language regarding future development or the Developer could be removed.

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- Removal of unnecessary definitions and provisions relating to the powers of the Association. Other sections can be simplified.
- Clarification or addition of restrictions on floor coverings could be revised to reflect what exists or should exist within the Condominium.
- Clarification or addition of restrictions regarding the appearance of the exterior of the building, patios, balconies, terraces, etc.
- Revision of voting requirements, like those to amend the Declaration, should be revised to allow for the possibility of amendment (as opposed to overly repressive documents that require unattainable percentages of approval).
- Clarification or addition of board rights to levy special assessments or borrow money when necessary to meet unexpected shortfalls in the operating budget.
- Clarification or addition of language allowing the Board to approve alterations to the common elements, thereby making the ability to change things an easier process.
- Revision of restrictions on sales and leases to allow the Association a right to approve sales, as opposed to what used to be very popular, a simple right of first refusal which limits the Association's ability to turn down someone who may not be an appropriate member.
- Addition of the ability to charge a transfer fee in connection with any sale or lease, to recover costs incurred in background checks and other screening efforts made by the Association.
- Revision of restrictions on members. Restrictions that no longer make sense or are illegal (such as limitations on children under a particular age) should be modified or deleted.
- Revision of the provisions regarding insurance to reflect the current obligations and limitations contained in the Florida Statutes and perhaps to remove language regarding the requirement for an Insurance Trustee.
- Clarification or addition of language allowing the collection of a security deposit from a proposed tenant to protect against damage to the common elements.
- Clarification or addition of the power to fine for violation of the Condominium documents and Rules and Regulations.
- Clarification or addition of language that will allow the Association to charge for use of common elements that will be used exclusively by any owner at any given time, like a party room or gazebo.
- Clarification of the size of the Board of Directors. Many documents provide a range and do not reflect the actual number.
- Clarification or addition of language regarding assessment obligations, late fees, interest chargeable and lien priority.
- Clarification or addition of language regarding liability limitations.
- Revision of the quorum provisions and allowing adjournment of meetings, even when a quorum exists, would be appropriate.
- Including the ability to provide notice by electronic transmission (e-mail) if so desired by an owner.

Again, it is imperative to understand that every community is different and what may work for one has nothing to do with what may work for another. Additionally, this is not meant to be an all inclusive list of possible amendments. Instead, it is meant to just give an idea as to the extent of possible amendments in the arena of community associations.

The next time you see your neighbor leaving his garbage can in front of his lawn or in the middle of the common area hallway and wished there was something in your governing documents that explicitly prohibited this, consider amendments to your documents. Your community's governing documents should reflect the needs of the current owners and via appropriate amendments, this can be achieved. ■

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Did you know?

Life Estates

There are many different forms of ownership of real property. One form of ownership is through a life estate. While less common these days, a life estate is an estate held only for the duration of a specified person's life, usually the possessor's, with a remainder interest granted to another individual or entity whose ownership automatically commences after the life estate terminates. When this occurs in a community association setting, the question arises whether the individual with a life estate may become a board member or vote on matters which come before the community.

In the case *Sauls v. Crosby*, 258 So. 2d 326 (Fla. 1st DCA 1972), the Court held that "in this jurisdiction a tenant for life or a person vested with an ordinary life estate is entitled to the use and enjoyment of his estate during its existence. The only restriction on the life tenant's use and enjoyment is that he not permanently diminish or change the value of the future estate of the remainderman [the person who will receive the property after the life estate ends]." This case was cited by the Division of Florida Land Sales, Condominiums and Mobile Homes and put into a condominium context in the arbitration decision, *Spevack v. Plaza Del Prado Condominium Association, Inc.*, Arb. case 04-00-2794, Summary Final Order (March 30, 2004). The Association's governing documents required an individual to be a unit owner, as defined by the Condominium Act, in order to be eligible for a seat on the Board. Section 718.103, Florida Statutes, defines "unit owner" as the "record owner of legal title to a condominium parcel." The arbitrator, citing Sauls v. Crosby, held that in his capacity as a life estate holder the individual was entitled to the use and enjoyment of his unit, which included rights provided to the unit owners via the governing documents, including the right to vote on association matters and eligibility as a board member. The arbitrator pointed out, however, that this did not hold true for the remainderman who had no right of possession until the life estate terminates.

If your Association is faced with a unit owner wishing to create a life estate, please consult with your Association's legal counsel to determine if such types of estates are permitted under your governing documents. ■

TIMESHARING, BY ANY OTHER NAME, SUCH AS FRACTIONAL OWNERSHIP–IS IT STILL THE SAME?

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In this climate of record foreclosures on homes, lackluster sales of new homes, inflated prices of homes, and other problems faced by everyone because of the plummeting real estate market, some developers of new areas or even some existing homeowners are attempting to sell new homes as "Fractional Ownership" homes. Are some trying to portray this as something other than what it really is–a fancy word for "Timesharing Ownership"? Why? If you look at many governing documents, "timesharing" is prohibited. In Florida Statute 718, the Condominium Act, for example, in order for a timeshare estate to be created this form of estate must be clearly allowed in the declaration by a conspicuous statement and details so that everyone will know that a home can be sold in time intervals to multiple owners. Also, it is important to note that many counties do not allow timesharing operations in a traditional residential area such as a homeowners' or condominium development. The counties generally will consider timesharing as a nonresidential use. Also, many codes limit timesharing, if it is classified a nonresidential use, to commercial areas, not residential areas. Also, in this market some owners of existing homes in established associations may want to sell their property using a "fractional ownership" approach.

Generally, Timeshare arrangements are governed by Florida Statute 721, unless, as with some clever plan, the periods sold (the fractional ownership sold) is less than seven (7) periods. Another way some plans seek to circumvent the Statute is to have multiple owners all on the deed as co-owners, each owner has an undivided interest in the entire property, which looks good, but usually there is a separate agreement for the specific periods of time that make up the fractional ownership and define the "use" of the home. This makes it difficult to uncover but we recommend that where a developer is concerned you look at the advertising of the sale of homes. Generally, timeshares are sold in week increments whereas fractional ownership is sold in bundles of time, for example, 1/4th of the time or 13 weeks. So, for example, if the fractional ownership is 1/4 of the time then most likely there are going to be 4 owners of the property and again, it will most likely be a side agreement that will define the fractional ownership so that this scheme is not easily detected by the association or county that prohibits this scheme.

Of concern to our existing associations, is when a developer is selling new homes, with fractional ownership, in areas already established, as it may change the face of the community impacting the use of recreational facilities, increasing traffic and use of the roads, use of water and electricity for common areas, difficulty determining the identity of multiple owners and controlling use of facilities. Similar concerns of congestion and overuse of the facilities develop if an owner in an existing community tries to sell the property to multiple owners under a fractional ownership sale. If your association's governing documents already prohibit timesharing then it appears that an existing home in your development cannot be sold as a fractional ownership; however, if your association is concerned, it may want to amend its declaration to specifically prohibit "fractional ownership" in addition to timesharing. Even with this amendment, you will have to do your due diligence to uncover and keep up with the creativity surrounding fractional ownership sales. ■

...some developers of new areas or even some existing homeowners are attempting to sell new homes as "Fractional Ownership" homes. Are some trying to portray this as something other than what it really is–a fancy word for "Timesharing Ownership"? Why?

FREE WIND INSPECTIONS

MY SAFE FLORIDA HOME

The My Safe Florida Home Program offers free wind inspections of single family detached site built homes in Florida. The Florida Department of Financial Services will have a qualified inspection firm or inspector call you to schedule your free inspections upon receipt of your application for free wind inspection. The inspection report that you would receive will "outline improvements that may be made to your home to increase resistance to hurricane wind damage, provide an estimate of how much each improvement would cost to complete, provide an estimate of insurance discounts that may be available (if you provided insurance information at the time you applied), and offer a hurricane resistance rating that shows the home's current ability and future ability with improvements, to withstand hurricanes." All applicants should know that, with the exception of the insurance information provided at the time one applies for an inspection, the information on the application and in the inspection report is considered public information and available upon request. Grant funds may be available for certain improvements that an owner makes upon recommendation in his or her inspection report. Information, and applications for the free wind inspection, can be obtained by calling the My Safe Florida Home help line at 1-866-513-6734.

Although mobile homes, manufactured homes, apartments, condominiums, multi-family dwellings and businesses are not eligible for free home inspections, you may contact one of the wind inspection firms directly and pay the $150.00 wind inspection fee yourself. More information is available at www.mysafefloridahome.com. ■

Grant funds may be available for certain improvements that an owner makes upon recommendation in his or her inspection report.

The Community Update newsletter written by Becker & Poliakoff, P.A. is published for the benefit of our clients, friends and colleagues. Becker & Poliakoff, P.A. is committed to law related education to benefit the Firm's clients and the public. The objective of this newsletter is to keep officers and directors of Condominium, Cooperative and Homeowner Associations informed about matters affecting their communities operations and was not sent for the purpose of obtaining professional employment. The information provided herein is provided for informational purposes only and should not be construed as legal advice. The publication of this newsletter does not create an attorney-client relationship between the reader and Becker & Poliakoff, P.A. or any of our attorneys. While we make every attempt to ensure that the information contained in the newsletter is accurate, neither Becker & Poliakoff, P.A. nor the author of any article contained in this newsletter are responsible for any errors or omissions. Readers should not act or refrain from acting based upon the information contained in the newsletter without first contacting an attorney, if you have questions about any of the issues raised herein. The hiring of an attorney is a decision that should not be based solely on advertisements or this newsletter. Before you decide, ask us to send you free written information about our qualifications and experience.

COMMUNITY UPDATE™

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SPECIAL FAIR HOUSING ISSUE

April is the 40th anniversary of the laws prohibiting discrimination in housing. The Civil Rights Act of 1968 created the basis for the current fair housing laws.

THE A TO Z'S OF PARTICIPATING IN AND DEFENDING A DISCRIMINATION COMPLAINT

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The thought of defending a discrimination complaint filed against the Association can be quite overwhelming and even unimaginable. If you have never had to participate in defending such a claim, consider yourself lucky. But your luck might run out and your Association may be defending a Discrimination Complaint filed against it, and potentially, the individual board members. If the Association finds itself in this position, the following is likely to occur. Most often, the Association learns of the charge of discrimination, when it receives a packet of documents containing a copy of a letter from the local Civil Rights Office, advising that a "Complaint of Discrimination" has been filed against your company, along with a copy of the actual Discrimination Complaint listing the name of the person filing the complaint, the company(ies) or persons accused of discrimination, and the alleged manner and type of discrimination involved. This packet also contains instructions advising the Association that it must file a "Position Statement" or advise the investigator assigned to the case that the Association would like to participate in some type of negotiated settlement agreement.

All of this is enough to frighten any Board into submission, but in reality a Position Statement is nothing more than the Association's response to the charge of discrimination, including all relevant facts, documents and other information reflecting the Association's defenses to the claim. For example, if a unit or homeowner requests a reasonable accommodation to maintain a pet in a "no pet" community but refuses to provide sufficient information to establish a disability requiring the pet, the Board can state that it did not have sufficient information with which to determine the reasonableness of the request. Conversely, if a unit owner with a visible disability, such as the use of a wheelchair or cane, requests the ability to install a pool lift for ingress and egress and the Association refuses based upon aesthetics, whether or not the Association was aware that its denial was discriminatory, the Association should opt for the settlement option to attempt to avoid the assessment of civil penalties and fines.

No matter what type of discrimination is alleged, the first thing a Board should do is notify its insurance carrier to determine if there is insurance coverage. Next, and just as important, the Board should notify its Association attorney so that a timely response is filed. The Association must convey all of the relevant facts and issues surrounding the charge so the attorney can determine which option best suits the situation. Many times, there is a simple misunderstanding that does not require a significant amount of time or energy. Other times, these cases can become time and labor intensive.

If the Association chooses to file a Position Statement, the county investigator will begin the investigation process. The investigator will request documents from the Association concerning the manner in which other similarly situated individuals have been treated in the past. For instance, there may be requests for violation letters sent to other unit or homeowners concerning the same circumstances, such as the removal of a pet in a "no pet" community; or requests for documents reflecting that the common areas/elements are available to all individuals or groups consistently. Generally, the Association must produce copies of all governing documents, including the Declaration, By-Laws, Articles of Incorporation and Rules and Regulations. The Claimant is also required to produce documentation substantiating the claim of discrimination. In cases involving a claim of medical disability and a request for a reasonable accommodation, the Claimant will be required to produce medical documentation to support the claim of disability. The

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investigator will use this documentation to determine whether discrimination has occurred. However, the Association is unable to view the Claimant's medical documents once a charge or claim of discrimination is filed with the local Civil Rights Office.

The Association also has the ability to offer documentation that the investigator may have overlooked. If there is documentation, testimony and evidence to challenge the charge and provide a legitimate, non-discriminatory basis for the Association's conduct, the Association can and should provide it to the investigator. If the investigator determines that he or she has insufficient information to determine whether or not discrimination has occurred, the investigator may request an informal meeting in which the parties are permitted to call witnesses and produce evidence either in support or opposition of the charge. The Association should understand that throughout the investigatory process, even after a Position Statement is filed, the parties may determine that from a cost/benefit analysis, a conciliation conference, much like an informal mediation, is the most expeditious and cost-effective manner to resolve a claim. This can occur even after a finding of "probable cause" of discrimination but before the case proceeds on the appellate track.

Once the investigator has concluded the investigation process, the investigator issues a finding of "probable cause" of discrimination or dismisses the claim. If the claim is dismissed, the matter is closed and no further action is necessary. If a finding of "probable cause" of discrimination is found, the investigating agency generally encourages the parties to participate in a conciliation conference in order to resolve the dispute. However, imposition of civil fines and penalties is always a possibility. Appellate options are available for those cases in which the Association believes the case has been improperly or unfairly adjudged. If an unsatisfactory decision is reached, the Association can appeal the decision in one of two ways. The case can proceed on appeal in an administrative hearing before the Human Rights Board or the Association can elect to have the claims alleged in the Statement of Charge decided in a civil action brought in a court of competent jurisdiction.

If the claim is brought before the Human Rights Board, the case proceeds in a much more informal manner, but remains with a division of the entity that previously ruled against the Association. If you elect to proceed in a civil action in state court, the case is initiated by the County Attorney's Office and the case proceeds in the same manner as any other civil court action. The rules of civil procedure apply and the case is heard by a judge and jury. There are pros and cons to each of these options and they should be discussed with your attorney so the Association can choose the most appropriate option under the circumstances.

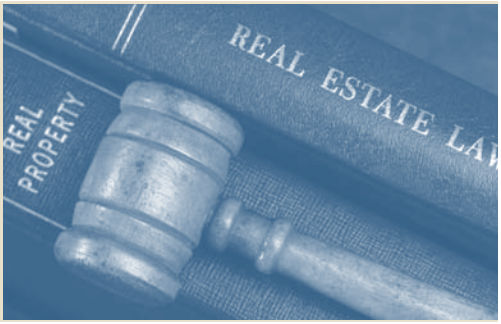
While there remain additional appellate options in the event of an adverse ruling on appeal, this is generally the point where the parties decide to either accept the ruling or attempt to resolve or settle the case. Sometimes the charges of discrimination filed against the Association are frivolous and this is apparent from the beginning. These are the cases that should proceed to investigation. Other times, there are cases in which a Board may not have known of the discriminatory impact of their decisions and although there is no intent to discriminate, the outcome favors the complainant. Settlement or conciliation may be the preferred method of resolution in these cases. Finally, there are situations where discriminatory practices are in effect or discrimination has occurred, and in those cases, conciliation and negotiated settlement agreements are the best option. The best advise is to immediately inform your attorney of the charge of discrimination so that the best course of action can be implemented to defend the claim. ■

Editor's Note: Ms. Burnett is one of the featured speakers at both Fair Housing Symposiums identified in this Update. Her presentation at the Palm Beach Symposium focuses on the housing provider's responsibilities with respect to requests for emotional support animals.

Doesn't Insurance Cover Fair Housing Claims?

Many Associations believe that their insurance policies provide coverage for fair housing or other types of claims of discrimination. While the insurance policy may provide coverage for the costs associated with defending a claim or complaint that the Association (its Board of Directors or employee) engaged in a discriminatory act, public policy prohibits insurance companies from indemnifying the insured for any damages or penalties. In this case, property owners claimed that Bal Harbour Club ("Club") returned their application to prevent Jewish persons from residing in the community. Since Club membership was mandatory, the property owners contended that the Club's actions prevented them from obtaining good and marketable title to the property. The case ultimately settled. While the insurance carrier for the Club appointed counsel to defend the action, it refused to reimburse the Club for the settlement, even though it agreed that settlement was appropriate and advisable under the circumstances. The dispute between the insurance carrier and the Club went through trial court, the appellate court and then all the way to the Supreme Court of Florida. The Supreme Court of Florida held in *Ranger Insurance Company v. Bal Harbour Club, Inc.*, 549 So.2d 1005 (Fla. 1989) that public policy of Florida prohibits an insured from being indemnified for a loss resulting from a discriminatory act. ■

FAIR HOUSING: MAKING REASONABLE ACCOMMODATIONS IN AN UNREASONABLE WORLD



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The Friendly Dunes Condominium Association prides itself on going the extra mile to accommodate every need of its members. Last week, however, was enough to challenge even the prodigious benevolence of the Association's usually affable manager, Patience Long. First there was the problem with Dessi Bell, a long term resident of the condominium who had lately taken to playing her Rolling Stones CDs at such a volume as to cause multiple and increasingly angry complaints from her neighbors. When Patience confronted her with charges of violating the condominium's noise policy, Dessi claimed that because of her failing hearing, she could no longer enjoy the music at normal volumes. She demanded that the Association either waive the noise policy as it applied to her or soundproof her unit. After muttering something about reasonable accommodation and calling her attorney, she bid Patience farewell by slamming the door in her face.

Next, there was Anita Lift, an octogenarian resident of the Association, who showed up in the Association office to complain about her inability to access the community pool due to her severe rheumatoid arthritis. Anita presented Patience with a letter from her doctor explaining that Anita's rheumatoid arthritis had deteriorated her joints, especially those in her legs, to a point where Anita was unstable and unable to enter or exit the pool safely. Anita then threatened that if the Association did not install a pool lift for Anita's exclusive use and at the Association's sole expense, she would sue.

Patience left the office that Friday in a dither, only to catch the youthful, dashing Lane Blocker illegally parking his trendy convertible in a fire lane for the third time that month. Despite her best persuasive efforts, Lane refused to move his car, claiming that his trick knee had gone out again and reminding Patience that he had made three separate requests for a designated parking space next to his unit. If the Association was going to ignore his reasonable requests, Lane reasoned, he was going to park wherever he pleased. With that, he gathered up his tennis racquet and trotted off, leaving Patience to contemplate how she would deal with this sudden onset of acrimony that had infected her peaceful community.

Each of these scenarios potentially implicates the provisions of the Fair Housing Act and the threats of legal action must not be taken lightly. The Fair Housing Act (42 U.S.C. §§3601-3619) makes it unlawful to discriminate against anyone in connection with the sale or rental of housing. Condominium and homeowners' associations are subject to the provisions of the Act and can be held liable in damages if found guilty of discrimination. Discrimination under the Act includes discrimination against persons with disabilities. Acts of discrimination include an Association's refusal to make reasonable accommodations that will ameliorate the effects of the disability. Assigning designated parking spaces, where available, to persons with mobility limitations, or waiving a "no pets" rule to accommodate a blind person's guide dog are two classic examples of accommodations that the Act requires an Association to make. These are by no means the only types of accommodations governed by the Act, and each request for accommodation must be treated as a separate case and resolved on its own merits.

Fair Housing issues arising in the context of condominium

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What are the protected classifications?

You may be aware that both the Federal and State Fair Housing Acts prohibit discrimination based on race, color, religion, sex, handicap, familial status and national origin. You may also know that discrimination on the basis of handicap (or disability) includes the refusal to permit a disabled person to modify the physical premises, at their expense, if the modification is necessary to afford them the full enjoyment of the premises and/or the refusal to make reasonable accommodations in rules, policies, practices or services if those accommodations are necessary to afford the disabled person equal opportunity to use and enjoy the dwelling and its appurtenances. Are you aware of other protected classifications? Local ordinances, on a county and/or municipal level, also govern actions of housing providers. In addition to the classifications mentioned above, some local ordinances include age, marital status, political affiliation and sexual orientation in the protected classifications. Broward County, for example, recently joined Orange and Monroe Counties by protecting transgender residents. The ordinance protects people from discrimination based on gender identity and expression which is defined as the appearance, expression or behavior of a person, regardless of the individual's sex at birth. Please check with your Association Attorney whether there are local ordinances in your jurisdiction. ■

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and homeowners' associations often pit the interests of the alleged disabled person against the burden the requested accommodations impose on the other Association members. Must, for example, the other members bear the considerable expense of installing a pool lift to accommodate a single person? Or pay for the soundproofing of a single unit? How the Association should weigh and decide between these competing interests is not always clear, and miscalculations can result in expensive litigation.

It is advisable for the Association to have in place a standard procedure for dealing with requests for accommodations. A written policy may even be desirable. When a request for accommodations is made, the Association should first require the applicant to give a clear statement of both the disability and the accommodation requested. Preferably, this statement will be in writing, but the Act does not require a written application, and the applicant's refusal to commit the request to writing is not a valid reason to deny it.

Once the disability and the requested accommodation have been clearly stated, the Association board, or some designated committee thereof, should immediately examine it and begin the process of addressing the request. Delays in taking action are not recommended, and depending on how far out the next regular board meeting is scheduled, the Association may need to call a special meeting to deal with the request.

Once the request is before the board, the board should attempt to resolve three questions: (1) does the applicant suffer from a disability?; (2) is the requested accommodation related to the disability in such a way that granting it will affirmatively enhance the applicant's quality of life by ameliorating the effects of the disability?; and (3) is the requested accommodation reasonable? If the board does not have sufficient data to answer these questions, it should request additional information from the applicant. In the above examples, the board would be well within its rights to require Lane Blocker to provide independent evidence of his disability, as such disability is not apparent from his outward appearance. On the other hand, requiring a wheelchair bound applicant to document his or her disability with medical records where the request for an accommodation is clearly related to an obvious disability – such as a wheelchair ramp to enter and exit his or her unit – might be viewed as an obstructionist tactic and is not advisable.

If the board determines that the applicant is disabled, it should next consider whether the requested accommodation would alleviate the disability. If the connection between the disability and the requested accommodation is not obvious – for example, an epileptic's request for waiver of a "no pet" rule to allow for the keeping of a small dog that barks to alert its owner of the onset of a seizure – the board is entitled to ask for information that will establish how the accommodation will alleviate the effects of the disability. It is the applicant's responsibility to supply such information.

