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CONDOMINIUM BUILDINGS SUBJECT TO RETROFITTING FOR FIRE SAFETY REQUIREMENTS

By Donna D. Berger, Esq.

Fires that occur within high-rise buildings pose the most risk for loss of life (both for occupants and firefighters) and severe property damage. While there is an inherent risk in combating any fire, one that rages within an inadequately protected high-rise building can rapidly become catastrophic.

High-rise fires are not only the stuff of blockbuster movies; they are the images that burn in a community's collective consciousness long after the flames have been doused. A fire that raged at the MGM Grand Hotel in Las Vegas resulted in 85 deaths and left a negative economic impact on hotel bookings for months following the tragedy. On a smaller scale, a recent Pinellas County high-rise condominium fire resulted in the death of two elderly occupants and serious injury to several firefighters. It is believed that the fire emanated from the kitchen of a unit on the fifth floor. One of the injured firefighters has filed suit against the association, alleging that the association failed to properly maintain its fire extinguishing system.

The potential for disaster in this arena has been known for some time. There has been a National Fire Protection Association (NFPA) Life Safety Code (LSC) (also known as NFPA-101) in place since 1991. This code has been adopted by all 50 states as a fire safety standard. In 1998, the Florida Legislature passed Chapter 98-287 which codified the Florida Building Code and incorporated the national fire safety standards into the new Florida Fire Prevention Code. At that time, the Florida Fire Code Advisory Council (FFCAC) heard testimony from potentially impacted parties around the State. The standards set forth in NFPA-101 that will impact condominium owners follow:

1. All existing high-rise buildings in excess of 75 feet in height, regardless of their use, must be protected throughout by a supervised automatic sprinkler system;
2. There is an exemption to this requirement for residential high-rise buildings where every dwelling unit has exterior access to an open-air walkway that leads to two remote stairwells. If there are

TIDBITS

Did You Know ???

In 2002, the Legislature changed the year end financial reporting requirements for condominiums, and there are now different rules for condominiums, cooperatives and homeowners' associations:

- ✓ Section 720.303(7), F.S. - Year end reports for homeowners' associations are due within 60 days after the close of the fiscal year. The association must provide either notice to all members that the financial report is available or a copy of the report to each member.
- ✓ Section 718.111(13), F.S. - For condominiums, reports are due within 90 days from the end of the fiscal year. However, within 21 days after the final financial report is completed by the association or received from a third party, but not later than 120 days from the end of the fiscal year, or other date set forth in the bylaws, the association must provide either notice that the financial report is available or a copy of the report to each member.

- ✓ Section 719.104(4), F.S. - In

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interior corridors, the exemption will not apply; and

- An exemption may be permitted if an Engineered Life Safety System (ELSS) has been approved by the authority having jurisdiction (i.e., the municipal Fire Marshal). For example, a fire sprinkler may not be necessary within each condominium unit if an engineer registered in the State of Florida determines that other fire safety features within the building code exceed code requirements, and the building is as safe as a building which is fully equipped with an automatic sprinkler system. An Engineered Life Safety System is usually comprised of a partial sprinkler system combined with some other life safety systems such as hard-wired fire alarm systems and fire doors. While an ELSS is less expensive than a full sprinkler system, there is no guarantee that a local Fire Marshal will find it to be an acceptable alternative to fully retrofitting a building with fire sprinklers. Obviously, the price tag attached to a complete retrofit work order will prove to be daunting to most, if not all, associations.



The official adoption of the NFPA 101 was on January 1, 2002. The fire service originally requested that communities be given only three to five years to retrofit their buildings with automatic fire sprinkler systems. Ultimately, however, a 12-year compliance timeframe was adopted in accordance with the FFCAC's recommendation. Thus, the deadline for compliance for all existing condominium buildings in excess of 75 feet is **December 31, 2014**. However, the Florida Fire Prevention Code defers to local authorities having jurisdiction with regard to implementing the more economical route of creating

an Engineered Life Safety System. This deferral is found in NFPA-1, Section 7-3.2.21.2.2 which reads,

"However, when a condominium decides to follow the more economical alternative route of the Engineered Life Safety System solution instead of a full sprinkler system solution, then the local fire department, which is the Authority Having Jurisdiction, may require that the implementation be performed in a shorter period of time."

