

PRIVILEGES THAT GO WITH LITIGATION



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A. Introduction

Under Fla. Stat. §90.502, a client has a privilege to refuse to disclose, and to prevent any other person from disclosing, the specific contents of any confidential communications when such other person learned of the communications because they were made in the rendition of legal services to the client. A lawyer cannot be compelled to disclose any communication made to them by his/her client, or to disclose any advice given in the course of the professional employment, without the consent of the client. *Liberty Mutual Insurance Co. v. Flitman*, 234 So. 2d 390 (Fla. 3d DCA 1970).

As a general rule, the attorney-client privilege arises under the following circumstances (See *Hoyas v. State*, 456 So. 2d 1225 (Fla. 3d DCA 1984)):

- where legal advice of any kind is sought;
- from a professional legal advisor in his or her capacity as such;
- the communications relating to that purpose;
- made in confidence;
- by the client;
- are at the client's instance permanently protected;
- from disclosure by the client or by the legal advisor; and
- unless the protection is waived.

The privilege is premised on the theory that "to promote freedom of consultation of legal advisers by clients, the apprehension of compelled disclosure by the legal advisers must be removed." *Dean v. Dean*, 607 So. 2d 494 (Fla. 4th DCA 1992). In order to properly offer effective assistance of counsel, the attorney needs to know all that relates to the client's reasons for seeking representation. The privilege is designed to encourage clients to fully disclose to counsel "all pertinent facts, whether favorable or unfavorable, so that counsel can provide competent and effective legal representation." *State v. Rabin*, 495 So. 2d 257 (Fla. 3d DCA 1986).

B. Who Holds The Privilege?

Generally, the attorney-client privilege belongs to the client and it is the client who may properly assert it. However, in addition to the client, the following list encompasses exactly who may claim the privilege (See Fla. Stat. §90.502(3)):

- a guardian or conservator of a client;
- the personal representative of a deceased client;
- a successor, assignee, trustee in dissolution, or any similar representative of an organization, corporation, or association or other entity, either public or private, whether or not in existence; and
- a lawyer, but only on behalf of a client.

Remember that the attorney-client privilege belongs to the client, not the attorney. *Neu v. Miami Herald Publishing Co.*, 462 So. 2d 821 (Fla.1985). In addition, the person invoking the privilege bears the burden of proving that it legitimately exists.

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C. What Does It Mean For Something To Be Confidential?

Not all confidential communications between an attorney and others will fall under the protection of the attorney-client privilege. Testimony as to communications with an attorney will not be excluded as privileged “unless it appears not only that the person was an attorney, but also that there was a relationship of attorney and client, and that the communications were made in the course of such professional employment.” *Molne v. Keyes Co.*, 357 So. 2d 262 (Fla. 3d DCA 1978). If the communication in question is not made by an attorney in his capacity as a lawyer, no attorney-client privilege will attach to those communications. *Skorman v. Hovnanian of Florida*, 382 So. 2d 1376 (Fla. 4th DCA 1980).

Several exceptions also apply to the privilege and no attorney-client privilege will be found in the following circumstances under Fla. Stat. §90.502(4) when:

- The services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew was a crime or fraud.
- A communication is relevant to an issue between parties who claim through the same deceased client.
- A communication is relevant to an issue of breach of duty by the lawyer to the client or by the client to the lawyer, arising from the lawyer-client relationship.
- A communication is relevant to an issue concerning the intention or competence of a client executing an attested document to which the lawyer is an attesting witness, or concerning the execution or attestation of the document.
- A communication is relevant to a matter of common interest between two or more clients, or their successors in interest, if the communication was made by any of them to a lawyer retained or consulted in common when offered in a civil action between the clients or their successors in interest.

D. When Will The Privilege End?

The attorney-client privilege endures even after the attorney-client relationship terminates. *Hoyas v. State*, 456 So. 2d 1225 (Fla. 3d DCA 1984). However, all matters that are covered by the attorney-client privilege will retain their privileged status until the protection of the privilege has been waived by the client. *Visual Scene, Inc. v. Pilkington Bros.*, 508 So. 2d 437 (Fla. 3d DCA 1987).

E. The Privilege In The Condominium Context

As mentioned in section “A” above, the Attorney-Client Privilege is governed by Fla. Stat. §90.502, which specifically defines a “client” as any person, public officer, corporation, association, or other organization or entity, either public or private, who consults a lawyer with the purpose of obtaining legal services or who is rendered legal services by a lawyer.

Additionally, a client has a privilege to refuse to disclose, and to prevent any other person from disclosing, the contents of confidential communications when such other person learned of the communications because they were made in the rendition of legal services to the client. *Id.* In the case of a corporation or association, any representative may claim the privilege. In *Philistin v. Shaker Village Condominium Association, Inc.*, 1998 WL 34311940 (Arb. Case No. 98-2858), the arbitrator found that although Chapter 718 does not specifically provide that a condominium association has an attorney-client privilege with respect to communications with its attorney, a condominium association is required to be formed as a corporation for-profit, or as a corporation not-for-profit. Therefore, a condominium association is a corporation and, pursuant to Florida law, may claim the privilege enjoyed by a corporation pursuant to §90.502. *Id.*

Specifically focusing in on the Condominium Act (Fla. Stat. §718), several direct statutory privileges are embedded within the text of the Condominium Act. See Fla. Stat. §718.112(2)(c) (providing that meetings between a condominium association’s board or committee and the Association’s attorney need not be open to members when pertaining to legal advice relevant to proposed or pending litigation); Fla. Stat. §718.111(12)(c)(1) (essentially providing that members of condominium association may not obtain documents protected under §90.502 until the conclusion of the legal proceedings to which the documents relate); *Philistin v. Shaker Village Condominium Association, Inc.*, 1998 WL 34311940 (Arb. Case No. 98-2858)(arbitrator held that although §718.111(12) does not specifically provide an attorney-client privilege to prevent disclosure of confidential communications between board members and an association’s attorney, the protection applies nonetheless); See also *Diane Heaton v. Ocean View Towers Condo. Assn.*, 2002 WL 32770486 (Arb. Case No. 02-4872)(Fla. Stat. §718.111(12)(c)(1) specifically provides that records of a condominium association protected by lawyer-client privilege, as defined by §90.502, are exempt from disclosure to unit owners).

Finally, it is important to note that although an association’s “official records” may generally be requested by any unit owner for inspection purposes, this right may be hampered when it comes to “official records” that may contain privileged information. In *Accardi v. Leisure Beach South, Inc.*, 2000 WL 34475863 (Arb. Case No. 00-0955) the arbitrator held that under §718.111, records of a Condominium Association protected by lawyer-client privilege, as defined by §90.502, are exempt from disclosure to unit owners....even when relating to documents or disclosures that would otherwise constitute “official records” that would ordinarily have to be disclosed. Therefore, a unit owner has no right of access to materials protected by the attorney-client privilege, even where such materials fall into the official records described by statute that are generally allowed to be inspected.

REAL ESTATE LAW

IS IT TIME FOR A CHANGE? CONSIDERING YOUR OPTIONS WHEN A CONDOMINIUM JUST DOESN'T WORK AS A CONDOMINIUM ANYMORE



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When the real estate market was hot, it was really hot. Untold market growth led to the belief that converting just about every apartment building or old hotel into a condominium would result in enormous financial gain. And, for a while, it did. Then came a market melt-down of untold proportions. As the realities of today's real estate and financial environment come to be understood, it is time consider whether some condominium communities should continue to operate as a condominium. But when do you know whether such a consideration is right for your community? What are the alternatives? How do you terminate a condominium? Why would you terminate a condominium?

This is not a topic to be taken lightly. However, where an association experiences significant increases in delinquencies and the majority of ownership is held by a collective group of banks with many more units are stalled in foreclosure process, the board and unit owners need to consider their alternatives. Surviving as a condominium for these associations is a true struggle.

Bankruptcy, as an alternative, is reasonable where an optimistic forecast of likely sales of units within a reasonable time exists. It buys time for an association that sees a developing trend of sales of units to owners who will pay assessments. If that day looks like it will never come, or is so far out on the horizon that the burden on current unit owners becomes unbearable, the community must ask itself, "Why continue as an association and what are the alternatives?"

Another alternative is making the community attractive to a single purchaser who would operate it as a multi-family rental community. As a dysfunctional condominium project, the difficulty lies in finding an investor who will (i) step in and buy the units one by one, then (ii) hope to negotiate short sales with a multitude of lenders then (iii) hope to secure necessary number of votes required of the remaining unit owners to terminate the condominium under Chapter 718, and, then (iv) complete the termination and begin operation as a rental community. This prospect may be even more daunting than the prospect of continued operation of the community. Instead, where the end of the condominium seems inevitable, the community



itself can consider taking several of the steps to terminate the condominium and attract a multi-family investor.

The process neither begins, nor ends, with the termination of the condominium. It begins by identifying the desired end result, and then gaining a proper understanding of what is involved in the termination process. If the board ascertains that there is consensus for termination, it must also the entity or structure that replaces the condominium documents for joint ownership and operation of the property between termination and sale to a multi-family investor. It is operation of the property during this period of time that will determine whether the community can get to the point where a marketable multi-family rental project emerges.

Seeing this alternative through to its end requires input and guidance from our real estate and community association, tax and corporate practice groups. Accomplishing this goal may also involve litigation strategies to clear up any lingering title issues. Change, for the sake of change, is not advised, but change, to achieve a well defined exit strategy, may be an alternative worth considering.

THE RIGHTS OF THE TENANT FOLLOWING FORECLOSURE BY THE ASSOCIATION



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In these tough economic times, Associations are considering alternative means of collecting delinquent assessments. One recent trend is to foreclose on units where the first mortgagee has failed to do so. Following foreclosure, the Association can lease the unit and collect rent to cover past due assessments and other budgetary deficiencies. However, if there is a tenant already occupying the unit, the Protecting Tenants at Foreclosure Act of 2009 (Title VII of Public Law 111-22), which took effect on May 20, 2009, seems to require Associations to take certain steps before it can evict the tenant and place a new tenant in the unit, in that it applies to any foreclosure on a federally-related mortgage loan or on any dwelling or residential real property, which arguably includes Association lien foreclosures.

Where it is the intent of the Association, following issuance of a Certificate of Title, to remove the current tenant, it must first provide the tenant with notice of same ninety (90) days in advance. Whether the tenant must vacate the unit at the end



of the 90 days turns on two-part test which looks at (1) who intends to occupy the unit following foreclosure and (2) the type of lease in place at the time of foreclosure, if any. The "occupant of the unit" prong of the test will likely not apply to Associations, in that this only serves to dispossess the tenant where the unit is sold to a purchaser who intends to occupy the unit as a primary residence.

Accordingly, it is necessary to look to the second prong of the test – the current lease. The tenant must vacate the unit at the end of the 90 days if (1) there is no lease, (2) the lease is terminable at will under State law or (3) the lease is not "bona fide". Important factors in determining whether a lease is "bona fide" is whether it was entered into following an arm's length transaction and whether it requires payment of rent that is not substantially less than fair market rent for the property.

Based on the foregoing, the Association must always provide the tenant with a notice to vacate 90 days before the effective date if it intends to evict the tenant following foreclosure. If there is a bona fide lease in place which is not terminable at will, the Association must allow the tenant to remain in the unit until the end of the stated lease term. Absent such a lease, the Association may seek to evict the tenant as of the effective date of the notice.

Unless subsequently extended, the Protecting Tenants at Foreclosure Act of 2009 will expire on December 31, 2012.



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WHAT'S THE RUSH?



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The economic downturn, the rise in foreclosures, and the inability to locate affordable housing has younger people running for the 55 and older communities. While The Fair Housing Act (FHA) protects all citizens from discrimination on the basis of race, color, national origin, religion, sex, handicap or familial status (families with children under the age of 18 living with parents or legal guardians; pregnant women and people trying to get custody of children under 18), there is an exemption under the Housing for Older Persons Act ("HOPA").

HOPA provides that housing that meets the FHA's definition of "housing for older persons" is exempt from the law's familial status requirements, provided that:

- 1.) It is occupied solely by persons who are 62 or older or
- 2.) It houses at least one person who is 55 or older in at least 80 percent of the occupied units, and adheres to a policy that demonstrates an intent to house persons who are 55 or older.

In order to qualify for an exemption to the familial status laws, a community must satisfy either 1 or 2 above – not both. The

majority of communities that fall within the exemption are 55 or older communities. In addition to the requirement that at least 80% of the units be occupied by a person 55 or older, the community must also publish and adhere to policies and procedures that demonstrate an intent to be a provider of housing for older persons. The community must also comply with rules established by HUD for verification of occupancy, which includes biennial age surveys of occupants.

Although HOPA established a minimum threshold that at least 80% of the units be occupied by a person 55 or older, the community may set forth more stringent requirements. For example, a community can require that at least 80 percent of the units be occupied by at least one person 60 years of age or older, that 100% of the units be occupied by at least one person 55 years of age or older, or that 80% of the units be occupied exclusively by persons aged 55 or older, so long as the additional requirements comply with state and local fair housing laws.

Many people misinterpret HOPA and incorrectly believe that once a community reaches 80% occupancy of units by a person 55 or older, the community must allow people below the age of 55 to occupy the remaining 20%. While Associations generally have the ability to grant "hardship

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exceptions”, the community is under no obligation to do so. In fact, in most cases, communities should adhere to strict enforcement of the 55 and older requirement, reserving the 20% buffer for situations in which a 55 or older spouse dies and an underage spouse will continue to occupy the unit, inheritance or a similar situation. In some cases, an Association’s governing documents do not permit hardship exceptions at all, or in limited situations, only for children under 18.

Due to the downturn in the economy, Associations are faced with an increasing number of underage family members and friends attempting to occupy units in 55 and older communities without someone who is 55 years of age or older. Sometimes, the units are vacation or seasonal units that sit vacant most of the year. The owner allows a friend or family member to take up residence, despite his/her age. In other cases, someone 55 or older purchases the unit and submits an application for occupancy stating that he/she will occupy the unit, when in fact, the unit is being purchased for an underage family member and the owner has no intention of residing in the unit. Whatever the underlying circumstances might be, the Association is faced with enforcing the 55 or older provision.

The unit owners are sent a letter advising them of the violation and requesting compliance. In response, the Association receives virtually the same response – the Association has at least 80% of the units occupied by someone 55 or older and therefore, you have to let my son or daughter reside in the unit or my son or daughter will be 55 in one year, so you should just let him/her stay. In a vacuum, the Association might be able to allow an underage occupant to remain in the



unit, however, from a practical perspective, an Association should reserve the 20% buffer for those situations that are out of their control such as death or inheritance. Granting a hardship exception or allowing the 20% buffer to be occupied by individuals under 55 years of age can lead to selective enforcement issues and in some cases, the loss of the HOPA exemption.

Associations qualifying for the housing for older person exception should be mindful of the mad dash toward these communities by underage occupants. Turning a blind eye today might prevent enforcement in the future.



DID YOU KNOW?