Finally, even if the board finds that the disability is legitimate and that the accommodation will enhance the applicant's enjoyment of life, the request can be denied if it imposes an unreasonable burden on the Association. Courts have held that accommodations which impose undue financial and administrative hardships or require fundamental alterations are not reasonable and do not have to be granted. See, *Liddy v. Cisneros*, 823 F. Supp. 164 (S.D.N.Y. 1993) and *Smith & Lee Assoc., Inc. v. City of Taylor, Mich.*, 13 F.3d 920 (6th Circuit 1993). Thus, Anita's request for a pool lift appears to be a legitimate request and a reasonable accommodation that will allow Anita to use and enjoy the community pool. However, because the accommodation is one that is exclusively for the benefit of Anita, the cost of installing and maintaining the lift is the responsibility of the disabled individual. Accordingly, the Association must carefully explain that the requested accommodation is granted, but the Association is not responsible for the cost of installing and maintaining the lift.

Fair Housing issues arise frequently in the context of condominium and homeowners' associations, and the mishandling of these matters has cost many Associations thousands of dollars in damage awards and attorneys' fees. When a request for accommodations is made, take it seriously, and refer any questions to your Association attorney. ■

There are several websites devoted to fair housing issues, they include:

http://fchr.state.fl.us
(Florida Commission on Human Relations)
http://www.hud.gov/offices/fheo
http://www.hud.gov/fairhousing
http://www.fairhousing.com
http://www.fairhousingfirst.org

Local Events:

On Friday, April 4th Broward County's Office of Equal Opportunity, Housing & Community Development is holding a Fair Housing Symposium at the Broward County Convention Center. For more information or to register for this free event call 954-357-7800.

On Friday, April 25th the Palm Beach County Office of Equal Opportunity, along with the Legal Aid Society of Palm Beach County, Inc. and the F. Malcolm Cunningham Sr. Bar Association, will hold a Fair Housing Symposium and Training at the West Palm Beach Marriott. Call 561-355-4884 to register or more information about this free event. ■

The Community Update newsletter written by Becker & Poliakoff, P.A. is published for the benefit of our clients, friends and colleagues. Becker & Poliakoff, P.A. is committed to law related education to benefit the Firm's clients and the public. The objective of this newsletter is to keep officers and directors of Condominium, Cooperative and Homeowner Associations informed about matters affecting their communities operations and was not sent for the purpose of obtaining professional employment. The information provided herein is provided for informational purposes only and should not be construed as legal advice. The publication of this newsletter does not create an attorney-client relationship between the reader and Becker & Poliakoff, P.A. or any of our attorneys. While we make every attempt to ensure that the information contained in the newsletter is accurate, neither Becker & Poliakoff, P.A. nor the author of any article contained in this newsletter are responsible for any errors or omissions. Readers should not act or refrain from acting based upon the information contained in the newsletter without first contacting an attorney, if you have questions about any of the issues raised herein. The hiring of an attorney is a decision that should not be based solely on advertisements or this newsletter. Before you decide, ask us to send you free written information about our qualifications and experience.

COMMUNITY UPDATE™

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CAN ASSOCIATION BOARD MEMBERS HAVE PERSONAL LIABILITY FOR UNPAID PAYROLL TAXES?

"It is important that an Association Board monitor the management company when payroll tax responsibilities are delegated to ensure compliance."

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Membership on the Board of Directors of a Homeowners or Condominium Association (an "Association") could result in liability that most board members would not envision. Specifically, Board members might have personal liability for payroll taxes that are not collected or remitted to the Internal Revenue Service ("IRS"), and for payroll tax returns not filed with the IRS.

Personal Liability for Failure to Pay Payroll Tax

If an organization fails to remit payroll taxes to the government, the IRS has the authority to assess a 100% penalty against certain responsible persons within the organization. The IRS may seek collection from any person within the organization who is responsible for the collection, truthful accounting for, and payment of the trust fund taxes, and who willfully failed to remit the taxes to the government.[1]

Who is a Responsible Person

Because neither the Internal Revenue Code ("IRC") nor the Treasury Regulations define who is considered a responsible person, the interpretation has been left up to the courts, which have taken a very broad view.[2] A responsible person has been described as an individual who:

- Possesses the effective power to pay the tax;[3]
- Exerts significant control over the company's finances or general decision-making;[4] or
- Controls disbursements of funds and the priority of payments to creditors in preference of withholding obligations.[5]

The determinations above are made on a pure facts and circumstances analysis. Although the following factors have been held to be relevant in making a responsible person determination, no single factor will cause an individual to be classified as a responsible person. These factors include whether the individual:

- is an officer or member of the board of directors;
- owns shares or possesses an entrepreneurial stake in the company;
- is active in the management of day-to-day affairs of the company;
- has the ability to hire and fire employees;
- makes decisions regarding which, when, and in what order outstanding debts or taxes will be paid;
- exercises control over daily bank accounts and disbursement records; and
- has check-signing authority.[6]

In analyzing the facts and circumstances, the courts attempt to determine whether the person was connected closely enough

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"...if there are options for the use and materials, design, size, and location of the structure or improvement, then neither the association nor the ARC can restrict an owner's right to choose from one of these options."

HOA ARCHITECTURAL CONTROL, SECTION 720.3035 OF THE FLORIDA STATUTES

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Many Boards are asking whether or not their authority to approve or disapprove alterations in a homeowners' association have been eliminated as a result of Section 720.3035 which became effective on July 1, 2007. Although the new law does not eliminate an association's ability to regulate alterations to a lot, said authority must be specifically stated or reasonably inferred within the Declaration of Covenants and Restrictions.

The new law provides that the authority of a homeowner's association or Architectural Review Committee (ARC) 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 as authorized by the Declaration of Covenants.

The term "reasonably inferred" means that the scope of the ARC's authority and ability to regulate the exterior appearance of the homes and lots can be fairly broad, but the application of the ARC's authority must be reasonably inferable from the express language of the Declaration. For example, if a Declaration provides that owners are responsible for painting the exterior of their homes, and that the association and/or the ARC has the authority to regulate exterior color, we could have reasonably inferred that the ARC has the ability to choose a pallet of colors from which an owner must pick the exterior color of his or her home. However, if the ARC does not have the authority to regulate color, then it would be permissible under Section 720.3035 for the owner to choose the color of the exterior of their home.

The new law provides that, if there are options for the use and materials, design, size, and location of the structure or improvement, then neither the association nor the ARC can restrict an owner's right to choose from one of these options. For example, if the Declaration states that a member may place a wooden fence in their yard, the ARC cannot restrict an owner's right to place a wooden fence in their yard, nor can the ARC require that all fences be made of PVC or wrought iron, without an amendment to the Declaration of Covenants and Restrictions.

Furthermore, unless otherwise specifically stated in the Declaration of Covenants or other published guidelines and standards authorized by the Declaration of Covenants, each parcel shall be deemed to have only one front for purposes of determining the required front setback, even if the parcel is bounded by a roadway or other easement on more than one side. When the Declaration of Covenants or other published guidelines and standards authorized by the Declaration of Covenants do not provide for specific setback limitations, the applicable county or municipal setback limitations shall apply, and neither the association nor any Architectural Review Committee (ARC) shall enforce or attempt to enforce any setback limitation that is inconsistent with the applicable county or municipal standard or standards. For example, if setbacks are not clearly set forth in the Declaration, then the association cannot create setbacks for the installation of improvements to the lot. The association, however, can require that the setbacks comply with any county or municipal setback limitations.

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This new law, as is the case with many new laws, is subject to interpretation until there is a precedent to guide us by the courts. However, a homeowner's association or ARC should not rely on undefined, unwritten, unpublished architectural control guidelines. Rather, the homeowner's association and ARC should be conservative and use the guidelines and standards that are published in the Declaration of Covenants or in a separate document, i.e., Rules and Regulations, if and only if one is permitted by the Declaration. A rule of thumb is if either the association or the ARC do not have the authority clearly provided in the Declaration or more specific ARC standards in writing to the extent that those standards address location, type, color, design, etc. and are permitted under the Declaration, the association should be cautious when approving or disapproving alterations to a lot.

The association should be aware that if the association or the ARC unreasonably, knowingly, and willfully infringe upon or impair the rights and privileges set forth in the Declaration of Covenants or other published guidelines and standards authorized by the Declaration of Covenants, the adversely affected parcel owners shall be entitled to recover damage caused by such infringement or impairment, including any costs and reasonable attorney's fees incurred in preserving or restoring the rights and privileges of the parcel owner set forth in the Declaration of Covenants or the published guidelines and standards authorized by the Declaration of Covenants.

Whenever a homeowner's association or ARC is in doubt as to whether or not they should approve or disapprove a modification to a lot, they should seek assistance from legal counsel to determine whether or not said authority is implied in the Declaration. Furthermore, if your association would like assistance reviewing the Declaration, or other published guidelines or standards authorized by the Declaration to determine whether any amendments are necessary based on this new law, please contact your association attorney for guidance. ■

720.3035 Architectural control covenants; parcel owner improvements; rights and privileges.--

(1) The authority of an association or any architectural, construction improvement, or other such similar committee of an association 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.

(2) If the declaration of covenants or other published guidelines and standards authorized by the declaration of covenants provides options for the use of material, the size of the structure or improvement, the design of the structure or improvement, or the location of the structure or improvement on the parcel, neither the association nor any architectural, construction improvement, or other such similar committee of the association shall restrict the right of a parcel owner to select from the options provided in the declaration of covenants or other published guidelines and standards authorized by the declaration of covenants.

(3) Unless otherwise specifically stated in the declaration of covenants or other published guidelines and standards authorized by the declaration of covenants, each parcel shall be deemed to have only one front for purposes of determining the required front setback even if the parcel is bounded by a roadway or other easement on more than one side. When the declaration of covenants or other published guidelines and standards authorized by the declaration of covenants do not provide for specific setback limitations, the applicable county or municipal setback limitations shall apply, and neither the association nor any architectural, construction improvement, or other such similar committee of the association shall enforce or attempt to enforce any setback limitation that is inconsistent with the applicable county or municipal standard or standards.

(4) Each parcel owner shall be entitled to the rights and privileges set forth in the declaration of covenants or other published guidelines and standards authorized by the declaration of covenants concerning the architectural use of the parcel, and the construction of permitted structures and improvements on the parcel and such rights and privileges shall not be unreasonably infringed upon or impaired by the association or any architectural, construction improvement, or other such similar committee of the association. If the association or any architectural, construction improvement, or other such similar committee of the association should unreasonably, knowingly, and willfully infringe upon or impair the rights and privileges set forth in the declaration of covenants or other published guidelines and standards authorized by the declaration of covenants, the adversely affected parcel owner shall be entitled to recover damages caused by such infringement or impairment, including any costs and reasonable attorney's fees incurred in preserving or restoring the rights and privileges of the parcel owner set forth in the declaration of covenants or other published guidelines and standards authorized by the declaration of covenants.

(5) Neither the association nor any architectural, construction improvement, or other such similar committee of the association shall enforce any policy or restriction that is inconsistent with the rights and privileges of a parcel owner set forth in the declaration of covenants or other published guidelines and standards authorized by the declaration of covenants, whether uniformly applied or not. Neither the association nor any architectural, construction improvement, or other such similar committee of the association may rely upon a policy or restriction that is inconsistent with the declaration of covenants or other published guidelines and standards authorized by the declaration of covenants, whether uniformly applied or not, in defense of any action taken in the name of or on behalf of the association against a parcel owner.

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with the business to prevent the nonpayment of tax from occurring.[7] The involvement by directors in the day-to-day activities of the organization has been found to be determinative in organization directors being responsible persons.[8]

Who is Not a Responsible Person

Courts have held, with respect to directors, that there had never been a case where an outside director of a publicly held corporation had been held to be a responsible person who: 1) neither signed nor had authority to sign checks, 2) did not participate in the day-to-day fiscal management of the corporation, 3) did not control the payroll, 4) did not determine which creditors would be paid, and 5) did not own a significant fraction of the company's voting stock.[9]

Although it was an important factor that the director was the most important individual in the business affairs of the company, that in and of itself was not sufficient to make him a responsible person. The crucial inquiry was whether the director held the substantive power to compel or prohibit the allocation of corporate funds with respect to the trust fund taxes. Given that no evidence was provided that such director had exercised control of the collection, accounting for, and payment of the trust fund taxes, the court ruled that he was not a responsible person.

Effect of Delegation to Management Company

Association Boards generally delegate the responsibility of payroll taxes to management companies. Generally the belief would be that such delegation of responsibilities would alleviate the Board members from the possibility of having personal liability, however, this is not necessarily the case.

Courts have held that if an individual had sufficient authority in the organization such that the tax delinquency could have been avoided, delegation of responsibility to collect and remit the tax will not relieve an otherwise responsible person of liability.[10]

In one case, the chairman of the board of directors of a not-for-profit organization attempted to avoid responsible person classification by claiming to have delegated it to others. The authority to oversee the preparation of tax returns, the keeping of records, the payment of wages, and the withholding and payment of taxes rested with the board, the duties were delegated to the executive director and the accountant. The court ruled that the law does not permit individuals to delegate their authority to another person and blindly trust that the duties will be carried out.[11]

In such situations where the Association Board delegates payroll tax responsibility to a management company, it is important that the Board verify that the management company is abiding by its responsibilities.

Willfulness

As discussed above, the responsible person must willfully fail to remit the taxes to the Government. This sounds like a high standard, however, the willfulness criterion has been described as a "voluntary, conscious and intentional decision to prefer other creditors over the Government".[12] Willfulness in this context requires only that the responsible person knew that the organization was required to pay withholding taxes and that company funds were being used for other purposes.[13] The IRS is not required to establish that the person deliberately sought to defraud the Government.[14]

Conclusion

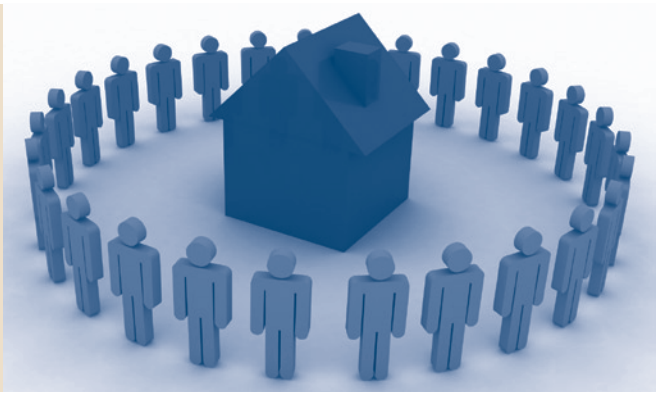
The members of an Association Board might have personal liability for the penalties for unpaid payroll taxes. It is important that an Association Board monitor the management company when payroll tax responsibilities are delegated to ensure compliance. In the event an Association Board discovers that the Association is delinquent in its payroll tax obligations, it is important for the Board to be proactive and work towards being 100% compliant. ■

IRS Circular 230 Disclosure

To ensure compliance with requirements imposed by the IRS, we inform you that any U.S. federal tax advice contained in this document 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 that is contained in this document. ■

[1] IRC section 6672(a)
[2] The CPA Journal, *Volunteers and Their Responsibilities for Trust Fund Taxes*, July 2007
[3] *Howard v. U.S.*, 83-2 USTC para. 9528 (CA-5, 1983)
[4] *Hochstein v. U. S.*, 90-1 USTC para. 50,205 (CA-2, 1990)
[5] *Gephart*, 87-1 USTC para. 9319 (CA-6, 1987)
[6] *Thomas v. U.S.*, 94-2 USTC para. 50,607 (CA-7, 1994)
[7] *Bowlen v. U.S.*, 92-1 USTC para. 50,098 (CA-7, 1992)
[8] *Carter v. U.S.*, 89-2 USTC para. 9446 (S.D. N.Y., 1989)
[9] *Godfrey v. U.S.*, 84-2 USTC para. 9974 (CA-FC, 1984)
[10] *Thomsen v. U.S.*, 89-2 USTC para. 9575 (CA-1, 1989)
[11] *Wright v. U.S.* [96-1 USTC para. 50,114 (E.D. N.Y., 1996)
[12] *Burden v. U.S.*, 73-2 USTC para. 9547 (CA-10, 1973)
[13] e.g., *U.S. v. Rem*, 94-2 USTC para. 50,357 (CA-2, 1994)
[14] *Thomas v. U.S.*, 94-2 USTC para. 50,607 (CA-7, 1994)

"Quorum requirements are generally found in an organization's bylaws. Simply reviewing bylaws alone, however, may not provide the correct answer to quorum questions when dealing with Florida condominium and homeowner associations."



QUORUM REQUIREMENTS EXPLAINED

A quorum is the minimum number of people who must be present at a meeting in order for the attendees to conduct business. It therefore stands to reason that the meeting chairperson's first priority should be to determine whether quorum requirements have been met. It is the presiding officer's responsibility to know the quorum requirements and to be certain that they are satisfied before conducting business.

Quorum requirements are generally found in an organization's bylaws. Simply reviewing bylaws alone, however, may not provide the correct answer to quorum questions when dealing with Florida condominium and homeowner associations. This is because certain provisions of Florida law sometimes "trump" the quorum provisions of the bylaws. Fla. Stat. 718.112 (2)(b)1, for example, fixes the quorum requirement for a condominium association owner's meeting at a majority of the voting interests, unless the bylaws provide for a lower number. Thus, the quorum requirements for a condominium association owner's meeting can never be greater than a majority, though they can be less, if the bylaws so provide.

Quorum requirements for a homeowner association members meeting are even less strenuous. Fla. Stat. 720.306(1)(a) fixes the requirement at thirty (30%) percent of the voting interests, unless the bylaws provide for a lower number. Regardless of what the bylaws provide, the quorum for such a meeting can never be greater than thirty (30%) percent of the voting interests.

As to board meetings, there are no Florida statutes that supersede the quorum requirements of an association's bylaws. Quorums for association board meetings, whether condominium or homeowner, are governed by the bylaws. If the bylaws are silent on the subject, Fla. Stat. 617.0824 fixes the quorum requirement at a majority.

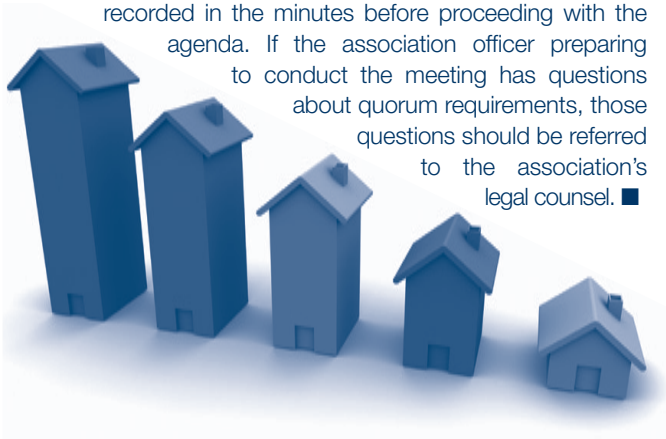
In determining whether a quorum is present for a condominium association owners meeting, both general and limited proxies should be counted. (Fla. Stat. 718.112 (2)(b)2) As to homeowner association membership meetings, members have a statutory right to attend meetings by proxy (Fla. Stat. 720.306(8)) and therefore general proxies must be counted to determine if a quorum is present. While limited proxies are not specifically mentioned in Chapter 720, it is this writer's opinion that they should also be counted for purposes of determining a quorum.

What if a condominium unit is being foreclosed so that there is no official representative for that unit? Can such a unit be disregarded for the purpose of calculating quorum requirements? The case of *Chateau DeVille Condominium Assoc., Inc. v. Mikhail*, 583 So.2d 358 (Fla. 5th DCA 1991) holds no. If the unit exists, it must be counted. The same logic would likely apply in cases where a homeowner association member's right to vote has been suspended for nonpayment of assessments. *Mikhail* suggests that it is the unit itself which must be counted, regardless of whether the unit owner is entitled to cast a vote.

Must quorum requirements be satisfied in order for a condominium association to hold board elections? Fla. Stat. 718.112(2)(d)(3) provides that there is no quorum requirement for election of board members. However, at least twenty (20%) percent of eligible voters must cast a ballot in order for the election to be valid.

It is important to remember that a quorum must be present throughout the meeting. If attendees leave during the course of a meeting so that a quorum is no longer present, the meeting should be either suspended until other members can be summoned or adjourned until a later date.

Any action taken at a meeting at which a quorum is not present is null and void. It is vital that the presiding officer note the presence of a quorum at the meeting's outset and have it recorded in the minutes before proceeding with the agenda. If the association officer preparing to conduct the meeting has questions about quorum requirements, those questions should be referred to the association's legal counsel. ■



LIFE SAFETY REMINDER

FIRE SPRINKLER RETROFIT REQUIRED BY 2014

The Florida Fire Prevention Code requires retrofitting of fire sprinklers in high rise buildings that are more than 75 feet in height by the year 2014. However, condominium and cooperative associations may "opt out" of the retrofitting requirement with respect to the units pursuant to Section 718.112(2)L, and Section 719.1055(6), Florida Statutes respectively. These Statutes contain detailed procedures summarized as follows:

Notwithstanding anything contained in the Florida Statutes or any other codes, ordinances or rules regarding fire prevention, a condominium or cooperative association is not obligated to retrofit the units with a fire sprinkler system if the unit owners have voted to forego such retrofitting by the affirmative vote of two-thirds (2/3rds) of all voting interests. However, said associations cannot vote to forego the retrofitting of the common areas, meaning the enclosed hallways, corridors, lobbies, stairwells or entryways.

A vote to forego retrofitting may be obtained at a membership meeting or by execution of a written consent by the member.

The vote shall be effective upon recording of a certificate attesting to such vote in the public records of the county where the condominium or cooperative is located.

Within thirty (30) days after the opt out vote, the results shall be mailed, hand delivered or electronically transmitted to all unit owners and maintained in the official records of the association.

After such notice is provided to each owner a copy shall be provided by the current owner to any new owner prior to closing and shall be provided to renters prior to signing a lease.

The association must also notify the Division of Florida Land Sales, Condominiums and Mobile Homes by completing forms provided by the Division.

Although the above-referenced law allows condominium and cooperative associations to opt out of the fire sprinkler retrofitting requirement, each association must consider that life safety codes are obviously designed to save lives. Although the cost of retrofitting may be great, each association must balance the cost savings against the life safety issues. ■

Editor's note: A legislative proposal to extend the date for compliance with retrofitting requirements until the year 2025 was vetoed after the 2006 session and another proposal to extend the date for compliance until 2020 died on the calendar in 2007. This issue is not addressed in any proposed legislation this session.