Thus, any local Fire Department has the potential authority to require a high-rise residential building to compose and complete an Engineered Life Safety System in fewer than twelve (12) years. It will be necessary to check with your local fire department to accurately determine the exact deadline you will be facing.

This is an issue that will affect thousands of buildings across the State of Florida including many residential buildings, such as yours, and will involve the expenditure of millions of dollars to accomplish the retrofitting. The State Fire Marshal has already commenced building inspections and is sending out notices of noncompliance with the uniform fire safety standards. An association that receives one of these notices has 180 days to file an intent to comply with the NFPA-101 provisions. As mentioned above, local authorities may require implementation of these fire safety standards well before the December 31, 2014 deadline. **For example, Miami Dade County has imposed a three (3) year compliance deadline for those buildings wishing to install an ELSS.**

There are currently two (2) bills that may be considered in the legislative session which convenes on March 4, 2003. House Bill 165 would allow two-thirds (2/3rds) of the total voting interests of a condominium or cooperative association to opt out of the retrofitting requirements. Senate Bill 244 would exempt all buildings

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Did You Know ???

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a cooperative, year end financial reports are due within 90 days from the end of the fiscal year, and the corporation is still required to provide a copy of the report to every shareholder, at no charge.

- ✓ In condominiums and cooperatives, the type of year-end financial report depends upon the total amount of the budget. However, the level of reporting can be waived or reduced if approved by at least a majority of the votes cast at a duly noticed, convened and constituted meeting of the membership.
- ✓ For homeowners' associations, the year end financial reports are required to be either financial statements in accordance with generally accepted accounting principles, or financial reports of receipts and expenditures, prepared on a cash basis.
- ✓ If copies of year-end financial reports are requested by condominium unit owners or members of a homeowners' association, the association is required to provide the copies at no charge to the owner/member.

constructed on or before January 1, 2002 from the total sprinkler retrofit requirements but would empower the local authority having jurisdiction to grant such exemptions.

If our clients show sufficient interest, Becker & Poliakoff, P.A. will undertake a lobbying effort to work towards the successful passage of legislation which will be beneficial to condominium and cooperative owners statewide. If you are interested, please contact Donna Berger at dberger@becker-poliakoff.com or call 1-800-432-7712, ext. 4163, or 954-985-4163.

THEY'RE PLAYING OUR SONG

By Marc J. Randazza, Esq.

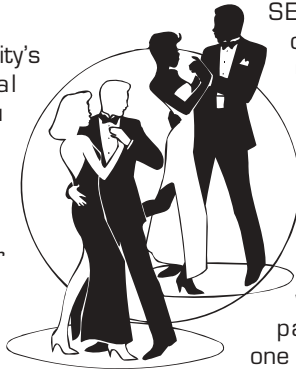
You walk into your community's clubhouse for the annual Valentine's Day dance. As you and your spouse enter, you hear Tony Bennett crooning through the loudspeakers. You smile, grasp her hand and say "Listen! They're playing *our* song."

You're wrong. As much as you may love it, it isn't *your* song. It's Tony Bennett's **intellectual property**, and like anything else, using someone else's property without permission is stealing, and the law forbids it.

In a restaurant or bar, open to the public, often the proprietor enhances the dining or drinking experience by entertaining patrons with music. This additional entertainment adds value to the restaurant or bar service, and whether the music comes from a purchased CD or over the airwaves, the owner of the copyright to that music has a property interest in the songs being played and a corresponding legal right to profit from its public performance.