There have been some significant rulings recently as courts take a closer look at lender rights and responsibilities in connection with foreclosures and bankruptcies.

- A bankruptcy court in New York ruled that Mortgage Electronic Registration Systems (MERS) doesn’t necessarily have the right to assign mortgages it services. This is significant since it impacts the determination of whether a lender is a valid secured creditor that can seek relief from the automatic stay imposed when a debtor files for bankruptcy protection.
- A Florida appellate court found a homeowners’ association was entitled to an award of attorney’s fees in connection with a foreclosure action involving one of the homes within its community. Fees are to be payable by both the lender and the lender’s attorney due to mistakes or sloppiness in the foreclosure filing and subsequent litigation.

Becker & Poliakoff attorneys throughout the State have received monetary sanctions from lenders and/or their attorneys, primarily as a result of lack of action in foreclosure cases despite a Court Scheduling Order.

EMPLOYMENT LAW

EMPLOYMENT VERIFICATION: A LIST OF DO'S AND DON'TS



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Everyday thousands of illegal immigrants enter the United States. Immigration officials estimate that over 500,000 people enter the United States illegally each year and further noting that the actual number may be much higher. The number one reason illegal aliens come to this country is to find employment. But is this legal? Quite simply, the answer is “no.”

It is unlawful to knowingly hire, recruit, or refer an illegal alien for a fee, who is not authorized to work in the United States. It is also unlawful to continue to employ an illegal immigrant knowing that the person is not authorized to work in the United States.

It is a federal felony to knowingly assist an illegal alien by transporting, providing shelter, or assisting an illegal alien to obtain employment. Penalties upon conviction can include criminal fines, imprisonment, and forfeiture of vehicles and real property used to commit the crime. Anyone who employs or contracts with an illegal alien without verifying his/her work authorization status is guilty of a misdemeanor. To comply with the law, an employer must verify the identity and employment authorization of each person hired, complete and retain a Form I-9 for each employee, and refrain from discriminating against individuals on the basis of national origin or citizenship.

The following is a list of do's and don'ts for an employer to ensure compliance with the law:

Do's

- Do treat all employees equally when recruiting, hiring, and when verifying employment authorization and identity.
- Do have your employees complete a Form I-9, unless they are not required to do so by law.
- Do allow the employee to select which document(s) he/she chooses to substantiate his/her identity and employment authorization.
- Do re-verify an employee's authorization status if the initial document(s) provided by the employee has an expiration date.
- Do retain completed Forms I-9 for all employees for 3 years after the date of hire or 1 year after the date employment is terminated, whichever is later.



- Do ensure that any professional employer organization (“PEO”) that you hire complies with the law by verifying identity and work authorization status. Remember, you can be found liable for their non-compliance.

Don'ts

- Don't request that employees produce more documents than are required by Form I-9 to establish the employee's identity and employment authorization.
- Don't request that an employee produce a particular document such as a “green card” to establish identity and/or employment authorization.
- Don't reject documents that reasonably appear to be genuine and belong to the employee presenting them.
- Don't treat groups of applicants differently when completing Form I-9, such as requesting certain groups of employees who look or sound “foreign” to produce particular documents the employer does not require other employees to produce.
- Don't limit jobs to U.S. citizens unless U.S. Citizenship is required for a specific position by law, regulation, executive order, or federal, state, or local government contract.

**IT IS UNLAWFUL TO KNOWINGLY
HIRE, RECRUIT, OR REFER AN
ILLEGAL ALIEN FOR A FEE, WHO IS
NOT AUTHORIZED TO WORK IN
THE UNITED STATES.**

REVENUE IS DOWN & RESERVES DEPLETED: HOW ABOUT CAPITAL CONTRIBUTIONS FROM NEW PURCHASERS?



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In these tight economic times many community associations are looking for new sources of revenue for operation and maintenance of their communities. In this regard some associations have started to charge a “capital contribution” at resale closings. The contribution is generally equal to several months of regular maintenance fees. Such capital contribution fees are common place in connection with the initial sales by the developer of the community but must be carefully considered with regard to resales. The authority to charge such a fee is not specifically addressed in the Statutes applicable to homeowners associations and therefore must be subject to separate analysis. While such capital contributions may be enforceable in the Homeowners Association context, provisions of the Condominium Act make such a fee problematic.

Specifically Section 718.112(2)(i) of the Florida Condominium Act provides that no charge may be made by the association or any body thereof in connection with the sale, mortgage, lease, sublease or other transfer of a unit unless the association is required to approve such transfer and a fee for such approval is provided for in the declaration, articles or bylaws. These fees are to be used for screening and transfer approval only. In addition, Section 718.110(4) of the Condominium Act provides that no amendment may change the proportion or percentage by which the unit owner shares the common expenses of the condominium unless the record owners of the unit and all record owners of liens on the unit join in the execution of the amendment and unless all record owners of all other units in the same condominium approve the amendment. Further, Section 718.104(4)(g) of the Condominium Act provides that the percentage or fractional share of liability for common expenses of the condominium for all residential units must be the same as the undivided share of ownership in the common elements appurtenant to each unit. Therefore, these provisions of the Condominium

Act may prohibit an amendment to the declaration of condominium to provide for a capital contribution upon resale.

However, the analysis differs with regard to a homeowners association as there are no similar restrictions contained in Chapter 720, Florida Statutes, the Homeowners Association Act. Therefore an amendment to the declaration of covenants or other governing documents to establish a capital contribution fee upon resale may be legally supportable. There are no Florida court decisions that address this issue specifically. However, the implementation of a capital contribution in homeowners associations by amendment to the governing documents has become somewhat common place and accepted in the industry, provided the amount thereof is reasonable.

Section 689.28, Florida Statutes dealing with Conveyances of Land provides that the public policy of this State favors the marketability of real property and further declares that transfer fees violate this public policy. However, there are certain exceptions thereto. Specifically exempt from the definition of a transfer fee prohibited by the statute is a contribution or other amount imposed by a declaration or covenant encumbering parcels in a community as defined in the Homeowners Association Act and payable to a non-profit organization for the purpose of supporting recreational, environmental, conservation or other similar activities benefiting the community. It is therefore arguable that since such a transfer fee is not specifically prohibited by this statute, but rather is specifically exempted, that a capital contribution contained in a properly amended declaration of covenants would be legally enforceable.

Prior to initiating such an amendment however, every association should consider the business as well as the legal implications thereof. If the benefits of increased revenue outweigh the potential restraints on marketability of resales, such an amendment may be a reasonable decision. Should you be in need of assistance in implementing such a capital contribution amendment, you should discuss the specific details with your association attorney.

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WHEN IT COMES TO RECOVERING INSURABLE LOSSES, DON'T HOLDBACK



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If your building were destroyed by a hurricane, lightning or fire, do you know whether your association will have to pay for some or all of the repairs before the insurance company will give you all of the

insurance proceeds to which your association is entitled? It is important to have a basic understanding of the interpretation and application of insurance policies and the laws governing them when it relates to rebuilding after a casualty loss, so that your association may better plan for what, and when, the insurance company will pay in the event of a loss.

Insurance policy coverage is often divided into two categories: (i) Actual Cash Value, and (ii) Replacement Cost. "Actual Cash Value", or "ACV", is the cash value of the property immediately before the loss occurred. In contrast, "Replacement Cost", or "RCV", covers not only the cash value of the property prior to the time of the loss, but also provides coverage for the difference between the cash value and the cost to rebuild or repair the property after the loss. The Condominium Act (Chapter 718, F.S.) specifically requires condominium associations to maintain RCV coverage. However, many insurance policies provide that in the event of a covered loss, the insurance company will pay for the replacement cost to complete the repairs or to replace the destroyed property, but will initially withhold from the initial award an amount calculated as the recoverable depreciation until the property

is actually repaired or replaced by the insured. This amount of money retained is categorized as recoverable depreciation and is commonly referred to as "holdback". For example, if a five-year-old air conditioner originally valued at \$2,000 is damaged in a windstorm, and the estimated useful life of the air conditioner is 10 years, the insurance company would only initially pay the insured \$1,000 and "holdback" another \$1,000 unless and until the insured replaces the air conditioner and provides the insurance company proof that they purchased a new air conditioner for \$2,000 or more.

For many associations, especially those with little or no reserves, the association may have insufficient funds to enter into a contract for the repairs without the holdback money. As a result, the property cannot be rebuilt in a timely manner without significant financial stress on the community to raise the funds necessary. Those associations would have to obtain a loan and/or levy a special assessment against its members in order to raise the money. Of course, the association would be entitled to receive the holdback money after the repairs have been completed, but by that time the association may have incurred significant hardship from financing the project to perform the repairs.

With these basic concepts in mind, is your association's insurance company lawfully allowed to holdback for depreciation? As with many things in the law, it depends. For example, replacement cost insurance policies for "homeowners" that are effective on or after October 1, 2005, are not permitted to holdback for depreciation in the event of a

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covered loss. Specifically, Section 627.7011(3), Florida Statutes, provides, "In the event of a loss for which a dwelling or personal property is insured on the basis of replacement costs, the insurer shall pay the replacement cost without reservation or holdback of any depreciation in value, whether or not the insured replaces or repairs the dwelling or property." This statutory change was certainly a welcome blessing to individuals who insure their single family residences. However, this statute does not help condominium associations struggling with casualty losses. Instead, condominium associations, as well as several cooperatives, townhome communities and other commercial residential structures, will more than likely be required to make the repairs first before the insurance company will pay the holdback money, unless their policy specifically provides otherwise.

In a recent unpublished federal appellate decision, Buckley Towers Condominium, Inc., v. QBE Insurance Corp., No. 09-13247, 2010 WL 3551609 (11th Cir. 2010), the court addressed the holdback issue in the condominium insurance context. In Buckley Towers, the association claimed that the legal doctrine of prevention of performance entitled them to receive the total value of the claim prior to making the repairs, not just ACV, since rebuilding the condominium without all of the insurance proceeds up front was too great of a financial

FOR MANY ASSOCIATIONS, ESPECIALLY THOSE WITH LITTLE OR NO RESERVES, THE ASSOCIATION MAY HAVE INSUFFICIENT FUNDS TO ENTER INTO A CONTRACT FOR THE REPAIRS WITHOUT THE HOLDBACK MONEY.

burden for the association to overcome. However, the Buckley Towers court, finding that the doctrine of prevention of performance did not apply, ruled against the association and held that the insurance contract was unambiguous and clearly required the association to make the repairs before being entitled to the full RCV. The Buckley Towers court further explained that "[a]lthough the association may be unable to receive the full range of benefits of their contract without an advance payment under Florida law, that cost and inconvenience may not relieve them of repairing the building prior to claiming RCV damages."

In conclusion, an association should carefully consider the type of insurance coverage the association is obtaining, and attempt to obtain a policy that does not provide for holdback for depreciation prior to the association making the repairs. If such a policy option is not available, then the association should plan ahead by ensuring that it has adequate reserves in place, or consider exploring the various financing options that are available from "association-friendly" lending institutions before a tragedy strikes. If your association has suffered a casualty loss, and the insurance company has told you that it will retain any portion of the proceeds for any reason, please consult with your community association attorney to explore the association's legal options.

LIMITED COMMON ELEMENTS: TRANSFER OF USE RIGHTS AND RESPONSIBILITY FOR MAINTENANCE



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In addition to common elements and units, most every condominium includes items of property or areas that are defined as limited common elements. Limited common elements are a subset of common elements that are reserved for the use of a certain unit or units to the exclusion of all other units. The designation of limited common elements must be specified in the declaration of condominium. And because every declaration can be different with respect to defining limited common elements, there are no hard and fast rules as to what is, and is not, a limited common element.

In many cases, the items of property or areas that are designated as limited common elements are expressly identified by name in the declaration of condominium. Typical examples include parking spaces, storage units, boat slips, and cabanas. In other cases, limited common elements are generally defined to include any common element for which the maintenance responsibility rests with the unit owner.

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Typical examples include balconies and terraces, vestibules and courtyard entryways, and in many cases, windows and doors. A fundamental characteristic of limited common elements is that they are appurtenant to a unit. In other words, rights in limited common elements are part of the unit owner's property rights and pass with the unit when it is sold.

But why not just simplify things and define all areas that are reserved for the exclusive use of a particular unit as "unit"? The main reason is that there are exclusive use areas such as balconies, terraces, courtyards, and cabanas that the association wishes to maintain in order to have direct control over the exterior appearance of the condominium property. While it is legally permitted for the declaration of condominium to authorize the association to maintain the unit, it is more conventional, and presumably better understood by condominium unit owners, to define such areas as limited common elements and to define the unit only as the primary living area and reserve unit maintenance responsibility to the unit owner. But in addition to convention, there are two provisions in the Condominium Act that apply only to limited common elements and that can make them desirable.

First, Section 718.106(2)(b), F.S. provides that the declaration of condominium, as originally recorded or as amended, may provide the right to transfer limited common element use rights to other units or unit owners. Obviously, this can be helpful if, for example, each of two units has a limited common element parking space appurtenant to it and the owners wish to swap spaces. The right to transfer limited common element use rights between owners can also be valuable to unit owners where there are fewer limited common elements than the total number of units and an owner with a limited common element no longer wishes to retain exclusive use. Typical examples include cabanas, carport spaces, and boat slips. But as noted, the right to transfer the right of exclusive use, and as a practical matter the procedural requirements to do so, must be set forth in the declaration of condominium.

Next, Section 718.113(1), F.S. provides that the declaration of condominium, as originally recorded or as amended, may provide that certain limited common elements shall be maintained by the association but with the cost shared only by those entitled to use those limited common elements. This allows the association to maintain direct control over the frequency and quality of maintenance while passing the actual cost along to the owner or owners who primarily benefit from the work. But in order to establish a clear legal obligation and to protect the limited common element unit owners from arbitrary allocations of maintenance costs, the statute requires that the declaration of condominium describe in detail the method of apportioning such costs among the units to which the limited common elements are appurtenant. Moreover, Section 718.112(2)(f), F.S., and the Florida Administrative Code at Section



61B-22.003(5), F.A.C., require that where an association maintains limited common elements at the expense of only those owners entitled to use the limited common elements, the budget shall contain a separate schedule, or schedules, conforming to the requirements for budgets.

Also noteworthy is a new provision added to the Condominium Act at Section 718.110(14), F.S., which became effective July 1, 2010. This statute allows amendment of the declaration of condominium to reclassify a portion of the common elements serving only one unit or a group of units as limited common elements upon the vote required to amend the declaration. While this new statute specifically provides that this authority is a clarification of existing law, at least one court had held that unanimous consent of all members and lien holders of record would be required to accomplish such a reclassification. This clarification should prove helpful to allow associations to reclassify certain common elements in order to assign maintenance responsibility, or at least maintenance cost responsibility, to certain unit owners where appropriate.

Obviously, the exclusive use rights associated with limited common elements can increase the value of a condominium unit. With appropriate provisions in the declaration of condominium, which can be added by amendment, limited common element use rights can be transferred between unit owners while the property maintained directly by the association at the expense of those owners who hold exclusive use rights in those common elements. Both provisions enhance the usefulness and benefits of limited common elements.