The Community Update newsletter written by Becker & Poliakoff, P.A. is published for the benefit of our clients, friends and colleagues. Becker & Poliakoff, P.A. is committed to law related education to benefit the Firm's clients and the public. The objective of this newsletter is to keep officers and directors of Condominium, Cooperative and Homeowner Associations informed about matters affecting their communities operations and was not sent for the purpose of obtaining professional employment. The information provided herein is provided for informational purposes only and should not be construed as legal advice. The publication of this newsletter does not create an attorney-client relationship between the reader and Becker & Poliakoff, P.A. or any of our attorneys. While we make every attempt to ensure that the information contained in the newsletter is accurate, neither Becker & Poliakoff, P.A. nor the author of any article contained in this newsletter are responsible for any errors or omissions. Readers should not act or refrain from acting based upon the information contained in the newsletter without first contacting an attorney, if you have questions about any of the issues raised herein. The hiring of an attorney is a decision that should not be based solely on advertisements or this newsletter. Before you decide, ask us to send you free written information about our qualifications and experience.

Save a Tree  Get an E-mail

Community Update is Going Green!!!

NEW POLICY– PLEASE READ

The July edition of Community Update
will be emailed to all board members with email addresses plus,
one (1) hard copy will be mailed to the Association's
designated contact.

ADDED BENEFIT

We will email to all Board Members for whom we have an email address plus we will email to as many other people the Board would like to include.

ACTION NEEDED

To sign up for e-CUP (electronic Community Update),
simply go to
http://www.becker-poliakoff.com/forms/ca.html

The Form must be complete in order to start receiving the newsletter electronically. If you are already receiving it electronically, you do not need to complete the form.

Questions?
Contact your Association's Attorney

COMMUNITY UPDATE™

VOLUME V, 2008 | **Serving Florida's Communities Since 1980** | Lisa Magill, Esq., Editor

FORE!!
WARNING–FLORIDA COURTS HOLD AMENDMENTS REQUIRING HOME PURCHASERS TO JOIN COUNTRY CLUBS ARE INVALID

By: Peter C. Mollengarden, Esq.
pmollengarden@becker-poliakoff.com

Sun, beach, boating and golf are typically among the first things that come to mind when one thinks of South Florida, and not necessarily in that order. Golf is a favorite activity or hobby of thousands, if not millions, of Floridians of all ages, but particularly for retirees since our climate allows year round play. In light of that, golf courses and country club communities have sprouted all over South Florida like Starbucks franchises. Why not keep developing country club golf communities to serve an unlimited supply of golfers and their insatiable hunger for places to live and play, right?

Alas, the "Field of Dreams" philosophy of "build it and they will come" has proven to be erroneous. Many county clubs are suffering from diminishing memberships and rising costs (maintaining and operating a golf course and related club facilities, including clubhouse, restaurant, tennis, etc ain't cheap) and are scrambling to increase revenues. Several clubs have turned to the most convenient and seemingly natural source of memberships and revenue, the homeowners in the community(ies) within which the club was developed. Although such communities were usually developed as a homeowners association whose membership is comprised of the owners of the residential lots and dwellings, typically membership in the country club was not mandatory and the Declaration of Covenants and Restrictions frequently would provide that the homeowners may, but were not required to join the club. In order to tap into this source of memberships and revenue several clubs and homeowners associations have managed to amend the Association's governing documents to provide that membership in the club is mandatory for Association members. Needless to say, such amendments caused great consternation and controversy among many homeowners who had no desire to be club members and be subjected to club dues, fees or assessments (including, in some cases, minimum food and beverage charges). Predictably, this has led to litigation as homeowners have challenged some of these mandatory club membership schemes.

Although there are currently no Florida appellate court decisions, in a least two (2) trial court decisions, from Palm Beach County and Martin County, amendments to homeowners associations documents establishing mandatory country club memberships have been

"Although there are currently no Florida appellate court decisions, in a least two (2) trial court decisions, from Palm Beach County and Martin County, amendments to homeowners associations documents establishing mandatory country club memberships have been struck down and held invalid."

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struck down and held invalid. In Anthony and Jayne Granuzzo vs. Willoughby Golf Club, Inc. and George and Joan Maclean (Circuit Court of the 19th Judicial Circuit, Martin County, Florida, Final Judgment January 17, 2008) the amendments had been approved by a vote of the membership and in George Chismark, Carmen Bowman, et al vs. Ironhorse Property Owners Association, Inc. and Ironhorse Country Club, Inc. (Circuit Court of the 15th Judicial Circuit, Palm Beach County, Florida, Final Summary Judgment, February 8, 2008) the challenged amendments had been adopted and recorded by the developer and then subsequently allegedly approved by a "straw vote" of the membership.

In Granuzzo, the original Declaration provided that "no owner or occupant gains any right to enter or use the Golf Club facilities by virtue of ownership or occupancy of a Unit" and "neither membership in the Association nor ownership or occupancy of a Unit shall confer any ownership interest in or right to use the Golf Club" and, finally, "…under no circumstances shall the Golf Club be conveyed to the Association and no Owner shall have any right or interest in the Golf Club by virtue of ownership or occupancy of a Unit." The Declaration was amended to provide that all Association members become at least social members of the country club (subject to club fees, assessments and a minimum food and beverage charge) and the provision prohibiting the conveyance of the Golf Club to the Association was deleted.

In Chismark, the Master Declaration originally provided that memberships in the club were voluntary and available to owners, subject to availability and the rules and regulations of the club, as outlined in the club's own separate governing documents. The developer recorded extensive amendments to the Master Declaration under a reservation of authority in the Master Declaration providing the developer the unilateral power to amend the Master Declaration for a certain period of time. The amendments provided that each owner of a lot with a home in the Ironhorse community must be a club member and eliminated the club's obligation to pay assessments to the Association.

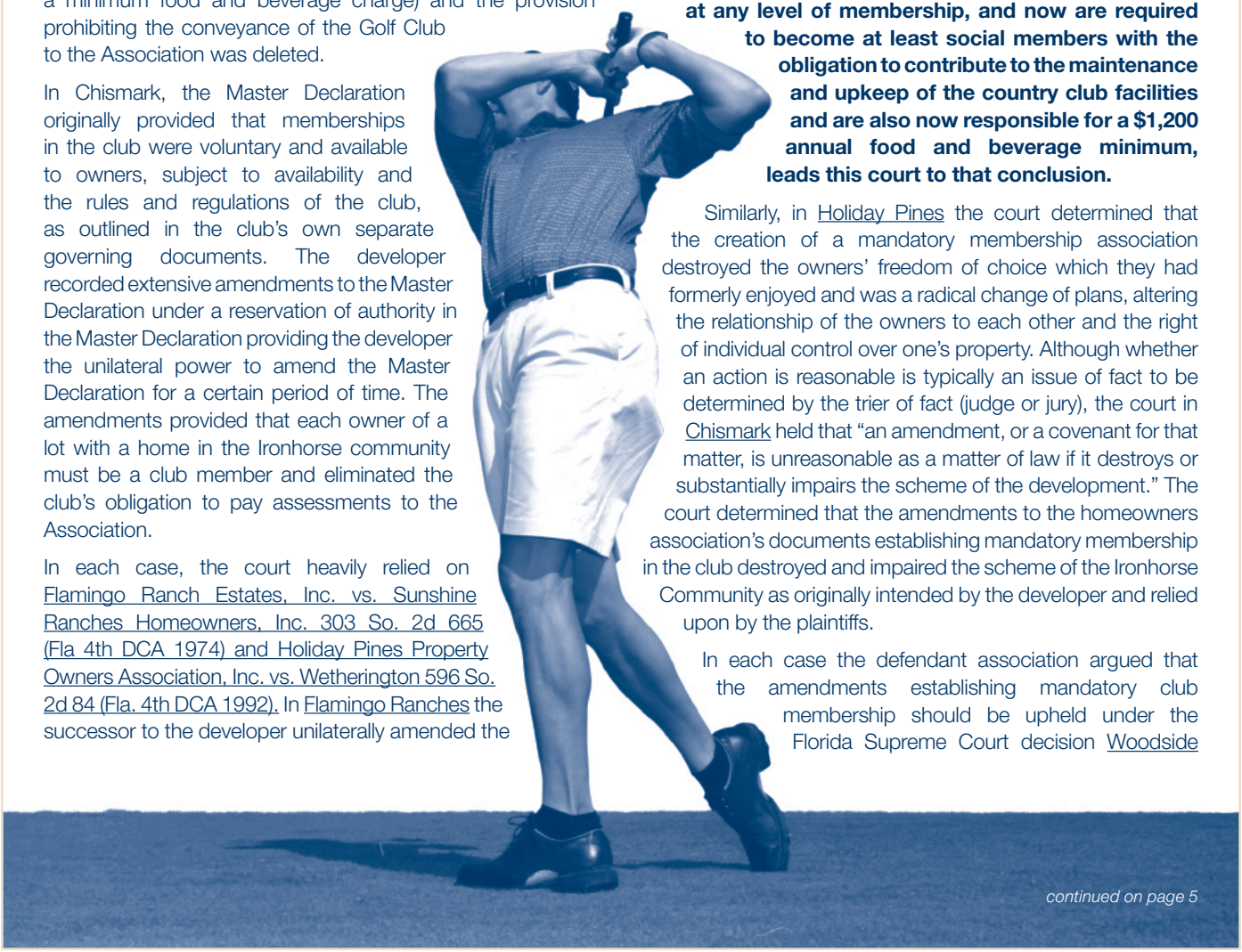
In each case, the court heavily relied on Flamingo Ranch Estates, Inc. vs. Sunshine Ranches Homeowners, Inc. 303 So. 2d 665 (Fla 4th DCA 1974) and Holiday Pines Property Owners Association, Inc. vs. Wetherington 596 So. 2d 84 (Fla. 4th DCA 1992). In Flamingo Ranches the successor to the developer unilaterally amended the Declaration of Restrictions to permit a portion of the property to be used for both business and residential purposes. In Holiday Pines the Declaration was amended twice, the first creating an association authorized to establish and amend regulations concerning the property, and the second making membership in the association mandatory and providing for the payment of dues or assessments and allowing the association to file and foreclose liens against the owners' lots for failure to pay.

The court in Flamingo Ranches held that a clause reserving the right to the developer to amend the declaration is valid so long as it is exercised in a reasonable manner as not to destroy the general scheme or plan of development. Even though more than sixty-seven percent (67%) of the voting members of the Willoughby Golf Club, Inc. (the homeowners association) approved the amendments to the Declaration mandating membership in the club (per the amendatory provisions of the Declaration) the court in Granuzzo held that the amendments were not exercised in a reasonable manner and had the effect of destroying the general scheme or plan of Willoughby. In support of that holding the court stated:

The fact that property owners who purchased in Willoughby, knowing that they were not required to become members of the golf course or country club, at any level of membership, and now are required to become at least social members with the obligation to contribute to the maintenance and upkeep of the country club facilities and are also now responsible for a $1,200 annual food and beverage minimum, leads this court to that conclusion.

Similarly, in Holiday Pines the court determined that the creation of a mandatory membership association destroyed the owners' freedom of choice which they had formerly enjoyed and was a radical change of plans, altering the relationship of the owners to each other and the right of individual control over one's property. Although whether an action is reasonable is typically an issue of fact to be determined by the trier of fact (judge or jury), the court in Chismark held that "an amendment, or a covenant for that matter, is unreasonable as a matter of law if it destroys or substantially impairs the scheme of the development." The court determined that the amendments to the homeowners association's documents establishing mandatory membership in the club destroyed and impaired the scheme of the Ironhorse Community as originally intended by the developer and relied upon by the plaintiffs.

In each case the defendant association argued that the amendments establishing mandatory club membership should be upheld under the Florida Supreme Court decision Woodside



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CUP SPOTLIGHT

Ellen Hirsch de Haan, Esq., a Firm Shareholder in our Tampa Bay office, was recently selected as "Educator of the Year" by Community Associations Institute ("CAI").

Her book entitled Self-Management: A Guide for the Small Community Association, was published by Community Associations Press, Alexandria, Virginia, in May, 2000.

Ms. de Haan was also installed as the President of the Foundation for Community Association Research, a national, nonprofit 501(c)(3) organization devoted to common interest community research, development, and scholarship. Incorporated in 1975, the Foundation supports and conducts research in the community, homeowner, and condominium association industry. ■

ELECTRONIC DELIVERY OF COMMUNITY UPDATE

Please make sure your Community Association Attorney has complete and up-to-date contact information for all of the officers of the Association and members of your management team. Distribution of this publication changes this July – don't miss out!

Help us: www.becker-poliakoff.com/forms/ca.html.

A full legislative update will appear in Volume VII. Many significant changes were approved this legislative session. Download the bills at www.callbp.com and check the website periodically for information on presentations explaining the changes in your area.

HOA RESERVE ACCOUNTS

Although not a model of clarity, pursuant to a legislative amendment to Section 720.303(6), Florida Statutes, a Homeowner's Association governed by Chapter 720, the Homeowners' Associations Act, is currently only required to establish reserve accounts for capital expenditures and deferred maintenance, as defined in this statute, under two (2) distinct scenarios, as follows: 1) a Developer effectuated these statutory reserve accounts during the time the subdivision was under Developer control; or 2) a majority of the entire membership has either voted at a duly convened membership meeting to establish reserve accounts, or executed written consents to accomplish same (in lieu of a membership meeting). If your subdivision's fiscal operations do not fall into one of these two (2) scenarios, then your Homeowner Association will be released from any requirement to establish these statutory reserve accounts, unless and until the membership votes to establish such reserve accounts or the law is changed.

If, however, your Homeowner Association does fall into one of these scenarios, then your reserve accounts will be handled in essentially the same fashion as reserve accounts in a condominium, as follows. Reserve account funding levels are calculated and collected based upon the estimated remaining useful life and estimated replacement cost or deferred maintenance expense of each reserve item. Once established, the only way these reserve funding levels can be collected at a lesser amount than that required by such calculation is upon the approval of a majority of those owners attending, in person or by proxy, a duly convened membership meeting at which they vote in favor of a reduced, or entirely waived, level of reserve funding. Similarly, any proposed use of existing reserves for purposes other than that for which originally collected would first require the approval of a majority of those owners attending, in person or by proxy, a duly convened membership meeting at which they vote in favor of such alternate use of the reserve funds.

Finally, if your Homeowners Association does not have these statutory reserve accounts because it does not fall under one of the two (2) scenarios described above, it may still be collecting "non-statutory" reserves. That is, the Association may be collecting for reserves pursuant to its documents or Board decision, even though such collection did not arise under either of the two (2) scenarios, discussed above, and may continue to collect these "non-statutory reserves." Unless otherwise required by the documents, changes (increases, reduction or elimination) to such "non-statutory" reserves can be accomplished by the Board of Directors, without the necessity of a membership vote. Nevertheless, the Association's statutorily required financial report must state in conspicuous type that the Association's budget does not provide for the statutory reserve accounts, and that the statutory reserve accounts can be established by membership vote, as further elaborated in Section 720.303(6)(c), Florida Statutes. ■

HOA RESERVE DISCLOSURES

In the event the Association does not maintain funded reserve accounts, the year end financial report must state:

THE BUDGET OF THE ASSOCIATION DOES NOT PROVIDE FOR RESERVE ACCOUNTS FOR CAPITAL EXPENDITURES AND DEFERRED MAINTENANCE THAT MAY RESULT IN SPECIAL ASSESSMENTS. OWNERS MAY ELECT TO PROVIDE FOR RESERVE ACCOUNTS PURSUANT TO THE PROVISIONS OF SECTION 720.303(6), FLORIDA STATUTES, UPON THE APPROVAL OF NOT LESS THAN A MAJORITY OF THE TOTAL VOTING INTERESTS OF THE ASSOCIATION.

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Village Condominium Association, Inc. vs. Jahren 806 S. 2d 452 (Fla. 2002). In Woodside, the Florida Supreme Court upheld an amendment to the declaration of condominium approved by two-thirds (2/3) of the membership restricting leasing and held that amendments approved by the owners should be presumed valid and upheld unless it is demonstrated that the amendments are arbitrary, against public policy, or in violation of some fundamental constitutional right. The court in Granuzzo and Chismark distinguished Woodside on the basis that it was a condominium case and that the Supreme Court had emphasized there is a difference between condominium life and other forms of property ownership. The Supreme Court stated in Woodside that "from the outset, courts have recognized that condominium living is unique and involves a greater degree of restrictions upon the rights of the individual unit owners when compared to other property owners."

Regarding condominiums, Section 718.114, Florida Statutes, addresses the power or ability of a condominium association to acquire memberships or use interests in facilities such as country clubs, golf courses, marinas and other recreational facilities as follows in pertinent part:

An association has the power to enter into agreements, to acquire leaseholds, memberships, and other possessory or use interests in lands or facilities such as country clubs, golf courses, marinas, and other recreational facilities. It has this power whether or not the lands or facilities are contigious to the lands of the condominium, if they are intended to provide enjoyment, recreation, or other use or benefit to the unit owners. All of these leaseholds, memberships and other possessory or use interests existing or created at the time of recording the Declaration must be stated and fully described in the Declaration. Subsequent to the recording of the Declaration, agreements aquiring these leaseholds, memberships, or other possessory use interests not entered into within twelve (12) months following the recording of the Declaration shall be considered a material alteration or substantial addition to the real property that is Association property, and the Association may not acquire or enter into agreements acquiring these leaseholds, memberships, or other possessory or use interests except as authorized by the Declaration as provided in Section 718.113.

The Declaration may provide that the rental, membership fees, operations, replacements, and other expenses are common expenses and may impose covenants and restrictions concerning their use and may contain other provisions not inconsistent with this chapter.

Chapter 720, Florida Statues, which governs homeowners associations, does not contain a provision similar to the above statute in the Condominium Act.

In any event, as noted above, Granuzzo and Chismark are trial court decisions which have limited precedential value. It is our understanding that as of the date of publication of this article each case is under appeal and hopefully the Fourth District Court of Appeal will render an opinion, or two, on the issue of amendments to homeowners association documents creating mandatory club memberships. Furthermore, had the above discussed amendments grandfathered in the current owners, and only required new owners to be club members, that may have led to a different result if the court determined that by grandfathering the current owners the amendment did not destroy the general scheme of development. That, however, is pure speculation and for now it is clear that, in at least two trial court cases, amendments to declarations of restrictions for homeowners associations establishing mandatory memberships in country clubs located in the community were not looked upon favorably and country clubs may have to go back to the drawing board in their quest for more members and revenue. In Granuzzo and Chismark the court ordered the plaintiffs be reimbursed all money paid to the club for membership fees, dues, assessments or related to the operations, repairs or maintenance of the club facilities. ■

"Alas, the 'Field of Dreams' philosophy of 'build it and they will come' has proven to be erroneous."

Many Florida residents bought homes in Country Club communities for the feel of Country Club living, without the attendant expenses of membership in the Club. Declining Club membership impacts Club operations, increases the costs per member and has a direct effect on the look of the property. Some communities have attempted to thwart drastic per member price increases by requiring new owners to join the Club. Florida Courts have rejected those amendments.

PROCEDURE FOR REVITALIZATION OF EXPIRED COVENANTS EXTENDED TO NON-MANDATORY HOMEOWNERS' ASSOCIATIONS

During the 2004 Legislative Session, the Florida Legislature adopted a covenant revitalization procedure that would permit a homeowners' association to revitalize a declaration of covenants that had ceased to govern one or more parcels in the community. This procedure is set forth in Chapter 720, Part III, Florida Statutes.

Because of its inclusion in Chapter 720, which governs "mandatory homeowners' associations," the revitalization process was not available to other types of homeowners' associations.

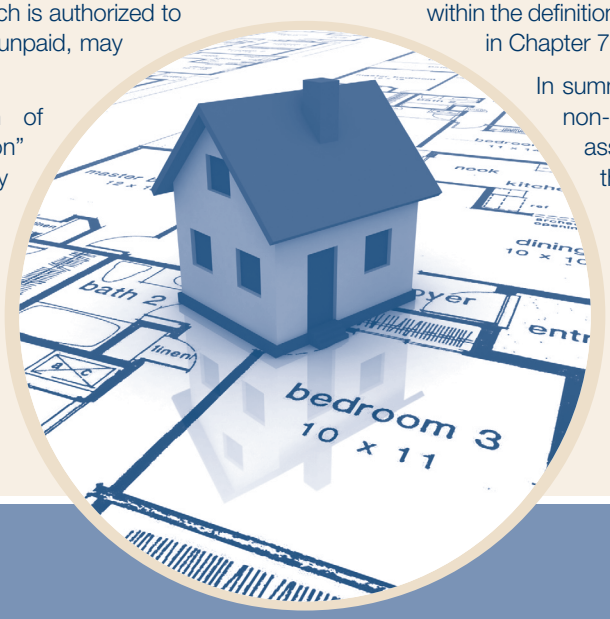
The term "homeowners' association" is defined in Section 720.301(9), Florida Statutes, as a Florida corporation responsible for the operation of a community or a mobile home subdivision in which the voting membership is made up of parcel owners or their agents, or a combination thereof, and in which membership is a mandatory condition of parcel ownership, and which is authorized to impose assessments that, if unpaid, may become a lien on the parcel.

Because of the definition of "homeowners' association" in Chapter 720, many associations that did not fall within the definition of homeowners' associations could not take advantage of the revitalization process in Chapter 720, Part III, Florida Statutes.

During the 2007 Legislative Session, the Legislature adopted an amendment to Chapter 712, known as the Marketable Record Title Act (MRTA). The new legislation created Section 712.11, Florida Statutes, stating that a homeowners' association not otherwise subject to Chapter 720, may use the procedures set forth in Chapter 720, Part III to revive covenants that have lapsed under the terms of Chapter 712 (MRTA).

The MRTA statute defines "homeowners' association" to also include an association of parcel owners which is authorized to enforce use restrictions that are imposed on the parcels.

Therefore, even if an association does not fall within the definition of "homeowners' association" in Section 720.301, Florida Statutes, it may now take advantage of the revitalization process in Chapter 720 if it otherwise falls within the definition of homeowners' association in Chapter 712.



In summary, the new law will permit non-mandatory homeowners' associations that have the authority to enforce use restrictions that are imposed on the parcels to take advantage of the revitalization process in Chapter 720, Florida Statutes, and revitalize covenants that have expired because of MRTA. ■

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COMMUNITY UPDATE™

VOLUME VI, 2008 | **Serving Florida's Communities Since 1980** | Lisa Magill, Esq., Editor

ASSOCIATION LEGAL COUNSEL: WHOM, OR MORE ACCURATELY "WHAT," DO WE REPRESENT?