Title 17 U.S.C. § 106(4) grants copyright owners the exclusive right to perform or to authorize the performance of their copyright works "Perform" under the copyright law means to either perform "directly or by means of any device or process." "Public performance" includes each step in the process by which the copyrighted work travels to the audience. Therefore, playing a concert is "performance," a radio broadcast of the concert is "performance," and a restaurant playing the radio broadcast of the concert is also a "performance." [See: *NFL v. Prime Time*, 211 F.3d 10 (2d. Cir. 2000)].

Under Title 17, any person or entity who performs, or allows others to perform, copyrighted music in a public place is legally responsible for obtaining prior permission from the copyright owner for this performance. Instead of each musician seeking copyright licensing fees from each potential performer or venue, artists sign up with copyright clearinghouses such as ASCAP, BMI, or



SESAC (the three main copyright clearinghouses).

Copyright owners enter into contracts with one of these clearinghouses which permits them to sell licenses for public performance or broadcast of the original copyright owner's musical work. When a business pays their licensing fee to one of the clearinghouses, that license allows the business to play any song on the clearinghouses' song list. To have the flexibility to play any song on the radio, businesses are well advised to purchase a license from ASCAP, BMI, and SESAC.

Not all performances of copyrighted materials are necessarily copyright infringement. There is a "common sense" exemption that Congress has written into the copyright laws at 17 U.S.C. § 110(5)(a). A business may turn on the radio for its customers' enjoyment as long as: (1) The radio is of a kind commonly used in private homes; (2) no direct charge is made to hear the transmission; and, (3) the transmission is not further transmitted to the public.

In 1998, Congress passed the Fairness of Music Licensing Act (Title II, Pub.L. No. 105-298, 112 Stat. 2830), which granted a specific exemption for bars and restaurants that are smaller than 3,750 gross square feet. This Act supersedes prior case law and gives bright line rules to help businesses determine whether they are exempt from licensing requirements.

- (1) The exemption applies only to the performance of non-dramatic musical works;
- (2) The exemption applies only to transmissions intended to be received by the general public;
- (3) The communicated broadcast must originate from a radio station licensed by the Federal Communication Commission;
- (4) At least one license must be paid to the copyright owner; for example, by the radio station;
- (5) There must be no direct charge to hear the music; and,

(6) The music must not be further transmitted.

If the business is not a foodservice or drinking establishment, then it may still qualify for the exemption, if it covers less than 2,000 sq. feet, and its sound system has less than a total of six loudspeakers and less than four loudspeakers in any one room or adjoining outdoor space. This exemption was crafted so that a small business need not fear the act of simply turning on the radio [See: *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151 (1975)].

If your association maintains a clubhouse, restaurant, or bar, your board of directors should look carefully at whether the association is exposing itself to liability by violating the copyright laws. One little radio on the counter isn't likely to raise a problem, but if, as a whole, the sound system is not the type commonly used in homes, the exemption is likely lost, and playing the stereo could result in some hefty fines [See: *SMI v. Claires Boutiques, Inc.*, 949 F.2d 1482, 1492 (7th Cir. 1991)].

For the purposes of the copyright laws, a performance is "public" if it takes place "at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered." Therefore, performances in social clubs, fraternal society meetings, summer camps, schools, and condominium clubhouses are "public performances" under the copyright laws.

ASCAP, BMI, and SESAC have been quite successful in prosecuting copyright infringement suits against businesses that do not properly obtain and pay for licenses. If your association is sued and loses a copyright infringement suit, you could be facing anywhere from minimum damages of \$250 per infringement up through statutory damages as high as \$2,500 per infringement.

Additionally, it is the norm that the court will also assess attorney's fees against the infringing party. Truly blatant cases can result in criminal charges against the infringer.

In *Re: Westwood Community Two Association, Inc. v. Barbee*, 293 F.3d 1332 (11th Cir. 2002), the United States Court of Appeal for the Eleventh Circuit held that an unofficial committee of homeowners had standing to appeal an order requiring each homeowner in the Westwood Two Community to pay a \$7,250.00 special assessment or risk having their homes liened. The Westwood Community Two Association, Inc. (the "Association") had previously filed for bankruptcy protection in the United States District Court for the Southern District of Florida as a result of successful litigation brought against the homeowners' association alleging violations of both the Federal and Florida Fair Housing Acts. After conducting a trial on the adversarial claims, the bankruptcy court allowed the discrimination claims to stand, which resulted in the Association facing liability in excess of one million dollars, including sums for compensatory and punitive damages.