RIGHTS IN LIMITED COMMON ELEMENTS ARE PART OF THE UNIT OWNER'S PROPERTY RIGHTS AND PASS WITH THE UNIT WHEN IT IS SOLD.

TO FORECLOSE OR NOT TO FORECLOSE



By: John Cottle, Esq.
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In the current economic environment, many condominium and community associations find themselves faced with the following dilemma: An owner is in serious default in the payment of assessments. There is a first mortgage

against the owner's property which, by statute, has priority over the association's lien, but the mortgagee is taking no action to foreclose its mortgage. If the association forecloses its lien, the likely result will be that the association will acquire the property subject to the first mortgage. The debt on the first mortgage will probably exceed the property's fair market value. Should the association foreclose its lien in this circumstance? Every situation is different and requires its own analysis, but there are several good reasons why an association should proceed with lien foreclosure:

1. The association can't always know what is owed on the 1st mortgage. If the mortgage indebtedness is less than the property's value (not common, but possible) the association may be able to recover all past dues and collection costs through a lien foreclosure.
2. In some cases, once the association starts a lien foreclosure action, the owner will pay up.
3. There have been several instances where a third party purchased the property at a lien foreclosure sale, even though the property was subject to a substantial mortgage. Probably the bidder did not know that he/she bought the property subject to the mortgage, but nonetheless they paid the bid price and the association got paid in full, including collection costs.
4. Some associations have acquired title to mortgaged properties through lien foreclosure and rented them out, collecting the rent until the mortgagee finally foreclosed



the first mortgage. In the current environment, it has been taking mortgagees as long as 2 years and more to complete a mortgage foreclosure. This provides a window of opportunity for associations to recover some of their past due assessments, and in some cases, even reap a windfall.

5. If the association acquires title to the property, there is always the possibility of negotiating a short sale in which the association would keep some of the proceeds. As the property owner, the association is in a position to take control of the negotiations.
6. If a mortgage foreclosure is filed after the association acquires title, the association can move the court, in the foreclosure case, to make the mortgagee take the property back. If successful, this will shorten the mortgage foreclosure process considerably and get a paying owner in the property quicker.
7. The association can also try to deed the property to the mortgagee in lieu for foreclosure of the mortgage. The mortgagee does not have to accept such a deed, but if it did, it would greatly speed up the mortgage foreclosure process.

There may be good reasons for an association to defer foreclosing its lien, but the potential benefits of immediately proceeding with foreclosure should not be overlooked. The association should weigh all of the pros and cons before deciding which course to pursue

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IT'S BETTER TO BE SAFE, AND NOT SAY YOU'RE SORRY



By Mark J. Stempler, Esq.
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When something bad happens to someone on the property of a community association, such as a slip and fall accident on the common elements, the Board of Directors' first instinct may be to apologize to the victim, which is a common courtesy. But that apology could be used against the Association at trial to infer liability, even when none may exist.

Hearsay is an out of court statement used to prove the truth of the matter asserted. Generally, hearsay is inadmissible as evidence in Florida courts. For example, a witness cannot testify that something is true because he or she heard someone else say it was true. Florida Statute § 90.803, however, contains many exceptions to the hearsay rule. One exception is that admissions from a party in a lawsuit may be considered as evidence if the out of court statement:

- was made in either an individual or a representative capacity;
- is one which the party has manifested an adoption or belief in its truth;
- was made by a person specifically authorized by the party to make a statement concerning the subject; or
- was made by the party's agent or servant concerning a matter within the scope of the agency or employment thereof, made during the existence of the relationship.

An admission may be in the form of an oral or written statement. In fact, a party can even make an admission through silence, or through a physical gesture. The word admission, however, is somewhat misleading. The out of court statement which is being sought to be introduced into evidence only has to be a statement by a party opponent. The reason behind the rule is that an adverse party cannot complain about its inability to cross-examine itself.

Apologies by criminal defendants have been deemed admissible into evidence in Florida. There are no published decisions regarding apologies by community associations. Suppose, however, a unit owner trips and falls on a crack on a stair leading up to the condominium clubhouse, a common

element. The unit owner hits his head as a result of the fall, suffers a neurological injury, and sues the Association. The Association board members, who feel sympathy for the victim shortly after it occurs, write him a letter stating that the board is sorry about the fall, and sorry they did not have their contractor fix the problem sooner. That apology letter will likely come into evidence at trial, and the Association may have admitted liability for the accident.

Taking that basic scenario one step further, suppose the crack on the stair had formed one second before the unit owner fell, and the Association had no notice of the defect. Now suppose shortly after the fall, a board member tells the unit owner lying on the ground that the Association is sorry that the accident occurred. That statement may come into evidence as an admission of liability by the Association, even though the Association may not be liable for the accident.

Statements of fault or apologies, however, should be contrasted from mere expressions of sympathy to an accident victim or his/her family, the latter of which are inadmissible as evidence. Florida Statute § 90.4026 provides that statements, writings or benevolent gestures which express sympathy or good will related to an accident victim's (or the victim's family) pain, suffering or death is inadmissible as evidence in a civil action. Thus, expressing sympathy to the slip and fall victim for his/her injuries or for his/her pain is not an admission that will be used against the Association in court.



ARBITRATION OFFERS ONE OPTION TO PURSUE NUISANCES



By: Marty Platts, Esq.
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Picture this: it's 2 o'clock in the morning and your upstairs neighbor, who in this instance is a tenant and not an owner, is AGAIN playing the piano in order to get her 13-month old infant to go back to sleep.

You've had enough of the "let's be a good

neighbor" philosophy, and, since you can not sleep anyways, you sit at your computer and start drafting a blazing letter to the Board complaining of this continued nuisance. What can the Board do about the nocturnal little darling and the Beethoven want-to-be mother? Can the Board take any steps against the tenants to eliminate this recurrent nuisance? Yes, it can. One way the Board can try to resolve this problem is to file a Petition for Arbitration against the owner of the rental unit.

Failure to comply with the provisions in the governing documents is a qualified "dispute" as defined by 718.1255, Florida Statute. In other words, the Board can petition the Florida Division of Condominium, Timeshares and Mobile Homes to "require" the owner of the unit to take an action involving that owner's unit. This is how you get to the tenant. The process, generally speaking, is:

- Written notice to the owner (or any violator) of the specific violation with a demand for compliance. This demand needs to include a reasonable time for compliance and must notify the violator of the intent to pursue arbitration.
- The Board files a petition for arbitration [which has to include the filing fee];
- The Arbitrator makes a preliminary determination on whether the controversy described in the petition falls within the jurisdiction of the Division;

- If so, the Arbitrator provides the owner of the unit with a copy of the petition and an order requiring the owner to respond within 20 days after receipt of the petition;
- If no response is filed by the owner [and this happens more times than not when the issue involves a tenant and the owner is located out of town], the Arbitrator enters a default and a final order against the owner;
- The Arbitrator's final order may grant "mandatory" or "prohibitory" relief.

So what does all this mean to the "good neighbor"? Is the nocturnal piano playing going to stop? Probably not yet. The Board, having complied with the pre-requisite of the arbitration process and having obtained a favorable relief, can now file an action with the court to make the arbitration order a final judgment. Failure of the owner to comply with the court's judgment would result in a finding of contempt which can take the form of both monetary fines and jail time. Unfortunately, the entire arbitration process under the above scenario where the owner failed to respond to the petition, may still take a few months.

It is important to note that the unit owner is ultimately responsible for all of the actions of his tenants and it is advisable for the Association to direct its enforcement action against the unit owner so that the unit owner incurs the cost and bears the burden of addressing the issue with the tenant. Lastly, the Association can seek to recover from the owner all its attorneys' fees and costs incurred in bringing a cause of action.

Another thing to remember is that the Association need not be forced to file a petition. If there is a claim for nuisance, the good neighbor can simply file suit seeking relief. The Association need not take on a dispute which could otherwise be handled by the Unit owners or in this case the owner and a tenant.

"THE UNIT OWNER IS ULTIMATELY RESPONSIBLE FOR THE ACTIONS OF HIS TENANT(S)."



EXPIRATION OF FHA/ FANNIE MAE APPROVALS: WILL YOUR CONDOMINIUM UNITS QUALIFY FOR MORTGAGE FINANCING?



By: Lisa Magill, Esq.
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The United States Department of Housing and Urban Development ("HUD") created deadlines for condominium projects that received approval for FHA-backed mortgage insurance.

Initial Project Approval Dates	Expiration Date
1972 – 1980	December 31, 2010
1981 – 1985	December 31, 2010
1986 – 1990	May 31, 2011
1991 – 1995	July 31, 2011
1996 – 2000	August 31, 2011
2001 – 2005	September 30, 2011
2006 – 2008 (Sept.)	March 31, 2011

In the past many association leaders viewed FHA financing negatively. The decline in real estate values and banking crisis has eliminated many options from conventional lenders. Lenders will not finance properties if the loan is not acceptable to the secondary market and many lenders are unwilling to finance condominium purchases. FHA requires a minimum down payment of only 3.5%, but it also requires proof of affordability and satisfactory credit scores. FHA guidelines limit housing costs to 31% of income which means a new buyer must earn 3 times the monthly mortgage, taxes and association dues.

Whether you think the economy is on its way to recovery, or gearing up for a double dip recession, having your community approved as a FHA/ Fannie Mae eligible project is one way to increase the marketability of units in your condominium.

Fannie Mae is a government-sponsored enterprise (GSE) chartered by Congress with a stated mission to provide liquidity, stability and affordability to the U.S. housing and mortgage markets and to increase the amount of funds available in order to make homeownership and rental housing more available and affordable. Fannie Mae works with mortgage bankers, brokers and other primary mortgage market partners to help ensure they have funds to lend to home buyers at affordable rates.

If your unit owners are experiencing difficulty in selling or refinancing their units, and your community's Fannie Mae or FHA project approval is about to expire, its important to investigate whether it would be worthwhile to start the recertification process. **Fannie Mae or FHA approval just may bring more buyers to the table for those units "for sale" because financing will be more readily available. Additionally, the increased marketability of those units currently for sale in a Fannie Mae or FHA approved project not only helps the current sellers, but also serves to increase the value of all units in the condominium.** This will not only help owners currently looking to sell or refinance, but will also help those unit owners who may wish to sell or refinance their units in the future.

Our Law Firm has taken the time and effort to search FHA approval deadlines for our condominium clients (homeowners associations don't require total project approval as each home may qualify separately). Be on the lookout for information about your options from the Firm and speak to your Association Attorney if you have any questions about these issues.



IS A REVERSE MORTGAGE RIGHT FOR YOU?

By Dane Leitner, Law Clerk

With budgets continuing to tighten due to the current economic environment many seniors are looking into reverse mortgages. What exactly is a reverse mortgage you ask? A reverse mortgage is a special type of home loan that allows senior homeowners to convert the equity in their home into cash. Black's Law Dictionary defines it as: "a mortgage in which the lender disburses money over a long period to provide regular income to the (usually elderly) borrower, and in which the loan is repaid in a lump sum when the borrower dies or when the property is sold." The Home Equity Conversion Mortgage ("HECM") is the Federal Housing Authority's ("FHA") reverse mortgage program. The HECM program allows the homeowner to withdraw their money in a variety of ways, either a fixed monthly amount, a line of credit, or a combination of both.

Similar to most bank loans, the amount of money a borrower is eligible for depends on certain factors. The factors taken into consideration to determine the mortgage amount given are: 1) the age of the youngest borrower, 2) the current interest rate, 3) the lesser of appraised value or the HECM FHA mortgage limit or the sales price, and 4) the Initial Mortgage Insurance Premium. Simply put, the more valuable the home, the older the borrower, and the lower the interest rate, the more an individual can borrow. The American Association of Retired Persons (AARP) website provides an online calculator for estimates (http://rmc.ibisreverse.com/rmc_pages/rmc_aarp/aarp_index.aspx). There is no limit on the value of homes qualifying for a HECM, however the maximum amount a person may borrow is \$625,500. The amount that a person may borrow is derived from the lower of the appraised value or the sales price.

The requirements for a HECM reverse mortgage are fairly straightforward. For a borrower to be eligible they must be sixty-two (62) years of age or older. They must own the property outright, or have a small mortgage. However, the reverse mortgage must be in a first lien position, so any existing indebtedness must be paid off. A borrower can pay off the existing mortgage with the reverse mortgage, money

from savings, or assistance from a family member or friend, etc. Additionally, the property must be occupied by the borrower and be their principal residence. The borrower must not be delinquent on any federal debt. The borrower must also participate in a consumer information session given by an approved HECM counselor. The reasoning behind the information session is largely to protect those entering into reverse mortgages and to make sure they fully understand the process.

To be eligible for a HECM a borrower's property must meet all FHA property standards and flood requirements: single family home or 1-4 unit home with one unit occupied by the borrower, HUD-approved condominium, or a manufactured home that meets FHA requirements.

If a condominium is not HUD-approved the condominium owner might still be eligible for a HECM. The owner must gather all the condominium documentation (CC&R's, Declaration of Condominium, By-Laws, Articles of Incorporation, Current Budget, Verification of Adequate Reserves, etc.) including a current Homeowner's Association Certification indicating things like owner occupancy ratios, percentage of owners delinquent on dues, pending litigation, etc. and submit this information to HUD for approval. Cooperatives were in the list of acceptable properties for a HECM when the Home Economic Recovery Act (HERA) passed in 2008, however as of the date of this publication the programs to include them have not been implemented.

By now you are probably asking yourself when you have to repay the loan. A HECM loan must be repaid in full when the borrower dies or sells the home. Additionally, the loan also becomes due and payable if: 1) the borrower does not pay property taxes, or hazard insurance, or violates other obligations, 2) the borrower moves to a new principal residence, 3) the borrower fails to live in the home for 12 months in a row (example of this is a 12 month or longer stay in a nursing home), and 4) the borrower allows the property to deteriorate and does not make necessary repairs.

If one of the above listed events occurs the total loan amount comes due. The borrower or their estate may choose to repay the reverse mortgage or put the home up for sale. If the equity in the home is higher than the balance of the loan, the remaining equity belongs to the borrower or estate. If the sale of the home is not sufficient to pay off the reverse mortgage the lender must take a loss. The lender can only enforce the debt through sale of the property which means that your estate and loved ones are protected. Since the property is sold to a third-party purchaser, in most cases the Association will recover assessments as well.

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LOOSE LIPS SINK SHIPS: WHAT CAN DIRECTORS SAY WHEN THERE IS A CLAIM OR LAWSUIT?



By Marilyn Perez-Martinez, Esq.
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Many Directors have questions about what they can say and who they can speak to about a claim or actual lawsuit. They understand there is a fine line between preserving the confidentiality that such actions require while maintaining the “open book” nature of associations and do not want to inadvertently cross it. While not all inclusive, what follows is a guide of who the Directors can speak to and what they can say.