By: Gregory W. Marler, Esq.
gmarler@becker-poliakoff.com

Almost weekly, an association member or board member asks a question or makes a statement that implicates this issue. Sometimes, the issue is raised at an association meeting when a member stands up and declares that since he pays the legal fees, he is entitled to have the association's attorney answer his questions, or even follow his instructions. On other occasions, a board member may call seeking association counsel's advice because the board member is being sued personally by a member, or is the subject of a recall petition, or feels he has been slandered by a member. But a critical legal and ethical concern of association counsel is to always remember that he represents the association, which is most often a not-for-profit corporation.

A corporation is a "creature of statute", obtaining its existence through compliance with certain statutory requirements. Once properly formed and maintained, a corporation has its own legal existence, separate from the person(s) who created it and separate from its officers, directors and shareholders or members. It is that corporation that is the association attorney's client. This point was made clear in the case of Ocean Club of Palm Beach Shores Condominium Association, Inc. v Estate of Daly, 504 So.2d 1377 (Fla. 4th DCA 1987). In the Ocean Club case, the estate of a deceased person, and individual unit owners, filed a lawsuit against the condominium association alleging negligence. The association asserted a counterclaim against the unit owners alleging that the unit owners were, themselves, negligent. The unit owners brought a motion to have the association's attorney disqualified due to an alleged conflict of interest based on the theory that association counsel cannot bring an action against members of the condominium association. The Court in Ocean Club held that there is no conflict of interest when an attorney represents a condominium association against a unit owner, and stated, "[w]ere it otherwise, a condominium association could never retain counsel in such litigation. In representing the association, counsel represents the corporate entity, not the individual unit owners."

Similarly, in the case of Brennan v Ruffner, 640 So.2d 143 (Fla. 4th DCA 1994), a shareholder in a closely held (i.e. non-public) corporation brought a legal action against the corporation's attorney who had prepared a shareholders' agreement between all of the shareholders. The lawsuit alleged that the attorney owed a duty to the individual shareholder(s) because each shareholder was a "third-party beneficiary" to the agreement. The Court in Brennan held that, "… where an attorney represents a closely held corporation, the attorney is not in privity with and therefore owes no separate duty of diligence and care to an individual shareholder absent special circumstances or an agreement to also represent the shareholder individually." Of course, ethical concerns will rarely make it possible for an attorney to enter into an agreement to represent both an association and an owner at the same time.

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The Court in Brennan went on to conclude that,"… an attorney representing a corporation does not become the attorney for the individual stockholders merely because the attorney's actions on behalf of the corporation may also benefit the stockholders."

The issue of whom, or what, association counsel represents often arises because members feel that the association attorney has taken up the representation of the board itself, or of particular board members. Clearly, if association counsel were to represent individual board members in matters concerning the association, the attorney would be acting improperly, as the same ethical issues that prevent association counsel from representing association members also make it practically impossible for association counsel to represent a board member personally. But it is natural, in fact legally required, that the association attorney interact closely and confidentially with the board. The Florida Not For Profit Corporation Act, under which most community associations are created, provides that "all corporate powers must be exercised by or under the authority of, and the affairs of the corporation managed under the direction of, its board of directors. . ." Thus, the association is governed and administered by a board. It is not the individual board members, but the board as a collective body, subject to all of the obligations and limitations contained in statutes and the governing documents of the association, that decides when and how the association will act.

What association members may not always recognize is that association attorneys are ever mindful of their obligations to the association under the Rules of Professional Conduct. In the event an officer or director were to violate the law or propose to act illegally, association counsel is obligated to advise the officer or director to take appropriate action or to cease illegal conduct. If the offending director does not heed the attorney's advice, the attorney must "climb the ladder" of the organization and advise other officers or directors of the issue so that they might correct the conduct. If the entire board fails to act legally, the attorney is permitted to withdraw, and may be required to withdraw, from representing the association. Failure of the attorney to follow the Rules of Professional Conduct can have significant ethical ramifications that can affect the attorney's license to practice law and can be the basis for a legal malpractice claim.

But within the parameters of legal conduct, which are often quite broad, the attorney is generally not ethically obligated, nor even entitled, to question board decisions that are merely imprudent. Within the parameters of legal conduct, board members are vested with the authority to use their "business judgment" to administer the association and strive to achieve their objectives. It is in these business judgments that much of the disagreement concerning the proper administration of an association can arise, but that is not a legal, nor ethical issue.

The association attorney represents the association, not the association members nor the board members. While the association members have certain rights arising from statutes and the governing documents, those rights do not include the right to control, or in many cases even communicate with, association counsel. Equally important, association counsel's interaction with the board and with individual board members is limited and regulated, and the attorney is well-aware of his ultimate obligation to the entity he represents.

ANNUAL MEETING QUESTIONNAIRES

Legislative Changes May Impact Your Next Annual Meeting And Election of Directors

Pay Attention to:

Questions Relating to Staggered Terms for Directors

Questions Regarding Reserve Funding and Reserve Disclosures

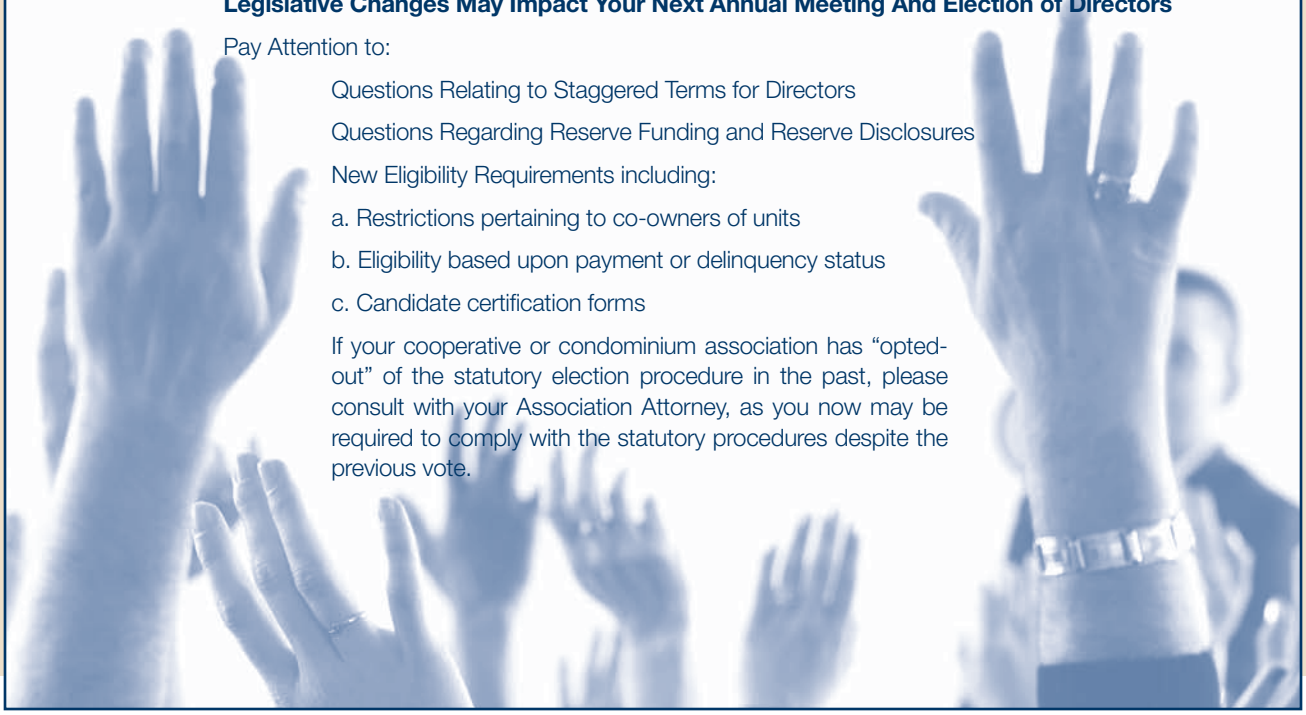
New Eligibility Requirements including:

a. Restrictions pertaining to co-owners of units

b. Eligibility based upon payment or delinquency status

c. Candidate certification forms

If your cooperative or condominium association has "opted-out" of the statutory election procedure in the past, please consult with your Association Attorney, as you now may be required to comply with the statutory procedures despite the previous vote.



WILLOUGHBY CASE UPDATE

Settlement in Favor of Homeowners Announced

The appeal in the *Granuzzo v. Willoughby Golf Club* case mentioned in the last issue of Community Update has been settled. The merged Homeowner's Association/Country Club filed an appeal from an Amended Final Judgment which held that amendments to the governing documents requiring all homeowners to pay for Club memberships and thereafter maintenance for the Club's facilities were invalid and void.

Many parcel owners that supported the case brought by the named Plaintiff were prepared to file suit themselves, seeking a refund of all amenity fees and social membership dues paid to the Club since the merger.

The attorney representing the individual homeowners explained that as a result of the settlement, all of the Plaintiffs' and additional parcel owners' properties are exempt from paying social membership dues "in perpetuity," and the amount charged for the "base assessment" (the original HOA assessments) is frozen at the pre-merger level, so those property owners and purchasers of those properties will not have to pay increased HOA maintenance fees as a result of the Club's expenses. The permanently grand-fathered properties are also exempt from any special assessments pertaining to the maintenance, repair or operation of the Club and its facilities.

The Club/HOA will continue to operate as a merged entity with the remaining owners bearing the costs associated with maintenance of the Club's facilities and membership fees.

DIVISION HOLDS AMENDMENT OF OCCUPANCY AGREEMENT APPLIES TO ALL COOPERATIVE OWNERS

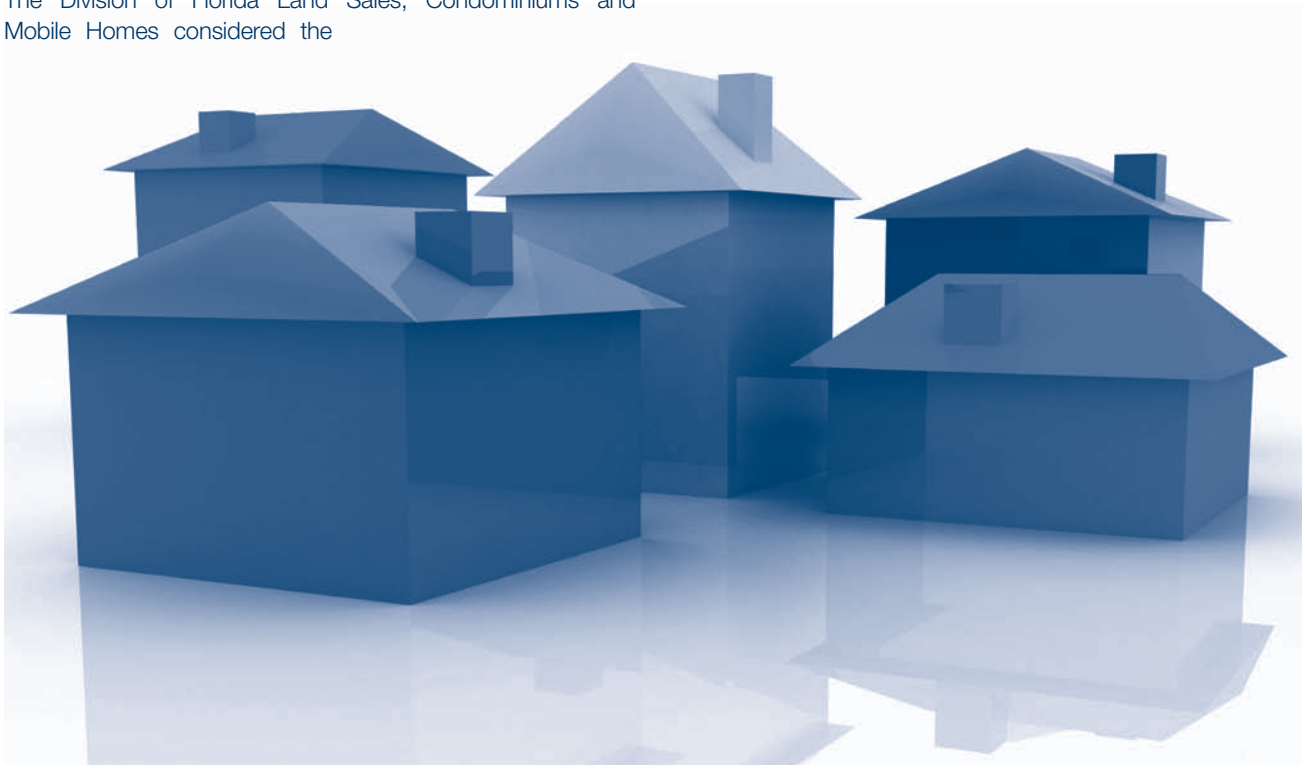
In Re: Petition for Declaratory Statement: Galt Mile Apartments, Inc., Final Order No. BPR-2007-07914, October 5, 2007

The Department of Business and Professional Regulation issued a Declaratory Statement regarding whether a cooperative association may amend the terms and conditions of the Occupancy Agreement pursuant to Section 719.1055(4)(a), Florida Statutes.

Coral Ridge Towers is a cooperative located in Fort Lauderdale, Broward County, Florida. Each shareholder is a member of the Association and entitled to the exclusive occupancy of a specific unit identified in a document entitled "Occupancy Agreement". The Occupancy Agreement governs the terms and conditions of the occupancy and use of the cooperative units, but different agreements were used at different times in the history of the cooperative, causing confusion with respect to the maintenance obligations of the Association and the individual shareholders. The Association's Board of Directors desired to amend the Occupancy Agreement by vote of the shareholders and then intended to apply the provisions of the amended agreement uniformly to all shareholders, regardless of which agreement was in force or effect when they acquired their cooperative interest.

The Division of Florida Land Sales, Condominiums and Mobile Homes considered the Occupancy Agreement one of the Cooperative Documents as defined by Section 719.103(13), Florida Statutes, as it is the document that grants the shareholder the right to exclusive occupancy of a particular unit within the cooperative. The Occupancy Agreement did not contain an amendment procedure so the Division Director applied Section 719.1055(4)(a), Florida Statutes and found that amendments approved by the favorable vote of two-thirds (2/3rds) of the shareholders would apply to all shareholders under the circumstances.

Note, amendments changing the size of the unit, materially altering or modifying the appurtenances to the unit or changing the proportion or percentage of sharing the common expenses (and surplus) require the joinder of the record owner of the unit and the record owner of any lien on the unit, as well as the approval of all shareholders in the cooperative. The amendment desired by the Board of Directors reallocated the responsibility for maintenance of portion of the property (specifically, it required the individual shareholders to maintain, repair and replace the windows). This type of amendment (shifting maintenance responsibilities) was not considered an amendment that modified the appurtenances to the unit or the percentage of responsibility for sharing the common expenses and therefore did not require approval by all shareholders.



ON-SITE WORK-RELATED INJURIES

By: Brian P. Miles, Esq.
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Now that budgets are tight, Associations are looking to trim expenses. One item sure to be discussed is the maintenance of the common areas or common elements, and who should conduct such maintenance. Some associations have employees to perform such tasks, while others hire outside help. In either case, questions regarding civil liability, in the event of a work-related injury on the association's property, are likely to surface. This article attempts to answer some of the questions.

Do associations incur liability for on-site, work-related injuries?

Community associations face civil liability any time a worker, working within the scope of their duties, is injured on the association's property, and files a claim in tort. That notwithstanding, associations may be able to limit their liability by obtaining workers' compensation insurance.

What is workers' compensation insurance?

Workers' compensation insurance provides injured employees a set schedule of funds to meet their living needs, while they are injured. The funds are provided regardless of whether the injury was caused by the negligence of the employer, negligence of the employee, or merely due to unavoidable accident. The trade-off is that the injured employee is generally precluded from asserting tort claims (personal injury claims for damages, pain and suffering, etc.) against the employer.

Who is required to carry workers' compensation insurance?

In Florida, workers' compensation insurance is governed by Chapter 440 of the Florida Statutes, which provides that an employer with four or more employees must carry workers' compensation insurance. Associations with four or more employees are considered "employers" under the statute and must carry workers compensation insurance. Conversely, associations with fewer than four employees are not required to carry workers' compensation insurance, but may do so for risk management purposes. Some associations' general liability insurance policies cover tort claims and, for this reason, some associations' feel it unnecessary to carry additional coverage, especially when it means higher premiums. However, community association law and employment law practitioners generally find it preferable for associations to address on-the-job injury claims through workers' compensation insurance rather than through general liability insurance. Associations should consult with their insurance agents to determine the scope of their policies.

Who is covered by workers' compensation insurance?

Workers' compensation insurance covers employees who are injured on the job. It does not cover independent contractors (or their employees) who are injured on the job. This is an important (albeit, sometimes confusing) distinction with which associations should be careful, so that they do not unknowingly fall within the scope of the workers' compensation insurance requirements.

How does an association distinguish an "employee" from an "independent contractor"?

The factors used in distinguishing an "employee" from an "independent contractor" are numerous and, basically, turn on the amount of control the employer exerts over the worker. The more control exerted, the more likely the worker will be deemed an "employee." Factors used in assessing control include, but are not limited to, whether the employer sets the worker's daily duties, whether the worker has their own federal employment identification number, whether compensation is paid to a business rather than to the individual worker, and whether the worker has the liberty of choosing their employers without undergoing an employment application process. Again, properly classifying a worker as "employee" or "independent contractor" may be tricky and may require the help of an attorney.

> An independent contractor's workers' compensation insurance covers the contractor's employees, not the association. In fact, whether or not the contractor has workers' compensation insurance has no effect whatsoever on the association's liability if one of the contractor's employees is injured on the property.

Why should associations hire independent contractors?

Independent contractors offer flexibility in the association's workforce. They are generally available to work on need-by-need basis. Hiring on a need-only basis may result in a cost savings for the association. Furthermore, independent contractors often possess specialized knowledge and skills particular to their industries. Depending on the task involved, it may be necessary to turn to an "expert" in the field.

Are there ways to reduce the liability involved with hiring independent contractors?

Associations should verify that independent contractors carry their own workers' compensation insurance, and demand proof

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thereof. Associations should also check that the independent contractor's policy covers the independent contractor's employees, if any are involved in the project.

Are associations exempt from liability where an independent contractor carries workers' compensation insurance?

An independent contractor's workers' compensation insurance covers the contractor's employees, not the association. In fact, whether or not the contractor has workers' compensation insurance has no effect whatsoever on the association's liability if one of the contractor's employees is injured on the property. In either event, the contractor's injured employee is entitled to sue the association for the injury. There is a one caveat. Where workers' compensation insurance is available, and the contractor's injured employee receives benefits therefrom, such benefits function as a set-off against damages otherwise suffered by the injured employee. In other words, a the amount of benefits collected by the contractor's injured employee will be included as part of the total amount awarded in any judgment against the association. Thus, it is in the association's best interest to require contractors to carry workers' compensation insurance.

Do these same considerations apply evenly for condominium associations, as well as homeowners' associations and cooperatives?

Due to recent case law, there may be some distinction in the way workers' compensation immunity impacts condominium associations as opposed to homeowners associations and cooperatives. Suffice it to say, however, that community associations, regardless of their nature, should consider the advantages and disadvantages (if there are any) of carrying workers' compensation insurance. Whether to obtain workers' compensation insurance, and how much coverage to acquire, are questions specific to each association. Accordingly, each association should speak with its attorney and insurance agent on these matters.

The Community Update newsletter written by Becker & Poliakoff, P.A. is published for the benefit of our clients, friends and colleagues. Becker & Poliakoff, P.A. is committed to law related education to benefit the Firm's clients and the public. The objective of this newsletter is to keep officers and directors of Condominium, Cooperative and Homeowner Associations informed about matters affecting their communities operations and was not sent for the purpose of obtaining professional employment. The information provided herein is provided for informational purposes only and should not be construed as legal advice. The publication of this newsletter does not create an attorney-client relationship between the reader and Becker & Poliakoff, P.A. or any of our attorneys. While we make every attempt to ensure that the information contained in the newsletter is accurate, neither Becker & Poliakoff, P.A. nor the author of any article contained in this newsletter are responsible for any errors or omissions. Readers should not act or refrain from acting based upon the information contained in the newsletter without first contacting an attorney, if you have questions about any of the issues raised herein. The hiring of an attorney is a decision that should not be based solely on advertisements or this newsletter. Before you decide, ask us to send you free written information about our qualifications and experience.

COMMUNITY UPDATE™

VOLUME VII, 2008 | Serving Florida's Communities Since 1980 | Lisa Magill, Esq., Editor

SPECIAL LEGISLATIVE ISSUE

SUMMARY OF THE 2008 LEGISLATIVE SESSION

By: CALL Co-Executive Directors – Yeline Goin, Esq. and David Muller, Esq.
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The 2008 Legislative Session was very eventful as there were a number of bills that passed which will significantly impact 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), beneficial legislation was adopted. We are very pleased to report that CALL achieved many of its goals this session, including the addition of "emergency powers" for condominium boards after a casualty and a "glitch fix" to the material alterations provisions in the Condominium Act. CALL was also successful in modifying legislation to remove objectionable language included in earlier versions, including the removal of "criminal sanctions" for condominium board members who fail to maintain official records. This article will provide an overview of the major legislation adopted in 2008 that will impact Florida's community associations.

Note that one of the bills that passed during the legislative session, HB 679, primarily impacting homeowners' associations, was vetoed by Governor Crist. Therefore, this article does not address HB 679. We are grateful to Travis Moore, CALL's full time Tallahassee lobbyist, for his assistance during this very hectic but productive session for residents of community associations.

HB 995 - COMMUNITY ASSOCIATIONS

HB 995 affects condominium associations and management firms. The effective date is October 1, 2008.

MANAGEMENT FIRM IMPACTS

Chapter 468: The bill will require community association management firms to be licensed if the firm manages more than 10 units or a budget of $100,000 or more.

CONDOMINIUM ASSOCIATION IMPACTS

Directors

- **718.111(1)(d):** This section includes a standard of care for directors similar to the standard of care imposed on directors of a not-for-profit corporation pursuant to Section 617.0830, Florida Statutes, (governing not-for-profit corporations). Will require directors to act in good faith and in a manner that he or she reasonably believes is in the best interest of the association. Also provides that directors will be liable for money damages if the director commits a crime, if the director derived an improper personal benefit, either directly or indirectly, or if the act constitutes recklessness, bad faith, with a malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety or property.
- **718.112(2)(d)1:** All board members must stand for election at the annual meeting. However, if the bylaws permit staggered terms of no more than 2 years and if a majority of the total voting interests approve, the directors can serve for 2 year staggered terms. Also states that if no one is interested in or demonstrates an intent to run, such person whose term has expired is automatically reappointed and does not have to stand for election.
- **718.112(2)(d)1:** Co-owners in condos with more than 10 units cannot serve on the board at the same time.
- **718.112(2)(d)1:** Provides that a person who has been suspended or removed by the Division, or is delinquent in the payment of assessment as provided in s. 718.112(2)(n)

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is not eligible for board membership. Also provides that if a person has been convicted of any felony is not eligible to serve on the board until 5 years after his or her civil rights have been restored.

