



LAW OFFICES

BECKER & POLIAKOFF, P.A.

# Community Up-Date™

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CURRENT NEWS FOR COMMUNITY ASSOCIATIONS

## MANAGERS BEWARE!

### FEDERAL COURT DETERMINES CONDOMINIUM MANAGER MAY BE LIABLE FOR DISCRIMINATION DUE TO CONDUCT WHICH EXCEEDS BOARD'S DIRECTIONS

In a case of extreme importance to managers and board members alike, a Federal Judge found that the conduct of an association might be actionable under Title VIII, U.S.C. §3604(f)(3)(B) of the Fair Housing Act as amended by the Fair Housing Amendments Act of 1988. In addition, the conduct of the manager might be actionable under Section 3617 of said Act. A Section 3604 violation is one where the association fails to make reasonable

accommodations in its rules and policies when the accommodation is necessary to afford a handicapped individual equal opportunity to use and enjoy a dwelling. A Section 3617 violation concerns itself with conduct which interferes with one's use and enjoyment of his/her condominium unit through threats, intimidations and other discriminatory actions.

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## TIDBITS

### Did You Know ???

The official records of a condominium or cooperative association shall be maintained within the State of Florida and shall be made available to a unit owner within 5 working days after receipt of a written request. This requirement may be complied with by having the official records available for inspection or copying on the condominium property.

- ✓ The official records of associations are open to inspection by any association member or the authorized representative of such member at all reasonable times.
- ✓ The right to inspect the records includes the right to make or obtain copies, at the reasonable expense, if any, of the association member. The association may adopt reasonable rules, however, regarding the frequency, time, location, notice, and manner of record inspections and copying.
- ✓ The failure of an association to provide the records within 10 working days after receipt

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The case involves a 146 unit condominium located in Downers Grove, Illinois. One of the unit owners, Marthon, suffers from Tourette's Syndrome, an inherited neurological disorder typified by involuntary motor and vocal "tics." Tourette's is also viewed as a mental disorder by the American Psychiatric Association. In this case, the unit owner's Tourette's results in involuntary "throat clearing, 'hooting' or 'barking', foot stomping" and, occasionally, instances of coprolalia (the vocalization of socially inappropriate words and phrases). He also suffers from a sleep related disorder and tinnitus, which cause anxiety and insomnia.

Neighboring unit owners, including

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of a written request shall create a rebuttable presumption that the association willfully failed to comply.

- ✓ A unit owner who is denied access to official records is entitled to the actual damages or minimum damages for the association's willful failure to comply.
- ✓ The minimum damages shall be \$50 per calendar day up to 10 days, the calculation to begin on the 11th working day after receipt of the written request.
- ✓ The failure to permit inspection of the association records entitles any person prevailing in an enforcement action to recover reasonable attorney's fees from the person in control of the records who, directly or indirectly, knowingly denied access to the records for inspection.

the president of the association, complained that the unit owner's actions kept them up all hours of the evening. At the insistence of the board, which was being barraged by complaints from other unit owners, the manager sent a letter to the Tourette sufferer advising that his conduct violated provisions of the covenants which prohibited "noxious or offensive" activity, as well as conduct which may be or become an annoyance or nuisance to other unit owners or occupants."

At issue during the hearing on motions for summary judgment was whether the unit owner with Tourette's was taking medication and doing everything possible to control his Tourette's symptoms. The answer to that and other unresolved issues precluded the court from entry of a summary judgment for either party. However, turning to the question of whether the condominium manager might be personally liable, the Judge concluded that, while the claims against the manager, which arose out of the manager's actions taken in furtherance of the board's dictates, should be denied (threatening the levy of fines and/or eviction of Marthon); however, as to allegations that the manager interfered with Marthon's use and enjoyment of the unit through threats, intimidation and other discriminatory actions, that cause of action would be sustained.

According to plaintiff's allegations, the manager told Marthon's wife that she could remain in the unit, but that he would have to move out, hired individuals to secretly test Marthon, sent letters purporting to terminate Marthon's rights as a unit owner, and distributed an intentionally deceptive story of the lawsuit against the association to enrage the owners against Marthon.

The court rejected the manager's

contention that he be insulated from liability for all actions taken at the direction, or even on behalf of its principal, noting that there are a myriad of cases which extend Fair Housing Act liability to non-innocent agents as well as principals.

Following the court's rulings, the association settled with the plaintiffs by agreeing to pay in excess of \$300,000 to cover their costs and legal fees. In this case, the plaintiff agreed to move from the condominium.