Members/Owners

- Entitled to know:
 - A claim/lawsuit exists.
 - The facts surrounding the claim/lawsuit.
 - Anything that is public record (e.g., that is available at the Courthouse, assuming an active lawsuit).
- Should not be told/provided Attorney-client privileged materials (e.g., communications regarding the claim and its investigation, settlement discussions, plans of action) to avoid waiving the privilege or providing the opposing party with the Association's legal strategy for handling the claim/litigation.
 - Paraphrasing/summarizing an Attorney-client communication could waive the privilege also.
- When in doubt let the Association's Attorney explain the specific (non-privileged) items which can be discussed.



Association's Attorney

- All communications are privileged.
- Tell the Attorney everything about the claim/litigation, underlying facts, and possible evidence (both good and bad),

Association's Insurance Agent

- Advise them of any claim against the Association so they can file a claim and demand coverage from your carrier.
- Advise them of the facts surrounding the claim.
- Be very careful not to divulge Attorney-client communications which are privileged. When in doubt, have them speak to the Association Attorney.

Association's Insurance Carrier (Claims Handler)

- Treat similarly to the Association's Attorney.
- If in doubt, include Association's Attorney in the discussions as it can help to clear up questions specific to the Association's governing documents and particular aspects of association law which pertain to the claim.

Association's Insurance Attorney (Attorney assigned by Insurance Carrier to defend claim)

- Duty is to the Association.
- All communications are privileged.

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- Treat them like you would the Association's Attorney but when in doubt talk to the Association Attorney and let them guide Association.

Opposing party (Person(s) filing claims or against whom claims are filed)

- There is no rule prohibiting the actual parties to a claim/litigation from speaking to each other about the claim/litigation.
- Not recommended that these conversations take place because:
 - You could inadvertently disclose privileged communications or legal strategy.
 - You could make admissions against interest. In other words statements that can be used against the Association in the case.
 - You could enter into agreements which are not legal or otherwise fail to adequately protect the interests of the Association.
 - You could waive coverage by your insurance carrier who has offered representation in the claim.

Opposing Party's Attorney

- Never speak to the Attorney without the Association's Attorney or the Association's Insurance Attorney present.
- Despite appearances this person is "not" your friend.
 - The most innocuous question asked (by the Opposing Party's Attorney or even the Director seeking clarification) could result in disclosure of information that would hurt the Association.
 - You could inadvertently disclose privileged communications or legal strategy.
 - You could make admissions against interest.
- If this person ever contacts the Association (its Directors, employees or agents) immediately advise them that the Association is represented by counsel and that all communication should be through that Attorney.
 - Provide them the contact information for that Attorney.
 - Contact the Attorney representing the Association in the matter and let them know.

Opposing Party's Insurance Agent

- Same as if speaking to the Opposing Party's Attorney.

Opposing Party's Insurance Carrier (Claims Handler)

- Same as if speaking to the Opposing Party's Attorney.

Opposing Party's Insurance Attorney (Attorney assigned by Insurance Carrier to defend claim)

- Same as if speaking to the Opposing Party's Attorney.

From the Editor's Desk:

Has Your Association Updated its Frequently Asked Questions & Answers Sheet?

The Florida Condominium Act requires both developer-controlled associations and unit-owner controlled associations to prepare "Frequently Asked Questions and Answers" (commonly referred to as a "Q&A Sheet"). The Q&A Sheet must include information:

- regarding unit owners' voting rights;
- unit use restrictions, including restrictions on leasing of a unit;
- indicating whether and in what amount the unit owners or the association is obligated to pay rent or land use fees for recreational or other commonly used facilities;
- identifying the amount of the current assessment levied pursuant to the budget for each unit type and whether payment is required monthly, quarterly, or otherwise;
- identifying any court cases in which the association is currently a party of record where the association may face liability in excess of \$100,000; and
- whether membership in a master or recreational facilities association is mandatory and, if so, what fees are to be charged per unit type.

The Q&A Sheet must be updated annually and must be kept as part of the association's official records. It must be provided to a prospective purchaser of a condominium unit in connection with resale of a unit. The completed, up-to-date "Frequently Asked Questions and Answers" form, and any application forms required in connection with the association's transfer approval authority, must be provided to the seller and prospective purchasers at no charge.

Keeping and updating the Q&A Sheet is one area where many condominium associations are not diligent, and are often in violation of the law.

Homeowners' Associations have different requirements. Section 720.401, Florida Statutes requires the seller (whether a developer or home owner) to supply a prospective purchaser with a disclosure summary in a specific format. That summary advises the prospective purchaser:

- there is a mandatory association;
- whether there are restrictive covenants governing the use and occupancy of the property;
- about the obligation to pay assessments, land use, rent and/or special taxing district fees;
- whether the developer has the unilateral right to amend the governing documents;
- that failure to pay assessments or other charges may result in a lien against the property and other important information.

Homeowners' association boards of directors may find it useful to include a reference to this disclosure summary in a welcome or application package, along with the rules, regulations and association policies.

EMPLOYMENT LAW

NEW FEDERAL REGULATIONS COVERING DISABLED EMPLOYEES WILL AFFECT GREATER NUMBERS OF ASSOCIATIONS



By: Mark A. Trank, Esq.
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On March 25, 2011, the U.S. Equal Employment Opportunity Commission (EEOC) issued its final revised Americans with Disabilities Act (ADA) regulations in order to implement the ADA Amendments Act of 2008. These new regulations will affect virtually all associations that employ 15 or more individuals, since they are covered under the ADA.

The ADA Amendments Act made important changes to the definition of the term “disability” by rejecting the holdings in several U.S. Supreme Court decisions. The effect of these changes is to make it easier for an individual seeking protection under the ADA to establish that he or she has a disability within the meaning of the ADA.

Following the ADA, the regulations keep the ADA’s definition of the term “disability” as a physical or mental impairment that substantially limits one or more major life activities; a record (or past history) of such an impairment; or being regarded as having a disability.

However, under the new regulations, the term “substantially limits” requires a lower degree of functional limitation than the standard previously applied by the courts. An impairment does not need to prevent or severely or significantly restrict a major life activity to be considered “substantially limiting.” This means that, while not every impairment will constitute a disability under ADA, it will be more difficult for an employer to argue successfully that an individual is not disabled.

The new EEOC regulations are lengthy and complex. However, it is clear that associations who have 15 or more employees will have to face the new reality that virtually



any worker who claims that he or she is disabled is likely to be deemed disabled. That means that the association will have to provide a “reasonable accommodation” to the employee in order to permit that individual to perform the essential functions of the job. Failure to do so may subject the association to enforcement action by the EEOC, as well as significant damages.

ON MARCH 25, 2011, THE U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (EEOC) ISSUED ITS FINAL REVISED AMERICANS WITH DISABILITIES ACT (ADA) REGULATIONS IN ORDER TO IMPLEMENT THE ADA AMENDMENTS ACT OF 2008. THESE NEW REGULATIONS WILL AFFECT VIRTUALLY ALL ASSOCIATIONS THAT EMPLOY 15 OR MORE INDIVIDUALS, SINCE THEY ARE COVERED UNDER THE ADA.

“SUCCESSORS IN TITLE”: INTERPRETING EASEMENTS IS NOT ALWAYS EASY



By: C. John Christensen, Esq.
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In *Terrill v. Coe*, 1 So.3d 223 (Fla. 5th DCA, 2008), an owner of unimproved land, prior to creating a subdivision on his land, granted an access easement over his land to an adjacent property owner, a married couple (the “Grantees”).

The easement stated it would “run in favor of Grantee and Grantee’s **successors in title**...”. Subsequently, these Grantees entered a contract to sell their adjacent property to a Purchaser who planned, as a “successor in title”, to use the easement over the now existing subdivision in order to provide access for a new 25 unit subdivision such Purchaser was planning to build on the adjacent property.

The Appellant, Terrill, an owner in the existing subdivision then sued to, among other things, prevent the use of the easement by the Purchaser, citing prior case decisions in Florida holding that easement rights cannot be increased beyond what was intended at the time the easement was created. Terrill’s position was that the impact of the easement’s use by the original Grantee, a married couple (their family, guests, invitees, etc.) upon Terrill’s subdivision was limited, but the impact upon Terrill’s subdivision by the use of the easement for the families, guests, invitees, etc., of owners of 25 residential units would be much more significant. Hence, Terrill asserted such increase in traffic over the easement was not intended at the time the easement was created.

In this regard, a leading case in Florida pertaining to easement rights is styled *Crutchfield v. F. A. Seabring Realty Company*, 69 s.2d 328 (Fla. 1954), in which the Florida Supreme Court states the following:

... A general principle governing all easements ... [is] that the burden [created by the easement] ... must not be increased to any greater extent than reasonably necessary and contemplated at the time of initial acquisition.

This conclusion has been reiterated in other case decisions, such as *Groff v. Moses*, 344 S.2d 951 (2nd DCA 1997), which provides that the burden of use upon property “created by the easement ... cannot be increased beyond that reasonably contemplated by the parties at the time of its creation.” Similarly, in a case styled *Tice v. Herring*, 717 S.2d 181 (1st DCA 1998), the First District Court of Appeal states that “as various cases have established, the burden of the easement on the ... property may not ordinarily extend beyond that which was reasonably contemplated with the creation of the easement.” All these cases stand for the proposition that the extent of an easement is determined by analysis of the easement language itself, according to the intent of the parties at the time the easement was established.

Therefore, although the Trial Court in *Terrill v. Coe* itself analyzed the grant of the easement to the married couple Grantees and their “**successors in title**,” and held that this phrase did not limit the number of **successors in title**, the 5th District Court of Appeal overturned this holding, surmising that the original intent of the phrase may have only been to evidence that the easement was perpetual and not to allow the number of parties using the easement to significantly increase. It therefore sent the case back to the Trial Court to determine the intent of the parties as to the meaning of this phrase at the time of the easement’s creation (e.g. the intent of the original Owner when he initially granted the easement to the married couple).

CALL

COMMUNITY ASSOCIATION
LEADERSHIP LOBBY

LEGISLATIVE SUMMARY IS COMING SOON

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.

DO YOU HAVE TO BUILD A RAMP? FAIR HOUSING LAWS COLLIDE

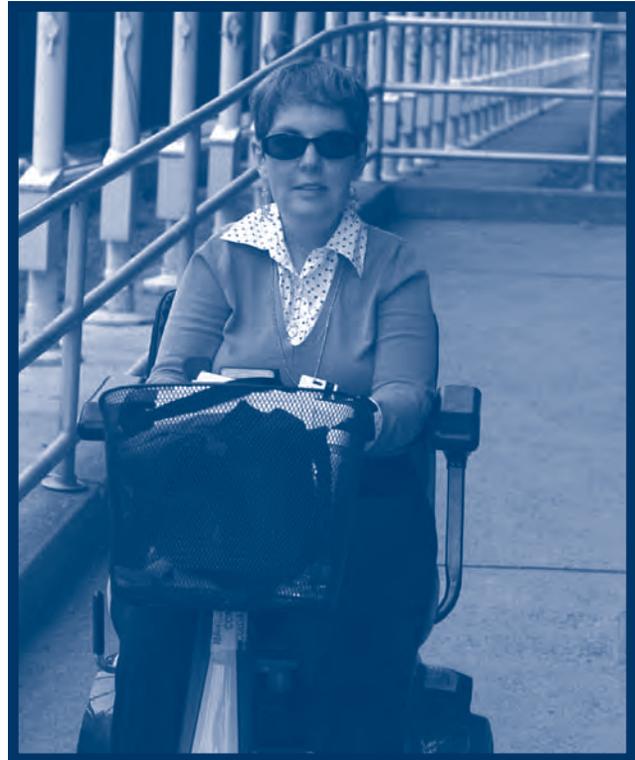


By: Ellen Hirsch de Haan, Esq.
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These days, community associations are occasionally advised by a vendor or a member that they have to install a pool lift or a handicap ramp, or make some other modification to the common property, to allow access by a handicapped person. The Board of Directors is then left to wonder who puts in the modification and who pays for it.

There are Federal laws which address the rights of handicapped persons to have access to the community association common areas. The applicable Federal and State Laws addressing handicap accessibility have been in place for many years, and have been interpreted by Federal and State Courts and various state and local Administrative Agencies, creating a body of administrative judgments and Case Law, which applies to these questions. There are two Federal laws which govern the accommodation and modification of condominium common elements for handicap accessibility: 1) the **AMERICANS WITH DISABILITIES ACT ("ADA")**, and 2) The **FEDERAL FAIR HOUSING AMENDMENTS ACT OF 1988 ("FFHA")**.

1. The ADA was created to address handicap accessibility to **public and government buildings**, including educational institutions, courts, day care centers, stores, offices, and hotels/ public accommodations. The ADA is



found in Title 42 of the United States Code, ("U.S.C.A."), Chapter 126. Relevant language includes:

Section 12132. Discrimination

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits or the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

Section 12182. Prohibition of discrimination by public accommodations.

No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

THIS IS AN AREA OF THE FEDERAL AND STATE LAWS THAT CAN BE DISASTROUS AND EXPENSIVE FOR THE ASSOCIATION IF NOT HANDLED CAREFULLY

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There are thousands of cases cited in the Annotations of Title 42, Chapter 126, U.S.C.A., all of which involve a governmental entity or agency, or a hotel, a store, a university, and other public services and locations. The ADA also applies to country clubs, golf courses and tennis clubs which have public memberships, and to beauty shops, restaurants, convenience stores, medical and professional offices which are open to the public. In other words, the ADA applies to public buildings and facilities which are intended for public use, beyond the use by the residents in a particular community. All modifications required to be made under the ADA are made at the expense of the property owner, and not the expense of the person requesting the handicap accessibility. And handicap accessibility to all public buildings is required, not discretionary.

Most of the common areas in community associations do not include these kinds of facilities. The facilities in community associations are generally intended and operated specifically for the use and benefit of the owners and residents, and their guests.

When that is the case, there are no uses or facilities which would be considered to be "public accommodations" or "public entities" as defined by the ADA. The community was not created for use by the General Public, but is solely a residential community of dwelling units, with common elements or common areas, for use of the Association and the residents. Accordingly, community associations as a whole are not subject to the ADA requirements for accommodations for handicapped persons. That is, the community association is not required to retrofit for handicap accessibility, and has no obligation to pay for such modifications.

It is very important to note that a community which uses its clubhouse to host bingo games or card tournaments or clubs or exercise classes, which are advertised to the public, will fall under the ADA and be required to retrofit the clubhouse if it is not already handicap accessible, as well as provide a substantial number of handicap reserved parking spaces. This may also be true if the association allows individual owners to hold private events and functions in the clubhouse, which are attended by persons outside of the community.

2. Assuming most associations are not covered under

the ADA, they do still have obligations to owners and residents who are requesting modifications to provide access to common areas. Community associations are governed by the FFHA, under which the Association must allow an owner or resident to make reasonable modifications to the common elements to accommodate handicap (mental or physical), **at the expense of the individual requesting the modification.**

For example, under the Florida Law, if an owner or a resident requested the association to make a reasonable modification for a handicap, the Board would have to permit that owner to arrange for the installation of a pool lift at the community pool. The lift would have to meet any Code and permitting requirements. The cost of the pool lift would be paid by the owner requesting the modification, not by the Association. Also, the installation of the pool lift would not be considered to be a material alteration, and would not require membership approval.