- **718.112(2)(d)3:** Requires candidates to certify, on a form provided by the Division, that they have read and understand "to the best of their ability" the condominium documents, statute, and applicable rules. The form must be submitted along with the notice of intent to run for the board.
- **718.112(2)(n):** Provides that directors who are 90 days delinquent in the payment of regular assessments shall be deemed to have abandoned the office, creating a vacancy in the office to be filled according to law.
- **718.112(2)(o):** Provides that a board member who is charged with felony theft or embezzlement involving the association's funds shall be removed from office, creating a vacancy in the office to be filled according to law. If the charges are resolved without a finding of guilt, the director shall be reinstated for the remainder of the term, if any.
- **718.1265:** Provides for "emergency powers" for Boards, when a state of emergency is declared, which will allow greater authority to mitigate damages, order a mandatory evacuation, etc.
- **718.3025(1)(f):** States that no written contract providing for maintenance or management services shall be enforceable unless the contract discloses any financial or ownership interest a board member or any party providing maintenance or management services to the association holds with the contracting party.
- **718.3026(3):** This is a new provision addressing contracts between the association and one or more of its directors of any corporation, firm, or entity in which one or more of its directors are financially interested. Will require certain disclosures to be made and the contract must be approved by two-thirds of the directors present at the meeting.
- **718.303(3):** State that fining committee members cannot be board members or persons residing in a board member's household.
- **718.501(1)(n):** Requires board members, employees, developers, managers and management firms to reasonably cooperate with the Division in its investigation.

Official Records

- **718.111(12)(a)11 and 718.112(12)(c):** States that anyone who knowingly and intentionally defaces or destroys accounting records required to be maintained by the statute, or knowingly or intentionally fails to create or maintain accounting records required by statute, is personally subject to a civil penalty.
- **718.111(12)(b):** Requires that all official records must be maintained for at least 7 years and within 45 miles of the condominium or within the county where the condominium is located. Gives the association the option to maintain and provide the records to the owners in an electronic format.
- **718.111(12)(c)(4):** Provides that social security numbers, drivers' license numbers, credit card numbers and other personal identifying information are not accessible to unit owners.

Financial

- **718.111(13):** Requires the Division to adopt additional rules regarding information to be included in a financial report such as a summary of the reserves including information as to whether such reserves are being funded at a level sufficient to prevent the need for a special assessment and, if not, the amount of the assessments necessary to bring the reserves up to the level necessary to avoid a special assessment.
- **718.111(13):** Cannot waive financial reports for more than 3 consecutive years.
- **718.112(2)(c):** States that notice of any meetings at which regular or special assessments will be considered shall specifically state the nature, estimated cost, and description of the reasons for assessment.
- **718.112(2)(f)4:** Requires the use of form language for proxy questions to waive or reduce reserves or to use reserves for other than the purposes for which they were intended.

Inspection Reports

- **718.113(6):** Requires an inspection report by architect or engineer every 5 years for buildings more than 3 stories attesting to required maintenance, useful life, and replacement costs. Also provides for an "opt-out" vote by a majority of the owners present in person or by proxy. Such meeting and approval must take place prior to the end of the 5 year period and is only effective for that 5 year period.

Hurricane Shutters

- **718.113(5) and 718.115(1)(e):** Provides that Board can install hurricane protection that complies with or exceeds applicable building codes (in addition to hurricane shutters). A vote of the owners is not required if the hurricane protection to be installed is the maintenance, repair, and replacement responsibility of the association. The cost to install the hurricane protection is a common expense if the hurricane protection to be installed is the maintenance, repair, or replacement responsibility of the association. In such case, owners who have previously installed code compliant hurricane protection will receive a credit on the assessment.

Liens

- **718.121(4):** Requires 30-day notice before filing a lien and requires service by certified mail and regular first-class mail. However, if the address of the owner is outside the United States, the notice must be sent by first-class mail to the unit address and to the last known address by regular mail with international postage.

Miscellaneous

- **718.112(2)(b)2:** Units owned by Association cannot be counted for any purpose.
- **718.112(2)(c):** Provides that if 20 percent of the voting interests petition the board to address and item of business, it must be considered by the board and its next regular meeting or at a special meeting, but not more than 60 days after receipt of the petition.
- **718.112(2)(d)1:** Require that the annual meeting be held at the location provided in the bylaws, and if the bylaws are silent, must be held within 45 miles of condominium.
- **718.112(2)(d)8:** Provides that in order to "opt-out" of voting

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and election procedures in the statute, the condominium must consist of only 10 units or less.

- **718.1124, 718.117(7)(a), and 718.127:** Revises procedures for the appointment of a receiver.
- **718.113(2)(a):** Includes the language "This provision is intended to clarify existing law and applies to associations existing on the effective date of the act." This is a "clean-up" amendment to include language that was inadvertently left out when amendments to this section were previously adopted.
- **718.113(7):** Provides that an association cannot refuse an owner a reasonable accommodation for the attachment on the mantle or frame of the unit door a religious object not to exceed 3 inches wide, 6 inches high, and 1.5 inches deep.
- **718.301(1):** Will require turnover to occur if the developer files for bankruptcy or if a receiver for the developer has been appointed and has not been discharged within 30 days after such appointment.
- **718.301(4)(p):** Will require the developer to prepare and turn over to the association a report, under seal of an architect or engineer, attesting to the maintenance, useful life, and replacement costs of a number of items including roof, elevator, heating and cooling systems, seawalls, etc.
- **718.3026:** Changes the ability of associations to "opt-out" of this section. Would permit only associations with 10 units or less to opt-out.
- **718.501(1)(j):** Requires the Division to providing educational programs (in addition to training programs), which may include web-based, electronic media and live training and seminars.

HB 601—COMMUNITY ASSOCIATIONS AND DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION

This bill primarily impacts condominium and homeowners' associations. It also changes the powers and duties of the Department of Business and Professional Regulation, which is the state agency responsible for regulating condominiums, cooperatives, and timeshares. The effective date is July 1, 2008.

CONDOMINIUM IMPACTS

Insurance and Reconstruction after Casualty: The new law rewrites Section 718.111(11), Florida Statutes. The following is a summary of the primary changes to this section of the statute.

- **Adequate Insurance.** Adequate hazard insurance shall be based upon the replacement cost of the property as determined by an independent insurance appraisal or update of a prior appraisal. The full insurable value must be determined at least once every 36 months.
- **Self-Insurance and Pooling.** The provisions for self insurance and pooled insurance remain unchanged, but pooled insurance programs will now require the approval of the Office of Insurance Regulation.
- **Deductible.** The deductible must be consistent with industry standards and prevailing practice for communities of similar size and age, and having similar construction and facilities in the locale where the condominium property is located. The Board must establish the amount of the deductible based upon the level of available funds and predetermined assessment authority at a meeting of the Board. Such meeting requires fourteen (14) days notice by mail to the owners and must be open to all unit owners. The notice must state the proposed deductible and the available funds and the assessment authority relied upon by the board and estimate any potential assessment amount against each unit. The Board meeting may be held in conjunction with budget meeting.
- **Association Insurance Responsibility.** The Association insures:

  (1) All portions of the condominium property as originally installed or replacement of like kind and quality, in accordance with the original plans and specifications;

  (2) All alterations and additions made to the condominium property pursuant to 718.113(2) (which means that alterations installed by individual owners will be excluded from the Association's coverage obligations.)

  (3) Exclusions: Same as before (floor, wall and ceiling coverings, etc.) except the statute will no longer exclude air conditioning and heating equipment from the Association's coverage obligations.
- **Unit Owner Insurance Responsibility.** Unit owner coverage is still mandated, but the statute will also require individual unit owner policies to provide $2,000.00 of loss assessment coverage per occurrence. The unit owner is required to provide proof of hazard and liability insurance upon request, but not more than once per year. The new statute also requires that the Association be named as an additional insured and loss payee on all casualty policies issued to unit owners. The statute also provides that all improvements or additions to the Condominium Property that benefit fewer than all owners must be insured by the unit owners having the use thereof or may be insured by the Association at the cost and expense of the owners having the use thereof. This provision is subject to interpretation and could be interpreted to apply to limited common element parking spaces, storage lockers, and even balconies and patios, although we do not believe that was not the intent of the new law. The intent of this provision was to require owners to insure additions to the condominium property benefiting fewer than all unit owners that were not part of the original construction.
- **Reconstruction.** All reconstruction is to be undertaken by the Association if the reconstruction work involves damages to portions of the property which the Association insures. The Association can authorize unit owners to undertake reconstruction work with the prior written consent of the board, but can condition such work upon the approval of the repair methods, qualifications of contractors, etc. Unit owners will be responsible for reconstruction of the property to the extent the damage pertains to portions of the property which the owners insure. If the Association undertakes reconstruction work for which the owners are responsible, the Association can charge the unit owner and lien the unit for the costs.
- **Codifies Plaza East; Associations can "Opt-Out".** The statute codifies the Plaza East decision, which was a declaratory statement issued by the Division of Florida Land Sales, Condominiums, and Mobile Homes which ruled that the deductible on the Association's casualty policy must be

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absorbed as a common expense, regardless of any provisions in the Declaration to the contrary. However, the statute gives each community the right to opt out by a majority of all voting interests, in which case the reconstruction expenses would be allocated in the manner provided in the Declaration.

- **Exceptions to Association Responsibility for Cost of Reconstruction.**

  (1) The Association will not be responsible for reconstruction of unit owner alterations if the improvement benefits only the unit for which it was installed and is not part of the standard improvements installed by the developer on all units as part of original construction, whether or not located within the unit.

  (2) Damages caused by casualty loss but which are attributable to unit owner negligence or failure to comply with the requirements of the covenants will be repaired at the expense of the owner.

  (3) Casualty losses within the units which were known or should have been known to the owner and not reported to the Association in a timely manner, such that the claim was denied on that basis, will also be the financial responsibility of the unit owner.

- **Opt-out Vote.** In order to opt-out, it requires the approval of a majority of the total voting interests of the association without regard to any mortgagee consent requirements. After the opt-out vote, the Association must record a notice in the public records. The Association can reverse the opt-out vote by the same vote required for the opt-out vote.

- **Action Needed by Associations.** As a result of this new statute, Associations should now do the following:

  (1) Obtain an insurance appraisal every 36 months.

  (2) Vote on the deductible yearly at a properly noticed board meeting. The notice must state: the proposed deductible and the available funds and the assessment authority relied upon by the board and estimate any potential assessment amount against each unit. Requires 14 days notice by mail to the unit owners.

  (3) Take an out-opt vote if you want to follow your condominium documents with regard to reconstruction costs, instead of the new statutory scheme.

Common Expenses for Fire Safety Equipment or Water and Sewer Service where a Master Meter Serves the Condominium: The new law amends to Section 718.115(1)(a) regarding common expenses. The new law provides that unless otherwise provided in the declaration, expenses such as fire safety equipment or water and sewer service where a master meter serves the condominium, will be common expenses whether or not such services are specifically identified as common expenses in the condominium documents.

Board Member Abstentions. The new law amends Section 718.111(1)(b), Florida Statutes and will permit directors to abstain from voting even if they do not have a conflict of interest. A director who abstains will be presumed to have taken no position with regard to the action.

CONDOMINIUM AND HOMEOWNERS' ASSOCIATION IMPACTS

Estoppel Certificates. The new law amends Sections 718.116(8) and 720.30851 to address estoppel certificates. The new law provides:

- The amount of the fee charged by the association or its authorized agent for the preparation of the estoppel certificate must be included on the certificate.
- The authority to charge a fee for the certificate shall be established by written resolution adopted by the board or provided by a written management, bookkeeping, or maintenance contract and is payable upon the preparation of the certificate.
- If the certificate is requested in conjunction with the sale or mortgage of a unit but the closing does not occur and no later than 30 days after the closing date for which the certificate was sought the preparer receives a written request, accompanied by reasonable documentation, that the sale did not occur from the payer that is not the unit owner, the fee shall be refunded to that payer within 30 days after receipt of the request.

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The new law provides that unless otherwise provided in the declaration, expenses such as fire safety equipment or water and sewer service where a master meter serves the condominium, will be common expenses whether or not such services are specifically identified as common expenses in the condominium documents.

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SB 1986 provides that the holder of a first mortgage who forecloses on the mortgage is liable for up to twelve months of assessments or 1% of the original mortgage amount, whichever is less, for past due assessments. Also, provides forms and procedures for notice of a claim by a homeowners' association and an objection to such a claim.

- The refund is the obligation of the unit owner, and the association may collect it from that owner in the same manner as assessments are collected.

DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION IMPACTS

The new law changes name of Division that regulates condominiums and cooperatives to "Division of Florida Condominiums, Time Shares and Mobile Homes." The new law also changes Division's powers and duties to allow the Division to:

- enter an emergency cease and desist order,
- petition the court for the appointment of a receiver,
- seek the imposition of a civil penalty through the circuit court;
- contract with agencies in the state or other jurisdictions to perform investigative functions or accept grants-in-aid from any source.

The intent of these changes is to give the Division more "teeth" in enforcing the law.

HB 1105 - COMMUNITY ASSOCIATIONS

HB 1105 affects condominium, cooperative and homeowners' associations. The effective date is July 1, 2008. This bill addresses two main subjects: (1) the appointment of a receiver and (2) filing of a lien. It requires condominium associations and cooperative associations to give 30 days notice of intent to file a lien. Additionally, the bill amends current law related to condominiums, cooperatives, and homeowners' association and creates ss. 718.127, 719.1124, 719.127, 720.3053, and 720.313, F.S. to provide that a unit or parcel owner must give notice to all the members of an association in addition to the association itself of his or her intent to apply to the circuit court for a receiver.

SB 1986 - HOMEOWNERS' ASSOCIATION LIEN CLAIMS

SB 1986 affects homeowners associations regarding lien claims. The effective date is July 1, 2008. This bill provides that the holder of a first mortgage who forecloses on the mortgage is liable for up to twelve months of assessments or 1% of the original mortgage amount, whichever is less, for past due assessments. Also, provides forms and procedures for notice of a claim by a homeowners' association and an objection to such a claim. The filing of an objection obligates the association to foreclose the lien within 90 days or, failing that, to waive the right to foreclose on that lien. Gives further direction and a form for use in qualifying offers, which are a means for an owner to forestall foreclosure of an association lien in exchange for an agreement to pay the outstanding balance by a certain date.

SB 464 - RELATING TO TRANSFER FEE COVENANTS/ REAL PROPERTY

SB 464 affects community associations regarding transfer fee covenants. The effective date is July 1, 2008. This bill prohibits transfer fee covenants (i.e. charges that are payable upon the transfer of an interest in real property or are payable for the right to make or accept such transfer), but also provides exceptions to protect community associations, including association assessments, charges, etc.

SB 564 - AUTOMATED EXTERNAL DEFIBRILLATORS

SB 564 affects the law regarding automated external defibrillators ("AED"). The effective date is July 1, 2008. The bill revises the requirements for the use of an AED in cases of cardiac arrest. Under the bill, any person who uses an AED is encouraged, rather than required, to obtain appropriate training. Also, the bill encourages persons or entities that possess an AED to notify, rather than register with, the local emergency medical services director of the location of the device. The bill also revises circumstances under which a person who acquires an AED may obtain immunity from civil liability for harm resulting from the use of an AED.

HB 1489 - RESIDENTIAL TENANCIES

HB 1489 revises the Florida Residential Landlord Tenant Act (Chapter 83, Florida Statutes) to allow for the implementation of an "early termination fee" of a rental agreement. The effective date of this bill is June 10, 2008.

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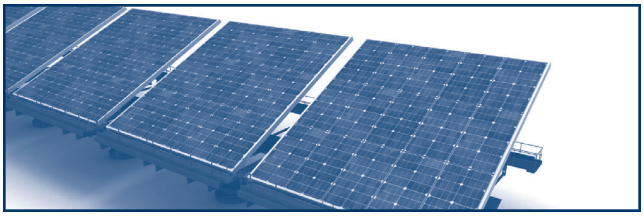
SB 1378 - FLAG POLES (HOMEOWNERS' ASSOCIATIONS

This new law applies only to homeowners' associations, not condominium or cooperative associations. The effective date is July 1, 2008. The new law provides that any homeowner may display one official U.S. flag and one flag which represents the United States Army, Navy, Air Force, Marine Corps, or Coast Guard or the POW/MIA flag not larger than 4 ½ feet by 6 feet. In addition, a homeowner is entitled to erect a freestanding flagpole no more than 20 feet high on the homeowner's property if the flagpole does not obstruct sightlines at intersections and is not erected within or upon an easement.



HB 697 and HB 7135—ENERGY BILLS/SOLAR PANELS

The new law amends Section 163.04 regarding energy devices based on renewable resources. The old law stated that associations could not prohibit solar collectors, clotheslines or other energy devices based on renewable resources with respect to dwellings not exceeding three stories in height. The new law takes out the three stories height requirement and adds that these devices can be installed within the boundaries of a condominium unit. Therefore, a condominium unit owner cannot cut through common elements, but if, for example, the roof is considered part of the unit, then the owner can install a device.

SB 2860—INSURANCE BILL, KNOWN AS THE "HOMEOWNERS' BILL OF RIGHTS"

The effective date of this law is July 1, 2008. The new law seeks to improve upon the property insurance reforms enacted in 2007 by:

- Extending the rate freeze for Citizens Property Insurance Corporation, the state's insurer of last resort, to January 2010. The freeze was set to expire in January 2009;
- Allowing single-family residential properties with a replacement value of up to $2 million and single condominium units with a combined dwelling and content replacement cost of $2 million or more into the Citizens insurance pool (up from $1 million, which was set to begin Jan. 1, 2009);
- Requiring Citizens' policyholders of property located in wind-borne regions and with an insured value of $500,000 or more to disclose the property's windstorm mitigation rating to a prospective buyer;
- Increasing fines for violations of the insurance code and for unfair trade practices by private insurers;
- Extending by one year to January 2010 a provision from last year's insurance bill that requires insurers to get state approval before raising property insurance rates;
- Requiring insurers to notify state regulators 90 days before dropping more than 10,000 homeowners' policies in one year;
- Requiring insurers to use state-approved methods to predict the risk of hurricanes, a key factor in setting rates.

NEWS YOU CAN USE

LEGISLATIVE UPDATE 2008 - FREE WEBINAR

Want to learn more about the NEW laws the Florida Legislature enacted this session that will affect you and your association? Get the inside scoop from our attorneys who were actively involved in developing the legislation.

Simply log on from your home or office to participate in our informative FREE webinar on AUGUST 19, 10:30 -11:30 AM, Eastern Time, where you'll learn about:

- NEW laws impacting board member rights and responsibilities;
- NEW insurance and reconstruction-after-casualty provisions on condominiums, and how you can "opt out";
- NEW statutes affecting elections and annual meetings;
- NEW collection and foreclosure procedures for condominiums, cooperatives, and HOAs and how to comply with them;
- NEW inspection requirements for condominiums that are more than 3 stories and how you can "opt out";
- NEW requirements on votes to waive reserves and financial statements.

Connections are limited, so please register today at http://bp.ilinc.com. Select Legislative Update 2008, click on register, fill in your first and last name and email address, and click submit. Once you've registered, we will email you simple instructions on how to participate.

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COMMUNITY UPDATE™

VOLUME VIII, 2008 | **Serving Florida's Communities Since 1980** | Lisa Magill, Esq., Editor

ANNUAL MEETINGS AND ELECTIONS

IMPORTANT CONSIDERATIONS FOR CONDOMINIUM ASSOCIATIONS

By: Joseph E. Adams, Esq.
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Even though it's summertime, many associations find annual meetings sneak up on them. The 2008 Legislative session resulted in many changes that impact annual meetings, particularly with regard to the election of directors. Some associations will have to hold general membership meetings prior to the election in order to continue current practices.

Effective October 1, 2008, Section 718.112(2)(d)1 of the Florida Condominium Act has been amended to provide as follows:

> The terms of all members of the board shall expire at the annual meeting and such board members may stand for reelection unless otherwise permitted by the bylaws. In the event that the bylaws permit staggered terms of no more than 2 years and upon approval of a majority of the total voting interests, the association board members may serve 2-year staggered terms. If no person is interested in or demonstrates an intention to run for the position of a board member whose term has expired according to the provisions of this subparagraph, such board member whose term has expired shall be automatically reappointed to the board of administration and need not stand for reelection.

The apparent intent of this law is to limit board terms to one year, apparently notwithstanding any contrary provisions in the association's bylaws. Many condominium associations (perhaps most) operate under a multi-year board seating system, with two years and three years being the most common terms for their board members.

Most associations with multi-year board terms operate under a "staggered" election system, where a set number of board members do not need to stand for election at each year's annual meeting (they would still have one or two years left on their terms). Many associations feel this approach is necessary to ensure that there is some continuity of experience on the board. For example, a common "staggering" system found in a typical bylaw provision might provide for a seven-member board, with four directors being elected for 2 year terms in one year, three directors elected the following year for a 2 year term, four the next year, and so on.

Under the new law, effective October 1, 2008, these bylaw provisions are apparently no longer valid.

There is an ability to "opt in" to two year staggered terms, by a vote of a majority of the entire voting interests of the association. There is usually one voting interest per unit in a condominium, and the new law requires approval by a majority of all units (not simply a majority of those who vote) to opt in to two year staggered terms.

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Accordingly, for associations that have two year staggered terms in their current bylaws, they will need to call a special meeting, presumably in advance of their next upcoming annual meeting, to "opt in" to the statute. More simply stated, a vote has to be taken to continue to have the right to operate under the existing bylaws. Otherwise, one year terms for board members will be the rule.

For associations with three year terms, it appears that some change will have to be made, I believe most associations will probably want to amend their bylaws to take advantage of the statutorily-permitted option for two year staggered terms. Associations with three year terms for their directors should also address this issue before their next annual meeting.

The new law certainly leaves several important questions unanswered. For example, are directors who have only partially served a multi-year term removed at the next annual meeting? Under the Florida Condominium Act, removal of a director from office is a power given to the unit owners in the condominium, not the Florida Legislature. Is it the intent of the law to be "phased in"; and "grandfather" those with time left on their terms, or is it supposed to take effect in October?

The law can also be construed to permit three year (or even longer) terms for board members, so long as they are not "staggered." I doubt that was the "intent" of the law, but it could certainly be interpreted that way, given how the language in the statute is written (the "otherwise permitted" phrase seems to suggest that other terms would be permissible, but if a staggered term, then only two year terms are permitted).

Associations which have one year director terms, and do not wish to change, need not worry about the new law as to this topic.

