



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

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

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



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

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

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

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

Another major issue that community associations deal with is unit owners wishing to express their individuality by altering the exterior appearance of their unit. The unit owner often has the mistaken belief that if they own it they can alter it. They enclose a balcony with windows, change the style of their front door or paint the exterior of their unit a different color than all of the

other units in the building. Such individual expression does not go over well in the condominium setting when it alters the exterior appearance of the unit and these issues often end up in arbitration.

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

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

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

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

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

Sound carries in most, if not all, condominium buildings. Therefore, ownership does not provide an unbridled right to be as loud and noisy as possible. The basic premise of a nuisance in a condominium setting is that the actions of one resident unreasonably interfere with another resident's use and enjoyment of his or her unit. Many condominium documents have specific prohibitions against creating a nuisance which disturbs other residents. Additionally, even without such language, there are common law nuisance actions which may also be brought depending on the circumstances. While often difficult to prove, an arbitration decision required noisy unit owners to cease and desist from creating excessive noise,

yelling, and other annoyances particularly between the hours of 11:00 p.m. and 9:00 a.m. The unit owners were also required to prohibit their guests from doing so. Nuisances may not only result from loud music. Improperly installed tile or hardwood floor coverings on upper floors of a building may also constitute a nuisance. As such, their installation may be regulated by the association's governing documents to prevent a nuisance from being created which disturbs the residents in the units below.

#### ***"Rules, Regulations and Governing Documents"***

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



## CIRCUIT COURT HOLDS THAT SECTION 718.302, FLORIDA STATUTES, APPLIES TO BULK CABLE CONTRACTS.

With limited exceptions, Section 718.302, Florida Statutes, allows unit owners, after transition, to cancel contracts made by the association prior to transition of control from the developer, if the contracts are for the operation, maintenance or management of a condominium association or the property serving the unit owners. If the contract or reservation in the declaration or lease requires the association to purchase condominium property or to lease condominium property to another party it must be

cancelled with eighteen (18) months from transition – otherwise the contract is deemed ratified. Recently a Broward Circuit Court ruled that this statute applies to bulk cable television contracts entered into by the Developer prior to transition in a case in which Comcast sought about \$370,000.00 in damages as a result of the Association's cancellation. Becker & Poliakoff, P.A. is monitoring the case and will report if an adverse ruling occurs at the appellate level. ■



## PRELIMINARY LEGISLATIVE UPDATE

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

### BILLS THAT PASSED:

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

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

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

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

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

### BILLS THAT DID NOT PASS:

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

- a. limitations on the ability to regulate hurricane shutters in a homeowners association community;
- b. allowing any unit owner or renter of a condominium unit to have a companion animal if the resident had two (2) healthcare professionals agree it would be beneficial;
- c. requirements that notices be sent by certified mail, including notice of proposed amendments;
- d. requirements to provide 24 hours advance written notice of the intent to access unit (increasing the costs

and burden on association volunteers);

- e. requirements to keep all records in the county of the condominium (burdening smaller associations without offices and whose members may not reside in Florida during the entire year);
- f. requirements for all board members to be unit owners (prohibiting a spouse of a unit owner who is not on title from serving on the board);
- g. requirements to obtain detailed estimates of the costs necessary to repair and replace damaged property no later than 60 days after a casualty;
- h. requirements that all insurance shortfalls be a common expense, even if the damage is to only one unit;

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- i. requirements for notices of any meeting in which a regular or special assessment is to be considered contain a specific breakdown of the proposed assessment(s);
- j. requirements for membership vote approving a loan or line of credit in any amount exceeding 10 percent of the association's annual budget, except under very limited circumstances.

SB 714, which would have prohibited associations from recording a Claim of Lien, foreclosing and/or pursuing a monetary judgment against owners for amounts less than \$2,500 and would have precluded the association from reimbursement of attorney's fees and costs. This bill

would have greatly impacted an association's ability to timely and efficiently collect assessments and maintenance payments necessary to ensure the continuation of essential community services.

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

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



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

## LIABILITY FOR BODIES OF WATER, A CASE NOTE

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### **Kenley v. Inwood Property Investments, Inc., 931 So2d 1053 (Fla. 4th DCA 2006).**

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

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

**C. HOLDING:** No.

**D. RATIONALE:** An owner or anyone in control of a dangerous body of water (including an Association) has no duty to protect against such an injury. It is fundamental that Florida is full of natural and artificial bodies of water. Additionally, such bodies of water often possess obvious and/or unknown dangers.

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

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