If an owner or resident requests a modification to provide handicap access, the association board can require him to provide detailed specifications for what he intends to build, and proof that the plans meet any applicable Code requirements. Also, the owner will be obligated to obtain a permit, if one is required.

The Agencies enforcing the Fair Housing Law are very serious about requiring associations to allow owners or residents to construct modifications which provide handicap accessibility, if they wish to do so. But, the Association is not required to construct the modification, and would not pay any of the costs.



In summary, the association would not generally be obligated to put in a pool lift or a handicap ramp or a chairlift on a set of stairs. But that association would be obligated to allow an owner or resident to do so, if he wants to, and it will be solely at his personal expense, even though others may be able to use it once it is in place.

This is an area of the Federal and State Laws that can be disastrous and expensive for the association and the community, if it is not handled carefully. If an owner or resident asks for a modification for handicap access to common areas, be sure to discuss the matter with your association attorney.

EMPLOYMENT LAW

IS YOUR COMMUNITY IN COMPLIANCE



By: Mark A. Trank, Esq.
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Associations often ask us: What employment laws apply to us? When do we know if we are covered?

The answer depends upon the number of employees, measured over the current or previous calendar year. Federal and state employment statutes (and some local ordinances) will apply if the association has sufficient employees, full-time and/or part-time. Here are some examples:

Americans with Disabilities Act (ADA): The ADA applies to private employers with 15 or more employees, and public employers.

Age Discrimination in Employment Act (ADEA): Applies to private employers with 20 or more employees, and public employers.

Title VII of the Civil Rights Act: Applies to private employers with 15 or more employees, and public employers. This includes the federal "Pregnancy Discrimination Act".

Family and Medical Leave Act (FMLA): Applies to private employers with 50 or more employees, and public employers.

Florida Civil Rights Act (FCRA): this is the state law that is patterned after Title VII and prohibits workplace discrimination

on the basis of race, sex, national origin, disability, family status, etc. Like Title VII, the FCRA applies to private employers with 15 or more employees, and public employers.

Some federal laws have lower thresholds, like OSHA (the Occupational Safety and Health Act) which regulates workplace safety and applies to employers with one or more employees. The Fair Labor Standards Act, which establishes minimum wage and overtime pay requirements, also applies to most employers regardless of size.

Local ordinances can also trigger coverage for associations that don't have enough employees to be covered under state or federal laws. For example, in Lee County, Florida, the local human rights/employment ordinance applies to employers with 6 or more full-time or 11 or more total (i.e., full-time and part-time) employees. Other localities in Florida (including Miami-Dade, Broward and Palm Beach counties) also have their own human rights/employment ordinances so associations located in those jurisdictions may be covered even if they don't have enough employees under state or federal law.

Bottom line: If a complaint against an association employer involves race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or (in Florida) family status, the association is covered if it has the required number of employees who worked for the association during the current or previous year (usually for at least twenty calendar weeks).

INFORMATION ABOUT AUTOMATIC EXTERNAL DEFIBRILLATORS (AED)



By: Lisa Magill, Esq.
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The American Heart Association encourages the purchase and availability of automatic external defibrillators (AED) and many community associations have already purchased this life safety equipment for on-site use. These machines have become commonplace in airports, hotels, supermarkets and shopping centers throughout the country.

You may wonder if there is any downside to having this machine available in the community association setting. While Florida's Cardiac Arrest Survival Act provides broader liability insulation than the Good Samaritan Statute, the protection is not absolute. The Cardiac Arrest Survival Act does protect the owner of the device from civil liability if:

- The device is properly maintained and tested; and
- Employees or agents of the owner have received appropriate training in the use of the device.

However, the owner is still protected from liability and specific training isn't required if:

1. The device is equipped with audible, visual, or written instructions on its use, including any such visual or written instructions posted on or adjacent to the device;
2. The employee or agent utilizing the device was not an employee or agent who would have been reasonably expected to use the device; or
3. There wasn't a reasonably sufficient time period between hiring the employee or agent and the event, or between the acquisition of the device and the occurrence of the harm.

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HOPA COMPLIANCE REMINDERS



By: JoAnn Burnett, Esq.
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In order to qualify for the Housing For Older Persons™ (“HOPA”) or 55 and older exemption, the Association must satisfy each of the following requirements:

- at least 80 percent of the occupied units must be occupied by at least one person 55 years of age or older per unit;
- the Association must publish and adhere to policies and procedures that demonstrate an intent to provide housing for persons 55 years or older; and
- the Association must comply with rules issued by the Secretary for verification of occupancy through reliable surveys and affidavits.

Types of Published Polices and Procedures that demonstrate an intent to qualify for the 55 or older exemption, include:

- the written rules, regulations, lease provisions, deed or other restrictions acknowledging the intent to be a 55 or older community,
- the actual practices of the Association used in the enforcement of the rules;
- the kind of advertising used to attract prospective residents to the community as well as the manner in which the community is described to prospective residents;

- the Association’s age verification procedures, and its ability to produce, in response to a familial status complaint, verification of required occupancy.

The following documents are considered to be reliable for age verification:

- birth certificate,
- drivers license,
- passport,
- immigration card,
- military identification,
- any other state, local, national or international documentation, provided it contains current information about the age or birth of the possessor,
- a self certification in a lease, application affidavit, or other document signed by an adult member of the household asserting that at least one occupant in the unit is 55 years of age or older will satisfy this requirement,
- statements made under penalty of perjury from third party individuals who have knowledge of the age of the occupants of a household may be used when the household itself refuses to cooperate by providing age verification,
- other information, such as statements indicating age in prior applications may be acceptable,
- government documents such as census data.

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As a practical matter I am told that all AED devices have audible commands. The device will analyze the victim’s hearth rhythm once the electrodes are placed on the victim’s chest. If the circumstances warrant, the device will charge and announce when it is time to push the “shock” button. The local American Red Cross office can facilitate purchase of a defibrillator at a discount and set up free training on the devise. The American Red Cross, along with other

organizations, lead CPR/AED certification classes for many groups (including community associations), either for free or a nominal charge.

Nonetheless, it’s a good idea to consult with your insurance adviser or liability carrier to learn whether there are special conditions associated with ownership or use of a defibrillator. Associations must test the battery every so often (once a year or as otherwise recommended) and make sure to replace the pads before they expire.



NEW ON FLORIDA CONDO & HOA LAW BLOG

- Sympathetic Board Avoids Selective Enforcement Defense
- Swimming Pool Drain Covers Recalled
- Defibrillators - Good Idea or Source of Liability?

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SPECIAL LEGISLATIVE ISSUE

SUMMARY OF THE 2011 LEGISLATIVE SESSION

OVERVIEW OF THE MAJOR LEGISLATION ADOPTED IN 2011 IMPACTING FLORIDA'S COMMUNITY ASSOCIATIONS



CALL Co-Executive Directors -
Yeline Goin, Esq. & David Muller, Esq.

The 2011 Legislative Session proved very eventful as there were several bills that passed through the Legislature, and were later signed into law by Governor Scott, which will impact community associations. The most significant bill, HB 1195, provides needed revisions to the law for condominium associations, homeowners' associations and cooperatives. The Community Association Leadership Lobby ("CALL"), the lobby arm of Becker & Poliakoff, P.A., assisted in drafting portions of the language that was incorporated into HB 1195, at the request of members of the Legislature, to clear up some of the confusion that arose from the passage of the large community association bill (SB 1196) that became law in 2010. Our CALL team spent much of the Legislative Session in Tallahassee pushing the bill through each committee stop and suggesting positive amendments to make the bill better. We are especially proud and grateful to the thousands of CALL members who contacted their elected officials to express their support for the bill.

The 2011 Legislative Session was also noteworthy for the problematic bills that were ultimately defeated. CALL and our members worked tirelessly to prevent some very bad legislation from passing including: (1) the language in the large deregulation bill that would have eliminated state regulation of community association managers and the Division of Condominiums, Timeshares and Mobile Homes; and (2) the "design professionals" bill that would have protected design professionals (e.g. architects and engineers) that fail to properly carry out their professional duties.

Overall, the 2011 Legislative Session was a good one for community association legislation. Again, thank you to the countless number of CALL members who assisted us during this past Legislative Session by providing your valuable input and by contacting your elected officials. Based on the hard work of the CALL team and our CALL members, the voice of the people was heard loud and clear in Tallahassee this year! Rest assured that your CALL team has already started the process of preparing for the 2012 Legislative Session, which will commence in January 2012, and we will keep you posted regarding our efforts via future CALL Alerts.



HB 1195—RELATING TO CONDOMINIUM, COOPERATIVE AND HOMEOWNERS' ASSOCIATIONS

Effective Date: July 1, 2011

Since HB 1195 is a large bill containing many important changes, this section is divided via topics with notations as to the applicability and impacts on condominium associations, cooperatives and homeowners' associations. In some of the sections, we have provided additional analysis that will assist you in applying these new laws to your association's operations.

OFFICIAL RECORDS

CONDOMINIUM IMPACTS

§718.111(12), F.S.

- Provides that e-mail addresses and facsimile numbers provided to the Association are not accessible to other unit owners unless specifically provided by the unit owner for purposes of receiving notice by electronic transmission or unless the unit owner consents in writing to the disclosure
- Clarifies that "personnel records" are those records pertaining to both Association and management company employees
- Clarifies that "personnel records" are not accessible to owners; however, written employment agreements with an Association employee or management company or budgetary or financial records that indicate the compensation paid to an Association employee are accessible to owners
- Provides that unit owners may consent in writing to the release of personal identifying information not otherwise accessible to unit owners (i.e. telephone numbers, facsimile numbers, e-mail addresses, other mailing addresses, etc.)



- Provides that the Association is not liable for the inadvertent disclosure of personal identifying information that is included in an official record of the Association and was voluntarily provided by the unit owner and not requested by the Association

HOMEOWNERS' ASSOCIATION IMPACTS

§720.303(5)(c), F.S.

- Clarifies that "personnel records" are not accessible to owners; however, written employment agreements with an Association employee or budgetary or financial records that indicate the compensation paid to an Association employee are accessible to owners
- Provides that owners may consent in writing to the release of personal identifying information not otherwise accessible to owners (i.e. telephone numbers, facsimile numbers, e-mail addresses, other mailing addresses, etc.)
- Provides that the Association is not liable for the inadvertent disclosure of personal identifying information that is included in an official record of the Association and was voluntarily provided by the owner and not requested by the Association

PRACTICE NOTE:

The 2010 amendments to the statutes, referenced above, provided that owners' telephone numbers, e-mail addresses and other "personal identifying information" could not be made accessible to other owners. This caused consternation for many associations which publish owner directories, telephone books, e-mail group lists, and the like. The previous statute did not say whether or not personal identifying information could be published if the owner whose information was being published signed a waiver form. The new statute permits owners to authorize the disclosure of such information, provided that their consent is evidenced in writing.

NOTICE AND CONDUCT OF ELECTIONS (TIMESHARE CONDOMINIUMS ONLY)

TIMESHARE CONDOMINIUM IMPACTS

§718.112(2)(d), F.S.

- Deletes statement that sub-subparagraph §718.112(2)(d)3.a, F.S. (relative to notice and procedural requirements of elections) does not apply to timeshare condominiums, but adds §718.112(2)(d)10., F.S., that states the chapter does not limit the use of general or limited proxies, require the use of general or limited proxies, or require the use of a written ballot or voting machine for any agenda item or election at any meeting of a timeshare condominium association

PRACTICE NOTE:

The deletion of the statement from §718.112(2)(d)3.a, F.S. and addition of §718.112(2)(d)10., F.S. seem to imply that timeshare condominiums must, regardless of what the condominium documents require, provide a first notice of election 60 days before the scheduled election and that a member interested in running for the Board must submit a notice of intent to the Association 40 days before the election and, if so desired, a candidate information sheet 35 days before the election.

BOARD MEETINGS/ "SUNSHINE" RULES

CONDOMINIUM IMPACTS

§718.112(2)(c)3., F.S.

- Allows the Board, without the Association's attorney being present, to hold a closed meeting for the purpose of discussing personnel matters (but attorney must still be present when discussing proposed or pending litigation with the Board or committee)

PRACTICE NOTE:

HB 1195 amends the Condominium Act to mirror the Homeowners' Association Act. Now, under both laws, a board can hold closed meetings (prevent owner attendance and observation) regarding "personnel matters." The law still permits association boards and committees to also meet in closed session with association legal counsel regarding pending or proposed litigation.



BOARD MEETINGS/PARTICIPATION

HOMEOWNERS' ASSOCIATION IMPACTS

§720.303(2)(b), F.S.

- Deletes requirement that members must petition the Board in order to speak at Board meetings
- Provides members with the right to speak at Board meetings with reference to all designated items

PRACTICE NOTE:

Under previous law, homeowners' association members could only speak at board meetings as a matter of right if so provided in the bylaws, or if the owners called for a special board meeting by a complicated petition process. The Condominium Act has, for decades, allowed unit owners to "participate" at board meetings with respect to all designated agenda items. Curiously, the new provisions in the Homeowners' Association Act, while providing that members now have the right to speak with reference to "designated items", does not require the Homeowners' Association board to publish an agenda with its posted notice, as is the case in condominiums.

BOARD ELECTIONS/QUALIFICATIONS

CONDOMINIUM IMPACTS

§718.112(2)(d), F.S.

- Clarifies that Board member terms do not expire at the annual meeting if all of the member terms would expire at the annual meeting but there are no candidates
- Provides that, where there are candidates, if the number of candidates is equal to or less than the number of Board members whose terms expire at the annual meeting, all candidates shall become members of the Board effective upon the adjournment of the annual meeting; any seats not filled by the candidates shall be filled by the affirmative vote of the majority of the directors making up the newly constituted Board, even if the directors constitute less than a quorum or there is only one director
- Provides that, in those cases where the term of a Board member expires at the annual meeting, the Board member may stand for reelection unless prohibited by the bylaws
- Clarifies that a candidate must be eligible to serve on the Board at the time of the deadline for submitting a notice of intent (i.e. 40 days before the election) in order for his or her name to be listed as a proper candidate on the election ballot or to serve on the Board
- Clarifies that where a newly-elected Board member chooses to complete the education curriculum administered by a Division-approved condominium education provider (in lieu of providing a written certification), he or she must complete the curriculum within 1 year before or 90 days

after the date of election or appointment and must submit a certificate of satisfactory completion within 90 days after the election

- Clarifies that a written certification or educational certificate is valid and does not have to be resubmitted as long as the director serves on the Board without interruption

PRACTICE NOTE:

The “unless prohibited by the bylaws” language relative to the ability of a Board member whose term has expired to stand for reelection suggests that term limits may be permitted if the bylaws impose term limits. Additionally, as referenced above, the Condominium Act has been amended to clarify that a candidate must be eligible to serve on the board at the time of the deadline for submitting a notice of intent (forty days before the election) in order for his or her name to be listed on the ballot. For example, if a unit owner is more than ninety days delinquent in the payment of assessments to the association at the time of deadline for submitting a self-nomination, they would not be eligible to run for the board. Interpretations of the previous statute were that such a person would need to be placed on the ballot, on the theory that they could cure their ineligibility (for example, bringing their account current) prior to taking their seat on the board.