A second significant change brought about by HB 995 concerns the age-old debate about spouses (or other co-owners of a condominium unit) simultaneously serving on the board. Under previous law, if both spouses were listed on the title to the unit (named on the deed), they both had the right to run for, and be elected to, the board of directors.

Section 718.112(2)(d)1 of the Condominium Act will provide, as of October 1, 2008, that "co-owners of a unit may not serve as members of board of directors at the same time". The law contains an exemption for condominiums containing 10 or fewer units.

This change addresses a common situation where spouses (or other co-owners) own a single unit, but both wish to serve on the board. Under the new law, that will no longer be permissible. However, this new law also leaves many unanswered questions.

As with the multi-year term issue, is it the intention to remove current directors (such as two spouses) from office, when they have been duly elected? Or, does the new law phase in only after they serve out their term? If one spouse is to be kicked off the board by the new law, who decides which one it will be?

The new law also states that co-owners cannot simultaneously serve on the board, but the law does not prohibit co-owners from simultaneously running for the board. What if two co-owners run for the board and both are elected, how does the association decide which one is elected?

What if John Doe and Jane Doe own five units in a condominium? Does the new law mean that both of them cannot serve on the board, each representing the interest of different units? The law prohibits "co-owners of a unit" from serving on the board "at the same time." These and other questions remain unanswered at the present time.

Lisa Colon

Tom Code

Congratulations to attorneys Lisa Colon (Ft. Lauderdale office) and Tom Code (Ft. Myers office) for becoming Board Certified in Construction Law by the Florida Bar. This distinction certifies that they are "specialists" with expertise in this highly specialized area of the law. With a total of nine Board Certified lawyers in Construction Law, no other law firm has more specialists in Construction Law in Florida than Becker & Poliakoff. Community Associations are advised to carefully monitor their common areas for symptoms of potential construction defects, and to contact their Becker & Poliakoff attorney at the first sign of trouble.

BUILDING INSPECTION REQUIREMENTS

By: Aaron J. Pruss, Esq.
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On October 1, 2008, several amendments to the Florida Condominium Act will go into effect. Among other changes, Fl St Sec. 718.113 will now contain a sixth subsection which requires that all condominiums with buildings four-stories or higher be inspected by an engineer or architect every five (5) years[1]. The engineer or architect will be required to write a report commenting on the required maintenance, useful life and replacement costs of the common elements.

The new law will force the targeted condominium associations to address ongoing maintenance and repair responsibilities and will not allow them to bury their head in the sand regarding maintenance and repair responsibilities for its high-rise buildings. While the new law applies only to associations with buildings four-stories or higher, it should be the practice of all condominium associations to engage the services of a engineering or architectural consultant at least every five years to get a report on the physical status of their buildings and other common elements such as a pool or clubhouse.

Most condominium associations hire an engineer or architect to inspect and report on the status of the buildings and common elements immediately after turnover from developer control. As most owners know, the Florida Condominium Act grants broad implied warranties of fitness and merchantability to the unit owners and association (as to the common elements) from the condominium's developer. The initial turnover report is often used to identify what, if anything, the developer did incorrectly during the construction of the condominium and allows the association to make a claim for, among other things, breach of the warranties noted above. Identifying construction defects within the statutory warranty period is important for condominium associations, but it is not the only time an association should investigate the condition of its buildings and other common elements.

In our experience, much of what the developer does incorrectly or fails to do during construction does not manifest itself until the statutory warranty period has expired. As a consequence, we frequently make claims on behalf of our association clients for breach of the implied warranties even though the warranty period has officially "expired". In those cases, we argue that the defects are latent and, though not discovered until the warranty period expired, existed during the warranty period. Oftentimes, defects are not discovered until someone complains of or has a problem, like a roof leak, and the association hires a consultant or contractor to address the issue. While we have had good success making latent defect claims, an association must be careful not to sit on its hands too long if it suspects or knows there is a problem.

A significant issue facing condominium associations is identifying or discovering a defect before the statute of repose expires and they are otherwise barred from making a construction defect claim. Simply put, the statute of repose bars any construction defect claim if it is not brought within 10-years of the issuance of a certificate of occupancy ("C.O.") for that particular structure. Unfortunately, many associations do not conduct a follow-up engineering study until they know of a problem and may be precluded from bringing a claim against the developer if too much time has passed.

For those associations who are nearing the 10-year anniversary of receiving a C.O., it may be prudent to enlist the services of an engineer or architect to inspect the common elements and ensure that there are no latent defects for which the association might have a claim against the developer. For those condominium associations between five and ten years from C.O., now would be a good time to hire a consultant to report on the status of the maintenance, repair and replacement of the common elements so as to try to avoid problems with the statute of repose and, more importantly, make sure their buildings are functioning as intended.

While Fl St Sec. 718.113(6) will technically only apply to condominiums with buildings four-stories or greater in height, all condominium associations would be wise to adhere to its requirements and get a periodic update of the physical status of the buildings and other common elements.

1 The new inspection and reporting requirement can be waived by a vote of the majority at a duly noticed meeting.

PAY UP DEADBEAT!

Before you take collection matters into your own hands, please be aware that Florida law prohibits unfair or abusive tactics with regard to debt collection, including the collection of assessments. Among other practices, Section 559.72, Florida Statute, prohibits the following:

- **Use of profane, obscene, vulgar, or willfully abusive language in communicating with a debtor or any member of his or her family;**
- **Communication with a debtor under the guise of an attorney by using the stationery of an attorney or forms or instruments which only attorneys are authorized to prepare;**
- **Orally communicating with a debtor in such a manner as to give the false impression or appearance that such person is associated with an attorney;**
- **Publishing or posting, threatening to publish or post, or causing to be published or posted before the general public individual names or any list of names of debtors, commonly known as a deadbeat list, for the purpose of enforcing or attempting to enforce collection of consumer debts;**
- **Mailing any communication to a debtor in an envelope or postcard with words typed, written, or printed on the outside of the envelope or postcard calculated to embarrass the debtor. An example of this would be an envelope addressed to "Deadbeat, Jane Doe" or "Deadbeat, John Doe";**
- **Communicating with the debtor between the hours of 9 p.m. and 8 a.m. without the prior written consent of the debtor.**

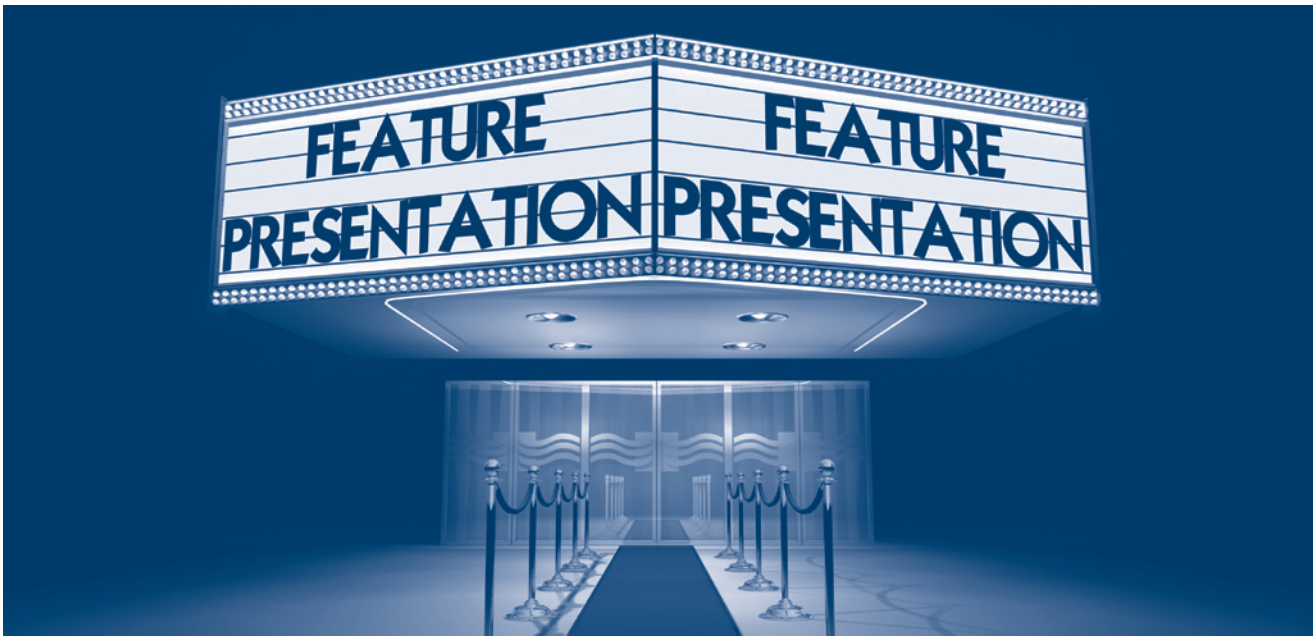
Despite these restrictions, members of your association are entitled to access official records of the association, which include a statement of each member's account and the amount due for such account. In fact, new legislation allows civil penalties to be imposed against individual directors if accounting records, including unit owner ledges, are mishandled. While every association must be diligent with its collection efforts, those efforts must be in compliance with legal and ethical standards.

The Community Update newsletter written by Becker & Poliakoff, P.A. is published for the benefit of our clients, friends and colleagues. Becker & Poliakoff, P.A. is committed to law related education to benefit the Firm's clients and the public. The objective of this newsletter is to keep officers and directors of Condominium, Cooperative and Homeowner Associations informed about matters affecting their communities operations and was not sent for the purpose of obtaining professional employment. The information provided herein is provided for informational purposes only and should not be construed as legal advice. The publication of this newsletter does not create an attorney-client relationship between the reader and Becker & Poliakoff, P.A. or any of our attorneys. While we make every attempt to ensure that the information contained in the newsletter is accurate, neither Becker & Poliakoff, P.A. nor the author of any article contained in this newsletter are responsible for any errors or omissions. Readers should not act or refrain from acting based upon the information contained in the newsletter without first contacting an attorney, if you have questions about any of the issues raised herein. The hiring of an attorney is a decision that should not be based solely on advertisements or this newsletter. Before you decide, ask us to send you free written information about our qualifications and experience.

COMMUNITY UPDATE™

VOLUME IX, 2008 | **Serving Florida's Communities Since 1980** | Lisa Magill, Esq., Editor

"MOVIE" NIGHT MAY PRESENT COPYRIGHT ISSUES



It is a typical "Friday Night at the Movies" for the residents of the "Not-that-Hollywood" Condominium Association, Inc. Popcorn in hand… a crowded room in the clubhouse… but what is about to happen may send shivers down the patron's spines… No, that isn't a monster hiding behind the closet door. This Association is about to break the law and potentially subject the association to a fine, which could be up to a staggering $150,000.00. (Scary movie music plays and patrons gasp…)

Many individuals, as well as associations, are under the mistaken impression that they are permitted to show films in the association's clubhouse simply by virtue of the fact that they have purchased the film from a retail store. In fact, in most cases, this is only true when the film is in the "public domain" (the time in which a film can be publicly exhibited without obtaining either a license or the copyright holder's express permission - one example of a work that is in the public domain is Charlie Chaplin's 1917 classic titled "*Easy Street*"). Another common misconception is that the Association does not need to obtain a license, so long as admission is not being charged. This is, once again, simply not accurate.

Copyright violations are a legitimate concern that can carry significant penalties. Many associations show films purchased at retail stores in the association's clubhouse without obtaining a license or the copyright holder's permission. In many cases, this constitutes a copyright violation known as "infringement". Copyright infringement is the violation of a copyright owner's rights, and is considered by many entertainment and legal industry professionals to be the equivalent of theft.

The owner of a copyrighted work, such as a movie, has certain exclusive rights that are associated with copyright ownership. In the case of a motion picture, one such right is the ability to "publicly perform" the film. A violation of the copyright holder's right to publicly perform the film constitutes infringement. To perform or display a work "publicly" is defined by the Copyright Act as the performance or display of a work at a place open to the public or at any place where a substantial number of persons "outside of a normal circle of a family and its social acquaintances is gathered".

Accordingly, the ultimate question is whether or not the showing of a film in an association's clubhouse constitutes a "public performance". A Florida Federal Court's decision, captioned *Hinton v. Mainlands of Tamarac, 611 F.Supp. 494 (S.D. Fla. 1985),* held that the performance of copyrighted material in an association's clubhouse was a "public performance" that obligated the Association to obtain a license. In the absence of obtaining the license, the Association was found to have

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infringed the copyright holder's right to publicly perform the copyrighted work. As a result, the Association was required to pay a fine.

However, the *Hinton* case is the only case of its kind, and although it is clear an association commits infringement under the facts in the *Hinton* case, the line between when an association can permissibly perform a copyrighted work (if at all) and when doing so will constitute infringement is not clear. Accordingly, the appropriate action for any association wishing to show a film is to obtain a license prior to doing so.

Associations wishing to obtain a license may do so by contacting a licensing agency, of which there are several. Many licenses that are offered are only good for one showing of a particular film. Obviously, obtaining licenses on an on-going basis creates an additional administrative burden. Accordingly, I would recommend that associations seeking to obtain a license obtain a "blanket license". A blanket license permits an association to show any movie under the licensing agency's catalogue for one flat fee. Blanket licenses are typically renewed on an annual basis and create less of an administrative burden for the association's management. Obtaining a license involves the payment of a nominal fee and prevents an Association from exposure for copyright infringement.

Please note, an association must be aware that any "blanket license" obtained by the association is only effective for those movies under the licensing agency's catalog. If the association shows a film outside the licensing agency's catalog, without obtaining an additional license, the association can still be guilty of copyright infringement. In other words, obtaining a blanket license from one licensing agency will not necessarily permit the association to show every movie that is commercially available at a retail store.

Further, blanket licenses are typically only available where the association does not charge admission, or an admission equivalent, such as a "donation". An additional point for an association's consideration is whether or not the payment of the licensing fee by the association is a proper common expense. For some, playing films may lead to more "drama", than any recently released thriller is worth, but for many, "Friday Night at the Movies" is an association tradition that justifies a minimal effort to ensure its survival.

Associations wishing to ensure they obtain the proper license, the expense for the license is a proper common expense, and that the license terms are favorable should consult with their attorney prior to entering into a licensing agreement. In either event, the Association should take the necessary steps to ensure that the next "Friday Night at the Movies" won't result in the Association "Coming Soon to a Courtroom Near You…"

LOCKER ENVY

by C. John Christensen, Esq.
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In many community Associations, but particularly in condominium Associations, the developer often reserves the right to "assign" to particular units items such as parking spaces or garages, storage lockers, boat docks, and the like. In this scenario, the Declaration often specifically establishes the ramifications of such developer assignment, typically providing that prior to such assignment these items are considered common elements, but upon such assignment automatically convert into *limited* common elements (to thereby serve only the unit to which assigned by the developer). Such developer assignment is also often conditioned upon a unit purchaser's payment of monetary consideration to the developer. Finally, any of these items which are not assigned by the developer remain common elements.

An initial question which often arises in this scenario is whether the Association, after the developer is out of the picture, may itself assign these items to particular unit owners requesting same, to thereby similarly convert them to *limited* common elements serving only the units to which assigned. However, it also frequently arises that Declaration provisions specifically authorizing the Association to assign these items are lacking. A second question arises as to whether the Association can require monetary consideration from unit owners desiring such Association assignment. We address these issues below, using as an example storage lockers located beyond the bounds of the units, some of which the developer assigned to units whose owners paid monetary consideration to obtain such assignment.

As to the initial question, if the original Declaration of Condominium specifically states that the Association, after the developer's right to assign such items has expired, may "step into the developer's shoes" and itself assign these unassigned items to particular units as limited common elements, such Declaration provision would be expected to be valid. Nevertheless, Associations without such specific authorizing language can still usually effectuate a very similar result, simply by

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utilizing an Association's general power to regulate the common elements, by adopting a rule or policy dedicating (rather than assigning) such items to the specific use of a particular unit *without converting* these items to limited common elements.

That is, case decisions such as *Juno By The Sea North Condominium v. Manfredonia, 397 So.2d 297 (4th DCA, 1981),* and Division arbitration decisions such as *Stegeman v. Harbor Towers Owners Association, Case No. 99-1036 (Draper, 1999),* stand for the proposition that a condominium Association can dedicate to individual units "use rights" in certain items otherwise considered general common elements, as long as such Association action is fair and reasonable. However, a number of decisions in the wake of *Juno By The Sea* have cautioned that an Association may not *permanently* dedicate the use of a general common element to a particular unit, since such action would be tantamount to converting the general common element into a limited common element, without obtaining the unanimous unit owner and lienholder approval that *718.110(4), Fla. Statutes*, appears to require. Hence, any Association dedication of "use rights" in common element items to a particular unit should not be made permanent, and should contain various provisions by which the Association can unilaterally terminate such dedication, in order to avoid a claim that the Association has improperly converted general common element property into limited common element property without obtaining the necessary membership approval.

As to the second question, if the Association is specifically authorized in the Declaration to "step into the shoes" of the developer and assign an item, such as a storage locker, as a limited common element to a unit, it is expected that the Association could condition such assignment upon the payment of monetary consideration by the unit owner(s) desiring same, pursuant to a case styled *Mayfair Engineering Co. v. Park, 318 So.2d 171 (4th DCA, 1975)*. This case provides the following in regard to the right of a *developer* to "assign for consideration" a parking space as a limited common element to a unit owner willing to pay such consideration: "nor do we believe that [the Condominium Act] in any way prohibits the developer's right to reserve and *sell* the exclusive use of the thirty-five parking spaces". Hence, the Association would likewise be expected to have the authority to condition such assignment upon receipt of monetary consideration from a unit owner desiring same.

However, Association receipt of monetary compensation becomes more complicated in regard to an Association which does not have any clear authority to step into the shoes of the developer to assign storage lockers as limited common elements. The Association would certainly not be able to "sell" the use of a common element storage locker to a particular owner desiring same, since, without specific assignment rights in the Declaration, such action would be tantamount to converting a general common element into a limited common element. Nevertheless, pursuant to Section *718.111(4), Fla. Statutes*, a condominium Association does have the authority to lease the common elements; provided that, an Association "may *not* charge a use fee against a unit owner for the use of common elements … unless otherwise provided for in the Declaration of Condominium or by a majority vote of the Association *or* unless the charges relate to expenses incurred by an owner having exclusive use of the common elements …".

Therefore, pursuant to this statute, the Association could *lease* common element storage lockers, parking spaces, boat docks, etc., to unit owners desiring the exclusive use of such items, with lease payments to the Association exceeding any Association expenses in this regard (e.g., for Association "profit"), *so long* as such action is either authorized in the Declaration of Condominium or is approved by a majority vote of the Association, and insofar as such leasing of these common element items to a particular owner is neither permanent nor so "ironclad" as to constitute a de facto conversion of a general common element into a limited common element. Hence, such action should be pursuant to a written lease between the Association and the unit owner, which contains various provisions by which the Association can, unilaterally and without penalty, terminate the lease, and the lease term should be limited (certainly no more than ten years on a renewable basis, etc.). Alternatively, if the Association does not desire to make any "profit", then pursuant to this statute the Association could "license" (rather than lease) the storage unit to a desiring unit owner, *so long as* any payment received from the unit owner does *not* exceed the "expenses incurred" to the Association for such licensing. That is, a benefit of licensing, rather than leasing, such common element items is that licensing would *not* need to be "provided for in the Declaration of Condominium or by a majority vote of the Association".

SEX OFFENDER REGISTRATION

On July 1, 2008, the Department of Justice announced the final guidelines for Title 1 of the Adam Walsh Child Protection and Safety Act of 2006, known as the Sex Offender Registration and Notification Act (SORNA).

The full text of the Adam Walsh Child Protection and Safety Act of 2006 can be found at http://www.govtrack.us/data/us/bills.text/109/h/h4472.pdf. This law is designed to protect children from sexual exploitation and violent crime, to prevent child abuse and child pornography, to promote internet safety, and to honor the memory of Adam Walsh and other child crime victims.

For the full text of the national guidelines for sex offenders registration and notification go to:

http://www.ojp.usdoj.gov/smart/pdfs/finalsornaguidelines.pdf

FAILURE TO COMPLY WITH POLICY CONDITIONS RESULTS IN LOSS OF COVERAGE

Starling v. Allstate Floridian Insurance Company, 956 So.2d 511, (5th DCA 2007)

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Are you familiar with the procedures and requirements for filing an insurance claim after a casualty? Not knowing cost Ginger Starling dearly. She was not entitled to any insurance proceeds after a fire substantially destroyed her home and its contents.

The Allstate insurance policy contained a typical provision requiring the insured to submit a signed and notarized sworn statement and proof of loss within sixty (60) days of the date of the fire. "Proof of Loss" is a term used in the insurance industry to describe the document containing the details of the claim. It identifies the property or portions of the property that were damaged, in some cases includes the cause of the damage, the extent of the damage, and the estimated dollar amount of the damage. A proof of loss might consist of a claim form, written estimates for repairs, receipts for mitigation or clean up performed as well as receipts showing the value of personal property damaged or destroyed, sworn statements from the insured or other witnesses, photographs and other evidence.

Allstate's claim representative sent Ms. Starling the claim form with a letter reminding her of the requirement to submit the proof of loss within sixty (60) days from the date of the fire. Ms. Starling provided Allstate with a partial list of damages within the sixty (60) days, but did not complete the sworn statement and likewise failed to have the document she submitted notarized, as required by the policy. She participated in Examinations Under Oath ("EUO") by the insurance carrier and explained to Allstate representatives that she had not completed the entire proof of loss at the time of the EUO because she wasn't finished calculating the total value of the damaged items. She finally provided Allstate with the signed, notarized proof of loss almost ten (10) months after the fire.

While Allstate denied the claim for various reasons, it placed primary importance on the failure of the insured to comply with policy conditions. The Court (both at the trial level and on appeal) agreed and stated that Ms. Starling's material breach of the duty to comply with an important condition of the policy "relieves the insurer of its obligations under the contract".

This case becomes particularly important for community leaders, especially with respect to condominium properties, as a result of the amendments to Section *718.111(1(d), Florida Statutes,* which provides, in relevant part:

> An officer, director, or agent shall be liable for monetary damages … if such officer, director, or agent breached or failed to perform his or her duties and the breach of, or failure to perform, his or her duties constitutes a violation of criminal law … a transaction from which the officer or director derived an improper personal benefit, either directly or indirectly; or constitutes recklessness or an act or omission that was in bad faith, with malicious purpose, or in a manner exhibiting wanton and willful disregard of human rights, safety or property.