Community associations, their officers, directors and managers need to be aware

of their responsibilities, and potential liabilities under the Federal and State Fair Housing Laws. They must also be aware that Florida law prohibits payment of discrimination judgments from insurance proceeds; in other words, if found guilty, the costs will be assessed directly against the unit owners and, in some instances, against the board members and manager, as individuals. Managers Beware!

**LEGISLATIVE FOLLOW-UP**

Recently, the Firm alerted its clients to proposed legislation which affected community associations. In that communication, Senate Bill 1742, which was not in the best interest of community associations, was incorrectly cited as Senate Bill 1724.

However, thanks to the response from a lot of the communities, the prospect of passage for Senate Bill 1742 is remote.



# REORGANIZATION OF THE DIVISION OF FLORIDA LAND SALES, CONDOMINIUMS AND MOBILE HOMES

As all of you who read this publication should be aware, the Division of Florida Land Sales, Condominiums and Mobile Homes (the "Division") of the Department of Business and Professional Regulation (the "Department"), is the government agency with the authority to enforce and ensure compliance with the provisions of the Florida Condominium Act (Chapter 718, Florida Statutes) and the Administrative Rules promulgated thereunder, relating to the development, construction, sale, lease, ownership, operation, and management of residential condominium units. The specific powers and duties of the Division are set forth in Section 718.501 of the Condominium Act and the aforesaid Administrative Rules.

Among the stated goals and objectives of Governor Jeb Bush's administration is reducing the cost of government through certain measures designed to make government function in a more streamlined and efficient manner. As part of such effort, the Division is being reorganized. The Division will now be comprised of three (3) functioning bureaus - Standards and Registration, Compliance and Customer Service.

The Bureau of Standards and Registration will be responsible for the consolidation and standardization of all examination and billing functions.

The Bureau of Compliance will handle all enforcement functions and perform case related public education. A regional manager will supervise each Division Field Office. Real Estate Development Specialists will be reclassified as Investigation Specialists and Real Estate Development Specialist Supervisors will be reclassified as Investigator Supervisors.

The Customer Service Bureau will handle complaints and inquiries, as well as the distribution of educational materials, maintenance of the Division's website, public record requests and newsletters. Inquiries will be handled by this bureau by toll free (800) direct access lines and written and electronic communication.

The Division will maintain separate account balances for each business area that it regulates and a quarterly financial statement will be posted on the website of the Department of Business and Professional Regulation. In light of the anticipated revenue to be generated by

each of the business areas, twelve positions within the Division are being eliminated.

Among the most significant proposals in conjunction with the reorganization is the proposed elimination of the Condominium Arbitration Program currently administered by the Division. The Department has determined that the bulk of the arbitration cases are "frivolous in nature and beyond the scope of the Department's jurisdiction". The Department's position is that the arbitration program is unnecessary in light of the fact that 49 counties currently offer a civil mediation program and ten of these counties offer a Citizen Dispute Settlement Program, which is a voluntary mediation service, free of charge, and do not require these disputes to be filed as a case in the court system. Five counties have arbitration programs. According to the Department, eliminating the condominium arbitration program from the Division will result in a reduction in the annual per unit condominium fee by forty cents (\$.40). The Department also



takes the position that indications are that the increased focus on condominium education will decrease the demand for arbitration services and, as indicated above, there are significant arbitration and mediation services available through county funded programs.

In order for the Division to eliminate its condominium arbitration program, the Condominium Act would have to be amended by the Florida Legislature and such legislation approved by the Governor's office, or a veto overridden by the Legislature. As readily apparent, any amendment to the Condominium Act

eliminating the condominium arbitration program from the duties of the Division would unlikely be vetoed by Governor Bush.

Currently, under Section 718.1255 of the Condominium Act, disputes between an association and a unit owner, except for certain limited exceptions, are subject to mandatory non-binding arbitration administered by the Division. Although imperfect, the arbitration process has provided a relatively cost effective mechanism to resolve disputes which otherwise would have to be resolved in circuit or county court, or a county administered mediation or arbitration program. If the Condominium Act is amended and the Division no longer handles condominium arbitration, it remains to be seen whether there will be viable, cost effective alternatives to resolve condominium related disputes. As noted in Section 718.1255, the Legislature had determined that unit owners are often at a disadvantage when litigating against an association due to the disparity in financial resources and that the courts were becoming

overcrowded with condominium related disputes, therefore, alternative dispute resolution was a means to reduce court dockets and trials and provide a more efficient, cost effective option to court litigation. In light of the fact that the arbitration program has proven to be a fairly effective and efficient method of resolving disputes, combined with the fact that the number of condominium projects and people living in condominium units in Florida is ever increasing, forty cents

per unit per year seems a relatively small price to pay to resolve what the Department has somewhat insensitively labeled as "frivolous" disputes. It may be shortsighted or far fetched to believe that condominium education will reduce the demand for arbitration services or that sufficient alternative dispute resolution services will be available to resolve future condominium related disputes.