HOMEOWNERS’ ASSOCIATION IMPACTS

§720.306(9), F.S.

- Provides that a person who is more than 90 days delinquent in the payment of any fee, fine or other monetary obligation to the Association or has been convicted of a felony in Florida or an offense in another jurisdiction that would be considered a felony in Florida (unless such felon’s civil rights have been restored for at least 5 years as of the date on which he or she seeks election to the Board) is not eligible to serve on the Board

PRACTICE NOTE:

HB 1195 amends the Homeowners Association Act, now making it consistent with the Condominium Act, providing that a person who is more than ninety days delinquent in the payment of fees to the association is not eligible to serve on the board. Curiously, the statute does not contain the language found in the Condominium Act which states that once a director becomes ninety days delinquent, he or she is deemed to have “abandoned” his or her office. The Homeowners Association Act now, similar to the Condominium Act, prohibits convicted felons from serving on the board.

- Provides that the validity of any action taken by the Board is not affected if it is later determined that a member of the Board is ineligible to serve on the Board

HURRICANE PROTECTION



CONDOMINIUM IMPACTS

§718.113(5), F.S.

- Provides that the association may install hurricane shutters, impact glass, other code-compliant windows, or hurricane protection that complies with or exceeds the applicable building code
- Provides that a vote of the owners is not required if the maintenance, repair, or replacement of the hurricane shutters, impact glass, or other code-compliant windows is the responsibility of the Association according to the declaration of condominium
- Allows the Association, upon approval by a majority vote of the voting interests, to install hurricane shutters, hurricane protection, or impact glass or other code-compliant windows, even if hurricane protection or laminated glass or window film architecturally designed to function as hurricane protection which complies with or exceeds the current applicable building code has been previously installed

PRACTICE NOTE:

HB 1195 expands the concepts found in the previous versions of the condominium statute which were applicable to “hurricane shutters” and “hurricane protection” to now include “impact glass or other code compliant windows.”

RECREATIONAL AGREEMENTS/ "BUNDLING"

CONDOMINIUM IMPACTS

§718.114, F.S.

- Allows the Association 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 upon a vote of, or written consent by, a majority of the total voting interests or as authorized by the provision in the declaration dealing with material alterations or substantial additions to the common elements or to real property which is association property

JOINT AND SEVERAL ASSESSMENT LIABILITY BETWEEN MASTER AND SUB-ASSOCIATIONS

CONDOMINIUM IMPACTS

§718.116(1)(b)2., F.S.

- Provides that an Association that acquires title to a unit through foreclosure of its lien for assessments is not liable for unpaid assessments, late fees, interest, or reasonable attorney's fees and costs that came due before the Association's acquisition of title in favor of any other condominium association or homeowners' association which holds a superior interest on the unit

HOMEOWNERS' ASSOCIATION IMPACTS

§720.3085(2)(d), F.S.

- Provides that an Association that acquires title to a parcel through foreclosure of its lien for assessments is not liable for unpaid assessments, late fees, interest, or reasonable attorney's fees and costs that came due before the Association's acquisition of title in favor of any other condominium association or homeowners' association which holds a superior interest on the parcel

PRACTICE NOTE:

The new statutes somewhat alleviate an existing glitch in the law when an association forecloses a claim of lien for unpaid assessments, the association can be jointly and severally liable with the foreclosed owner for assessments owed to another association, such as a "master association." HB 1195 provides that a foreclosing association is not liable for past due assessments owed to an association which holds a superior interest in the unit.

ATTACHMENT OF RENTS

CONDOMINIUM IMPACTS

§718.116(11), F.S.

- Deletes reference to "future monetary obligations" and clarifies that demand is for subsequent rental payments due from the tenant to the unit owner



- Clarifies that, upon written notice from the Association, the tenant is responsible for paying all subsequent rental payments over to the Association until all monetary obligations of the unit owner related to the unit have been paid in full
- Provides specific language to be included in notice to tenant
- Provides tenant with immunity from any claim by the landlord related to the timely payment of rent to the Association after the Association has made written demand

COOPERATIVE IMPACTS

§719.108(10), F.S.

- Deletes reference to "future monetary obligations" and clarifies that demand is for subsequent rental payments due from the tenant to the unit owner
- Clarifies that, upon written notice from the Association, the tenant is responsible for paying all subsequent rental payments over to the Association until all monetary obligations of the unit owner related to the unit have been paid in full
- Provides specific language to be included in notice to tenant
- Provides tenant with immunity from any claim by the landlord related to the timely payment of rent to the Association after the Association has made written demand

HOMEOWNERS' ASSOCIATION IMPACTS

§720.3085(8), F.S.

- Deletes reference to "future monetary obligations" and clarifies that demand is for subsequent rental payments due from the tenant to the owner

- Clarifies that, upon written notice from the Association, the tenant is responsible for paying all subsequent rental payments over to the Association until all monetary obligations of the owner related to the parcel have been paid in full
- Provides specific language to be included in notice to tenant
- Provides tenant with immunity from any claim by the landlord related to the timely payment of rent to the Association after the Association has made written demand

PRACTICE NOTE:

HB 1195 cleans up some glitches from the 2010 law which permitted an association to require that rents owed by a tenant to a delinquent owner be paid directly from the tenant to the association. HB 1195 clarifies that when a unit owner is delinquent to the association in the payment of any monetary obligation, the association may require that all future rents be paid to the association, as they become due until the owner's debt is satisfied. The statute also contains a standard form demand letter that associations must send to tenants.

TERMINATION OF TIMESHARE CONDOMINIUMS AND PARTIAL TERMINATION OF CONDOMINIUMS

CONDOMINIUM IMPACTS

§718.117, F.S.

- Allows for the termination of a condominium that includes units and timeshare estates where the improvements have been totally destroyed or demolished and requires that such petition for termination be filed in court by a unit owner seeking relief
- Allows for partial termination of a condominium pursuant to a plan of termination approved by at least 80 percent of the total voting interests of the condominium if no more than 10 percent of the total voting interests have rejected the plan by negative vote or by providing written objections to the plan of termination
- Specifies that a plan of partial termination is not an amendment subject to §718.110(4), which requires approval of all unit owners and record lienholders, if the ownership share of the common elements of a surviving unit remains in the same proportion to the surviving units as it was before the partial termination
- Requires that a plan of termination identify the units that survive the partial termination and provide that such units remain in the condominium form of ownership pursuant to an amendment to the declaration or an amended and restated declaration
- Specifies that title to the surviving units and common

elements that remain part of the condominium property remain vested in the ownership shown in the public records and do not vest in the termination trustee

- Requires that, in a partial termination, the aggregate values of the units and common elements that are being terminated must be separately determined and the plan of termination must specify the allocation of the proceeds of sale for the unit and common elements
- Requires that, in a partial termination, liens that encumber a unit being terminated be transferred to the proceeds of sale of that portion of the condominium property being terminated which are attributable to such unit
- States that, in a partial termination, the association may continue as the condominium association for the property that remains subject to the declaration of condominium

FINES AND SUSPENSIONS

CONDOMINIUM IMPACTS

§718.303(3)-(6), F.S.

- Clarifies that the Association can fine and, for a "reasonable period of time", suspend the rights of the unit owner, or a unit owner's tenant, guest, or invitee to use the common elements, common facilities, or any other association property for the failure of the unit owner or its occupant, licensee, or invitee to comply with the terms of the condominium documents
- Continues previous limits for fines to \$100 per violation and \$1,000 in the aggregate
- Continues requirement that a fine cannot become a lien against a unit
- Continues proviso that the Association provide 14-day written notice and opportunity for hearing prior to imposition of fine or suspension for failure to comply with the terms of the condominium documents



- Clarifies that the Association can suspend the rights of the unit owner or the unit's occupant, licensee, or invitee to use the common elements, common facilities, or any other association property and suspend voting rights of the unit owner if the unit owner is more than 90 days delinquent in paying a monetary obligation due to the Association
- Clarifies that when the Board suspends the use rights and voting rights of a unit owner who is more than 90 days delinquent in paying a monetary obligation due the Association, the Association must impose the suspension(s) at a duly-noticed Board meeting and thereafter provide written notice of such suspension(s) to the unit owner and, if applicable, the unit's occupant, licensee, or invitee by mail or hand delivery
- Clarifies that the voting interest or consent right allocated to a unit which has been suspended is not to be counted towards the total number of voting interests necessary to constitute a quorum, the number of voting interests required to conduct an election, or the number of voting interests required to approve an action



COOPERATIVE IMPACTS

§719.303(3) - (5), F.S.

- Removes requirement that the right to fine for the failure of the unit owner or the unit owner's occupant, licensee or invitee to comply with the terms of the cooperative documents must be in the cooperative documents
- Continues previous limits for fines to \$100 per violation and \$1,000 in the aggregate
- Continues requirement that a fine cannot become a lien against a unit
- Allows the Association, for a "reasonable period of time", to suspend the rights of the unit owner, or a unit owner's tenant, guest, or invitee to use the common elements, common facilities, or any other association property for the failure to comply with the terms of the cooperative documents
- Requires that the Association provide written notice and opportunity for hearing before a committee of other unit owners prior to imposition of fine or suspension for failure to comply with the terms of the cooperative documents
- Allows the Association to suspend the use rights of the unit owner or the unit's occupant, licensee, or invitee and suspend voting rights of a unit owner if the unit owner is more than 90 days delinquent in paying a monetary obligation due to the Association

- Provides that the Board suspension of use rights and voting rights of unit owner who is more than 90 days delinquent in paying a monetary obligation due the Association must be imposed at a duly-noticed Board meeting and thereafter provide written notice of such suspension to the unit owner and, if applicable, the unit's occupant, licensee, or invitee by mail or hand delivery
- Provides that suspension of common element use rights does not apply to limited common elements intended to be used only by that unit, common elements needed to access the unit, utility services provided to the unit, parking spaces, or elevators
- Provides that the voting interest or consent right allocated to a unit which has been suspended is not to be counted towards the total number of voting interests necessary to constitute a quorum, the number of voting interests required to conduct an election, or the number of voting interests required to approve an action

HOMEOWNERS' ASSOCIATION IMPACTS

§720.305, F.S.

- Clarifies that the Association can fine and, for a "reasonable period of time", suspend the rights of the owner, or an owner's tenant, guest, or invitee to use the common areas and facilities for the failure of the owner of the parcel or its occupant, licensee, or invitee to comply with the terms of the governing documents
- Continues previous limits for fines to \$100 per violation and \$1,000 in the aggregate, though the fine can exceed \$1,000 if so provided in the governing documents
- Continues requirement that a fine of less than \$1,000 cannot become a lien
- Continues proviso that association provide 14-day written notice and opportunity for hearing prior to imposition of fine or suspension for failure to comply with the terms of the governing documents

- Clarifies that the Association can suspend use rights of the owner, or an owner's tenant, guest, or invitee if the member is more than 90 days delinquent in paying a monetary obligation due to the Association
- Removes requirement that the right to suspend voting rights of an owner if more than 90 days delinquent in paying any monetary obligation due to the Association must be in the governing documents
- Provides that the Board suspension of use rights and voting rights of an owner who is more than 90 days delinquent in paying a monetary obligation due the Association must be imposed at a duly-noticed Board meeting and the Board must thereafter provide written notice of such suspension to the owner and, if applicable, the occupant, licensee, or invitee by mail or hand delivery
- Provides that the voting interest or consent right allocated to a parcel which has been suspended is not to be counted towards the total number of voting interests necessary to constitute a quorum, the number of voting interests required to conduct an election, or the number of voting interests required to approve an action

BULK BUYERS

CONDOMINIUM IMPACTS

§§718.703 – 718.707, F.S.

- Amends the definition of "bulk assignee" and "bulk buyer" to mean a person who acquires more than 7 condominium parcels in "a single condominium"
- Provides that a bulk assignee is not liable for warranties under 718.203(1) or 718.618, except as expressly



provided by the bulk assignee in a prospectus or offering circular, or the contract for purchase and sale executed with a purchaser, or for design, construction, development or repair work performed by or on behalf of the bulk assignee

- Provides that if, at the time the bulk assignee acquires title to the units and receives an assignment of developer rights, the developer has not relinquished control of the board, for purposes of determining the timing of transfer of control, a condominium parcel acquired by the bulk assignee is not deemed to be conveyed to a purchaser, or owned by an owner other than the developer, until the condominium parcel is conveyed to an owner who is not a bulk assignee
- Requires filing with the division and certain disclosures to purchasers and lessees if a bulk assignee or bulk buyer is offering "more than seven units in a single condominium" for sale or for lease for a term exceeding 5 years
- Provides that a bulk assignee or bulk buyer is not required to comply with the filing or disclosure requirements if all of the units owned by the bulk assignee or bulk buyer are offered and conveyed to a single purchaser in a single transaction
- Provides that a person acquiring condominium parcels may not be classified as a bulk assignee or bulk buyer unless the condominium parcels were acquired on or after July 1, 2010, but before July 1, 2012

MANAGEMENT FEE COLLECTION

COOPERATIVE IMPACTS

- §719.108(4), F.S.
- Removes provision from 2010 statute that allowed the Association to lien for collection services for which the Association has contracted

PRACTICE NOTE:

In 2010, Chapter 719 of the Florida Statutes, the Florida Cooperative Act, was amended to permit a cooperative association to add a management company's administrative processing charges onto a claim of lien for delinquent assessments. The law was not similarly amended in 2010 for condominiums or homeowners' associations. HB 1195 repealed the 2010 amendment as to cooperatives. Accordingly, the current statutes do not authorize any type of association (condominium, cooperative, or homeowners' association) to add on administrative processing fees or other charges from a management company as part of delinquent assessments. The laws do permit an administrative late fee of up to \$25.00 per late installment, or five percent of the delinquent installment (whichever is greater) if authorized in the governing documents.



BULK SERVICES

HOMEOWNERS' ASSOCIATION IMPACTS

§720.309(2), F.S.