In a case involving claimed violations of the Fair Credit Reporting Act, the U.S. Supreme Court defined recklessness as any action involving an "unjustifiably high risk … that is either known or so obvious that it should be known." While there is a significant difference between recklessness and merely being careless, a finding of recklessness may be made without showing any "bad" intent, or malicious purpose. Black's Law Dictionary says conduct (or lack of conduct) may be considered "reckless" if the person responsible for the conduct disregarded or was indifferent to the consequences of their actions and/or their failure to act. Is the failure to read, understand and comply with insurance policy pre-conditions "reckless"? It certainly resulted in harm to Ms. Starling under these circumstances.

Insurance policies are confusing and compliance with all the conditions and procedures necessary to preserve a claim may be complicated. Knowing what types of losses the policies cover and the extent of the coverage of each policy is the first step to handling claims adequately. Understanding the policies and procedures for the different carriers providing coverage to an Association is a daunting task, but well worth the effort, not only when there is a claim, but to aid in the decision-making process at renewal time.

The Community Update newsletter written by Becker & Poliakoff, P.A. is published for the benefit of our clients, friends and colleagues. Becker & Poliakoff, P.A. is committed to law related education to benefit the Firm's clients and the public. The objective of this newsletter is to keep officers and directors of Condominium, Cooperative and Homeowner Associations informed about matters affecting their communities operations and was not sent for the purpose of obtaining professional employment. The information provided herein is provided for informational purposes only and should not be construed as legal advice. The publication of this newsletter does not create an attorney-client relationship between the reader and Becker & Poliakoff, P.A. or any of our attorneys. While we make every attempt to ensure that the information contained in the newsletter is accurate, neither Becker & Poliakoff, P.A. nor the author of any article contained in this newsletter are responsible for any errors or omissions. Readers should not act or refrain from acting based upon the information contained in the newsletter without first contacting an attorney, if you have questions about any of the issues raised herein. The hiring of an attorney is a decision that should not be based solely on advertisements or this newsletter. Before you decide, ask us to send you free written information about our qualifications and experience.

COMMUNITY UPDATE™

VOLUME X, 2008 | **Serving Florida's Communities Since 1980** | Lisa Magill, Esq., Editor

"FLORIDA-FRIENDLY LANDSCAPE" – CREATING A FLORIDA-FRIENDLY YARD IN A HOMEOWNERS' ASSOCIATION

By: Anne M. Hathorn, Esq.
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Section 720.3075(4), Florida Statutes, states: "Homeowners' association documents, including declarations of covenants, articles of incorporation, or bylaws, entered after October 1, 2001, may not prohibit any property owner from implementing Xeriscape or Florida-friendly landscape, as defined in *s. 373.185(1)*, on his or her land."

Section 373.185(1)(b), Florida Statutes, defines "Florida-friendly landscape" as "quality landscapes that conserve water and protect the environment and are adaptable to local conditions and which are drought tolerant." The principles of Xeriscape include planning and design, appropriate choice of plants, soil analysis which may include the use of solid waste compost, efficient irrigation, practical use of turf, appropriate use of mulches, and proper maintenance."

There is no Florida case law defining what types of plants qualify as "Florida-friendly landscape," or what an HOA would be prohibited from allowing or requiring based upon the above statutes.

For instance, if an Association's Declaration of Covenants or Architectural Manual requires lawns to be sodded with varieties of St. Augustine grass, can an owner claim that he/she could not be prohibited from sodding with Bahia grass, because Bahia grass is "Florida-friendly?" With the current drought conditions and watering restrictions in effect throughout much of Florida, can owners neglect yard maintenance, or remove all of their grass, as an implementation of "drought tolerant" landscaping?

At this point, the answers are uncertain. It does not appear that the intent of the above statutes was to allow owners in HOAs to ignore or violate all lawn and landscaping-related requirements and standards. In the absence of case law interpreting the "Florida-friendly landscape" statutes, all homeowners, including Board members, would be advised to learn the basics of "Florida-friendly landscape," so that yards are designed to be attractive and environmentally friendly, with plants suited to the

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local climate, soil, and wildlife, while reducing water, fertilizer and pesticide use, all in compliance with the Association's governing documents.

Here are some of the principles:

Right Plant, Right Place.

Some plants are more drought-tolerant than others. Some plants grow well in shade, while others need full sun. Still other plants should be selected and planted in certain locations to serve as wind barriers.

And, of course, there are "invasive plants." Many Associations have a list of plants that owners cannot plant, because they are invasive or otherwise threatening to Florida's ecosystems and wildlife. The State of Florida prohibits planting certain plants, including Brazilian pepper, Australian pine and melaleuca. For a list of invasive plants, visit your county's Extension office, or the University of Florida/Institute of Food and Agricultural Sciences (UF/IFAS)'s website, at: http://plants.ifas.ufl.edu.

"Florida-friendly" landscapes emphasize plants that reduce maintenance and prevent runoff pollution, attract wildlife, and affect humans by providing shade, privacy screening, and food.

Water Efficiently.

Most parts of Florida are currently subject to watering restrictions. Even with watering restrictions, many homeowners still overwater, or water inefficiently. By choosing water-efficient and drought-tolerant plants, installing rain shutoff devices on irrigation systems, and watering at certain times of day, owners can reduce their water bills, insect and disease problems, while maintaining the quality and appearance of their yards.

Fertilize Appropriately. It is important not to overfertilize plants and grass, as this can aggravate pest problems, stimulate excessive growth, and require frequent watering. In addition, when owners use too much fertilizer on plants and grass, it can seep through the ground, past the root zone of the grass, plants or trees and into the aquifer. Excessive fertilizer can also be washed off by rainfall directly into surface water or via stormwater systems.

Mulch.

Adding a mulch layer around trees, shrubs, planted beds and over bare ground provides many benefits. Mulch improves soil fertility, buffers soil temperature, maintains soil moisture, inhibits weed growth and certain diseases, and gives planting beds a neat and uniform appearance that complements plantings. There are many different types of mulch that can be used throughout "Florida-friendly" yards.

Manage Yard Pests Responsibly.

"Florida-friendly landscape" emphasizes the Integrated Pest Management ("IPM") approach to managing pests. IPM includes planting pest-free and pest-resistant plants, evaluating whether treatment is required or whether natural enemies will solve the pest problem, and if treatment is necessary, using the safest alternatives first.

Obviously, no one can maintain a complete insect and disease-free yard. Most yard pests have natural enemies, like ladybugs and wasps. In order for these "good guys" to benefit a yard, some "bad guys" must be present. Learn to identify the "good guys" so that they, not chemicals, can solve pest problems.

Recycle.

Landscape maintenance activities, such as mowing, pruning and raking, generate yard waste that can be returned to the soil, recycling valuable nutrients. Composting is also a way that owners can recycle home or yard waste, with the added benefits of improving soil structure, texture and aeration, increasing the water-holding capacity of soil, and creating a favorable environment for microorganisms, earthworms and other "soil builder" insects.

Reduce Stormwater Runoff.

A healthy, properly maintained "Florida-friendly" lawn absorbs stormwater runoff, protecting Florida's natural waters by preventing fertilizer chemicals from entering natural waterways and damaging aquatic life and harming people. One of the most basic concepts of "Florida-friendly landscape" is that rain falling into a yard should soak into the yard. This benefits the landscape, and reduces runoff. Installing downspouts, incorporating "earth shaping" such as swales and berms into yards, and collecting rainwater in rain barrels and cisterns, are all practical tips that homeowners can use to reduce stormwater runoff from yards.

Protect the Waterfront.

For owners living on the water, "Florida-friendly landscape" is especially important. Shoreline protection, managing mangroves, removing invasive aquatic plants, and properly managing ponds or other natural stormwater filtration systems are all essential in protecting this valuable resource.

"Florida-friendly landscapes" provide many benefits, for homeowners and for Associations. To ensure that your Association's documents comply with the "Florida-friendly landscape" statutes, contact your Association attorney.

By choosing water-efficient and drought-tolerant plants, installing rain shutoff devices on irrigation systems, and watering at certain times of day, owners can reduce their water bills, insect and disease problems, while maintaining the quality and appearance of their yards.

WHAT CAN YOU DO IF YOUR NEIGHBOR WANTS TO BUILD A 20 STORY OFFICE TOWER?

By: Keith Poliakoff, Esq.
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In general, the neighboring property owner must Plat the property as the first step. By way of background, a plat is a map, drawn to scale, showing how a piece of land is divided. In general, plats serve to create rights-of-way, to dedicate lands, to ensure compliance with land use and zoning, to provide for public utilities, and to ensure a bonafide infrastructure.

The notion of platting has been around since medieval times, where the word "plat" referred to a piece (or "plot") of land. Prior to the development of plats, property records were difficult to discern. In fact, I have a property conveyance from the sixth year of King George the Third in which a parcel of land was conveyed for three cows. In the conveyance document, which is the size of a movie poster, the boundary is determined by walking fifty paces from George Carsson's barn. For these onerous and imprecise reasons, plats of cities, towns and villages were quickly created to show subdivisions as blocks with streets and alleys. This simplified the conveyance records by simply referring to the particular lot, block and often subdivision.

The creation of plats played an important role in the development of the United States. It enabled complex conveyance records of undeveloped property to be stored at one central location to preserve proper ownership records. It is interesting to note that the original 1849 plat for San Francisco, California can be found at the Clackamas County courthouse in Oregon City, Oregon, which in 1849 was the capital of the Oregon Territory and the closest federal land office. California did not become a state until the following year.

Although historically plats were utilized as a means to easily identify properties, today plats are utilized mainly as a means for municipalities and counties to collect impact fees to mitigate how a proposed development may negatively affect its municipal or county services.

The platting requirement is contained in Section 177 of the Florida Statutes which defines the term "plat" to mean "a map or delineated representation of the subdivision of lands, being a complete exact representation of the subdivision and other information in compliance with the requirement of all applicable sections of this part and of any local ordinances." To be approved, a proposed plat must only meet technical surveying requirements. Once the technical requirements for plat approval are met, there is no discretion in government authority to refuse approval of the plat. In the case entitled *Broward County v. Narco Realty, Inc.,* the Fourth District Court emphasized that the granting of approval of a plat to a landowner who met all legal requirements for platting land was a "ministerial" function of government, and, therefore, the applicant was entitled to have the plat approved and recorded.

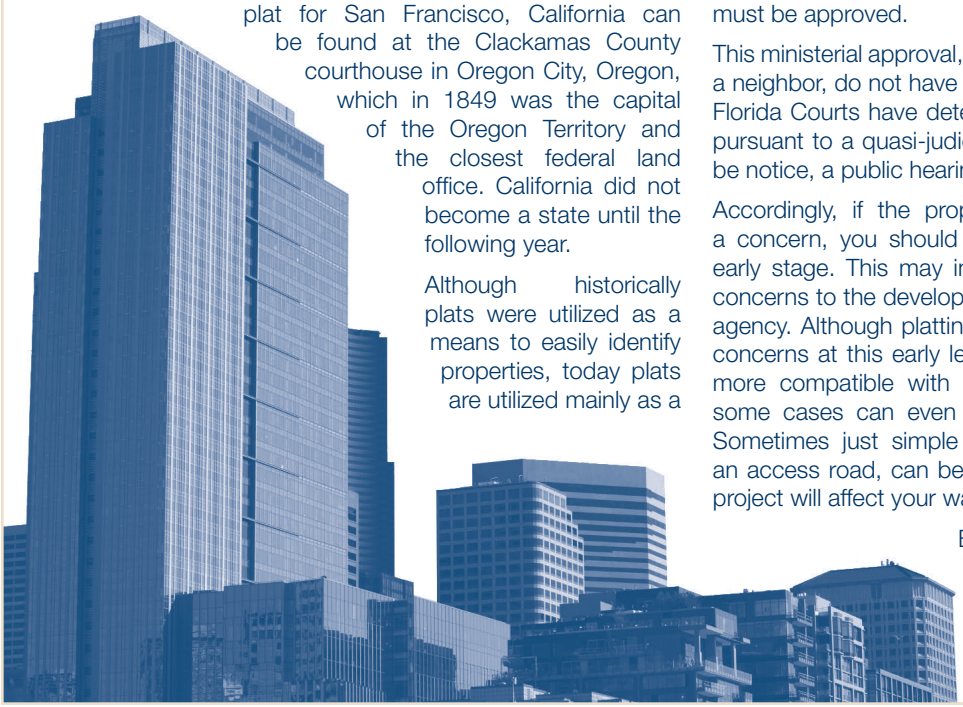
In *City National Bank of Miami v. City of Coral Springs*, the Fourth District Court of Appeal reaffirmed the principle espoused in *Narco Realty* and further declared that "once a party complies with all legal requirements for platting there is no discretion in government authority to refuse approval of the plat."

So, it is clear that a reviewing agency is not given any discretion when reviewing a plat. It simply must determine whether the plat meets the technical criteria of the code and if so the plat must be approved.

This ministerial approval, however, does not mean that you, as a neighbor, do not have a say in the process. To the contrary, Florida Courts have determined that plats must be reviewed pursuant to a quasi-judicial process and as such there must be notice, a public hearing, and the opportunity to be heard.

Accordingly, if the proposed twenty story office tower is a concern, you should let your concerns be known at an early stage. This may include meeting and presenting your concerns to the developer, local staff, and even the reviewing agency. Although platting is only the first stage, voicing your concerns at this early level can go far in making the project more compatible with the surrounding community and in some cases can even thwart the proposed development. Sometimes just simple things, like shifting the location of an access road, can be the deciding factor as to whether a project will affect your way of life.

Becker & Poliakoff, P.A.'s Government Team is available to answer any questions that you may have concerning proposed development in your area.



POOL & SPA RETROFITS REQUIRED

In January of 2008, President Bush signed, Title XIV, also known as the Virginia Graene Baker Pool and Spa Safety Act, into law. This federal law requires "public pools" and spas to be retrofitted and/or equipped with anti-entrapment devices, specifically targeted at their drains and suction systems in order to reduce the risk of injury or death associated with pool and spa drainage systems. Public pools and spas are defined, among other things, as swimming pools or spas that are "open exclusively to residents of a multi-unit apartment building, apartment complex, residential real estate development or other multi-family residential area." This, of course, impacts condominium, cooperative and homeowners' association-governed communities. The retrofitting and equipping of the pools and spas must take place within one year after the date of the enactment of the law. In other words, all retrofits must be completed by December 19, 2008.

Also relevant, condominiums, homeowners' and cooperative associations should be aware of requirements imposed on them by *Florida Statutes Chapter 514* governing public swimming and bathing facilities. "Public swimming pools" or "public pools" are defined in this statute as pools operated by or serving subdivisions or cooperative living type projects of five or more living units, such as apartments and townhouses. This statute sets forth details regarding the Florida Department of Health's authority to adopt and enforce rules to protect the health, safety and welfare of persons using public pools, including sanitation and safety standards. It also details the permits necessary to operate public pools and enforcement methods available to the Department.

Specifically excluded from supervision or regulation by the Department of Health under *Florida Statute Chapter 514* are pools serving condominium or cooperative associations that have no more than 32 condominium or cooperative units and which are not operated as public lodging establishments (although these pools will still be subject to the water quality standards set forth in *Chapter 514*). Also excluded from supervision or regulation are pools serving condominium or cooperative associations of more than 32 units and whose recorded documents prohibit the rental or sub-lease of units for periods of less than sixty days (these types of condominium or cooperative associations are, however, required to apply for, obtain and receive an initial operating permit for their pools as set forth in the statute). However, it is still necessary to comply with federal law.

Notably, homeowners associations are not exempt from regulation under *Chapter 514*. Part of the 2008 legislation was an attempt by lawmakers to include homeowners' associations meeting the limits set forth for condominium and cooperative associations above to be similarly excluded from regulation. Governor Crist, however, vetoed this bill. As of now, there are no homeowners associations exempt from *Chapter 514*.

Editor's Note: While the U.S. Consumer Product Safety Commission (CPSC) advises there are four (4) manufacturers of a product that complies with the federal requirements, several Florida pool contractors have encountered difficulties trying to obtain these products. Approved covers will display the following information when installed:

- *ASME A112.19.8 2007*
- *Flow rating of "X GPM"*
- *Life "X" years*
- *Manufacturer & Model*

Please consult with the pool contractor servicing your common areas in order to comply with this life safety requirement imposed by Federal Law.

CUP SPOTLIGHT

FIRM SHAREHOLDER ROSA DE LA CAMARA APPOINTED TO FLORIDA COMMUNITY ASSOCIATION LIVING STUDY COUNCIL

Ms. de la Camara was appointed to the Council, established by the Florida Legislature in 2008, by the Speaker of the Florida House of Representatives Marco Rubio.

The Council's role is to receive public input regarding issues of concern with respect to community association living and to make recommendations to the Legislature for changes in the law related to community associations.

Ms. de la Camara previously served as a member of the Florida Advisory Council on Condominiums, the body charged as liaison between the public and the Division of Florida Land Sales and Condominiums. She also serves as co-counsel for the Miami Beach Council of Condominiums.

We applaud Ms. de la Camara's devotion to public service for the betterment of community associations throughout the State.

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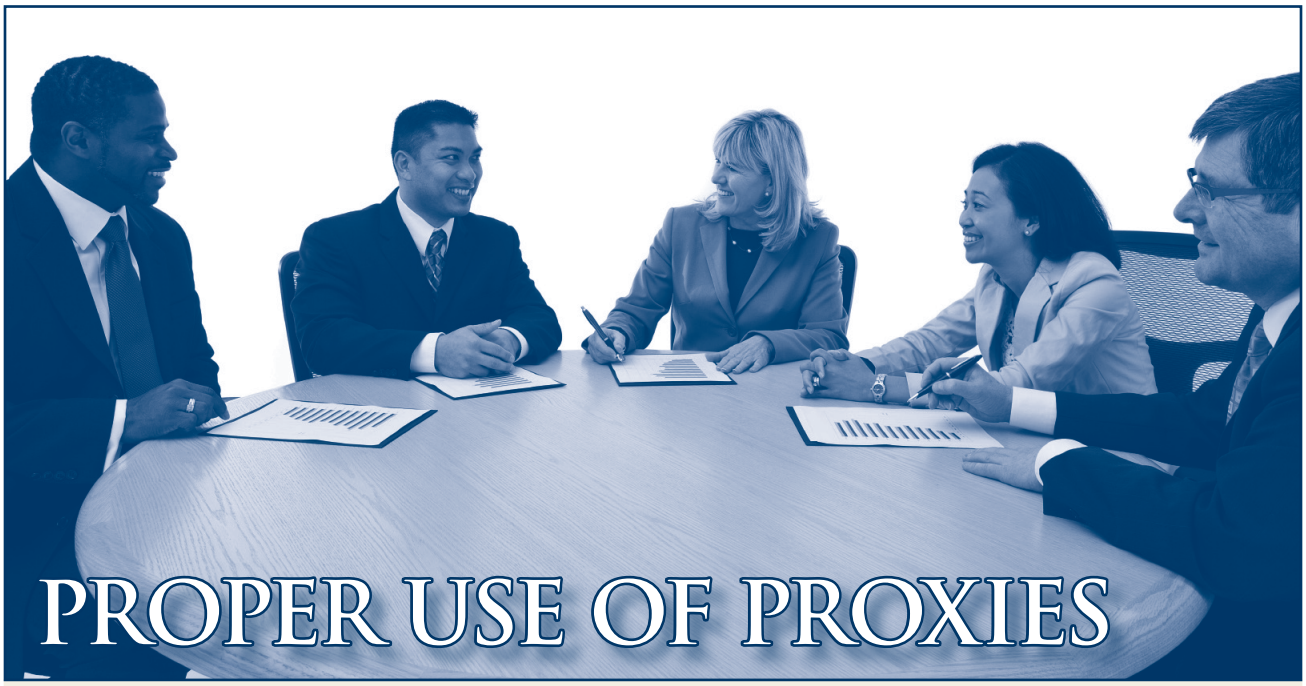
COMMUNITY UPDATE™

VOLUME XI, 2008 | **Serving Florida's Communities Since 1980** | Lisa Magill, Esq., Editor



PROPER USE OF PROXIES

On the limited proxy, you are given a choice of proxyholders. Generally, your choices will be (a) the association secretary or other designated association officer or (b) there will be blank for you to fill in the name of your proxyholder.

By: Angela Chao Clark, Esq.
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It is almost time for your annual meeting. Prior to the meeting, you will receive the Annual Meeting Notice Package which may include the notice and agenda for the meeting, election information, and a general and/or limited proxy. The notice informs you of the date, time and location of the meeting and the agenda lists the matters to be discussed at the meeting. Although the notice and agenda are essentially self-explanatory, the proxy is more complex. This article discusses the use of proxies at meetings, as well as offers guidance on how to properly fill out a proxy.

In order for your vote to count, you must complete your proxy properly.

Step One: Choose who will serve as your proxyholder.

You must designate a proxyholder (someone to vote for you). On the limited proxy, you are given a choice of proxyholders. Generally, your choices will be (a) the association secretary or other designated association officer or (b) there will be blank for you to fill in the name of your proxyholder. If you fail to choose (a) or (b), the person appointed as your proxyholder will be the designated association officer (i.e., association President, Secretary, or other officer).

Step Two: Choose whether to grant general powers.

You may be given a choice of whether or not to grant your proxyholder "General Powers." *Section 718.112(2)(b)(2)* of the Florida Statutes provides that:

> Except as specifically otherwise provided herein, after January 1, 1992, unit owners may not vote by general proxy, but may vote by limited proxies substantially conforming to a limited proxy form adopted by the division. Limited proxies and general proxies may be used to establish a quorum. Limited proxies shall be used for votes taken to waive or reduce reserves in accordance with subparagraph (f)2.; for votes taken to waive the financial reporting requirements of s. 718.111(13); for votes taken to amend the declaration pursuant to s. 718.110; for votes taken to amend the articles of incorporation or bylaws pursuant to this section; and for any other matter for which this

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> chapter requires or permits a vote of the unit owners. Except as provided in paragraph (d), after January 1, 1992, no proxy, limited or general, shall be used in the election of board members. General proxies may be used for other matters for which limited proxies are not required, and may also be used in voting for nonsubstantive changes to items for which a limited proxy is required and given…

Consequently, if you check the "General Powers" box, you are granting your proxyholder general powers to vote on any matters that may be discussed at the membership meeting for which a limited proxy is not required. However, there are few items on which a general proxyholder may vote as the Florida Statutes control.

Step Three: Vote on the issues presented.

Third, on the limited proxy, there is a statement granting the proxyholder "Limited Powers." For your vote to count, you must cast your vote on the specific items presented on the proxy. Your proxyholder does not have the authority to fill out the answers to the specific questions, so make sure you have voted on every issue before sending your proxy to the Association or giving it to your proxyholder.

Step Four: Execute the proxy.