In any event, we will attempt to keep you apprised of the status of the changes being made or proposed to the structure and role of the Division, whether administratively or by legislation.



## CASENOTES

### OWNER PROTECTED FROM FORGED RELEASES

In the case of *Continental Concrete, Inc. v. Lakes at La Paz III Limited Partnership*, 25 FLW D1196 (Fla. 4th DCA, 5/17/00), the owner contracted for the construction of a building. The contractor, in turn, subcontracted for concrete. Prior to making any payments to the contractor, the owner recorded the Notice of Commencement. During the course of construction, the owner required the contractor to deliver releases of liens from the contractor and subcontractors before the owner would make a payment to the contractor. For many months, the parties followed this procedure. Subsequently, the subcontractors informed the owner that the contractor had not been making payments to the subcontractors. It was discovered that the contractor had forged the signatures of the subcontractors on the partial releases of lien to induce payment from the owner, but never paid the subcontractors. The owner made arrangements, with the consent of the contractor, to pay the subcontractors directly for awhile, then the owner terminated the contractor. The owner entered into another contract with a new contractor to finish the job. The total amount the owner paid to the original contractor, the new contractor and then directly to the subcontractors exceeded the contract price.

One of the subcontractors recorded a lien against the property for the amounts the subcontractor never received from the contractor. When the owner refused to pay the construction lien, the subcontractor filed suit. The owner defended on the basis it had relied upon the forged releases in making payment to the contractor, that it strictly followed all the construction lien laws, and paid an amount that exceeded the original contract price. This defense is more commonly known as the "proper payments" defense.

The court recognized that both the owner and subcontractor were innocent parties damaged by the wrongful act of the contractor. However, the court ruled in favor of the owner based upon two holdings. First, the "proper payments" defense absolutely protects the owner from all liens, even when releases of lien are forged, as long as the owner strictly follows the construction lien laws, as long as the contractor is responsible under its subcontract to pay the subcontractor, as long as the owner, in good faith, believes the forged releases are valid, and as long as the total amount of payments made by the owner equal

or exceed the contract price. Second, there is a general legal principle "that where one of the two innocent persons must suffer as a result of the default of another, the loss shall fall on him whose act made the loss possible." Because the subcontractor extended the contractor credit by continuing to perform work without getting paid, the subcontractor made the loss possible and, therefore, must bear the loss.

### HOMEOWNERS ASSOCIATION LIENS DO NOT SURVIVE TAX DEED

In the case of *Sugarmill Woods Oaks Village Association, Inc. vs. Andrew M. Wires et al*, 25 Fla. Law Weekly D2300, (Fla. 5th DCA 2000), the court found that the issuance of a tax deed extinguished a prior homeowners association lien on a lot for delinquent assessments.

This case turns solely on the interpretation of applicable Florida Statutes governing tax deeds. Section 197.552 originally provided that no right, interest, restriction or other covenants shall survive the issuance of a tax deed. However, this Statute was subsequently amended to provide several exceptions. With the formal recognition and acceptance of subdivisions and homeowners associations, the legislature added Section 617.312, Florida Statutes, which preserves covenants and restrictions imposed by homeowners associations as follows:

All provisions of a declaration of covenants relating to a parcel that has been sold for taxes or special assessments survive and are enforceable after the issuance of a tax deed or a masters deed or upon the foreclosure of an assessment, a certificate or lien, a tax deed, tax certificate or tax lien to the same extent that they would be enforceable against a voluntary grantee of title to the parcel immediately before the delivery of the tax deed or masters deed or immediately before foreclosure.

The intent of this Statute was to safeguard homeowners associations' declarations of covenants and restrictions from being extinguished by the issuance of a tax deed. However, the legislature did not specifically provide that liens assessed against lots by homeowners associations would also survive the issuance of a tax deed. Therefore, Section 617.312 simply preserves the power of the homeowners association to assess liens pursuant to recorded declarations of covenants in the future but does not preserve liens filed before issuance of a tax deed.