- Authorizes the Board to enter into a bulk contract for communications services as defined in §202.11(2), F.S. (which includes cable and telephone), information services and internet services, regardless of whether such authority is contained in the governing documents; however, if the authority to enter into such contract is not contained in the governing documents, the costs are to be allocated on a per-parcel rather than a percentage basis regardless of the manner in which expenses are allocated in the governing documents
- Provides that any bulk service contract entered into before July 1, 2011 in which the cost of service is not equally divided among all parcel owners may allocate the cost equally among all parcels upon the approval of a majority of the voting interests present at a regular or special meeting of the Association
- Provides that bulk service contracts made by the Board can be canceled by a majority of the voting interests present at the next regular or special meeting of the Association, but if no motion to cancel is made or such motion fails, the contract shall be deemed ratified for the term provided in the contract
- Allows hearing-impaired or legally blind parcel owners who do not occupy the parcel with a non-hearing-impaired or sighted person and parcel owners who receive social security or food assistance to disconnect bulk service without penalty and further exempts them from operating expenses for such services if disconnected
- Prohibits homeowners' associations from denying individual franchised, licensed or certified cable or video service to any resident if the resident pays the provider directly for services; further prohibits Association from requiring the resident or service provider from having to pay anything of value (other than service or installation fees) to obtain or provide the service

FIRE SAFETY

CONDOMINIUM AND COOPERATIVE IMPACTS

§633.0215(14), F.S.

- Clarifies that buildings with less than 4 stories and a corridor providing an exterior means of egress are exempt from the requirement to install a manual fire alarm system

PRACTICE NOTE:

HB 1195 fixes a discrepancy created by two separate bills approved in 2010 which both amended §633.0215(14), F.S.

HOUSE BILL 59- RELATING TO SERVICE OF PROCESS

Effective Date: July 1, 2011

§48.031(7), F.S.

- Provides that a gated residential community, including a condominium or a cooperative, must grant unannounced entry into the community, including the common areas and common elements, to a person attempting to serve process on a defendant or witness who resides within or is known to be within the community

HOUSE BILL 849- RELATING TO PUBLIC SWIMMING POOLS; ELEVATORS

Effective Date: July 1, 2011

§514.0315(1), F.S.

- Adopts the pool retrofitting requirements in the federal Virginia Graeme Baker Pool and Spa Safety Act by requiring public swimming pool and spa drain covers and grates to be equipped with an anti-entrapment system or device



§514.0315(2), F.S.

- Provides that public pools built before January 1, 1993, with a single main drain other than an unblockable drain, must be equipped with at least one of the following:
 - A safety vacuum release system that stops operation of the pump, reverses circulation flow, or otherwise provides a vacuum release at a suction outlet when a blockage is detected;
 - A suction limiting vent system with a tamper-resistant atmospheric opening;
 - A gravity drainage system that uses a collector tank;
 - An automatic pump shut-off system; or
 - A device or system that disables the drain.

PRACTICE NOTE:

The above-referenced retrofitting methods are consistent with the federal law and expand state law to allow gravity drainage with a collector tank as an acceptable retrofitting method.

§553.509(2), F.S. (repealed)

- Eliminates the requirement that multi-family dwellings, including condominiums that are at least 75 feet high and contain a public elevator, have at least one elevator that can be powered by an alternate power source (e.g., a generator)
- Eliminates the requirement that operators of such buildings adopt a written emergency operations plan that details the sequence of operations before, during, and after a natural or manmade disaster

HOUSE BILL 883- RELATING TO PUBLIC LODGING ESTABLISHMENTS

Effective Date: June 2, 2011

Chapter 509, F.S.; §386.203(4), F.S.

- Replaces the terms “resort condominiums” and “resort dwellings” with the term “vacation rental”

§509.032(7)(b), F.S.

- Provides that a local law, ordinance, or regulation may not restrict the use of vacation rentals, prohibit vacation rentals, or regulate vacation rentals based solely on their classification, use, or occupancy, unless such ordinance was adopted on or before June 1, 2011

§509.242(1)(c), F.S.

- Defines a “vacation rental” as any unit or group of units in a condominium, cooperative, or timeshare plan or any individually or collectively owned single-family, two-family, or four-family house or dwelling unit that is also a transient public lodging establishment

PRACTICE NOTE:

HB 1195 appears to cut off the capability of local governing bodies in resort communities to regulate the length of permissible rentals.

SENATE BILL 408- RELATING TO PROPERTY AND CASUALTY INSURANCE

Effective Date: May 17, 2011

§626.70132, F.S.

- Reduces the window for filing hurricane and windstorm claims from five to three years after a storm

§627.062, F.S.

- Increases rate by which insurers may raise premiums for reinsurance costs from 10% to 15% per year

§627.351, F.S.

- Provides that sinkhole coverage is limited to structural damage for primary buildings

§627.706, F.S.

- Strictly defines “structural damage” to minimize frivolous claims



- Provides that any claim, including, but not limited to, initial, supplemental, and reopened claims under an insurance policy that provides sinkhole coverage is barred unless notice of the claim was given to the insurer in accordance with the terms of the policy within 2 years after the policyholder knew or reasonably should have known about the sinkhole loss

§627.7011, F.S.

- Provides that with respect to homeowners' policies, if the dwelling is insured on the basis of replacement cost, the insurer must initially pay the actual cash value of the insured loss, less the deductible; any remaining amounts shall be paid as work is performed and expenses are incurred, except if a total loss of a dwelling occurs, the insurer shall pay the replacement cost without holdback of any depreciation in value

SENATE BILL 650- RELATING TO MOBILE HOME PARKS

Effective Date: June 2, 2011



§723.024, F.S.

- Provides that local governments must cite the responsible party for violations of local codes or ordinances
- Clarifies that mobile home owners and mobile home park owners have specific obligations under the statute and can only be penalized for violations of their respective obligations

§723.061(1), F.S.

- Clarifies language relating to eviction due to change in land use
- Provides mobile home park associations with a right of first refusal to purchase a mobile home park, when the mobile home park is subject to a land use change, and establishes notice procedures for the same

- Clarifies that the six months notice of an eviction due to a land use change must be provided to the affected mobile home owners rather than to the affected tenants

§723.061(4), F.S.

- Exempts officers of a mobile homeowners association from the notice requirements in s. 723.061 (1)(d)1., F.S. Officers of mobile homeowners associations no longer need to receive the notice via certified mail or registered mail, return receipt requested

Did You Know that Becker & Poliakoff Archives Webinars for Viewing On-Demand?

The Firm holds periodic webinars as part of our continuing efforts to educate our clients, community leaders and community association professionals. You probably received registration notices in the past. Participants automatically receive a link to the recorded webinar so they can access the presentation after the live event. You can still benefit from these presentations, even if you haven't participated, by playing the recorded webinar at your leisure. Go to: <http://www.becker-poliakoff.com/events/webinar.html> to view informative presentations led by Firm attorneys and special guests.

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Community Update Archives

For more than twenty five years, Becker & Poliakoff attorneys have published a monthly newsletter, *Community Update*, to keep owners, board members, and management professionals informed about developments in Community Association law, notes on significant case decisions, helpful tips on the business aspect of Association operations, and details on changes in legislation and administrative decisions. Visit www.becker-poliakoff.com/cu/



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Florida Locations



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* Available for consultation by appointment

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HOW WILL THE RECOVERY OF THE REAL ESTATE MARKET AFFECT THE QUALITY OF LIFE IN YOUR COMMUNITY?



By Kenneth Direktor, Esq.
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Many of us are seeing articles suggesting that real estate sales in Florida are increasing. However, many of those articles or the comments posted in response to those articles indicate that buildings with increased sales still appear to be completely dark. Reports from the Federal Reserve also indicate that sales are up. However, by all indications, most buyers are all cash buyers.

So who is fueling this increased volume in real estate sales? It would appear to be that the buyers are primarily investors. Most of your communities have experienced investor purchases and are wary of investor purchasers for a number of reasons. For example, investors rarely, if ever,

occupy the unit, and there has always been a preference for owner occupancy in Florida's condominium, cooperative and homeowner communities. Furthermore, the occupancy of the investor-owned units tends to be more transient as investor purchasers prefer to have as much flexibility as possible with regard to the occupancy of their properties. Finally, if there are significant repair projects on the horizon, you may find investor owners less willing to undertake such projects and less willing to pay their share of any assessments. For those investors who obtain financing to purchase units, the Association must consider methods of protecting its ability to recover assessments in the event an investor chooses to walk away from the property, which can happen if an investor was not required at the time of purchase to pay some appreciable portion of the purchase price in cash.

continued on page 2



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How do you balance your desire to protect your community and preserve your lifestyle against the obvious need to participate in the recovery of the real estate market? Aren't you better off if non-paying owners are replaced by owners who will start paying the assessments? These are difficult questions because preserving a lifestyle and facilitating sales are often conflicting objectives. For example, an association could attempt to impose strict leasing and occupancy restrictions by amendment to the governing documents in order to deter those who would buy for the purpose of using the units for short term rentals. You could also amend your documents to require the payment of a portion of the purchase price in cash and the maintenance of a specified equity cushion to protect your subordinate lien. Of course, these type of restrictions may protect your lifestyle, but they may also deter certain types of buyers from looking at units in your community. Frankly, whether you restrict the type of vehicles that can be parked on your property, the types of animals that can be brought on to your property, or become housing for older persons, any and all of these use restrictions will have an impact on the resale market. This is where your desire to establish and preserve a certain lifestyle can become counter-intuitive for those who are looking to preserve or enhance property values for the purpose of resale in the current climate.

These challenging policy decisions must be made by the community, not by your management or your counsel. There are many options available to your communities in terms of amending your documents to preserve a lifestyle, as long as you can get the vote required to amend your documents. In some communities, this has already become a moot point because you cannot get these kinds of amendments passed by the requisite percentage of your owners because you already have too many investor owners. In others, the window of opportunity to amend your documents to prepare for the next wave of buyers is open at this time, but will close as an increasing number of investor purchasers acquire units in your communities.

A few examples of what you can consider in your documents would include: requiring a person acquiring title to maintain a certain equity cushion above the first mortgage; clarifying or strengthening your right to screen transfers, whether they be transfers of title or transfers by lease; or you may wish to consider the value of adding the right to screen other

occupants who might live in a unit in your community, but who might not otherwise be included on the deed or the lease as a named owner or as a named tenant. Consider the fact that the institutional lending market has imposed much stricter guidelines with regard to acceptable loan to value ratios. If the institutional mortgagees find this advisable to protect their position, why isn't a similar requirement in your documents advisable to protect the Association's position? Also, consider the fact that some institutional lenders are now using questionnaires to determine whether you have a primarily investor owned community based upon the percentage of units rented.

You might also consider your options with regard to fiscal management, particularly as regards the creation and maintenance of reserves. The requirements imposed by FNMA already impact your options with regard to reserves. Many communities which waived reserves entirely for the past few decades are now beginning to fund some level of reserves in order to make certain mortgage financing available to those who are buying or refinancing units. Regardless of the lending criteria, the establishment and maintenance of reserves creates liquidity for the Association and should be considered from a purely business standpoint anyway.

These are but a few of the specific examples of steps that should be considered as the real estate market changes in Florida. Depending upon the specific issues confronting your community, there may be many other specific examples of operational and documentary changes you could consider to protect yourself and preserve the lifestyle you have in your community.

At the same time, it will be very important not to impede your ability to be part of the recovery of the real estate market by making sure that unnecessary restrictions and regulations and others that might deter potential buyers are re-evaluated and, where appropriate, removed from your covenants.

All community leaders are urged to consult among themselves and with the owners in their communities, and with their professional advisors with regard to these issues. We all hope the economic recovery is coming. However, we also all hope that we can participate in that recovery while preserving the lifestyle that we value in our communities.

There are many options available to your communities in terms of amending the documents to preserve a lifestyle. These challenging policy decisions must be made by the owners, with the board's leadership, as every community is different and the owners have different goals and ideals.

HOW TO “DO” PROCESS – ASSOCIATION’S OBLIGATIONS TO ALLOW ACCESS

Must an Association allow process servers into the community to serve process on residents?

First, be advised that process servers can either be law enforcement officers or private companies approved by the Courts. Under Section 843.02, Florida Statutes, whether the process server is a law enforcement officer or appointed by the Court, *resistance to the process server’s efforts is a first degree misdemeanor*. This statute provides the following, in pertinent part:

843.02 *Resisting officer without violence to his or her person.*—Whoever shall **resist, obstruct, or oppose** any officer as defined in s. 943.10(1), (2), (3), (6), (7), (8), or (9); member of the Parole Commission or any administrative aide or supervisor employed by the commission; county probation officer; parole and probation supervisor; personnel or representative of the Department of Law Enforcement; or **other person legally authorized to execute process in the execution of legal process** or in the lawful execution of any legal duty, without offering or doing violence to the person of the officer, **shall be guilty of a misdemeanor of the first degree**, punishable as provided in s. 775.082 or s. 775.083.

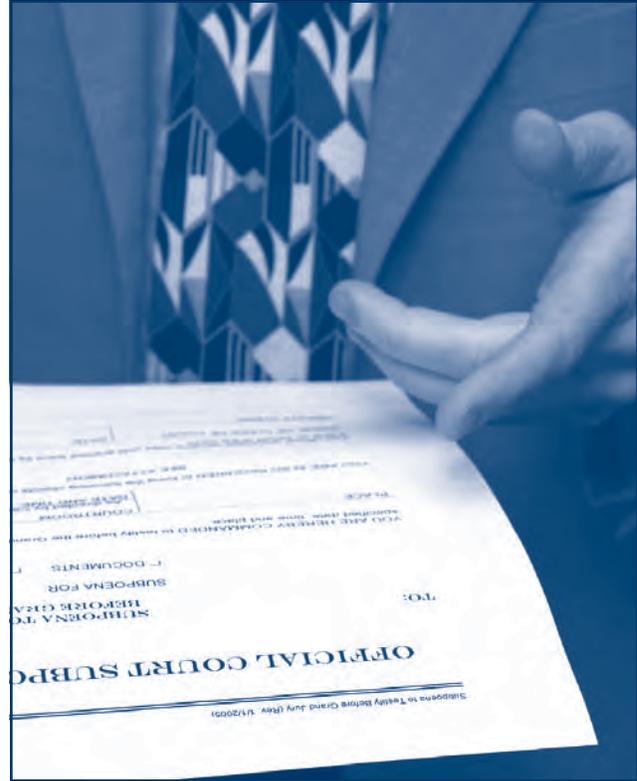
In other words, it’s unlawful to interfere with a process server trying to serve legal process.

Second, although calling a resident to advise that a process server is coming to his home does not seem to be part of the crime of “obstructing justice”, it could be considered **conspiracy** to obstruct justice **if** the resident then utilizes this information to evade service of process and **if** the Association has a policy to inform residents of the impending visit of a process server. (There are cases in other states holding that advance notification of a process server’s visit does indeed constitute obstruction of justice.)

Moreover, s. 48.031 (7), Florida Statutes, a new statute that took effect July 1, 2011, now specifically provides that, in regard to a **gated residential community** (including a condominium or cooperative), the Association **must allow** a process server access to the community, **without announcing** such entry to the residents. Therefore, the Association’s rule of thumb should be that a process server who has produced proper identification will be provided unannounced access into the community.

To sum up, a process server should be provided unannounced access into the community.

Furthermore, the Association should neither ‘help’ nor ‘hinder’ the process server in any way. The only duty upon the Association is to provide the unannounced right of access. In this regard, since there may be more process server



traffic given the rise in foreclosure suits, the association could notify the residents that process servers will be given access to the community without announcement, pursuant to statutory obligations.