The court-appointed trustee of the bankruptcy estate sought reconsideration of the bankruptcy court's decision to allow the claims. When the bankruptcy court denied the motion for reconsideration, the trustee elected not to file an appeal to the district court, and instead took the position that, pursuant to the Association's governing documents, the trustee had authority to specially assess each homeowner their pro rata share of the Association's liability (\$7,250.00 per home) in order to satisfy the judgments.

After the trustee sought collection of the special assessment, a group of homeowners calling themselves the "Unofficial Ad-Hoc Committee for Westwood Community Two" filed an action in the bankruptcy court challenging the special assessment by claiming its members did not engage in any of the wrongful conduct that led to the claims. The bankruptcy court ruled in favor of the trustee, finding that the trustee had the power to impose the special assessment, and authorize its collection. The Unofficial Committee appealed the bankruptcy court's rulings to the federal district court, but their appeal was denied under that court's determination that the committee lacked standing to challenge the bankruptcy court's ruling. The Committee then appealed to the

The Eleventh Circuit held that the Unofficial Committee did have standing to appeal the bankruptcy court's order as its members were "personally aggrieved" under the bankruptcy court's order. The court noted that "generally, only the bankruptcy trustee may appeal an order from the bankruptcy court." However, the court recognized an exception to this rule for purposes of appeal where a person's interests are "directly and adversely affected pecuniarily by the [bankruptcy court's] order." The court indicated that standing may be conferred in bankruptcy matters where the appellant has a financial stake that the challenged order diminishes, increases, burdens, or impairs rights. Based on that holding, the Eleventh Circuit remanded the matter to the district court for consideration of the Unofficial Committee's claims that they should not be specially assessed their pro rata share of the claim amount since the members alleged they did not participate in any of the wrongdoing which resulted in the claim.

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CASENOTES

“BE WARY OF FAIR HOUSING ISSUES WHEN ENFORCING COVENANTS”

Do your governing documents contain prohibitions against commercial or business uses of the residences? Do your governing documents contain language, which restricts the occupancy of the dwellings to single-family residential purposes? Most community association documents do contain these or similar provisions, and the widely held belief among homeowners and community leaders is that such restrictions would prohibit a for-profit corporation from operating a group home in the community. However, this is not necessarily the case.

In *Dornbach v. Holley*, 2002 WL 31875013 (Fla. 2nd DCA) 2002 (Not Released for Final Publication), the Second District Court of Appeal issued a preliminary opinion effectively allowing homeowners within a deed-restricted community to lease their property to a for-profit corporation named Res-Care Florida, Inc. to operate a group home that would house between four and six developmentally disabled adults. The Court concluded that any attempt to prevent the use of the home in this manner constituted illegal discrimination in violation of the Fair Housing Act.

Both the Federal and Florida Fair Housing Acts prohibit discrimination against handicapped persons. An entity may discriminate against

handicapped persons in three (3) ways:

Intentional Discrimination – which is generally described in the case as any action motivated by a desire to prevent a handicapped person or persons from residing in the community but can also be proven by having different standards or terms and conditions of the housing for different groups that are protected by the Acts.

Incidental Discrimination - this occurs when any act or actions result in creating different terms and conditions for different classes of people or that make the property unavailable for handicapped persons; and

Failure to Make Reasonable Accommodations/Modifications – this occurs when a handicapped person’s request for modifications is denied, thereby depriving him or her of the ability to enjoy the subject residence.

In this case, while intentional discrimination was not proven, the Court found a refusal to make a reasonable accommodation when the enforcement of the restrictions against business or commercial use and the requirement for single-family residences resulted in making the property unavailable for these handicapped residents. Therefore, the Court ruled in favor of the property owner and allowed the group home use.