Next, the limited proxy must be signed by "all the unit owners" or the "designated voter" for your particular unit. Depending on your condominium documents, you may need to execute a voting certificate. A voting certificate is a document signed by all owners of a unit (i.e., record owners as reflected on the deed) designating one of those owners as the "voting representative." If your condominium documents require a voting certificate, the only signature required on the limited proxy is that of the voting representative. Alternatively, each unit owner may sign the limited proxy.

Lastly, *718.112(2)(b)(3)*, Florida Statutes provides:

> Any proxy given shall be effective only for the specific meeting for which originally given and any lawfully adjourned meetings thereof. In no event shall any proxy be valid for a period longer than 90 days after the date of the first meeting for which it was given. Every proxy is revocable at any time at the pleasure of the unit owner executing it.

Generally, the limited proxy form will include similar language stating that the proxy is revocable and is valid only for the meeting for which it is given and any lawful adjournments.

For your vote to count, you must cast your vote on the specific items presented on the proxy. Your proxyholder does not have the authority to fill out the answers to the specific questions, so make sure you have voted on every issue before sending your proxy to the Association or giving it to your proxyholder.

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COMPARISON OF HOA & CONDOMINIUM COLLECTION AND FORECLOSURE PROCEDURES

There have been recent changes in both Chapters 720 and 718 with regards to collection and foreclosure. The following is a breakdown of how these changes affect HOA and Condominium Associations:

HOA, Chapter 720, Florida Statutes
The Association must send a 45 day intent to lien letter for any unpaid assessments prior to recording a claim of lien as of July 1, 2007.
The 45 intent to lien letter should be sent by the Association's attorney.
Once the 45 days has expired, the Association attorney may prepare a lien for the assessments.
At the time the lien is prepared, the Association's attorney will send a 45 day intent to foreclosure letter.
In the event that the owner does not pay within the 45 day intent to foreclose, the Association may file a foreclosure action.
Section 720.3085 was amended on July 1, 2008 and secures special assessments in the 12 months prior to the title transfer as well as regular assessments or 1% of the original mortgage debt or whatever is less. This amendment applies to mortgage foreclosures and to banks that take title in a mortgage foreclosure.
Pursuant to 720.3085, if a mortgage company or any third company bidder is the highest bidder at the foreclosure sale, that bidder is jointly and severally liable with the previous owner for all unpaid assessments that came due up to the time of transfer of title.
The highest bidder is then, regardless of how his or her title to the property has been acquired, including by purchase of the foreclosure sale or by deed in lieu of foreclosure, liable for all assessments to come due while the highest bidder is the parcel owner.
The highest bidder's liability for assessments may not be avoided by waiver or suspension of the use or enjoyment of any common area or by abandonment of the parcel upon which the assessments are made.

Condominium, Chapter 718, Florida Statutes
As amended on July 1, 2008, the Association through their attorney, must send a 30 day intent to lien letter prior to any claim of lien being recorded.
Once the 30 days has expired, the Association, through their attorney, may file a claim of lien for any unpaid assessments.
The owners are then provided a copy of the lien with a 30 day demand letter of the Associations' intent to foreclose.
In accordance with 718.116, if the mortgagee at a foreclosure sale takes title to the property or deed in lieu of foreclosure, the mortgagee is then responsible for 6 months assessments or 1% of the mortgage amount or which ever is less. The Association will not recover any attorney fee or cost associated with the previous owner.
If a third party purchaser takes possession of the property at a mortgage foreclosure sale or in a transfer of title, then the third party purchaser is jointly and severally liable for all assessments that came due and owing prior to the transfer of title.
The highest bidders liability for assessments may not be avoided by waiver or suspension of the use or enjoyment of any common area or by abandonment of the parcel upon which the assessments are made.

TWO DECISIONS BY THE FLORIDA SUPREME COURT EXPAND INSURANCE COVERAGE OF CONSTRUCTION DEFECTS UNDER CGL POLICIES

By: Thomas J. Code, Esquire
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On December 20, 2007, the Florida Supreme Court issued its opinion in *United States Fire Insurance Company v. JSUB, Inc.* The question before the Court was whether an insured general contractor had coverage for damages caused by the faulty workmanship of a subcontractor under a standard CGL policy and the question was answered in favor of the insured. The case involved allegations that the site work subcontractor used improper computation and testing methods which caused damage to foundations, drywall, and other parts of the project. Pursuant to the Court's reasoning, the defective work performed by the subcontractor that damaged the general contractor's completed work constituted "property damage" under a post-1986 standard form commercial liability policy. The Court held that the faulty workmanship by the subcontractor which was neither intended nor expected from the standpoint of the insured general contractor was an "occurrence" and that therefore the cost of repairing the damage caused by the defective workmanship was "property damage" within the meaning of the CGL policy. Although the Court found coverage under the CGL policy for the damage which resulted from the subcontractor's defective work, it left open the question of whether coverage existed for the defective work itself.

On June 12, 2008, the Florida Supreme Court applied the *JSUB* reasoning in the case of *Auto-Owners Insurance Company v. Pozzi Window Company* and determined that a CGL policy provided coverage for repairing or replacing the defective work of a negligent subcontractor. The *Pozzi* case involved allegations of defective installation of windows in a commercial building. In keeping with its opinion in *JSUB*, the Court held that if the windows were not defective prior to installation but were damaged by the defective installation by the subcontractor, coverage would exist for the cost of repair or replacement of the windows. However, a different result would follow if the windows were defective themselves before being installed and the damage to the completed project was therefore caused by defective windows rather than defective workmanship or installation.

The *JSUB* and *Pozzi* decisions provide a greater level of clarity for construction defect insurance claims. Although these Court opinions will probably lead to changes in future CGL policy forms, for the time being the decisions have the potential to expand insurance coverage of construction defects under comprehensive general liability or CGL policies.

Editor's note: Construction issues, particularly disputes with contractors, construction lien claims and common area defects, are a major concern to community associations. Therefore, we will include construction related articles in this publication from time to time.

CUP SPOTLIGHT

HOW OWNERS CAN AVOID LITIGATION ON CONSTRUCTION PROJECTS

Attorneys Steven Lesser and Michelle Ammendola were published in the book "Construction Checklists - A Guide to Frequently Encountered Construction Issues" for the American Bar Association. Their Chapter is a practical guide for minimizing disputes and protecting owners from costly litigation.

Mr. Lesser is a Board Certified Construction Attorney who leads the Firm's Construction Law Practice Group and Ms. Ammendola is an attorney in the group.

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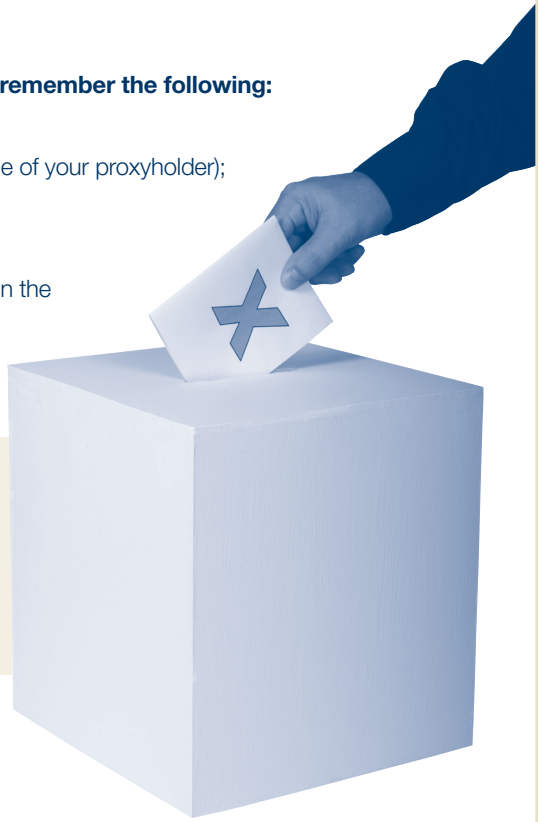
In summary, if you receive a limited proxy from your association, please remember the following:

- Fill in your unit number (and building number, if appropriate);
- Choose your proxyholder (i.e., designated association officer or fill in the name of your proxyholder);
- Grant general powers to your proxyholder, if you so choose;
- Vote on each of the items presented on the limited proxy;
- Sign and date the limited proxy. Remember that the proper persons must sign the limited proxy (i.e., designated voter or all the owners of a unit);
- Return the limited proxy by the date of the meeting.



Your vote is important, as is your participation in Association affairs. Therefore, please contact your association attorney if you have any questions regarding the use of proxies at any annual or special membership meetings.

NOMINATIONS ARE NOW OPEN FOR THE "FLORIDA COMMUNITIES OF EXCELLENCE AWARDS."

This new statewide program recognizes Associations that promote innovative solutions and utilize best practices to maintain and improve the quality of life for residents of community associations throughout the State.

Applications will be judged by a distinguished panel of independent experts practicing in fields such as safety & security, environmental concerns, disaster preparedness, communications and civic involvement.

For information and nomination forms please check out www.flcaj.com/coe.

IMPORTANCE OF ACCURATE ACCOUNTING LEDGERS

By: Tracy Mitchell
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Everyone knows that owner delinquencies are more prevalent now than ever before and Associations have been forced to engage in collection and foreclosure actions. In order to begin the collections process, an Association must submit a copy of the owner's account ledger to our collections/foreclosure department so that the total amount owed by the owner can be calculated. The ledger is used by the collections/foreclosure department to prepare the figures used in demand letters to unit owners, the Claim of Lien, estoppel letters and/or court filings.

In order to accurately calculate the amount due by an owner, the collections/foreclosure department needs to have a ledger that goes back to the last date the unit owner was current, with either a credit balance or a zero balance on their account. A "zero-balance ledger" is critical to the collections/foreclosure process because, among other benefits, it prevents accounting errors and ensures that the Association has written evidence to establish the unit owner's delinquency. Although it is not preferred, a collections/foreclosure case *can* move forward with the records that are available if it is impossible to produce a zero-balance ledger. However, having written evidence of an owner's delinquency is crucial when an Association must go before the court for a hearing or trial.

An Association should understand the importance of properly maintaining its records because it is obligated by law to keep good business and accounting records. The Condominium Act, the Cooperative Act and the Homeowners' Associations Act all require Associations to maintain accounting records for a period of at least 7 years. In compliance with Generally Accepted Accounting Principles (GAAP), the accounting records are required to include statements or ledgers for the accounts of each unit owner. If an Association changes its property management company, it should make sure that the new management company receives all records from the former management company.

Submitting delinquent owners to collections expediently, rather than waiting months or even years to do so, makes it easier to provide a ledger that starts with a zero-balance. In the long-run, a zero-balance ledger can increase the Association's chances of success in recovering the balance due.

Generally Accepted Accounting Principles (GAAP)

Are conventions, rules, and procedures that define accepted accounting practice, including broad guidelines as well as detailed procedures.

The Financial Accounting Standards Board (FASB) www.allbusiness.com/glossaries/financial-accounting-standards-board-fasb/4950859-1.html, an independent self-regulatory organization, is the primary source of these accounting rules which are followed by auditors and certified public accountants.

The aim of GAAP accounting principles is uniformity in financial statements.

The Community Update newsletter written by Becker & Poliakoff, P.A. is published for the benefit of our clients, friends and colleagues. Becker & Poliakoff, P.A. is committed to law related education to benefit the Firm's clients and the public. The objective of this newsletter is to keep officers and directors of Condominium, Cooperative and Homeowner Associations informed about matters affecting their communities operations and was not sent for the purpose of obtaining professional employment. The information provided herein is provided for informational purposes only and should not be construed as legal advice. The publication of this newsletter does not create an attorney-client relationship between the reader and Becker & Poliakoff, P.A. or any of our attorneys. While we make every attempt to ensure that the information contained in the newsletter is accurate, neither Becker & Poliakoff, P.A. nor the author of any article contained in this newsletter are responsible for any errors or omissions. Readers should not act or refrain from acting based upon the information contained in the newsletter without first contacting an attorney, if you have questions about any of the issues raised herein. The hiring of an attorney is a decision that should not be based solely on advertisements or this newsletter. Before you decide, ask us to send you free written information about our qualifications and experience.

COMMUNITY UPDATE™

VOLUME XII, 2008 | Serving Florida's Communities Since 1980 | Lisa Magill, Esq., Editor

By: Lisa Magill, Esq., Editor
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The foreclosure crisis took a nasty turn into a credit crisis, not only here in Florida, not only here in the United States, but globally, as well. The CALL survey conducted from March 26 through April 8 revealed that there was over a seventy (70%) percent increase in foreclosures in HOA communities and more than fifty (50%) percent increase in foreclosures in condominiums. Close to ninety (90%) percent of all survey participants believed that the increased foreclosure rate and the failure of banks to honor financial responsibilities after foreclosure negatively impacted the financial health of their associations.

Unfortunately, some buyers and owners overextended themselves. Renters became homeowners, homeowners bought bigger homes, second homes & investment properties, took out lines of credit and second mortgages to finance home improvements or other projects and while casual investors turned into speculative investors, it seemed like everyone did whatever they could to buy property. Mortgages were so profitable they became the commodity and were packaged into investments. When the assumptions used to calculate expected returns from these types of investments failed … everything changed.

In March, the Federal Reserve bailed out a private equity firm by guaranteeing $30 Million in debt. In September, the Government seized control of Fannie Mae and Freddie Mac, which are basically government guaranteed "pooled" mortgage owners. After a first failed attempt, in October, Congress approved spending up to $700 Billion to avoid a possible collapse of banking and financial institutions.

Florida legislators targeted issues that seem contrary to each other, but received equal support. Personal freedoms were secured by the enactment of Section 718.113(7), Florida Statutes, allowing residents of condominiums to observe religious practices and Section 720.304(2)(a)-(c), Florida Statutes, allowing homeowners to display their patriotism. Consumers received substantial protections by the imposition of building inspection requirements, audits at least every three (3) years, specific financial disclosures on reports and voting forms, written notice before filing liens and other conditions for associations.

Becker & Poliakoff, spearheaded by efforts of CALL, responded to the changing needs of community associations. The survey clearly revealed that Associations were struggling and it seemed inevitable that revenue would only decline if the real estate market continued to falter. CALL members from across the state described how maintenance fees weren't paid during a pending foreclosure and the lack of maintenance and care of the properties after foreclosure. In a lot of cases it took a year or more for the bank to foreclose. The Co-Executive Directors of CALL approached Ken Direktor, Esq., Leader of the Firm's Community Association practice, with an urgent request to support a legislative solution. Brainstorming took place immediately. Why shouldn't the banks have more of an obligation when they foreclose? CALL drafted a proposed resolution for consideration by community leaders and presented it at the Town Hall Meeting sponsored by Jerry Libbin, a Miami Beach Commissioner who has led his constituents' call for legislative reform. After reading hundreds of emails from CALL members and listening to the concerned citizens at the Town Hall meeting, CALL's Directors, Ms. Goin and Mr. Muller, revised the draft resolution to clarify the goals of the community association

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leaders and owners throughout the state. Well over 200 community associations have adopted resolutions supporting changes to lessen the burden left on homeowners "holding the bag" when there are empty homes from foreclosures and the resulting credit/financial crisis.

As the year comes to a close, light is visible from the "end of the tunnel." President Bush signed the Emergency Economic Stabilization Act of 2008 (EESA) into law to assist delinquent homeowners and encourage lenders to take advantage of the fast-track loan modification program designed to minimize foreclosures by restructuring payments. The Daily Business Review[1] reported that REO sales[2] accounted for over thirty (30%) percent of the home sales in Miami-Dade County in the third quarter and lenders have been increasingly willing to negotiate prices or consider short sales.[3] Meanwhile, County officials have stepped-up enforcement measures when REO properties are in violation of local codes and ordinances as a result of a lack of maintenance and care.

Additional Town Hall style meetings are being held throughout the State of Florida[4] with regard to this issue. Bills impacting community association operations have already been filed and legislators are working on modifications to the insurance provisions and requirements of Florida law. CALL will continue to provide the Firm's clientele with up-to-date information about legislative activities. We encourage all community leaders, board members, professional managers and owners of properties governed by community associations to remain involved in the process and voice your concerns.

The Firm is committed to providing our clientele with information and resources necessary for successful community operations. We covered a wide variety of issues in 2008 ranging from enforcement of use restrictions to discrimination to corporate governance and beyond. Volume VII contains a comprehensive explanation of the legislation adopted in 2008 and future issues will address court or division rulings interpreting the new laws. Best wishes are extended to all for the holiday season and the New Year.

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[1] *Foreclosure Crisis: Banks have a new attitude toward home sales.* December 4, 2008.

[2] Real Estate Owned – property belonging to a lender as a result of foreclosure.

[3] A "short sale" generally refers to a sale of the property for less than the amount of the outstanding mortgage.

[4] This issue will be presented and discussed at the CAI-Southeast Florida Annual Day of Education and Exposition being held on January 24, 2009. Please refer to www.cai-seflorida.org for more information.

YEAR IN REVIEW – THE ARTICLES:

Vol I Features:

Removal or Eviction of Tenants by Community Associations. The Authors explain the procedures involved and statutory framework governing removal of tenants by Community Associations.

Also:

Homeowners' Association Presuit Mediation Requirements are explained by David Muller.

Kevin Edwards discusses the Use of Electronic Mail.

Vol II Features:

Liliana Farinas-Sabogal does a thorough job of exploring how Amendments to Governing Documents Will Improve Association Operations.

Also:

Did You Know: Life Estates

Timesharing vs. Fractional Ownership

Vol III SPECIAL FAIR HOUSING ISSUE:

From the Editor:

In Vol. III, 2008 we noted it had been forty (40) years since the death of Reverend Martin Luther King, Jr., and the enactment of the 1968 Civil Rights Act. We now have a Civil Rights Act that has been amended to include Fair Housing Laws such as the Housing for Older Persons Act, affording protection against discrimination on the basis of several protected classifications, including requirements to make reasonable accommodations or modifications under certain circumstances. A new law, the Americans with Disabilities Amendments Act of 2008 expands the definition of the term "disability" and provides examples of "major life activities" which, if impaired, would lead to a finding of disabled status. These expanded definitions are likely to apply in the Fair Housing context.

Discrimination Complaints – the A's to Z's, by JoAnn Burnett.

Making Reasonable Accommodations in an Unreasonable World, by John Cottle

Also:

Doesn't Insurance Cover Fair Housing Claims?

What are 'Protected Classifications?'

Vol IV Features:

Payroll Taxes: Director Liability, by Ryan Pinder.

Architectural Control – Guideline Requirements, by Marlene Kirtland

Also:

Quorum Requirements Explained

Life Safety Reminder: Fire Sprinkler & Safety Upgrades

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Vol V Features:

Mandatory Memberships Rejected: Florida Courts Invalidate Amendments Requiring Purchasers to Join Country Club

Also:

HOA Reserve Disclosures

Revitalizing Expired Covenants – Voluntary Community Associations

Vol VI Features:

Association Legal Counsel: The Role Explained, by Gregory Marler.

Common questions regarding On-Site Work Related Injuries, answered by Brian Miles.

Vol VII SPECIAL LEGISLATIVE ISSUE:

Summary of the 2008 Legislative Session, by Yeline Goin and David Muller.

Vol VIII ANNUAL MEETINGS AND ELECTIONS:

Important Considerations for Condominium Associations. Joe Adams explains changes regarding terms for directors and eligibility issues.

Also:

A report on the new Building Inspection Requirements found in the Condominium Act, by Aaron Pruss.

Sure, you may want to say Pay Up Deadbeat, but consider all regulations first – important warnings for Community Associations.

Vol IX Features:

VCR and DVD Rentals: Are there Copyright Issues?

Locker Envy – Who assigns spaces? By: John Christensen

Also:

Can your insurance company avoid paying a claim? If you Fail to Comply with Policy Conditions, it's possible. By: Lisa Magill

Vol X Features:

Florida Friendly Landscape – Creating a Florida Friendly Yard in a Homeowners Association. Anne Hathorn explains how properties can remain beautiful in light of water restrictions and other impediments.

Also:

Keith Poliakoff answers the question about your rights in "What if a 20 Story Office Tower was Going up Right Next Door?"

Pool & Spa Retrofits Required by December 19 – Are You Ready?

Vol XI Features:

Angela Chao Clark explains the Proper Use of Proxies step-by-step.

Also:

Comparison of HOA & Condominium Collection and Foreclosure Procedures.

Tom Code reports on Two Decisions by the Florida Supreme Court that expand the scope of insurance coverage for construction defects.

Tracy Mitchell provides details about the Importance of Accurate Accounting Ledgers.

To access past issues of Community Update, please visit www.becker-poliakoff.com/pubs/newsletters/cu/publications_cu.html

HIGHLIGHTS:

Vol I *2008 Annual Community Leadership Conferences.* Over 1,000 attended educational programming offered by the Firm.

Vol II Reminder about the *Free Wind* Inspections offered by the My Safe Florida Home Program

Vol III Attorney JoAnn Burnett gave a presentation that included valuable information about the law with regard to Emotional Assistance Animals on Friday, April 4, at *Broward County's Fair Housing Symposium.*

Ms. Burnett likewise lectured about Fair Housing issues on Friday, April 25, at the *Palm Beach County & F. Malcolm Cunningham Bar Assn.'s Fair Housing Symposium.*

Vol V The *Educator of the Year Award* granted to Shareholder Ellen de Haan by Community Associations Institute.

Vol VI Info on Annual Meeting Questionnaires: *Legislative Changes Impact Elections*

Mandatory Golf Membership Case Update – Objecting Owners Not Bound

Vol VII *Becker & Poliakoff* announces the first in a series of Webinars. Over 150 participated in 2 Webinars conducted by Attorneys Ken Direktor, Lisa Magill and David Muller.

Vol VIII *Additional Construction Law Board Certifications Announced:* Becker & Poliakoff has more board certified construction lawyers than any other Firm in Florida.

Vol X Rosa del la Camara appointed to the *Florida Community Association Living Study Council* by the Speaker of the Florida House of Representatives.

Vol XI Steve Lesser and Michelle Ammendola are recognized for their work describing *How Owners Can Avoid Litigation on Construction Projects.*

We Are Also Pleased To Announce:

Nova Southeastern University's Sheppard Broad Law Center named Gary A. Poliakoff at Adjunct Professor of the Year for developing and teaching the Condominium Law and Practice course since 1984.

Attorney Alan Krinzman received LEED (Leadership in Energy & Environmental Design) Professional Accreditation from the U.S. Green Building Council.

Florida Communities of Excellence Awards were announced.

Our **2009 Community Association Leadership Conference** is coming to a location near you! Get the latest information on important topics including

- Strategies to help your community navigate through liens and foreclosures in an uncertain economy;
- New law from the 2008 legislative session impacting common ownership housing communities;
- Court decisions that have shaped the law in recent months and how those decisions affect your daily operations.

For more information, including dates and locations, or to register for this ***FREE*** conference, go to www.callbp.com/events.php today!

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