Finally, if your community has security personnel logging visitors, this should be done with process servers as well, and the Association can require process servers to produce identification. The Association can also ask to photocopy the identification, especially if a process server is not a law enforcement officer. Of course, any process server who conducts himself in an unprofessional manner should be reported to the court administrator’s office. (The Association could also request a list of the approved process servers from the court administrator’s office; in this manner, any process server producing identification could be checked against the list.)

To conclude, neither Association security, nor any Association employee, agent, officer, director, nor any owner, resident, or guest should accompany the process server, since some recipients of service of process may respond violently. A process server agrees to take on this risk as part of his or her job; however, others are not trained to be exposed to this kind of risk, so the Association should eliminate its exposure to liability for these kinds of risk.

TAHITI BEACH HOMEOWNERS ASSOCIATION INC V. PFEFFER



By Steven M. Davis, Esq.
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Editor's Note: The statutes change from time to time but many associations don't change the governing documents exactly at the same time or in the same way. When there is a conflict between

the statute and the governing documents, confusion arises. Determining whether to apply newly enacted statutory provisions to existing documents is tricky – as this association learned.

Great care should be taken when attempting to enforce rules or declaration provisions that conflict with statutes and statutory amendments. These rules and declaration provisions may be outdated and unenforceable. It is best to have them reviewed by your association attorney prior to attempting to enforce them. Enforcing an invalid rule could subject an association to liability for damages, costs, and attorneys fees, which could easily eat away at the Association's budget and require the imposition of a special assessment.

In a case where Becker and Poliakoff represented a homeowner, the Third District Court of Appeals agreed with Becker and Poliakoff's position and affirmed the trial court's ruling in favor of the homeowner. This January 5, 2011 ruling found that the fining statute controlled over the association's existing documents.

In this case, the Tahiti Beach Homeowner's Association fined our client \$10,000 per month. That's right, \$10,000 per month, because it took the homeowner longer than two years to build his house in violation of an association rule. The rule provided that for every month over 24 months, until the certificate of occupancy is issued, the homeowner gets fined \$10,000. At oral arguments, one Judge inquired: "If the homeowner is one day late, does he get fined \$10,000?" the answer given was "yes". Fines may not be punitive.

The court analyzed the rule along with the statutory scheme providing a limitation on fines of \$100 per day. Daily fines may accumulate up to a maximum of \$1,000 unless the governing documents provide otherwise. Although the rule was in effect prior to the statute being enacted, the Court

held that the statute was remedial and procedural in nature and therefore could be applied to the facts of this case.

The Court observed that "statutes relating to remedies or procedure operate retrospectively in the sense that all pending proceedings, including matters on appeal, are determined under the law in effect at the time of the decision rather than that in effect when the cause of action arose or some earlier time."

The Court rejected the constitutional analysis advanced by the Association. Because penal, remedial, and procedural issues were addressed in the legislation (rather than vested, substantive rights), the case presented no constitutional issue. The Court also rejected the Association's claim that our clients somehow waived their rights to challenge the fine. In sum, the Court believed the fine was punitive and contrary to provisions on fining in the Florida Statutes.



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A Few Bad Apples ...



Common Sense Tips to Avoid Financial Loss

By **Brian Willis, Esq.**
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When a new member of the Association is elected to the Board of Directors, they can bring a fresh perspective to the Association's operations. In one recent lawsuit I was involved in, it took a new Board member asking the right questions to uncover years of financial mismanagement by the Association's manager.

The manager had a long standing relationship with the Association and had earned the trust of the Board of Directors. The Association allowed the manager to sign its checks. The manager received the Association's bills and bank statements. The manager was even allowed to open a credit card account, in the Association's name. The manager would provide regular financial reports and a CPA would audit the Association's records at the end of every year. Everything seemed fine, because the Association was not looking at the right records, its monthly bills and checks.

Everything changed when a new board member came along and started asking to see the Association's monthly bills. Once he saw the bills, he wanted to know why so many charges were being made to the Association's credit card. Like an unraveling sweater, the Association's financial picture came undone. The Association learned that the manager had used the Association's credit card to make over \$50,000 in purchases and the manager could not account for how the money had been spent.

That's when the Association came to us. I filed a lawsuit on behalf of the Association and began the discovery process, through which I obtained documents and information from the opposing

party, the manager. What we learned was astounding. The property manager managed multiple associations and was using the credit cards to purchase supplies and items for other Associations. We reviewed the bills as far back as we could obtain, and found regular charges that were made for other associations. Sometimes the charges were only a few dollars for a light bulb or air filter, sometimes they went into the thousands. Over almost a decade those small charges added up to big losses for my client.

The manager claimed that every dollar had been properly accounted for and paid back, but was never able to account for all of the lost money. We uncovered hundreds of checks from many of the manager's other associations. Thousands of dollars was apparently being shuffled back and forth between associations and the property manager was signing all the checks, for all the associations.

While this was an extreme case, simple misappropriation of association funds happens far too often. Association's want to trust the professionals they work with to do what is right. But, to protect the association, and prevent fraud and abuse, the Board of Directors has a fiduciary duty to ensure that someone is independently reviewing all income and expenses. If only one person, whether it be an accountant, board member, or property manager controls all of the bills and all of the payments, it is simply too easy for that individual member to misuse Association funds and cover up his or her actions.

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Owner Won't Leave?

Then Enforce Your Lien Foreclosure Judgment Through a Writ of Possession

By Jay Roberts, Esq.
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Your association has filed a lien foreclosure action and the court has issued a final judgment of foreclosure and taken title following the foreclosure sale. **What happens if the owner still refuses to leave the property?** This is where writs of possession come into play.

A final judgment of foreclosure entitles the successful bidder at the foreclosure sale to have possession of the subject property exclusive of all those named as defendants in the foreclosure action. A writ of possession is simply a direction from the court to the sheriff's department to place the successful bidder at a foreclosure sale in actual possession of the property that was the subject of the foreclosure action once the Clerk of Court has issued a Certificate to the bidder. Since the successful bidder is entitled to the writ of possession, the issuance of the writ is actually considered a ministerial function and it is issued by the Clerk of Court. However, the Clerk will not issue a writ of possession without

(1) a final judgment that includes language directing the Clerk of Court, to issue the writ of possession; or (2) a post-judgment order from the court directing the court to issue the writ of possession.

Once issued by the Clerk of Court, the writ of possession will be served on the property by a deputy sheriff. The sheriff's department will charge an administrative fee for service of the writ of possession. Depending on the local procedures of your sheriff's department, the deputy sheriff may post the writ of possession on the door giving the defendants until the end of the day to vacate the premises, or the deputy may stay at the subject property until the defendants and personal items are removed. If the deputy sheriff serves the writ of possession by posting it on the door, he/she will tell you to contact the sheriff's department to arrange a time for another deputy to return if the defendants do not leave of their own accord. We often hear the following questions from community leaders:

What if the lender forecloses?

Q: If a lender gets a final judgment of mortgage foreclosure, but does not follow up with taking possession of the property, can the association get a writ of possession and force the lender to take actual possession of the property?

A: *No. Only the person/entity which takes title to the property following the foreclosure sale is entitled to request a writ of possession. However, once a certificate of title is issued following a mortgage foreclosure action, the person/entity on the certificate of title is liable for assessments regardless of whether the person/entity takes actual control/possession of the property.*

What does it cost?

Q: Is the administrative fee standard across the state?

A: *No. The fee is set by the individual counties. Some counties charge a flat fee, whereas other counties have fees that vary depending on how many occupants are to be removed. You can contact your local sheriff's office to inquire about these fees.*

Does it take a long time?

Q: How long does the process take?

A: *It depends on the individual county. It can take a few weeks in some instances as one must rely on the Clerk of Court to issue the writ of possession to the sheriff.*

What if the owner leaves on his or her own – do we still have to take this extra step?

Q: Is a writ of possession always required even if the property was abandoned?

A: *Obtaining a writ of possession is the safest course of action to ensure the Association has legally taken possession, even when the property appears abandoned.*

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Based on the firm's years of experience with community Associations, we suggest that an association institute the following practices, to minimize the opportunity for fraud to occur:

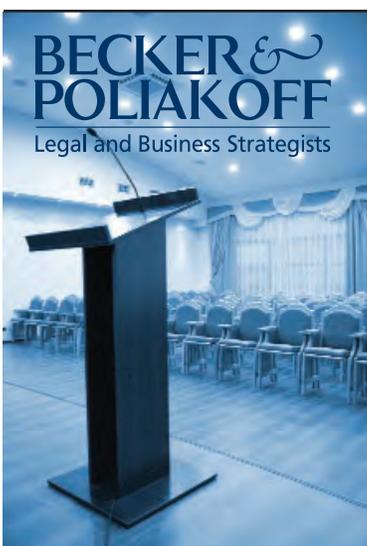
- ✓ Two signatures should be required on every check, one signature being an Officer or Director.
- ✓ The Board should personally verify that the signature cards for the bank accounts are accurate, and that no additional signatures have been added.
- ✓ The Board should insist on reviewing original bank statements in conjunction with reconciliation of the accounts.
- ✓ Use on-line banking, or other banking services where the Association can verify that received checks are consistent with checks signed by the Association.
- ✓ The bank records should be reconciled by a person or entity other than the person writing the checks (and, the person reconciling the bank records should have the authority to report directly to the Board).
- ✓ Never pre-sign checks.
- ✓ The annual year-end financial report (Audit, review or compilation) should be prepared by an independent CPA, who is not affiliated with the person or entity handling the Association's day-to-day financial and accounting operations.
- ✓ Require that a photocopy of the check be attached to each invoice for which the check is payment.
- ✓ Require bank transfers to be made only by written authorization of the Board, with a copy sent to the President or other authorized officer.

The Association should also protect itself from losses by obtaining fidelity or dishonesty coverage, a type of insurance policy that pays money to the Association when one of its board members steals association funds. These policies are required by statute for condominium associations and strongly recommended for homeowners' associations. The coverage must include damages from 'wrongful acts' of the manager or any agents, employees, directors and officers.

Watch Out for Broad Indemnification Clauses:

Finally, a quick point about contracts with managers and other vendors, these contracts frequently contain "indemnification clauses." An indemnification clause provides that when a manager is sued in the course of his work for the association, the association will cover the costs of the manager's defense and, ultimately, pay any damages from association funds. In the case I discuss above, the manager claimed that the association was required to pay his attorneys' fees even though the lawsuit involved his own wrongful actions. We successfully fought the manager's attempts to use the indemnification clause against the association, but the entire issue could have been avoided if the management contract expressly stated that the indemnification clause did not apply to lawsuits between the association and the property manager.

It is a sad fact of the Association business that unscrupulous individuals will try to take advantage of Associations. The Association's board has a fiduciary duty to the Association and must act to protect the Association's finances. For one client, it took a new board member, asking the right questions, to unravel years of financial mishandling. Taking the above steps to ensure independent oversight of the association's finances will help protect your association.



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WHO SHOULD ATTEND?

Board Members of:

- Condominium Associations
- Cooperative Associations
- Timeshare Associations
- Homeowners' Associations
- Mobile Home Associations

Owners of:

- Condominiums
- Cooperatives
- Timeshares
- Single Family Homes
- Mobile Homes

Property Managers:

- CAMs
- Other Community Association Professionals

Control Over Owners/Residents

Is the Association Going Too Far?

By Joseph E. Adams, Esq.
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In 2002, the Florida Supreme Court issued an opinion which concluded that, with limited exceptions, every unit owner purchases a condominium unit with notice that his or her property rights can be altered through an amendment to the declaration of condominium. The case of *Woodside Village Condominium Association, Inc. v. Jahren*, 806 So. 2d 452 (Fla. 2002) is considered by some to be the most significant condominium governance decision issued by the Florida Supreme Court in the near half-century during which Florida has had a condominium statute (the first Florida Condominium Act was adopted in 1963).

At issue in *Woodside* was an amendment to a declaration of condominium which severely limited (nearly banned) a unit owner's right to lease. The court ruled that the right to lease was conferred by the declaration of condominium, that the declaration of condominium is itself an amendable contract, and thus the rights conferred by the declaration are likewise amendable through amendment of the declaration.

The application of the *Woodside* ruling to homeowners' associations is perhaps a subject that could be debated. The *Woodside* Court held that condominiums are strictly a "creature of statute" and seemed to place some emphasis on that point in its decision. Homeowners' associations are not necessarily a "creature of statute", but are increasingly becoming subject to a statutory regime very similar to that which is applicable to condominiums. In my view, the courts would be likely to apply the *Woodside* doctrine to HOAs. The basic underlying theory is that your rights are subject to an amendable contract; the declaration of condominium in the condominium context, the declaration of covenants in the HOA context.

However, the laws themselves set forth certain rights which cannot be changed without every owner's approval. For example, the Homeowners' Association Act provides that no amendment may materially and adversely alter the proportionate voting interests of a parcel, or increase the proportion or percentage by which a parcel shares in the common expenses of the association unless unanimously approved by all owners and lienholders, such as mortgagees.

In addition, somewhat unique to the homeowners' association context, there is a line of cases (mostly from trial courts, whose pronouncements are not technically binding as "the law") that hold that declaration amendments cannot change the "general scheme of development" without unanimous approval of all of

the owners. The most common application of this doctrine involves attempts to impose mandatory golf club membership upon homeowners who originally bought their homes in communities where golf club membership was voluntary. In response to the mandatory golf club membership cases, the Homeowners' Association Act was amended last year to provide the ability to create mandatory club membership on less than unanimous approval, if authorized by the declaration.

A wholly separate, equally interesting and somewhat even more complicated legal discussion, involves the extent to which statutory amendments can be retroactively applied to affect vested property rights. This issue has also been the subject of a recent Florida Supreme Court case. In *Cohn v. The Grande Condominium Association, Inc.*, published March 31, 2011, the high court held that 2007 changes to the condominium statute which adjusted proportionate voting rights between residential and commercial units in mixed-use developments could not be retroactively applied, based on constitutional grounds.

Like the U.S. Constitution, Article I, Section 10, of the Florida Constitution prohibits the legislature from passing a law "impairing the obligation of contracts". Declarations of community associations are considered, for most purposes, to be contract. So, the general rule is new laws cannot change the specific rights and obligations set forth in community association Declarations. The *Cohn* decision follows long-standing precedent in Florida regarding the applicability of statutory amendments to condominium or community association operations. If the governing documents of the association contain "magic language" incorporating statutes (in this case, the Condominium Act) as amended from time to time, statutory changes impact operations, rights and obligations of owners, the association governing the owners and, in some cases, third party vendors or service providers. There are other exceptions and as mentioned in the previous Community Update, there is a specific analysis required to determine whether a statute will control over an existing provision in the documents.

**EVERY UNIT OWNER PURCHASES A
CONDOMINIUM UNIT WITH NOTICE THAT
HIS OR HER PROPERTY RIGHTS CAN BE
ALTERED THROUGH AN AMENDMENT TO
THE DECLARATION OF CONDOMINIUM**